Case No. 24-127544-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

POWERBACK REHABILITATION, LLC,
Petitioner-Appellee

v.

KANSAS DEPARTMENT OF LABOR
Respondent-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Johnson County
Honorable David W. Hauber, Judge
District Court Case No. 23 CV 1681

Respectfully submitted,

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III. Did the Kansas Department of Labor Act Unreasonably, Arbitrarily, or Capriciously Through Its Application of the Vaccine Act in Its Final Order?

STATEMENT OF FACTS

Powerback Rehabilitation, LLC (hereinafter, "Powerback") provides physical therapy, occupational therapy, speech therapy, respiratory therapy and care to elderly patients. (R. III, 53). Powerback provides its services pursuant to contracts with residential care facilities and assisted living communities at several locations, including a facility located at Town Village of Leawood, Kansas. *Id*. As a certified Medicare and Medicaid funded provider, Powerback is subject to the requirements and guidelines promulgated by federal and state health agencies applicable to the facilities in which it provides services. *Id*. Because of their age and/or underlying health conditions, Powerback's patients are particularly vulnerable to the serious health risks associated with COVID-19. *Id*.

In the wake of the resurgence of the Delta variant of the COVID-19 virus and the associated health risks to the patient population it served, Powerback implemented a universal COVID-19 vaccination policy for its employees on or about August 2, 2021. (R. III, 53-54). However, an employee could request a medical or religious exemption from the vaccination requirement. (R. I, 24). In the absence of an approved exemption, non-compliance with the mandatory vaccination policy would result in corrective action up to and including termination. *Id*.

On November 9, 2022, Powerback offered Katlin Keeran ("Keeran") the position of Occupational Therapy Assistant. (R. III, 54). The offer of employment was made strictly contingent upon proof of COVID-19 vaccination absent an approved exemption. *Id*. On November 18, 2022, Keeran submitted a Religious Accommodation Request Form, which required her to "[d]escribe the religious belief or practice that necessitate[d]her request for accommodation." (R. III, 37). In response, Keeran stated, "I believe in seeking alternatives to vaccines made using cell lines from aborted fetuses." *Id*. In support, she provided a letter from a friend, who wrote that Keeran had "a religious objection to the vaccine due to fetal cells being using [sic] in the development stage to create the vaccine." (R. III, 38).

On November 28, 2022, Powerback inquired further, seeking information about any other vaccines Keeran had received in the past. (R. III, 40). Keeran initially responded that she had received a "flu shot" "[m]aybe 2-3 years" prior. (R. III, 41). On December 1, 2022, Keeran added, "I am not familiar with this vaccine, but I decline to receive it as I am not familiar with it." (R. III, 40). Based on the information she provided, Powerback determined Keeran did not meet the requirements for a religious exemption to the Company's universal vaccine policy. (R III, 54). Keeran refused to provide proof of vaccination, and Powerback consequently rescinded its job offer. *Id*.

On December 21, 2022, Keeran filed a complaint with the Kansas Department of Labor ("KDOL"), alleging Powerback denied her request for a religious exemption to the Company's vaccination policy in violation of K.S.A. 2023 Supp. 44-663 (the "Vaccine Act"). (R. III, 4-6). On March 1, 2023, the KDOL entered its Final Order on Keeran's complaint, in which the KDOL found Powerback "should have honored Keeran's request

for a religious exemption to the COVID-19 vaccination and therefore did violate [the Vaccine Act]." (R. III, 47-49).

On March 30, 2023, Powerback filed its Petition for Judicial Review in the District Court of Johnson County, Kansas under K.S.A. 77-611. (R. I, 4-7). Powerback argued that the Vaccine Act was unconstitutional in that it was preempted by an Interim Final Rule promulgated by the U.S. Secretary of Health and Human Services and invalid under Title VII of the Civil Rights Act of 1964 ("Title VII"). (R. III, 59). Powerback argued further that the Vaccine Act was invalid under the Fourteenth Amendment to the U.S. Constitution in that it violated the Equal Protection Clause and the Due Process Clause. (R. III, 68-70). Finally, Powerback contended the KDOL erroneously applied or interpreted the Vaccine Act, and its Final Order was unreasonable, arbitrary, and capricious. (R. III, 74).

The District Court granted the Petition, finding that the Vaccine Act conflicted with federal law, which required Powerback to implement a universal vaccination policy or risk losing Medicare/Medicaid funding. (R. I, 32). The District Court found further that the Vaccine Act was preempted by federal law because it precluded healthcare facilities like Powerback from inquiring into the sincerity of an employee's or prospective employee's purported religious beliefs even though such an inquiry is specifically authorized under applicable federal law. (R. I, 35-37). Finally, the District Court found that the Vaccine Act violated Powerback's due process rights under the Fourteenth Amendment. (R. I, 37).

This appeal followed.

ARGUMENTS AND AUTHORITIES

ISSUE I: THE VACCINE ACT IS UNCONSTITUTIONAL AS PREEMPTED BY FEDERAL LAW.

A. Standard of Review

The Judicial Review Act is the exclusive means for obtaining judicial review of agency actions. K.S.A. 77-606. In order to obtain judicial review of a final agency action, a person must meet the requirements contained in K.S.A 77-607(a). In reviewing a final agency action, a Kansas court must grant relief if any one of eight factors set forth in K.S.A. 77-621(c) is met. The factors allowing relief relevant to this matter are: 1) whether the statute or rule and regulation on which the KDOL action was based is unconstitutional on its face or as applied or 2) whether the agency action is otherwise unreasonable, arbitrary or capricious. K.S.A. 77-621(2)(c)(1), (3), (8). If the district court finds any one of these factors true, the court may set aside or modify the agency action. K.S.A. 77-622.

An appellate court exercises the same statutorily-limited review of an agency's action as does the district court, i.e., as though the appeal was made directly to the appellate court. *Frick Farm Properties v. Kansas Dept. of Agriculture*, 216 P.3d 170, 176 (Kan. 2009). Under K.S.A. 77-621(b)(1), a court may reverse an agency's action if "the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied." The Court's review of constitutional issues is *de novo*. *Downtown Bar & Grill, LLC v. State*, 273 P.3d 709, 711 Syl. ¶ 4 (Kan. 2012).

B. The Interim Final Rule and the Vaccine Act

1. *The Interim Final Rule*

On November 5, 2021, the U.S. Secretary of Health and Human Services (the "Secretary") promulgated an Interim Final Rule ("IFR"), providing that "in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff – unless exempt for medical or religious reasons – are vaccinated against COVID-19." *Biden v. Missouri*, 595 U.S. 87, 89 (2022) (quoting 86 Fed. Reg. 61,555 (2021)). The purpose of the IFR was to slow or combat the spread of COVID-19 to vulnerable patient populations and medical staff. The IFR specifically noted that as of November 2021, the COVID-19 virus had "overtaken the 1918 influenza pandemic as the deadliest disease in American history." 86 Fed. Reg. 61,556. The IFR applied to specific medical providers specializing in post-acute care, including rehabilitation facilities like Powerback.

The IFR contains an express preemption provision, noting that in promulgating the IFR, the Secretary intended to "preempt inconsistent State and local laws as applied to Medicare-and Medicaid-certified providers and suppliers." 86 Fed. Reg. 61,568. The IFR provides further that in implementing COVID-19 vaccination policies, covered providers "must comply with applicable Federal anti-discrimination laws and civil rights protections[,]" including those found in Title VII and the Americans with Disabilities Act ("ADA"). *Id*. The IFR specifically accounts for the fact that some employees may seek exemptions to a covered provider's vaccination policy based on the employees' medical conditions or sincerely held religious beliefs. 86 Fed. Reg. 61,572. The IFR states that a covered provider must maintain a system for tracking such requests, the provider's decision

on the requests, and any accommodations provided. *Id*. It also requires a covered provider to evaluate such requests "in accordance with applicable Federal law and each facility's policies and procedures." *Id*. The IFR specifically "preempts the applicability of any State or local law providing for exemptions to the extent such law provides broader exemptions than provided for by federal law and are inconsistent with this [IFR]." *Id*.

2. *The Vaccine Act*

The Vaccine Act was enacted on November 23, 2021. It provides generally that:

> Notwithstanding any provision of law to the contrary, if an employer implements a COVID-19 vaccine requirement, the employer shall exempt an employee from such requirement, without punitive action, if the employee submits a written waiver request to the employer stating that complying with such requirement would: …
>
> (2) violate sincerely held religious beliefs of the employee, as evidenced by an accompanying written statement signed by the employee.

K.S.A. 2023 Supp. 44-663(a)(2). The Vaccine Act goes on to say that "[a]n employer ***shall*** grant an exemption requested in accordance with this section based on sincerely held religious beliefs ***without inquiring into the sincerity of the request***." K.S.A. 2023 Supp. 44-663(b) (emphasis added). "Religious beliefs" are defined under the Act to include "theistic and non-theistic moral and ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views." K.S.A. 2023 Supp. 44-663(d)(8).

C. The Interim Final Rule Preempts the Vaccine Act to the Extent It Conflicts with Federal Law.

"Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are

invalid." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). Preemption can be either "express" or "implied":

> Federal law preempts state law explicitly if the language of the federal statute reveals an express congressional intent to do so. In the absence of such language, the state's law may still be preempted implicitly, in either of two ways. "Field preemption" occurs where the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for the States to supplement it. "Conflict preemption" occurs where it is impossible to comply with both the federal and state laws, or the state law stands as an obstacle to the accomplishment of Congress's objectives.

U.S. v. Denver, City and County of, 100 F.3d 1509, 1512 (10th Cir. 1996) (citations omitted). In its appeal, the KDOL asserts that "conflict, rather than express preemption, is at issue." Appellant's Br. at 13 n.3. However, Powerback submits the Vaccine Act is expressly preempted by the IFR because the IFR "defines explicitly the extent to which" it preempts "state law." *Emerson v. Kansas City*, 503 F.3d 1126, 1129 (10th Cir. 2007); *see also* 86 Fed. Reg. 61,568, 61,572. However, whether the IFR expressly or impliedly preempts the Vaccine Act, the result is the same: the Vaccine Act is preempted by federal law.

"The IFR only allows for exceptions to the vaccination requirement when required by Federal law." *State ex rel. O'Connor v. Ascension Healthcare*, No. 21-CV-488-TCK-SH, 2 (N.D. Okla. Nov. 23, 2021) (citing 42 C.F.R. § 482.42(g)(3)(vi)). The Secretary has stated it is the intention of the IFR, "consistent with the Supremacy Clause of the United States Constitution, that this nationwide regulation preempts inconsistent State and local laws as applied to Medicare- and Medicaid-certified providers and suppliers." *See* 86 Fed. Reg. at 61,568. The IFR expressly addresses conflicting state laws as follows:

> State and local laws that forbid employers in the State or locality from imposing vaccine requirements on employees directly conflict with this exercise of our statutory health and safety authority to require vaccinations for staff of the providers and suppliers subject to this rule.

86 Fed. Reg. at 61,613. The IFR goes even further by stating it:

> preempts the applicability of ***any*** State or local law providing for exemptions to the extent such law provides broader grounds for exemptions than provided for by Federal law and are inconsistent with this IFC. In these cases, consistent with the Supremacy Clause of the Constitution, the agency intends that this rule ***preempts*** state and local laws to the extent the State and local laws conflict with this rule.

86 Fed. Reg. at 61,613 (emphasis added).

1. *The Vaccine Act Is Preempted Because It <u>Requires</u> Employers to Provide a Broader Religious Exemption than Federal Law Allows.*

Here, the Vaccine Act is preempted by the IFR because the Vaccine Act ***requires*** Kansas employers to provide broader exemptions than are provided under federal law. In particular, the Vaccine Act requires employers to grant an exemption based on an employee's purported "sincerely held religious beliefs" without inquiring into the sincerity of those beliefs. In other words, to receive a religious exemption from an organization-wide vaccination policy, the employee need only inform her employer that receiving the COVID-19 vaccination violates her sincerely held religious beliefs. This directly conflicts with the requirements for obtaining a religious exemption as set forth in the IFR.

The IFR directly addresses religious or disability-based accommodation requests and states, yet again, that it preempts any state or local law that would permit (or require) a facility to grant broader exemptions than federal law allows:

> Providers and suppliers must have a process for collecting and evaluating such requests, including the tracking and secure documentation of

> information provided by those staff who have requested exemption, the facility's decision on the request, and any accommodations that are provided.
>
> Requests for exemptions based on an applicable Federal law must be documented and evaluated in accordance with applicable Federal law and each facility's policies and procedures. As is relevant here, this IFC preempts the applicability of any State or local law providing for exemptions to the extent such law provides broader exemptions than provided for by Federal law and are inconsistent with this IFC.

86 Fed. Reg. at 61,572.

The IFR recognizes that some staff members "cannot be vaccinated because of … [their] sincerely held religious beliefs, practice, or observance…." *Id*. In those circumstances, the IFR directs employers to the Equal Employment Opportunity Commission's ("EEOC") website, which provides guidance to employers that receive requests for religious exemptions:

> EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. ***However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.*** *See also* 29 CFR 1605.

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (emphasis added).

The IFR also directs employers to the EEOC's Compliance Manual, which identifies several factors that an employer may consult to determine whether an employee's religious beliefs are, in fact, "sincerely held":

> Factors that – either alone or in combination – might undermine an employee's credibility include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

EEOC Compliance Manual § 12-I(A)(2); *see also* 86 Fed. Reg. at 61,572.

In other words, in enacting the IFR, the Secretary endorsed (1) the EEOC's position that an employer may lawfully question the sincerity of an employee's stated religious beliefs and (2) the EEOC's factors for determining the sincerity of a particular employee's religious beliefs. All of this supports one conclusion: federal law does not require an employer to accept at face value an individual employee's stated religious beliefs. Federal law allows an employer to inquire into the sincerity of those beliefs under certain circumstances, and that sort of inquiry is what the IFR requires.

The KDOL attempts to side-step this conclusion in two ways. First, the KDOL argues that EEOC guidance does not carry the force of law and, therefore, cannot preempt a contrary state law. While that may be true, "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. Federal Communications Commission*, 486 U.S. 57, 64 (1988). The question is not whether the Vaccine Act conflicts with the EEOC's

Compliance Manual or the guidance posted on its website. Rather, the issue before the Court is whether the Vaccine Act conflicts with the IFR, a regulation promulgated pursuant to the Secretary's statutory authority to administer rules and regulations under the Medicare and Medicaid Act. The IFR adopts and incorporates the guidance set forth on the EEOC's website and in its Compliance Manual as that guidance pertains to evaluating the sincerity of a religious belief. That guidance therefore constitutes a part of the IFR as if it were set forth in full within the IFR itself. *North Amer. Safety Valve Industries v. Wolgast*, 672 F. Supp. 488, 492 n.1 (D. Kan. 1987) (material that does not otherwise carry the force of law will be recognized as "controlling law" when such material is incorporated by reference into a regulation).

Moreover, even if the guidance set forth on the EEOC's website and within its Compliance Manual were not incorporated into the IFR, federal common law clearly provides that an employer may lawfully investigate the sincerity of an employee's purported religious beliefs. This conclusion is unavoidable because if an employer were required to accept an employee's religious objection to a vaccination requirement (or any other mandatory policy) without any further inquiry, no policy would be truly mandatory. An employee or prospective employee could avoid the reach of any company mandate simply by requesting an exemption on religious grounds. *Dockery v. Maryville Acad.*, 379 F. Supp. 3d 704, 718-19 (N.D. Ill. 2019) ("Absent the ability to inquire into the sincerity of a person's religious beliefs, all statements of belief would have to be automatically accepted as sincerely held and be accommodated.") (citation and internal quotation marks omitted); *E.E.O.C. v. Papin Enterprises, Inc.*, No. 6:07CV1548ORL28GJK, 2009 WL

2256023, at *4 n.11 (M.D. Fla. July 28, 2009) ("Indeed, as a matter of common sense an employer must be permitted some inquiry into the purported beliefs of an employee before the duty to accommodate arises."); *Bushouse v. Local Union 2209*, 164 F. Supp. 2d 1066 (N.D. Ind. 2001) ("[T]he court concludes that Title VII does permit an inquiry into the sincerity and religious nature of an employee or member's purported beliefs before the duty to accommodate such a belief arises…."); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 451 (7th Cir. 2013) (noting that managers may inquire into the nature of an employee's request for a religious exemption without running afoul of federal law).

The IFR specifically preempts state or local laws that provide for exemptions on broader grounds than are contemplated by federal law. In this regard, federal precedents are in accord that an inquiry into the sincerity of an employee's stated religious objections is permissible, and even necessary under certain circumstances. Indeed, the KDOL has not cited a ***single precedent*** endorsing the position reflected in the Vaccine Act that an employer must simply accept an employee's purported religious objection without attempting to examine the sincerity of those beliefs.

Finally, even setting aside the IFR's incorporation of the EEOC's guidance and Compliance Manual, as well as the abundance of cases that directly contradict the Vaccine Act's approach to requests for religious exemptions, the KDOL's position still fails. The IFR specifically notes that an employee may apply for a religious exemption and ***not receive one***:

> Under Federal law, including the ADA and Title VII of the Civil Rights Act of 1964 as noted previously, workers who cannot be vaccinated or tested because of an ADA disability, medical condition or sincerely held religious

> beliefs, practice, or observance ***may in some circumstances be granted an exemption from their employer***.

86 Fed. Reg. at 61,572. This language is antithetical to the scheme created by the Vaccine Act, which makes abundantly clear that a situation can ***never*** arise where an employee would merely state she has a sincerely held religious belief and ***not*** receive an exemption from her employer. Under the plain language of the Vaccine Act, a religious exemption is ***automatic*** whenever the employee requests one. It literally goes without saying that the framework set forth in the Vaccine Act is broader than the exemptions contemplated by the IFR, which clearly states that an employee with a religious objection to the vaccine may (but not always) be accommodated.

The KDOL's second argument is that the Vaccine Act is not preempted because there is no conflict between federal law and the Vaccine Act. Rather, both federal law and the Vaccine Act allow for exemptions to vaccine requirements based on an employee's medical condition or sincerely held religious beliefs. While true, the conflict between the IFR and the Vaccine Act does not pertain to the ***types*** of exemptions allowed by the respective laws but rather their ***breadth***. Federal law does allow an employee to obtain an accommodation based on her sincerely held religious beliefs. However, that exemption is ***narrower*** than the one contemplated by the Vaccine Act because federal law allows the employer to investigate the sincerity of the employee's religious beliefs in certain circumstances and, if the sincerity is verified, consider whether there is a reasonable accommodation that can be made. By contrast, the Vaccine Act ***specifically prohibits*** such an investigation and requires an accommodation be made. The Vaccine Act therefore

provides "broader exemptions than provided for by Federal law," is "inconsistent with" the IFR, and is therefore preempted by the express language of the IFR.

The KDOL takes this argument a step further by citing to ***the same EEOC guidance*** that specifically allows an employer to inquire into the sincerity of an employee's purported religious beliefs. Here, the KDOL seizes on language in the guidance providing that "the sincerity of an employee's stated religious beliefs is usually not in dispute and is generally presumed or easily established." Appellant's Br. at 16 (quoting the EEOC Compliance Manual § 12-I.2) (internal quotation marks omitted). But the terms "usually" and "always" are not interchangeable. By using terms like "usually" and "generally" the EEOC recognized that it is sometimes permissible for an employer to scrutinize an employee's stated religious beliefs (even if such occasions are unusual). And if that choice of terminology were not clear enough, the EEOC proceeds – ***in the same paragraph*** – to endorse several factors that employers may use to evaluate the sincerity of an employee's religious beliefs.

In other words, the KDOL has once again framed the question incorrectly. The issue is not whether the Vaccine Act and federal law provide for exemptions and accommodations based on religious beliefs – they both clearly do. The issue is the scope of the exemption as set forth in the two different laws – the Vaccine Act provides for a much broader religious exemption than is allowed under federal law. The Vaccine Act is therefore preempted by federal law.

2. *The Vaccine Act Is Preempted Because Its Definition of "Religious Beliefs" Is Broader Than the Definition Provided Under Federal Law.*

Under federal law, "religious beliefs" are defined to include "theistic beliefs as well as non-theistic moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." EEOC Compliance Manual § 12-I(A)(1) (internal quotations and citations omitted); *see also* 29 C.F.R. § 1605.1. To distinguish "religious beliefs" from secular philosophical beliefs or personal preferences, the Compliance Manual goes on to describe other hallmarks of religion. It states that "religion typically concerns ultimate ideas about life, purpose, and death[]" and "addresses fundamental and ultimate questions having to do with deep and imponderable matters." *Id*. (citations and internal quotation marks omitted). "Social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII." *Id*.

By contrast, the Vaccine Act states only that the phrase "'religious beliefs' includes, but is not limited to, theistic and non-theistic moral and ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views." K.S.A. 44-663(d)(8). In other words, the Vaccine Act adopts the Compliance Manual's overarching definition of "religious beliefs" but eschews the clarifying qualifications and descriptions that follow. This has important consequences because it blurs the distinction between legitimate "religious beliefs" and non-religious personal beliefs. In that regard, Keeran's request represents an apt case-in-point. She first stated she did not want to receive the vaccine because she believed it was made from the cell lines of aborted fetuses. She

then stated she was actually not familiar with the vaccine and would not be receiving it on that ground. Neither of these justifications flow from a "religious belief," although that is how Keeran chose to characterize her objection. Indeed, Keeran's subsequent clarification demonstrates that her objection to the vaccine was little more than a strong personal preference. In that regard, Keeran's objection to the vaccine could constitute a "religious belief" as described in the Vaccine Act (which does not even contain a limitation on what sorts of beliefs are "religious"), but it does not qualify as a "religious belief" under federal law because it has nothing to do with religion.

As noted throughout this brief, the IFR expressly preempts state and local laws to the extent they require broader exemptions than are allowed under federal law. 86 Fed. Reg at 61,572. The religious exemption required under the Vaccine Act is broader than federal law provides because the Vaccine Act's definition of "religious beliefs" is much broader than the definition set forth under federal law. The Vaccine Act's definition of "religious beliefs" embraces a whole host of secular philosophies, beliefs, and preferences that are simply not religious in nature (as this case illustrates). Because the Vaccine Act's religious exemption is broader than federal law provides, it is preempted and cannot stand.

D. Title VII of the Civil Rights Act Invalidates the Vaccine Act.

The IFR requires that an employer comply with applicable federal law when faced with accommodation requests under the federal anti-discrimination laws and civil rights protections. Indeed, the IFR expressly identifies Title VII as one of the federal laws it intended employers to follow. *See* 86 Fed. Reg. at 61,568. Title VII provides, in relevant part, "It shall be an unlawful employment practice for an employer . . . to discharge any

individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion," 42 U.S.C. § 2000e-2(a); *see also Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1154 (10th Cir. 2000) (quoting 42 U.S.C. § 2000e(j)). "Religion" is defined to include only those "aspects of religious observance and practice" that an employer is able to "reasonably accommodate . . . without undue hardship on the conduct of the employer's business." *Id.* at 1154-1155 (quoting 42 U.S.C. § 2000e(j)). Title VII requires employers to "reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." 29 C.F.R. § 1605.2(b)(1), (2) (1980).

The system for evaluating an accommodation request involves an interactive process that requires participation by both the employer and the employee. *Thomas*, 225 F.3d at 1155 n.5 (stating that "[t]he [ADA] 'interactive process' rationale is equally applicable to the obligation to offer a reasonable accommodation to an individual whose religious beliefs conflict with an employment requirement"); *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 69 (1986) (stating that, consistent with the goals expressed in the legislative history of the religious accommodation provision, "courts have noted that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business") (internal quotations and citations omitted). Whether a particular accommodation creates an undue hardship on an employer must be made by considering "the particular factual context of each case." *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 134 (3d Cir. 1986). Requiring

an employer to violate the law in order to accommodate an employee would absolutely result in an undue hardship. *See*, *e.g.*, *Weber v. Leaseway Dedicated Logistics, Inc.*, No. 98-3172, 1999 WL 5111, at *1 (10th Cir. Jan. 7, 1999).

Other courts have looked at similar COVID-19 vaccine issues when comparing applicable state laws to analyze the workability of an accommodation and the existence of undue hardship. Courts have routinely held that when an employer would have had to violate a state law in order to accommodate its employee, violating the law clearly established an undue hardship for the employer/business. *See e.g., Lowe v. Mills,* 68 F.4th 706, 720 (1st Cir.), *cert. denied*, 144 S. Ct. 345, 217 L. Ed. 2d 184 (2023) (holding that the employer had established an undue hardship when it would have been required to violate a state COVID-19 vaccine mandate to accommodate the employee's religious-based exemption request); *Marte v. Montefiore Med. Ctr.*, No. 22-CV-03491-CM, 2022 WL 7059182, at *4 (S.D.N.Y. Oct. 12, 2022) (holding that the plaintiff's requested accommodation would qualify as an undue hardship because it required the defendant-employer to violate the New York State Department of Health mandate requiring personnel at healthcare facilities to be fully vaccinated against COVID-19). Indeed, courts have found that "particular jobs may be completely incompatible with particular religious practices, and it would be unfair to require employers faced with such irreconcilable conflicts to attempt futilely to resolve them." *Equal Emp. Opportunity Comm'n v. JBS USA, LLC*, 339 F. Supp. 3d 1135, 1181 (D. Colo. 2018) (citations omitted).

The Vaccine Act prohibits employers from engaging in the interactive process expressly required under Title VII. Specifically, the Vaccine Act states an employer is

prohibited from "inquiring into the sincerity of the request" once a written request for an accommodation has been made. An employer's inquiry into an employee's accommodation request is the bilateral cooperation required of an employer and employee to engage in the interactive process under Title VII. The interactive process is intended to provide the employee and employer a means of searching for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business. The Vaccine Act's express prohibition prevents employers from complying with the mandates of Title VII, further demonstrating an undue hardship on the employer. In Keeran's case, Powerback would have been required to act in a manner inconsistent with Title VII to comply with the Vaccine Act. Violating the law to comply with the Vaccine Act is an undue hardship and, therefore, Powerback was not required to approve Keeran's vaccination accommodation request.

In *Groff v. DeJoy*, the Supreme Court held that an employer faces an undue hardship if the accommodation request results in substantial increased costs rather than the *de minimis* cost standard previously used by courts to assess the feasibility of an accommodation. 143 S. Ct. 2279, 2281 (2023). When evaluating the cost of an accommodation, the Court explained that "all relevant factors at hand" along with the "particular impact" of the "particular accommodation" must be considered to determine whether an accommodation constitutes an undue hardship. *Id*. at 2295. Further, when determining what is a substantial increased cost, the Court directed businesses to look at the "context of an employer's business in the common-sense manner that it would use in applying any such test." *Id*. at 2296.

As the District Court acknowledged in its Judgment, the Vaccine Act places facilities like Powerback in an intractable double-bind: "Either lose federal funding and get fined by the federal government or feel the heel of state penalties through a legislatively crafted 'religious exemption' that is essentially unchallengeable." (R. I, 32). Compliance with the Vaccine Act would mean running afoul of the IFR because the Vaccine Act endorses a much broader religious exemption than the IFR contemplates. And violation of the IFR would subject Powerback to "monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the [Medicare/Medicaid] programs." *Biden*, 595 U.S. at 91.[1]

In fact, on February 14, 2022, Kansas Governor Laura Kelly issued Executive Directive No. 22-550, acknowledging that compliance with the Kansas Vaccine Act puts the state of Kansas and healthcare facilities at risk of losing federal funding to the detriment of the most vulnerable citizens of Kansas. Governor Kelly's Directive reads in relevant part:

> …the federal Centers for Medicare and Medicaid Services (CMS) has published an interim final rule establishing requirements regarding COVID-19 vaccine immunization of staff among Medicare-and Medicaid-certified providers and suppliers;

[1] The KDOL argues that "[i]f Powerback had honored Ms. Keeran's religious objection, there is no likelihood that it would have risked losing federal funds." Appellant's Br. at 17 n.6. In support, the KDOL cites a Politico article in which an unidentified official stated that CMS does not have the ability to assess the legitimacy of a religious exemption. This anecdote from an anonymous source does not negate the language of the IFR, which clearly provides for strict enforcement penalties in the event of a covered facility's non-compliance.

> …attempts to prevent enforcement of the CMS rule failed to receive temporary relief from [SCOTUS], creating an active requirement to comply [with the IFR] in order to receive needed funds for medical care; and
>
> …the loss of CMS funding would result in the loss of services for Kansas veterans, elderly and disabled.

The Governor's Office, Executive Directive No. 22-550 (February 14, 2022) (*see* R. III, 152-154). As acknowledged by Governor Kelly, for a healthcare facility that primarily services an elderly and disabled patient population, losing Medicare/Medicaid funding results in a substantial loss and cost to the business through loss of patients as well as the primary source of income for the facility's services. This loss of business and income results in an undue hardship for facilities like Powerback.

The IFR specifically incorporates the exemption standards under Title VII (and the ADA) and provides that it preempts state and local laws to the extent they conflict with those standards or authorize broader exemptions. Under Title VII, an employer only needs to provide a religious exemption or accommodation when doing so would not constitute an undue hardship. Complying with the Vaccine Act would potentially cause Powerback to completely forfeit its Medicare/Medicaid funding, which undoubtedly constitutes an undue hardship even under the more stringent standard articulated in *Groff*. But the Vaccine Act leaves no space for an "undue hardship" analysis – it requires providers to grant religious exemptions whenever an employee asks for one. Therefore, the Vaccine Act conflicts with Title VII by requiring Powerback to accommodate a religious exemption request that creates an undue hardship on the business.

E. The IFR Does Not Exceed Congress' Spending Power to the Extent It Preempts the Vaccine Act.

The KDOL's argument that "[t]he Federal Government has no authority to use its spending power to preempt state law through an agreement between third parties and CMS," Appellant's Br. at 20, was not presented to the District Court and is not preserved for this Court's review. The Court should decline the KDOL's request to review its unpreserved argument regarding the Federal Government's spending powers.

"When constitutional issues are raised for the first time on appeal, they are not properly before this court for review." *State v. Albright*, 273 Kan. 811, 827 (Kan. 2002). The Court has, however, recognized exceptions to this general rule. "They are: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason." *State v. Gomez*, 235 P.3d 1203, 1207 (Kan. 2010). The KDOL contends the Court should consider its unpreserved "Spending Power" argument because "consideration of the issue is necessary to prevent denial of fundamental rights." Appellant's Br. at 20. The KDOL goes on to say that if the IFR were to preempt the Vaccine Act, it would "invade the State's sovereignty." Appellant's Br. at 21. The KDOL cites no support for its argument that "state sovereignty" constitutes a "fundamental right" that would justify consideration of a waived constitutional argument. This is reason enough to deny the KDOL's request. Kan. R. App. P. 6.02 ("If [an] issue was not raised below, there must be an explanation why the issue is properly before the court.").

The KDOL also argues that its unpreserved argument involves a pure legal issue, meaning the Court can consider it under the first exception listed in *Gomez*. But even if this is true, "[t]he decision to review an unpreserved claim under an exception is a prudential one." *State v. Gray*, 459 P.3d 165, 170 (Kan. 2020). "Even if an exception would support a decision to review a new claim, [the Court has] no obligation to do so." *Id.* Here, even if an exception applies, the Court should exercise its discretion not to review the KDOL's "Spending Power" argument. The Parties extensively briefed multiple constitutional issues to the District Court. The KDOL had a full opportunity to present its "Spending Power" argument and failed to do so. "This failure deprived the trial judge of the opportunity to address the issue in the context of this case and such an analysis would have benefitted [the Court's] review." *Id*. The Court should therefore limit its consideration to the arguments the KDOL actually made to the District Court.

If the Court does consider the merits of the KDOL's "Spending Power" argument, it should still be rejected. "The Spending Clause provides that '[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defen[s]e and general Welfare of the United States . . .'" *Kansas v. U.S.*, 214 F.3d 1196, 1198 n.3 (10th Cir. 2000) (quoting U.S. Const. art. I, § 8, cl. 1). "This language allows Congress to fix the terms on which it shall disburse federal money to the [s]tates." *Id*. (citation omitted). "When Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (citation and internal quotation marks omitted).

As the KDOL appears to argue, the preemption analysis differs depending on whether Congress acts pursuant to its Commerce Power or Spending Power. In the latter context, state laws that conflict with Spending Power legislation are preempted to the extent a state has participated in the federal program or accepted federal money:

> [T]he principal difference is that whereas preemptive legislation enacted under the Commerce Clause trumps state law throughout the United States *ex proprio vigore,* preemptive legislation enacted under the spending power presents states with a choice: they may either accept federal funds (and subject themselves to requirements imposed by federal law) or decline such funds (and avoid the necessity of abiding by those requirements).

Planned Parenthood of Houston Southeast Tex. v. Sanchez, 403 F.3d 324, 330 (5th Cir. 2005) (citation omitted); *see also Westside Mothers v. Haveman*, 289 F.3d 852, 860 (6th Cir. 2002) ("The Court has recently held that, when a state agency accepts federal funds appropriated under the spending clause, the supremacy clause requires conflicting local law to yield."); *Lewis v. Alexander*, 685 F.3d 325, 331-32 (3d Cir. 2012) ("Enacted under Congress' Spending Clause authority, Medicaid is voluntary. No State is obligated to join Medicaid, but if they do join, they are subject to federal regulations governing its administration.").

Kansas participates in Medicaid, receives federal funds through its participation, and is therefore subject to federal regulations governing its administration (including the IFR).[2] Accordingly, Kansas statutes that conflict with the IFR are preempted. And because

[2] *Kansas Medicaid: A Primer 2024*, available at https://www.khi.org/articles/2024-kansas-medicaid-a-primer/

the Vaccine Act provides broader exemptions than are authorized under federal law, it is preempted by the express language of the IFR.

F. The District Court's Comments About the Motives of Kansas Legislators in Enacting the Vaccine Act Are Immaterial to the Preemption Analysis.

In its Judgment Granting Petition for Review, the District Court highlighted comments made by individual lawmakers about their displeasure with "federal vaccination policy." (R. I, 27-28, 31). The KDOL makes much of these statements in its brief: "By delving into the statements of individual lawmakers, the court fixated on policy disagreements between the federal executive branch and a few individual state lawmakers. But H.B. 2001's text—not the personal intentions of a few legislators—is the law." Appellant's Br. at 18. The KDOL cites several authorities for the general proposition that the subjective motivations of legislators do not determine the outcome of preemption analysis.

This argument is a red herring. Powerback agrees that it is the text of IFR and the Vaccine Act that determine whether the latter is preempted. The District Court agreed with this proposition as well: "The IFC forbids, essentially, what K.S.A. 44-663 allows, an evasion of vaccination policy by employees who object to the same by virtue of a state exemption that is untouchable." (R. I, 33). In this regard, the IFR preempts state laws that provide broader religious exemptions than are provided under federal law. *See* 86 Fed. Reg. 61,572. The Vaccine Act requires employers to grant broader exemptions than are provided for under federal law, and it is therefore preempted.

ISSUE II: THE VACCINE ACT VIOLATES THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION

A. Standard of Review

The Vaccine Act is unconstitutional on its face and/or as applied because it violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution. This argument represents a challenge to the constitutionality of the Vaccine Act under K.S.A. 77-621(c)(1). Accordingly, this Court's review is *de novo*. *Downtown Bar & Grill, LLC v. State*, 273 P.3d 709, 711 Syl. ¶ 4 (Kan. 2012).

B. The Vaccine Act Violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

"[T]he Fourteenth Amendment states, in relevant part, that no State can deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461, 472 (Kan. 2019) (internal quotation marks omitted). The Kansas Constitution Bill of Rights, Section 2, contains equivalent protections, and "the equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution. ... Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment." *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022).

Due process rights require, at a minimum, that "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Board of Reno County Comm'rs v. Akins*, 271 Kan. 192, 196 (Kan.

2001) (citation omitted). "Due process may refer to substantive due process, which protects individuals from arbitrary state action, or procedural due process, which at its core protects the opportunity to be heard in a meaningful time and manner." *Creecy v. Kan. Dep't of Revenue*, 447 P.3d 959, 966 (Kan. 2019). "[T]o prevail on either a procedural or substantive due process claim, a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectible property interest." *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007) (citation and internal quotation marks omitted). Here, Powerback has an interest in the funds it receives through its participation in the Medicare and Medicaid programs "sufficient to trigger Fourteenth Amendment due process protections." *Taylor v. Kansas Dep't of Health & Env't*, 49 Kan. App. 2d 233, 241, 305 P.3d 729, 736 (2013). On a more fundamental level, "the Fourteenth Amendment to the United States Constitution grants [Powerback] a property interest in [its] money." *Pew v. Sullivan*, 329 P.3d 496, 501 (Kan. Ct. App. 2014).

"To satisfy substantive due process requirements, a statute must not be applied to parties in an arbitrary or capricious manner." *State v. Robinson*, 303 Kan. 11, 175, 363 P.3d 875, 993 (2015), *disapproved on other grounds by State v. Cheever*, 306 Kan. 760, 402 P.3d 1126 (2017). "The standard applied in reviewing substantive due process claims is one of reasonableness." *Id*. Here, the Vaccine Act is unreasonable, arbitrary, and capricious as applied to Powerback. The IFR specifically requires employers to follow federal law in administering their vaccination programs; in turn, federal law contemplates an inquiry into the sincerity of an employee's purported religious beliefs. *See Issue I*, *supra*. The Vaccine Act specifically ***disallows*** this same inquiry. The Vaccine Act thus forces Powerback to

make an impossible decision between compliance with Kansas law or compliance with federal law. *See United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.") (citation and internal quotation marks omitted).[3]

Under this framework, there is no way for Powerback to avoid a stiff monetary penalty under either federal or Kansas law – if it complies with the IFR, it is subject to fines under the Vaccine Act. But if it complies with the Vaccine Act and ignores the IFR, it risks civil penalties, loss of monetary reimbursement through the Medicare and Medicaid programs, and (ultimately) termination of participation in the programs altogether. The statute is unreasonable because it forces Powerback to choose between compliance with federal law and Kansas law and opens the company up to unavoidable monetary penalties in the process.

The Vaccine Act also violates procedural due process for the reasons articulated by the District Court. "A 'procedural due process' violation refers to an instance where the state violates the Constitution not in the action that it takes, but in its failure to provide sufficient process to guarantee that the individual is treated fairly." *Specht v. Jensen*, 832 F.2d 1516, 1521 n.6 (10th Cir. 1988). "To set forth an actionable procedural due process claim, a plaintiff must demonstrate: (1) the deprivation of a liberty or property interest and (2) that no due process of law was afforded." *Stears v. Sheridan Cty,* 491 F.3d 1160, 1162

[3] The District Court specifically acknowledged that the Vaccine Act forces employers to choose between following federal law or state law: "The state 'religious exemption' provision sets up a no-win employer dilemma. Either lose federal funding and get fined by the federal government or feel the heel of state penalties…" (R. I, 32).

(10th Cir. 2007). Both elements are satisfied here. As set forth above, and as the KDOL concedes in its brief, Powerback has a due process property interest in avoiding fines or other monetary penalties. Appellant's Br. at 24. The Vaccine Act violates due process because it requires facilities like Powerback to surrender that property interest without a meaningful opportunity to be heard. As the District Court noted, "[i]t makes a fine a foregone conclusion." (R. I, 39).

Once again, the Vaccine Act essentially requires covered medical facilities to face severe penalties whether or not a hearing is provided. If the facility complies with the Vaccine Act, it is providing a broader religious exemption than federal law contemplates, and it is therefore not complying with the IFR. Non-compliance with the IFR subjects the facility to monetary penalties and forfeiture of its right to participate in the Medicare and Medicaid programs. But if the facility chooses to comply with the IFR rather than the Vaccine Act, it faces fines administered by the KDOL of up to $10,000 or $50,000 (depending on the business size of the facility). K.S.A. 2023 Supp. 44-663(c)(3)(C). In other words, the facility can be hit with monetary fines or penalties regardless of what it does and regardless of whether it receives formal notice and an opportunity to be heard. As the District Court observed, "[d]ue process requires a hearing *before* there is a permanent deprivation of rights…" (R. I, 41). Due process also requires a ***meaningful*** opportunity to be heard, which means the facility must have an opportunity to fight the deprivation of its property interest rather than choose which statute it prefers to be penalized under. *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009) ("[T]he minimal

procedural due process rights" require an "opportunity to be heard at a meaningful time and in a meaningful manner.").

The Vaccine Act violates both substantive and procedural due process by arbitrarily depriving facilities like Powerback of their property without reasonable notice and an opportunity to be heard. Therefore, the District Court's judgment should be affirmed.

C. The Vaccine Act Violates Due Process Because It Is Unconstitutionally Vague.

The Vaccine Act is unconstitutionally vague in that it does not define the phrase "sincerely held religious beliefs" in a way that could be understood by a person of ordinary intelligence. It therefore fails to place providers like Powerback on notice of the conduct it proscribes. Although it prohibits employers from inquiring into the sincerity of an employee's stated religious beliefs, its definition of religious beliefs is so vague that it raises more questions than answers. Particularly relevant to this case, it does not define "religious beliefs" in a way that would differentiate those beliefs from an employee's non-religious preferences regarding vaccines.

Although the District Court did not specifically address the "void-for-vagueness" issue, Powerback made this argument below, and it serves as an additional reason to affirm the judgment. (R. III, 70-73). "An appellate court may consider an issue argued below although not relied upon by the district court in deciding a case," and it may affirm the District Court's judgment on any basis found in the trial record. *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 288 (Kan. Ct. App. 2011) (citing *Vencor Hospitals v. Blue Cross Blue Shield*, 169 F.3d 677, 682 n. 12 (11th Cir.1999)).

The due process clause of the Fourteenth Amendment guarantees against enforcement of unconstitutionally vague state statutes. *Capital Serv., Inc. v. Dahlinger Pontiac-Cadillac, Inc.*, 232 Kan. 419, 422 (Kan. 1983). A law is "void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). A statute is unconstitutionally vague if it fails to give an adequate warning of the proscribed conduct and thus "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *State v. McCune,* 299 Kan. 1216, 1235, 330 P.3d 1107 (2014) (citation omitted); *Faustin v. City and County of Denver, Colo.,* 423 F. 3d 1192, 1201-1202 (10th Cir. 2005). Similarly, a statute may be so vague as to violate the due process clause of the Fourteenth amendment when it fails to protect against arbitrary enforcement. *Steffes v. City of Lawrence,* 284 Kan. 380, 389, 160 P.3d 843 (2007). Violation of either aspect of these predictability requirements is grounds for invalidating a statute. *City of Lincoln Center v. Farmway Co–Op, Inc.,* 298 Kan. 540, 545, 316 P.3d 707 (2013); *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003, 1010 (2015).

In assessing whether a statute is unconstitutionally vague, the inquiry is a commonsense determination of fundamental fairness. *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 240, 834 P.2d 368, 370 (1992). When analyzing a statute's constitutionality, the court looks to the language of the statute to determine whether the statute is unconstitutionally vague "as applied" to the challenger. *City of Shawnee v. Clark*, 358 P.3d 878, 2015 WL 662068, at *4 (Kan. Ct. App. 2015). The Vaccine Act is unconstitutionally vague insofar as it does not identify to an ordinary person what constitutes a "sincerely held" religious belief and, therefore, neither an employer nor an individual seeking a waiver

under the Act can make a determination as to what is required and/or prohibited. The EEOC Compliance Manual provides some guidance regarding religious beliefs under Title VII and reads in relevant part:

> Religious beliefs include theistic beliefs as well as non-theistic moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views . . . . [R]eligion typically concerns ultimate ideas about life, purpose, and death . . . Social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII.

EEOC Compliance Manual § 12-I(A)(1) (internal quotations and citations omitted); *see also Adeyeye*, 721 F.3d at 448 ("Thus, a genuinely held belief that involves matters of the afterlife, spirituality, or the soul, among other possibilities, qualifies as religion under Title VII."); *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 492 (3d Cir. 2017) (holding that employee's objection to flu vaccine did not qualify as a religious belief protected by Title VII because his beliefs that "one should not harm their own body and . . . that the flu vaccine may do more harm than good" did not "address fundamental and ultimate questions having to do with deep and imponderable matters" and were not "comprehensive in nature"). While the Vaccine Act's definition contains the opening language of the EEOC's guidance, it conspicuously omits the explanatory and clarifying language that follows.

In the instant case, the vagueness of the Vaccine Act was amply demonstrated by Keeran's lack of understanding regarding what was intended by the statute as a sincerely held religious belief. The information Keeran provided to Powerback to support her request for an exemption from the Vaccine Policy demonstrated that she had only a personal

preference regarding the COVID-19 vaccine. Her statement that she was unfamiliar with the COVID-19 vaccine would not be considered a sincerely held religious belief under the EEOC's guidance. Even more problematic, Powerback was left without notice under the Vaccine Act as to how to determine the existence of a "sincerely held" religious belief. If federal guidelines apply, Keeran did not have a sincerely held religious belief and Powerback was not required to exempt her from its vaccination policy. However, it is impossible to determine from the statute what standard was applied by the KDOL other than Keeran's subjective and misguided statement. The Vaccine Act is "void for vagueness" under the due process principles of the Fourteenth Amendment because the Act's vague or absent statutory language fails to inform an ordinary person of what is proscribed. As such, the District Court's judgment should be affirmed.

D. The Vaccine Act Violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

The Vaccine Act violates the Equal Protection Clause of the Fourteenth Amendment. Although the District Court declined to decide the Equal Protection issue, Powerback made this argument below, and it serves as an additional reason to affirm the judgment. (R. I, 43; R. III, 68-70). As noted above, an appellate court may affirm a district court's judgment on any basis that was argued below even if the district court did not rely on that basis in its judgment. *Estate of Belden*, 46 Kan. App. 2d at 288.

"The guiding principle of equal protection analysis is that similarly situated individuals should be treated alike." *In re K.M.H.*, 285 Kan. 53, 73, 169 P.3d 1025 (2007). Equal protection challenges are evaluated in three steps. *Village Villa v. Kansas Health*

Policy Authority, 296 Kan. 315, Syl. ¶ 3, 291 P.3d 1056 (2013). First, the court determines whether the legislation creates a classification resulting in different treatment of similarly situated individuals. Second, the court determines the appropriate level of scrutiny by examining the nature of the right affected by the classification. Third, the court applies that level of scrutiny to the legislation. *Id*.; *State v. Dixon*, 60 Kan. App. 2d 100, Syl. ¶ 8, 492 P.3d 455, *rev. denied* 314 Kan. 856 (2021).

In Kansas, the analysis of an equal protection claim begins with determining the nature of the legislative classifications and whether the classifications result in arguably indistinguishable classes of individuals being treated differently. *Nash v. Blatchford*, 56 Kan. App. 2d 592, 612, 435 P.3d 562, 577 (2019). Once it has been determined that a statute has made such classifications among distinguishable classes of individuals, the court must determine what level of review to apply in analyzing the claim: (1) rational basis – non-suspect classification, (2) intermediate scrutiny – quasi-suspect classification, and (3) strict scrutiny – suspect classification. *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Comm'n*, 889 F.2d 929, 932 (10th Cir. 1989).

In deciding whether to recognize additional classifications as suspect, courts traditionally look to see if the classification is based on characteristics beyond an individual's control, and whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez,*411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16

(1973)); *Blue v. McBride,* 252 Kan. 894, 913, 850 P.2d 852 (1993) (Religion is an inherently suspect classification). When a suspect classification or fundamental right is involved, the burden of proof to justify the classification shifts to the proponent of the statute. *Riley v. National Mills, Inc.*, 873 P.2d 214, 218 (Kan. Ct. App. 1994); *Logsdon v. State*, 79 P.3d 1076, 1079 (Kan. Ct. App. 2002). In such a case, the government agency (i.e., the KDOL) has the burden of proving that its classifications are narrowly tailored to further compelling governmental interests. *Johnson v. California*, 543 U.S. 499, 505 (2005).

The Vaccine Act impacts multiple suspect classifications of individuals. Specifically, those suspect classifications consist of persons who are exercising their sincere religious beliefs, the elderly and/or disabled (a group saddled with disabilities and history of unequal treatment), and the employees of healthcare facilities who provide services to Kansans utilizing Medicare/Medicaid resources. Because multiple suspect classifications are at issue, the Court must apply strict scrutiny when evaluating the Vaccine Act. In light of Governor Kelly's acknowledgment that the Vaccine Act negatively impacts suspect classifications, the KDOL cannot demonstrate any justification that the Vaccine Act is narrowly tailored to further a compelling government interest. For the foregoing reasons, the Vaccine Act is unconstitutional on its face and/or as applied in that it violates the Equal Protection Clause of the Fourteenth Amendment.

ISSUE III: THE KDOL'S "FINAL ORDER" WAS UNREASONABLE, ARBITRARY, AND CAPRICIOUS

A. Standard of Review

The KDOL's Final Order was unsupported, arbitrary, capricious and based upon misguided methodology and a deficient factual investigation as to whether Keeran had a "sincerely held religious belief" as defined under the Vaccine Act. Powerback made this argument to the District Court, although the District Court ultimately did not address it. Nevertheless, this Court may affirm a judgment on any basis supported by the record even if not relied upon by the District Court. *Estate of Belden*, 46 Kan. App. 2d at 288. Kansas appellate courts apply the following standard of review to challenges to an agency action brought under K.S.A. 77-621(c)(8): "A rebuttable presumption of validity attaches to all actions of an administrative agency. The burden of proving arbitrary and capricious conduct lies with the party challenging the agency's actions." *In re Equal. Appeal of Tallgrass Prairie Holdings, LLC*, 333 P.3d 899, 915 (Kan. Ct. App. 2014).

B. The KDOL's "Final Order" Was Arbitrary, Unreasonable, and Capricious.

A court "shall grant relief" following an administrative decision when "the agency action is otherwise unreasonable, arbitrary or capricious." K.S.A. 77-621(c)(8). An administrative decision is "arbitrary and capricious if it is unreasonable or without foundation in fact." *Columbus Tel. Co. v. Kansas Corp. Comm'n*, 31 Kan. App. 2d 828, 834, 75 P.3d 257, 262 (2003). The Kansas Supreme Court has defined unreasonable action as that which is taken without regard to the benefit or harm of all interested parties. *Farmland Industries, Inc. v. Kansas Corp. Comm'n*, 971 P.2d 1213, 1217 (Kan. Ct. App.

1999). The test for arbitrary and capricious conduct "relates to whether a particular action should have been taken or is justified, such as the reasonableness of an agency's exercise of discretion in reaching the determination, or whether the agency's action is without foundation in fact." *Lario Oil & Gas Co. v. Kansas Corporation Comm'n* , 57 Kan. App. 2d 184, 205, 450 P.3d 353 (2019).

The KDOL made its determination without regard to the benefit or harm of all interested parties – including Keeran, Powerback, Powerback's employees and patients, and Kansans during a time of global crisis. Specifically, the KDOL made virtually no inquiry into Powerback's business, its industry, or the bases for its COVID-19 vaccination policy. The KDOL also did not consider the federal mandates that a healthcare facility, like Powerback, was required to comply with. Without sufficient facts related to Powerback's business, the KDOL could not have considered any facts about interested parties, including patients and Kansans, when it reached its determination.

Next, the KDOL based its Final Order on the Vaccine Act without inquiring into the sincerity of Keeran's religious belief or whether she had even articulated a religious belief in the first place, sincere or otherwise. Specifically, Powerback provided the KDOL Keeran's explanation about her reasons for declining the COVID-19 vaccine, which were "I believe in seeking alternatives to vaccines made using cell lines from aborted fetuses" and "I am not familiar with this vaccine, but I decline to receive it as I am not familiar with it." (R. III, 54). These two statements demonstrate Keeran's personal preference and lack of familiarity with the COVID-19 vaccine, not a sincerely held religious belief. The KDOL acted arbitrarily and capriciously when it determined that Powerback violated the Vaccine

Act because it did not even consider the evidence that Keeran's objection to the vaccine was secular (rather than religious) in nature.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the Court should affirm the District Court's decision granting Powerback's Petition for Judicial Review and reversing the KDOL's Final Order.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER/APPELLEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of December 2024, the above and foregoing was filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, including:

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INDEX TO APPENDIX

APPENDIX A

No. 21-CV-488-TCK-SH
United States District Court, Northern District of Oklahoma

State ex rel. O'Connor v. Ascension Healthcare

Decided Nov 23, 2021

21-CV-488-TCK-SH

11-23-2021

STATE OF OKLAHOMA, ex rel., JOHN M. O'CONNOR, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff, v. ASCENSION HEALTHCARE, ASCENSION MEDICAL GROUP, ASCENSION MEDICAL GROUP ST. JOHN LLC, Defendants.

TERENCE C. KERN, United States District Judge.

OPINION AND ORDER

TERENCE C. KERN, United States District Judge.

This matter is before the Court on Plaintiff's Motion to Remand (Doc. 12). Defendants filed a Response (Doc. 28) on November 19, 2021, and Plaintiff filed a Reply on November 22, 2021 (Doc. 29).[1] Therefore, pursuant to the Court's Order (Doc. 18), the Motion has been fully briefed. Having reviewed the filings and accompanying exhibits submitted by both parties, the Court **grants** Plaintiff's Motion to Remand.

[1] The arguments asserted by Plaintiff to defeat this Court's jurisdiction based on the Eleventh Amendment, several abstention doctrines, and diversity were misleading, and unhelpful to the Court in deciding the issues in this case.

At its core, this case is about conditions of employment, and whether a private employer can modify its employment conditions to require employees to be vaccinated in response to an unprecedented global pandemic. Within that framework, the issue is whether the law requires preliminary enjoinment of a mandatory vaccination policy. For the reasons that follow, the Court concludes that it does not have subject matter jurisdiction. *2

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I. BACKGROUND

Due to "the fast-moving nature of the COVID-19 pandemic and its ongoing threat to the health and safety of individuals receiving health care services in Medicare- and Medicaid-certified providers and suppliers, " the Center for Medicare and Medicaid Services ("CMS") recently issued an interim final rule ("IFR") requiring healthcare employers to require COVID-19 vaccinations for their employees. 86 Fed. Reg. at 61, 568; see also 42 C.F.R. § 482.42(g). The IFR only allows for exceptions to the vaccination requirement when required by Federal law. *See* 42 C.F.R. § 482.42(g)(3)(vi). CMS stated, that the "IFR preempts the applicability of any State or local law providing for exemptions to the extent such law provides broader exemptions than provided for by Federal law and are inconsistent with this IFR." 86 Fed. Reg. at 61, 572; *see also* 86 Fed. Reg. at 61, 568 ("We intend, consistent with the Supremacy Clause of the United States Constitution, that this nationwide regulation preempts inconsistent State and local laws as applied to Medicare- and Medicaid-certified providers and suppliers.").

Plaintiff filed a Petition for Enforcement of the Oklahoma Anti-Discrimination Act and Application for a Temporary Restraining Order ("TRO"), in Tulsa County, Case No. CJ-2021-

3251, on November 12, 2021, seeking enforcement of State law. Plaintiff sought an order "restraining and enjoining Ascension from taking any [] adverse action against those who have sought a religious exemption until the Office of Civil Rights Enforcement ("OCRE") completes its pending investigation into complaints of discrimination" by Defendants. (Doc. 2-3 p.1). The Plaintiff further stated he had "reasonable cause to believe Ascension has engaged and is engaging in unlawful discriminatory practices in the implementation and administration of its mandatory vaccinate or terminate policy." (Doc. 2-3 p. 2). *3

Dr. Duininck filed a charge of discrimination with the OCRE against Defendants alleging the following:

In July or August of 2021, he was notified by Defendants that he would be required to be vaccinated for COVID-19 to continue his employment with Defendants. (Doc. 2-3, Ex. 1).

Plaintiff claims a sincerely held religious belief that prevents him from receiving the COVID-19 vaccination. *Id.* ¶ 3.

On August 30, 2021, Plaintiff notified Defendants of his religious beliefs and requested a religious accommodation exempting him from that mandatory vaccine policy. *Id*. ¶ 4.

As part of Plaintiff's request for an accommodation, Defendants required him to acknowledge that if he was not fully vaccinated or granted an accommodation by November 12, 2021, his employment would be immediately suspended, and that further non-compliance would be deemed voluntary resignation. *Id.* ¶ 5.

On October 6, 2021, Defendants summarily denied his request for a religious accommodation. *Id.* ¶ 6.

On October 9, 2021, Defendants acknowledged the sincerity of Plaintiff's beliefs and stated, "Due to the nature of your role and working onsite as well as with patients, it would pose an undue hardship on the organization to grant your religious exemption request because the vaccine is the most effective means to mitigate the risk to patient and workplace safety." *Id.* ¶ 7.

Plaintiff appealed Defendants' denial of his religious accommodation on October 11, 2021 and provided additional information in support of his request on October 13, 2021. *Id.* ¶ 8.

Defendants again denied Plaintiff's request on November 5, 2021 stating that the denial was not a challenge to his personal beliefs and the decision was driven by his strong need to promote and protect the health and safety of their workforce and patients. *Id.* ¶ 9. *4

Plaintiff claims that Defendants had determined in advance, before they notified him and other employees of the mandatory vaccination policy, that they would summarily deny all requests for religious accommodations based on the use of aborted fetal cell lines in the development of the vaccine. *Id.* ¶ 10.

Plaintiff claims Defendants failed to identify any undue hardship to justify its denial of his request. In fact, Plaintiff states he works close to another employee who was granted a medical exemption and remains unvaccinated, but Defendants have not given any additional instructions regarding reasonable accommodations beyond those precautions already in place. *Id.* ¶ 11.

Plaintiff claims Defendants have approved requests for religious accommodation for some non-employees working in their facilities based on sincerely held religious beliefs identical to his own beliefs. But Defendants have not provided any justifications for denying his request. *Id.* ¶ 12.

Defendants failed to engage in the interactive process to determine whether any other reasonable accommodations were available that would adequately protect Defendants' patients and staff while allowing Plaintiff to continue adhering to his religious beliefs. *Id.* ¶ 13.

Plaintiff claims Defendants believe he has or may acquire a communicable disease and are treating him as if he already has the disease, claiming Defendants are treating him as if he was disabled. *Id.* ¶¶ 14-15.

Plaintiff believes Defendants failed to accommodate his religious beliefs and are discriminating against him based on his religion and Ascension's perception that he is or will get COVID-19 making him disabled in violation of Title VII, the ADA, and the Oklahoma AntiDiscrimination Act. *Id.* ¶ 16.

Based on these same allegations, the state court granted a TRO on November 12, 2021, stating that it would grant a temporary and emergency order
5 pending a full hearing set for *5 December 1, 2021, at 9:30 a.m. (Ex. 2). That Order provides that "Ascension Healthcare et al., is temporarily restrained and enjoined from suspending or terminating the employment of, or taking any other adverse action against, any of defendants' Oklahoma employees and contractors who have requested but have been denied a religious exemption from Ascension's COVID-19 vaccine mandate. Defendants shall rescind all such suspensions, terminations, or other adverse actions that have occurred prior to the entry of this order and allow Oklahoma employees an additional thirty (30) days from the entry of this order to submit requests for religious accommodations." The TRO further provides that "The Court enters this Temporary Restraining Order on a temporary and emergency basis and sets this matter for further hearing on the [1st] day of [December], 2021 to determine whether a temporary injunction should be granted during the pendency of the Attorney General's investigation of the complaints of discrimination that have been filed against defendants."

After the TRO was granted, Defendants filed a Notice of Removal in this Case. (Doc. 2). After the Removal was filed, the State of Oklahoma filed an Amended Complaint removing all federal causes of action. (Doc. 7).

II. ANALYSIS

Generally, any civil action brought in a state court where the United States District Courts have original jurisdiction may be removed by defendants to the United States District Court for the district and division embracing the place where the original suit pends. 28 U.S.C. § 1441(a). That said, federal courts are courts of limited jurisdiction, and the removal statute is subject to strict construction. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (recognizing that removal "determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system"); *Shamrock Oil & Gas Corp. v.*
6 *Sheets*, *6 313 U.S. 100, 107 (1941); *Wily v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). "[A]ny doubt about the propriety of removal must be resolved in favor of remand." *Gasch v. Hartford Acc. & Indem. Co.*, 491 F.3d 278, 281-82 (5th Cir. 2007). Absent diversity jurisdiction, cases cannot be removed if the complaint fails to affirmatively allege a federal claim under the well-pleaded complaint rule. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 5-6.

The question remains, however, whether Plaintiff's Amended Complaint, filed after removal, superseded the original Complaint, and if so, whether the Amended Complaint raises a federal question despite the fact that Plaintiff has eliminated any references to the federal causes of action. Determination of this issue is based on reconciling Supreme Court precedent which establishes that the propriety of removal is determined on the basis of the original complaint filed in state court and not on post removal amendments, [2] with Supreme Court precedent that permits remand where the federal claim from the original complaint has been eliminated in an amended complaint. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988).

2 See *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938) ("[E]vents occurring subsequent to removal which reduce amount recoverable ... do not oust the district court's jurisdiction once it has attached."); *Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290 (11th Cir. 2000)("[T]he district court must determine whether it had subject matter jurisdiction at the time of removal.") reversed on other grounds, *Alvarez v. Uniroyal Tire Co.*, 508 F.3d 639 (11th Cir. 2007).

In *Carnegie-Mellon,* the Supreme Court resolved "whether a district court has discretion to remand a removed case to state court, as opposed to dismissing it, when all the federal-law claims have dropped out of the action and only the pendent state-law claims remain." 484 U.S. at 345. In *Carnegie-Mellon,* the plaintiffs filed suit in state court alleging a violation of federal and state employment discrimination laws as well as state-
7 law tort claims. *Id.* Defendants removed the *7 suit to federal court arguing that the complaint stated a claim under the Age Discrimination in Employment Act. *Id*. at 346. Six months later, Plaintiffs moved to amend their complaint to delete the federal law claims and filed a motion to remand. *Id.* The district court allowed the amendment and granted the motion to remand. *Id.* On review, the Supreme Court held that a district court had discretion to remand supplemental state law claims after the plaintiff dropped the federal claims on which removal was originally based. *Id.* at 357. The Court emphasized that a federal court must weigh the considerations of "economy, convenience, fairness, and comity" when determining whether to remand the amended complaint. *Id*. at 350.

In contrast, the *Eleventh Circuit in Poore v. American-Amicable Life Ins. Co*., 218 F.3d 1287 (11th Cir. 2000), reaffirmed the principle established by the Supreme Court in *St. Paul Mercury Indemnity, Co.,* 303 U.S. 283 (1938), that the time of removal is the critical jurisdictional juncture. In *Poore* the Eleventh Circuit was called upon to review the propriety of a remand in a class action diversity case based on an amended complaint that eliminated claims exceeding $75,000. Shortly after removal the Plaintiff sought leave to amend the complaint to delete the claims for punitive damages and to redefine the class to exclude any plaintiffs whose claims exceeded $75,000. The Eleventh Circuit, in noting that the district court must determine whether it had subject matter jurisdiction at the time of removal, appropriately held that the "[e]vents occurring after removal which may reduce the damages recoverable below the amount in controversy requirement do not oust the district court's jurisdiction." 218 F.3d at 1291. The Court acknowledged, however, that "other post-removal events may divest the district court of jurisdiction." *Id*. at 1291 n. 2.

Thus, *Poore* simply reaffirms the rule that a district court must view the events which exist at the time of removal - rather than subsequent
8 events - when determining whether the Court *8 initially has removal jurisdiction. This rule is not at odds with the rule in *Carnegie-Mellon*, which provides that a Court has discretion to remand supplemental state law claims after the federal claims have been dropped and after the initial determination has been made that removal jurisdiction is appropriate.

Once the federal claims have been eliminated the only question for the Court is whether it should continue to accept or should decline to exercise jurisdiction over the pendent state claims. This analysis of the Court's jurisdiction is different from the analysis of whether the Court in the first place has removal jurisdiction. In the latter instance *Poore* instructs that post removal events should be ignored. *Poore* does not instruct, however, that a Court does not subsequently have discretion to reexamine whether it will retain jurisdiction over a case that only involves state law claims. That determination is based on

considerations of "economy, convenience, fairness and comity" as instructed by the Supreme Court in *Carnegie-Mellon.*

Here, economy and convenience weigh in favor of remand because this case is in its very early stages, a fact the *Carnegie-Mellon* court deemed significant. 484 U.S. at 351. ("When the single federal law claim in the action [is] eliminated at an early stage of the litigation, the district court [has] a powerful reason to choose not to continue to exercise jurisdiction."). Furthermore, Defendants have not even answered the Amended Complaint due to the pendency of a motion to dismiss. Because of the status of the pleadings it is reasonable to assume that discovery is in the early stages as well. The Court has not yet expended a significant amount of judicial labor and time in this case and thus remand at this stage of the proceedings would not require a state court to duplicate the efforts of this court. *9

Principles of comity also weigh in favor of remand because the court will be called upon to interpret issues of state law that are best suited for determination by a state court. Lastly, principles of fairness will not be offended if the case is remanded to state court. Fairness in the context discussed by *Carnegie-Mellon* is addressed more to the issue of forum shopping. The *Carnegie-Mellon* court specifically recognized that a plaintiff's use of manipulative tactics to secure a state forum in which to try the case is a factor a district court can consider when deciding whether to remand a case. 484 U.S. at 357. This concern involved situations where federal claims had been eliminated late in a case in order to secure another judge (i.e. a state court judge) to try a case after the federal court has expended significant resources. That is not the case here because of the early posture of this case. Moreover, a remand to state court would merely effectuate Plaintiff's original choice of a state forum and, therefore, the traditional aversion of federal courts to forum shopping is not substantially implicated[3]

3 In fact, Plaintiff alleges it is Defendants who are forum shopping because the instant Motion to Remand was only filed after the state court issued a TRO in Plaintiff's favor.

Finally, Defendants argue that although only state law claims remain in the Amended Complaint, they are preempted by the IFR, thus providing federal jurisdiction. The IFR requires Defendants' employees to be vaccinated and only allows for accommodations under Federal law. *See* 42 C.F.R. 482.42(g)(3)(vi). *See also* 86 Fed.Reg. 61, 569 (employers following "this IFR may also be required to provide appropriate accommodations, to the extent required by Federal law"). CMS expressly stated: "As is relevant here, this IFR preempts the applicability of any State or local law providing for exemptions **to the extent such law provides broader exemptions than provided for by Federal law and are inconsistent with this IFR**." (emphasis added). 86 Fed. Reg. 61, 572. *See also* 86 Fed. Reg. at 61, 568 ("We intend, consistent with the Supremacy Clause *10 of the United States Constitution, that this nationwide regulation preempts **inconsistent State and local laws** as applied to Medicare- and Medicaid-certified providers and suppliers.") (emphasis added).

"Preemption" is an affirmative defense to a state law claim which, alone, cannot invoke federal question jurisdiction as a well-pleaded complaint. *See, e.g.*, *Spear Marketing Inc. v. BancorpSouth Bank*, 844 F.3d 464 467 n.3 (5th Cir. 2016). An exception to the well-pleaded complaint rule exists where there is complete preemption of the state claim by federal law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

The complete preemption doctrine, also known as the artful-pleading doctrine, provides that the preemptive force of some federal statutes is so strong that "it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule, " such that removal is possible. *GlobeRanger Corp.*

v. Software AG, 691 F.3d 702, 705 (5th Cir. 2012) (quoting *Caterpillar Inc*., 482 U.S. at 393). For example, the Copyright Act is a federal statute that completely preempts the substantive field. *Id.* at 706. Complete preemption for the purpose of establishing federal subject matter jurisdiction is thus a purely jurisdictional doctrine distinct from ordinary preemption's defensive properties. *See Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011).

Complete preemption applies only when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " *Caterpillar Inc*., 482 U.S. at 393 (quoting *Metro Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). The Supreme Court has recognized only three statutory provisions as having such extraordinary
11 preemptive force: (1) *11 Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185; (2) Section 502(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a); and (3) Sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85-86. *Sullivan v. Am. Airlines, Inc*., 424 F.3d 267, 272 (2d Cir. 2005). Thus, "[a]s a general matter, complete preemption is less common and more extraordinary than defensive or ordinary preemption." *Elam*, 635 F.3d at 803.

The question here is whether the IFR has a pre-emptive force "so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Caterpillar Inc.,* 482 U.S. at 393. "[T]o determine whether a federal statute completely preempts a state-law claim within its ambit, the Court must determine whether the federal statute provides 'the exclusive cause of action' for the asserted state-law claim." *Sullivan*, 424 F.3d at 275-76 (quoting *Anderson,* 539 U.S. at 9).

As the removing party, Defendants fail to demonstrate that the IFR expressly "preempts the applicability of any State or local law providing for exemptions to the extent such law provides broader exemptions than provided by Federal law." 86 Fed.Reg. at 61, 572. First, the IFR does not provide a cause of action, but merely a mandate for vaccinations with accompanying avenues for exemptions. This is completely consistent with the Oklahoma law. See Okla. Const. Art. I, § 2; and Okla. Stat. 51 § 251-258. Further, the IFR at issue remains in the notice and comment phase before becoming effective. The comment period does not expire until "5:00 p.m. on January 4, 2022." *Id.* at 61, 555. Providing for a comment period implicitly suggests that the rule may be reconsidered and that the level of uncertainty is high. It is always the case that an agency can regulate, or deregulate after the comment period is concluded. *See e.g. Perez v. Mortgage Bankers Assoc. et al*., 575 U.S. 92 (2015); *State of California v. Azar*, 911 F.3d 558
12 (2018). *12

Therefore, as the removing party, Defendants fail to demonstrate the IFR falls within the ambit of complete preemption. As such, the Amended Complaint provides no basis for subject matter jurisdiction and the case is remanded to Tulsa County District Court, Oklahoma.

13 **IT IS SO ORDERED.** *13

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APPENDIX B

2009 WL 2256023
United States District Court, M.D. Florida,
Orlando Division.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, Plaintiff,
v.
PAPIN ENTERPRISES, INC., Papin, Inc.,
Doctor's Associates, Inc., Defendants.

No. 6:07–cv–1548–Orl–28GJK.
|
July 28, 2009.

Attorneys and Law Firms

Kaleb M. Kasperson, Maria Kate Boehringer, Jimmy K. Edwards, Equal Employment Opportunity Commission, Miami, FL, Marisol Estevez, U.S. Equal Employment Opportunity Commission, Nora Ellen Curtin, EEOC, Miami, FL, for Plaintiff.

Christopher Charles Skambis, Jr., The Skambis Law Firm, Orlando, FL, Michelle I. Anderson, Theresa M. Gallion, Michelle I. Anderson, Theresa M. Gallion, Fisher & Phillips, LLP, Tampa, FL, for Defendants.

ORDER

JOHN ANTOON II, District Judge.

***1** The Equal Employment Opportunity Commission ("the EEOC") filed this suit against Doctor's Associates, Inc. ("DAI"), the franchisor of Subway restaurants, and two of its franchisees, Papin Enterprises, Inc., and Papin, Inc. (collectively, "the Papin entities"). The EEOC alleged in the Complaint (Doc. 1) that Defendants discriminated against employee Hawwah Santiago ("Santiago") by failing to accommodate her religious practice of wearing a ring in her nose. In addition to compensatory damages, the EEOC sought injunctive relief and punitive damages.

The case proceeded to jury trial on the issue of whether Defendants had unlawfully discriminated against Santiago, but the parties stipulated that the issues of punitive damages and entitlement to injunctive relief were to be decided by the Court alone. The jury returned a verdict finding that Santiago did not wear the nose ring because of a sincerely held religious belief, and that finding was dispositive of the religious accommodation claim. The parties disputed whether the jury's finding disposed of the entire case-Defendants took the position that absent a finding of discrimination against Santiago the EEOC had no further claims or relief to pursue, while the EEOC maintained that it could still obtain injunctive relief and punitive damages for what it regards as unlawful practices employed by DAI in considering whether to grant religion-based waivers of its uniform requirements. After the jury was discharged, the Court received additional testimony and argument on the issues of injunctive relief and punitive damages and allowed the parties to submit further briefing (Docs. 153 & 154). Having considered the evidence and the parties' submissions, the Court finds that the EEOC is not entitled to any relief in this case.

I. Facts

For a few months in 2006, Santiago worked as a "sandwich artist" and assistant manager at a Subway restaurant owned by the Papin entities [1] in New Smyrna Beach, Florida. At some point during her employment, Santiago began wearing a metal ring in her nose. Joseph Papin ("Papin"), owner of the Papin entities, repeatedly asked Santiago to remove the nose ring while she was at work because it violated the no-facial-jewelry portion of the uniform policy set forth in the Subway Employee Handbook [2] and had resulted in Papin's restaurant being written up as "out of compliance" by a DAI subcontractor who routinely assessed the restaurant to ensure conformity to DAI's requirements. Santiago refused, stating that wearing the nose ring was a practice of her Nuwaubian religion. With the assistance of Papin, Santiago sought a waiver [3] of the uniform policy from DAI on religious grounds. As a part of the waiver process, DAI requested written verification of the Nuwaubian practice of wearing nose rings. No such documentation was provided to DAI. Eventually, Papin fired Santiago when she persisted in wearing her nose ring, and the EEOC brought this suit on her behalf.

***2** As earlier noted, the jury found that Santiago's wearing of the nose ring was not based on a sincerely held religious belief. (*See* Verdict, Doc. 139). However, after that finding was made, the EEOC continued to press its claim to an entitlement to injunctive relief and punitive damages based on DAI's practice of asking employees for documentation supporting requests for religion-based waivers—a practice

that the EEOC regards as improper under Title VII. The parties presented this part of the case, including the matter of whether there was indeed any part of the case remaining for the EEOC to pursue, to the Court, without a jury. The EEOC did not present any live testimony during this phase of the trial, instead relying on the deposition testimony of Timothy Miller, an operations specialist for DAI who administers DAI's uniform policy and handles requests for waivers from it. DAI also relied on Miller's deposition testimony and called one witness, Steven Lawrence, DAI's Assistant Director of Operations,.

Miller testified in his depositions[4] regarding his practice upon receipt of requests for waivers of the uniform policy. Miller stated that when such a request was received, he looked for something to support a waiver; in the case of a religion-based request, he typically looked for "any form of religious text." (Miller March 2009 Dep. at 13). Once he received some type of documentary support for a request, Miller conducted research to "verify" the support. (*Id.* at 68). If there were no documentation available to support a religion-based request, Miller would request to speak to an elder or other religious figure. (*Id* . at 69). Miller also testified that if an employee requesting an accommodation claimed to adhere to a religion that did not have documents or clergy, he would consider the word of the employee as verification of such a "religion of one," though he had never been faced with such a situation. (*Id.* at 70–74). Miller could not recall any occasion in the five years that he had been handling uniform waivers that he had rejected any religious documentation as inadequate. (*Id.* at 14).

Lawrence testified that in January 2009, DAI changed its practice regarding both jewelry waivers and the handling of requests for religious accommodations. Lawrence explained that Miller, who reports to him indirectly, no longer requests any documentation of any kind when presented with a request for a uniform waiver based on religion. (Trial Tr. Excerpt, Doc. 146, at 5–6). Additionally, all requests for waivers for the wearing of jewelry are now rejected by DAI based on food safety guidelines. (*Id.* at 6).

II. Discussion

This case is unusual in that the EEOC is seeking relief notwithstanding the jury's finding that Defendants did not discriminate against Santiago as alleged in the EEOC's Complaint. The EEOC maintains that DAI's practice of "requiring franchisee employees to prove that their requested observance or practice is required by their faith" is itself a violation of Title VII. (Pl.'s Br., Doc. 154, at 2). The EEOC argues that through this practice, DAI impermissibly passes on the validity of the employees' religious beliefs rather than on the sincerity of those beliefs. The EEOC contends that Miller's routine efforts to verify the religious practices of Subway employees in considering their requests for uniform and jewelry waivers entitle it to injunctive relief[5] and punitive damages.

***3** DAI, on the other hand, asserts that in light of the jury's verdict finding that it did not discriminate against Santiago, the EEOC is not entitled to relief. DAI emphasizes that the EEOC did not bring a pattern and practice claim under § 707 of Title VII (42 U.S.C. § 2000e6), instead bringing the case only under § 706 of Title VII (42 U.S.C. § 2000e–5). DAI avers that in the absence of § 707 allegations, the EEOC has no standing to pursue claims on its own behalf now that the claim regarding Santiago has been resolved in Defendants' favor by a jury. Alternatively, DAI asserts that even if the EEOC may properly pursue a policy claim at this juncture, there is no basis for an award of injunctive relief or punitive damages.

DAI is correct that the allegations of the Complaint are focused on Defendants' treatment of Santiago and not on practices that allegedly resulted in discrimination against, or failure to accommodate, anyone else. Nearly every paragraph of the Complaint mentions Santiago by name as the victim of Defendants' actions. Although there is one generally-worded paragraph in the statement of the claim that does not mention Santiago specifically (Doc. 1 ¶ 13d), it is buried amid paragraphs that plainly pertain to Defendants' treatment of Santiago. Thus, it is no wonder that Defendants were surprised by the EEOC's pursuit of a broader "policy" claim in addition to its claim regarding the failure to accommodate Santiago's practice of wearing a nose ring.

Assuming arguendo that the EEOC can now properly pursue this claim in the face of its failure to establish that Defendants violated Santiago's rights under Title VII, the EEOC is not entitled to any relief on its policy claim. The EEOC has not shown that any policy or practice of DAI resulted in anyone being denied a religious accommodation to which he or she was entitled by Title VII; the lack of evidence on this point was conceded by counsel for the EEOC during the bench trial phase of the case. (*See* Doc. 146 at 11). Santiago is the only person to have complained about the way DAI handled

requests for waiver of its uniform policy; there is no evidence of any other action being filed by any other individual or by the EEOC.

Moreover, through the trial testimony of Mr. Lawrence, DAI established that it has now changed its practice regarding processing of requests for religious waivers and that it no longer requests supporting documentation from employees who seek to deviate from the uniform policy for religious reasons. Although Mr. Lawrence acknowledged that the reason for the change in practice was the instant case, and such changes are viewed with a skeptical eye by the courts, [6] the EEOC has not persuaded the Court—assuming for the sake of argument that DAI's former practice was violative of Title VII—that there is a danger that such a practice is likely to continue in the future. [7] Thus, although a court may award injunctive relief even when the complained-of conduct has ceased, [8] in this case there is no evidence that there has been a prior or subsequent complaint of discrimination against these Defendants; the alleged discriminatory conduct is limited to asking for information supporting a request for a deviation from a company-wide uniform policy; the one incident of discrimination that has been alleged was not proven at trial; and the challenged practice has been abandoned. Under the totality of these circumstances, equitable relief is not warranted.

***4** Furthermore, the EEOC is not entitled to punitive damages in this case. First, the EEOC only pled punitive damages with regard to Santiago, not for its own benefit. (*See* Compl. at 5 ¶ 5 (requesting that the Court "[o]rder Defendants to pay Santiago punitive damages for Defendants' malicious and reckless conduct described above, in amounts to be determined at trial")). Absent a finding of discrimination against Santiago, there is no basis for an award of damages of any kind to her. And, as the EEOC has not sought an award of punitive damages to itself, it may not now obtain one.

Moreover, there is no basis for an award of punitive damages in this case in any event. Such damages are available where an employer has engaged in intentional discrimination "with malice or with reckless indifference to ... federally protected rights." 42 U.S.C. § 1981 a(b)(1). "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526, 535, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). "[A]n employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536. "Malice means 'an intent to harm' and recklessness means 'serious disregard for the consequences of [one's] actions.' " *EEOC v. W & O, Inc.,* 213 F.3d 600, 611 (11th Cir.2000) (citation and internal quotation omitted) (alteration in original). To prevail on a claim for punitive damages, a "plaintiff must come forward with substantial evidence that the employer acted with actual malice or reckless indifference to his federally protected rights." *Miller v. Kenworth of Dothan, Inc.,* 277 F.3d 1269, 1280 (11th Cir.2002).

DAI's former practice in its processing of religious accommodation requests does not rise to this level. Although DAI now concedes that the practice of seeking corroboration of an employee's proposed religious practice was perhaps "excessively enforced," [9] DAI plainly made an effort to accommodate workers who made requests. Moreover, the law regarding what an employer may or may not do in handling such requests is undeveloped and far from settled. The EEOC's own publications acknowledge that some inquiry into the sincerity of an employee's belief as well as into the religious nature of the belief is appropriate. [10] Indeed, if the rule were otherwise, an employer would have to grant an accommodation any time an employee requested one, even if there were not a sincerely-held religious belief but instead only a purely personal or stylistic preference. And, it cannot be said that "research" regarding a religious practice amounts per se to impermissible questioning of the "validity" of a religion rather than of the sincerity of the person holding the religious belief or of the religious nature of the belief. [11] Even if it did, it certainly does not, in and of itself, rise to the level of "malice" or "reckless disregard."

***5** In sum, even if the EEOC had properly pled or presented a policy claim apart from its claim regarding the treatment of Santiago, the Court concludes that the EEOC has failed to prove that DAI's policies or Miller's conduct on behalf of DAI warrants injunctive relief or punitive damages. Therefore, the EEOC's requests for such relief are denied.

It is **ORDERED** and **ADJUDGED** as follows:

1. As set forth herein, the Court finds that Plaintiff has not established an entitlement to punitive damages or injunctive relief in this case. Plaintiff's ore tenus motion for judgment as a matter of law on its policy claim (see Doc. 133) is **DENIED.**

2. Defendants' ore tenus motion for judgment as a matter of law (*see* Doc. 131) is **DENIED as moot.**

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3. In accordance with this Order and with the jury's verdict of April 22, 2009 (Doc. 139), the Clerk is directed to enter a judgment providing that Plaintiff shall take nothing from the Defendants in this action. Thereafter, the Clerk shall close this file.

DONE and **ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2009 WL 2256023, 106 Fair Empl.Prac.Cas. (BNA) 1854, 92 Empl. Prac. Dec. P 43,624

Footnotes

1 Joseph Papin owns Papin Enterprises, Inc. and Papin, Inc. Santiago worked primarily at one of the stores, but both of Papin's corporations have been named as Defendants.

2 The Subway Employee Handbook provides as follows regarding “Jewelry/Accessories”:

> Minimum jewelry may be worn. The following is permissible:
>
> ◆ one plain ring
>
> ◆ non-dangling earrings may be worn in the ears only
>
> ◆ a wrist watch
>
> ◆ plain necklaces, if worn, must be worn inside the uniform *Any other visible parts of body may not be adorned with jewelry.*

(Pl.'s Trial Ex. 19 at 8) (emphasis in original). This handbook provision is less strict than, but based on, the ServSafe Essentials manual published by the National Restaurant Association. These ServSafe Essentials provide in part:

> ***Proper Work Attire***
>
> A foodhandler's attire plays an important role in the prevention of foodborne illness, so foodhandlers must observe strict dress-code standards....
>
> Managers should make sure that foodhandlers observe the following guidelines regarding their attire.
>
> ...
>
> • **Remove jewelry prior to preparing or serving food or while working around food-preparation areas.** Jewelry can harbor microorganisms, can tempt foodhandlers to touch it, and may pose a safety hazard around equipment. Remove rings (except for a plain wedding band), bracelets, watches, earrings, necklaces, and facial jewelry (such as nose rings, etc.)

(Defs.' Trial Ex. 58 at 4–7).

3 The DAI Operations Manual contained the following provision:

> **Uniform Waivers**

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> If an employee needs to deviate from the uniform policy for religious reasons or to accommodate special needs, you must submit a written request to your DA/ADM [Development Agent/Area Development Manager] detailing the reasons for the deviation. Upon review, your DA/ADM will send the request to HQ for consideration. The Operations Department will forward a written response to your DA/ADM explaining the parameters of the deviation or the reasons for denial.

(Pl.'s Trial Ex. 25 at 14.10).

4 One deposition of Miller was taken by the EEOC in August 2008, and one was taken by Defendants, with permission of the Court, in March 2009 after it became apparent that Miller would be unavailable to testify at trial.

5 As injunctive relief, the EEOC requests that the Court enter an order enjoining such conduct in the future; requiring DAI to receive outside training and to advise franchise employees of a new policy not requiring evidence in support of a request to accommodate a religious practice or belief; and mandating that DAI submit a report to the EEOC every six months describing each religious waiver request and how it was handled.

6 *See NAACP v. City of Evergreen,* 693 F.2d 1367, 1370 (11th Cir.1982) (“Courts should keep in mind the oft-repeated observation that ‘reform timed to anticipate or blunt the force of a lawsuit offer[s] insufficient assurance that the practice sought to be enjoined will not be repeated.’ ” (quoting *James v. Stockholm Valves & Fittings Co.,* 559 F.2d 310, 354–55 (5th Cir.1977))).

7 The EEOC argues that based on the March 20, 2009 deposition testimony of Miller, there is a question as to whether DAI has in fact abandoned its policy of seeking verification. However, that deposition was taken by Defendants once Miller became unavailable for trial, and Defendants had not asked Miller any questions when the EEOC deposed him in August 2008. No questions were asked regarding any change in policy that may have been made in the interim. The Court trusts that Miller has been advised by Lawrence that the practice of seeking third party verification has been abandoned.

> Additionally, the Court has not overlooked the email from Defendants' counsel to the EEOC's counsel stating that the policy would continue if this Court determined that the EEOC had failed to state a policy claim independent of the charge of discrimination on behalf of Santiago. (Ex. 2 to Doc. 154). However, this email between counsel does not dictate a result other than that reached in the text of this Order.

8 *See City of Evergreen,* 693 F.2d at 1370 (“[T]he power to issue an injunction survives discontinuance of the illegal conduct sought to be enjoined.”).

9 (*See* Doc. 146 at 17).

10 *See* EEOC Compliance Manual, § 12–I.A.3 (2008) (“If ... an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.”); *see also id.* § 12–IV.A.2 (“An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation. By the same token, employers who unreasonably request unnecessary or excessive corroborating evidence being held liable for denying a reasonable accommodation request ....”).

11 Courts have been cautioned against inquiry into “validity” of religious beliefs. *See, e.g., Redmond v. GAF Corp.,* 574 F.2d 897, 900 (7th Cir.1978) (noting the Supreme Court's admonishment in *Fowler v. Rhode Island,* 345 U.S. 67, 70, 73 S.Ct. 526, 97 L.Ed. 828 (1953), that “[i]t is no business of courts to say ... what is a religious practice or activity”). Similarly, it does not seem appropriate for employers to make accommodations

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conditional upon their determination of the validity of an employee's belief or practice. Despite the impropriety of inquiry into "validity," however, the matter of determining whether a belief is sincerely held is different. Indeed, as a matter of common sense an employer must be permitted some inquiry into the purported beliefs of an employee before the duty to accommodate arises. *See* *Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers,* 164 F.Supp.2d 1066, 1075 (N.D.Ind.2001). In the absence of a right to make such an inquiry, an employer would simply be required to accept any self-serving statement of an employee that the employee had a belief that conflicted with a requirement of the job. *Id.* Under such a scheme, all statements of belief would have to be automatically accepted as sincerely held and be accommodated. Prohibiting employers from making limited inquiry regarding the practice for which accommodation is sought would negate the requirement that the practice for which accommodation is sought be based on a sincerely held religious belief.

The difference between an employer's insistence that a request for accommodation be based on a *valid* religious belief and the employer's consideration of the *sincerity* of a belief is subtle but crucial. The relevant question is whether the belief is sincerely held as opposed to merely a personal preference. *See* *Vetter v. Farmland Indus., Inc.,* 120 F.3d 749, 752 (8th Cir.1997) (observing that purely personal preferences do not require accommodation). In resolving this question, the employer should not be concerned with whether the belief is consistent with mainstream doctrine or even consistent with the beliefs of a single other person. Determination of sincerity is a delicate task, but an employer is entitled to investigate whether the belief is sincere and religious in nature. When a practice is not obviously based on religious belief, an employee should expect inquiry by an employer asked to accommodate the practice. *See* *Seshadri v. Kasraian,* 130 F.3d 798, 800 (7th Cir.1997) ("[A] person who seeks to obtain a privileged legal status by virtue of his religion cannot preclude inquiry designed to determine whether he has in fact a religion."); *Sidelinger v. Harbor Creek Sch. Dist.,* No. CIV 02–62 ERIE, 2006 WL 3455073, at *15 (W.D.Pa. Nov.29, 2006) ("Where the claimed belief does not appear to be a recognizable religious belief or practice, the objector must expect that his employer will inquire into the religious basis of the belief.").

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APPENDIX C

166 F.3d 1223
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA 10 Rule 32.1 before citing.)
United States Court of Appeals, Tenth Circuit.

Don M. WEBER, II, Plaintiff-Appellant,
v.
LEASEWAY DEDICATED LOGISTICS, INC., formerly known as Leaseway Logistics Service, a California corporation, Defendant-Appellee.

No. 98-3172.
|
Jan. 7, 1999.

Before SEYMOUR, Chief Judge, BALDOCK, and HENRY, Circuit Judges. **

ORDER AND JUDGMENT *

1 Plaintiff Don M. Weber appeals the district court's grant of summary judgment in favor of Defendant Leaseway Dedicated Logistics, Inc. (hereafter "Leaseway") under Fed.R.Civ.P. 56. Also before the court is Plaintiff's motion to proceed on appeal in forma pauperis. In his complaint, Plaintiff asserted that Defendant discriminated against him because of his religious beliefs in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* when Defendant refused to hire Plaintiff unless he provided Defendant with his social security number. Our jurisdiction arises under 28 U.S.C. § 1291. We review the district court's grant of summary judgment de novo, using the same standard applied by the district court. *Aramburu v. The Boeing Co.,* 112 F.3d 1398, 1402 (10th Cir.1997). We grant Plaintiff's motion to proceed in forma pauperis, and affirm the district court.

Plaintiff refuses to obtain or use a social security number because he claims it represents the "mark of the beast" as described in the Book of Revelations in the Bible. In April 1996, Plaintiff applied for a position as a truck driver with Defendant. On the application for employment Plaintiff refused to provide a social security number. Defendant did not hire Plaintiff and informed him that he would not be hired without a social security number.

We analyze Title VII religious discrimination claims under a burden-shifting approach. *See Toledo v. Nobel-Sysco, Inc.,* 892 F.2d 1481, 1486 (10th Cir.1989). First the employee must establish a prima facie case of religious discrimination by showing that (1) he has a bona fide religious belief in conflict with an employment requirement; (2) he informed the employer of the belief; and (3) he was not hired because he failed to satisfy the requirement. *Id.* Once the plaintiff has established a prima facie case, the burden shifts to the employer to show that a reasonable accommodation would result in undue hardship to the employer. 42 U.S.C. § 2000e(j); *Lee v. ABF Freight Sys., Inc.,* 22 F.3d 1019, 1022 (10th Cir.1994) The district court concluded that Plaintiff could not establish a prima facie case. The district court further concluded that assuming arguendo that Plaintiff met his burden, his claim would still fail because accommodating Plaintiff would place an undue hardship on Defendant. We agree with the district court's conclusion that accommodating Plaintiff would place an undue hardship on Defendant.

Under federal law, all employers are required to withhold certain income taxes and social security taxes and file a report with the Internal Revenue Service as to each individual employee. These reports require identification of the employee by social security number. 26 U.S.C. § 6109; 26 C.F.R. §§ 31.6109-1, 31.6051-1(a)(1). Requiring Defendant to violate these laws in order to accommodate Plaintiff would result in undue hardship to Defendant. *See United States v. Board of Educ.,* 911 F.2d 882, 891 (3rd Cir.1990) (requiring defendant to violate state statute to accommodate plaintiff resulted in undue hardship); *see also Droz v. Commissioner of IRS,* 48 F.3d 1120, 1123 (9th Cir.1995) (compulsory participation in the social security system, where the plaintiff's objection is based on religious grounds, is not unconstitutional).

2 Furthermore, by accommodating Plaintiff's refusal to provide a social security number, Defendant would be subject to penalties from the IRS for not reporting the employee's social security number. *See* 26 U.S.C. §§ 6722, 6723. To require an employer to subject itself to potential fines also results in undue hardship. *See Lee,* 22 F.3d at 1023. In response, Plaintiff argues that Defendant would not be subject to undue hardship because Defendant could receive a waiver of penalties under 26 U.S.C. § 6724. Section 6724(a) provides that "[n]o penalty shall be imposed under this part with

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respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect." Plaintiff cited no authority to support his contention that the Internal Revenue Service would find that Defendant's omission of Plaintiff's social security number was due to "reasonable cause." *Cf. EEOC v. Allendale Nursing Centre,* 996 F.Supp. 712, 718 (W.D.Mich.1998) (employer under no obligation to seek § 6724 waiver in order to accommodate Plaintiff). Therefore, we reject Plaintiff's argument. For these reasons, the judgment of the district court is

AFFIRMED.

All Citations

166 F.3d 1223 (Table), 1999 WL 5111, 1999 CJ C.A.R. 288

Footnotes

** After examining the briefs and appellate record, this panel has determined that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

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APPENDIX D

KeyCite Yellow Flag - Negative Treatment
Distinguished by Stroup v. Coordinating Center, D.Md., September 28, 2023

2022 WL 7059182
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Venecia MARTE, Plaintiff,
v.
MONTEFIORE MEDICAL CENTER, Defendant.

No. 22-CV-03491-CM
|
Signed October 12, 2022

Attorneys and Law Firms

Jay M. Weinstein, Jay M. Weinstein, Attorney at Law, Woodmere, NY, for Plaintiff.

Jean L. Schmidt, Emma Jane Diamond, Littler Mendelson, P.C., New York, NY, for Defendant.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

McMahon, United States District Judge:

***1** Venecia Marte ("Plaintiff") is a former employee of Montefiore Medical Center ("Defendant" or "Montefiore"). In October 2021, Montefiore fired Plaintiff after she refused to get vaccinated against the COVID-19 virus. (Dkt. No. 1 ("Compl."), ¶17). Plaintiff, a woman of Hispanic descent and a Born-Again Christian (*id.* ¶9), alleges that Defendant was obligated to provide "reasonable accommodation" when she refused to receive the COVID-19 vaccine. (*Id.* ¶20). She claims her termination was a pretext and premised on her "race and/or religious practices." (*Id.*).

Plaintiff alleges that, by failing to provide her with a reasonable accommodation, Defendant violated her federal civil rights pursuant to Title VII of the Civil Rights Act of 1964, the Free Exercise Clause of the First Amendment of the United States Constitution, the Equal Protection Clause of the 14th Amendment of the United States Constitution, 42 U.S.C. § 1983 *et seq.*, and various provisions of Title 29 of the United States Code (Count I) [1]; violation of New York State Human Rights Law, New York State Executive Law § 269 *et seq.* (Count II); and violation of New York City Human Rights Law, Administrative Code of the City of New York § 8-101 *et seq.* (Count III). Plaintiff seeks nine million dollars in damages. (Compl., at 6).

Defendant moves to dismiss Plaintiff's complaint in its entirety for failure to state a claim upon which relief can be granted. (Dkt. No. 13). The motion is opposed. (Dkt. No. 17).

In response, Plaintiff seeks leave to amend her original complaint, and attached a proposed amended complaint for the Court's consideration. (Dkt. No. 17; Dkt. No. 17-1).

For the reasons that follow, Defendant's motion to dismiss is GRANTED; Plaintiff's request for leave to amend is DENIED.

BACKGROUND

A. Parties

Plaintiff is a resident of Bronx County in the City and State of New York. (Compl., ¶4). Plaintiff is a woman of Hispanic descent and a Born-Again Christian. (*Id.* at ¶9).

Defendant is a public health corporation located within the State of New York. (*Id.* at ¶5). From 2006 to 2021, Defendant employed Plaintiff as a physician's assistant in the Department of Psychiatry at one of its hospitals, also located in the County of Bronx. (*Id.* at ¶¶5-8).

B. New York's Vaccine Mandate and Plaintiff's Termination of Employment

On August 26, 2021, the New York State Department of Health issued a mandate applying to hospitals and other healthcare entities, requiring the facilities to continuously require eligible personnel to be fully vaccinated against COVID-19 (the "Mandate"). N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61 (2021). [2] The Mandate covered all employees "who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." *Id.* at § 2.61(a)(2). The only listed exception to the Mandate is for employees for whom the vaccination would be detrimental to their health. *Id.* at § 2.61(d)(1). On or before October 30, 2021, Defendant implemented a vaccination policy for all employees. (Dkt. No. 14 ("MTD Br."), at 3).

***2** In October 2021, the Second Circuit heard a challenge to the Mandate in *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021). The plaintiff-appellants in *We The Patriots* challenged the Mandate's lack of a religious exemption as a violation of the First Amendment, the Supremacy Clause via Article VII of the Civil Rights Act of 1964, and the Fourteenth Amendment. *Id.* at 272. Ultimately, the court rejected these claims and upheld the Mandate in a decision dated November 4, 2021. *Id.* at 296. Eight days later, on November 12, 2021, the Second Circuit clarified that while the Mandate was not unconstitutional for want of a religious exemption, medical facilities might be able to accommodate employees with religious exemptions by employing them in a manner that removed them from the scope of the Mandate. *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 368, 370 (2d Cir. 2021) [hereinafter *We The Patriots II*].

Defendant argues that it required that all its employees receive the COVID-19 vaccine in order to comply with the Mandate. (MTD Br., at 2-3). Defendant also argues that Plaintiff's work as a physician's assistant required her to work in-person around patients and staff every day, which made her an employee covered by the Mandate. (*Id.*, at 8).

Plaintiff alleges in her complaint that she was unwilling to receive the COVID-19 vaccine. (Compl., ¶15). She pleads that she requested a specific accommodation: to continue her work with patients while unvaccinated, but while taking the same precautions she had observed before the implementation of the Mandate. (*Id.*, ¶¶15, 16, 22). Plaintiff did not specify what those precautions were.

Plaintiff also pleads, albeit "on information and belief," that other Montefiore employees were offered an accommodation; she does not plead who those people were, nor facts tending to show that those who allegedly received these "information and belief" accommodations were members of any particular race or national origin group, or that they held (or did not hold) any particular religious beliefs. (*Id.*, ¶18).

Defendant ended Plaintiff's employment on October 30, 2021. (*Id.*, ¶17). Plaintiff alleges that the termination was pretextual, and that the termination was premised on her race and/or religious beliefs. She also alleges that she was denied a reasonable accommodation. (*Id.*, ¶¶16-16 [*sic*]).

C. Procedural Posture

Plaintiff filed this lawsuit on April 29, 2022. (*Id.* at 7). Defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 13). Defendant argues that each of Plaintiff's claims is pleaded in a deficient manner or, alternatively, is fundamentally flawed in light of existing caselaw. (MTD Br., at 2). Specifically, Defendant argues that several of the issues raised by Plaintiff were decided by the Second Circuit in *We The Patriots* and that the accommodation proposed by Plaintiff qualified as an undue hardship under New York State and City laws. (*Id.*).

After Defendant filed its response, Plaintiff filed a letter motion requesting leave to amend her complaint. (Dkt. No. 17, at 9-10). She attached a proposed amended complaint, the relevant part of which will be discussed below. (Dkt. No. 17-1).

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." In assessing a Rule 12(b)(6) motion to dismiss, the Court is required to accept all material facts alleged in a complaint as true, and to draw all reasonable inferences from its allegations in the plaintiff's favor. *Wharton v. Duke Realty, LLP*, 467 F. Supp. 2d 381, 386-87 (S.D.N.Y. 2006). The court is, however, limited to the facts stated in the complaint or in documents attached to the complaint. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). "To survive a motion to dismiss under Rule 12(b)(6) ... a complaint must contain sufficient factual matter accepted as true, to state a claim to relief that is plausible on its face." *Mabry v. Neighborhood Def. Serv.*, 769 F. Supp.2d 381, 389 (S.D.N.Y. 2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 at 678.

***3** In deciding a motion to dismiss pursuant to Rule 12(b)(6), "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 664. A plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 677-78 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A plaintiff's

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obligation ... requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Unless the well-pleaded allegations have "nudged [plaintiff's] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Id.* at 570.

DISCUSSION

I. Plaintiff Fails to State a Claim for Federal Rights Violations; Her Federal Rights Claims are Dismissed.

A. Plaintiff's Title VII Religious and Racial Discrimination Claims are Dismissed.

Plaintiff argues that, by terminating her employment while refusing to offer a reasonable accommodation, Defendant violated Plaintiff's rights pursuant to Title VII of the Civil Rights Act of 1964. (Compl., ¶24).

Section 2000e-2(a)(1) of Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ..."

Section 2000e(j) defines religion to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." When an employee has a religious belief that conflicts with a requirement of employment, the employer must offer the aggrieved employee a reasonable accommodation unless it would cause undue hardship. *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002).

A prima facie religious discrimination claim based on a failure to accommodate a religious belief requires Plaintiff to allege (1) she held a bona fide religious belief conflicting with an employment requirement; (2) she informed her employer of this belief; and (3) she was disciplined for failure to comply with the conflicting employment requirement. *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001). If a plaintiff can make out a prima facie case, then the employer is required to show that it offered her a reasonable accommodation or that doing so would cause undue hardship. *Baker v. The Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006).

Even with the presumption of veracity given to a complaint in a motion to dismiss proceeding, Plaintiff's complaint does not state a prima facie case for a Title VII violation. Plaintiff pleaded that she is a Born-Again Christian, which could give rise to a bona fide religious belief. (Compl., ¶8). However, the complaint itself never alleges that Plaintiff had a bona fide religious belief that conflicted with the mandate; it simply says that she is "unwilling to receive the COVID-19 vaccinations." (*Id.* at ¶15). In her opposition to the present motion, Plaintiff asserted that she objects to the use of fetal cells in the COVID-19 vaccines due to her religious beliefs, but that was never alleged in the complaint itself. (Dkt. No. 17, at 2). Plaintiff cannot amend her complaint by opposition. *See Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (citing cases).

***4** More significantly, Plaintiff does not allege that she informed Defendant that she had a religious objection to the COVID-19 vaccination, or even that Defendant was aware that she has a *religious* objection to the vaccine; she pleads only that she told her employer she did not want the vaccine and asked for "a reasonable accommodation as defined by law." (Dkt. No. 17, ¶22). Defendant could not have discriminated against Plaintiff on the basis of her religious beliefs if Defendant was unaware of those beliefs; the second requirement of a prima facie case is that the employee must make her employer aware that there was a conflict between her religious belief and the employment requirement. As Plaintiff fails to plead that she told her employer that she had conflicting religious beliefs, she has failed to plead a viable claim for religious discrimination. *Knight*, 275 F.3d at 167.

Even if Plaintiff had pleaded a prima facie claim for religious discrimination, her argument is foreclosed by the Second Circuit's decision in *We The Patriots*. Defendant correctly argues that Plaintiff's requested accommodation would qualify as an undue hardship because it required Defendant to violate the law. *See Bey v. City of New York*, 999 F.3d 157, 170 (2d Cir. 2021) ("Title VII cannot be used to require employers to depart from binding federal regulations."); *Lowman v. NVI LLC*, 821 F. App'x 29, 31-32 (2d Cir. 2020) (affirming the dismissal of a Title VII complaint when a requested religious accommodation would cause an employer undue hardship by forcing it to violate the law). *We The Patriots* expressly rejected the notion that Title VII entitles employees to a blanket religious exemption to the

Mandate that would allow them to continue in their positions unvaccinated. 17 F.4th 266 at 292. This is exactly the type of accommodation Plaintiff requested—permission to remain in her position without being vaccinated. (Compl., ¶16-16 [*sic*]). The only accommodation Plaintiff requested was found to be unreasonable and an undue hardship in *We The Patriots*.

Plaintiff's complaint also fails to state a prima facie case for discriminatory behavior on the part of Defendant on the basis of her race. To show race-based discrimination under Title VII, Plaintiff must show that: "(1) she is a member of a protected class; (2) she satisfactorily performed the duties required by the position; (3) she was discharged; and (4) ... the discharge occurred in circumstances giving rise to an inference of unlawful discrimination." *Lenzi v. Systemax, Inc.*, 944 F.3d 97, 107 (2d Cir. 2019); *see also Woods v. Ruffino*, 8 F. App'x 41, 42 (2d Cir. 2001).

The complaint asserts that Plaintiff is a Hispanic woman and that her termination was a pretext. She pleads in fairly conclusory terms that other employees were offered accommodations from the mandate, and that the Defendant's refusal to offer an accommodation was due to Plaintiff's race. (Compl., ¶¶8, 19, 20).

However, Plaintiff alleges no facts that raise an inference of unlawful discrimination due to her race. (*Id.*). Conclusory statements, such as the termination being pretextual or that Defendant's refusal to offer an accommodation was due to Plaintiff's race, are not given the same presumption of veracity as factual assertions at this stage in a proceeding. *Twombly*, 550 U.S. at 555. The complaint does not plead that exemptions from the Mandate were given to non-Hispanic employees. Therefore, Plaintiff fails to plead facts from which a trier could find that the discharge "occurred in circumstances giving rise to an inference of unlawful discrimination." *Lenzi*, 944 F3d at 107. Saying "I am Hispanic; I didn't get an exemption; and I got fired; that must have happened because I am Hispanic" has long been held to be an insufficient pleading. *See Martin v. N.Y. State Dep't of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978) ("[Plaintiff]'s complaint stated only that the defendants had discriminated against him on the basis of race.... It is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)."); *Ochei v. The Mary Manning Walsh Nursing Home Co.*, No. 10 Civ. 2548(CM)(RLE), 2011 WL 744738, at *3 (S.D.N.Y. Mar. 1, 2011) ("naked assertions by plaintiff that some protected demographic factor motivated an employment decision, without a fact-specific allegation of a causal link between defendant's conduct and the plaintiff's membership in a protected class, are simply too conclusory to withstand a motion to dismiss.").

***5** Plaintiff's proposed amended complaint does not solve the original complaint's deficiencies.

The amended complaint alleges that "plaintiff was and remains unwilling to receive the COVID-19 vaccinations by reason of her profound religious beliefs," thereby filling in one blank in her original complaint. (Dkt. No. 17-1, ¶15). However, the amended complaint does not plead that Plaintiff advised Defendant that her objection to the vaccine was religious in nature; she still does not allege that Defendant knew that the vaccine violated her religious beliefs. And the amended complaint, like the original complaint, pleads no facts tending to show that Defendant refused to grant her an exemption due to her race. (*Id.*); (MTD Br., at 9). Furthermore, she cannot plead around *We The Patriots*. The accommodation she specifically requested was illegal and so was an undue hardship as a matter of law. For those reasons, it would be futile to allow Plaintiff to file her proposed amended complaint.

B. Plaintiff's First and Fourteenth Amendment Claims are Dismissed.

Plaintiff claims a violation of her Free Exercise Clause rights and of her First Amendment rights in general. (Compl., ¶24). The First Amendment bars federal or state government from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof ..." U.S. CONST. amend. I. Supreme Court precedent dictates that laws that burden religion but are neutral and of general applicability face only minimum scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

The First Amendment only applies to government actors. *See Am. Atheists, Inc. v. Port Auth. of New York & New Jersey*, 936 F. Supp. 2d 321, 330 (S.D.N.Y. 2013) ("Private conduct need not conform to the First Amendment unless 'the challenged action of a private party is fairly attributable to the state.' "); *Parker v. Blackerby*, 368 F. Supp. 3d 611, 624 (W.D.N.Y. 2019) ("Private hospitals (and their employees) are generally not considered state actors."). Montefiore has been held in many cases to be a private actor, not a state actor. *See, e.g.*, *Antwi v. Montefiore Med. Ctr.*, Case No. 14 Civ. 840

(ER), 2014 WL 6481996 (S.D.N.Y. Nov. 18, 2014) ("Plaintiff offers no facts or arguments to establish that [Montefiore], a private hospital, meets the state action requirement of § 1983"); *Jackson v. Ramirez*, No. 1:15-cv-617-GHW, 2016 WL 796854, at *9 (S.D.N.Y. Feb. 22, 2016) (dismissing a § 1983 claim against a Montefiore employee because she was a private actor and was not conspiring with state officials). In fact, Plaintiff states that Defendant is a non-governmental hospital in her opposition to the present motion. (Dkt. No. 17, at 3). Thus, the complaint fails to state a claim for a First Amendment violation. Plaintiff's proposed amended complaint does not include a claim that Defendant a state actor —nor could it—so it fails to remedy the deficiencies in the claim, rendering the amendment futile in this regard as well. (Dkt. No. 17-1).

Plaintiff also contends that Defendant's termination constituted a violation of her equal protection rights under the Fourteenth Amendment. (Compl., ¶24). The Fourteenth Amendment ensures equal protection of state laws. U.S. CONST. amend. XIV. As is the case with the First Amendment, the Fourteenth Amendment only applies to government actors. *See Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009) ("By its terms, 'private action is immune from the restrictions of the Fourteenth Amendment,' and the Amendment 'offers no shield' against private conduct, " 'however discriminatory or wrongful.' " " (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974))). Plaintiff has stated that Defendant is a private hospital. Thus, the complaint fails to state a claim for a Fourteenth Amendment violation. As explained above, the amended complaint does not allege cure the problem.

***6** Plaintiff spends much of her opposition to the present motion attacking the Mandate. (Dkt. No. 17, at 4-7). Plaintiff goes as far as to state that, "The sole issue before this Court is whether the uncontested religious beliefs of this plaintiff should be randomly and irrationally set aside by a full-frontal attack against religious beliefs by a Governor who had only been recently appointed by reason of the resignation of her predecessor." (*Id.* at 5). But that is not the issue in this case. Neither the Governor nor the State is a defendant; the named Defendant is a private party. Moreover, following *We The Patriots*, the legality of the mandate as applied to persons in Plaintiff's position is now settled law in this Circuit.

C) Plaintiff's Section 1983 Claims Are Dismissed

Plaintiff claims her rights were violated pursuant to 42 U.S.C. § 1983. Section 1983 states that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ..."

Section 1983 applies only to actions performed under color of law. *Feingold v. New York*, 366 F.3d 138, 159 (2d Cir. 2004) (" 'To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.' " (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988))). As has already been explained, Plaintiff stated that Defendant is not a government actor. Therefore, Defendant was not acting under color of law, and this claim fails. *See Antwi*, 2014 WL 6481996 at *5.

D) Plaintiff's Various Title 29 Claims Are Dismissed.

Plaintiff originally pled violations of various Title 29 provisions, but has since acknowledged that these allegations are "inappropriately pled" and has abandoned them. (*See* Dkt. No. 17, at 9). Accordingly, her Title 29 allegations are dismissed.

II. Plaintiff Fails States a New York State Human Rights Law Claim Based on Her Bona Fide Religious Beliefs; Plaintiff's New York State Human Rights Law Claim Based on Her Race is Dismissed.

Plaintiff claims her rights were violated pursuant to New York State Executive Law § 296. Claims brought under § 296 utilize the same framework as a Title VII claim. *Moccio v. Cornell Univ.*, 889 F. Supp. 2d 539, 581 (S.D.N.Y. 2012). Thus, in a religious accommodation case under § 269, a plaintiff must show that " '(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.' " *Bowles v. New York City Transit Auth.*, 285 F. App'x. 812, 813 (2d Cir. 2008) (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985)).

In a race discrimination case under § 296, a plaintiff must allege that " '(1) [s]he belonged to a protected class; (2) [s]he was qualified for the position [s]he held; (3) [s]he suffered

an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent.' " *Smith v. N.Y. & Presbyterian Hosp.*, 440 F. Supp. 3d 303, 328 (S.D.N.Y. 2020) (quoting *Brown v. City of Syracuse*, 673 F. 3d 141, 150 (2d Cir. 2012)).

Plaintiff's State law claims fail for the same reasons as her Title VII claims. Although Plaintiff's complaint includes that she is a Born-Again Christian, the complaint does not allege that Plaintiff informed Defendant that her opposition to the vaccine was because of her bona fide religious belief. Plaintiff alleged only that she told Defendant she did not want the vaccine. (Dkt. No. 1, ¶8). And, in any event, Plaintiff's proposed amended complaint does not cure the deficiency. (Dkt. No. 17-1). With regard to her race claim, Plaintiff does not allege sufficient facts to give rise to an inference of discriminatory intent. (*See supra* at page 8-9).

III. Plaintiff Fails to States a New York City Human Rights Law Claim Based on Her Bona Fide Religious Beliefs; Plaintiff's New York City Human Rights Law Claim Based on Her Race is Dismissed.

***7** Finally, Plaintiff alleges that her rights were violated pursuant to New York City Administrative Code § 8-107. That law states that "It shall be an unlawful discriminatory practice for an employer or an employee or agent thereof to impose upon a person as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such person to violate, or forego a practice of, such person's creed or religion ... and the employer shall make reasonable accommodation to the religious needs of such person." New York City Administrative Code § 8-107(3)(a). "Reasonable accommodation" is defined as an "accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business." § 8-107(3)(b).

Section 8-107 claims are analyzed under a similar standard to those of Title VII. *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013). Although the standards are similar, claims under the New York City Human Rights Law (NYCHRL) must be evaluated independently and with its provisions construed broadly in the plaintiff's favor. *Id.*

To make a prima facie religious accommodation case under § 8-107, a plaintiff must demonstrate that "(1) [s]he has a bona fide religious belief that conflicts with an employment requirement; (2) [s]he informed the employer of h[er] belief; and (3) [s]he was disciplined for failure to comply with the conflicting employment requirement." *Price v. Cushman & Wakefield, Inc.*, 829 F. Supp. 2d 201, 222 (S.D.N.Y. 2011).

To make a prima facie race discrimination case under § 8-107, Plaintiff must allege that she was treated less well due to Defendant's discriminatory intent. *Syeed v. Bloomberg L.P.*, 568 F. Supp. 3d 314, 321 (S.D.N.Y. 2021).

Plaintiff has failed to plead a prima facie case under § 8-107. Plaintiff's complaint does not allege that she had a bona fide religious belief that conflicted with an employment requirement, or that she informed Defendant about that belief. Plaintiff's proposed amended complaint does not cure the latter deficiency. (Dkt. No. 17-1).

Plaintiff's complaint also does not plead facts from which one could infer discriminatory intent due to her Hispanic race. As explained above, the complaint alleges is that Plaintiff was unwilling to take the vaccine in accordance with Defendant's policy and that she was fired, while other, unidentified employees received an accommodation "on information and belief." (Compl., ¶¶ 15, 18). This is insufficient to admit of an inference that Defendant discriminated against Plaintiff on the basis of her race.

Even under the more lenient NYCHRL standard, this claim fails and the amended complaint is futile.

IV. Plaintiff's Motion for Leave to Amend the Complaint is Denied

Federal Rule of Civil Procedure 15 states that "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Under this liberal standard, leave is generally given as long as (1) the party seeking the amendment has not unduly delayed, (2) that party is not acting in bad faith or with a dilatory motive, (3) the opposing party will not be unduly prejudiced by the amendment, and (4) the amendment is not futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The moving party bears the burden of explaining any delay, while the party opposing the amendment must show bad faith, prejudice, or futility.

In opposing the motion for leave to amend, the Defendant claims that an amendment would be futile and that Plaintiff delayed for two months after Defendant alerted her to deficiencies in the complaint. (MTD Br., at 6-7).

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"Futility is a determination, as a matter of law, that proposed amendments would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012). In assessing whether the proposed complaint states a claim, we accept as true all non-conclusory factual allegations in the complaint and proposed amendments, and draw all reasonable inferences in Plaintiff's favor. *Id.*

***8** As explained above, Plaintiff's amended complaint does not cure the deficiencies in the original complaint, and Defendant's motion to dismiss would be granted even if this Court were to grant Plaintiff leave to amend her complaint. This Court may deny leave to amend when the amendment would be futile. *Jones v. N.Y. State Div. of Mil. & Naval Affs.*, 166 F.3d 45, 50 (2d Cir. 1999). As Plaintiff's proposed amended complaint fails to fix the deficiencies in her original complaint, her leave to amend is denied.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED. The complaint is dismissed with prejudice in its entirety.

This constitutes the decision and order of the court. This is a written decision.

All Citations

Not Reported in Fed. Supp., 2022 WL 7059182

Footnotes

1 Plaintiff agrees that allegations pursuant to Title 29 are "inappropriately pled" and proposes an amended complaint removing references to Title 29. (*See* Dkt. No. 17, at 9).

2 The Court may "take judicial notice of relevant matters of public record." *Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012).

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APPENDIX E

358 P.3d 878 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

CITY OF SHAWNEE, Kansas, Appellee,
v.
Jonathan CLARK, Appellant.

No. 112,751.
|
Oct. 30, 2015.
|
Review Denied July 22, 2016.

Appeal from Johnson District Court; James Franklin Davis, Judge.

Attorneys and Law Firms

Jonathan Clark, appellant pro se.

Karen L. Torline, of City of Shawnee, for appellee.

Before LEBEN, P.J., GREEN, J., and JEFFREY E. GOERING, District Judge, assigned.

MEMORANDUM OPINION

PER CURIAM.

***1** Jonathan Clark was convicted in Shawnee Municipal Court of unlawful possession of a firearm and driving with an unsecured load on the roadway. On appeal to the district court, the City moved to dismiss the firearm charge but Clark was convicted of the unsecured load charge. Clark raises four issues on his direct appeal: (1) whether the district court properly interpreted the Shawnee Municipal Code 10.04.179, (2) whether the Shawnee Municipal Code 10.04.179 is constitutional, (3) whether sufficient evidence existed to find Clark guilty of the unsecured load charge, and (4) whether the district court erred in denying Clark's motions. Finding no merit in these contentions, we affirm.

On December 2, 2013, Officer Nathan Karlin saw a white Chevrolet truck pulling a tandem axle trailer loaded with unsecured wooden pallets within the city limits of Shawnee, Kansas. Officer Karlin noticed that the wooden pallets were not tied down or secured to the trailer in any way. He also noticed that some of the pallets were stacked higher than the side rails of the trailer. The trailer also did not have an end gate. Officer Karlin believed that there was nothing preventing the pallets from "simply falling over the side rail or sliding off the back of the trailer onto the highway and causing an accident."

Around the time that Officer Karlin turned on his lights, Clark was already pulling over to the shoulder of the road. Clark then got out of his truck to get some straps from the bed of the truck. When Officer Karlin told Clark why he had pulled him over, Clark admitted that he had forgotten to strap down the load of wooden pallets. Officer Karlin gave Clark a ticket for having an unsecured load, illegal possession of a firearm, and having an untagged trailer. The only remaining charge is the unsecured load charge which is in violation of Shawnee Municipal Code 10.04.179.

Clark filed numerous motions before the district court including a motion to dismiss, a motion to suppress, and a motion for release of property, to name a few. At some point, the City verbally moved to dismiss the weapons charge. After learning that the weapons charge had been dismissed, the district court judge asked Clark which motions remained. Clark replied, "We should just have three remaining motions, all complaints." Clark then corrected himself and stated, "I guess it would just be on the remaining for the spilling on the highway." The district court then heard evidence regarding the unsecured load. The district court ultimately found Clark guilty of violating Shawnee Municipal Code 10.04.179 for having an unsecured load.

Did the District Court Properly Interpret Shawnee Municipal Code 10.04.179?

Clark argues that the district court incorrectly interpreted the Shawnee Municipal Code (Code) because the interpretation of the judge "allows for subjective determination by those alleging a violation, including the determination of 'securely fastened' and 'hazard to other users.' "

***2** Interpretation of a statute is a question of law over which appellate courts have unlimited review. *State v. Eddy,* 299 Kan. 29, 32, 321 P.3d 12 (2014). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meaning. *State v. Phillips,* 299 Kan. 479, 495, 325 P.3d 1095 (2014). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative

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intent behind the clear language, and it should refrain from reading something into the statute that is not readily found in its words. *State v. Brooks,* 298 Kan. 672, 685, 317 P.3d 54 (2014).

In this case, Clark was charged with violating Shawnee Municipal Code 10.04.179, which states as follows:

> "10.04.179 Spilling Loads on Highways Prohibited:
>
> "A. No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom, except that:
>
> "(1) This Section shall not prohibit necessary spreading of any substance in highway maintenance or construction operations; and
>
> "(2) Subsections A and C shall not apply to trailers or semitrailers when hauling livestock if such trailers or semitrailers are properly equipped with a cleanout trap and such trap is operated in a closed position unless material is intentionally spilled when the trap is in a closed position. Paragraph (2) shall not apply to trailers or semitrailers used for hauling livestock when livestock are not being hauled in such trailers or semitrailers.
>
> "B. All trailers or semitrailers used for hauling livestock shall be cleaned out periodically.
>
> "C. No person shall operate on any highway any vehicle with any load unless such load and any covering thereon is securely fastened so as to prevent the covering or load from becoming loose, detached or in any manner a hazard to other users of the highway."

Shawnee Municipal Code 10.04.179 directly mirrors K.S.A. 8–1906.

Here, Clark argues that the district court incorrectly interpreted the Code because the Code allows for a subjective determination, which could be unfairly applied. Specifically, Clark maintains that the district court's interpretation of the statute allows a conviction based on a mere possibility that something could happen or a mere hunch or speculation that something might happen.

Clark's speculation argument is misplaced. As stated earlier, when the statute is plain and unambiguous, the court should not speculate as to its intent or meaning. Here, the language used in Shawnee Municipal Code 10.04.179 is clear. The Code requires that any vehicle carrying a load must have the load "*securely fastened* so as to *prevent* the covering or load from becoming loose, detached or in any manner a hazard to other users of the highway." (Emphasis added.)

Clark argues that he should not be convicted of having an unsecured load because his load never fell off his truck; thus, it was secured. Nevertheless, there was evidence to show that the load was not securely fastened in any way, and therefore, there was nothing preventing the load from spilling out on the highway.

***3** Shawnee Municipal Code 10.04.179 clearly requires that any vehicle carrying a load must have a securely fastened load that prevents the load from falling out. As a result, we determine that the district court properly interpreted the Shawnee Municipal Code and correctly found that Clark was in violation of 10.04.179.

Is Shawnee Municipal Code 10.04.179 Constitutional?

Next, Clark argues that the Code is unconstitutional because it is vague "concerning what constitutes 'securely fastened' and 'hazard to other users.' " Clark contends that by using the phrases "securely fastened" and "hazard to other users" the Code creates the possibility of a statutory interpretation that would allow someone to be charged with something based only upon the subjective opinion or hunch of an officer.

Whether a statute is constitutional is a question of law subject to unlimited review. *State v. McCaslin,* 291 Kan. 697, 730, 245 P .3d 1030 (2011). Appellate courts presume that statutes are constitutional and resolve all doubts in favor of passing constitutional muster. If there is any reasonable way to construe a statute as constitutionally valid, this court has both the authority and duty to engage in such a construction. *State v. Seward,* 296 Kan. 979, 981, 297 P.3d 272 (2013).

A statute is unconstitutionally vague if it fails to give adequate warning of the proscribed conduct. For example, if it " 'fails to provide a person of ordinary intelligence fair notice of what is prohibited.' " *State v. McCune,* 299 Kan. 1216, 1235, 330 P.3d 1107 (2014) (quoting *United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 [2008]). A statute is also unconstitutionally vague if it fails to protect against arbitrary enforcement. *Steffes v. City of Lawrence,* 284 Kan. 380, 389, 160 P.3d 843 (2007). A violation of either one of these requirements is grounds for invalidating a statute. *City*

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of Lincoln Center v. Farmway Co–Op, Inc., 298 Kan. 540, 545, 316 P.3d 707 (2013).

Therefore, the two-step test used to determine whether a criminal statute is so vague as to be unconstitutional involves the following analysis: (1) whether the statute gives fair warning to those potentially subject to it, and (2) whether it adequately guards against arbitrary and unreasonable enforcement. *City of Wichita v. Wallace,* 246 Kan. 253, 259, 788 P.2d 270 (1990). "At its heart the test for vagueness is a commonsense determination of fundamental fairness." *State v. Kirby,* 222 Kan. 1, 4, 563 P.2d 408 (1977).

Here, it is clear that the Code is facially constitutional. The Code gives fair warning to individuals that they must securely fasten their load so that there is no potential for it to come loose which could create a hazard for other drivers. Moreover, it is difficult to succeed on a challenge that a statute is facially unconstitutional. *State v. Bollinger,* 302 Kan. ——, 352 P.3d 1003, 1010 (2015); see *Farmway,* 298 Kan. at 548 (citing *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450–51, 128 S.Ct. 1184, 170 L.Ed.2d 151 [2008]).

***4** Next, we will look to whether the statute was unconstitutional as applied to Clark. Clark argues that the statutory phrases "securely fastened" and "hazard to other users" are so ambiguous and vague that they allow a person to be subject to stops and fines based only on the subjective opinion or hunch of the accusing officer. Clark further argues that the Code is unconstitutional because it allows charges to be based solely on a mere possibility that it could become a hazard to other users.

Applying the Code language to Clark and the specific facts of this case, we determine that the proscribed conduct is not unconstitutionally vague or ambiguous. A reasonable interpretation of the statutory phrases "securely fastened" and "hazard to other users" implies that the load is fastened down in some fashion so that there is no potential for it to come loose and fall out. As a result, we determine that the Code is sufficiently clear as to inform Clark that transporting a load that is not secured in any way would constitute a violation, and the resulting prosecution did not constitute an arbitrary and discriminatory enforcement of the Code against him.

Was There Sufficient Evidence to Find Clark Guilty?

Next, Clark argues that there was insufficient evidence to find him guilty of having an unsecured load.

When the sufficiency of the evidence is challenged in a criminal case, this court reviews all the evidence in the light most favorable to the prosecution and must be convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Williams,* 299 Kan. 509, 525, 324 P.3d 1078 (2014).

In determining whether there is sufficient evidence to support a conviction, an appellate court generally will not reweigh the evidence or the credibility of witnesses. *Williams,* 299 Kan. at 525. It is only in rare cases where the testimony is so incredible that no reasonable factfinder could find guilt beyond a reasonable doubt that a guilty verdict will be reversed. See *State v. Matlock,* 233 Kan. 1, 5–6, 660 P.2d 945 (1983).

In this case, the evidence clearly shows that Clark's load was not secured. First, Officer Karlin testified that the load was not strapped down or secured in any way. Second, Clark was already pulling over to the side of the road when Officer Karlin initiated the stop because he knew he had not secured his load. Clark even went to get straps out of his truck to secure the load once he pulled over. Based on this evidence, it is readily apparent that there was sufficient evidence to convict Clark for violating Shawnee Municipal Code 10.04.179 for having an unsecured load.

Did the District Court Err in Denying Clark's Motions?

Finally, Clark argues that the district court erred in denying some of his motions as moot. Clark maintains that his motion to suppress should not have been denied as moot because the State failed to prove the lawfulness of the search and seizure. He also argues that his motion to dismiss should not have been denied as moot.

***5** There was one hearing held in this case on August 19, 2014. At the hearing, the district court judge noted that Clark had filed numerous motions and asked Clark which motions remained after some of the charges were dropped. The following exchange occurred:

"THE COURT: Mr. Clark, you tell me what you think is still—

"MR. CLARK: We should just have three remaining motions, all complaints.

"THE COURT: They are as follows.

"MR. CLARK: It would be—

"[THE STATE]: Judge, that is document 23.

"THE COURT: Motion to Dismiss all Complaints?

"MR. CLARK: I guess it would just be on the remaining for the spilling on the highway."

Following this exchange, the State presented evidence on the unsecured load charge. Clark did not present any evidence but argued that he believed his load was secure for the speed he was going. After hearing the arguments and reviewing the evidence, the district court found Clark guilty of an unsecured load. After finding Clark guilty, the district court judge stated: "Everything else is gone from this case, so we'll proceed with sentencing." At no point did Clark object to this statement or inform the court that he still had other motions he wished to argue. Nevertheless, on appeal, Clark argues that the district court incorrectly held that his remaining motions were withdrawn or moot.

We determine that Clark neglected to preserve the motion to suppress for appeal. Clark failed to inform the district court that there were other pending motions that he wished to address, and therefore he cannot argue those motions for the first time before this court. Issues not raised before the district court cannot be raised on appeal. See *State v. Kelly,* 298 Kan. 965, 971, 318 P.3d 987 (2014). Moreover, a party may not invite error and then complain of the error on appeal. *State v. Verser,* 299 Kan. 776, 784, 326 P.3d 1046 (2014). Here, the district court specifically asked Clark which motions were still pending. Clark failed to mention the motion to suppress; therefore, he cannot argue it now for the first time.

Affirmed.

All Citations

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