THE HONORABLE TANA LIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JAMIE ZIMMERMAN, *et al.*,

Plaintiff,

v.

PEACEHEALTH, *et al.*,

Defendants.

No. 3:22-cv-05960-TL

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' SUPPLEMENTAL BRIEFING REGARDING PENDING MOTION TO DISMISS

I. INTRODUCTION

"The erroneous *de minimis* interpretation of *Hardison* may have had the effect of leading courts to pay insufficient attention to what the actual text of Title VII means with regard to several recurring issues." *Groff v. DeJoy*, 600 U.S. ____ (June 29, 2023) (slip op., at 19).

After Defendants' Motion to Dismiss was filed and fully briefed, the Supreme Court of the United States issued an opinion in *Groff v. DeJoy*, 600 U.S. ____ (June 29, 2023), which clarifies relevant issues and supports Plaintiffs' contention that dismissal is premature in this matter. In *Groff*, the Supreme Court rejected the "more than *de minimis* cost" standard as applied to employee requests for workplace accommodations under Title VII of the Civil Rights Act and adopted the "substantial increased costs" standard when evaluating an undue hardship to the employer for accommodating such a claim. The Supreme Court held that "Title VII requires an

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employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Groff*, 600 U.S. at 18. Here, Defendants employed the "more than *de minimis* cost" standard in evaluating Plaintiffs' requested accommodations. Furthermore, evidence will show that Defendants unreasonably viewed Plaintiffs as carriers of a contagious disease they did not have, treated them differently than others who were similarly situated, were hostile to Plaintiffs religious beliefs or expression, and that rather than reasonably accommodating, Defendants chose to discipline Plaintiffs. Such evidence will demonstrate the disingenuousness of Defendants' claims that accommodating Plaintiffs would require defendants to violate the law. Federal and State policies allowed for accommodation of religious objectors. Defendants discriminated against Plaintiffs notwithstanding the fact that there was no substantial cost in accommodating Plaintiffs. For these reasons, and because *Groff* solidifies Plaintiffs' contentions, Defendants' Motion to Dismiss should be denied.

II. ARGUMENT

A. Legal Standard

1. The de minimis standard adopted in Hardison is "mistaken".

The Supreme Court held in *Groff* that "Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substant6ial increased costs in relation to the conduct of its particular business." *Id.* at 18. The Court was clear in *Groff* that "the more than *de minimis* cost" standard adopted from *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) is incorrect, even calling such an interpretation a "mistaken view." *Id.* at 19. The Court was clear on several points: (1) "[a]lthough this line would later be viewed by many lower courts as the authoritative interpretation of the statutory term

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'undue hardship'" it is doubtful that it was meant to take on that large role;" (2) "Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business;" (3) "a coworker's dislike of 'religious practice and expression in the workplace' or 'the mere fact [of] an accommodation' is not 'cognizable' to factor into the undue hardship inquiry." This applied to customers as well; and (4) "Title VII requires that an employer reasonably accommodate and employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations" without considering other options. *Id.* at 11, 14 n.13, 18, 20. The court further held that this test must be applied "in a manner that takes in to account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer." *Id.* at 18. Thus, the proper standard for employers to evaluate the ability to accommodate an employee is whether substantial costs would be incurred by the employer to accommodate the employee.

In rejecting the *de minimis* standard, the Supreme Court explained that it did not adopt the "EEOC's construction of *Hardison*" as "basically correct." *Id.* at 18-19. Rather, the Court held that the Equal Employment Opportunity Commission's ("EEOC") guidance, which provides that the following circumstances, "temporary costs, voluntary shift swapping, occasional shift swapping or administrative costs . . . relaxation of dress codes and coverage for occasional absences" should be accommodated, remains unchanged and does not denote an undue hardship. *Id.* at 19-20. The Supreme Court also clarified that "[t]he EEOC has also accepted *Hardison* as prescribing a "'more than a *de minimis* cost' test, . . but has tried in some ways to soften its impact." *Id.* at 13. The Supreme Court, therefore, declined to adopt all the EEOC's

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recommendations which allow an employer to evade accommodating an employee's religious beliefs. It instead instructs courts to "resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test." *Id.* at 19. Thus, the cost to an employer's business must be substantial when considering all relevant factors as outlined earlier.

2. *The undue hardship standard requires a comprehensive assessment of accommodations.*

The court continues with the undue hardship analysis by observing that employer, employee, or customer bias, hostility, or animosity against a particular religious practice cannot be considered an undue hardship. *Id.* at 14 n.13, 19. "If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself." *Id.* at 20. Additionally, "Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations." *Id*. Thus, it is not enough to ask the employee what accommodation they would like, but the employer must consider other possible options. *Id.* Further, employers are obligated to offer an accommodation, barring undue hardship, that causes the least disadvantage to an employee's employment opportunities, which include compensation, terms, conditions, or privileges. Commission Guidelines, 29 C.F.R. § 1605(c)(2).

3. *Defendants erroneously summarize the proper standard of accommodating Title VII requests* ***and*** *the importance of Groff.*

The Defendants would have the court believe that the *Groff* decision has no effect on the standard it should consider in this case and that it simply needs to weigh the *de minimis* standard used by it against all previous findings. Def. Suppl. Br. 2. The Supreme Court does not simply

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"disavow literal interpretations of the more than *de minimis* cost standard" as the Defendants would have the court believe. Def. Suppl. Br. 2. Rather, the court rejected the *de minimis* standard as the proper interpretation of Title VII accommodations. The Court was clear: "[w]e hold that showing more than a *de minimis* cost, as that phrase is used in common parlance, does not suffice to establish undue hardship under Title VII." *Groff*, 600 U.S at 15 (internal quotations omitted). "Of course, there is a big difference between costs and expenditures that are not 'substantial' and those that are '*de minimis*' which is to say, so 'very small or trifling' that they are not even worth noticing." *Id.* at 12. And, after considering the difference in the definitions *de minimis* and undue hardship, the court concluded that,

> When "undue hardship" is understood in this way, it means something very different from a burden that is merely more than *de minimis* . . .. So considering ordinary meaning while taking *Hardison* as a given, we are pointed toward something closer to *Hardison's* references to "substantial additional costs" or "substantial expenditures." *Id.* at 17.

Finally, the Court accepted the EEOC's references to the minimum accommodations required of employers but was clear: an evaluation of what constitutes an undue hardship must be reevaluated going forward. *Id.* at 19.

B. Application of *Groff* to the instant matter.

1. *PeaceHealth used the "more than de minimis cost" standard in response to the Equal Employment Opportunity Commission complaint.*

PeaceHealth claims that *Groff* does not change its analysis regarding the accommodation of its employees who religiously objected to PeaceHealth's COVID-19 vaccine mandate. Not so, as PeaceHealth explicitly used the *de minimis* standard in its position statement to the EEOC. For example, in PeaceHealth's response to Ms. Zimmerman's EEOC complaint, attached hereto as Exhibit A, Defendants claimed that:

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> An accommodation that would require PeaceHealth "to bear more than a de minimis cost" imposes and undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); *see also* 29 C.F.R. § 1605.2(e)(1). Allowing an unvaccinated employee to work in-person presents more than a de minimis cost to PeaceHealth. The potential spread of COVID-19 to PeaceHealth's employees imposes a non-trivial financial cost on PeaceHealth, as those employees cannot work while quarantining and recovering from COVID-19. Ex. A, at 2.

Clearly, contrary to the claims it is making now in its brief, PeaceHealth utilized the *de minimis* standard, even stating that such a cost would be "non-trivial." Defendants cannot change course to suit the Supreme Court's decision and claim that a substantial cost standard was employed. Furthermore, Defendants present no evidence that the cost of quarantining unvaccinated workers is any greater than the cost of quarantining vaccinated workers, let alone substantially greater. Defendants offer suppositions and bald assertions—no more. Defendants also did not allow an accommodation process; rather, they merely stated that unvaccinated workers could not be allowed upon the property without giving any cost/benefit analysis or engaging in a dialogue of reasonable accommodations—Defendants seemingly forget that Plaintiffs had worked safely during the pandemic until they were placed on leave without pay. Defendants disingenuously argue that this is an acceptable practice and that *Groff* does not address non-financial hardships. *Groff* specifically addresses non-financial hardships such as "reputational" costs and rejects such arguments. Ex. A, at 2. For Defendants to declare that health care workers who safely worked the first year of the pandemic were a risk to their patients, other employees, or PeaceHealth's reputation, and to discipline these same employees without cause or further explanation, is unreasonable, even under the *de minimis* standard.

Groff is clear: for Defendants to meet the standard for an undue hardship, Defendants must show that the requested accommodations, or any other accommodation would amount to a

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substantial cost or an undue hardship, a standard which it cannot meet. Moreover, Defendants never employed such a standard or analysis.

2. *Groff requires Defendants demonstrate that the unvaccinated were a danger to patients regardless of whether they were contagious.*

Defendants treated the unvaccinated as though they were able to transmit COVID regardless of whether the individual carried the disease. This is indisputably unreasonable and unscientific. It is common knowledge, of which the court can take judicial notice, that a person who does not have a contagious disease cannot transmit that disease. *See PPL Mont., LLC v. Montana*, 565 U.S. 576, 593, 132 S. Ct. 1215, 1229 (2012) (quoting *United States v. Utah*, 283 U.S. 64, 77, 51 S. Ct. 438, 441 (1931)). Therefore, Defendants' justification for removing the unvaccinated workers as a constant health risk to patients, other employees, and even the general public **is** both unscientific and unreasonable. For this reason, the denial of accommodations such as regular testing is also unreasonable. The fact that testing would, and did, through the pandemic prior to the mandate help reduce the spread, made it a reasonable accommodation. Likewise, those with prior infections could have been accommodated because they had robust immunity that could not be acquired through vaccination. Further, even after Defendants barred the unvaccinated, they required the vaccinated to continue to use mitigation methods such as wearing personal protective equipment, social distancing, and masking. PeaceHealth could have deployed these measures to reasonably accommodate the unvaccinated employees who were similarly situated to the vaccinated employees as PeaceHealth had used them successfully for approximately a year and a half prior to placing its unvaccinated staff on unpaid leave. Plaintiffs have demonstrated that the failure to accommodate was unreasonable, and that accommodation would have been by no means an undue hardship on Defendants under the *Groff* standard; should the Court desire further

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evidence, upon resolution of the Motion to Dismiss, Plaintiffs will proffer further evidence to support their claims.

3. *Defendants knew that the vaccinated could acquire and transmit COVID at the time it refused to accommodate religious objectors, thus treating the religious objectors differently from similarly situated individuals.*

As alleged in the Complaint, Defendants knew, not only from public announcements of government officials, but also from experience within their own hospitals, that the vaccinated could and did transmit the disease. The only basis upon which to require the vaccine is that vaccination would prevent the transmission of COVID, which it could not. That vaccination decreased the individual's severity of illness makes the choice to become vaccinated a purely personal decision. Without the vaccine's ability to stop transmission, Defendants cannot be excused from accommodating religious vaccine objectors. In fact, by not accommodating religious objectors, Defendants were treating religious objectors differently from other similarly situated individuals – the vaccinate – something neither *Groff* nor Title VII allows.

Defendants claim that it is "indisputable" that the unvaccinated are a safety risk. Def. brief, 4. But that is precisely the dispute at the core of this matter. The CDC's pronouncements that Defendants ask the court to take judicial notice of states that the burden relies upon "fear" of those being treated. Def. brief, 5. *Groff* squarely addresses such bias and animus, calling it "'off the table' for consideration" in the accommodation process. *Groff*, 600 U.S. 14, 20. Fear of unvaccinated workers was generated, not by the unvaccinated, nor by a reasonable assessment, but by the PeaceHealth policy of making vaccination status public through the use of nametags, and by other workers at PeaceHealth telling people to avoid unvaccinated health care workers. Compl. ¶ 150. Fear and animus, especially when perpetrated by decisionmakers, are not legitimate excuses to refuse to accommodate based on *Groff*.

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Similarly, Defendants offer reputational damage as a reason for refusing to accommodate religious objectors. Exhibit A. This, too, demonstrates animus toward religious objectors and is off the table under *Groff*. The Supreme Court points out in footnote 13 of the *Groff* opinion that the rejection of an accommodation based on "customer preference" or "negative stereotypes and perceptions about Muslims" were not legitimate reasons to deny accommodation. *Groff*, 600 U.S at 14 n.13. PeaceHealth's desire to announce it was a one hundred percent vaccinated workplace, as it did on September 1, 2021, is not good cause for denying religious accommodations and is instead evidence of animus.

4. *Groff clarified that Title VII requires that Defendants demonstrate that no accommodations exist that would not disadvantage an employee's employment.*

Under *Groff*, PeaceHealth is required to look beyond the accommodations the employee requests and consider other options to accommodate. However, Defendants failed to do this, even requiring that workers who worked full-time from home be vaccinated in order to purportedly protect the community. Ex. B, at 2. Laboratory workers, such as Plaintiff Branch, could have remained in the laboratory yet, because she had to walk the hallways to access the laboratory when she arrived at work, she was denied such an accommodation, regardless of her willingness to wear a mask or test prior to arriving at work. Such an accommodation is far from undue, especially when PeaceHealth allowed unvaccinated patients and other non-employees on the premises. Additionally, PeaceHealth allowed vaccinated workers who tested positive for COVID to report to work, despite knowing the vaccinated could transmit the disease. Others within the hospital, including traveling nurses, were not vaccinated as discovery will reveal. Thus, Defendants unreasonably denied reasonable accommodations because it treated religious objectors differently than others similarly situated.

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5. *Defendants would not have been violating any laws by reasonably accommodating Plaintiffs as the CMS Rule and State policies allowed for accommodations.*

Defendants could have reasonably accommodated without violating any law. Both the Washington and Oregon vaccine policies and the CMS vaccine policy allowed for employers to grant religious accommodations. Accommodating employees was left up to the employer and was not dictated by state or federal regulation. The CMS rule provides:

> These Federal laws continue to apply during the PHE and, in some instances, require employers to offer accommodations for some individual staff members in some circumstances. These laws do not interfere with or prevent employers from following the guidelines and suggestions made by CDC or public health authorities about steps employers should take to promote public health and safety in light of COVID–19, to the extent such guidelines and suggestions are consistent with the requirements set forth in this regulation. In other words, employers following CDC guidelines and the new requirements in this IFC may also be required to provide appropriate accommodations, to the extent required by Federal law, for employees who request and receive exemption from vaccination because of a disability, medical condition, or sincerely held religious belief, practice, or observance.

86 Fed. Reg. 615698-69 (Nov. 5, 2021).

Further, Washington and Oregon both allowed religious accommodations. *See*: Proclamation of Washington Gov. Jay Inslee No. 21-14.1. Defendants cannot claim that granting Plaintiffs accommodation would amount to an undue hardship under *Groff* because it would be forced to violate law. This claim is nothing short of disingenuous.

6. *Defendants misapprehend the coercion doctrine under the Establishment Clause of the First Amendment of the United States Constitution.*

Defendants baselessly warn the court about violating the Establishment Clause of the First Amendment to the United States Constitution. Defendants begin by noting *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) was "decided while *Hardison's* 'no more than *de minimis* cost' standard held full sway." Def. Suppl. Br. 12. While that may be accurate historically, it does not square with *Groff*, which clarified that the *de minimis* standard was **never**

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the proper standard. Thus, *Abercrombie*, a favorable ruling to the employee, was decided under a lowered standard than should be employed by this Court (and Defendants). In *Groff*, the Court explained the history of *Hardison*, including the fact that the Establishment Clause was expected to "figure prominently" in the decision. *Groff*, 600 U.S. at 7. This never happened, largely because the 1972 amendment to Title VII "was intended to make the Title VII religious discrimination analysis the same as the analysis of claims under the Free Exercise Clause, thereby providing private and public employees with the same rights to be free from religious discrimination. 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph)." *Peterson v. Wilmur Communs., Inc.*, 205 F. Supp. 2d 1014, 1021 (E.D. Wis. 2002); *See also Groff*, 600 U.S. at 9 n.9 ("the Court later clarified that 'Title VII does not demand mere neutrality with regard to the religious practices' but instead 'gives them favored treatment' in order to ensure religious persons' full participation in the workforce.") (quoting *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 775).

Last year, the Supreme Court in *Kennedy v Bremerton School District.*, 142 S. Ct. 2407 (2022) clarified that *Lemon v. Kurtzman*, 403 U.S. 602 (1971) has been abrogated. *Kennedy*, 142 S. Ct. at 2427. In *Kennedy*, the Supreme Court explained that the Establishment Clause "must be interpreted by 'reference to historical practices and understandings,'" and that the Establishment Clause and the Free Exercise Clause have "complimentary purposes, not warring ones." *Id.* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576, 134 S. Ct. 1811 (2014) (plurality opinion)). Under the Establishment Clause, the coercion test involves forcing someone to "make a religious observance compulsory," or to "engage in a formal religious exercise." *Id.* at 2429. Importantly, the query for the Court is not whether others may find the act offensive, but the question is whether the act is tantamount to coercion. Afterall, "[o]ffense . . . does not equate to coercion." *Id.* at 2415 (quoting *Town of Greece*, 572 U. S., at 589, 134 S. Ct. 1811, 188 L. Ed. 2d

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835). Thus, it is not the fact that one must observe or tolerate a religious observance one disagrees with, but whether one is coerced into participation in the observance in question. Here, no such facts have occurred as Defendants were not required to participate in Plaintiffs' religious beliefs; rather, Defendants merely needed accommodate such observance.

Indeed, in this case, the coercive effect is on the Plaintiffs and other religious objectors, not the Defendants. The religious objectors were given a Hobson's choice – either violate their sincerely held religious belief or lose their jobs (or even career as for many Plaintiffs, PeaceHealth holds a veritable monopoly on healthcare jobs in their region). The Plaintiffs are not asking, nor do they have power to insist, that others join them in their religious observance of avoiding the vaccine. Plaintiffs simply ask to observe their own conscience and to follow their sincerely held religious beliefs—this, the law requires. Nothing in any of the Plaintiffs' vaccine exemption requests hint at the idea that anyone should or must join them. Defendants' warning to the Court to avoid Establishment Clause violations demonstrates their hostility and bias against Plaintiff-employees' religious beliefs. Because PeaceHealth does not want to tolerate or is offended by Plaintiffs' religious practice of rejecting these vaccines Defendants would have this Court reject "the First Amendment's double protection for religious expression" and equate private religious expression with "coercing others to participate in it." *Kennedy,* 142 S. Ct. at 2431.

7. *Defendants Admit to Government Actor Status.*

Plaintiffs alleged that Defendants are a government actor for the purposes of the implementation of the challenged vaccine mandate policy. First Amendment Compl., ¶ 195. In their supplemental brief, Defendants admit to government actor status, noting that a failure to adhere to the CMS mandate would amount to "violat[ing] legal requirements of the Omnibus COVID-19 Health Care Staff Vaccination mandate." Def. Supp. Brief, at 9-10. Defendants then

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noted that, the CMS mandate provided that "providers and suppliers that are cited for noncompliance may be subject to enforcement remedies imposed by CMS depending on the level of noncompliance and the remedies available under Federal law" and that "Such penalties would have posed the risk of substantial economic costs that themselves constitute an undue hardship." *Id.* Regardless of potential hardship, Defendants admit that their avoidance of accommodating religious objectors was dictated by the government, despite rules facially allowing for accommodations. In addition to its stated policy of protecting the public, a quintessential government role, Defendants now admit that the basis for denying accommodations was the potential penalization for providing reasonable accommodations. This is more indication that Defendants were working as government actors and should afford Plaintiffs an opportunity to do further discovery on this claim.

8. *Plaintiffs Object to Defendants overlength brief.*

Plaintiffs object to Defendants overlength brief. The local rules have a word limit of 4200 words and Defendants brief is certified at 4,359 words. (LCR 7(e)). Plaintiffs request the court strike the motion in its entirety or any portion thereof in excess of 4,200 words.

III. CONCLUSION

Accepting Plaintiffs allegations as true, the Court should deny the Defendants motion to dismiss. The Defendants have failed to prove that there are not circumstances under which Plaintiffs can prevail or that Plaintiffs have failed to plead all elements of their claim. Plaintiffs dispute the central issues claimed by Defendants, (1) that Defendants used the correct standard under *Groff*, or that Defendants could meet such a standard; (2) that Plaintiffs were dangerous to patients, employees, and/or the community such that there very presence of unvaccinated *employees* in the facility could not be tolerated requiring discipline of such employees; and/or (3)

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that the law would not allow Defendants to accommodate Plaintiffs religious beliefs. Therefore, the motion to dismiss should be denied.

DATED this 1st day of August 2023.

I certify that this memorandum contains 3,934, in compliance with the Local Civil Rules.

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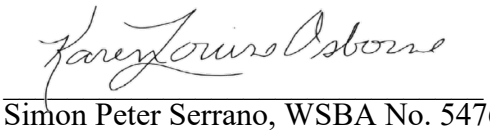

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2023, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which will send notification of such filing to all parties who are registered with the CM/ECF system.

DATED this 1st day of August 2023.

/s/Karen L. Osborne
Karen L. Osborne

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