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SUMMARY  
August 10, 2023

**2023COA74**

**No. 22CA1922, *Simon v. ICAO* — Labor and Industry — Colorado Employment Security Act — Benefit Awards — Disqualification — Insubordination — COVID-19**

A division of the court of appeals considers, as a matter of first impression, whether, under section 8-73-108(5)(e)(VI), C.R.S. 2022, an employee is barred from receiving unemployment benefits as a consequence of her refusal to sign her employer's religious exemption form after informing the employer that she would not take a COVID-19 vaccine based on her religious beliefs. The employer placed the employee on unpaid leave after she refused to sign the exemption form. The division holds that the employee is barred from receiving benefits under section 8-73-108(5)(e)(VI) because she deliberately disobeyed her employer's reasonable

instruction that she either get vaccinated or sign the exemption form.

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Court of Appeals No. 22CA1922  
Industrial Claim Appeals Office of the State of Colorado  
DD No. 73871-2021

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Jessica Simon,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Bayada Home  
Health Care, Inc.,

Respondents.

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ORDER AFFIRMED

Division VI  
Opinion by JUDGE LIPINSKY  
Harris and Schutz, JJ., concur

Announced August 10, 2023

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Jessica Simon, Pro Se

Philip J. Weiser, Attorney General, Evan P. Brennan, Assistant Attorney  
General, Tanya M. Santillan, Assistant Attorney General, Gabrielle Falcon,  
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Claim Appeals Office

No Appearance for Respondent Bayada Home Health Care, Inc.

¶ 1 Many employers throughout the country adopted mandatory COVID-19 vaccination policies when vaccines became available after the pandemic struck in 2020. Earlier this year, in *Bara v. Industrial Claim Appeals Office*, 2023 COA 19, ¶¶ 16, 24, 530 P.3d 416, 419-20, 421, a division of this court decided that an employee was disqualified from receiving unemployment benefits because she knew about her employer’s vaccination policy, declined a COVID-19 vaccination, did not seek an exemption from the policy, and her employment was terminated as a result. The division in *Bara* affirmed the determination of the Industrial Claim Appeals Office (the Panel) that the employee was not entitled to benefits under section 8-73-108(5)(e)(VII), C.R.S. 2022, because she “[v]iolat[ed] . . . a statute or . . . a company rule which resulted or could have resulted in serious damage to the employer’s property or interests.” *Bara*, ¶¶ 12, 24, 530 P.3d at 419, 421. The division did not reach the Panel’s alternative determination that the employee was also disqualified from receiving unemployment benefits under section 8-73-108(5)(e)(VI), which applies to employees who deliberately disobeyed “a reasonable instruction of [their] employer.” *See Bara*, ¶ 24, 530 P.3d at 421.

¶ 2 Today we extend the reasoning of *Bara* to hold that an employee who claims a religious exemption from her employer’s COVID-19 vaccination policy and who is placed on unpaid leave after refusing to sign her employer’s religious exemption form likewise is not entitled to receive unemployment benefits. Under such circumstances, the employee is barred from receiving benefits under section 8-73-108(5)(e)(VI) because she deliberately disobeyed her employer’s reasonable instruction that she either get vaccinated or complete and sign the exemption form.

¶ 3 Jessica Simon, a registered nurse, seeks review of the Panel’s final order affirming a hearing officer’s decision disqualifying her from unemployment benefits. We affirm the Panel’s order.

#### I. Background

¶ 4 Simon worked for Bayada Home Health Care, Inc. (Bayada) from January to October 2021. Bayada is a home health care agency licensed by the Colorado Department of Public Health and Environment (CDPHE). The applicable CDPHE regulations required home health agencies such as Bayada to maintain proof of their employees’ immunizations or “[d]ocumentation of a religious exemption, as defined by facility policy.” Dep’t of Pub. Health &

Env't Ch. 2, Rule 12.2.4(C), 6 Code Colo. Regs. 1011-1 (effective Aug. 30, 2021). In compliance with CDPHE's COVID-19 vaccine regulations, Bayada adopted a policy requiring its employees either to be fully vaccinated against COVID-19 or to complete a medical or religious exemption form by October 31, 2021.

¶ 5 Simon declined to get vaccinated due to her religious beliefs. Although Simon knew Bayada's vaccination policy and completed Bayada's religious exemption form, she refused to sign it. Despite multiple warnings that Bayada would place her on unpaid leave if she did not sign the exemption form, she continued her refusal and was placed on unpaid leave in October 2021.

¶ 6 Simon applied for unemployment benefits. A deputy for the Division of Unemployment Insurance (the Division) concluded that Simon was disqualified from unemployment benefits on the grounds that she was at fault for her job separation because she refused to sign a form that would allow her to continue working with other accommodations despite remaining unvaccinated. (The parties do not contest that Bayada's placement of Simon on unpaid leave constituted a "separation." For this reason, we assume that a "separation from employment" occurred for purposes of determining

Simon's eligibility for unemployment benefits. *See* § 8-73-108(5)(e).)

The Division issued a notice of determination that Simon was disqualified from benefits under section 8-73-108(5)(e)(XX) (addressing an employee's failure to meet established job performance standards).

¶ 7 Simon appealed her disqualification and was granted a hearing, at which she and two witnesses for Bayada testified. Simon asserted that getting the COVID-19 vaccine would violate her religious beliefs and that Bayada would have reduced her work hours if she had signed the exemption form. She also said she objected to the language in the exemption form holding Bayada harmless from "any claims for their inability to accommodate my request due to undue hardship, direct threat, or state/local regulatory reasons." Simon asserted that such language was "illegal."

¶ 8 Susanne Anderson, a director at Bayada, said that Bayada does not disclose an employee's vaccination status to clients and that some of its unvaccinated employees who had received religious exemptions continued to see patients and "were staying very busy."

¶ 9 Briell Taylor, another Bayada employee, testified that the “State” mandated that home health care providers such as Bayada submit signed exemption forms from its employees who declined to be vaccinated for religious reasons. Taylor also testified that, because none of Bayada’s employees were guaranteed hours, Simon was incorrect in asserting that signing the form would have “impede[d] her hours.”

¶ 10 Based on the evidence presented at the hearing, the hearing officer found in February 2022 that Simon had acted knowingly in refusing to sign the exemption form and was aware that her refusal to provide the signed form would place her employment in jeopardy. The hearing officer was not persuaded that a reasonable person similarly situated to Simon would have refused her employer’s instruction to sign the form and found that Simon’s refusal to sign the exemption form, if she chose to remain unvaccinated, was fully under her control. For these reasons, the hearing officer concluded that Simon was at fault for her job separation and was therefore disqualified from receiving benefits under section 8-73-108(5)(e)(VI).

¶ 11 Simon appealed to the Panel, which affirmed the hearing officer’s decision.



¶ 12 After the Panel issued its decision, the hearing officer reconsidered his decision on the grounds of an apparent error. He scheduled a second hearing, at which the hearing officer announced that he would not consider certain evidence and testimony because Bayada had not provided it in advance. There is no indication that the hearing officer or the Panel relied on such evidence in their final determinations, and our decision does not rest on any of the excluded evidence.

¶ 13 In his reconsidered decision, the hearing officer reaffirmed his original determination that Simon was disqualified from receiving unemployment benefits. He concluded that, even in the absence of the excluded evidence, Bayada had shown that its vaccination policy was reasonable and that Simon had not established discrimination based on her religious beliefs. Importantly, the hearing officer found that Simon had not “presented sufficient evidence that other individuals sharing the same beliefs as hers would have found the employer’s instruction to be unreasonable.” The hearing officer concluded that, because Bayada “was acting in accordance with a mandate issued by a state regulatory agency,”

Bayada’s instruction to Simon to submit a signed exemption form was objectively reasonable.

¶ 14 On review, the Panel affirmed the hearing officer’s reconsidered decision. It found that Simon deliberately refused an instruction that a reasonable person similarly situated would not have refused and, therefore, the disqualification was proper under section 8-73-108(5)(e)(VI). Additionally, citing *Biden v. Missouri*, 595 U.S. \_\_\_, \_\_\_, 142 S. Ct. 647, 651 (2022), the Panel noted that COVID-19 vaccine mandates “pertinent to health care providers receiving Medicare or Medicaid Funds are legal and valid — although, they must allow religious exemptions.”

¶ 15 The Panel also addressed Simon’s religious discrimination arguments, noting that, at the time, guidance from the Equal Employment Opportunity Commission regarding vaccine mandates did “not support [Simon’s] objection.” See U.S. Equal Emp. Opportunity Comm’n, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (2021), <https://perma.cc/2LYE-3GMZ>.

¶ 16 The Panel further explained that, under *Biden*, there were compelling health reasons for the mandate, including “data showing

that the COVID-19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely when healthcare workers are unvaccinated.” *Biden*, 595 U.S. at \_\_\_, 142 S. Ct. at 651. Accordingly, consistent with *Biden*, providers must “ensure that their covered staff are vaccinated against COVID-19 . . . . A [provider]’s failure to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the programs.” *Id.* As the Panel noted, Bayada required only that Simon sign the religious exemption form, and she refused to do so.

## II. Analysis

¶ 17 Simon, proceeding pro se, asks us to set aside the Panel’s order, arguing that Bayada engaged in religious discrimination by ordering her to sign the exemption form if she remained unvaccinated. She specifically contends as follows:

- Signing the exemption form would have allowed Bayada to limit her hours and reduce her assignments.
- Bayada discriminated against her on the basis of her religion by placing her on unpaid leave for refusing to sign the exemption form.

- The exemption form had “illegal provisions and unconscionable terms.”
- Bayada violated her rights under the Fifth and Fourteenth Amendments and her right to privacy by advising clients that they could request care from “vaccinated[-]only” clinicians.

¶ 18 In response, the Panel argues that Bayada, as a home health care provider, was required to follow CDPHE’s emergency COVID-19 rules. Under those rules, CDPHE required Bayada to maintain documentation of religious exemptions and to submit a vaccination status report for its employees each month. The Panel contends that Bayada’s request that Simon sign the exemption form did not violate any of her rights and that the exemption form did not contain illegal or unconscionable terms.

#### A. Legal Principles and Standard of Review

¶ 19 We will uphold the Panel’s decision unless its findings of fact do not support the decision or the decision is erroneous as a matter of law. § 8-74-107(6)(c)-(d), C.R.S. 2022; *see Mesa Cnty. Pub. Libr. Dist. v. Indus. Claim Appeals Off.*, 2017 CO 78, ¶ 17, 396 P.3d 1114, 1118-19. We review de novo ultimate conclusions of fact and

ultimate legal conclusions. *Harbert v. Indus. Claim Appeals Off.*, 2012 COA 23, ¶¶ 8-9, 272 P.3d 1190, 1192. Whether a claimant is at fault for her separation from employment is an ultimate legal conclusion, *Mesa Cnty. Pub. Libr. Dist.*, ¶ 17, 396 P.3d at 1118, and requires a case-specific consideration of the totality of the circumstances, *Morris v. City & Cnty. of Denver*, 843 P.2d 76, 79 (Colo. App. 1992).

¶ 20 A worker's entitlement to unemployment benefits depends on the reason for the worker's job separation. *See Debalco Enters., Inc. v. Indus. Claim Appeals Off.*, 32 P.3d 621, 623 (Colo. App. 2001). An individual is entitled to receive unemployment benefits if she is unemployed through no fault of her own. *See* § 8-73-108(1)(a). For purposes of the unemployment statutes, "fault" includes "a volitional act or the exercise of some control or choice in the circumstances leading to the discharge from employment such that the claimant can be said to be responsible for the termination." *Richards v. Winter Park Recreational Ass'n*, 919 P.2d 933, 934 (Colo. App. 1996).

¶ 21 An employee may be disqualified from receiving unemployment benefits for multiple reasons. *See* § 8-73-108(5)(e). In this case,

the deputy initially disqualified Simon under a different subsection than the one on which the hearing officer and Panel relied. If the evidence arguably might support the application of more than one basis for disqualification under section 8-73-108(5), the Panel has broad discretion in determining which subsection to apply. *Sch. Dist. No. 1 v. Fredrickson*, 812 P.2d 723, 725 (Colo. App. 1991).

While the record evidence arguably may support the deputy's determination that Simon was disqualified under section 8-73-108(5)(e)(XX), we need only review the hearing officer's and the Panel's determinations that Simon was disqualified for benefits under section 8-73-108(5)(e)(VI) for refusing a reasonable request from Bayada. In assessing the reasonableness of an employer's request to its employee, "the Panel must consider the facts and circumstances of each case, using its independent judgment to determine whether the request which claimant refused was one which a reasonable person would have refused." *Rose Med. Ctr. Hosp. Ass'n v. Indus. Claim Appeals Off.*, 757 P.2d 1173, 1174 (Colo. App. 1988).

B. The Panel Did Not Err by Deciding that Simon Was Not Entitled to Receive Unemployment Benefits

1. Signing the Exemption Form Would Not Have Impacted Simon's Employment

¶ 22 The evidence supported the hearing officer's conclusion that signing the exemption form would not have impacted Simon's hours or working conditions. Evidence in the record showed that Simon was never guaranteed a certain number of hours and that some Bayada employees who had received religious exemptions from the vaccine policy were "staying very busy" and were working "without any problems whatsoever." No evidence in the record supports Simon's argument that Bayada would have limited her hours or job opportunities if she had submitted a signed exemption form.

2. Bayada Did Not Discriminate Against Simon Based on Her Religious Beliefs

¶ 23 "To make out a *prima facie* case" of religious discrimination, an employee must establish four elements: "(1) an observance or practice that is religious in nature, and (2) that is based on a sincerely held religious belief, (3) conflicted with an employment requirement, and (4) the religious observance or practice was the basis or a motivating factor for the employee's . . . discriminatory

treatment.” *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861, 883 (7th Cir. 2023). Thus, the crux of a religious discrimination claim is *discrimination*. The plaintiff must establish that she was treated differently from other employees because of her religious beliefs. In contrast, “a rule that distinguishes between vaccinated and unvaccinated healthcare professionals does not draw lines on the basis of a suspect or quasi-suspect class.” *Griner v. Biden*, No. 22CV149, 2022 WL 7501065, at \*10 (D. Utah Oct. 13, 2022) (unpublished order).

¶ 24 We agree with the hearing officer and the Panel that Bayada did not treat Simon differently from other employees because of Simon’s religious beliefs. Bayada’s COVID-19 related policies were “facially neutral and generally applicable.” *See Kane v. de Blasio*, 623 F. Supp. 3d 339, 359 (S.D.N.Y. 2022). Thus, Bayada drew a distinction between its vaccinated and unvaccinated employees. Simon, as an unvaccinated person, was not similarly situated to someone who was vaccinated. *See id.* She does not point to any “similarly situated persons who have been treated differently.” *See id.*



¶ 25 Because she makes no claim of differential treatment among similarly situated people, Simon’s claim of disparate treatment based on her religious beliefs fails. *See Salazar v. Indus. Claim Appeals Off.*, 2022 COA 13, ¶¶ 35-36, 508 P.3d 805, 813.

3. Bayada Did Not Require Simon to Consent to the Allegedly Illegal Provisions Contained in the Exemption Form

¶ 26 We reject Simon’s argument that Bayada conditioned her execution of the exemption form on her consent to the hold harmless language in the form. Simon did not prove at the hearing that Bayada would not accept the signed form if she declined to consent to the hold harmless language. Thus, the record evidence fails to establish that Bayada forced Simon to agree to any allegedly illegal provisions in the exemption form. (On appeal, Simon does not indicate which specific language in the exemption form was allegedly “illegal.” We glean from her testimony at the hearing, however, that her “illegality” argument rests on the hold harmless provision.

4. Simon Fails to Provide Support for Her Argument That Bayada Violated Her Rights Under the Fifth and Fourteenth Amendments and Her Right to Privacy

¶ 27 Simon contends that allowing Bayada’s clients to request a vaccinated provider violated her rights under the Fifth and Fourteenth Amendments to the United States Constitution and her right to privacy. Her argument fails for three reasons.

¶ 28 First, Simon did not argue to the hearing officer or the Panel that Bayada violated any of her constitutional rights other than her right to exercise her religion. Thus, she did not preserve her arguments regarding the Fifth and Fourteenth Amendments and the right to privacy. We need not consider unpreserved arguments. *Drachmeister v. Brassart*, 93 P.3d 566, 568 (Colo. App. 2004).

¶ 29 Second, in any event, the record evidence shows that Bayada did not disclose to clients which of its employees were or were not vaccinated. Although “clients would be able to request vaccinated staff only,” Bayada did not disclose to clients which of its employees had signed a religious exemption form in lieu of getting vaccinated. The record does not show that Bayada’s decision not to assign an unvaccinated employee to a particular client necessarily conveyed the message that such employee had not been vaccinated. And

Simon does not argue that lack of vaccination was the sole reason why Bayada did not assign a particular employee to a particular client in 2021.

¶ 30 Third, Simon’s challenge to Bayada’s policy to honor the wishes of clients who requested only vaccinated staff was part of her religious discrimination argument. At the hearing, Simon answered “yes” when asked, “[I]f a client requested that you not attend to them because you’re not vaccinated, . . . that’s religious discrimination?” But as noted above, Simon failed to establish that Bayada treated her differently from other employees based on her religious beliefs; rather, Bayada drew a permissible distinction between vaccinated and unvaccinated employees.

#### 5. The Record Evidence Supports the Panel’s Decision

¶ 31 The record shows that Bayada made clear to Simon on numerous occasions that her failure to sign the religious exemption form, as required by Bayada’s COVID-19 policy, would result in her job separation. As we explain above, Bayada had the right to require that its registered nurses either get the COVID-19 vaccine or, if the employee’s religious beliefs precluded vaccination, complete and sign an exemption form. This instruction was

reasonable. Yet Simon refused to comply with Bayada’s policy and chose to deliberately disobey a reasonable instruction from her employer.

¶ 32 Simon had the ability to choose whether to become vaccinated or to sign the religious exemption form; she did not act in a manner that was “essentially involuntary” or “accidental.” *See Starr v. Indus. Claim Appeals Off.*, 224 P.3d 1056, 1065 (Colo. App. 2009). Accordingly, her placement on unpaid leave was within her control, and thus volitional. *See Richards*, 919 P.2d at 934.

¶ 33 For these reasons, we conclude that the Panel did not err by determining that Simon was disqualified from receiving unemployment benefits under section 8-73-108(5)(e)(VI).

### III. Disposition

¶ 34 The Panel’s order is affirmed.

JUDGE HARRIS and JUDGE SCHUTZ concur.