No.: 23-2266

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS CLOBES,

Plaintiff-Appellant,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Minnesota
No. 0:23-cv-00158-NEB-DTS
Judge Nancy E. Brasel United States District Judge

BRIEF OF APPELLANT THOMAS CLOBES

Robert E. Barnes, Esq.
robertbarnes@barneslawllp.com
Lexis Anderson, Esq.
lexisanderson@barneslawllp.com
BARNES LAW
700 S. Flower Street, Suite 1000
Los Angeles, California 90017
Telephone: (310) 510-6211

Francis H White, III
Francis White Law PLLC
8362 Tamarack Village
Suite 119-220
Woodbury, MN 55125
651-829-1431
Fax: 651-714-7119
francis.white@franciswhitelaw.com

Attorneys for Appellant Thomas Clobes

SUMMARY OF THE CASE

Appellant Thomas Clobes requests oral argument because it will aid the decisional process in resolution of this appeal. Among other reasons, this appeal involves whether the dismissal of the entire action at the pleading stage, by the District Court below, should be reversed in an action that raises critical issues arising from mandated medical procedures and religious discrimination in an employment setting.

Amidst unprecedented governmental mandates, global shutdowns and unleashing of worldwide vaccination campaigns by central authorities, one would be hard pressed to present issues of more sweeping importance before this Court, than the ones offered by this appeal. For these reasons, Appellant submit that oral argument will aid in resolving what is likely to be a seminal decision over significant issues of first impression. Appellant requests twenty (20) minutes to present the argument.

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INTRODUCTION

We face an unparalleled moment in history, when employers have mandated an experimental vaccine that utilizes novel mRNA gene therapy technology and has not only has conferred little to no benefit to recipients but has injured hundreds of thousands of individuals who elected or were forced to receive the vaccine by virtue of mandates exactly like Appellee's.

Never before have we seen sweeping policies implemented by private employers requiring employees undergo a medical procedure as a condition of employment and never before have employers been so adamant in their refusal to respect the religious freedoms of their employees.

Appellee 3M Company's ("Appellee" or "3M") unlawful COVID-1 vaccine mandate held Appellant Thomas Clobes ("Appellant" or "Mr. Clobes") hostage by forcing him to contemplate the impossible choice of suffering a physical assault and uninvited invasion of his body by receiving the experimental and harmful mRNA COVID-19 vaccine, at the expense of his religious beliefs, bodily autonomy, medical privacy, and his health, or losing his livelihood. This case brings to light novel legal and ethical questions of what constitutes harassment and a hostile work environment in the context of mandated medicine.

JURISDICTIONAL STATEMENT

The basis for subject-matter jurisdiction by the lower court below, the U.S. District Court for the District of Minnesota (the "District Court"), was 28 United States Code ("U.S.C.") Sections 1131 and 1361. The underlying action arises out of the acts of 3M Company ("Appellee") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and the Minnesota Civil Rights Act, Minn. Stat. § 363A.08.

This Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §§ 1291 and 1294, as it is an appeal of a final order or judgment that disposes of all parties' claims, pursuant to the District Court's entry of an Order Granting Defendants' Motion to Dismiss entered February 27, 2023 (the "Order of Dismissal"). App. 96; R. Doc. 21.

This appeal is timely because Appellant filed a Notice of Appeal with the District Court on May 20, 2023, less than 60 (sixty) days after entry of the Order of Dismissal, incompliance with the Federal Rules of Appellate Procedure, Rules 3 and 4. R. Doc. 25.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in dismissing Appellant's claims for religious harassment and hostile work environment on the grounds that Appellant failed to establish a link between his religious beliefs and Appellee's conduct regarding the vaccine mandate.

Apposite Statutes and Cases:

A. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

B. Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.08(subd. 2)(2)

C. *Winspear v. Cmty. Dev., Inc.,* 574 F.3d 604, 607 (8th Cir.2009)

D. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993)

II. Whether the District Court erred in dismissing Appellant's claims for religious harassment and hostile work environment on the grounds that plaintiff was not subjected to severe or pervasive harassment.

Apposite Statutes and Cases:

A. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

B. Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.08(subd. 2)(2)

C. *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999)

III. Whether the District Court erred in holding that Appellant was entitled to amend his pleadings.

Apposite Cases:

A. *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988)

STATEMENT OF THE CASE

Appellant asks this Court to vacate and reverse the Order of Dismissal. App. 96, 98; R. Doc. 21. The grounds asserted by the District Court to support the Order of Dismissal was its finding that Appellant failed to establish a link between his religious beliefs and Appellee's coercive conduct regarding the vaccine and that Appellant was not subjected to severe or pervasive harassment. Upon that finding, the District Court granted Appellee's Motion to Dismiss for Failure to State a Claim filed on February 27, 2023 (the "Motion to Dismiss").

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits "discriminat[ion] against any individual with respect to their compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1); *see also EEOC v. Abercrombie & Fitch Stores, Inc*., 575 U.S. 768 (2015). "Employers violate Title VII of the Civil Rights Act of 1964 if they commit, abet, or condone discrimination based on sex or religion that results in a hostile work environment." *Powell v.*

Yellow Book USA, Inc., 445 F.3d 1074, 1076–77 (8th Cir. 2006). "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49 (1986).

Similarly, the Minnesota Human Rights Act ("MHRA") affords the same protections under Minnesota state law and prohibits an employer from "discriminat[ing] against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363A.08(subd. 2)(2). Claims of discrimination under the MHRA are analyzed under the same standard as Title VII discrimination. *Said v. Mayo Clinic,* 44 F.4th 1142 (8th Cir. 2022).

In September 2021, Defendant mandated that Plaintiff become fully vaccinated for COVID-19 by December 8, 2021. Plaintiff was given an ultimatum: become fully vaccinated or be terminated from his position of 25 years. Plaintiff sought a religious accommodation on November 18, 2023 on the grounds that his religious beliefs prevent him from receiving a COVID-19 vaccine. Plaintiff vehemently objects to the use of aborted fetal cells in the manufacturing and testing of all COVID-19 vaccines and vaccine-related death in his own family posed sincere moral and ethical barriers to receiving the vaccine. As such, Appellant could not comply with Appellee's mandate.

Appellee refused to grant Appellant's request for a religious accommodation and Appellant, upon information and belief, anticipated being imminently terminated from his position due to his unresolved religious conflict with Appellee's policy. Not only did Appellee refuse to engage in any interactive process or individualized assessment of Appellant's circumstances, despite having full knowledge of Appellee's religious and personal objections, but Appellee continued its harassing and coercive conduct toward Appellant.

Plaintiff was harassed daily by email and loudspeaker announcements while at work to receive the COVID-19 vaccine. Because of his granddaughter's vaccine-induced death, such pressure to take the vaccine caused emotional trauma and stress to Plaintiff. Because he wasn't vaccinated, Plaintiff was required to wear a mask. Like a "Scarlet Letter," this singled him out as unvaccinated to his co-workers. Plaintiff had to join a number of support groups due to the stress caused by the persistent workplace pressure to get vaccinated for COVID-19. Training video images of people getting injected with the vaccine made Plaintiff physically ill. Plaintiff wrote in his follow-up questionnaire: "Because of my personal family tragedy I have prayed to God and his guidance has [led] me to hold a sincere and genuine belief that this vaccine and any vaccine are a danger to my health and mental well-being," Plaintiff suffered emotional distress, because of a continual fear that he was going to be terminated for not taking the vaccine.

Plaintiff felt discriminated against because he had to justify not taking a COVID-19 vaccine.

On January 19, 2023, Appellant filed the underlying action. App. 6; R. Doc. 1. Appellee subsequently filed the Motion to Dismiss, based on alleged failure to state a claim under Title VII or the Minnesota Human Rights Act. App. 38-53; R. Doc. 11, 13. Appellant filed his brief in opposition to Appellee's Motion, App. 54; R. Doc. 18, and Appellee filed its reply brief in support. App. 64; R. Doc. 19.

The District Court heard the Motion to Dismiss on April 20, 2023 and granted dismissal of Appellant's entire action on the grounds that Appellant had failed to plead claims for religious discrimination or a hostile work environment. While the District Court did not issue a comprehensive order or judgment justifying the dismissal, the District Court did provide its grounds for dismissal at the hearing.

SUMMARY OF THE ARGUMENT

Appellant challenges the District Court's dismissal of his Complaint on the grounds that the District Court erred in holding that he could not establish a *prima facie* case for religious harassment and a hostile work environment under Title VII and the MHRA because 1) Appellant demonstrated a sufficient causal connection between his sincere religious beliefs and Appellee's harassing conduct and 2)

Appellee's conduct was severe and pervasive so as to bring a claim for hostile work environment.

ARGUMENT

I. STANDARD OF REVIEW

A. Standard of Review for Dismissal of Appellant's Claims for Hostile Work Environment

De novo review is the proper standard of review as to whether the District Court erred in entering the Order Granting Appellee's Motion to Dismiss. Court of Appeals reviews de novo the dismissal of a claim, accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the party who did not move for dismissal. *Cockram v. Genesco, Inc.*, 680 F.3d 1046 (8th Cir. 2012). The District Court dismissed Appellant's claims for religious harassment and a hostile work environment pursuant to Rule 12(b)(6).

De novo review of the District Court's above-described rulings is therefore appropriate on this appeal, which seeks reversal of the District Court's Order Granting Appellee's Motion to Dismiss.

"Generally, we review the denial of leave to amend a complaint under an abuse of discretion standard; however, 'when the district court bases its denial on the futility of the proposed amendments, we review the underlying legal

conclusions de novo.' " *Crest Constr. II, Inc. v. Doe,* 660 F.3d 346, 359 (8th Cir.2011) (quoting *Walker v. Barrett,* 650 F.3d 1198, 1210 (8th Cir.2011)). Therefore, where the District Court denied Appellant's request to file an amended complaint on the grounds that any amendment would be futile to cure the deficiencies, *de novo* is the proper standard of review as to whether the District Court erred in denying leave to amend.

II. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANT'S COMPLAINT DID NOT SUFFICIENTLY ESTABLISH A LINK BETWEEN HIS RELIGIOUS BELIEFS AND APPELLEE'S CONDUCT

"To succeed on a hostile environment claim, a plaintiff must prove four elements of a prima facie case: (1) membership in a protected group; (2) the occurrence of unwelcome harassment; (3) that the harassment was based on [religion]; and (4) that the harassment affected a term, condition, or privilege of employment. *Gonzalez v. City of Minneapolis*, 267 F. Supp. 2d 1004, 1015 (D. Minn. 2003), *aff'd on other grounds*, 107 F. App'x 702 (8th Cir. 2004). "[H]ostile work environment discrimination can exist absent a tangible employment action. *Winspear v. Cmty. Dev., Inc.,* 574 F.3d 604, 607 (8th Cir.2009). There is no doubt that Appellant is a member of a protected group as a Christian and that he was the subject of unwelcome harassment at the hands of Appellee via their coercive and

or causal link between his sincere religious objections to receiving the COVID-19 vaccine and Appellee's continuous coercion and pressure to receive the vaccine and therefore fails to show that Appellee's harassing conduct was based on religion.

Specifically, the District Court stated in the Motion hearing as grounds for dismissal that the "complaint alleges nothing that links Appellant's religion to Appellee's efforts to ensure its employees were vaccinated against COVID." App. 92; R. Doc. 24, at 18. In doing so, the District Court ignores the direct connection between Appellant's religious objections to the vaccine, Appellee's rejection of Appellant's religious accommodation request, and the continued pressure and coercion to comply with Appellee's vaccine mandate.

Appellant alleges in his Complaint that he submitted a religious accommodation and exemption request to Appellee in which he outlined his sincere religious objections to the vaccine. App. 8; R. Doc. 1, at 3. By doing so, Appellee was put on direct notice of Appellant's religious beliefs and justification for refusing to take the mRNA injection, which stems from his refusal to inject a pharmaceutical project into his body that uses aborted fetal cells in its manufacturing and testing. Furthermore, Appellant informed Appellee of his own personal experience of the vaccine-induced death of his granddaughter, which

pharmaceutical project into his body that uses aborted fetal cells in its manufacturing and testing. Furthermore, Appellant informed Appellee of his own personal experience of the vaccine-induced death of his granddaughter, which further supported Appellant's religious and ethical objections to receiving any subsequent vaccine.

Appellee made Appellant's religious beliefs an issue by requesting additional information from Appellant articulating his religious objections in his answers to Appellee's follow-up inquiries to his exemption request. App. 8; R. Doc. 1, at 3. Despite this knowledge, Appellee still subjected continuous coercion to receiving the vaccine to such an extent that he suffered emotional trauma and stress. App. 8-9; R. Doc. 1, at 3-4.

Appellant informed Appellee of his religious conflict with its COVID-19 vaccine mandate on November 18, 2021. Appellee's mandate was not lifted until December 10, 2021. As such, Appellant was subject to coercion and harassment to take the vaccine for several weeks at the hands of his supervisors at Appellee. His job was held hostage during that time and Appellant, due to extensive information, and notices from Appellee was of the belief that his employment would be imminently terminated.

The temporal connection between the denial of Appellant's religious exemption request and the continued pressure to receive a COVID-19 vaccine,

under threat of termination, gives rise to an inference of discrimination based on religion at the hands of Appellee. Moreover, Circuits have held that "conduct need not be explicitly religious to constitute harassment because of religion." *Rivera*, 331 F.3d at 190 n. 2; *see Venters v. City of Delphi,* 123 F.3d 956, 973 (7th Cir.1997) (religious harassment can be established through indirect comments that are not on their face about religion); *cf. Landrau–Romero v. Banco Popular De Puerto Rico,* 212 F.3d 607, 614 (1st Cir.2000) ("Alleged conduct that is not explicitly racial in nature may, in appropriate circumstances, be considered along with more overtly discriminatory conduct in assessing a Title VII harassment claim."). Therefore, Appellee need not have explicitly referenced Appellant's religious beliefs in their coercive practices; it is enough that Appellant's sincere religious accommodation request was denied, and that Appellee continued to engage in pressuring and coercive conduct aimed at Appellant with full knowledge of his religious objections, his personal family history with vaccine injuries, and the substantial emotional distress Appellee's actions were causing to Appellant.

Appellant has clearly established a link between his religious beliefs and the harassment he withstood at the hands of Appellee. Indeed, there could not be a closer nexus between Appellant's religious beliefs and the anxiety he sustained due to Appellee's mandate. Appellant is a member of a protected group as a Christian.

Appellant vaccination status was inherently tied to his religious objections to the COVID-19 vaccine such that harassment on the basis of one is harassment on the basis of the other.

Appellant satisfied his burden at the pleading stage to allege a claim of harassment and hostile work environment on the basis of religion and respectfully requests this Court to reverse the District Court's dismissal of his claims.

III. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF WAS NOT SUBJECT TO SEVERE OR PERVASIVE HARASSMENT

The District Court further erred in concluding that Appellant failed to satisfy the final element of a hostile work environment claim under Title VII because he was not subject to harassment that was severe or pervasive. Specifically, the District Court concluded that the "Complaint also does not allege conduct that is severe or pervasive sufficient to support a hostile work environment theory." App. 93; R. Doc. 24, at 19.

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, as amended, 42 U.S.C. § 2000e–2(a)(1). The

Supreme Court has held that this not only covers "terms" and "conditions" in the narrow contractual sense, but "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Savings Bank, FSB v. Vinson,*477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986) (citations and internal quotation marks omitted).

"When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). We can determine "whether an environment is 'hostile' or 'abusive' ... only by looking at all the circumstances, [which] may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005) (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993).

The District Court erroneously concluded that Appellant was not subjected to such severe or pervasive conduct to establish a *prima facie* hostile work environment claim. However, it is clear that when employers engage in coercive and pressuring activity such as Appellee did that causes distress and harms the

psychological well-being of an employee, such conduct is sufficient to satisfy the fourth element of a *prima facie* case of harassment which requires that the harassment affected a term, condition, or privilege of his employment.

The Supreme Court has established that "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). "To be sufficiently objectively severe or pervasive to be actionable, the environment must be such that a reasonable person in the plaintiff's position, considering 'all the circumstances' would find it hostile or abusive." *Leichliter v. The Des Moines Reg*., 617 F. Supp. 2d 818, 827 (S.D. Iowa 2009) (citing *Harris,* 510 U.S. at 23, 114 S.Ct. 367)).

Certainly, Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, *Meritor, supra,* 477 U.S., at 67, 106 S.Ct., at 2405, there is no need for it also to be psychologically injurious. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295 (1993).

A number of factors are relevant in assessing the magnitude of harassment, including the frequency and severity of the discriminatory conduct, whether it is

physically threatening or humiliating or only an offensive utterance, whether it unreasonably interferes with the employee's work performance, physical proximity to the harasser, and the presence or absence of other people, Harassment need not be so extreme that it produces tangible effects on job performance or psychological well-being to be actionable. *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) (citations omitted).

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. *Harris v. Forklift Sys.*, Inc., 510 U.S. 17, 22, 114 S. Ct. 367, 370–71, 126 L. Ed. 2d 295 (1993). Furthermore, "[h]arassing conduct is considered unwelcome if it was uninvited and offensive. *Elghoul v. United States*, No. 4:18-CV-01009-HFS, 2021 WL 1847336, at *10 (W.D. Mo. Mar. 9, 2021), *aff'd sub nom. Elghoul v. McDonough*, No. 21-2014, 2022 WL 457409 (8th Cir. Feb. 15, 2022). "The proper inquiry is whether the plaintiff indicated by her conduct that the alleged harassment was unwelcome." *Mahler v. First Dakota Title Ltd. Partnership*, 931 F.3d 799, 806 (8th Cir. 2019).

The harassment experienced by Appellant was not merely "the ordinary tribulations of the workplace." The harassment that Appellant experienced

surpassed this threshold as it did cause him psychological injury. As alleged in his Complaint, Appellant was harassed daily by email and loudspeaker announcements while at work to receive the COVID-19 vaccine. App. 8-9; R. Doc. 1, at 3-4. Plaintiff had formerly expressed to Appellee that part of his religious objection to the vaccine stemmed from his own granddaughter's vaccine-induced death. Plaintiff has articulated in his complaint that he communicated to Appellee in his exemption questionnaire: "Because of my personal family tragedy I have prayed to God and his guidance has [led] me to hold a sincere and genuine belief that this vaccine and any vaccine are a danger to my health and mental well-being." App. 8-9; R. Doc. 1, at 3-4. Appellee was fully aware of Plaintiff's distress, as Plaintiff shared this story with Appellee via both the exemption process and via email. App. 8-9; R. Doc. 1, at 3-4. What's more, Appellant was forced to reveal his vaccination status to his coworkers due to Appellee's policy that unvaccinated workers only were required to wear masks, while vaccinated employees were not required to submit to such a requirement. App. 8-9; R. Doc. 1, at 3-4.

Appellant has demonstrated that he has sincere religious beliefs that prevent him from receiving the COVID-19 vaccine, he was subjected to unwelcome harassment at the hands of Appellee due to his religious beliefs, such harassment caused psychological harm and created a working environment that Appellant perceived as decidedly hostile and anxiety-inducing.

Furthermore, dismissal was inappropriate at the pleading stage because while the standard of "severe and pervasive" conduct contains both an objective and a subjective component, "[s]ubject to some policing at the outer bounds, it is for the jury to weigh those factors and decide whether the harassment was of a kind or to a degree that a reasonable person would have felt that it affected the conditions of [his] employment." *Marrero v. Goya of Puerto Rico, Inc.,* 304 F.3d 7, 18 (1st Cir.2002).

Accordingly, Appellant satisfied his burden at the pleading stage to allege a claim of harassment and hostile work environment on the basis of religion and respectfully requests this Court to reverse the District Court's dismissal of his claims.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO AMEND HIS PLEADINGS

Finally, the District court abused its discretion in denying leave to amend Appellant's complaint. In his brief in opposition to Appellee's Motion to Dismiss and at the Motion hearing before the District Court, Appellant requested leave to amend should the District Court deem Appellant's complaint insufficiently pleaded. The District Court denied Appellant's request and dismissed with prejudice.

"Federal Rule of Civil Procedure 15(a) provides that leave to amend 'shall be freely given when justice so requires." Unless there is a good reason for denial, "such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment, leave to amend should be granted.' " *Becker v. Univ. of Nebraska at Omaha*, 191 F.3d 904, 907–08 (8th Cir. 1999) (quoting *Brown v. Wallace,* 957 F.2d 564, 566 (8th Cir.1992)). "A complaint should not be dismissed under Fed.R.Civ.P. 12(b)(6) 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988) *(quoting Conley v. Gibson,*355 U.S. 41, 47, 78 S.Ct. 99, 101, 2 L.Ed.2d 80 (1957)).

Providing Appellant leave to amend in this case will fulfill the purposes of the Federal Rules and facilitate a proper decision on the merits. Had Appellant been given leave to amend, he would have filed his first amended complaint.

CONCLUSION

For the reasons set forth above, this Court of Appeal should vacate and reverse the District Court's Order of Dismissal.

Dated: September 5, 2023 Respectfully submitted,

/s/ Lexis Anderson, Esq.

Lexis Anderson, Esq.
Email: lexisanderson@barneslawllp.com
Robert E. Barnes, Esq.
Email: robertbarnes@barneslawllp.com
BARNES LAW
700 South Flower Street, Suite 1000
Los Angeles, California 90017

Francis H White , III
Francis White Law PLLC
8362 Tamarack Village
Suite 119-220
Woodbury, MN 55125
651-829-1431
Fax: 651-714-7119
Email: francis.white@franciswhitelaw.com

Counsel for Appellant Thomas Clobes

CERTIFICATE OF SERVICE

I certify that on September 5, 2023, the foregoing BRIEF OF APPELLANT THOMAS CLOBES was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record as follows:

Nathan T Boone
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
225 South Sixth Street
Suite 1800
Minneapolis, MN 55402
612-336-6862
Email: nathan.boone@ogletree.com

Patrick R Martin
Ogletree Deakins
225 South Sixth Street
Ste 1800
Minneapolis, MN 55402
612-336-6870
Fax: 612-339-0061
Email: pat.martin@ogletreedeakins.com

/s/ Lexis Anderson, Esq.

Lexis Anderson, Esq.
Email: lexisanderson@barneslawllp.com
Robert E. Barnes, Esq.
Email: robertbarnes@barneslawllp.com
BARNES LAW
700 South Flower Street, Suite 1000
Los Angeles, California 90017

Francis H White , III
Francis White Law PLLC
8362 Tamarack Village
Suite 119-220
Woodbury, MN 55125
651-829-1431
Fax: 651-714-7119
Email: francis.white@franciswhitelaw.com

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the 13,000-word type-volume limit of FRAP 32(a)(7)(B)(i) because, excluding the parts of the document exempted by FRAP 32(g) and, this document contains 4,061 words.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this document has been prepared in a proportionally spaced typeface using 14-point Times New Roman style font.

Dated: September 5, 2023

/s/ Lexis Anderson

Lexis Anderson, Esq.
Email: lexisanderson@barneslawllp.com
BARNES LAW
700 South Flower Street, Suite 1000
Los Angeles, California 90017
Telephone: (310) 510-6211

Counsel for Plaintiff-Appellant