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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Mally Gage,

Plaintiff,

v.

Mayo Clinic et al.,

Defendants.

No. CV 2:22-CV-02091-SMM

## ORDER

Pending before the Court is Defendants' Motion to Dismiss Plaintiff's Amended Complaint. (Doc. 25). The Motion has been fully briefed. (Docs. 25, 26, 29). For the following reasons, the Court grants Defendants' Motion to Dismiss.

### I. BACKGROUND

*Pro se* Plaintiff Mally Gage interviewed for and was offered a position as an inpatient pharmacist with Defendant Mayo Clinic Arizona ("Defendant") in March of 2022. (Doc. 19 at 3). At the time, Defendant required all employees to be fully vaccinated against COVID-19 unless granted a religious exemption (Id. at 3–4). Defendant provided new employees with a Religious Accommodation Request Form ("Accommodation Form") through which employees could request an exemption from the requirement. (Id. at 2). The Accommodation Form gave applicants 500 characters to explain their religious beliefs, required disclosure of any vaccinations

received within the past five years and asked whether the applicant's religious beliefs had changed over time. (Id.) The Accommodation Form also asked applicants if they had any objection to the use of fetal cell lines. (Id.) If answered affirmatively, the Accommodation Form then listed between twenty to thirty drugs that use such cell lines. (Id.) If any applicant confirmed the use of any of these drugs, the Accommodation Form presented them with two options: they could state that they would stop taking the drugs and "act consistent with [their] religious beliefs" or continue taking the drugs and admit that their beliefs were insincere. (Id.) The Accommodation Form also, Plaintiff alleges, required "the forfeiture of rights including but not limited to agreeing to disparate treatments, forgoing additional Requests for Accommodations and agreement to possible termination." (Id. at 2).

Rather than fill out the provided form, Plaintiff submitted to Defendant her own two-page request for a religious exemption along with an explanation for her refusal to fill out the online Accommodation Form. (Id. at 4, 9, 11). On March 22, Plaintiff was informed that Defendant's Religious Exemption Committee would not address her exemption request and would only accept such a request through the online Accommodation Form. (Id. at 4). On March 23, Plaintiff informed Defendant that she would not be submitting her exemption request through the Accommodation Form and that she planned to submit an Equal Employment Opportunity Commission (EEOC) charge, which she submitted soon after. (Id.) Later that day, Defendant completed a Post Offer Placement Assessment during which Plaintiff stated that she was 24 weeks pregnant. (Id. at 5). On March 25,

Defendant left Plaintiff a voicemail stating that she would be required to fill out the Accommodation Form as a term of employment. (Id.) In response, Plaintiff partially filled out the Accommodation Form. (Id. at 6). On March 28, Defendant informed Plaintiff that it would only accept the Accommodation Form filled out in its entirety. (Id.) After Plaintiff repeated that she would not fill out an online form that she deemed to be illegal, Defendant terminated her employment. (Id. at 6–7).

On December 12, 2022, Plaintiff filed a Complaint in this Court. (Doc. 1). On March 24, 2023, Defendant filed a Motion to Dismiss for Failure to State a Claim. (Doc. 15). This Court granted the Motion on May 3, 2023, dismissing Plaintiff's complaint and granting Plaintiff leave to amend. (Doc. 18). Plaintiff filed a First Amended Complaint (FAC) on May 19, 2023, (Doc. 19), adding Defendant Mayo Clinic Arizona, and Defendants filed a Motion to Dismiss Plaintiff's FAC on the same grounds on July 24, 2023. (Doc. 25). It is this Motion to Dismiss that is now before the Court.

## II. LEGAL STANDARD

Courts must liberally construe the pleadings of pro se plaintiffs. Draper v. Rosario, 836 F.3d 1072, 1089 (9th Cir. 2016). Yet such pleadings must still comply with recognized pleading standards. Ghazali v. Moran, 46 F.3d 52, 52 (9th Cir. 1995). A pleading must contain "a short and plain statement of the claim *showing* that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). The pleading must "put defendants fairly on notice of the claims against them." McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991). While Rule 8 does not demand

detailed factual allegations, "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 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Threadbare recitals of the elements of a cause action, supported by mere conclusory statements, do not suffice." Id.

Motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). In evaluating a motion to dismiss, a court will "accept the factual allegations of the complaint as true and construe them in the light most favorable to the plaintiff." AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 636 (9th Cir. 2012).

## III. DISCUSSION

As an initial matter, the Court will address Plaintiff's arguments regarding *pro se* pleading standards. Plaintiff argues in her Response to Defendants' Motion to Dismiss that she is wrongly being subjected to heightened pleading standards as a *pro se* litigant. (Doc. 26 at 1).

The Supreme Court held in Swierkiewicz v. Sorema N.A. that "an employment discrimination plaintiff need not plead a prima facie case of

discrimination." 534 U.S. 506, 508 (2002). Instead, plaintiffs were only required to state a short and plain statement of the claim sufficient to "give the defendants fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). However, the pleading standard articulated in Conley—and relied upon in Swierkiewicz—is no longer the standard for pleading a cause of action. The Supreme Court in Twombly raised the standards for pleading, holding that plaintiffs must plead enough facts to state a claim for relief which is plausible on its face. Twombly, 550 U.S. at 547. The Supreme Court in Iqbal then applied the standard it articulated in Twombly to all civil actions. 556 U.S. at 678.

The Ninth Circuit in Starr v. Baca articulated the principals in common between Swierkiewicz and the subsequent decisions:

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

652 F.3d 1202, 1216 (9th Cir. 2011). Thus, although Plaintiff need not include "heightened fact pleading of specifics," Plaintiff still must allege facts that state a plausible claim for relief. Id.

Though Plaintiff is correct in distinguishing between standards for summary judgment and Rule 12 motions to dismiss, Plaintiff's contention that she is being subjected to inflated pleading requirements is misplaced. There is no "expert legal

theory" being required of Plaintiff. Rather, specific causes of action—such as religious discrimination under Title VII—can be pleaded under various theories supporting a claim for relief, and different theories require distinct allegations in order to comprise a viable cause of action. Simply stating that she was discriminated against does not establish a claim which "is plausible on its face" and cannot survive a 12(b)(6) motion to dismiss.

Plaintiff is correct in that she does not need to prove a prima facie case at this point. See Swierkiewicz, 534 U.S. at 510–11 ("This Court has never indicated that the requirements for establishing a prima facie case under McDonnell Douglas also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."). However, Plaintiff still must plead a *plausible* claim for relief, which requires examining the substance of Plaintiff's allegations. If Plaintiff does not allege facts that support a claim of employment discrimination, the Court cannot find that Plaintiff has stated a plausible claim for relief. Plaintiff's pleadings are construed liberally as a pro se plaintiff, but Plaintiff must still allege more than legal conclusions.

**A. Religious discrimination**

Plaintiff raises a cause of action for religious discrimination under Title VII in her FAC. (Doc. 19). Claims under Title VII for religious discrimination may be asserted under various theories, the most common being disparate treatment and failure to accommodate. See Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004). As with Plaintiff's first Complaint, Plaintiff does not delineate a

specific theory of discrimination under Title VII, but Plaintiff's FAC suggests both failure to accommodate and disparate treatment claims. Defendant moves to dismiss both religious discrimination claims on the grounds that Plaintiff has again failed to state a claim upon which relief can be granted. (Doc. 25). The Court evaluates Plaintiff's claims in turn.

**1. Failure to Accommodate**

Title VII requires employers to reasonably accommodate an applicant's sincerely held beliefs should those beliefs conflict with a job requirement. Groff v. DeJoy, 143 S. Ct. 2279, 2287–88 (2023). Such an accommodation is required unless it "would result in substantial increased costs in relation to the conduct of [the employer's] particular business." Id. at 2295. Courts employ a two-part burden-shifting framework to analyze failure to accommodate claims. First, a plaintiff must show that "(1) [s]he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) [s]he informed [her] employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected [her] to an adverse employment action because of [her] inability to fulfill the job requirement." Peterson, 358 F.3d at 606. Once a plaintiff has established a prima facie case, the employer must then "establish that it initiated good faith efforts to accommodate the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship." Id. (citation omitted).

As an initial matter, it is not the Court's purpose at this stage of the proceedings to render judgment on whether Plaintiff's beliefs are sufficiently tied to

the particular tenets of her religion. See Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[T]he resolution of [whether a belief is religious] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection."). In evaluating whether a plaintiff has sufficiently pleaded a sincerely held religious belief, the Court must avoid "second-guessing the reasonableness of an individual's assertion that a requirement burdens her religious beliefs." Bolden-Hardge v. Off. of Cal. State Controller, 63 F.4th 1215, 1223 (9th Cir. 2023). The role of the Court is instead to determine whether Plaintiff "has alleged an actual conflict" between her religious beliefs and an employment requirement. Id. Conversely, the Court is not required to "take plaintiffs' conclusory assertions of violations of their religious beliefs at face value." Id.

In a "Legal Dossier" Plaintiff sent to Defendants in lieu of completing the religious exemption form, Plaintiff describes herself as a devoted Christian.[1] (Doc. 19 at 39). Plaintiff believes that "God has given [her] direction to abstain from [the COVID-19] vaccine." (Id.) Plaintiff believes, per her interpretation of Biblical passages, that she must submit to her husband, who "leads in abstaining" from vaccination. (Id.) Plaintiff believes that her body is a temple for the Holy Spirit and that the "immoral and unethical" use of fetal stem cells in development of the

[1] Plaintiff has attached this document as one of numerous exhibits to her Amended Complaint. Exhibits are considered as "part of the pleading for all purposes." Fed. R. Civ. P. 10(c).

COVID-19 vaccine renders the vaccines "unrighteous for [Plaintiff] to put in [her] body." (Id.)

Several recent cases have addressed religious objections to COVID-19 vaccination based on the use of fetal stem cells during development of the available vaccines, with varying results. Compare Kiel v. Mayo Clinic Health Sys. S.E. Minn., Nos. 22-1319 et al., 2023 WL 5000255, at *8–10 (D. Minn. Aug. 4, 2023) (finding that plaintiffs had not pleaded bona fide religious beliefs because they failed to tie their opposition to fetal cell use to particularized religious beliefs), and Winans v. Cox Auto., Inc., No. 22-3826, 2023 WL 2975872, at *4 (E.D. Penn. Apr. 17, 2023) (finding that plaintiff failed to plead a sincerely held religious belief), with Algarin v. NYC Health + Hosp. Corp., No. 22-8340, 2023 WL 4157164, at *7 (S.D.N.Y. June 23, 2023) (finding that plaintiff pleaded a sincerely held religious belief), Corrales v. Montefiore Med. Ctr., No. 22-1329, 2023 WL 2711415, at *5–6 (S.D.N.Y. Mar. 30, 2023) (finding that plaintiff pleaded a prima facie case of discrimination), and Keene v. City & Cnty. of S.F., No. 22-16567, 2023 WL 3451687, at *2 (9th Cir. May 15, 2023) (finding that district court erred in holding that plaintiffs had failed to assert sincere beliefs because their beliefs were not scientifically accurate).

Bearing in mind that the burden for asserting a conflict is "fairly minimal," see Bolden-Hardge, 63 F.4th at 1223, the Court finds that Plaintiff has alleged a "bona fide" religious belief which is sufficient to overcome a 12(b)(6) motion to dismiss. See Keene, 2023 WL 3451687, at *2 ("A religious belief need not be consistent or rational to be protected under Title VII, and assertion of a sincere

religious belief is generally accepted."). Though Plaintiff raises moral and ethical points that appear to be rooted in personal, rather than religious, beliefs, Plaintiff has asserted that she holds a sincere belief that conflicts with Defendant Mayo Clinic's policy, and the Court will not second-guess Plaintiff's assertions.

Defendants do not dispute in the Motion to Dismiss that Plaintiff has sufficiently pleaded the second and third elements of a failure to accommodate claim, and so the Court will not address those here.

Having found that Plaintiff has alleged a prima facie failure to accommodate claim, the burden then shifts to Defendants to contend that good faith efforts were made to accommodate Plaintiff's beliefs, or that Defendants could not make such efforts without undue hardship. See Peterson, 358 F.3d at 606.

An employer has a duty to offer a potential accommodation when requested by an employee for religious reasons. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977); Opuku-Boateng v. California, 95 F.3d 1461, 1467 (9th Cir. 1996). If the proposed accommodation "fails to eliminate the affected employee's religious conflict, the employer must implement an alternative accommodation proposed by the employee, unless the employer proves that the accommodation would cause 'undue hardship' to the employer." Am. Postal Workers Union, S.F. Loc. v. Postmaster Gen., 781 F.2d 772, 776 (citing Burns, 589 F.2d at 407). However, "although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy [her] needs through means offered by the employer. In other words, a reasonable

accommodation need not be on the employee's terms only." Am. Postal Workers Union, 781 F.2d at 777.

The inquiry into whether Defendants made good faith efforts to accommodate Plaintiff's beliefs begins with the question of whether Defendants offered a potential accommodation to Plaintiff. However, Defendants do not argue that Defendants offered an accommodation, instead, Defendants argue that Plaintiff's claims are foreclosed by the fact that Plaintiff failed to utilize Defendants' established procedure—here, the Accommodation Form—for requesting a religious accommodation. (Doc. 25 at 6–8).[2] (Id.) Defendants cite to several cases to support the assertion that employees must follow an employer's accommodation request process. See Somos v. Classic MS, LLC, No. 1:22 CV 1081, 2022 WL 4483917, at *3 (N.D. Ohio Sept. 27, 2022); Miceli v. JetBlue Airways Corp., 914 F.3d 73, 82–83 (1st Cir. 2019); Vitti v. Macy's Inc., 758 F. App'x 153, 157–58 (2d Cir. 2018); Christianson v. Boeing Co., Case No. C20-1439RSM, 2022 WL 1486432, at *3; Bresloff-Hernandez v. Horn, 05 Vic. 0384 (JGK), at *25–26 (S.D.N.Y. Sept. 21, 2007); Lundquist v. Univ. of South Dakota Sanford Sch. of Med., No. 09-4147-RAL, 2011 WL 5326074, at *8–9 (D.S.D. Nov. 4, 2013); Aycox v. City of Gainesville, No. 1:10CV51-WS-GRJ, 2013 WL 5676591, at *6 (N.D. Fla. Oct. 17, 2013).

[2] Defendant argues that there was "no obligation to engage in the interactive process" because Plaintiff failed to submit the Accommodation Form. The Court notes that Plaintiff has also raised arguments concerning a required interactive process. (Doc. 19 at 4, 6, 10). The interactive process is a requirement for accommodations made under the Americans with Disabilities Act. See Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002). The Ninth Circuit has not extended the requirement to religious accommodations.

The cases which Defendants cite are distinguishable from the facts of this case. As an initial matter, most of the cases are disability accommodation cases, not Title VII religious accommodation cases. See, e.g., Miceli, 914 F.3d at 82–83; Vitti, 758 F. App'x at 157–58; Christianson, 2022 WL 1486432, at *3. These cases are also distinguishable because the employers' request processes and procedures do not appear to require the employee to agree to terms of an accommodation; they are wholly procedural processes.

Defendants have additionally referenced the EEOC's own Religious Accommodation Request Form—available on the EEOC website—to support Defendants' requirement that employees complete a standardized form. (Doc. 25 at 8); Equal Opportunity Emp. Comm'n, Religious Accommodation Request Form, https://perma.cc/3XV9-TM6S. The EEOC's form is irrelevant to the Court's analysis. The form's terms appear to be wholly dissimilar to Mayo Clinic Arizona's Accommodation Form; the EEOC form contains no character limit for applicants to express the sincerity of their beliefs, no requirement that an employee agree to stop medications inconsistent with their beliefs, no requirement that an employee submit proof of the duration of their beliefs, and no requirement that an employee accept terms and conditions of an accommodation. In lieu of providing Defendants' own form to the Court, Defendants apparently seek to validate Mayo Clinic Arizona's Accommodation Form via an entirely different and decidedly less demanding form.

While Defendants characterize the Accommodation Form as a "preliminary inquiry into whether an accommodation should be considered," the Accommodation Form required applicants to agree to specific terms and conditions of an exemption. Because of this, the Accommodation Form goes beyond the sort of accommodation request processes considered in the cases to which Defendants cite. Rather, the Court finds that the Form constitutes a proposed accommodation on the part of Defendants.

The next inquiry is whether Defendants' proposed accommodation would have removed the conflict between Plaintiff's work requirements and religious beliefs. The purpose of Defendant's Accommodation Form was to provide employees with an avenue to avoid COVID-19 vaccination for religious reasons. Thus, Defendants' Accommodation Form, if submitted and approved, would have permitted Plaintiff to forgo COVID-19 vaccination. Accordingly, Defendants' proposed accommodation would have removed the conflict between Plaintiff's work requirements and Plaintiff's bona fide religious beliefs.

The Court next considers whether Defendants' offered accommodation was reasonable. See Am. Postal Workers Union, 781 F.2d at 776. ("Where an employer proposes an accommodation which effectively eliminates the religious conflict faced by a particular employee . . . the inquiry under Title VII reduces to whether the accommodation reasonably preserves the affected employee's employment status."). A reasonable accommodation is one which itself is not discriminatory, see Ansonia Board of Education v. Philbrook, 479 U.S. 60, 70–71 (1986), and one which does not

adversely impact the employee's employment status. See Am. Postal Workers Union, 781 F.2d at 776–77; see also 42 U.S.C. § 2000e-2(a)(2). Title VII requires an employer to accommodate an employee's religious beliefs "in a manner which will reasonably preserve that employee's employment status, i.e., compensation, terms, conditions, or privileges of employment." Id. at 776.

Plaintiff argues that the proposed accommodation was unreasonable, and that agreeing to the terms of Defendants' Accommodation Form would have waived her Title VII rights. Plaintiff largely objects to the terms of the Accommodation Form because some of the terms—namely, terms requiring face masks and frequent PCR testing—were inconsistent with Plaintiff's own proposed accommodations. However, an employer is only obligated to accept an employee's proposed accommodations when the employer's own accommodation fails to remove the employee's religious conflict. Am. Postal Workers Union, 781 F.2d at 776. Plaintiff does not allege a religious conflict with the terms of Defendants' proposed accommodation. Rather, Plaintiff's objections appear to be secular in nature. An employer is not required to accept an employee's proposed accommodation when "the employee rejects an accommodation posed by the employer solely on secular grounds." Id.

Plaintiff's contentions with the terms of Defendants' proposed accommodation appear to be unrelated to her religious conflict with receiving COVID-19 vaccination. For instance, Plaintiff objects to questions pertaining to Plaintiff's vaccination history and to the duration of Plaintiff's religious beliefs. Plaintiff

further objects to the number of characters allotted on the Accommodation Form for an individual requesting an exemption to explain their religious beliefs. The Court agrees with Plaintiff that the 500-character limit is unnecessarily restrictive and would make it exceedingly difficult for an applicant to express the details and sincerity of their beliefs. However, Plaintiff never submitted the Accommodation Form, and so Plaintiff's answers to those questions were not used to deny her an accommodation. Consequently, the Court will not scrutinize the questions asked in the Form.

Plaintiff alleges that agreeing to the terms of the Accommodation Form would have forfeited Plaintiff's Title VII rights, but Plaintiff does not plausibly allege how. The courts have been clear that "a reasonable accommodation need not be on the employee's terms only." Am. Postal Workers Union, 781 F.2d at 777. The Court finds that Defendant's proposed accommodation constitutes a good faith effort on the part of Defendant to reasonably accommodate Plaintiff's religious objections to COVID-19 vaccination. See Anderson, 589 F.2d at 401. However, for secular reasons, Plaintiff did not utilize the means to an accommodation offered by Defendant, even when informed that it was mandatory in order to be considered for an exemption. Consequently, Plaintiff did not make a good faith attempt to resolve the conflict "through means offered by the employer" and did not fulfill her duty to cooperate. Am. Postal Workers Union, 781 F.2d at 777; see also Heller, 8 F.3d at 1440. As such, Plaintiff has not plausibly stated a failure to accommodate claim under Title VII.

### 2. Disparate Treatment

Pleading a disparate treatment claim requires the Plaintiff to show that "(1) [s]he is a member of a protected class; (2) [s]he was qualified for her position; (3) [s]he experienced an adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." Peterson, 358 F.3d at 603; see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Court finds that Plaintiff has not pleaded a plausible claim of disparate treatment.

The Court previously found that Plaintiff had adequately pleaded the second and third elements of a disparate treatment claim but had not pleaded the first element. The Court interpreted Plaintiff's complaint as alleging that nonvaccinated individuals were a protected class, which is not the case under Title VII. By amending and adding exhibits to supplement her Complaint that describe her Christian faith, Plaintiff has now adequately pleaded the first element. The Court thus finds that Plaintiff, as a practicing Christian, is a member of a protected class.

The fourth and final element requires that Plaintiff plausibly allege that individuals outside her protected class were treated more favorably, or other circumstances give rise to an inference of discrimination. See Peterson, 358 F.3d at 603. Defendants argue that Plaintiff has not presented facts which would allow the Court to reach the conclusion that non-Christians were treated more favorably by Defendants than Christians. (Id.) The Court agrees. Plaintiff only alleges that

vaccinated employees were treated more favorably than unvaccinated employees because unvaccinated employees were subject to additional measures to prevent the spread of COVID-19. Plaintiff has not alleged facts sufficient to suggest that this amounts to disparate treatments of Christians, or more favorable treatment of non-Christians. As such, the Court finds that Plaintiff has not pleaded a plausible claim of disparate treatment on the basis of religion.

**B. Retaliation**

Plaintiff's second cause of action alleges retaliation under Title VII. For this claim, Plaintiff must show that: (1) she engaged in protected activity, (2), she suffered an adverse employment action, and (3) the two are causally linked. See Porter v. Cal. Dep't of Corr., 419 F.3d 885, 894 (9th Cir. 2005). To establish a causal connection between her protected activity and the adverse actions, a plaintiff may allege direct or circumstantial evidence from which causation can be inferred, such as an employer's "pattern of antagonism following the protected conduct," id. at 895, or the temporal proximity of the protected activity and the occurrence of the adverse action. Pardi v. Kaiser Found. Hosp., 389 F.3d 840, 850 (9th Cir. 2004); Bell v. Clackamas Cnty., 341 F.3d 858, 865 (9th Cir. 2003).

As with before, Plaintiff has adequately pleaded the first two elements of a retaliation claim. Plaintiff filed a claim with the EEOC—a protected activity—and then suffered the adverse employment action of termination. The issue is whether Plaintiff has plausibly alleged that the two are causally linked.

Plaintiff's Exhibit H, attached to her FAC, shows that—after some back-and-forth through e-mails regarding the Accommodation Form—Plaintiff informed Defendants' Preboarding Coordinator Pang Her on March 23, 2022 that Plaintiff would file a charge of discrimination to the EEOC. (Doc. 19 at 61). Plaintiff received a response on March 25 from Sarah Lee, a Senior Recruiter for Defendant Mayo Clinic Arizona, informing Plaintiff that Plaintiff was required to complete the Accommodation Form, and failure to complete the form would be considered a "back out of hire." (Id. at 64). A subsequent e-mail from Sarah Lee stated that "I will be plan [sic] to process the back out of hire next week unless I hear that you plan to complete the form." (Id. at 66).

Although the temporal proximity of Plaintiff's protected activity and her termination support Plaintiff's retaliation claim, the e-mails suggest that Plaintiff's refusal to fill out the Accommodation Form, rather than Plaintiff's filing of an EEOC charge, was the cause of her termination. It is apparent that Defendants' policy required employees to either receive COVID-19 vaccination or obtain an exemption from that policy. When Plaintiff refused to do either, Defendants warned Plaintiff that she could be terminated. Plaintiff has not plausibly alleged that the filing of her EEOC complaint and her termination are causally linked; as such, the Court finds that Plaintiff has not pleaded a prima facie case of retaliation.

**C. Pregnancy discrimination**

Plaintiff's final claim alleges that Defendants discriminated her based on her pregnancy. (Doc. 19 at 16). Under the Pregnancy Discrimination Act, "for all Title

VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983). Therefore, to establish a prima facie case of pregnancy discrimination, Plaintiff must plead a prima facie case of sex discrimination, showing that: (1) she belongs to a protected class; (2) she was qualified for her position; (3) she was subject to an adverse employment action; and (4) similarly situated individuals outside her protected class were treated more favorably." Davis v. Team Elec. Co., 520 F.3d 1080, 1090 (9th Cir. 2008). These are the same elements as those of Plaintiff's disparate treatment claim.

The Court agrees with Defendants that Plaintiff still has not pleaded a plausible claim of pregnancy discrimination. Plaintiff's FAC does not differ significantly from Plaintiff's initial Complaint with regards to this claim, and the Court dismissed Plaintiff's initial Complaint because Plaintiff failed to allege the fourth element of a prima facie case. Plaintiff's FAC does not adequately allege that individuals outside her protected class were treated more favorably by Defendants. Plaintiff's pleadings show that Plaintiff and Defendants communicated about the exemption form well before Plaintiff notified Defendants of her pregnancy, and Plaintiff was ultimately terminated due to her refusal to fill out the online form. There is no indication in the pleadings that Plaintiff's pregnancy was a factor in her termination. Because the factual allegations do not allow the Court to draw any reasonable inference that Defendants are liable for pregnancy discrimination, the

Court therefore grants Defendants' Motion to Dismiss as it relates to Plaintiff's Title VII claim of pregnancy discrimination.

### D. Proper Defendant

Defendant Mayo Clinic continues to maintain that it is not a proper defendant to this case because Plaintiff was hired by Mayo Clinic Arizona, a separate corporate entity. (Doc. 25 at 16–17). Because the Court dismisses Plaintiff's FAC without leave to amend, the Court need not address whether Defendant Mayo Clinic is a proper defendant.

## IV. CONCLUSION

The Court finds that Plaintiff has not stated plausible claims under Title VII. The Court therefore grants Defendants' Motion to Dismiss and dismisses Plaintiff's First Amended Complaint without further leave to amend.

Accordingly,

**IT IS HEREBY ORDERED granting** Defendants' Motion to Dismiss. (Doc. 25).

**IT IS FURTHER ORDERED** dismissing without prejudice Plaintiff's First Amended Complaint. (Doc 19).

**IT IS FURTHER ORDERED** directing the Clerk of Court to terminate this case. Dated this 15th day of December, 2023.

**NOT FOR PUBLICATION**

FILED

JUN 23 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MALLY GAGE,

Plaintiff - Appellant,

v.

MAYO CLINIC; MAYO CLINIC - ARIZONA,

Defendants - Appellees.

No. 23-4410

D.C. No.
2:22-cv-02091-SMM

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Submitted June 18, 2025**

Before: SANCHEZ, H.A. THOMAS, and DESAI, Circuit Judges.

Mally Gage appeals the district court's dismissal of her First Amended Complaint ("FAC") for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). "We review *de novo* the district court's grant of a motion to dismiss under

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). "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) (quotation omitted).[1] We review the district court's grant of an extension of time under Federal Rule of Civil Procedure 6(b) for abuse of discretion. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258 (9th Cir. 2010). We have jurisdiction under 28 U.S.C. § 1291. We affirm.

1. The FAC fails to state a claim of religious discrimination under Title VII. *See* 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1). First, the FAC does not plausibly allege that Mayo Clinic and Mayo Clinic Arizona (collectively, "Mayo") failed to accommodate Gage's religious conflict with its COVID vaccination requirement. We use a burden-shifting framework to evaluate failure to accommodate claims. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004). If a plaintiff pleads a prima face case of failure to accommodate, the burden shifts to the employer "to show that it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the

[1] The district court properly applied this standard when it determined that the FAC failed to state a claim.

employee without undue hardship." *Id.* (quotation omitted). An employer meets its burden if it offers a reasonable accommodation that eliminates the employee's religious conflict. *Am. Postal Workers Union, S.F. Loc. v. Postmaster Gen.*, 781 F.2d 772, 777 (9th Cir. 1986).

Here, the FAC pleads facts indicating that Mayo made good faith efforts to accommodate Gage. The FAC alleges that Mayo's religious accommodation request form included substantive conditions—such as masking and frequent COVID testing—to which Gage had to agree when submitting her exemption request. The form thus proposed a reasonable accommodation: if granted an exemption, Gage would not have to receive the COVID vaccine, but she would need to undergo other measures to mitigate her risk of transmitting COVID. *Cf. Hudson v. W. Airlines, Inc.*, 851 F.2d 261, 266 (9th Cir. 1988) (treating scheduling processes offered in a collective bargaining agreement as a reasonable accommodation for an employee's religious conflict). Because this accommodation would resolve Gage's religious conflict with Mayo's vaccination requirement, Mayo satisfied its burden under Title VII. *See Am. Postal Workers Union*, 781 F.2d at 777.

Gage alleges that Mayo did not offer a reasonable accommodation in good faith because she objected to the form and offered her own proposed accommodations, which Mayo ignored. But "a reasonable accommodation need not be on the employee's terms only." *Id.* Once Mayo offered an accommodation that

resolved Gage's religious conflict, its burden was satisfied; it had no obligation to accept Gage's preferred accommodations. *See id.* ("[T]he employee has a correlative duty to make a good faith attempt to satisfy [her] needs through means offered by the employer.").

Second, the FAC fails to plausibly plead a claim of disparate treatment. An employee pleads a prima facie case of disparate treatment by alleging that "(1) [s]he is a member of a protected class; (2) [s]he was qualified for [her] position; (3) [s]he experienced an adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Peterson*, 358 F.3d at 603.

Gage alleges no facts to support the fourth prong. The FAC states that Mayo's form "displays intentional malice" and "preconceived prejudice," but such conclusory allegations do not plausibly give rise to an inference of discrimination. *See id.*; *Iqbal*, 556 U.S. at 678. Similarly, the FAC states that Mayo did not require employees outside Gage's protected class to agree to the form's masking and testing conditions. But the facts alleged in the FAC indicate that Mayo imposed these conditions on any employee seeking an exemption from the vaccine, regardless of their religious beliefs. Thus, the FAC does not plausibly plead that Mayo treated non-Christians more favorably than Christians when applying its COVID policies.

2. The FAC fails to state a claim of retaliation. *See* 42 U.S.C. § 2000e-3(a). To plead a prima facie case of retaliation, a plaintiff must allege that "(1) she had engaged in protected activity; (2) she was thereafter subjected by her employer to an adverse employment action; and (3) a causal link existed between the protected activity and the adverse employment action." *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 894 (9th Cir. 2005). The FAC and its exhibits make clear that Mayo did not hire Gage because she was "considered a back out of hire" after she refused to complete the religious accommodation request form. Thus, although the temporal proximity between Gage's EEOC complaint and the termination of her hiring process might otherwise give rise to an inference of causation, *see Bell v. Clackamas County*, 341 F.3d 858, 865 (9th Cir. 2003), the FAC alleges facts that make this inference implausible.

3. The FAC fails to state a claim of pregnancy discrimination. *See* 42 U.S.C. §§ 2000e(k), 2000e-2(a)(1). The FAC does not allege that similarly situated employees who were not pregnant were treated more favorably than Gage. And it does not allege any facts that give rise to an inference of discrimination. *See Peterson*, 358 F.3d at 603–05.

4. The district court did not abuse its discretion by granting Mayo multiple extensions to file its motions to dismiss. The district court found good cause to grant each extension, *see* Fed. R. Civ. P. 6(b)(1)(A), and Gage does not show that it acted

illogically, implausibly, or without support in inferences drawn from the record, *see Ahanchian*, 624 F.3d at 1258–59.

5. We decline to review the other claims that Gage raises in her opening brief because they were not presented to the district court. *See Tibble v. Edison Int'l*, 843 F.3d 1187, 1193 (9th Cir. 2016) ("Generally, we do not entertain arguments on appeal that were not presented or developed before the district court." (cleaned up)).

**AFFIRMED.**

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mally Gage,

Plaintiff,

v.

Mayo Clinic et al.,

Defendant.

No. 23-4410

D.C. No. 2:22-CV-02091-SMM

MEMORANDUM*

Appeal from the United States District Court for the District of Arizona

Stephen M. McNamee, District Judge, Presiding

Submitted June 18, 2025**

Before: SANCHEZ, H.A. THOMAS, and DESAI, Circuit Judges.

Mally Gage appeals the district court's dismissal of her First Amended Complaint ("FAC") for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). "We review *de novo* the district court's grant of a motion to dismiss under

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). "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) (quotation omitted).[3] We review the district court's grant of an extension of time under Federal Rule of Civil Procedure 6(b) for abuse of discretion. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258 (9th Cir. 2010). We have jurisdiction under 28 U.S.C. § 1291. We affirm.

1. The FAC fails to state a claim of religious discrimination under Title VII. *See* 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1). First, the FAC does not plausibly allege that Mayo Clinic and Mayo Clinic Arizona (collectively, "Mayo") failed to accommodate Gage's religious conflict with its COVID vaccination requirement. We use a burden-shifting framework to evaluate failure to accommodate claims. See *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004). If a plaintiff pleads a prima face case of failure to accommodate, the burden shifts to the employer "to show that it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship." *Id.* (quotation omitted). An employer

[3] The district court properly applied this standard when it determined that the FAC failed to state a claim.

meets its burden if it offers a reasonable accommodation that eliminates the employee's religious conflict. *Am. Postal Workers Union, S.F. Loc. v. Postmaster Gen.*, 781 F.2d 772, 777 (9th Cir. 1986).

Here, the FAC pleads facts indicating that Mayo made good faith efforts to accommodate Gage. The FAC alleges that Mayo's religious accommodation request form included substantive conditions—such as masking and frequent COVID testing—to which Gage had to agree when submitting her exemption request. The form thus proposed a reasonable accommodation: if granted an exemption, Gage would not have to receive the COVID vaccine, but she would need to undergo other measures to mitigate her risk of transmitting COVID. *Cf. Hudson v. W. Airlines, Inc.*, 851 F.2d 261, 266 (9th Cir. 1988) (treating scheduling processes offered in a collective bargaining agreement as a reasonable accommodation for an employee's religious conflict). Because this accommodation would resolve Gage's religious conflict with Mayo's vaccination requirement, Mayo satisfied its burden under Title VII. *See Am. Postal Workers Union*, 781 F.2d at 777.

Gage alleges that Mayo did not offer a reasonable accommodation in good faith because she objected to the form and offered her own proposed accommodations, which Mayo ignored. But "a reasonable accommodation need not be on the employee's terms only." *Id.* Once Mayo offered an accommodation that resolved Gage's religious conflict, its burden was

satisfied; it had no obligation to accept Gage's preferred accommodations. *See id.* ("[T]he employee has a correlative duty to make a good faith attempt to satisfy [her] needs through means offered by the employer.").

Second, the FAC fails to plausibly plead a claim of disparate treatment. An employee pleads a prima facie case of disparate treatment by alleging that "(1) [s]he is a member of a protected class; (2) [s]he was qualified for [her] position; (3) [s]he experienced an adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Peterson*, 358 F.3d at 603.

Gage alleges no facts to support the fourth prong. The FAC states that Mayo's form "displays intentional malice" and "preconceived prejudice," but such conclusory allegations do not plausibly give rise to an inference of discrimination. *See id.*; *Iqbal*, 556 U.S. at 678. Similarly, the FAC states that Mayo did not require employees outside Gage's protected class to agree to the form's masking and testing conditions. But the facts alleged in the FAC indicate that Mayo imposed these conditions on any employee seeking an exemption from the vaccine, regardless of their religious beliefs. Thus, the FAC does not plausibly plead that Mayo treated non-Christians more favorably than Christians when applying its COVID policies.

2. The FAC fails to state a claim of retaliation. *See* 42 U.S.C. § 2000e-3(a). To plead a prima facie case of retaliation, a plaintiff must allege that "(1) she had engaged in protected activity; (2) she was thereafter subjected by her employer to an adverse employment action; and (3) a causal link existed between the protected activity and the adverse employment action." *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 894 (9th Cir. 2005). The FAC and its exhibits make clear that Mayo did not hire Gage because she was "considered a back out of hire" after she refused to complete the religious accommodation request form. Thus, although the temporal proximity between Gage's EEOC complaint and the termination of her hiring process might otherwise give rise to an inference of causation, *see Bell v. Clackamas County*, 341 F.3d 858, 865 (9th Cir. 2003), the FAC alleges facts that make this inference implausible.
3. The FAC fails to state a claim of pregnancy discrimination. *See* 42 U.S.C. §§ 2000e(k), 2000e-2(a)(1). The FAC does not allege that similarly situated employees who were not pregnant were treated more favorably than Gage. And it does not allege any facts that give rise to an inference of discrimination. *See Peterson*, 358 F.3d at 603–05.
4. The district court did not abuse its discretion by granting Mayo multiple extensions to file its motions to dismiss. The district court found good cause to grant each extension, see Fed. R. Civ. P. 6(b)(1)(A), and Gage

does not show that it acted illogically, implausibly, or without support in inferences drawn from the record, *see Ahanchian*, 624 F.3d at 1258–59.

5. We decline to review the other claims that Gage raises in her opening brief because they were not presented to the district court. See Tibble v. Edison Int'l, 843 F.3d 1187, 1193 (9th Cir. 2016) ("Generally, we do not entertain arguments on appeal that were not presented or developed before the district court." (cleaned up)).

**AFFIRMED.**

## APPENDIX C

**No. 23-4410**

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mally Gage,

Plaintiff,

v.

Mayo Clinic, Mayo Clinic Arizona,

Respondent

On Appeal from the United States District Court for the District of Arizona

No. 2:22-CV-02091-PHX-SMM Hon. Stephen M. McNamee

## APPELLANT'S PETITION FOR PANEL REHEARING

### I. INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 40 and Ninth Circuit Rule 40-1, *pro se* Plaintiff-Appellant respectfully petitions for panel rehearing. The panel's memorandum disposition overlooks or misapprehends critical points of fact and controlling law, particularly concerning Title VII religious accommodation, the individualized assessment of religious belief, and fundamental pleading standards under Rule 12(b)(6). In addition, significant Constitutional concerns arise due to apparent partiality by a panel judge whose familial ties and public advocacy conflict with the subject matter of the litigation.

### II. GROUNDS FOR REHEARING

### A. The Panel Misapplied Long Standing and Recent Binding Authority on the Individualized and Specific Nature of Religious Beliefs

In regard to disparate treatment, the panel erroneously held and compared directly against Gage's asserted facts – labeling and comparing Gage's group as "Christians", contrary to long-settled law. In *Thomas v. Review Bd. of Ind.* Emp't Sec. Div., 450 U.S. 707 (1981), the Supreme Court made clear that religious beliefs are not to be evaluated by comparison with others who share a common label – rather the beliefs itself are to be recognized and treated specifically. In this instance, Mayo Clinic clearly made an entire policy, form, and specialized separate treatments for those that requested religious exemptions to the COVID-19 vaccine, which in-line, creates a Title VII protected group. Mayo Clinic tailored their pejorative mischaracterization of Gage's religious beliefs into a categorical religious box which they then demanded those in the box, such as Gage, to make apostasy statements on their beliefs – regardless if they apply or not. This panel's conclusion that Plaintiff failed to allege disparate treatment because she did not show how "non-Christians" were treated more favorably than Christians, imposes an impermissible threshold and mischaracterizes Plaintiff's burden under Title VII.

Recent courts have also expressly rejected this flawed comparative common label reasoning. In *Ringhofer v. Mayo Clinic Ambulance*, No. 23-2999 (8th Cir. 2024), the Eighth Circuit reversed a dismissal for similar reasoning, holding that comparing a plaintiff's beliefs to the general term "Christian" was error further

citing *Holt v. Hobbs,* 574 U.S. 352, 362 (2015), which confirms that the Free Exercise Clause protects beliefs not universally shared within a faith.

Most recently, the First Circuit in *Bazinet v. Beth Israel Lahey Health,* Inc., No. 24-1148 (1st Cir. 2024), reversed a 12(b)(6) dismissal where a hospital denied a religious exemption without engaging in the interactive process, holding that claims such as undue hardship cannot be resolved without factual development. Likewise in this current case, for the court to assert finding on disparate treatment or any of the alleged actions in this complaint requires the court to allow factual development past the complaint filing alone. This court and the district court well-recognize that Gage asserted the facts relevant to all the Rule 12(b)(6) claims, they just subjectively disagree with them.

Moreover, this court erroneously found that Mayo Clinic imposed same conditions Gage was subject to on any employee seeking an exemption from the vaccine, regardless of their religious belief – this is factually incorrect and against what Gage stated in her facts. Mayo Clinic grouped and categorized religious beliefs together based on their assertion of religious exemption to the COVID-19 vaccine – Mayo Clinic's prejudice was to the religious belief that conflicted with the mandate and policy – which is why they held demands to make religious apostasy statements per their forms that were tailored to Gage's group regardless of the employees actual and specific beliefs – they were treated as a group, all holding the same religious belief and needing to agree to the same apostasy statements on that belief, waiver of rights and other separate statements.

Moreover, Mayo Clinic held exactly different policy for people seeking exemption through other means such as medical.

### B. The Panel Overlooked Core Factual Allegations in the First Amended Complaint

The panel concluded that Plaintiff failed to plausibly allege religious discrimination under Title VII, despite explicit and repeated allegations to the contrary. The standard under Rule 12(b)(6) requires the court to accept all pleaded facts as true and draw all reasonable inferences in Plaintiff's favor, *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). This is especially true for *pro se* litigants whose filing are to be construed liberally and allowed to be amended, if at all possible (*Lopez v. Smith*), yet the panel discounted nearly every material factual allegation and instead relied on Mayo Clinic's disputed narrative—despite the absence of an answer to the original Complaint. This court even inserted argument on behalf of Mayo Clinic who factually did not engage in good faith during the interactive process and did not answer Gage's religious exemption and accommodation requests with any claim of undue hardship, rather only stating they didn't have to engage because they were entitled to make her sign a waiver of rights as a matter of law – a law yet to be substantiated.

This panel asserts that Gage did not plausibly allege a failure to accommodate her religious beliefs. However, Gage's brief well-stated she submitted multiple specific accommodation requests, which Mayo categorically rejected and refused to engage in the interactive process unless she first signs a

waiver of rights to the very accommodations she was requesting. The district court acknowledged this form was "wholly dissimilar" from EEOC guidance and this court is overlooking the entire issue and facts while making erroneous conclusions. This form required Plaintiff to sign statements agreeing to be terminated and disclaim religious protection that she already asked for—conditions which violate Title VII as a matter of law.

Critically, the panel sua sponte argued that Mayo Clinic attempted to accommodate Plaintiff in good faith—an assertion not only absent from Mayo's defense, but directly contrary to the record. Mayo Clinic explicitly stated that no accommodations would be considered unless Plaintiff first signed a waiver of her rights and make the statements of apostasy. This shifts the burden impermissibly and deprives Plaintiff of the Rule 12(b)(6) presumption.

The panel's conclusion that Mayo Clinic offered "masking or testing" as accommodations also mischaracterizes the factual record and overlooks all the facts asserted. Plaintiff alleged and requested her own accommodations that if such measures were imposed, they must comply with federal safety standards (29 CFR §§ 1910.132–134), and apply equally to all potentially infectious or infectable employees. Mayo Clinic never engaged on these issues, never asserted undue hardship, and never responded to the proposed terms. The panel's reasoning—accepting Mayo's disputed assertions and ignoring Plaintiff's allegations—directly violates Rule 12(b)(6) and requires rehearing.

### C. The Panel Errored in Its Analysis of Disparate Treatment Under McDonnell Douglas

The panel well-recognized Gage asserted all her claims and notices of disparate treatment but misapplied the McDonnell Douglas framework by concluding Plaintiff failed to allege that similarly situated individuals outside her protected class were treated more favorably. This is factually incorrect. In her opening brief (DktEntry 5.1, pp. 31–33), Plaintiff identified specific facts showing that only those seeking religious exemptions were targeted by Mayo's improper forms, waiver of rights and separate actions. The challenged actions were directed solely at religious employees who requested an exemption from the COVID-19 vaccine.

Moreover, the panel, again, imposed an improper requirement that Plaintiff compare herself to "other Christians" rather than evaluate whether her individualized religious belief was targeted—a flawed approach already addressed in *Thomas*, *Ringhofer*, and other authorities.

### D. The Panel's Retaliation Analysis is Legally and Factually Flawed

The panel also rejected Plaintiff's retaliation claim based on an erroneous finding. The panel asserts that Mayo Clinic refused to hire Plaintiff because she was considered a "back out of hire" due to her failure to complete the accommodation form; however, Plaintiff never alleged this as the basis of the adverse action. Rather, Plaintiff states that Mayo Clinic refused to hire her because of her religious beliefs, requested accommodations and her refusal to sign statements waiving those rights and agreeing to apostasy and that is factually what the

record shows. Gage submitted her exemption and accommodation requests and defendant stated they wouldn't accept it or engage in good faith in the interactive process. This court set the precedent that they were to favor Gage's claims and view them in a light favorable to her as the nonmoving party, but they have well-failed to uphold that standing and rather held to the exact opposite. Gage includes emails and other documentation showing that she attempted in good faith to comply but refused to sign apostasy statements or waiver of rights. All information in the form was filled out to the extent the law required and was submitted by Gage and awaiting for Mayo Clinic to engage in good faith. Mayo Clinic's justification was that it was entitled to require those exact statements and signature of waiver of rights as a "matter of law" but refused to engage in good faith in the interactive process.

This court's panel sua sponte asserts that Mayo Clinic acted in good faith, a factual conclusion not supported by the facts or argued by the defense. This violates both procedural fairness and the applicable standard under Rule 12(b)(6). Mayo Clinic simply argues that they did not have to answer or engage in the interactive process unless Gage first signs a waiver of rights and make apostasy statements. Mayo Clinic believes they found the end-all-be-all of loop holes for an interactive process, in that they can demand the employee to first sign a statement agreeing to any action they take on them, even termination.

### E. The Panel Overlooked Jurisdictional Defects Related to the EEOC's Noncompliant Notice of Right to Sue

The panel failed to address Plaintiff's claim that her EEOC Notice of Right To Sue was defective under 29 C.F.R. § 1601 and 42 U.S.C. § 2000e. The Ninth Circuit is concurrently reviewing the validity of the EEOC's issuance of that notice in Gage v. EEOC, No. 23-4232. This court did not stay this appeal pending resolution, nor did it acknowledge the potential jurisdictional defect that arises from a right-to-sue notice issued without a proper EEOC investigation that is required in Title VII litigation.

Instead, the panel grouped and declined to review "other claims" (assuming the jurisdiction and deprivation of rights claims) citing *Tibble v. Edison Int'l*, 843 F.3d 1187 (9th Cir. 2016), and quoted the case as: "Generally, we do not entertain arguments on appeal that were not presented or developed before the district court." This paraphrase distorts the actual language of *Tibble*, which emphasizes a "general rule," and holds that arguments may be entertained if raised sufficiently to allow a ruling. In this case, Plaintiff has been denied any discovery or evidentiary development and has not even passed the pleading stage. The rule in *Tibble* does not apply to jurisdictional defects or undeveloped records caused by premature dismissal. Moreover, as seen in the *Tibble* case, it proceeded to full bench trial, first appeal, supreme court and then second appeal which made the finding that declined to hear the argument because the issue was not brought in the district court **or** even the first appeal. There is concern that this court is not hearing the issue because it is a stark matter of law that shows Gage was deprived of an EEOC investigation that is legally required to occur before she was

forced to file a Complaint in federal court. Before filing such Complaint, all other parties under Title VII have an EEOC Complaint, answer by the defendant, and potential investigation/evidence prior to issuing a Notice of Right to Sue as a matter of law.

### F. Apparent Judicial Partiality by Judge Roopali Desai Requires Rehearing

Significant due-process concerns arise from Judge Roopali Desai's participation on this panel. Judge Desai is the sister of Judge Sharad Desai who is presiding over Plaintiff's related case, *Gage v. Banner Health*. In this case, defense counsel compelled Plaintiff during deposition to disclose non-public information about this litigation and her personal overseeing of it with aim and grounds that the matters were intertwined and relevant to each other - which Judge Sharad Desai allowed. In recent weeks, Judge Sharad Desai has taken extraordinary, frequent and repeated measures against Gage in the Banner case which may constitute misconduct. Gage has placed notice to the court of multiple issues in the Banner case and anticipation of filing a disqualification motion under 28 U.S.C. § 455 – which Gage is still working to get hearing transcripts currently being impeded while she is finding more and more evidence in which his impartiality might reasonably be questioned – especially in regard to COVID-19 mandates and/or religious exemptions and advocacy for employer rights to them.

Soon after Gage announced her intent to seek recusal of Judge Sharad Desai, this case—pending for over a year—was summarily dismissed by a panel that

included his sibling (his sister) Justice Roopali Desai with clear overlook on legal grounds and facts for Gage's rights while having full support, even arguing sua sapote for the employer.

Of concern, COVID-19 vaccine mandates and especially PPE hold large political bias and opinion for those that pertain to political groups. Both Desai siblings are President Biden appointees (along with all the panel in this appeal) and they hold political advocation of COVID-19 vaccine mandates, policy, and employers' ability to assert them unimpeded before assignment to the bench.

Justice Roopali Desai is publicly recognized for political advocacy, even gaining the title from USA Today and AZ Central as "**A Hero of Democratic Legal Causes**" which was directly tied to multiple efforts including her personally challenging bans on "masking", fighting for the allowance for organizations/schools to be able to force mask mandates appearing to not be aligned with OSHA or any real safety standards such as required in hospitals in this case. This panel overlooked a major portion of this case – stating that Mayo Clinic's "masking" on Gage's religious group was reasonable, without addressing the law, Gage's assertions, the totality of facts, or the ability in allowing the facts to develop. They took no regard for its application to 29 CFR § 1910.132-134 compliance, what groups were being subject to it, and what groups weren't.

Under 28 U.S.C. § 455(a) and (b), as interpreted in *Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)*, and *Tumey v. Ohio, 273 U.S. 510 (1927)*, any appearance of partiality necessitates recusal. In *Liljeberg v. Health Services Acquisition Corp.,*

*486 U.S. 847 (1988)*, the Supreme Court held that the failure to recuse can require vacatur even absent actual bias. The ruling here is tainted by an appearance of partiality that undermines confidence in the decision. Respectfully, Justice Desai was found before her assignment to the bench as a clear political activist with specific ties to allowing unimpeded actions by employers/organizations on COVID-19 related actions/policies and holds a stark conflict of interest regarding this case.

### G. Conclusion on Rehearing Grounds

The decision in this panel's finding alters Mayo Clinic's actual legal arguments, overlooks pivotal allegations, misstates the law, and raises serious concerns about impartiality. Plaintiff was terminated because she declined to abandon her religious beliefs and rights—a fact Mayo Clinic has admitted and stands by because they believe they are allowed to subject employees to such actions before engaging in the interactive process. The court's sua sponte defense of Mayo's conduct, reliance on improper comparisons, and disregard for procedural rights of a *pro se* litigant demand correction.

## III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the panel grant rehearing and vacatur its finding based on Justice Desai's appearance of partiality. At minimum, vacatur is needed for Justice Desai in this matter, and the Complaint must be remanded to allow factual development consistent with Title VII, Rule 12(b)(6), and due-process.

Respectfully submitted this 2nd day of July, 2025

## APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mally Gage,

Plaintiff,

v.

Mayo Clinic et al.,

Defendant.

No. 23-4410 D.C. No. 2:22-CV-02091-SMM

District of Arizona, Phoenix ORDER

Before: SANCHEZ, H.A. THOMAS, and DESAI, Circuit Judges.

(Filed July 15, 2025)

The Petition for Panel Rehearing, Dkt. 20, is DENIED.

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