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Re: *Adams et al v. Confluence Health*
Douglas County Cause No. 22-2-00104-09

Counsel:

This letter sets forth the Court's rulings on the following motions:

1. Confluence Health's Motion to Dismiss all claims set forth in the initial Amended Complaint.
2. Confluence Health's Motion to Strike the Declaration of Dr. Peter McCullough.
3. Plaintiffs' Motion for CR 11 Sanctions.
4. Confluence Health's Motion to Dismiss the additional claims set forth in the Second Amended Complaint.

The Court appreciates the parties' patience as the Court worked through all of the various motions and issues listed above. Fortunately, the attorneys representing both sides of this dispute made excellent presentations during the court hearings and in the legal briefing, and their skilled advocacy and arguments were helpful to the Court in sorting through some interesting and sometimes complex legal issues.

The first part of this letter ruling will address items 1 through 3 above (all claims set forth in the initial Amended Complaint). The second part of this letter will address item 4 (the additional claims the Plaintiffs asserted in the Second Amended Complaint), as well as any remaining issues framed by the parties' motions.

For the reasons set forth below, the Court dismisses each of Plaintiffs' claims with prejudice, denies the Defendant's motion to strike Dr. McCullough's declaration and denies Plaintiffs' motion for CR 11 sanctions.

I. Introduction

Plaintiffs are former health care workers who were terminated by Defendants, a group of private hospitals. All Plaintiffs are unvaccinated against COVID-19, although their reasons for not being vaccinated appear to vary.

Plaintiffs have brought this lawsuit against Defendants asserting in their initial Amended Complaint (1) wrongful discharge in violation of public policy; (2) disability discrimination based on disparate treatment; and (3) disability discrimination based on failure to accommodate. Plaintiffs' Amended Complaint also asserts disability discrimination based on disparate *impact*, although they appear to have abandoned that claim.

In the Second Amended Complaint the Plaintiffs added two additional claims for failure to accommodate a medical disability and failure to accommodate bona fide religious beliefs.

Defendants have filed motions to dismiss all pending claims, as well as a motion to strike a declaration filed by Plaintiffs. In turn, Plaintiffs have moved for sanctions against Defendants under CR 11.

Defendants' motion to dismiss must be treated as a motion for summary judgment because Plaintiffs have introduced extraneous materials that are not referenced in their Amended Complaint or Second Amended Complaint. Defendants' motion to dismiss is granted as to all of Plaintiffs' claims.

As explained below, Plaintiffs have not identified a clear mandate of public policy that supports their claim for wrongful discharge. Additionally, being unvaccinated is not, as a matter of law, a disability under the reasoning of the Supreme Court's decision in *Taylor v. Burlington Northern Railroad Holdings, Inc.*, 193 Wn.2d 611, 444 P.3d 606 (2019). This is fatal to the Plaintiffs' disparate treatment and failure-to-accommodate claims. All of Plaintiffs' claims are dismissed with prejudice.

Because granting Defendants' motion to dismiss disposes of the case entirely, this Court need not reach Defendants' motion to strike the declaration filed by Plaintiffs. Lastly, Plaintiffs' motion for sanctions is denied.

II. Background

Plaintiffs are "health care workers" who were "previously employed" by Defendants. (Am. Compl. at ¶1). They claim that "each of them was terminated by [Defendants] between October, 2021 and the end of January, 2022." (*Id.* at ¶1) They allege their terminations were either "express[] or constructive[]." (*Id.* at ¶12). Plaintiffs do not identify who among them were constructively discharged instead of expressly discharged.¹

According to Plaintiffs: (1) they were not vaccinated; (2) the governor's Proclamation 21-14.1 and related Department of Health guidance prohibit nonexempt health care workers from having direct contact with patients; and (3) Defendants terminated them, either expressly or constructively. (Am. Compl. at ¶¶6, 8(a)).

Proclamation 21-14.1 requires all "Health Care Provider[s]" to be "fully vaccinated against COVID-19" by October 18, 2021. (Pls.' Opp. to Mot. to Dismiss, Ex. A at pg. 5). The proclamation allows for exemptions based on a disability or sincerely held religious beliefs. (*Id.* at pg. 5). To qualify as a "Health Care Provider," the person must work in a "public or private setting that is primarily used for the delivery of in-person health care services to people." (*Id.* at pg. 10). The proclamation refers to such settings as "Health Care Settings[s]." (*Id.* at pg. 10). "If located at a facility that is primarily used for the delivery of health-care services, such as a hospital, then the entire facility is a Health Care Setting." (*Id.* at pg. 10). In contrast, a pharmacy within a grocery store is considered a Health Care Setting but the rest of the store is not. (*Id.*) Plaintiffs do not appear to dispute that they were "Health Care Providers" who worked in "Health Care Settings."

Plaintiffs allege "[a]l the dismissed employees either sought an accommodation from [Defendants] or were aware from communications made to them by or from [Defendants] that seeking an accommodation would be futile in terms of preserving their jobs." (Am. Compl. at ¶10). The Amended Complaint does not explain how requesting an accommodation would have

¹ There appears to be a dispute between the parties over the employment status of some Plaintiffs. In their motion to dismiss, Defendants assert that "approximately half of Plaintiffs are still employed by Defendants." (Defs.' Mot. to Dismiss at pg. 2 n.1). For purposes of the motion, Defendants accept Plaintiffs' allegation that they have all been discharged. (*Id.* at pg. 2 n.1). Regardless of whether Defendants' motion is treated as brought under CR 12(b)(6) or CR 56(c), Plaintiffs' assertion that they have all been expressly or constructively discharged should be, and is for purpose of this motion, taken as true.

been “futile.” Plaintiffs somewhat clarify this statement in their briefing: They attach Exhibit B to their opposition, which is a letter from Defendant Confluence Health to Plaintiff Katie Michael approving her religious exemption and placing her on a leave of absence beginning October 18, 2021 (*i.e.*, the date the vaccine mandate became effective). The maximum length of absence is 12 weeks. The letter advises Plaintiff Michael that, if she was not fully vaccinated by the end of the 12-week period, then she would be “automatically terminated.” Apparently, Plaintiffs believe that the “automatic[] terminat[ion]” after 12 weeks made requesting accommodations “futile.”

Exhibit C to Plaintiffs’ opposition is a document from Confluence’s human resources department titled, “Guideline: Leaves of Absence.” This document states that a leave of absence up to 12 weeks will be granted “as an accommodation for an approved religious or medical exemption; for those whose applications for religious or medical exemption and accommodation were not processed by October 18; and for those who chose not to be vaccinated by October 18, 2021.” (Pls.’ Opp. to Mot. to Dismiss, Ex. C at pg. 11). Additionally, “[t]here will be no extensions granted beyond the initial 12 weeks.” (*Id.* at pg. 11).

Plaintiffs’ Amended Complaint is vague as to who among them requested a disability or religious accommodation and were granted or denied an accommodation. They allege that a “majority” of them “appropriately sought” a “medical or religious exemption[],” but were “effectively denied.” (Am. Compl. at ¶8(a)). In a footnote, Plaintiffs acknowledge that Defendants, in fact, “grant[ed]” these requests. (Pls.’ Opp. to Mot. to Dismiss at pg. 10 n.1). Apparently, Plaintiffs believe that Defendants’ policy of capping the leave of absence at 12 weeks for all unvaccinated employees (including those with religious or disability exemptions) was “effectively [a] deni[al]” of their accommodation request, even if the request was actually granted.

Some Plaintiffs resigned without seeking an exemption. (*Id.* at pg. 10:11-12). Other Plaintiffs are “union members” and have remained on leave longer than 12 weeks. (*Id.* at pg. 10:14-17). Plaintiffs claim these employees have nevertheless been “constructively discharged.” (*Id.* at pg. 10:17-18).

III. Procedural Posture

Plaintiffs have filed and served an Amended Complaint along with the Declaration of Peter McCullough, MD, MPH in support of the Amended Complaint. Dr. McCullough does not describe himself as a current or former employee of Defendants. Instead, he appears to be an expert witness retained by Plaintiffs. His declaration offers opinions related to COVID-19, vaccines, and vaccine mandates.

Defendants moved to dismiss Plaintiffs’ Amended Complaint and to strike Dr. McCullough’s declaration. Plaintiffs opposed both motions and Defendants have replied.

Plaintiffs also seek sanctions against Defendants under CR 11. Plaintiffs claim that Defendants' motion to dismiss and motion to strike Dr. McCullough's declaration are "baseless" because they are "grounded in the claim that the Proclamation of Governor Inslee and/or the recommendations of the state Department of Health created a legal duty on the part of the Defendants to fire them." (Pls.' Mot. For Sanctions at pgs. 1:21-25, 3:24-25). The Plaintiffs argue this is the "opposite of the premise" that the Amended Complaint is purportedly based. (*Id.* At pg. 3:8-10). Defendants oppose this motion.

After the court hearing on the various motions just listed, the Plaintiffs filed a Second Amended Complaint in which the Plaintiffs asserted two additional claims for failure to accommodate a medical disability and failure to accommodate bona fide religious beliefs.

Defendants have moved to dismiss the two additional claims set forth in the Second Amended Complaint. The Plaintiffs opposed that motion and the Defendants have replied.

IV. Analysis

A. Plaintiffs' Causes of Action in the Amended Complaint

Plaintiffs allege three causes of action in their initial Amended Complaint: (1) wrongful discharge in violation of public policy; (2) disparate treatment disability discrimination under the Washington Law Against Discrimination, ch. 49.60 RCW; and (3) failure-to-accommodate disability discrimination under the WLAD.

Plaintiffs' Amended Complaint also refers to "disparate impact" (as opposed to disparate treatment). (Am. Compl. at ¶14). Defendants suggest Plaintiffs mentioned "disparate impact" on accident and, in any event, Plaintiffs did not plead the elements of that claim. (Defs.' Mot. to Dismiss at pg. 20:21-14). Plaintiffs failed to respond to this argument, indicating they have abandoned their disparate impact claim. (Defs.' Reply at pg. 11:19-26).

B. Should Defendants' Motion Be Considered Under CR 12(b)(6) or CR 56(c)?

Defendants filed their motion to dismiss under CR 12(b)(6). For such motions, a trial court generally may consider only the allegations contained in the complaint and may not go beyond the face of the pleadings. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975). However, a trial court may take judicial notice of public documents if the authenticity of those documents cannot be reasonably disputed. *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977). Additionally, "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008).

Plaintiffs refer to Dr. McCullough's declaration in their Amended Complaint. (Am. Compl. at ¶8(b)-(d)). As such, this Court is permitted to consider the declaration even if the dismissal motion is decided under CR 12(b)(6). *Rodriguez*, 144 Wn. App. at 726.

In their opposition to the dismissal motion, Plaintiffs attach three documents: (1) Proclamation 21-14.1 issued by the governor on August 20, 2021 (Exhibit A); (2) a letter sent to Plaintiff Katie Michael from the human resources department at Defendant Confluence Health, as well as a "Frequently Asked Questions" document regarding Confluence's vaccine policy (it is unclear if the FAQ was originally enclosed with the letter) (Exhibit B); and (3) a Confluence human resources document titled, "Guideline: Leave of Absence" (Exhibit C).

The proclamation is referred to in the Amended Complaint. (Am. Compl. at ¶8(a)). Additionally, it is a public document, the authenticity of which cannot be reasonably disputed. *Berge*, 88 Wn.2d at 763. The other two documents, however, are not referred to in the Amended Complaint and are not public documents that may be judicially noticed.

The "submission . . . of extraneous materials" by either party converts a CR 12(b)(6) motion into a CR 56(c) motion for summary judgment. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 121, 744 P.2d 1032 (1987), *as amended*, 109 Wn.2d 107, 750 P.2d 254 (1988). Courts may choose to exclude such materials when considering a CR 12(b)(6) motion. *Mason v. Mason*, 19 Wn. App. 2d 803, 820, 497 P.3d 431 (2021). If the materials are not excluded, then the motion "must" be treated as a summary judgment motion. *Id.* (citing *Worthington v. Westnet*, 182 Wn.2d 500, 505, 341 P.3d 995 (2015)).

Exhibit B and Exhibit C to Plaintiffs' opposition to the dismissal motion are "extraneous materials." *Haberman*, 109 Wn.2d at 121. This Court will consider Exhibit B and Exhibit C in opposition to the Defendants' motion and therefore deems Defendants' motion to be converted into a summary judgment motion to be decided under CR 56(c).

C. Standard Under CR 56(c)

Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). All evidence and reasonable inferences must be construed in a light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972). A material fact is one upon which the litigation depends in whole or in part. *Adams v. Johnston*, 71 Wn. App. 599, 608, 860 P.2d 423 (1993), *as amended*, 869 P.2d 416 (1994).

To defeat a summary judgment motion, the nonmoving party must raise a genuine issue of material fact for "each essential element" of its claim. *Thurston Cnty. Rental Owners Ass'n v. Thurston Cnty.*, 85 Wn. App. 171, 177, 931 P.2d 208 (1997). Failure to support a single element

of a claim “renders all other facts immaterial.” *Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993); *see also Saddle Mountain Mins., L.L.C. v. Joshi*, 152 Wn.2d 242, 258, 95 P.3d 1236 (2004) (Sanders, J., dissenting) (“Failure to prove a single element is fatal to the claim.”)

D. Wrongful Discharge in Violation of Public Policy

1. Generally

“‘[A]s a narrow exception to the employment at will doctrine, an employer cannot terminate an employee for reasons that contravene a clear mandate of public policy.’” *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 570, 459 P.3d 371 (2020) (quoting *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 425 P.3d 837 (2018)).

The tort was adopted in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) (en banc) and has “generally been limited to four scenarios”: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers’ compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, *i.e.*, whistle-blowing. *Martin*, 191 Wn.2d at 723.

When the allegations fit one of these scenarios, the elements of the claim are (1) the employee’s discharge may have been motivated by reasons that contravene a clear mandate of public policy, and (2) the public-policy-linked conduct was a significant factor in the decision to discharge the worker. *Peiffer v. Pro-Cut Concrete Cutting & Breaking Inc.*, 6 Wn. App. 2d 803, 829, 431 P.3d 1018 (2018).

If the claim does not fit the above-mentioned scenarios, a slightly different analysis is called for. In *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996) (en banc), the Supreme Court adopted a four-part test “to resolve a wrongful discharge suit that did not neatly fall into one of those four recognized categories.” *Martin*, 191 Wn.2d at 732. The four parts are (1) the plaintiffs must prove the existence of a clear public policy (the clarity element); (2) the plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element); (3) the plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element); (4) the defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element). *Gardner*, 128 Wn.2d at 941.

The four-part *Gardner* test “did not . . . substantively change the wrongful discharge tort,” as the “common law already contained clarity and jeopardy elements.” *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 278, 358 P.3d 1139 (2015) (en banc). In other words, a wrongful discharge claim that fits within one of the four scenarios discussed above—the

employee's discharge may have been motivated by reasons that contravene a clear mandate of public policy—simply folded the clarity and jeopardy elements into a single element. *Peiffer*, 6 Wn. App. 2d at 829.

2. Does Plaintiffs' wrongful discharge claim fit one of the four traditional scenarios?

Plaintiffs seem to believe that their wrongful discharge claim corresponds with the third established scenario, *i.e.*, they were fired for exercising a legal right or privilege, such as filing workers' compensation claims. However, neither their Amended Complaint nor their opposition to the dismissal motion identifies the right or privilege they exercised. As such, this Court analyzes their wrongful discharge claim under the four-part *Gardner* test.

3. The clarity element

“The question of what constitutes a clear mandate of public policy is one of law” and can be established by prior judicial decisions or constitutional, statutory, or regulatory provisions or schemes.” *Martin*, 191 Wn.2d at 725 (quoting *Dicomes v. State*, 113 Wn. 2d 612, 618, 782 P.2d 1002 (1989) (en banc)). “To qualify as a public policy for purposes of the wrongful discharge tort, a policy must be ‘truly public’ and sufficiently clear.” *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208, 193 P.3d 128 (2008) (en banc) (quoting *Sedlacek v. Hillis*, 145 Wn.2d 379, 388, 36 P.3d 1014 (2001) (en banc)).

As such, the analysis of the clarity element “does not end with the determination that a policy is expressed in an approved source.” *Sedlacek*, 145 Wn.2d at 393. Instead, “[t]he source must also state a clear mandate of Washington public policy.” *Id.*; see also *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 757, 257 P.3d 586 (2011) (en banc) (“A clear mandate of public policy sufficient to meet the clarity element must be clear and truly public; it does not exist merely because the plaintiff can point to legislation or judicial precedent that addresses the relevant issue.”)

a. Parties' arguments

Plaintiffs argue that “[i]t is the clear public policy of the State of Washington that adult persons have the fundamental right to control their own decisions relating to bodily autonomy and the rendering of their own health care.” (Am. Compl. ¶5). In support, Plaintiffs cite RCW 70.122.010, which reads, in relevant part, “The legislature finds that adult persons have the fundamental right to control the decisions relating to the rendering of their own health care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition.” This statute is part of the Natural Death Act, ch. 70.122 RCW.

Plaintiffs also cite Article I, §7 of the Washington State Constitution, which provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” (Am. Compl. ¶5). This section is “comparable” to the Fourth Amendment to the U.S. Constitution. *State v. Smith*, 88 Wn.2d 127, 133, 559 P.2d 980 (1977) (en banc). Finally, Plaintiffs cite *McNabb v. Department of Corrections*, 163 Wn.2d 393, 180 P.3d 1257 (2008) (en banc), in which the Supreme Court held that Article I, §7 did not prohibit the State from force-feeding an inmate who had refused food and drink.

Defendants contend that RCW 70.122.010 and Article I, §7 are inapplicable to “employment situations.” (Mot. to Dismiss at pg. 7:21-24). Next, Defendants contend that “an individual’s right to decline medical care” does not “create[] a public policy that prohibits their employer from ending the employment relationship if it . . . require[s] employees to be vaccinated against COVID-19 as a prerequisite to providing patient care.” (*Id.* at pg. 9:3-7).

Defendants then cite *Jacobson v. Massachusetts*, which upheld a state law that permitted cities and towns to require the smallpox vaccination of all individuals 21 years or older, as well as a city regulation promulgated under this law. *Id.*, 197 U.S. 11, 25 S. Ct. 358, 49 L.Ed. 643 (1905). The U.S. Supreme Court held that the state’s police power allowed it to “enact quarantine laws and ‘health laws of every description’” and “such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.” *Id.* at 24-25. Unless the laws or regulations are “so arbitrary and oppressive,” such as forcing individuals who are “not . . . a fit subject of vaccination,” they comply with the U.S. Constitution. *Id.* at 38.

Defendants conclude their argument by asserting that “the ability to decline a vaccination” does not create a “public policy requiring an employer to disregard a legally imposed requirement.” (Mot. to Dismiss at pg. 11:10-12) According to Defendants, “public policy” requires employers to “follow vaccination mandates and avoid legal penalties.” (*Id.* at pg. 11:11-13).

In their opposition, Plaintiffs reiterate the position from their Amended Complaint, namely that RCW 70.122.010 and *McNabb* establish a “constitutional as well as a common law right to autonomously determine what is done with [one’s] body.” (Pls.’ Opp. to Mot. to Dismiss at pgs. 7:19-28, 8:1-2). According to Plaintiffs, these authorities “compel[] the conclusion that there is a clear mandate of public policy in this state providing that each adult individual has a fundamental right to control the decisions relating to their own health care.” (*Id.* at pg. 9:5-7).

Plaintiffs argue Defendants’ decision to terminate Plaintiffs “was not made or compelled by any mandate or policy of the State of Washington” and that they could have been granted exemptions and “allow[ed] to keep their jobs as part of the accommodation process.” (*Id.* at pgs. 4:12-13, 9:9-13).

In their reply, Defendants contend that Plaintiffs implicitly admit Article I, §7 does not apply to private entities. (Defs.' Reply at pg. 811-13). They further argue that Plaintiffs "fail to establish . . . the existence of a clear mandate of public policy restricting an employer from removing an unvaccinated Health Care Provider from a Health Care Setting" (these terms are defined on pages 9-11 of Exhibit A to Plaintiffs' opposition). (*Id.* at pg. 9:7-9).

b. Plaintiffs have not identified a public policy mandate

Plaintiffs rely on three sources for the alleged public policy mandate: (1) RCW 70.122.100; (2) Article I, §7; and (3) *McNabb*. None of these support Plaintiffs' position.

The first source is a statute from the Natural Death Act, Ch. 70.122 RCW, which was enacted by the legislature primarily to clarify the "considerable uncertainty in the medical and legal professions as to the legality of terminating the use or application of life-sustaining treatment." RCW 70.122.100. The act, among other things, shields healthcare providers from liability if they withhold or withdraw life-sustaining treatment in accordance with the act. *See* RCW 70.122.051(2). It also criminalizes the tampering, falsifying, or forging of a directive related to life-sustaining treatment. RCW 70.122.090.

The act provides that "adult persons have the fundamental right to control the decisions relating to the rendering of their own health care." RCW 70.122.100. This proclamation is made in the context of an act that concerns the relationship between a patient (or their representative) and healthcare providers. The Louisiana Supreme Court recently addressed a similar argument made by former employees of a private hospital who were terminated for not being vaccinated against COVID-19. *See Hayes v. Univ. Health Shreveport, LLC*, 332 So. 3d 1163, 1166 (La. 2022). In that case, the plaintiffs argued, as Plaintiffs do here, that they had a "'fundamental right' to make autonomous, informed decisions regarding medical treatment." *Hayes*, 332 So.3d at 1168. They cited the Louisiana Medical Consent Law, which protects the "right of a person eighteen years of age . . . to refuse to consent to medical or surgical treatment as to his own person." La. R.S. 40:1159.7.

The Louisiana Supreme Court held this statute did not give rise to a wrongful discharge claim because it was limited to the relationship between a healthcare provider, a patient, or a patient's lawful representative." *Hayes*, 332 So.3d at 1170. Similar to the medical consent law in *Hayes*, RCW 70.122.100 is found in the Natural Death Act, which concerns the provider-patient relationship—not the employer-employee relationship.

An instructive case from Washington is *Roe*, in which the plaintiff was terminated for testing positive on a drug test after using medical marijuana. She argued that the Medical Use of Cannabis Act "proclaims a broad policy that 'the medical use of marijuana by patients with terminal or debilitating illness is a personal, individual decision.'" *Roe*, 171 Wn.2d at 758. The Supreme Court rejected this argument, explaining that the act and court decisions interpreting the

act “do not support such a broad public policy that would remove all impediments to authorized medical marijuana use or forbid an employer from discharging an employee because she uses medical marijuana.” *Id.*

As with *Roe*, RCW 70.122.100 does not contain a clear mandate of public policy that would “remove all impediments” to not getting vaccinated. *Id.*; *see also id.* at 757 (“A clear mandate of public policy sufficient to meet the clarity element must be clear and truly public; it does not exist merely because the plaintiff can point to legislation or judicial precedent that addresses the relevant issue.”). In short, RCW 70.122.100 does not support Plaintiffs’ clarity element argument.

Article I, §7 and *McNabb* also do not substantiate Plaintiffs’ asserted public policy mandate. The constitutional provision applies only to state action. *See City of Pasco v. Shaw*, 127 Wn. App. 417, 422, 110 P.3d 1200 (2005) (Article I, §7 “require[s] some form of state action to invoke [its] protection[.]”). The Louisiana Supreme Court in *Hayes* rejected the plaintiffs’ similar reliance on their state’s version of the Fourth Amendment. The court “decline[d] the invitation to extend the scope of [the constitutional provision] to restrict private actors.” *Id.* at 10. Because the Washington Supreme Court has also limited Article I, §7 to state actors, Plaintiffs’ reliance on that provision is misplaced.

McNabb is based on Article I, §7 and thus inapplicable for the reasons described in the preceding paragraph. Moreover, Plaintiffs’ description of *McNabb* is not accurate. They claim the plaintiff “successfully asserted both a constitutional as well as common law right to autonomously determine what is done with his body.” (Pls.’ Opp. to Mot. to Dismiss at pg. 8:1-3). The Supreme Court declined to characterize the constitutional right in that way. Instead, it “refer[red] to [the plaintiff’s] asserted right as the right to refuse artificial means of nutrition and hydration.” *McNabb*, 163 Wn.2d at 396. The dissent—not the majority—framed the right as “an essential privacy right of autonomous decision-making and bodily integrity.” *Id.* at 414 (Sanders, J., dissenting).

In sum, Plaintiffs have failed to support the clarity element of their wrongful discharge claim and the Court does not need to reach the other elements. *See Boyce*, 71 Wn. App. at 665. Defendants’ motion to dismiss is granted as to Plaintiffs’ wrongful discharge claim.

E. Disability Discrimination (Disparate Treatment) Under the WLAD

1. Generally

To state a disability discrimination claim based on disparate treatment under the WLAD, Plaintiffs must allege they were (1) disabled; (2) subject to an adverse employment action; (3) doing satisfactory work; and (4) discharged under circumstances that raise a reasonable inference of discrimination. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 491, 84 P.3d 1231 (2004).

“Thus, the first thing an employee alleging disability discrimination must establish is that she is disabled.” *Callahan v. Walla Walla Hous. Auth.*, 126 Wn. App. 812, 819, 110 P.3d 782 (2005).

The WLAD prohibits employment discrimination based on real or perceived disability. RCW 49.60.010. A “disability” is defined as “the presence of a sensory, mental, or physical impairment” that (1) is medically cognizable or diagnosable; (2) exists as a record or history; or (3) is perceived to exist whether or not it exists in fact. RCW 49.60.040(7)(a)(i)-(iii).

An “impairment,” in turn, is defined as (1) “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary [genitourinary], hemic and lymphatic, skin, and endocrine”; or (2) “[a]ny mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” RCW 49.60.040(7)(c)(i)-(ii). The definition of impairment “includes, but is not limited to” these two categories.

The Washington Administrative Code provides further definition: “A condition is a ‘sensory, mental, or physical disability’ if it is an abnormality. . . . [A] person will be considered to be disabled by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the condition is abnormal.” WAC 162-22-020(2).

2. Parties’ arguments

Plaintiffs argue they have a “perceived” disability in the form of “lack of COVID-19 immunity produced by so-called vaccination.” (Am. Compl. at ¶9). Plaintiffs use the word “perceived” to denote Defendants’ alleged belief that “the dismissed employees unvaccinated condition was a bodily condition which so affected the respiratory systems of the dismissed employees that they, in the mind of [Defendants], were more likely than others in the workplace to infect people, making them a threat to the workplace.” (Pls.’ Opp. to Mot. to Dismiss at pg. 17:5-11). Defendants respond that unvaccinated status does not qualify as a disability because it is not an “‘abnormality.’” (Defs. Reply at pg. 12:19-25) (quoting WAC 162-22-020(2)).

3. The refusal to be vaccinated does not qualify as a disability

Plaintiffs argue that their disability is a “bodily condition.” (Pls.’ Opp. to Mot. to Dismiss at pg. 17:6). In *Taylor v. Burlington Northern Railroad Holdings, Inc.*, 193 Wn. 2d 611, 444 P.3d 606 (2019), a case cited by both sides in their briefing, the Supreme Court examined when a “condition” qualifies as a disability under the WLAD.

The Supreme Court noted the legislature did not define “condition,” but the regulations promulgated pursuant to the WLAD provided a definition that was entitled to “‘great weight.’”

Id. at 626 (quoting *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989)). These regulations require the condition to be “abnormal.” WAC 162-22-020(2). Abnormal does not mean rare. *Taylor*, 193 Wn. 2d at 628; *see also* RCW 49.60.040(7)(b) (disabilities may be “common or uncommon”). Instead, abnormal refers to the medically-defined imbalances or deficiencies caused by the condition. Hence, the alleged disability in *Taylor*—obesity—was associated with “*abnormal* energy balance” and “*abnormal* endothelial function” and “results in metabolic *abnormalities*.” *Taylor*, 193 Wn.2d at 628 (emphasis in original).

An unvaccinated person cannot be “abnormal” under the definition of *Taylor*. A person with an abnormal condition is abnormal relative to a baseline standard of health generally accepted by the medical community. People who met these standards were eligible to be vaccinated against COVID-19 because even they could not produce enough protection against COVID-19 on their own. (Defs.’ Opp. to Pls. Mot. to Dismiss, Ex. A at pg. 2) (stating that “all Washingtonians over the age of 16 have been eligible to receive free COVID-19 vaccinations”); (Decl. of Dr. McCullough at ¶2) (stating that “individuals who never received a COVID-19 vaccine . . . possess essentially no significant vaccine-induced protection from COVID-19”).

A person who refuses the COVID-19 vaccine is rejecting treatment that, at least according to vaccine proponents, would enhance their condition above and beyond the baseline standard of normal health. But *Taylor* holds that a condition is a disability only if it results in a deficiency or imbalance *below* that baseline. *See Taylor*, 193 Wn.2d at 628. When Plaintiffs declined the vaccine, they purportedly became more susceptible to COVID-19 relative to the vaccinated population. But the vaccinated population is not the proper comparison for determining a disability. Instead, unvaccinated persons should be compared to the baseline standard of normal health. This baseline lacks sufficient protections against COVID-19—hence the need for vaccines throughout the general population. (Defs.’ Opp. to Pls. Mot. to Dismiss, Ex. A at pg. 2); (Decl. of Dr. McCullough at ¶2).

Of course, the parties disagree about the efficacy of the vaccine, but that is beside the point: Plaintiffs ground their claim on what *Defendants* allegedly believed, namely that vaccinated persons have more protection than unvaccinated persons. (Pls.’ Opp. to Defs.’ Mot. to Dismiss at pg. 2:4-11) (arguing that Defendants’ “perception” was that “the dismissed employees[’] unvaccinated condition” made them “more likely than others in the workplace to infect people”). But Defendants’ belief does not mean Plaintiffs have a disability. Rather, unvaccinated persons simply remain at the baseline standard of health and are not “abnormal” relative to it. Under *Taylor*, they cannot not be deemed disabled.

As a matter of law, Plaintiffs have not established a disability under WLAD. As such, this Court need not reach the other elements of Plaintiffs’ claim for disparate treatment, *see Boyce*, 71 Wn. App. at 665, and this Court hereby dismisses the claim.

F. Disability Discrimination (Failure to Accommodate) Under the WLAD

A claim for disability discrimination based on a failure to accommodate requires four elements: (1) the employee has a disability; (2) the employee is qualified to perform the job's essential functions; (3) the employee gave the employer notice of the disability; and (4) upon notice, the employer failed to provide or adopt measures that were available to the employer and medically necessary to accommodate the employee's disability. *Townsend v. Walla Walla Sch. Dist.*, 147 Wn. App. 620, 627, 196 P.3d 748 (2008).

As explained above, a person is not disabled as a matter of law simply because they are unvaccinated. Since the existence of a disability is an essential element to a failure-to-accommodate claim, Defendants' motion is granted as to this claim as plead in the initial Amended Complaint. *Thurston Cnty. Rental Owners Ass'n*, 85 Wn. App. at 177.

G. Plaintiffs' Additional Claims Set Forth In Second Amended Complaint

1. Plaintiffs' Additional Causes of Action in the Second Amended Complaint²

There are minimal differences between the Amended Complaint and the Second Amended Complaint. The first change is on page five. The cause of action previously titled "Perceived Disability Discrimination" is now simply titled "Disability Discrimination." However, the paragraphs under this claim did not change in the Second Amended Complaint. For example, paragraph nine still states, "All the dismissed employees were disabled in the sense that the employer *perceived* each of them to have a status . . . that the employer *claimed* to have a substantial limiting effect on their ability to perform their various jobs." (2nd Am. Compl. at ¶9) (emphasis added).

The second change is on page six. The previous version of paragraph thirteen stated, "The discharges of the dismissed employees were because of the perceived disability of the dismissed employees." In the Second Amended Complaint, paragraph thirteen now reads, "The discharges of the dismissed employees were because of the perceived disability of the dismissed employees *and/or constituted a failure to accommodate their claims for accommodation based on medical or religious exemptions in violation of RCW 49.60.180.*" (2nd Am. Compl. at ¶13).

² As discussed earlier, the Court has concluded that Plaintiffs' wrongful discharge claim as plead in the initial Amended Complaint must be dismissed because Plaintiffs failed to plead the element of clarity. More specifically, they likely did not identify a clear mandate of public policy in Washington that "remove[d] all impediments" to not getting vaccinated. *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 758, 257 P.3d 586 (2011) (*en banc*). Plaintiffs' Second Amended Complaint sets forth the exact same allegations for this claim. Accordingly, this claim must likewise be dismissed.

2. CR 12(b)(6) Applies to the Additional Claims Rather than CR 56

As discussed above, the Court deemed the Defendants' motion to dismiss Plaintiffs' claims asserted in the Amended Complaint to be converted into a summary judgment motion because Plaintiffs' opposition introduced extraneous materials not referenced in their Amended Complaint. However, Plaintiffs' opposition to Defendants' motion seeking dismissal of the additional claims asserted in the Second Amended Complaint does not present such materials. Therefore, the Defendants' motion seeking dismissal of the two additional claims set forth in the Second Amended Complaint will be decided as a CR 12(b)(6) motion to dismiss.

3. Legal Standard For CR 12(b)(6) Motion to Dismiss

Dismissal is appropriate under CR 12(b)(6) "where 'there is not only an absence of facts set out in the complaint to support a claim of relief, but there is no hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim.'" *Daniels v. State Farm Mut. Auto. Ins. Co.*, 193 Wn.2d 563, 571, 444 P.3d 582 (2019) (*en banc*) (quoting *Worthington v. Westnet*, 182 Wn.2d 500, 505, 341 P.3d 995 (2015)). A motion to dismiss should be granted when "plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *San Juan Cnty. v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007) (*en banc*).

4. Disability Discrimination (Disparate Treatment) Under the WLAD

In their Amended Complaint, Plaintiffs alleged Defendants "perceived" they had a disability. (Am. Compl. at ¶9). In their Second Amended Complaint, Plaintiffs apparently now claim they were discriminated against because they had an actual disability. The cause of action was previously titled, "Perceived Disability Discrimination." Plaintiffs' Second Amended Complaint now labels it "Disability Discrimination."

Yet Plaintiffs did not change any of the allegations under this claim. If this claim is still construed as disability discrimination based on a *perceived* disability, then this Court must dismiss the claim. As explained earlier, an unvaccinated person is not "abnormal" relative to a baseline standard of health generally accepted by the medical community. WAC 162-22-020(2). According to Plaintiffs' reasoning, Defendants believed that vaccinated persons enhanced their immune systems. As such, unvaccinated persons simply remain at the baseline and are not "abnormal" relative to the general population. Plaintiffs have not pled the existence of a disability as matter of law. *See Taylor v. Burlington Northern Railroad Holdings, Inc.*, 193 Wn. 2d 611, 628, 444 P.3d 606 (2019) (obesity is a "condition" that qualifies as a disability under the WLAD because it is associated with "*abnormal* energy balance" and "*abnormal* endothelial function" and "results in metabolic *abnormalities*")

If Plaintiffs' claim is interpreted as disability discrimination based on an *actual* disability, then their claim must still be dismissed. The WLAD prohibits employment discrimination based on real or perceived disability. RCW 49.60.010. A "disability" is defined as "the presence of a sensory, mental, or physical impairment" that (1) is medically cognizable or diagnosable; (2) exists as a record or history; or (3) is perceived to exist whether or not it exists in fact. RCW 49.60.040(7)(a)(i)-(iii). If Plaintiffs are not relying on the perception of a disability, then they must show their unvaccinated status was either "medically cognizable or diagnosable" or "exists as a record or history." *Id.*

They also must allege that their unvaccinated status is an "impairment," *i.e.*, (1) "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary [genitourinary], hemic and lymphatic, skin, and endocrine"; or (2) "[a]ny mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." RCW 49.60.040(7)(c)(i)-(ii).

Plaintiffs argue that their unvaccinated immune system is an "impairment." Examples of impairments in the WLAD's regulations are "disfigurement," "anatomical loss," "cognitive limitation," "illness," and "disabilities." RCW 49.60.040(7)(c)(i)-(ii). Yet Plaintiffs allege that because they were unvaccinated, they had "provable or presumed natural immunity due to their exposure to the virus, providing them *greater immunity* from COVID-19 than those who had taken the so-called vaccine." (2nd Am. Compl. at ¶8(c)) (emphasis added). This Court's research has not identified any caselaw authority – and none appears to be cited by Plaintiffs -- supporting the proposition that a *superior* physiological trait qualifies as an "impairment."

Further, Plaintiffs' argument does not comport with the Supreme Court's interpretation of "impairment" as having a negative effect on the body's systems. The "impairment" at issue in *Taylor* was obesity, which the Supreme Court described as a "primary disease" associated with "a derangement of function" leading to "joint pain, immobility, sleep apnea, and low self-esteem." *Taylor*, 193 Wn.2d at 623-26. Plaintiffs' allegation that their purported disability gave them "greater immunity" cannot be reconciled with the legal definition of "disability."

In sum, Plaintiffs' claim for disability discrimination—regardless of whether it is based on a perceived or actual disability—must be dismissed. Neither theory presents a coherent argument or legal authority to support Plaintiffs' position, which may be why Plaintiffs did not even address the claim in their opposition.

5. Failure to Accommodate

The only new claim presented in the Second Amended Complaint is that “[t]he discharges of the dismissed employees . . . constituted a failure to accommodate their claims for accommodation based on medical or religious exemptions in violation of RCW 49.60.180.” (2nd Am. Compl. at ¶13).

To plead a claim for failure to reasonably accommodate a disability, Plaintiffs must establish (1) they had a sensory, mental, or physical abnormality that substantially limited their abilities to perform their jobs; (2) they were qualified to perform the essential functions of the jobs in question; (3) they gave Defendants notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, Defendants failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality. *Davis v. Microsoft Corp.*, 149 Wn. 2d 521, 532, 70 P.3d 126 (2003) (en banc).

The analysis for the first element is the same as any disability discrimination claim, namely Plaintiffs must allege they have a “sensory, mental, or physical disability.” *Gamble v. City of Seattle*, 6 Wn. App. 2d 883, 887, 431 P.3d 1091 (2018) (quoting RCW 49.60.180(3)). As explained above, Plaintiffs have not alleged they have a disability, either perceived or real. Because “it appears beyond a doubt that [Plaintiffs] cannot prove any set of facts which would justify recovery” for their failure-to-accommodate claim, this Court must dismiss the claim. *Tenore v. AT & T Wireless Servs.*, 136 Wn. 2d 322, 330, 962 P.2d 104 (1998) (en banc).

Plaintiffs spend much of their opposition arguing about the level of specificity required at the pleading stage and urging this Court to deny Defendants’ motion so Plaintiffs can, through discovery, “prove that they sought accommodation or that such was not required due to the futility that existed due to the Defendants’ communications to them.” (Pls.’ Opp. to Mot. to Dismiss at pg. 11:17-19). Whether Plaintiffs sought accommodations is immaterial, however, given that they have not established the existence of a disability in the first place.

Moreover, even under the liberal notice pleading standard, Plaintiffs’ claims cannot survive. While Plaintiffs may need to merely allege that they sought accommodations (as opposed to specifically alleging when and how they sought accommodations), they cannot allege they have an unspecified disability. Instead, Plaintiffs must allege the existence of particular “a sensory, mental, or physical abnormality.” *Becker v. Cashman*, 128 Wn. App. 79, 84, 114 P.3d 1210 (2005). Since they have not done so, this Court need not reach Plaintiffs’ other arguments.

“The superior court has the discretion to dismiss a complaint with prejudice when ‘amendment would be futile,’ including when the plaintiff cannot ‘identify any additional facts’ to support his claim.” *Eugster v. Washington State Bar Ass’n*, noted at 11 Wn. App. 2d 1067, 2020 WL 71351, at *4 (2020) (quoting *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 730, 189 P.3d 168 (2008)); see also *Hair Plus Beauty Outlet, Inc. v. OMH, Inc.*, noted at 2 Wn. App. 2d

1031 (2018), 2018 WL 834346, at *4 (2018) (“The trial court can exercise the discretion to dismiss with prejudice in limited circumstances where dismissal without prejudice would be pointless.”) In this case, Plaintiffs have had three separate opportunities to plead their claims. Each version of the complaint suffers from the same defect: The lack of COVID-19 vaccination does not qualify as a disability under the WLAD as a matter of law. Plaintiffs have been unable to remedy this flaw so far and there is no reason to conclude they would be able to do so with further amendment.

V. Remaining Motions

Given that the Court is granting the Defendants’ motion to dismiss, this Court need not address Defendants’ motion to strike Dr. McCullough’s declaration.

The remaining motion—Plaintiffs’ motion for sanctions—is denied. Plaintiffs disagree with how Defendants characterize the claims in this case. But that is not a basis for sanctions under CR 11, especially given that Defendants’ motion to dismiss is granted.

While Plaintiffs claim that CR 11 sanctions should apply to “improper filing[s]” of a motion to dismiss, the federal case they cite does not support their requested relief. In the case, *Aetna Life Ins. Co. v. Alla Med. Servs., Inc.*, 855 F.2d 1470 (9th Cir. 1988), the court held the motion to dismiss was “objectively reasonable and cannot be considered frivolous.” *Id.* at 1476. The court noted, however, that the motion was “part of a pattern of abusive litigation activity” that consisted of the defendants delaying the filing of their answer for seven months, two motions for more definite statements, and filing a prior motion to dismiss. *Id.* Still, the court stopped short of imposing sanctions for the motion to dismiss at issue and instead remanded the issue to the trial court for further consideration. *Id.* at 1477. That case is inapposite to the matter before this Court.

The “threshold” for imposing CR 11 sanctions is “high.” *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004). “CR 11 sanctions have a potential chilling effect” and “so the trial court should impose sanctions only when it is patently clear that [the arguments] ha[ve] absolutely no chance of success.” *Id.* at 754-55. Nothing indicates that Defendants’ motion to dismiss “was filed for the purpose of harassment, delay, nuisance, or spite.” *Id.* at 756. To the contrary, Plaintiffs’ claims present novel questions that are ripe for reasonable, good-faith disagreements about how the issues should be framed and resolved. In short, Plaintiffs’ motion for sanctions must be denied.

VI. Conclusion

I trust the attorneys will draft any written orders necessary to memorialize the rulings set forth in this letter. If possible, I would like to enter an order on an ex parte basis that has been

Steve Lacy
Jeffrey James
November 18, 2022
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signed by counsel and agreed as to form. Please contact the Court Administrator if a special set presentment hearing is needed. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Huber", written in a cursive style.

Brian C. Huber
Judge of the Superior Court
BCH/jlj
cc: Court File