KAUFMAN DOLOWICH LLP

Judges Are Not 'Employees' of the New York State Court System (as Far as Title VII Is Concerned), by Jordan Sklar, Esq. and Alessandro Angelori, Esq., published in New York Law Journal, 11-3-2023

A recent decision in a vaccine-mandate lawsuit held that state court judges are not "employees" of the court system under Title VII, showing that lawsuits brought in response to pandemic-era employment restrictions have not become moot as the world continues to transition to a post-COVID mindset. Just because the world—and the New York state court system along with it—continues to transition to a post-COVID mindset, that does not mean that the many lawsuits brought in response to pandemic-era employment restrictions have suddenly become moot. To the contrary, a recent decision in a vaccine-mandate lawsuit has just held that state court judges are not "employees" of the court system under Title VII of the Civil Rights Act (Title VII).

Background

As alleged in the complaint, in August 2021, the Chief Judge of New York's Court of Appeals directed that all "employees" of the Office of Court Administration (OCA) had to be vaccinated against COVID-19 unless the employee applied for, and was granted, a religious or medical exemption. The OCA then instituted a Sept. 27, 2021, deadline for all judges to submit proof of COVID-19 vaccinations or an approval for a medical or sincerely-held religious exemption.

On Sept. 21, 2021, Plaintiff Judge Frank Mora, a city court judge in Poughkeepsie, New York, submitted an application for a religious exemption based on his opposition to all immunizations based on his Catholic faith. The OCA's Vaccine Exemption Committee (VEC), was tasked with reviewing Judge Mora's application and requested additional information. On Dec. 23, 2021, Mora's application for a vaccine exemption was denied.

On or around Dec. 6, 2022, Mora filed a lawsuit in the U.S. District Court for the Southern District of New York, claiming that the defendants violated his First and Fourteenth Amendment rights when they denied his application for a religious exemption (Mora v. New York State Unified Court System, Office of Court Administration, et al., 2023 WL 6126386 (S.D.N.Y. 2023)).

Mora alleged that the OCA ordered him to stop conducting criminal proceedings or sit as a presiding judge in county and family courts, allowing him only to appear virtually for civil matters and criminal matters where no appearances are required. Even after the courts started to let unvaccinated persons into the courthouses in November 2022, Mora alleged that he remained prevented from entering the Poughkeepsie courthouse because he had not complied with the vaccine mandate.

The claim most relevant to employment law is Mora's cause of action under Title VII alleging discrimination based on religion. In order to make a prima facie case of religious discrimination under Title VII, a plaintiff must show: (1) that they held a bona fide religious belief conflicting with an employment requirement; (2) that they informed their employer of the belief; and (3) that they were disciplined for failure to comply with the conflicting employment requirement (Baker v. The Home Depot, 445 F.3d 541, 546 (2d Cir. 2006)).

The defendants moved to dismiss Mora's action for failing to state a cause of action. On Sept. 19, 2023, the district court issued a decision granting the defendants' motion. Significantly, the court did not analyze Mora's Title VII claim under the Baker standard. Instead, the court dismissed the Title VII claim against OCA because Mora was deemed not an "employee" of the OCA.

Discussion

*As U.S. District Judge Vincent L. Briccetti noted in the opinion, Title VII defines an employee as "an individual employed by an employer," but specifically excludes "an appointee on the policy making level…" 42 U.S.C. § 2000e(f). Judge Briccetti then held that Mora is a "duly appointed … City Court Judge … who conducts criminal proceedings as a substantial share of [his] workload" and "exercise[s] [ ] discretion concerning issues of public importance" (internal citations omitted) (Mora, 2023 WL 6126486 at *8). Therefore, the court held that Mora fell within the "policymaker exception," and was not an "employee" for Title VII purposes.*

Until this decision, the "policymaker exception" had never been applied in a Title VII action brought by a state court judge before a Second Circuit court. In contrast, the "policymaker exception" was examined in the context of claims made under the Age Discrimination in Employment Act of 1967 (the ADEA).

In Gregory v. Ashcroft, 501 U.S. 452, 467 (1991), the U.S. Supreme Court held that the aforementioned exception is "sufficiently broad" and exempts "appointed state judges." Although Mora argued that Gregory should not apply because it interpreted the definition of an employee under the ADEA and not Title VII, the court rejected that argument since the definition of "employee" was identical in both the ADEA and Title VII.

While the Mora court did not deeply discuss why a judge was a "policymaker," (relying, instead, on the analogous application in Gregory), the Second Circuit court in Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir. 1994) set forth several factors to decide whether or not an employee is a "policymaker."

In brief, Vezzetti stated courts should look at "whether the employee: (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders."

Future Applications

Due to the broad language of the statute, in addition to the Vezzetti factors, courts have previously held that the "policymaker exception" applies to a variety of government workers, not solely state court judges.

In Butler v. New York State Department of Law, 211 F3d 739 (2d Cir. 2000), the Second Circuit dismissed in part a former New York State Law Department deputy bureau chief's complaint after determining that his position was an appointee policymaker exempt from the definition of "employee" under Title VII. Likewise, in Schallop v. New York State Department of Law, 20 F Supp 2d 384 (N.D.N.Y. 1998), the court held that a former assistant attorney general's Title VII claim must be dismissed because her position was also that of a policymaker.

However, there is no "blanket rule," as there are some government positions which do not fall within the "policymaker exception." For example, in Fischer v. New York State Department of Law, 2014 WL 12674462 (S.D.N.Y. 2014), the court found that an Assistant Solicitor General is not considered a "policymaker" as the attributes of her role more closely resembled a supporting staff member to the Solicitor General rather than a policymaker in her own right.

Conclusion

Mora's challenge to the OCA's vaccination requirement has resolved for now the ambiguity regarding the applicability to state court judges of the "policymaker exception" and Title VII's definition of an "employee." However, given the way the COVID-19 pandemic unexpectedly changed the way the workplace functions, another large-scale event may well prompt other government employees to challenge the definition of an "employee" under Title VII.

Public employers who look to implement workplace restrictions and requirements should be aware of the status of their employees under Title VII and any state or federal employee protection laws.

Jordan Sklar *is a partner in the White Plains, NY, office of Kaufman Dolowich. His practice focuses on professional liability as well as labor and employment law. He has extensive litigation experience, including appellate work, and has argued before the New York State Appellate Division and the Court of Appeals, as well as the Second Circuit Court of Appeals.*

Alessandro J. Angelori *is an associate in the White Plains, NY, office of Kaufman Dolowich. His practice focuses on labor and employment law, insurance litigation and coverage, intellectual property matters and general liability defense.*

Reprinted with permission from the Nov. 3, 2023 edition of "The New York Law Journal"© 2023 ALM Global Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-256-2472 or reprints@alm.com

© 2026 Kaufman Dolowich. All Rights Reserved. | www.kaufmandolowich.com