

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

ELIZABETH J. ZIEGLER and NICHOLE L. DIETEL,

Plaintiffs-Appellants,

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-00595-DSD-TNL
Judge David S. Doty United States District Judge

**BRIEF OF APPELLANTS ELIZABETH J. ZIEGLER AND NICHOLE L.
DIETEL**

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 Appellants Elizabeth J. Ziegler and Nichole L. Dietel

SUMMARY OF THE CASE

Appellant 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 submits that oral argument will aid in resolving what is likely to be a seminal decision over significant issues of first impression. Appellants request twenty (20) minutes to present the argument.

TABLE OF CONTENTS

Contents:	Page(s):
SUMMARY OF THE CASE.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION.....	1
JURISDICTIONAL STATEMENT.....	2
STATEMENT OF THE ISSUES.....	3
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	8
ARGUMENT	9
I. STANDARD OF REVIEW	9
II. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANTS’ COMPLAINT DID NOT SUFFICIENTLY ESTABLISH A LINK BETWEEN THEIR RELIGIOUS BELIEFS AND APPELLEE’S CONDUCT.....	10
III. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANTS WERE NOT SUBJECT TO SEVERE OR PERVASIVE HARASSMENT.....	14
CONCLUSION	22
CERTIFICATE OF SERVICE	24
CERTIFICATE OF COMPLIANCE	26

TABLE OF AUTHORITIES

Cases:	Page(s):
<i>Al-Zubaidy v. TEK Indus., Inc.</i> , 406 F.3d 1030, 1038 (8th Cir. 2005).....	16, 17
<i>Burlington Indus., Inc. v. Ellerth</i> , 24 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).....	16
<i>Carter v. Chrysler Corp.</i> , 173 F.3d 693, 702 (8th Cir. 1999).....	3, 15, 17
<i>Cockram v. Genesco, Inc.</i> , 680 F.3d 1046 (8th Cir. 2012).....	9
<i>Durham Life Ins. Co. v. Evans</i> , 166 F.3d 139, 148–49 (3d Cir.1999).....	10
<i>EEOC v. Abercrombie & Fitch Stores, Inc.</i> , 575 U.S. 768 (2015).....	4
<i>Elghoul v. United States</i> , No. 4:18-CV-01009-HFS, 2021 WL 1847336, at *10 (W.D. Mo. Mar. 9, 2021), <i>aff'd sub nom. Elghoul v. McDonough</i> , No. 21-2014, 2022 WL 457409 (8th Cir. Feb. 15, 2022).....	18
<i>Gonzalez v. City of Minneapolis</i> , 267 F. Supp. 2d 1004, 1015 (D. Minn. 2003), <i>aff'd on other grounds</i> , 107 F. App'x 702 (8th Cir. 2004).....	10
<i>Hall v. Gus Const. Co., Inc.</i> , 842 F.2d 1010 (8th Cir.1988).....	10
<i>Harris v. Forklift Systems, Inc.</i> , 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993).....	3, 15, 16, 17, 18
<i>Hathaway v. Runyon</i> , 132 F.3d 1214 (8th Cir. 1997).....	3, 18, 19

<i>Hicks v. Gates Rubber Co.</i> , 833 F.2d 1406 (10th Cir.1987).....	10
<i>Leichliter v. The Des Moines Reg.</i> , 617 F. Supp. 2d 818, 827 (S.D. Iowa 2009).....	16
<i>Mahler v. First Dakota Title Ltd. Partnership</i> , 931 F.3d 799, 806 (8th Cir. 2019).....	18
<i>McKinney v. Dole</i> , 765 F.2d 1129 (D.C.Cir.1985).....	10
<i>Meritor Sav. Bank, FSB v. Vinson</i> , 477 U.S. 57, 65, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49 (1986).....	4, 15, 17
<i>Powell v. Yellow Book USA, Inc.</i> , 445 F.3d 1074, 1076–77 (8th Cir. 2006).....	4
<i>Reeves v. C.H. Robinson Worldwide, Inc.</i> , 594 F.3d 798 (11th Cir. 2010).....	15, 19
<i>Said v. Mayo Clinic</i> , 44 F.4th 1142 (8th Cir. 2022).....	5
<i>Smith v. St. Louis Univ.</i> , 109 F.3d 1261, 1265 (8th Cir.1997).....	10
<i>Winspear v. Cmty. Dev., Inc.</i> , 574 F.3d 604, 607 (8th Cir.2009).....	3, 10

Statutes:

28 U.S.C. § 1131.....	2
28 U.S.C. § 1291.....	2
28 U.S.C. § 1294.....	2

28 U.S.C. § 1361.....	2
42 U.S.C. § 2000e.....	2, 3, 4, 15
Minn. Stat. § 363A.08.....	2, 3, 5

Rules:

Federal Rules of Appellate Procedure

- Rule 3.....	2
- Rule 4.....	2
- Rule 12(b)(6).....	9

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.

Not only have we never before seen such sweeping policies implemented by private employers requiring employees undergo a medical procedure as a condition of employment, but employers have demonstrated their flagrant disregard for the religious freedoms of their employees, which have been long protected in this country in principle and by law.

Appellee Minnesota Mining and Manufacturing Company's ("Appellee" or "3M") unlawful COVID-19 vaccine mandate held Appellants Elizabeth J. Ziegler and Nichole L. Dietel (collectively "Appellants") hostage by forcing them to contemplate the impossible choice of suffering a physical assault and uninvited invasion of their bodies by receiving the experimental and harmful mRNA COVID-19 vaccine, at the expense of their religious beliefs, bodily autonomy, medical privacy, and their health, or losing their livelihood. Appellants were subject to a work environment that was coercive and put their religious beliefs on trial. 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 in the workplace.

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 on August 3, 2023 (the “Order of Dismissal”). App. 99; R. Doc. 25.

This appeal is timely because Appellant filed a Notice of Appeal with the District Court on September 5, 2023, less than 60 (sixty) days after entry of the Order of Dismissal, in compliance with the Federal Rules of Appellate Procedure, Rules 3 and 4. App. 114; R. Doc. 27.

STATEMENT OF THE ISSUES

- I. Whether there is a link between Plaintiffs’ religious beliefs and 3M’s conduct regarding the vaccine mandate.
 - 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 mandating a medical procedure under threat of termination constituted severe or pervasive harassment.
 - 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)
 - D. *Hathaway v. Runyon*, 132 F.3d 1214 (8th Cir. 1997).

STATEMENT OF THE CASE

Appellant asks this Court to vacate and reverse the Order of Dismissal. App. 99; R. Doc. 25. The grounds asserted by the District Court to support the Order of Dismissal was its finding that Appellants failed to establish a link between their 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 May 3, 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).

This appeal arises from Appellants Elizabeth J. Ziegler and Nichole L. Dietel’s complaint action seeking relief from Appellee 3M Company’s coercive vaccine policy and discriminatory behavior against Appellants’ sincere religious objections. In October 2021, Appellee mandated that all employees become fully vaccinated for COVID-19 or face termination of their employment. App. 8; R. Doc. 9, at 3. Appellants were given an ultimatum: become fully vaccinated or be terminated from their long-held positions as loyal employees. Appellants held sincere religious beliefs that prevented them from complying with Appellee’s policy without violating their religious and moral conscience. App. 8-12; R. Doc. 9, at 3-7. Among other reasons, Appellants vehemently objected to the use of aborted fetal cells in the manufacturing and testing of all COVID-19 vaccines; Appellants therefore held sincere moral and ethical barriers to receiving the vaccine. As such, Appellants could not comply with Appellee’s mandate.

Appellants submitted religious exemption requests to Appellee on October 28, 2021, based on their Christian beliefs. App. 8, 11; R. Doc. 9, at 3, 6. Appellee refused to grant Appellants' requests for a religious accommodation and Appellants, upon information and belief, anticipated being imminently terminated from their position due to their unresolved religious conflict with Appellee's policy. App. 10, 12; R. Doc. 9, at 5, 7. Appellee denied Appellants' exemption requests without leaving any appeals process or recourse for Appellants to contest Appellee's decision. Appellee continued to coerce and harass Appellants to comply with the mandate under threat of immediate termination. Appellants were under the reasonable belief that their jobs and livelihoods would be imminently stripped from them so long as they adhered to the principles of their faith and religion. Appellee, with full knowledge of Appellants' religious conflicts, continued to pressure Appellants on a daily basis and hold their employment captive.

Appellant Ziegler was harassed daily by email, manager visits, and corporate reminders while at work to receive the COVID-19 vaccine. App. 10; R. Doc. 9, at 5. Her supervisors asked her on a near daily basis if she was vaccinated. Such pressure to take the vaccine caused emotional trauma and stress to Ms. Ziegler. App. 10; R. Doc. 9, at 5. Furthermore, because she wasn't vaccinated, she was required to wear a mask, unlike her vaccinated coworkers, labeling her as unvaccinated and subjecting her to potential prejudice from fellow 3M employees.

App. 10; R. Doc. 9, at 5. Ms. Ziegler suffered emotional distress because of a continuous fear that she was going to be imminently terminated for not receiving a COVID-19 vaccine. App. 10; R. Doc. 9, at 5. Her emotional distress was so severe that she was ultimately forced to seek medical attention and was prescribed anxiety medication. App. 10; R. Doc. 9, at 5. Ms. Ziegler felt discriminated against because she had to justify not taking a COVID-19 vaccine and was subjected to continuous pressure and coercion to comply with 3M's mandate. App. 10; R. Doc. 9, at 5.

Similarly, Appellant Dietel was subject to the same pressure and coercion to comply with 3M's mandate under threat of termination and loss of income. App. 12; R. Doc. 9, at 7. Ms. Dietel was required to wear a mask due to her unvaccinated status, unlike vaccinated coworkers - revealing her confidential medical information in the process. App. 12; R. Doc. 9, at 7. Ms. Dietel was continuously harassed and given written and verbal warnings when she was not wearing a mask. App. 12; R. Doc. 9, at 7. Ms. Dietel submitted three separate ethics complaints to resolve her conflicts with 3M's policy, but she never received a reply. App. 12; R. Doc. 9, at 7. Ms. Dietel experienced severe emotional distress during and following the denial of her religious exemption, disparate treatment of unvaccinated employees by forcing them to wear masks, and the constant threat of

termination. App. 12; R. Doc. 9, at 7. For months, Ms. Dietel was forced to endure having her religious beliefs put on trial, only to be told termination was imminent.

On April 23, 2023, Appellants filed their underlying Amended Complaint. App. 6; R. Doc. 9. Appellee subsequently filed its Motion to Dismiss, based on an alleged failure to state a claim under Title VII and the Minnesota Human Rights Act. App. 48-73; R. Doc. 12, 14. Appellants filed their brief in opposition to Appellee's Motion, App. 74; R. Doc. 22, and Appellee filed its reply brief in support. App. 88; R. Doc. 23.

The District Court heard the Motion to Dismiss on July 6, 2023, and granted dismissal of Appellants' entire action on the grounds that Appellant had failed to plead claims for religious discrimination or a hostile work environment under Title VII and the MHRA.

SUMMARY OF THE ARGUMENT

Appellants challenge the District Court's dismissal of his Complaint on the grounds that the District Court erred in holding that Appellants could not establish a *prima facie* case for religious harassment and a hostile work environment under Title VII and the MHRA. Appellants contest that 1) Appellants demonstrated a causal connection between their 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.

Allowing a company to disregard employee's sincere religious conflicts with employment policy, hold their employee's livelihood hostage, and engage in religiously offensive behavior is not the law and nor can it be. Individuals subject to religiously discriminatory treatment should be afforded the same protections as other rights in the employment setting. Holding otherwise would contribute greatly to the erosion of religious freedoms.

ARGUMENT

I. STANDARD OF REVIEW

A. Standard of Review for Dismissal of Appellants' 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 Appellants' 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.

II. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANTS' COMPLAINT DID NOT SUFFICIENTLY ESTABLISH A LINK BETWEEN THEIR 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).

Indeed, “[a]ll instances of harassment need not be stamped with signs of overt discrimination to be relevant under Title VII if they are part of a course of conduct which is tied to evidence of discriminatory animus.” *Carter v. Chrysler Corp.*, 173 F.3d 693, 701 (8th Cir. 1999); *see also Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1014 (8th Cir.1988); *see also Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148–49 (3d Cir.1999); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir.1987); *McKinney v. Dole*, 765 F.2d 1129, 1138–39 (D.C.Cir.1985). In the context of sexual harassment, “harassment alleged to be because of sex need not be explicitly sexual in nature.” *Id.*; *see Smith v. St. Louis Univ.*, 109 F.3d 1261, 1265 (8th Cir.1997).

There is no doubt that Appellants are a member of a protected group as Christians and that they were the subject of unwelcome harassment at the hands of Appellee via its coercive and pressuring policy that all employees were required to become fully vaccinated for COVID-19 or face imminent termination.

The District Court erroneously dismissed Appellants' claims for a hostile work environment on the grounds that the Appellants failed to demonstrate a nexus or causal link between their 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. However, in arriving at this conclusion, the District Court ignores the direct connection between Appellants' 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 in violation of their sincerely held religious beliefs.

Appellee put Appellants' faith and religious beliefs at direct issue by denying their exemption requests and failing to engage in the interactive process with Appellants to accommodate their religious objections to 3M's vaccine policy, thus creating an environment where Appellant's religious faith was under scrutiny and the source of anticipated adverse employment action.

Appellant Ziegler alleges in Appellants' Amended Complaint that she submitted a religious accommodation and exemption request to Appellee in which she outlined her sincere religious objections to the vaccine. App. 8-9; R. Doc. 9, at 3-4. By doing so, Appellee was put on direct notice of Appellant Ziegler's religious beliefs and justification for refusing to take the mRNA injection, which stems from her refusal to inject a pharmaceutical product into his body that uses aborted fetal cells in its manufacturing and testing.

Furthermore, Appellant Dietel alleges in Appellants' Amended Complaint that she sought a religious accommodation and exemption from Appellee's vaccine mandate and informed Appellee of her religious objections to its policies. App. 11; R. Doc. 9, at 6. Again, Appellee was properly informed Ms. Dietel's religious beliefs and reasons for being unable to comply with 3M's mandate. Appellee further launched an inquisition into Ms. Dietel's faith and brought her beliefs into issue by requesting additional information articulating her religious objections in her answers to Appellee's follow-up inquiries to his exemption request. App. 12; R. Doc. 9, at 7.

Despite this knowledge, Appellee continued with its ongoing daily pressure and coercion to force Appellants to receive the vaccine to such an extent that they suffered emotional trauma and stress. App. 12; R. Doc. 9, at 7. Appellants informed Appellee of their religious conflicts with its COVID-19 vaccine mandate

on October 28, 2021. Appellee's mandate was not lifted until December 10, 2021. As such, Appellants were subject to coercion and harassment to take the vaccine daily for several weeks at the hands of Appellee. Appellants' jobs were held hostage during that time and Appellants, due to extensive information and notices from Appellee, were of the belief that their employment would be imminently terminated.

The temporal connection between the denial of Appellants' 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 Appellants' religious beliefs in their coercive practices; it is enough that Appellants' sincere religious accommodation requests were denied, and that Appellee continued to

engage in pressuring and coercive conduct aimed at Appellants with full knowledge of their religious objections and the substantial emotional distress Appellee's actions were causing to Appellants.

Appellants have clearly established a link between their religious beliefs and the harassment they withstood at the hands of Appellee. Indeed, there could not be a closer nexus between Appellants' religious beliefs and the anxiety they sustained due to Appellee's mandate. Appellants are member of a protected group as Christians. Appellants vaccination status was inherently tied to their religious objections to the COVID-19 vaccine such that harassment on the basis of one is harassment on the basis of the other.

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

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

The District Court further erred in concluding that 3M's conduct towards Appellants did not rise to the level of severe or pervasive. However, Appellants contend what more would have been required? Does holding one's livelihood hostage unless they forgo their conscience and sincerely held religious beliefs not rise to the level of egregious enough to be protected under Title VII?

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). Under Title VII, employees are entitled to a workplace free from discriminatory intimidation, ridicule, and insult motivated by employees' membership in a protected class. *Carter v. Chrysler Corp.*, 173 F.3d 693 (8th Cir. 1999).

“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). Note that *either severity or pervasiveness* is sufficient to establish a violation of Title VII. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594

F.3d 798, 808 (11th Cir. 2010); *see, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 743, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

The District Court erroneously concluded that Appellants were not subjected to such severe or pervasive conduct to establish a *prima facie* hostile work environment claim. However, 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)).

There isn't just one factor, but several, that contributes to the analysis of whether an employee is being subjected to a hostile working environment. *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)).

Some of these factors that are relevant in assessing the magnitude of harassment include 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).

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).

Title VII comes into play to protect an employee long 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).

A work environment is shaped by the accumulation of abusive conduct; the harm cannot be measured by looking at discrete incidents. *Hathaway v. Runyon*, 132 F.3d 1214 (8th Cir. 1997). For example, in *Hathaway*, the Eighth Circuit held that the plaintiff had demonstrate severe or pervasive conduct when she was the victim of unwelcome physical touching and then forced to work in close proximity to her coworker who made unwelcome comments and advances. Although the plaintiff did not seek medical or psychiatric care, and Defendant argued that a reasonable person would not have been detrimentally affected by the conduct, the court found that the issue hinges on whether working conditions had been discriminatorily altered. *Id.* “It is sufficient that [plaintiff] credibly testified that she felt afraid, intimidated, and anxious, and that those feelings had a detrimental

impact on her psychological well-being and on her ability to perform her work.”

Id. at 1223.

Other circuits have confirmed that alleging harassment based on being a member of a protected group, such as a religion, is sufficient to advance a hostile work environment claim under Title VII. The Eleventh Circuit has held that “workplace conduct cannot be viewed in isolation, but rather is to be viewed cumulatively, and in its social context; and [] a plaintiff can prove a hostile work environment by showing severe or pervasive discrimination directed against her protected group, even if she herself is not individually singled out in the offensive conduct.” *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (finding that exposing Plaintiff to “disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed” constituted harassment).

Like the plaintiff in *Hathaway*, Appellants were subject to a work environment that made them feel afraid, intimidated, and anxious. Taking into account the totality of the circumstances and the accumulation of coercive and discriminatory conduct to which Appellants were subjected, the harassment experienced by Appellants was not merely “the ordinary tribulations of the workplace.” As alleged in the Amended Complaint, Appellant Ziegler was harassed daily by email, manager visits, and corporate reminders while at work to

receive the COVID-19 vaccine. App. 10; R. Doc. 9, at 5. Her supervisors asked her on a near daily basis if she was vaccinated. Such pressure to take the vaccine caused emotional trauma and stress to Appellant Ziegler. App. 10; R. Doc. 9, at 5. Furthermore, because she wasn't vaccinated, she was required to wear a mask, unlike her vaccinated coworkers, labeling her as unvaccinated and subjecting her to potential prejudice from fellow 3M employees. App. 10; R. Doc. 9, at 5.

Meanwhile, Appellant Dietel was subject to the same pressure and coercion to comply with 3M's mandate under threat of termination and loss of income. App. 12; R. Doc. 9, at 7. Ms. Dietel was required to wear a mask due to her unvaccinated status, unlike vaccinated coworkers - revealing her confidential medical information in the process. App. 12; R. Doc. 9, at 7. Appellant Dietel was continuously harassed and given written and verbal warnings when she was not wearing a mask. App. 12; R. Doc. 9, at 7. Appellant Dietel submitted three separate ethics complaints to resolve her conflicts with 3M's policy, but she never received a reply. App. 12; R. Doc. 9, at 7. Appellee's conduct yielded severe emotional distress App. 12; R. Doc. 9, at 7. Indeed, harassment that Appellants experienced surpassed this threshold as it did cause psychological injury.

Appellants have demonstrated that they have sincere religious beliefs that prevent them from receiving the COVID-19 vaccine, their employment was under constant threat as a result, they were subjected to unwelcome harassment at the

hands of Appellee due to their religious beliefs, and such harassment caused psychological harm and created a working environment that Appellants perceived as decidedly hostile and anxiety-inducing. Under any reasonable analysis, this conduct would rise to the level of severe or pervasive enough to allow Appellants' claims to proceed.

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).

The District Court's ruling as it stands creates a heightened threshold for discrimination specifically on the basis of religion. In another context, the harassment experienced by Appellants would be seen as actionable. For example, had 3M engaged in similar conduct that was motivated by race or gender, 3M's conduct would be perceived as discriminatory. If for a reason of race or gender, an employee could not partake in a particular activity at work, would we consider 3M's constant demand they engage in that activity as a term of employment discriminatory or harassing? According to established law, the answer is yes.

Accordingly, this Court should reverse the District Court's dismissal of Appellants claims for harassment and hostile work environment on the basis of their Constitutionally protected religious beliefs.

CONCLUSION

The consequence of the District Court's findings is dire for religious freedoms in the workplace as they have elevated the hurdle to seek relief for harassment based on religion. Indeed, a simple substitute suffices: substitute a racially offensive or offensive by gender, and would a claim exist? Repeatedly, the answer is yes, if you simply substitute the gender or racially offensive conduct for the religiously offensive conduct that pervaded the workplace in this case. The religiously offensive conduct took place daily, by managers and co-workers alike, for months and months, with the threat of termination always looming if not going along with the religiously offensive conduct.

If we substituted in racially or gender offensive conduct, we'd immediately see the discriminatory harm; but because it concerned religiously offensive behavior, the lower court dismissed it. That is not the law, nor can it be, if religious rights are treated as equal to all others against discriminatory treatment.

For the reasons set forth above, Appellants respectfully request that this Court of Appeals should vacate and reverse the District Court's Order of Dismissal.

Dated: November 27, 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 Plaintiffs-Appellants

ELIZABETH J. ZIEGLER and NICHOLE

L. DIETEL

CERTIFICATE OF SERVICE

I certify that on November 27, 2023, the foregoing BRIEF OF APPELLANTS ELIZABETH J. ZIEGLER AND NICHOLE L. DIETEL 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 Plaintiffs-Appellants

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 4,923 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: November 27, 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 Plaintiffs-Appellants