FILED
United States Court of Appeals
Tenth Circuit

November 26, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DIANN R. BOLONCHUK,

Plaintiff - Appellant,

v.

CHERRY CREEK NURSING CENTER/NEXION HEALTH,

Defendant - Appellee.

No. 23-1320
(D.C. No. 1:22-CV-02590-RMR-KAS)
(D. Colo.)

ORDER AND JUDGMENT[*]

Before **HOLMES**, Chief Judge, **MORITZ**, and **CARSON**, Circuit Judges.

Diann R. Bolonchuk, proceeding pro se, appeals from the district court's dismissal of her suit against her former employer, Nexion Health at Cherry Creek, Inc. d/b/a Cherry Creek Nursing Center. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the dismissal of Ms. Bolonchuk's First Amendment claim, but we reverse the dismissal of her Title VII claim and remand for further proceedings.

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[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

Ms. Bolonchuk worked at the Cherry Creek Nursing Center in Aurora, Colorado, during the COVID-19 pandemic. In the first part of the pandemic, she tested for COVID before entering the facility.

On August 30, 2021, the Colorado Board of Health adopted an emergency rule requiring certain employees in licensed healthcare settings in Colorado—which included Cherry Creek—to receive their first dose of COVID-19 vaccine by September 30, 2021, and to be fully vaccinated by October 31, 2021 (the Vaccine Mandate). *See* 6 CCR 1011-1, Chp. 2, Part 12.2.1 (Aug. 30, 2021). Ms. Bolonchuk was a covered employee, but she has a religious objection to COVID-19 vaccines.

On September 24, 2021, Ms. Bolonchuk requested Nexion allow her a religious accommodation to continue testing before entering the facility, rather than being vaccinated. Nexion denied the request, stating it would place an undue burden on the facility due to safety concerns. It terminated Ms. Bolonchuk's employment effective October 1, 2021, for failing to take the COVID vaccine.

After filing a complaint with the Equal Employment Opportunity Commission, Ms. Bolonchuk filed a pro se lawsuit asserting religious discrimination claims under Title VII and the First Amendment. Nexion moved to dismiss under Fed. R. Civ. P. 12(b)(6). The magistrate judge recommended that the district court grant the motion, and Ms. Bolonchuk objected. The district court overruled the objections, adopted the recommendation, and granted Nexion's motion. It dismissed the suit with prejudice.

Ms. Bolonchuk timely appealed.

DISCUSSION

I. Standards of Review

"We review de novo a district court's decision on a Rule 12(b)(6) motion for dismissal for failure to state a claim. Under this standard, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (italics, citation, and internal quotation marks omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "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." *Id.* Because Ms. Bolonchuk proceeds pro se, we construe her filings liberally. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

II. Title VII Claim

Title VII makes it "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the

conduct of the employer's business." *Id.* § 2000e(j). To satisfy the "undue hardship" standard, "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Groff v. DeJoy*, 600 U.S. 447, 470 (2023). "[C]ourts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer." *Id.* at 470-71 (brackets and internal quotation marks omitted).

The magistrate judge concluded that "Defendant would have had to violate a state law (i.e., the regulation mandate) in order to accommodate Plaintiff, clearly establishing an undue hardship," R. at 62, and the district court was persuaded by that conclusion. Ms. Bolonchuk denies that providing her accommodation would have caused Nexion an undue hardship, stating that Nexion could have continued allowing her to test before entering the facility.

"While the 12(b)(6) standard does not require that Plaintiff establish a prima facie case in her complaint, the elements of each alleged cause of action help to determine whether Plaintiff has set forth a plausible claim." *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012). To establish a prima facie Title VII religious discrimination claim based on a failure to accommodate, an employee must show: "1) the employee has a bona fide religious belief that conflicts with a job requirement, 2) the employee informed the employer of this conflict[,] and 3) the employer fired the employee for failing to comply with the job requirement."

Tabura v. Kellogg USA, 880 F.3d 544, 549 (10th Cir. 2018). The amended complaint alleged (1) Ms. Bolonchuk had a sincerely held religious objection to taking a COVID vaccine; (2) she notified Nexion of her religious objection and requested an accommodation (continued testing) in lieu of vaccination; and (3) Nexion denied her request and terminated her employment for failing to take a COVID vaccine. These allegations stated a plausible Title VII claim.

The next question is whether Nexion has established an undue hardship as a matter of law. Courts have recognized an undue hardship where a requested religious accommodation would require an employer to violate the law. *See Lowe v. Mills*, 68 F.4th 706, 719-20 (1st Cir.), *cert. denied*, 144 S. Ct. 345 (2023); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999). It is not clear, however, that Nexion would have been in violation of the Vaccine Mandate had it granted Ms. Bolonchuk's request for accommodation.

Crucially, the Vaccine Mandate contemplates the availability of religious exemptions. The regulation explicitly provides that "[a] facility may seek a waiver of the 100% vaccination requirement at Part 12.2.1 on the basis that one or more individuals have claimed a religious exemption, pursuant to facility policy." 6 CCR 1011-1, Chp. 2, Part 12.3(A) (Aug. 30, 2021).[1] It also requires facilities to develop policies that "shall address, at a minimum . . . [t]he facility's criteria for

[1] We may take judicial notice of the regulation, *see Ray v. Aztec Well Serv. Co.*, 748 F.2d 888, 889 (10th Cir. 1984), and thus we may consider it when ruling on a Rule 12(b)(6) motion, *see Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013).

accepting or rejecting medical or religious exemptions [and] how the facility will implement testing and masking for unvaccinated individuals," *id.* Part 12.2.3(B), (C), and to keep "[d]ocumentation of a religious exemption, as defined by facility policy," *id.* Part 12.2.4(C). Given that the regulation allows for religious exemptions, the district court erred in concluding, as a matter of law, that granting a request for a religious accommodation would require Nexion to violate Colorado law.

Nexion argues that the requested accommodation would have imposed an undue hardship based on safety considerations because of the risks posed by COVID-19 in the fall of 2021. While "on occasion it is proper to dismiss a claim on the pleadings based on an affirmative defense[,] . . . that is only when the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements." *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018). That is not the case here. In similar circumstances in which a state vaccine mandate allowed for religious exemptions, the First Circuit very recently vacated a Rule 12(b)(6) dismissal as premature, holding that more factual development was necessary to determine whether the employer would have suffered an undue hardship from granting a religious accommodation. *See Bazinet v. Beth Israel Lahey Health, Inc.*, -- F.4th --, No. 24-1148, 2024 WL 3770708, at *7-8 (1st Cir. Aug. 13, 2024); *see also Cole v. Grp. Health Plan, Inc.*, 105 F.4th 1110, 1113 (8th Cir. 2024) ("Any inquiry as to whether [the employer] offered [the employee] a reasonable accommodation or would suffer an undue hardship by accommodating [the employee] is generally not appropriately considered at the

motion to dismiss stage.”). Given the lack of factual allegations and development, the question of whether Nexion would have experienced undue hardship cannot be resolved at this stage of the case.

Without expressing any opinion on the merits of Ms. Bolonchuk’s claim or Nexion’s undue hardship defense, we reverse the dismissal of the Title VII claim and remand for further proceedings.

III. First Amendment Claim

The magistrate judge recommended dismissing the First Amendment claim because Nexion is a private company and the amended complaint fails to establish it is a state actor. *See Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019) (recognizing that the First Amendment restricts governmental conduct, not private conduct); *Together Emps. v. Mass Gen. Brigham Inc.*, 19 F.4th 1, 8 (1st Cir. 2021) (estimating that First Amendment claim arising from vaccine mandate would fail because hospital employer “is not a state actor governed by the First Amendment”). The district court agreed.

Ms. Bolonchuk argues that Nexion “was acting at the bequest of the government, and therefore was the agent of the government.” Aplt. Opening Br. at 3. She also asserts that Title VII makes the First Amendment applicable here. It is well-established, however, that a private company is not a state actor simply because it operates under government regulation. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974) (“The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth

Amendment."); *Ciraci v. J.M. Smucker Co.*, 62 F.4th 278, 284 (6th Cir. 2023) (recognizing, in vaccine case, "[w]hen a private company complies with federal law, that does not by itself make the company a governmental actor"). Further, contrary to Ms. Bolonchuk's assertions, Title VII does not make the First Amendment directly applicable to a private actor.

Nothing in the amended complaint establishes that Nexion is a state actor, such that it can be held liable for violating the First Amendment. We therefore affirm the dismissal of Ms. Bolonchuk's First Amendment claim.

CONCLUSION

We grant Ms. Bolonchuk's motion to file an untimely reply brief and her July 2024 motion to offer an additional supplemental authority. We deny her November 2024 motion to offer additional supplemental authorities, which fails to comply with Fed. R. App. P. 28(j). We affirm the dismissal of the First Amendment claim but reverse the dismissal of the Title VII claim and remand for further proceedings.

Entered for the Court

Joel M. Carson III
Circuit Judge