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Employee Challenges to Vaccine Mandates under Title VII, the MHRA, and the ADA

By Trevor Johnson

Employees challenging vaccine mandates put in place during the COVID-19 pandemic have relied on Title VII, the Minnesota Human Rights Act (MHRA), and the Americans with Disabilities Act (ADA). Recent decisions from the District of Minnesota indicate judges are skeptical of these claims and willing to entertain Rule 12(b)(6) motions to dismiss.

Religious Discrimination Claims under Title VII

A common thread in judicial dismissals of Title VII claims related to vaccine mandates is a finding that the plaintiff's objection was not actually religious, but rather scientific or medical. Judges have applied this rule even where explicitly religious language is invoked in the complaint. For example, in *Colson v. Hennepin Cty.* (D. Minn., Dec. 12, 2023), Judge Wilhelmina Wright granted the defendant employer's motion to dismiss, finding that the employees failed to show a prima facie case of religious discrimination under *Jones v. TEK Indus., Inc.*, 319 F.3d 355, 359 (8th Cir. 2003). Though the plaintiff alleged a belief that "each person has the God-given right to choose what he or she will inject into their body, or extract from their body, based on free will," Judge Wright found that plaintiff's objections were based in her "scientific, personal, and medical objections." The court found that a "belief that the vaccine is unhealthy or unsafe…is not itself a religious belief."

Similarly, in *Kiel v. Mayo Clinic Health Sys. Se. Minn.* (D. Minn. Aug. 4, 2023), Judge Tunheim analyzed plaintiff's belief that her body was the temple of God and introducing "impure substances" into her body would violate her beliefs. Judge Tunheim found that this was a medical, or scientific belief, and not a bona fide religious belief, because the belief was essentially "that the vaccine is unhealthy or unsafe[.]" In regard to another plaintiff in this case who alleged that his religious belief that "God would take care of him" and that God had told the plaintiff to avoid altering his immune system with vaccines, Judge Tunheim again analyzed the language of the complaint and concluded that the objection was "a medical decision and safety judgment" – not a religious belief. The court cited an allegation in the complaint that the plaintiff "did research" and that the vaccines contained "altering stuff." In contrast, Judge Tunheim suggests that a plaintiff's belief that "she must remain as God made her" – without reference to the efficacy or safety of the vaccine – *would* be "sufficient to show a religious conflict at the pleading stage." *See Petermann v. Aspirus, Inc.* (W.D. Wis. Mar. 28, 2023).

Courts have also dismissed Title VII vaccine- and testing-related claims for failing to adequately connect the alleged religious belief to the objection. In *Kiel,* a plaintiff claimed that she objected to receiving a vaccine developed using "cells from aborted human babies." The plaintiff claimed that receiving the vaccine would "make her a participant in the abortion [.]" Observing that "many Christians who oppose abortion still receive vaccines," Judge Tunheim held that plaintiff's opposition to vaccines that were "potentially developed using a fetal cell line" was not "tie[d]…to any particularized religious belief." Another plaintiff in *Kiel* objected to testing on the basis of her belief God would direct her, via prayer, whether to test or not. In this case, the court found that the plaintiff "cite[d] no religious tenets for this presumption or explain [ed] how her religion would prohibit testing."

In conclusion, courts will require plaintiffs to plead both (a) the existence of a particular religious belief and (b) how or why that belief leads to the objection.

Religious Discrimination Claims under the MHRA

Vaccine-mandate litigation highlights the "principal difference" between Title VII and the MHRA: Title VII requires reasonable accommodation for religious belief and the MHRA does not. Stephen F. Befort, 17 Minn. Practice., Employment Law & Practice § 11:18 (4th ed. 2022); *Aronson v. Olmsted Med. Ctr.*, (D. Minn. Apr. 4, 2023).

In *Aronson*, the plaintiff was denied a religious exemption from her employer's vaccine mandate, was terminated after she refused to be vaccinated, and brought claims under the MHRA. Finding that the MHRA did not require the employer to provide religious accommodations, the employer's procedure for granting or denying religious exemptions was not scrutinized and the court did not conduct any further analysis of whether plaintiff's religious beliefs were bona fide or particularized. Finding that the employer uniformly discharged all employees who did not comply with the mandate, without regard to their reason for not complying, Judge Montgomery concluded that there was no plausible allegation that plaintiff's discharge was discriminatory.

Claims under the ADA

The ADA prohibits covered employers from requiring medical examinations or inquiring about disability status without establishing that such inquiries are job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A).

In *Kehren v. Olmsted Med. Ctr.* (D. Minn. Apr. 4, 2023), despite the broad definition of "medical examination" used by the EEOC ("a procedure or test that seeks information about an individual's physical or mental impairments or health"), Judge Montgomery concluded that requiring an employee to disclose vaccination status is not unlawful under the ADA because it is "not likely to elicit information about a disability." Likewise, the court found that COVID-19 testing is "not likely to reveal a disability" because COVID-19 infection "does not meet the ADA's definitions of disability or impairment." In *Kiel*, Judge Tunheim similarly observed that "federal courts – including the District of Minnesota – have consistently held that subjecting employees to COVID-19 testing does not amount to an unlawful medical examination under the ADA" (cleaned up). In *Colson*, Judge Wright agreed, stating that testing and vaccination reporting requirements "do not violate the ADA because neither requirement would elicit information about a disability."

While Minnesota courts have been consistent on this question, employers should use caution in relying on these holdings. *Aronson, Colson, Kehren,* and *Kiel* each cite EEOC Enforcement Guidance as authority on what constitutes a disability and EEOC guidance is subject to change. In fact, the guidance cited in *Aronson* and *Kehren* has been updated since the opinions were issued in April 2023. As updated May 15, 2023, the EEOC document "What You Should Know about COVID-19 and the ADA" (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws) now states that COVID-19 infection may be a disability under the ADA. According to the EEOC, determining whether a COVID-19 infection constitutes a disability will "always be a case-by-case determination that applies existing legal standards to the facts of a particular individual's circumstances." *Id. at G.6.* Moreover, the EEOC guidance establishes that a COVID-19 viral test *is* a medical examination within the meaning of the ADA. Per the EEOC guidance, an employer must be able to show that viral testing is job-related and consistent with business necessity. *Id. at A.6.*

Congratulations

Congratulations to Bernadette (Bernie) Theis for being named the President-Elect for the Minnesota Chapter of the Association of Legal Administrators (ALAMN). Bernie has been the Administrator for Jardine, Logan, and O'Brien P.L.L.P. since 2018. She began her career with the firm in 2006 as an Administrative Assistant. She especially enjoys collaborating with the IT & Accounting/Billing departments, working with her team, and getting to wear many different hats.

She holds an associate degree in business from Inver Hills Community College, and a bachelor's degree in human resource management from Metropolitan State University. She returned to Metro State and is currently enrolled in their Master of Business Administration (MBA) program.

After joining ALAMN in 2018, Bernie immediately got involved with the Diversity, Equity, Inclusion & Accessibility team. She currently serves on the board as the Administrative Director. She is very excited and looking forward to her new role as President-Elect in April 2024.

Born in Manila, Philippines, Bernie immigrated to this country at ten years old. She speaks Tagalog and English. She enjoys her volunteer work with CAPI, a non-profit that helps provide basic needs, shelter, job opportunities, and so much more to immigrant, refugee, and under-resourced communities.

In *Nygard v. City of Orono*, No. 23-509 (DWF/DLM), 2024 U.S. Dist. LEXIS 2514 (D. Minn. Jan. 5, 2024), **Elisa Hatlevig** obtained dismissal on behalf of the City of Orono, its Mayor, and Chief of Police, in relation to claims brought by a landowner seeking to invalidate the City's ordinance regulating siting and construction of Small Wind Energy Conversion Systems, and alleging constitutional, civil RICO conspiracy, and state law tort claims. Despite the wide-ranging allegations in Plaintiff's 525 paragraph complaint, the court granted a Motion to Dismiss finding that the Plaintiff's claims were precluded by applicable statutes of limitations and jurisdictional doctrines.

In *Bonnett v. City of Orono,* No. 27-CV-22-12243 (Hennepin County), **Elisa Hatlevig** and obtained summary judgment on behalf of the City of Orono against claims brought by a landowner for breach of contract, fraudulent inducement, and unjust enrichment, in relation to a permanent easement agreement entered into with the City. The Plaintiff claimed that he and his wife were fraudulently induced to sign the permanent easement agreement based on conversations/alleged promises made to them by the Mayor, City Administrator, and other City staff. Judge Susan Burke found that the Plaintiff's claims were barred by the statute of frauds, precluded by Minn. Stat. § 412.201, and that the express terms of the permanent easement agreement were not ambiguous or breached. The court further found that it was unreasonable as a matter of law for Plaintiff to rely on any alleged oral promises, as persons contracting with municipalities are conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing.

Congratulations to **Elisa Hatlevig** and **Trevor Johnson** who obtained dismissal of claims filed in U.S. District Court against a guardianship provider. In a wide-ranging Complaint, plaintiffs alleged violations of their constitutional rights, the ADA, the Social Security Act, and Minnesota statutes arising from the guardianship of one of the plaintiffs. In granting the motion to dismiss, the Court agreed that plaintiffs' claims constituted a collateral attack on the state court guardianship proceedings and were thus barred by the *Rooker-Feldman* doctrine. The Court further held that the Complaint, spanning 234 pages and over 1,100 paragraphs, violated Rule 8. By obtaining judgment via pre-Answer motion practice, the client avoided a protracted and unwarranted discovery process.

Congratulations to **Vicki Hruby** and **Trevor Johnson**, who obtained summary judgment on behalf of the City of Woodbury in a First Amendment retaliation and Minnesota Whistleblower Act case. Plaintiff Joseph Baker, a former Woodbury paramedic, alleged the City retaliated against him for raising concerns about purported training and recordkeeping issues for paramedics, and claimed he blew the whistle on a police officer, who allegedly ordered him to administer ketamine without performing a medical evaluation. The U.S. District Court found that Baker's claims were without merit, holding that Baker did not engage in speech protected by the First Amendment, the City did not subject Baker to any adverse employment action, and that Baker was not ordered to sedate a patient. Moreover, the Court found no evidence that any City paramedics were improperly certified or that the City had a policy of improperly administering ketamine.

In *Koenig v. Washington County*, **Tessa McEllistrem** obtained a finding of "No Probable Cause" from the Minnesota Department of Human Rights on behalf of Washington County regarding a claim of pregnancy discrimination in the workplace. Tessa obtained another finding of "No Probable Cause" from the Minnesota Department of Human Rights on behalf of her client in the case of *Leach v. Des Moines Valley Health and Human Services* regarding claims of disability discrimination and reprisal in the workplace.

Minnesota's New Law on Pay History

By Abbi Swaminath

Joining 28 other states, Minnesota has amended its law on unfair employment discriminatory practices aiming to decrease the gender and racial pay gap amongst Minnesota employees. Except in certain circumstances, the law prohibits employers from inquiring about a candidate's past and current pay history during the hiring process.

Section 363A.08 Subdivision 8 disallows employers from inquiring into, considering, or requiring "disclosure from any source the pay history of an applicant for employment for the purpose of determining wages, salary, earnings, benefits, or other compensation for that applicant." Employers also cannot require candidates to sign any waiver that would remove their rights granted under this amendment and force them to discuss their past salaries and working conditions.

This new law applies to all public, private, and nonprofit employers in Minnesota and applies to all job applicants, including current full and part time employees seeking an internal promotion or transfer. However, there are exceptions for salaries that are on the public record as per state or federal law, or any pay transparency by the employer regarding pay and salary benefits to the applicant. The law also does not prohibit the employer from asking about the applicant's *expectations* for compensation and benefits.

Statistically, women and people of color are consistently paid less than white men. For every $1.00 that white men earn, white women on average only earn $0.81. The discrepancy is even worse for women of color. Asian women earn on average $0.70 for every $1.00 a white man earns, while black and indigenous women earn $0.61, and Latina women $0.55. The discrepancy is better for men of color, but still substantial. For every $1.00 that white men earn, Asian men earn $0.86, indigenous men $0.70, black men $0.69, and Latino men $0.65.

With this law, Minnesota seeks to urge employers to consider the applicant's skills, education, and other qualifications for base pay. Prohibiting inquiry into the paid pay of applicants is one step in preventing the employee from being locked into this lower wage pay in their career. The law does not prohibit the candidate themselves from disclosing their pay as a matter of negotiating compensation, but protects them from being harmed by lower pay because of their past or current earnings amount.

Minnesota Department of Human Rights (MNDHR) Commissioner Rebecca Lucero states that the "new law seeks to break the cycle" of where "someone's future pay is locked to their past pay, [which creates] the cycle of unequal pay that impacts them over the course of their life." As evidenced by the 28 other states across the nation, the laws around pay history are effective in increasing the average pay for women, people of color, and indigenous community members.

For Minnesota employers, who will be impacted by this law, it is important that they review their applicant materials to remove *any* part of the materials that asks about current or past pay of the employee, because even making disclosure of pay optional is against the law. Discussions by the hiring commissions are going to be needed to decide what other information will be used to determine an applicant's pay. For employers, communicating this change to their current employees as soon as possible can address any confusion and eliminate any violation of the law before it becomes an issue. The MNDHR recommends offering a compensation form to candidates to help them demonstrate what they are seeking from the employer outside of previous/current pay while smoothing the entire hiring process.

Such a law will give an applicant more autonomy in securing a higher paying job based on their skillset and experiences, without being hindered by the past pay grade that was awarded to them in their previous employment. In cases of voluntary disclosure, the information of their payment history cannot be used against them for lower pay by the employer. It is also important for employees to know that they can report violations about being asked about current or past pay during the hiring process.

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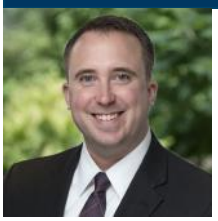

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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

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