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Fed. Judge Won't DQ Herself In Gov't Vaccine Mandate Case

By Jack Karp

Law360 (April 28, 2022, 1:56 PM EDT) -- A California federal judge will not step aside from a lawsuit challenging the Biden administration's vaccine mandates for federal workers and contractors, ruling that her husband's employment by a company that has no connection to the case does not cast doubt on her impartiality.

On Wednesday U.S. District Judge Cathy Ann Bencivengo **denied** a motion to have her disqualified from hearing the legal challenge to the federal government's vaccination requirements for federal employees and contractors. She also rejected a simultaneous motion to vacate her previous dismissal of the case.

The government contractors and employees had moved to have the judge disqualified and her dismissal undone because her husband works for scientific and medical equipment supplier Thermo Fisher Scientific Inc. and the couple own stock in the company.

But that connection is irrelevant to the case, according to Judge Bencivengo.

"Thermo Fisher Scientific Inc. is not a party to this lawsuit. Nor was Thermo Fisher mentioned in the complaint or any of the briefing related to the application for a temporary restraining order filed by plaintiffs (which the court denied)," the judge ruled.

The federal contractors and employees who filed the suit claimed that since Thermo Fisher contracts with the federal government to provide COVID-19 tests and is involved in a number of vaccine projects, the company — and its stock — could be impacted by the outcome of the case.

In 2021, products related to the pandemic contributed 23% of the company's total sales, the workers said. And Thermo Fisher's stock price increased by nearly \$200 per share in the time between the first authorization of COVID-19 vaccines for emergency use and the implementation of the government's vaccine mandates.

That means Judge Bencivengo's connection to the company could place her impartiality in doubt, according to the workers. In addition to her husband's working at the company, the judge's financial disclosures show that she owns \$50,000 to \$100,000 worth of the company's stock, they said.

"A request to enjoin the governmental vaccine mandates and forced COVID-19 testing, which plaintiffs have requested in their complaint, would directly impact Thermo Fisher, and the stock held by Judge Bencivengo," the workers said.

The judge's decision not to recuse herself from the case is "inappropriate and wrong," the workers' attorney, Gary George Kreep, told Law360 Thursday.

"Because it impacts her and her husband's income and their ownership interest in the company, she's required to recuse herself. She declined to do that," Kreep said, adding, "She should have recused herself, the law is very clear."

An attorney for the federal government declined to comment Thursday.

The federal employees and contractors, originally numbering more than 100, filed suit in February challenging the Biden administration's executive orders that they be fully vaccinated against COVID-19 or lose their jobs. Those requirements violate their rights to due process, bodily autonomy and free exercise of religion, among other claims, according to the complaint.

Judge Bencivengo denied the workers' motion for a temporary restraining order and dismissed the suit earlier this month, ruling that the "overwhelming majority" of the plaintiffs had not lost their jobs and either had obtained an exemption to the vaccine requirements or had a request for an exemption pending.

"None of the presently employed plaintiffs have alleged or presented evidence that they have experienced an adverse employment action based on either the employee mandate or the contractor mandate," the judge wrote at the time.

The few remaining plaintiffs lack standing to sue since a TRO blocking the government from enforcing the mandates would not reinstate them at their jobs, the judge added. On top of that, both of the executive orders being challenged in the suit are already subject to nationwide injunctions from other courts.

Federal judges in Arizona, Kentucky, Missouri, Florida and Georgia have issued **orders blocking** the federal contractor vaccination mandate. A split Fifth Circuit **recently revived** the mandate for federal employees after a Texas federal judge **blocked it**.

The 13 plaintiffs remaining in the case before Judge Bencivengo have until May 5 to amend their complaint, according to the judge's Wednesday order.

The workers don't intend to file an amended complaint, however, and instead plan to appeal Judge Bencivengo's dismissal of their case, according to Kreep.

"She's trying to box us into a position where only a couple of our plaintiffs are allowed to proceed. We're not going to do that. We're going to appeal her ruling, and part of it's going to be on the basis that she never should have heard the case," Kreep said.

The workers are represented by Gary George Kreep of the Law Office of Gary Kreep.

The federal government is represented by Valerie Torres of the U.S. Attorney's Office for the Southern District of California.

The case is De Cristo Cano et al. v. Biden et al., case number 3:22-cv-00193, in the U.S. District Court for the Southern District of California.

--Additional reporting by Alyssa Aquino, Katie Buehler and Dave Simpson. Editing by Steven Edelstone.

Update: This story has been updated to include comment from the workers' attorney and to reflect that an attorney for the federal government declined to comment.