

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

KYLE BOBAY, D.O.,

Plaintiff,

-vs.-

WRIGHT STATE UNIVERSITY, et al.

Defendants.

CASE NO.:

JUDGE:

**PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER**

Plaintiff Kyle Bobay, D.O. (“Dr. Bobay) moves the court, pursuant to Rule 65, for a temporary restraining order against defendants for the following reasons.

I. Law and Argument

A. Plaintiffs’ Evidence Supports the Required Elements of a Temporary Restraining Order

1. Standard

“[T]he purpose of a TRO under Rule 65 is to preserve the status quo so that a reasoned resolution of a dispute may be had.” *Proctor & Gamble v. Bankers Trust Co.*, 78 F.3d 219, 226 (6th Cir. 1999). The factors to be considered for a temporary restraining order are the same as for a preliminary injunction. *Northeast Ohio Coalition v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). The four factors to be considered in deciding whether to grant a preliminary injunction are likelihood of success on the merits, irreparable injury, harm to third parties and the public interest. *Six Clinics Holding Corp., II v. Cafomb Systems, Inc.*, 119 F.3d 393,399 (6th Cir 1997). They are “factors to be balanced, not prerequisites that must be met.” *Id.* at 400.

2. Success on The Merits

“In order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere possibility of success on the merits of a claim.” *Id.* at 402 “However, it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Id.*

The United States Supreme Court has stated:

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834, 68 L. Ed. 2d 175 (1981)

Hence a party must show a substantial likelihood, not a probability, of success on the merits i.e., more than a mere possibility.

Plaintiff incorporates herein the facts set forth in his verified complaint. He seeks a temporary restraining order precluding defendants from violating his religious free exercise rights by terminating him from the Wright State University Emergency Medicine Residency Program (“EM Residency Program”) on January 4, 2022, as a result of his refusal for religious reasons to take a Covid-19 vaccine. Defendants’ policy allowed requests for religious exemptions. However, defendant Kettering denied plaintiff’s request on the grounds that it did not meet the standard for a religious exemption.

Plaintiff in his requests stated that his religious belief regarding abortion and his body being the temple of the Holy Spirit precluded him from taking the vaccine. Complaint, Exhibits 6 and 11. Kettering stated that his explanation contained political and social statements that did not qualify as religious beliefs. Complaint, Exhibit 10. This rationale violates the well settled principle that “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretation of those creeds.” *Hernandez v. Comm’n of Internal Revenue*, 490 U.S. 680, 699 (1989); see also *Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div.*, 450 U.S. 707,714 (A plaintiff’s “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”)

Defendant Wright State University as a state university is subject to the rule that “[t]he First Amendment, as incorporated through the Fourteenth Amendment, prevents a state from ‘prohibiting the free exercise of religion’.” *Dahl v. Board of Trustees of Western Michigan University*, 15 F. 4th 728, 731 (2021) (Applying this principle to a state university in the context of a religious exemption from a Covid-19 vaccine mandate.)

A challenged activity will be considered state action for purposes of the Fourteenth Amendment and 42 U.S.C. §1983 actions “when a private actor operates as a ‘willful participant in joint activity with the State or its agents.’” *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288, 296 (2001).

In the present case, Kettering is acting as a fiscal agent for the Wright State University Emergency Medicine Residency Program in relation to Dr. Bobay’s residency. Wright State operates, supervises and administers Dr. Bobay’s residency and Kettering is a willful participant in this joint activity with Wright State, as described in detail in the complaint. As such Kettering’s

challenged conduct in planning to terminate Dr. Bobay's residency agreement is state action and subject to the First Amendment and 42 U.S.C. §1938.

The issue of whether Kettering's participation in the EM Residency Program constitutes state action was addressed in great detail in *Daniel v. American Bd. of Emergency Medicine*, 237 F. Supp 2d 336, 347-354 (W.D. N. Y. 2002). The pertinent part of the *Daniel* ruling is attached as Exhibit A. In *Daniel*, Kettering successfully maintained that even though it is a private actor, its participation in the EM Residency Program constitutes state action for purposes of state immunity from an anti-trust claim. In like manner, Kettering's participation in the EM Residency Program constitutes state action for purposes of the First Amendment and 42 U.S.C. §1983.

Defendants' actions condition Dr. Bobay's participation in the EM Residency Program on his willingness [t]o abandon [his] sincerely religious beliefs" and therefore they have "burdened [his] free exercise rights." *Dahl* at 733.

Because defendants have provided a mechanism for individualized exemptions, defendants vaccine mandate is not generally applicable and is subject to strict scrutiny. *Id.* at 733. Therefore, defendants must prove that the decision not to grant Dr. Bobay's religious exemption survives strict scrutiny. *Id.* at 733.

To survive strict scrutiny, the denial of Dr Bobay's exemption must advance "interests of the highest order" and be "narrowly tailored to achieve those interests." *Fulton v. City of Philadelphia* 141 S. Ct. 1868, 1880. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.* at 1880.

Defendants can't meet this test because "narrow tailoring is unlikely if the University's conduct is 'more severe' than that of other institutions." *Dahl* at 735.

In the present case, Dr. Bobay has been granted religious exemptions from Covid-19 vaccine mandates imposed by Premiere Employee Health and Wright State. Complaint, Exhibits 18 and 19. Moreover, Kettering granted a religious exemption to a physician on its medical staff based on information similar to that provided by Dr. Bobay in his exemption request. Exhibit 20, attached (an executed copy of this Exhibit will be filed as soon as it is received from affiant). As a result, defendants' actions in terminating Dr. Bobay from the ER Residency Program violates his free exercise rights and he has a substantial likelihood of success on the merits.

Plaintiffs have shown more than a mere possibility of success on the merits of its claims of constitutional and statutory violations and therefore show a substantial likelihood of success on the merits.

2. Irreparable Harm

“Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors.” *Roberts v. Neace*, 958 F. 3d 409 (6th Cir 2020) (upholding injunctive relief regarding a COVID-19 vaccine mandate because of a constitutional violation.) “Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff’s constitutional rights.” *Overstreet v. Lexington-Fayette Urb. Cty. Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002). A presumption of irreparable harm for preliminary injunction purposes arises from constitutional violations because “The loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896, at *4 (S.D. Ohio Apr. 21, 2020)

(“Where irreparable harm is based upon a violation of a plaintiff’s constitutional rights, that violation, no matter how temporary, is sufficient to show irreparable harm.”).

A survey of cases applying a presumption of irreparable harm in preliminary injunction hearings may be found in a law review article titled, Irreparability, I Presume? On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions, by Beatrice Franklin. 45 Colum. Hum. Rts. L. Rev. 623 (2014). The author traced the application of this presumption to a wide range of constitutional violations and recommended that it be treated as a general rule. *Id.* at 665.

Plaintiffs have shown a substantial likelihood of success on its claim of a constitutional violation and therefore irreparable injury is presumed for purposes of a temporary restraining order.

Moreover, even if there wasn’t a constitutional violation, “a delay in the ability to pursue a chosen profession [has been found by courts] to be the type of irreparable harm which will support temporary injunctive relief.” *Sellers v. University of Rio Grande*, 838 F. Supp 2d 677, 687 (S.D. Ohio 2012), citing *Bonnette v. District of Columbia Court of Appeals*, 796 F. Supp. 2d 164, 186-87 (D.C.D.C. 2011).

3. Balance of Harms and the Public Interest

“In a suit against the government, balancing of the equities merges into our consideration of the public interest.” *SAM Party of New York v. Kosinski*, 987 F.3d 267, 278 (2d Cir. 2021). “Whether the grant of a preliminary injunction furthers the public interest in such a case is largely dependent on the likelihood of success on the merits because the protection of constitutional rights is always in the public interest.” *Daunt v. Benson*, 956 F. 3d 396, 422 (6th Cir 2020). “As for the

remaining parts of the preliminary injunction analysis, the public-interest factor merge[s] with the substantial-harm [to third parties] factor when the government is the defendant.” *Id.* at 422.

As *Jacobson* provides, Ohio’s police power permits it to set health policy as it in its wisdom may determine. The Ohio constitutional convention of 1851 with respect to Art. I, Sec. 1 as construed by the Ohio Supreme Court and the Ohio Legislature with respect to the subject statutes has determined such public policy. Defendants’ constitutional and statutory violations are therefore a violation of the public interest.

II. Conclusion

For the above reasons, Plaintiffs request the court to issue a temporary restraining order precluding defendants from terminating his GME Agreement on January 4, 2022.

Respectfully Submitted,

/s/ Thomas W. Connors
Thomas W. Connors (0007226)
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Counsel for Plaintiff

INSTRUCTIONS FOR SERVICE

Plaintiff requests the clerk of courts to serve this motion for temporary restraining order on defendants at the addresses listed in the caption of the complaint.

/s/ Thomas W. Connors
Counsel for Plaintiff

Thomas L. Retzios, DPM, FACFAS

Sworn to and subscribed before me this _____ day of January, 2021.

Notary Public

Religious Exemption from COVID Vaccinations

I am requesting an exemption from the requirement of receiving any COVID 19 vaccine. After much prayer, I cannot in good conscience take any COVID 19 vaccination as they contradict my sincerely held religious beliefs.

The basis of my request is due to my strongly held religious belief that life is sacred, no matter what stage it is in. It does not matter if it is fetal tissue or embryonic tissue, I believe God creates these structures for human life.

I originally realized the sinful nature of abortions as a young child. From listening to my Priest proclaim the Gospel of Luke:

43 And why am I so honored, that the mother of my Lord should come to me?

44 For as soon as the sound of your greeting reached my ears, the baby in my womb leaped for joy.

This “baby” was John the Baptist, who had already assumed his holiness in the womb.

Later on in my life, I experienced the most powerful example of the sanctity of all human life. At 4 years of age, my first born son, Lazaros, was diagnosed with an extremely rare cancer. Despite all we did, he died one and a half years later. One and a half years of suffering and pain for the entire family. It breaks my heart that all mothers don't experience this same overwhelming love, which would prevent them from aborting their babies.

In the 2001, I closely followed the banning of federal funding for fetal/embryonic cell line research by the Bush administration. I recall how the argument at that time was that adult stem cell were superior to embryonic cell lines in research and medical applications. I was very disappointed in 2009 when the Obama Administration inexplicably reversed the ban on funding of embryonic stem cell research.

I also recall watching in horror as physicians casually spoke about, and laughed about selling aborted fetuses. What a monstrous practice.



I cannot phrase my opposition any better than how Dr. Kyle McKenna concluded his article 'Use of Aborted Fetal Tissue in Vaccines and Medical Research Obscures the Value of All Human Life' published in *The Linacre Quarterly* in February 2018:

“Each medical benefit or scientific advance from the use of fetal tissue from elective abortions desensitizes beneficiaries, scientists, and doctors to the original evil act that produced these cells. Aborted fetal tissues used in laboratories are minimized to merely human cells, and the human beings whose lives were taken to provide those cells become irrelevant and with time forgotten. Of greatest concern is that desensitization ultimately leads to scandal by erroneously validating elective abortions for a greater good. Without careful oversight, the fetus could become, like fetal tissue cell lines, merely cells, cultured within the uterus for scientific exploration. All people of good conscience have the responsibility to voice opposition to the use of fetal tissue from elective abortions in order to promote development of alternatives, affirm the value of all human life, and limit scandal.”¹

I feel this is my attempt at being one of those “people of good conscience” fulfilling my responsibility to voice opposition to the use of this fetal tissue in developing the vaccines.

These are a few of the objections I have to these current vaccines, and for these reasons, I request the religious exemption from the vaccine mandate.

¹ McKenna, PhD., K. C. (2018). Use of Aborted Fetal Tissue in Vaccines and Medical Research Obscures the Value of Human Life. *The Linacre Quarterly*, 85(1). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6027112/#!po=65.3846>

Thomas Connors

From: Thomas Retzios <retzios@yahoo.com> on behalf of Thomas Retzios
Sent: Friday, December 31, 2021 7:01 PM
To: Thomas Connors
Subject: Fwd: Approved - Religious Exemption Request

This is all I received from Kettering.

Thomas L. Retzios, DPM, FACFAS

Begin forwarded message:

From: EH Programs <EHPrograms@ketteringhealth.org>
Date: November 29, 2021 at 4:31:44 PM EST
To: EH Programs <EHPrograms@ketteringhealth.org>
Subject: Approved - Religious Exemption Request

Your request for a religious exemption from the COVID-19 vaccine mandate has been approved. Incident Command will provide ongoing direction regarding the safety precautions you must take at work based on your vaccination status.



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