

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. _____

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QLARANT INTEGRITY
SOLUTIONS, LLC,

Petitioner/Appellee,

vs.

NICHOLAS GUTHNECK,

Respondent/Appellant.

NOTICE OF APPEAL

NOTICE is given that Nicholas Guthneck, the Appellant above-named and who is the Respondent in that cause of action filed in the First Judicial District, in Lewis and Clark County as Cause No. ADV-2023-483, hereby appeals to the Supreme Court of the State of Montana from the *Order – Petition for Judicial Review* entered in such action on the 28th day of March, 2024, a copy of which is attached to this Notice of Appeal as Exhibit A.

THE APPELLANT FURTHER CERTIFIES:

1. That this appeal is subject to the mediation process required by M. R. App. P. 7. The money judgment being sought is not less than \$5,000.
2. That this appeal is not an appeal from an order certified as final under M.

R. Civ. P. 54(b).

3. That the notice required by M. R. App. P. 27 has been or will be given, within 11 days of the date hereof, to the Supreme Court and to the Montana Attorney General with respect to a challenge to the constitutionality of any act of the Montana Legislature.

4. That all available transcripts of the proceedings in this matter have been ordered from the court reporter contemporaneously with the filing of this notice of appeal.

5. That included herewith is the filing fee prescribed by statute.

Respectfully submitted this 28th day of March, 2024.

TIPP COBURN LOCKWOOD PC

/s/ Torrance L. Coburn

Torrance L. Coburn

Attorney for Respondent/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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Clerk of Lewis and Clark County District Court
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Dated this 28th day of March, 2024.

/s/ Torrance L. Coburn
TIPP COBURN LOCKWOOD, PC

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

QLARANT INTEGRITY
SOLUTIONS, LLC,

Petitioner,

v.

NICHOLAS GUTHNECK,

Respondent.

Cause No. ADV-2023-483

**ORDER – PETITION FOR
JUDICIAL REVIEW**

Before the Court is Petitioner Qlarant Integrity Solutions, LLC's (Qlarant) petition for judicial review. Amy D. Christensen and Vicki Bignell represent Qlarant. Torrance L. Coburn represents Respondent Nicholas Guthneck (Guthneck).

STATEMENT OF FACTS

This petition for judicial review arises from the Montana Human Rights Commission's (Commission) June 27, 2023 remand order in Montana Human Rights Bureau (HRB) Case No. 0220091 (Remand Order). Qlarant is a

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EXHIBIT

A

1 Maryland not-for-profit corporation with its principal place of business in Easton,
2 Maryland. Qlarant employed Guthneck as a health fraud investigator from
3 October 2020 to November 2021. At the time of his termination, Guthneck was a
4 resident of Park City, Montana and was working for Qlarant remotely.

5 In May 2021, Montana Code Annotated § 49-2-312 became law.
6 Relevant to the current matter, the statute made it unlawful for “an employer to
7 refuse employment to a person, to bar a person from employment, or to
8 discriminate against a person in . . . privilege of employment based on the
9 person's vaccination status.” On September 9, 2021, the President of the United
10 States implemented Executive Order 14042 entitled Ensuring Adequate COVID
11 Safety Protocols for Federal Contractors. 86 Fed. Reg. 50985 (Sept. 9, 2021).
12 EO 14042 required federal contractors to comply with all guidance published by
13 the Safer Federal Workforce Task Force. On September 24, 2021, the Task
14 Force issued “Guidance for Federal Contractors and Subcontractors.” The
15 guidance required employees of federal contractors, including employees
16 working remotely from their residences, to obtain COVID-19 vaccinations except
17 in limited circumstances where an employee was legally entitled to an
18 accommodation. The guidance further required covered contractors, including
19 Qlarant, to comply with the vaccination mandate by December 8, 2021.

20 On October 6, 2021, Qlarant’s chief executive officer sent a
21 company-wide email detailing Qlarant’s mandatory COVID vaccination policy.
22 The policy required all Qlarant employees submit proof of vaccination by
23 November 24, 2021, or face termination. On November 4, 2021, Qlarant
24 requested Guthneck’s decision regarding disclosure of his vaccination status.

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1 Guthneck advised Qlarant he was uncomfortable disclosing information
2 regarding his vaccination status. As a result, Qlarant terminated Guthneck's
3 employment the same day.

4 Also on November 4, 2021, following his termination, Guthneck
5 filed a complaint with the Montana HRB alleging unlawful discrimination in
6 employment on the basis of vaccination status. Following an informal
7 investigation, the HRB found cause to believe Qlarant had violated Montana
8 Code Annotated § 49-2-312. The HRB transferred the case to the Office of
9 Administrative Hearings (OAH) for a contested case proceeding. On December
10 29, 2022, Qlarant filed a motion to dismiss the contested case proceeding for
11 failure to state a claim. On February 24, 2023. The Hearings Officer issued an
12 order (hearing officer's order) dismissing Guthneck's complaint on the grounds
13 EO 14012 preempted Montana Code Annotated § 49-2-312.

14 Guthneck appealed the hearing officer's order to the Commission.
15 Following briefing and oral argument, the Commission issued its remand order
16 vacating the hearing officer's order and remanding the matter to OAH to proceed
17 with the contested case. The Commission concluded the hearing officer and the
18 Commission lacked authority to determine whether EO 14042 preempted
19 Montana's vaccination statute because the issue was constitutional in nature and
20 could only be decided by a judicial body.

21 On July 19, 2023, Qlarant filed its petition for judicial review of
22 the Commission's remand order. Qlarant asks this Court to reverse the
23 Commission's remand order rejecting the hearing officer's decision.
24 Alternatively, Qlarant requests this Court to review the preemption issue *de novo*
25 and enter an order finding EO 14042 preempted Montana Code Annotated

1 § 49-2-312 during the relevant period. Although the Commission’s remand order
2 does not constitute a final agency decision, Qlarant requests immediate review on
3 the grounds the Commission’s finding prevents the preemption issue from being
4 resolved at the agency level.

5 PRINCIPLES OF LAW

6 The Montana Administrative Procedures Act (MAPA) governs
7 petitions for judicial review. MAPA confines a district court’s review of an
8 agency decision to the existing record. Mont. Code Ann. § 2-4-704(2). The
9 court may reverse or modify the agency decision if it finds substantial rights of
10 the appellant have been prejudiced because the agency’s decision is in violation
11 of constitutional or statutory provisions or affected by other error of law. Mont.
12 Code Ann. § 2-4-704(2) (a)(i);(iii). A district court reviews an agency's
13 interpretations and applications of law *de novo* to determine whether they are
14 correct. *Knowles v. Lindeen*, 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d 595.
15 Montana Code Annotated § 2-4-701 provides for immediate review of a
16 “preliminary, procedural, or intermediate agency action or ruling...if review of
17 the final agency decision would not provide an adequate remedy.”

18 ANALYSIS

19 Qlarant challenges the Commission’s finding the OAH hearing
20 officer and the Commission lack authority to determine whether EO 14042
21 preempted Montana Code Annotated § 49-2-312. Although the Commission’s
22 order is not a final agency decision, the Court finds the decision reviewable
23 pursuant to Montana Code Annotated § 2-4-701.

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1 The Commission's order remanded this matter to the OAH for
2 further proceedings. Even if the Commission's legal conclusion was correct,
3 remanding the issue to the hearing officer while specifically rejecting the hearing
4 officer's authority to make a finding on Qlarant's affirmative defense would be
5 futile. The Commission did not find the hearing officer's preemption
6 determination was substantively incorrect. Rather, it concluded the issue was
7 unresolvable at the agency level. Review of the Commission's intermediate
8 decision is appropriate because the preemption issue is determinative. Any
9 further proceedings conducted before resolving the issue would be premature.
10 Whether Qlarant's actions violated Montana Code Annotated § 49-2-312 is
11 irrelevant if the statute does not apply. Therefore, it is appropriate for this Court
12 to review the Commission's intermediate decision before requiring the parties to
13 participate in further proceedings at the agency level.

14 The Court next considers the preemption issue raised in the
15 Commission's order. The Commission bases its order on *Jarussi v. Board of*
16 *Trustees*, 204 Mont. 131, 135m 664 P.2d 316, 318 (1983), where the Montana
17 Supreme Court held, "the exhaustion doctrine does not apply to constitutional
18 issues." While the Commission correctly concluded the judicial branch has
19 exclusive authority over constitutional questions, it erred in determining the
20 preemption issue raises a constitutional question. In *Jurassi*, the plaintiff alleged
21 the defendants violated his fundamental right to know as established under
22 Article II, Section 9 of the Montana Constitution. Thus, the Montana Supreme
23 Court necessarily analyzed whether the defendants' actions complied with
24 constitutional requirements.

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1 This case is easily distinguishable from *Jurassi*. The Commission
2 erred in framing Qlarant’s preemption argument as a challenge to the validity of
3 Montana Code Annotated § 49-2-312. Qlarant did not challenge the general
4 validity of the statute. Instead, Qlarant argued EO 14042 preempted the statute in
5 the case of federal contractors in Qlarant’s position. Finding EO 14042
6 preempted the Montana statute under the facts of this matter would have no effect
7 on the validity of Montana Code Annotated § 49-2-312 as applied to any party
8 not subject to the executive order. This matter does not require the Commission
9 to determine the constitutionality of either the Montana statute or the executive
10 order.

11 While federal preemption is rooted in the Supremacy Clause of
12 United States Constitution, applying the doctrine does not require constitutional
13 interpretation. On the contrary, the Montana Supreme Court has held “Express
14 preemption is a question of statutory interpretation.” *Reavis v. Pa. Higher Educ.*
15 *Assistance Agency*, 2020 MT 181, ¶ 19, 400 Mont. 424, ¶ 19, 467 P.3d 588,
16 ¶ 19 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484, 116 S. Ct. 2240, 2250,
17 135 L. Ed. 2d 700 (1996)). Additionally, “[c]onflict preemption is a question of
18 law that we can address at the pleading stage.” *Id.* at ¶ 25. In analyzing
19 preemption arguments, the Montana Supreme Court and the United States
20 Supreme Court have both directed courts to “look to the ‘text and structure of the
21 statute at issue.’” *Id.* at ¶ 16 (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S.
22 658, 664, 113 S. Ct. 1732, 1737, 123 L. Ed. 2d 387 (1993)). Whether EO 14042
23 preempted Montana Code Annotated § 49-2-312 is a matter of statutory
24 interpretation. As such, the hearing officer acted within her jurisdiction in
25 considering Qlarant’s preemption argument.

1 In the present matter, the hearing officer followed the proper
2 analysis in addressing preemption. The hearing officer correctly distinguished
3 between express and implied preemption and applied the standards for each to
4 the facts of the case. The hearing officer did not err in determining preemption
5 applied to bar Guthneck's claims. Therefore, the Commission should adopt the
6 hearing officer's legal conclusions on remand.

7 **CONCLUSION**

8 The Commission incorrectly rejected the hearing officer's order
9 based on an error of law. The Commission erred in concluding the OAH hearing
10 officer and the Commission lack authority to determine whether EO 14042
11 preempted Montana Code Annotated § 49-2-312 during the period relevant to
12 Guthneck's claim. As such, this matter is remanded to the Commission with
13 instructions to adopt the hearing officer's February 24, 2023 order dismissing
14 Guthneck's claim.

15 **ORDER**

16 **IT IS HEREBY ORDERED** Qlarant Integrity Solution, LLC's
17 petition for judicial review is **GRANTED**.

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19
20 /s/ Mike Menahan
21 MIKE MENAHAN
22 District Court Judge

23 c: Amy D. Christensen, via email
24 Vicki Bignell, via email
25 Torrance L. Coburn, via email

MM/sm/ADV-2023-483

CERTIFICATE OF SERVICE

I, Torrance Lee Coburn, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 03-28-2024:

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Electronically Signed By: Torrance Lee Coburn
Dated: 03-28-2024