Brian C. Huber
Douglas County Superior Court Judge

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August 15, 2025

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Re: ***Adams et.al. vs Confluence Health***
Douglas County Cause No. 23-2-00117-09

Counsel:

I. Introduction

This matter came before the court on Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment. Defendants have also submitted a motion to strike the Declaration of Dr. Peter McCullough, and Plaintiffs have submitted a motion to strike the Declarations of Dr. Scott Lindquist and Dr. John Lynch. The Court heard oral argument on said motions and has reviewed the entire record and files herein, including the supplemental briefing provided after oral argument.

For the reasons explained below, Defendants' Motion for Summary Judgment is granted, Plaintiffs' Motion for Summary Judgment is denied, Defendants' Second Motion to Strike the Declaration of Dr. Peter McCullough is granted, and Plaintiffs' Motion to Strike Declarations of Undisclosed Experts is denied.

II. Analysis

1. Motions for Summary Judgment

Under CR 56, a party may seek summary judgment when the pleadings show that there is no genuine issue as to any material fact. "The fundamental premise of summary judgment is that

it is appropriate only when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Ehrhart v. King Cnty.*, 195 Wn.2d 388, 409, 460 P.3d 612, 623 (2020) (internal quotations marks omitted). A material fact is one that by its nature affects the outcome of the litigation, either in whole or part. *Ruff v. Cnty. of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

The party moving for summary judgment bears the initial burden of offering factual evidence showing that there is no genuine issue of material fact that could influence the outcome at trial and that it is entitled to judgment as a matter of law. *Hash v. Children's Orthopedic Hosp. & Medical Center*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). If the moving party produces factual evidence that shows it is entitled to judgment as a matter of law, the burden then shifts to the nonmoving moving party to produce facts showing that there is a genuine issue of material fact. *Id.* at 915. "On a motion for summary judgment, the trial court views all evidence and draws all reasonable inferences in the light most favorable to the nonmoving party." *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835, 837 (2001). "A question of fact may be determined as a matter of law when reasonable minds can reach only one conclusion." *Id.*

a. Undue Burden

Under the holding of *Kumar* "an employee establishes a prima facie claim of failure to accommodate religious practices under the WLAD by showing that (1) they had a bona fide religious belief, the practice of which conflicted with employment duties, (2) they informed the employer of the beliefs and conflict, and (3) the employer responded by subjecting the employee to threatened or actual discriminatory treatment." *Suarez v. State*, 3 Wn.3d 404, 418, 552 P.3d 786 (2024). Employees are not entitled to the specific accommodation requested. *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 45 P.3d 589 (2002). The employer need only prove undue burden if it makes no accommodation and if the accommodation was reasonable, then the employer has satisfied its obligation. *Id.* at 443. "An employer need not remove or modify the essential functions of a position to accommodate an employee." *Id.* at 444. "[A]n employer is not required to reassign an employee to a position that is already occupied, create a new position, or eliminate or reassign essential job functions." *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 778, 249 P.3d 1044, 1049 (2011). It is an affirmative defense to a failure to accommodate religious practices claim where the employer can show that "the reasonable accommodation would not be possible without "undue hardship on the conduct of the employer's business." *Suarez*, 3 Wn.3d at 418 (quoting *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 497, 325 P.3d 193, 197 (2014) (internal quotation marks omitted)). An employer may establish that a particular accommodation would impose undue hardship by showing 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).

While there are few Washington cases that have analyzed undue hardship in the context of religious exemption requests for the COVID-19 vaccine, there is one federal case that is particularly instructive, *Williams v. Legacy Health*, 3:22-CV-06004-TMC, 2024 WL 3993162 (W.D. Wash. Aug. 29, 2024). While state courts are not bound by federal court interpretations of

state statutes, in the absence of state court guidance, federal court interpretations may be considered as persuasive. *In re Elliott*, 74 Wn.2d 600, 602, 446 P.2d 347 (1968); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 849, 292 P.3d 779 (2013); *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179, 979 P.2d 374 (1999). This is particularly true in the case of claims under the WLAD – "[e]ven though almost all of the WLAD's prohibitions predate Title VII's, the ADA's, and the ADEA's, Washington courts still look to federal case law interpreting those statutes to guide our interpretation of the WLAD." *Kumar,* 180 Wn.2d at 491. This Court finds the federal caselaw discussed below to be persuasive.

In *Williams*, a regional healthcare system operating hospitals and clinics in Washington and Oregon was subject to the Washington proclamation requiring COVID-19 vaccination and faced with the issue of whether to grant requests for exemptions from that requirement and their own policy. *Id.* at *1-*3. The court found that the defendant had established that the plaintiffs' work responsibilities required them to frequently interact with vulnerable patients and that allowing staff with an increased risk of spreading COVID-19 to continue that close interaction would have substantial ramifications on its business. *Id.* at *6. The court in *Williams* ultimately held that "even with those [non-vaccination-based] protocols, having unvaccinated staff interacting with patients and other staff throughout its healthcare system was itself the 'substantial' cost to its business of providing healthcare and upholding the health of its patients and staff. *Id.* at *7.

Like *Williams*, Defendants have established, through the testimony of Dr. Johnson, that COVID-19 was and is a highly transmissible disease and that having unvaccinated healthcare workers treat and be in the presence of patients created a substantial danger to the patients and other employees. Declaration of Jeffrey A. James in Support of Defendant's Motion for Summary Judgment, Exhibit A (Johnson Arb. Test) at 198:25-200:6. Whether other methods of limiting transmission were available does not change the substantial cost created by the increased risk of infection created by allowing unvaccinated employees to interact with patients. Plaintiffs have failed to provide evidence to the contrary. Accordingly, Defendants have established that accommodation would have created an undue hardship on Defendants' ability to conduct their business.

b. The Interactive Process

Plaintiffs argue that Defendants failed to engage in the interactive process and therefore they should not be able to rely on the defense of undue hardship. While courts envision that employers and employees will ideally participate in a flexible, interactive process, at a bare minimum the employee must communicate their religious beliefs and how that belief conflicts with their work duties and the employer must determine the nature and extent of the conflict. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 779–80, 249 P.3d 1044, 1050 (2011) (discussing the interactive process in the context of disability accommodations under WLAD). The employee has an ongoing duty to cooperate with the employers' efforts by providing requested information. *Bartholomew v. Washington*, 725 F. Supp. 3d 1225, 1231-32 (W.D. Wash. 2024) (Defendant's refusal to provide requested information and insistence on preferred

accommodation "doomed his complaint"). While a mutual sharing of information is key, the employee is not entitled to a "discussion." *Id.* at 1232.

While Washington courts do not appear to have ruled on the issue of whether failure to engage in the interact process precludes a defense of undue hardship, this Court will once again look to federal court decisions for guidance. In one recent case, the federal court ruled unequivocally that "for the employer, a meritorious undue hardship defense precludes liability premised on failure to engage in an interactive process." *Shirley v. Washington State Dep't of Fish & Wildlife*, 3:23-CV-05077-DGE, 2025 WL 1374977, at *11 (W.D. Wash. May 9, 2025) (citing *McGinn v. Hawaii Symphony Orchestra*, 727 F. Supp. 3d 915, 938 (D. Haw. 2024); *E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988). If an employer is able to show that there is no accommodation available without undue hardship, then they are not required to engage in the futile act of the interactive process. *E.E.O.C.*, 859 F.2d at 615. The Court agrees and concludes that Defendant's undue hardship claim precludes liability based on failure to engage in the interactive process, since under *E.E.O.C.* to hold otherwise would be to require employers and employees to engage in a meaningless and futile act.

Even so, the Court also finds that Defendants have adequately established that they did engage in the interactive process. The declarations provided by Defendants show that Plaintiffs communicated their request for an exemption, Defendants approved the request and communicated the accommodation that would be provided (administrative leave), and Defendants communicated that the requested accommodation could not be provided. Declaration of Brianna Winstanley in Support of Defendants' Motion for Summary Judgment. These actions satisfy the minimum requirements of the interactive process.

Defendants have established undue hardship, and the defense is not precluded by the allegation that they did not participate in the required interactive process. Accordingly, the Plaintiffs' claims must be dismissed.

2. Motions to Strike

a. Declaration of Dr. McCullough

The admission of expert witness testimony is governed under ER 702. "The evidence rules permit expert testimony '[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *State v. Rivers*, 1 Wn.3d 834, 867–68, 533 P.3d 410, 429 (2023) (quoting ER 702). An expert may be qualified based on "knowledge, skill, experience, training, or education" and qualification may be based on experience alone. *Id.* (quoting *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 355, 333 P.3d 388 (2014) (internal quotation marks omitted)). "An expert may not testify about information outside his area of expertise." *Katare v. Katare*, 175 Wn.2d 23, 38, 283 P.3d 546, 553 (2012). In addition, under ER 702, failure to follow proper methodology when scientific consensus has determined that a particular methodology is reliable will render the expert's testimony unreliable

and therefore inadmissible. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 920, 296 P.3d 860 (2013). "Unreliable testimony does not assist the trier of fact." *Id.* at 918.

As it relates to COVID-19, Dr. McCullough's testimony has previously been excluded, limited, and disregarded either because it was found to be unreliable or because his testimony went beyond his expertise. See, e.g., *Slattery v. Main Line Health, Inc.*, CV 22-4994, 2025 WL 897526 (E.D. Pa. Mar. 24, 2025) (finding Dr. McCullough was not qualified to discuss religious beliefs of the plaintiffs or to give opinions related to COVID-19, the vaccine or the public health response, and finding that his testimony was unreliable because he blatantly stated false facts and misrepresented available studies); *Roth v. Austin*, 603 F. Supp. 3d 741 (D. Neb. 2022) (finding Dr. McCullough's credentials did not qualify him as an expert on COVID-19 and that his claims *Maki v. Fed. Reserve Bank of Minneapolis*, 22-CV-2887, 2025 WL 1455913 (D. Minn. May 21, 2025); *Navy SEAL 1 v. Austin*, 600 F. Supp. 3d 1 (D.D.C. 2022), *abrogated on other grounds*, 22-5114, 2023 WL 2482927 (D.C. Cir. Mar. 10, 2023) (court questioned Dr. McCullough's expertise and reliability).

While the decisions and comments of other courts on Mr. McCullough's qualifications and reliability are not binding on this court, as the *Slattery* court stated, they do "have an impact on the reliability of his testimony." *Slattery*, slip op. at 13. Like the court in *Slattery*, this Court reaches similar conclusions regarding Dr. McCullough's qualifications and reliability. For example, Dr McCullough's declaration includes broad unsupported statements such as "I believe with medical certainty that the vaccine could cause the death of a significant number of the Plaintiffs." Declaration of Peter McCullough, MD, MPH, in Support of Plaintiff's Complaint at 3 (Apr. 8, 2022).

Dr. McCullough obtained his medical degree from University of Texas Southwestern Medical School in Dallas and has a master's degree in public health in the field of epidemiology from the University of Michigan. Dr. McCulough is a board-certified Internist and Cardiologist and prior to the COVID-19 epidemic his specialty was focused on internal medicine. Declaration of Peter McCullough, MD, MPH, in Support of Plaintiff's Complaint at 4-5 (Apr. 8, 2022). He has never practiced as an infectious disease specialist, he has never been board certified as an infectious disease specialist and has never completed an infectious disease fellowship. Declaration of Jeffrey A. James in Support of Defendants' Motion to Strike, Exhibit No. 1, Deposition of Peter McCullough, M.D. at 31-32 (Apr. 8, 2025). While Dr. McCullough has certainly been involved in issues pertaining to COVID-19, his skill, training, and experience are in internal and cardiovascular medicine, not infectious diseases and immunology. The Court finds that Dr. McCullough is not qualified to testify on the efficacy of the COVID-19 vaccine or mandatory vaccination in the workplace, the religious beliefs of the plaintiffs, or Washington's public health response.

In addition, the Court is persuaded that Dr. McCullough's testimony is unreliable. Given the decisions and comments of other courts regarding Dr. McCullough's testimony and this Court's own review of Dr. McCullough's declaration testimony, which includes conclusory statements unsupported by reliable methodology as determined by scientific consensus, this

Court cannot find that his testimony would be helpful to a trier of fact. Thus, the Declaration of Dr. McCullough does not satisfy the requirements of ER 702 and shall be stricken.

b. Declarations of Dr. Scott Lindquist and Dr. John Lynch

Plaintiffs have moved the Court to strike the declarations of Dr. Scott Lindquist and Dr. John Lynch submitted by Defendants in support of their motion to strike Dr. McCullough's declaration on the basis that they are undisclosed expert witnesses. However, the Court did not rely on these declarations in making its determination that Dr. McCullough was not qualified to testify on the topic of the COVID-19 vaccine. The motion is therefore moot.

III. Conclusion

For all of these reasons, it is hereby ordered:

1. Defendants' Motion for Summary Judgment is GRANTED.
2. Plaintiffs' Motion for Summary Judgment is DENIED.
3. Defendants' Motion to Strike is GRANTED.
4. Plaintiffs' Motion to Strike is DENIED.

Mr. James should draft and circulate appropriate orders memorializing these rulings. If a presentment hearing is needed, please contact the Court Administrator at 509-745-9063 or CourtAdministrator@co.douglas.wa.us.

Sincerely,

Brian C. Huber
Judge of the Superior Court
Cc: Court file