

**IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel.,)
JOHN M. O’CONNOR, ATTORNEY)
GENERAL OF OKLAHOMA,)**

Plaintiff,)

vs.)

Case No. _____

**ASCENSION HEALTHCARE,)
ASCENSION MEDICAL)
GROUP, ASCENSION MEDICAL)
GROUP ST. JOHN LLC,)**

Defendants.)

**ATTORNEY GENERAL JOHN M. O’CONNOR’S
APPLICATION FOR TEMPORARY RESTRAINING ORDER
AND TEMPORARY INJUNCTIVE RELIEF AND BRIEF IN SUPPORT**

Plaintiff, State of Oklahoma *ex rel.* John M. O’Connor, Oklahoma Attorney General, applies to the Court for an emergency temporary restraining order (“TRO”) and temporary injunctive relief against Defendants, Ascension Healthcare, Ascension Medical Group, and Ascension Medical Group St. John LLC, (collectively, “Ascension”), prohibiting Ascension from carrying out its threat to suspend on November 12, 2021 and to terminate on January 4, 2022 all employees and contractors who requested but have been denied a religious exemption from Ascension’s COVID-19 vaccine mandate in violation of the Oklahoma Anti-Discrimination Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. The Attorney General also seeks an order restraining and enjoining Ascension from taking any other adverse action against those who have sought a religious exemption until the OCRE completes its pending investigation into complaints of discrimination against Ascension. In support hereof, the Attorney General submits the following brief of arguments and authorities.

I. INTRODUCTION

The Attorney General supports the right of private employers to implement health and safety policies of their choosing; however, the Attorney General strenuously objects to and will not tolerate religious or other discrimination in the administration of those policies. Therefore, the Attorney General is seeking an emergency temporary restraining order and injunctive relief to stop Ascension from engaging in unlawful religious and disability discrimination against Oklahoma's healthcare heroes who have served faithfully and fearlessly on the front lines of the COVID pandemic and who have requested but have been denied religious exemptions from Ascension's COVID-19 vaccine mandate.

Upon an initial investigation of verified complaints and charges of discrimination filed with the OCRE and against Ascension, the Attorney General has 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. The Attorney General simply asks this Court to prevent Ascension from placing employees who are unvaccinated due to religious objections from being suspended or terminated pending the OCRE's full and fair investigation.

II. BACKGROUND

On July 27, 2021, Ascension announced it would require "all associates be vaccinated against COVID-19, whether or not they provide direct patient care, and whether they work in our sites of care or remotely." *See* Ex. 1 (Press Release). "Ascension includes more than 150,000 associates and 40,000 aligned providers. The national health system operates more than 2,600 sites of care — including 142 hospitals and more than 40 senior living facilities — in 19 states," including Oklahoma. *See* Ex. 2 (Ascension's About Us Webpage). The impact of this policy and Ascension's discriminatory and retaliatory treatment of employees requesting religious exemption

is far-reaching, affecting Oklahoma healthcare workers and even Oklahoma citizen's ability to receive care from the providers and/or medical facilities of their choosing.

The OCRE has received several complaints from Ascension employees alleging Ascension is engaging in improper procedures with respect to its "evaluation" of religious exemption requests. Ascension employees across the nation have been experiencing the same discriminatory and retaliatory conduct in response to requesting religious exemptions to Ascension's vaccine mandate. *See Darling v. Sacred Heart Health Sys., Inc.*, No. 3:21-CV-01787-TKW-HTC (N.D. Fla.) (seeking injunctive relief from a myriad of healthcare agencies, including Ascension).

Recently, the OCRE has begun an investigation in response to its receipt of a verified complaint from Dr. Mitchell W. Duininck, a practicing Christian and physician in Tulsa with over 35 years' experience. Dr. Duininck prioritizes his religious beliefs professionally by working directly with Ascension, an avowed faith-based medical provider, and by serving as the President and CEO of In His Image, Inc. ("IHI") since 2006. IHI is a Christian community-based family medicine residency training program, with its primary teaching hospital being Ascension's St. John Medical Center, a major tertiary referral center in Tulsa. Dr. Duininck sought a religious exemption from Ascension's vaccine mandate within the deadlines imposed by Ascension, but his request was repeatedly rejected.

Mr. Duininck's complaint asserts that Ascension notified employees prior to implementing its mandatory vaccination policy, that it would summarily deny all requests for religious accommodations based on the use of aborted fetal cell lines in the development of the vaccine. *See* Ex. 3 (Journal Article); Ex. 4 (Charge of Discrimination ("COD")), ¶ 10; *see also* Verified Complaint for Declaratory and Injunctive Relief at 18, 20, *Darling v. Sacred Heart Health Sys., Inc.*, No. 3:21-CV-01787-TKW-HTC (N.D. Fla. Oct. 27, 2021) (identifying individual employees

who sought exemption due to the vaccines' connection to fetal cell lines). Dr. Duininck's request for religious accommodation, which was timely submitted to Ascension, expressly stated his objection to the vaccination on that basis. *See* Ex. 5 (Duininck letter to Ascension). As his request explained, Ascension's vaccine mandate would require Dr. Duininck to violate his sincerely held religious belief against the use of aborted fetal cell lines in the development of vaccinations. *Id.*

Ascension recently informed its employees that if they are not fully vaccinated by November 12, 2021, they will be suspended from their employment, creating the very likely possibility that numerous Oklahoma healthcare heroes, including Dr. Duininck, will be forced to either act in contradiction to their sincerely held religious beliefs or face a myriad of consequences, including unpaid leave, inability to be promoted or considered for raises or bonuses, and eventually termination, if Dr. Duininck and the many others stand for their religious beliefs.

The OCRE is seeking immediate relief from this Court to block Ascension from its discriminatory practices. It is not the OCRE or the Attorney General's position that no private employer can develop safety policies as such companies see fit. The concern is with the discriminatory practices of implementing those policies — an implementation process that summarily denies religious accommodation requests, or, at the very least, is wholesale denying them.

To date, OCRE's rapidly expanding initial investigation shows that Ascension has a discriminatory and retaliatory practice for "processing" requests for religious exemption. While the July 2021 Ascension press release promised the thousands of healthcare heroes impacted by this mandate a "process for requesting an exemption similar to the process we use for the annual influenza vaccine," (Ex. 1, Press Release), the process that Ascension implemented was never intended to consider religious exemption requests.

Ascension's process is retaliatory because it requires employees seeking to assert their religious rights to confirm that they will "voluntarily resign" if their exemption request is denied. *See* Ex. 4, COD, ¶ 5. The process is discriminatory because Ascension has made clear that it will not grant accommodations for requested religious exemptions because any accommodation would pose an undue hardship based on public health and safety. Thus, its accommodation process is a sham. Further, while Ascension's purported basis for "undue hardship" is the risk of employing unvaccinated workers, Ascension is granting accommodations to other unvaccinated employees whose exemption requests are not based on religion. Those employees are receiving the same accommodations that Dr. Duininck and many others requested, *i.e.*, masking, regular testing, and proper hygiene.

Instead of instructing employees about what information would be pertinent to evaluating the sincerity of a religious exemption request, Ascension's system appears to auto-generate a "no" to any religious exemption request. *See id.* ¶ 6; At this stage of the "process," employees are given only seven (7) days to provide additional supporting information. But Ascension's standardized "no" fails to provide employees with any indication of what additional supporting information would impact Ascension's ability to evaluate the sincerity of the employee's stated religious belief, practice, or observance. *See* Ex. 6 (10-6-2021 email from service desk).

Ascension's practice after a summary denial appears to be to reconsider the sincerity of expressed beliefs, only once more to summarily deny any requested exemptions. In Dr. Duininck's case it took the service desk only three (3) days. *See* Ex. 7 (10-9-2021 email from service desk). Ascension provided a brief explanation to Dr. Duininck. Without identifying any accommodations that it objectively considered in its review, the cursory response state only that "[d]ue to the nature of [Dr. Duininck's] role and working onsite as well as with patients, . . . would pose an undue

hardship on the organization to grant your religious exemption request.” *Id.* Despite efforts by employees requesting religious exemptions to seek accommodations, Ascension is summarily denying those requests and asserting “undue hardship” to protect the “health and safety of our workforce and patients.” Nevertheless, Ascension is permitting other unvaccinated individuals to access their facilities, even when involved in direct-patient care. *See* Ex. 4, COD, ¶ 12.

The OCRE's initial investigation into complaints received against Ascension thus far is sufficient to establish reasonable cause to believe that Ascension is discriminating and retaliating against employees because of their religion, warranting temporary injunctive relief blocking the suspensions or any adverse actions until the OCRE can complete a thorough investigation. The OCRE has authority to seek this relief under the reasonable cause standard pursuant to 25 O.S. 1502.1.

III. ARGUMENT AND AUTHORITIES

Having received a verified charge, the Attorney General has reason to believe that Ascension, the respondent in that charge, has engaged in an unlawful discriminatory practice. As a notice of a hearing was provided to Ascension, 25 O.S. § 1502.1 provides that if the Court finds that there is reasonable cause to believe that the respondent has engaged in a discriminatory practice, then it may grant injunctive relief or a restraining order as it deems just and proper.

A. The OCRE Has Demonstrated Reasonable Cause

While Oklahoma courts have not defined “reasonable cause” as it used in Section 1502.1, the “reasonable cause” standard is frequently applied when federal agencies seek to stop discriminatory conduct before the conclusion of a full investigation. In *Sharp ex rel. NLRB v. Webco Industries, Inc.*, the Tenth Circuit Court of Appeals explained that “to establish reasonable cause, the [National Labor Relations] Board does not have to prove that an unfair labor practice

has occurred, rather it must only produce some evidence ‘that [its] position is fairly supported by the evidence.’ 225 F3d 1130, 1134 (10th Cir. 2000) (quoting *Asseo v. Centro Medico Del Turabo, Inc.*, 900 F2d 445, 450 (1st Cir. 1990)).

By way of other example, the Occupational Safety and Health Administration deems the “reasonable cause” standard met when “after consideration of the relevant law and facts — that a reasonable judge could believe a violation occurred.” Memorandum from Eric S. Harbin, Acting Director, on Clarification of the Investigative Standard for OSHA Whistleblower Investigations (Apr. 20, 2015), <https://www.whistleblowers.gov/memo/2015-04-20>. “The evidence does not need to establish conclusively that a violation *did* occur.” *Id.* Thus, to prove reasonable cause, the Attorney General must proffer something more than mere suspicion but something far less than a preponderance of the evidence. The Supreme Court articulated the type of evidence required under Title VII as “objectively verifiable suspicion.” *EEOC v. Shell Oil Co.*, 466 U.S. 54, 76 (1984) (*dicta*).

Here, the OCRE has put forth evidence that Ascension is summarily rejecting religious accommodation requests, without engaging in an interactive process, and without exploring the same accommodations that it is actively providing to unvaccinated employees who have not made requests for religious exemption. Ascension’s sham processes are in violation of its obligations under Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Oklahoma Anti-Discrimination Act (“OADA”).

1. The OADA and Title VII preclude Ascension from treating similarly situated employees less favorably than others on the basis of their religious beliefs

The OADA and Title VII preclude employers from taking adverse employment action because of an individual’s religion. *See* 25 O.S. §§ 1101 *et seq.*; *see also* OUJI 21.21. Ascension employees requesting accommodations because of their religious beliefs have been summarily

denied the same accommodations that are being provided to other unvaccinated employees. Ascension has engaged in religious discrimination by failing to grant reasonable accommodations for the sincerely held religious beliefs of Dr. Duininck and others, when Ascension's actions in granting medical exemptions prove that there is no objective "undue hardship" in making those accommodations. In alleging the "undue hardship" is based on a concern for the health and safety of its workers and patients, there is no greater risk to Ascension workers and patients from unvaccinated employees who seek religious exemptions than unvaccinated workers who seek medical exemptions. Because Ascension is not denying medical exemptions on the grounds that such accommodations constitute an "undue hardship" for safety reasons, it is a discriminatory practice to claim the same safety reasons are an "undue hardship" when the requested exemption is based on a sincerely held religious belief.

2. The OADA and Title VII preclude Ascension from denying religious accommodation requests absent an employer's ability to demonstrate "undue hardship."

Title VII requires that an employer accommodate religious beliefs "unless [the] 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." 42 U.S.C. § 2000e(j).¹ A *prima facie* showing in a failure-to-accommodate case under Title VII generally

¹ "The OADA is analyzed similarly to Title VII claims." *Jones v. Needham*, 856 F.3d 1284, 1292 (10th Cir. 2017); see also *Tilghman v. Kirby*, 662 F. App'x 598, 601 (10th Cir. 2016). Therefore, "claims under the OADA are evaluated using the same standards as claims under Title VII, and a claim that fails under Title VII will also fail under the OADA." *Cunningham v. Skilled Trade Servs., Inc.*, No. CIV-15-803-D, 2015 WL 6442826, at *3 (W.D. Okla. Oct. 23, 2015); see also *Payne v. WS Servs., LLC*, 216 F. Supp. 3d 1304, 1311 n.1 ("Importantly, Plaintiffs' state law discrimination claims are decided in the same manner as its federal claims."). It should be noted, however, that Title VII simply serves as "a floor beneath which federally provided protection may not drop rather than a ceiling above which it may not rise." *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶ 6, 833 P.2d 1218, 1222. Therefore, "states' remedies for relief from employment discrimination and for the compensation of its victims may be both different from and broader than those provided by Title VII." *Id.* ¶ 6, 833 P.2d at 1223 (emphasis removed). This is because the Oklahoma legislature intended for the OADA "to provide protection equal to or greater than protection provided by the federal civil rights provisions." *Duncan v. City of Nichols Hills*, 1996 OK 16, ¶ 20, 913 P.2d 1303, 1308.

requires the employee to show three elements: “(1) he or she had a *bona fide* religious belief that conflicts with an employment requirement; (2) he or she informed his or her employer of this belief; and (3) he or she was fired for failure to comply with the conflicting employment requirement.” *Thomas v. Nat’l Ass’n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000); *see also Brown v. Children’s Hosp. of Phila.*, 794 F. App’x 226, 227 (3d Cir. 2020) (requiring the same elements).

Once the *prima facie* case is satisfied, the burden shifts to the employer to “(1) conclusively rebut one or more elements of the . . . *prima facie* case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable reasonably to accommodate the employee’s religious needs without undue hardship.” *Thomas*, 225 F.3d at 1155 (footnote omitted).

Whether an undue hardship exists is a fact-specific question to be considered on a case-by-case basis. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989) (discussing *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 134 (3d Cir. 1986)). The Tenth Circuit has determined that “an employer who has made no efforts to accommodate the religious beliefs of an employee or applicant before taking action against him may only prevail if it shows that no accommodation could have been made without undue hardship.” *Id.* Certainly, an employer’s undue-hardship defense is stronger when it “can point to hardships that actually resulted.” *Id.* (quoting *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975)). That is because the hardship described must be actual — not merely hypothetical. *Id.*²

² Though the Attorney General understands that the undue hardship is currently a more lenient standard under Title VII, it also notes that several Supreme Court justices have expressed grave concern that this standard allows employers to unabashedly discriminate against religious beliefs. *See, e.g., Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1229 (2021) (Gorsuch, J., dissenting) (calling the Hardison definition a “mistake . . . of the Court’s own making” and stating “it is past time for the Court to correct it”); *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 685 (2020) (Alito, J., concurring) (“I agree with the most important point made in that brief, namely, that we should reconsider the proposition, endorsed by the opinion in [Hardison] . . . , that Title VII does not require an employer to make any accommodation for an employee’s practice of religion if doing so would impose more than a de minimis burden.”).

3. Ascension employees have asserted *prima facie* failure to accommodate claims

Ascension employees asserted bona fide religious beliefs that conflict with the mandatory vaccine policy that were summarily denied by Ascension's auto-generated response. *See generally* Ex. 4 (COD); *see also* Ex. 6 (Oct. 6 email). Given Ascension's practice of summarily denying initial requests for religious exemption, Ascension is acting inapposite to the EEOC's guidance for evaluating an employee's request.

As recently as October 25, 2021, and in direct response to vaccine mandates like this one coming into effect, the EEOC advised that employers should "assume that a request for religious accommodation is based on sincerely held religious beliefs" and explained that Title VII does not permit employers to ask for additional information absent an objective basis for questioning that the employee's expressed belief is sincere. *See* EEOC, *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> (last updated Oct. 28, 2021) (religious discrimination located in Section L). The OCRE's initial investigation into complaints received indicates that Ascension is doing the opposite — presuming initially that requests for religious exemption are insincere and summarily denying them, asking the employees to provide "additional information," imposing a deadline, and threatening to end the interactive process after only seven (7) days.

4. Ascension is unable to summarily defend its refusal to accommodate on the basis of its proffered safety concerns

Based on its initial investigation, the OCRE has reasonable cause to believe that even after Ascension accepts the sincerity of a stated religious belief, Ascension's "process" then summarily rejects requests based on an undue-hardship defense. Nevertheless, this second summary denial is occurring without Ascension engaging in any type of interactive process with the employee. By

way of example, the OCRE is aware of at least one other instance involving a nurse who only worked remotely, yet Ascension communicated that her unvaccinated status as a remote worker posed safety issues that would make an exemption to Ascension's vaccine mandate an "undue hardship."

The EEOC has expressly rejected this approach as well. *See* EEOC Guidance, *supra*, at Section L.3. When describing Title VII's requirements for considering reasonable accommodations, the EEOC stated that employers should not engage in summary decisions but "assess undue hardship by considering the particular facts of each situation." *Id.* Further, the EEOC explains that accommodation request cannot be denied based on "speculative hardships" but should be determined on "objective information." *Id.* The OCRE's investigation to date demonstrates that Ascension's summary denials did not involve an individualized assessment of each employee's particular circumstances. Rather, Ascension bases its denials on a summary conclusion that unvaccinated employees pose a safety risk constituting "undue hardship."

Here, Ascension is not considering religious exemption requests. Rather, Ascension is taking the position that any unvaccinated individual is a threat to health and safety. Yet, as evidence of the discriminatory nature of this position, Ascension is still permitting unvaccinated individuals who have not requested religious exemptions to remain employed with accommodations. *See* Ex. 4 (COD), ¶ 11. As United States Supreme Court Justice Neil Gorsuch reasoned in a dissenting opinion in *Doe v. Mills*, when it comes to an interest in protecting the health and safety of colleagues and the general public, "medical exemptions and religious exemptions are on comparable footing" because "unvaccinated religious objectors and unvaccinated medical objectors are equally at risk for contracting COVID-19 or spreading it to their colleagues." No. 21A90, --- S. Ct. ----, 2021 WL 5027177, at *3 (Oct. 29, 2021) (Gorsuch,

J., dissenting) (reviewing application for injunctive relief). Where Ascension argues that accommodating requests for religious exemption would create an undue hardship because of safety, the same alleged safety concerns are being disregarded for employees who have not expressed their religious beliefs.

For the foregoing reasons, the OCRE has reasonable cause to believe that Ascension's existing practices with respect to processing and responding to employee's requests for religious exemption violate the religious protections found in both Title VII and the OADA.

B. A TRO and Preliminary Injunction is Just and Proper

A Temporary Restraining Order is just and proper in this instance because of the harms that will result in the event action is not taken by the Court. The OCRE is not seeking to ban Ascension from developing policies and practices that are intended to protect public health and safety; rather, the OCRE is seeking to require Ascension to abide by its existing obligations under Title VII and the OADA in processing religious exemption requests.

If the Court does not act to restrain Defendants, Ascension employees in Oklahoma will lose their First Amendment freedoms. As held by the United States Supreme Court, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U. S. 347, 373 (1976) (plurality opinion). Ascension employees requesting religious exemptions are being forced to confirm they will voluntarily resign and will be deemed to have voluntarily resigned unless they are vaccinated.

While Ascension will certainly raise a public health argument in favor of its existing practices, it is unclear why the same public health concerns are not driving Ascension to deny accommodations to other unvaccinated employees. Those stated health concerns will exist regardless of whether this Court grants the relief requested by the OCRE because Ascension will

continue to employ unvaccinated individuals — just those whose requests were not based on a religious belief.

If the Court declines to act, Oklahoma patients will be denied access to care or, at a minimum, to see the provider of their choice. Moreover, numerous Oklahoma employees will face significant irreparable and financial consequences associated with job loss and interruption of patient care.

Granting the relief requested herein is just and proper for the reasons set forth above.

III. CONCLUSION

For the foregoing reasons, the OCRE respectfully requests that the Court issue a temporary restraining order (“TRO”) and a preliminary injunction, restraining Ascension from:

- 1) Continuing to require Ascension employees in Oklahoma to “voluntarily resign” in order to submit a request for religious exemption;
- 2) Summarily rejecting requests for religious exemption based on a subjective view that an employee’s request for religious exemption lacks sincerity or is not based on a religious belief;
- 3) Summarily rejecting requests for undue hardship without engaging in a fact-specific inquiry about possible accommodations;
- 4) Relying on subjective hardships to deny religious accommodation requests while providing accommodations to unvaccinated employees who have not requested religious exemptions;
- 5) 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 and require defendants to rescind all such suspensions, terminations, or other adverse actions that have occurred prior to the entry of this order; and
- 6) Requiring defendants to allow Oklahoma employees and contractors an additional thirty (30) days from the entry of a temporary restraining order to submit requests for religious accommodations.

Dated: November 12, 2021

Respectfully submitted,

JOHN O'CONNOR
ATTORNEY GENERAL

By: _____

Kevin McClure, OBA No. 12767
Tiffany J. Wythe, OBA No. 21405
Julie Pittman, OBA No. 32266
Assistant Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Fax: (405) 521-6246

ATTORNEYS FOR PLAINTIFF,
STATE OF OKLAHOMA, ex rel.,
OKLAHOMA ATTORNEY GENERAL