United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 13, 2022
Lyle W. Cayce
Clerk

No. 21-20311

JENNIFER BRIDGES; BOB NEVENS; MARIA TREVINO; RICARDO ZELANTE; LATRICIA BLANK; ET AL.,

Plaintiffs—Appellants,

versus

THE METHODIST HOSPITAL, *doing business as* HOUSTON METHODIST; METHODIST HEALTH CENTERS, *doing business as* HOUSTON METHODIST THE WOODLANDS HOSPITAL,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC 4:21-CV-1774

Before JOLLY, ELROD, and HAYNES*, *Circuit Judges*.

PER CURIAM:**

Houston Methodist (HM) hospitals imposed a mandatory COVID-19 vaccination policy on its employees. Plaintiffs, former employees of HM,

* Judge Haynes concurs in the judgment only.

** Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

allege that they were fired or were going to be fired for refusing to receive the COVID-19 vaccine, as required by the policy. They sued HM for violations of federal law and regulations and for wrongful discharge under Texas law. The district court granted HM's motion to dismiss under Rule 12(b)(6), and plaintiffs appealed. Because plaintiffs do not demonstrate any error in the district court's judgment on the arguments made in that court but instead make an entirely new argument on appeal, we AFFIRM the district court's dismissal of plaintiffs' complaint.

On April 1, 2021, Defendant Houston Methodist[1] announced a mandatory vaccination policy for its employees. The policy was rolled out in two phases, the first applying only to management employees and the second applying to everyone else. Under the policy, HM required employees to either be fully vaccinated (pursuant to either a one- or two-dose vaccine), within a certain period of time, or else apply for exemptions based on medical condition or sincerely held religious belief. Employees who failed to comply with the policy by a certain date—namely, by being vaccinated or qualifying for an exemption—were placed on a two-week, unpaid suspension. Failure to comply with the policy by the end of the two-week suspension would result in immediate dismissal.

Plaintiffs filed suit on May 28, 2021, in Texas state court. HM removed the case to federal court and filed a Rule 12(b)(6) motion to dismiss. In response, plaintiffs filed an amended complaint, the operative complaint here. The complaint set forth three claims: (1) wrongful discharge under

[1] Houston Methodist is a hospital system composed of, among other entities, defendant-appellee The Methodist Hospital, *doing business as* Houston Methodist, and defendant-appellee Methodist Health Centers, *doing business as* Houston Methodist The Woodlands Hospital. For convenience, we refer to the defendant-appellees in this case as Houston Methodist (HM).

Sabine-Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985), for violating public policy by forcing plaintiffs to engage in an illegal act; (2) wrongful discharge for violating public policy by forcing plaintiffs to receive an experimental vaccine; and (3) violations of federal law and regulations, including 21 U.S.C. § 360bbb-3, 41 C.F.R. 46.101, 46.102, and 46.116, for failure to advise plaintiffs of the risks and benefits of the vaccine and to provide an option to accept or refuse the vaccine. HM filed another Rule 12(b)(6) motion to dismiss, which the district court granted. Plaintiffs appeal that decision.[2]

This court reviews dismissals under Rule 12(b)(6) *de novo*. *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim for relief may be foreclosed "on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

Plaintiffs appeal only the district court's dismissal of their second claim. They argue that firing an employee for her refusal to receive an experimental COVID-19 vaccine violates public policy and merits an exception to Texas's general rule of at-will employment.[3] Pointing to the Supreme Court of Texas's decision in *Sabine Pilot*, 687 S.W.2d at 735,

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[2] HM removed this case to federal court on the basis of federal-question jurisdiction, 28 U.S.C. § 1331, which was implicated by the plaintiffs' claim that HM violated federal law and regulations. *See* 28 U.S.C. § 1441. We have jurisdiction over this final decision of the district court under 28 U.S.C. § 1291.

[3] "The long standing rule in Texas is that employment for an indefinite term may be terminated at will and without cause." *Winters v. Hous. Chron. Pub. Co.*, 795 S.W.2d 723, 723 (Tex. 1990); *see also Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 659 (Tex. 2012).

plaintiffs ask this court to hold that they have stated a claim for wrongful discharge under Texas law.

In *Sabine Pilot*, the Supreme Court of Texas recognized an exception to the general employment-at-will doctrine. *Id.* At issue was whether "an allegation by an employee that he was discharged for refusing to perform an illegal act states a cause of action" for wrongful discharge. *Id.* at 734. The court held that "public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception" to at-will employment. *Id.* at 735. This narrow exception "covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act." *Id.*

Plaintiffs argue that the logic underlying *Sabine Pilot*'s exception for refusals to perform an illegal act should also apply to refusals to receive the (at that time) experimental COVID-19 vaccines.

However, we agree with the district court that plaintiffs' alleged violations of federal law are insufficient to show any violation of public policy for purposes of an at-will-employment exception. Indeed, plaintiffs hardly protest on appeal. Instead of reasserting their reliance on alleged violations of federal law and regulations, plaintiffs have pivoted to alleged violations of Texas law and executive orders, and now even equivocate on whether federal law supports their claim.[4] Federal law does not, and the district court did not err in dismissing plaintiffs' claim.

[4] We need not reach plaintiffs' new contentions that Texas law and executive orders are the source of a public-policy exception. In light of the principles of federalism that chaperone our interpretation of Texas law, hazarding a first guess, on appeal, on the meaning of state law is ill-advised.

We also decline plaintiffs' invitation to certify this question to the Supreme Court of Texas, as plaintiffs did not raise in district court an issue worthy of certification. This court's respect for federal–state comity makes it "chary about certifying questions of law absent a compelling reason to do so," *Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247 (5th Cir. 1997), and there is no compelling reason to do so here.

* * *

For these reasons, we AFFIRM.

United States Court of Appeals

FIFTH CIRCUIT
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June 13, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 21-20311 Bridges v. Methodist Hospital
USDC No. 4:21-CV-1774

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that each party bear its own costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Whitney M. Jett, Deputy Clerk

Enclosure(s)

Mr. Grant Bellows Martinez
Mr. Daniel F. Patton
Ms. Constance Hankins Pfeiffer
Ms. Jill Schumacher
Mr. Michael W. Twomey
Mr. Christian J. Ward
Mr. Jared Ryker Woodfill V