

Nick Rolovich vs. Washington State University
By Martin J. Greenberg and Ben Crockett

I. Nick Rolovich Termination for COVID-19 Vaccination Refusal

A. Nick Rolovich Background

Nick Rolovich (“Rolovich”) was the Head Football Coach at Washington State University (“WSU”) until he was fired on October 18, 2021 for failing to comply with the State of Washington’s COVID-19 vaccine mandate for state employees.¹ Rolovich had been hired by WSU on January 13, 2020 to replace Coach Mike Leach.² He had a record of 5-6 at WSU, including 4-3 in 2021 before being fired.³ WSU brought in Dr. Guy Palmer, a professor of pathology and infectious disease, to discuss the COVID-19 vaccine with Rolovich.⁴ Rolovich elected not to receive the vaccine, and on July 21, 2021 released a statement on his personal Twitter account stating he was unable to attend Pac-12 Media Day in person.⁵ Rolovich had previously been the Head Football Coach at the University of Hawaii from 2016-2019, where he had a career record of 28-27.⁶ He was also a football player for the University of Hawaii, where he graduated from in 2002.⁷ He enjoyed a brief professional career, playing in NFL Europe and the Arena Football League, before becoming a full-time coach at the University of Hawaii in 2008, as the team’s quarterback’s coach.⁸

¹ Kyle Bonagura, *Washington State Fires Football Coach Nick Rolovich, 4 Assistants for Refusing State-Mandated COVID-19 Vaccine*, https://www.espn.com/college-football/story/_/id/32426315/nick-rolovich-washington-state-football-coach-refusing-state-mandated-covid-19-vaccine-source-says, (last visited April 18, 2022).

² Nick Rolovich Biography, <https://wsucougars.com/sports/football/roster/coaches/nick-rolovich/2892>, (last visited February 1, 2022).

³ *Id.*

⁴ Kyle Bonagura, *Inside Nick Rolovich’s Downfall at Washington State Over the COVID-19 Vaccine*, https://www.espn.com/college-football/story/_/id/32459767/inside-nick-rolovich-downfall-washington-state-covid-19-vaccine, (last visited February 2, 2022).

⁵ Nick Rolovich, <https://twitter.com/NickRolovich/status/1417957468366200832>, July 21, 2021.

⁶ Nick Rolovich Biography, <https://wsucougars.com/sports/football/roster/coaches/nick-rolovich/2892>, (last visited February 1, 2022).

⁷ *Id.*

⁸ *Id.*

Rolovich was fired from his position at WSU because he refused to be vaccinated against COVID-19.⁹ Washington Governor Jay Inslee (“Inslee”) placed one of the strictest vaccine mandates on State of Washington employees, which essentially gave two options: get vaccinated or be terminated.¹⁰ Rolovich chose the latter option, and was ultimately terminated.¹¹ While there was a religious exemption that existed, Rolovich did not apply for this option until September 28, 2021.¹² Rolovich is a practicing Catholic, but WSU denied his exemption on October 13, 2021.¹³ It is unclear if Rolovich attempted to pursue a religious exemption at an earlier date, or if his September 28th application was the only one.

B. Governor Inslee’s Vaccine Mandate

The requirement for COVID-19 vaccinations for state employees became effective on August 20, 2021 through Proclamation 21-14.1 as executed by Inslee.¹⁴ This Proclamation created a deadline of October 18, 2021 for state employees to receive their COVID-19 vaccinations, show proof of exemption, or be terminated from their position.¹⁵ On the State of Washington Governor’s website, there are a number of questions answered relating to the Proclamation.¹⁶ One answer states that “employees who refuse will be subject to non-disciplinary dismissal from employment

⁹ Kyle Bonagura, Washington State football coach Nick Rolovich fired: How it Happened, What Comes Next and More, https://www.espn.com/college-football/story/_/id/32427102/washington-state-football-coach-nick-rolovich-fired-how-happened-comes-next-more, (last visited April 9, 2022).

¹⁰ Jim Brunner, *Washington’s COVID Vaccine Mandate Ordered by Gov. Jay Inslee are Among the Strictest in the Nation*, Seattle Times, (last visited February 1, 2022).

¹¹ Kyle Bonagura, Washington State football coach Nick Rolovich fired: How it Happened, What Comes Next and More, (last visited April 9, 2022).

¹² Dan Wolken, Ex-Washington State Coach Football Coach Nick Rolovich Files Appeal Over Firing, <https://www.usatoday.com/story/sports/ncaaf/pac12/2021/11/04/nick-rolovich-ex-washington-state-coach-appeal-firing-covid-vaccine/6285282001/>, (Nov. 4, 2021).

¹³ *Id.*

¹⁴ *Proclamation By the Governor Amending Proclamations 20-05 and 20-14, 21-14.1, COVID-19 Vaccination Requirement*, <https://www.governor.wa.gov/sites/default/files/proclamations/21-14.1%20-%20COVID-19%20Vax%20Washington%20Amendment.pdf>, (Aug. 14, 2021).

¹⁵ *Id.*

¹⁶ *Vaccine Mandate Frequently Asked Questions*, WASHINGTON GOVERNOR JAY INSLEE, <https://www.governor.wa.gov/VaccineMandateFAQ>, (last visited February 7, 2022).

for failing to meet the qualifications of the job.”¹⁷ In addition, the Proclamation dictates what must occur if an employee were to receive a religious exemption. In Section 2(a) of Proclamation 21-14.1 states:

Workers for State Agencies, Workers for operators of Educational Settings, and Health Care Providers are not required to get vaccinated against COVID-19 under this Order if they are unable to do so because of a disability or if the requirement to do so conflicts with their sincerely held religious beliefs, practices, or observance.¹⁸

Further, the Proclamation indicates that operators of Educational Settings must comply with Title VII of the Civil Rights Act of 1964, and any other applicable law.¹⁹ Before any determination is made regarding a sincerely held religious belief, a state agency was required to receive documentation from the individual stating their sincerely held belief, and could only grant exemptions that were truthful.²⁰ Therefore, a state employer who received an application for a religious exemption had to evaluate whether that claim was sincere based upon Title VII of the Civil Rights Act of 1964.

C. The Rolovich-WSU Employment Agreement

Rolovich’s Employment Agreement (“Agreement”) with WSU created a number of responsibilities and other covenants which Rolovich was required to follow. Rolovich’s duties and responsibilities are outlined in Section 1.2 “Description of Employee’s Responsibilities” of his Agreement.²¹ Importantly, Section 1.2.1 “Recognition of Duties” includes two statements which can be broadly applied.²² First, Section 1.2.1 states that the “[e]mployee agrees to devote

¹⁷ *Id.*

¹⁸ *Proclamation By the Governor Amending Proclamations 20-05 and 20-14, 21-14.1, COVID-19 Vaccination Requirement*, <https://www.governor.wa.gov/sites/default/files/proclamations/21-14.1%20-%20COVID-19%20Vax%20Washington%20Amendment.pdf>, (Aug. 14, 2021).

¹⁹ *Id.*

²⁰ *Proclamation By the Governor Amending Proclamations 20-05 and 20-14, 21-14.1 COVID-19 Vaccination Requirement*, (2021).

²¹ Rolovich Employment Contract, Section 1.2.

²² *Id.* at Section 1.2.1.

Employee's best efforts to the performance of their duties for the University, and to comply with and support all rules, regulations, policies, and decisions established or issued by the University."²³ This clause required Rolovich to comply with all rules, policies and decisions issued by WSU. WSU is a state university, and therefore it is subject to state law and other state decisions that are issued by the state government. With that, WSU was and is subject to Inslee's COVID-19 vaccine mandate mentioned above. By not complying with the COVID-19 vaccine mandate, Rolovich was not complying with all "rules regulations, policies, and decisions established or issued by the University."²⁴ That was the first provision of Rolovich's duties which WSU could draw on to terminate Rolovich for just cause.

Secondly, Section 1.2.1 stated that the "[e]mployee agrees to abide by all provisions of law."²⁵ This clause required Rolovich to comply with all provisions of law which was not limited to one source. Therefore, Rolovich was required to comply with all local, state, and federal laws that were applicable at the time of his employment.

Further, and possibly not as strong as the previous provisions, Section 1.2.1.2(e) placed requirements on Rolovich to "[c]onduct the Football program with integrity and maintain financial responsibility consistent with the Football program budget, standards, and reasonable expectations of the Athletic Department and the University."²⁶ This provision required Rolovich to run the football program with integrity, and remain consistent with WSU's "standards, and reasonable expectations."²⁷ While it is not as clear as the previous two provisions, it can be argued that Rolovich did not comply with WSU's standards and expectations by refusing to be vaccinated

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at Section 1.2.1.2.

²⁷ *Id.*

against COVID-19. When an order by the Governor is issued upon all state employees, WSU could reasonably expect their head football coach to comply with the order or prove an exemption of some nature to the requirement. The requirements found in Section 1.2 and 1.2.1.2(e) established the requirement for Rolovich to be vaccinated in order to earn the compensation laid out in his Agreement. Without complying with these provisions, Rolovich may not be entitled to receive his yearly compensation.

C. Compensation pursuant to the Agreement

The Agreement stated the various levels of compensation Rolovich will receive. The compensation language is found in Section 3 “Compensation.”²⁸ Pursuant to Section 3.1, Rolovich was entitled to a \$2 million base pay.²⁹ In addition to this amount, he received \$1 million per year for each employment year for collateral opportunities.³⁰ Finally, Rolovich received a number of fringe benefits found in Section 3.3 which included a vehicle, a membership to a country club, game tickets, and a parking pass for games, among other benefits.³¹ In addition, Rolovich would receive various incentives found in Section 3.4 of the contract for achievements of the football team.³² These would be paid in addition to his other compensation, if met by the football team.

Importantly the Preamble found in Section 3 states that “[i]n consideration for the promises he has made in entering into this Agreement, Employee shall be entitled to the compensation set forth herein.”³³ Rolovich was only entitled to his compensation “in consideration for the promises he has made.”³⁴ These promises included complying with all rules and regulations of WSU, complying with all local, state and federal laws, and to lead the football team with integrity and in

²⁸ *Id.* at Section 3.

²⁹ *Id.* at Section 3.1.

³⁰ *Id.*

³¹ *Id.* at Section 3.3.

³² *Id.* at Section 3.4.

³³ *Id.* at Section 3.

³⁴ *Id.*

compliance with WSU policies.³⁵ If Rolovich did not hold up his promises, he may not be entitled to his compensation.

D. Termination for Just Cause vs. Termination without Just Cause

Rolovich's Agreement contained certain provisions for termination. Section 4.1 is entitled "Termination by University for Just Cause" and provided a number of scenarios which would constitute just cause.³⁶ Section 4.1 also stated that these provisions are "in addition to and as examples of its normally understood meaning in employment contracts."³⁷ WSU built in a just cause provision that allows WSU to terminate the Agreement for a wide variety of reasons. The additional enumerated reasons Rolovich could be fired for just cause included: deliberate and serious violations of Section 1.2; deliberate and serious violations of any other provisions of the Agreement; an act of misconduct; an intentional or major violation by Rolovich, an employee, or a player where he did not intervene; conduct prejudicial to WSU; and a prolonged absence from his position without consent from his supervisor (the Athletic Director).³⁸

Any just cause determination would be made by the Athletic Director in good faith pursuant to Section 4.2 of the Agreement.³⁹ Once the just cause termination has been made, the employee has fifteen (15) days to respond, in writing, outlining why the employee should not be terminated.⁴⁰ If that has been received within 15 days, the Athletic Director then, within seven (7) days may provide the President of WSU the written termination notice, the employee's response,

³⁵ *Id.*

³⁶ *Id.* at Section 4.1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at Section 4.2.

⁴⁰ *Id.*

and the written termination decision.⁴¹ After that, the President will issue a final decision within thirty (30) days of receiving the materials from the Athletic Director.⁴²

Rolovich could also be fired without just cause, as detailed in Section 4.4 of the Agreement which would be accomplished by WSU giving Rolovich written notice, signed by the Athletic Director or President.⁴³ Rolovich would then receive liquidated damages calculated pursuant to Section 4.4.1.⁴⁴ This Subsection stated if Rolovich was terminated without just cause prior to June 30, 2025, he would receive 60% of the remaining base salary under the Agreement.⁴⁵ In addition, Rolovich has no duty to mitigate any of the damages under Section 4.4.1.⁴⁶

In order for Rolovich to be fired for just cause, he would have to be deemed to not be in compliance with his Agreement, and therefore be terminated under Section 4.1.2.⁴⁷ This Section states just cause can be found for the following:

Deliberate and serious violations by Employee of any of the other terms and conditions of this Agreement not remedied after fourteen (14) days' written notice to Employee or, if the violation cannot reasonably be remedied within that period, Employee's failure to make reasonable efforts to cure such violation.⁴⁸

Rolovich refusing to be vaccinated could be found to be in violation of this Subsection. The Agreement states in Section 1.2.1 that Rolovich was required to comply WSU policies, rules and regulations, in addition to abiding by all provisions of the law.⁴⁹ Washington State law included a mandate that all state employees be vaccinated, or be terminated, by October 18, 2021.⁵⁰

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at Section 4.4.

⁴⁴ *Id.* at Section 4.4.1.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at Section 4.1.2.

⁴⁸ *Id.*

⁴⁹ *Id.* at Section 1.2.1.

⁵⁰ *Proclamation By the Governor Amending Proclamations 20-05 and 20-14, 21-14.1, COVID-19 Vaccination Requirement*, <https://www.governor.wa.gov/sites/default/files/proclamations/21-14.1%20-%20COVID-19%20Vax%20Washington%20Amendment.pdf>, (Aug. 14, 2021).

By choosing to not follow a state mandate, Rolovich was committing a deliberate and serious violation of the Agreement by not following the Inslee’s orders.

In addition, Rolovich could have been found to be in violation of Section 4.1.1 which stated just cause could be found for actions that are a “[d]eliberate and serious violations of the duties outlined in Section 1.2 of this Agreement or refusal or unwillingness to perform such duties in good faith and to the best of Employee’s abilities.”⁵¹ Rolovich did not provide a viable religious exemption to be exempt from the requirement and could be terminated with just cause pursuant to both Section 4.1.1 and 4.1.2.⁵² Both of these Subsections require compliance with the Agreement, specifically Section 1.2, which Rolovich violated by not complying with the State of Washington vaccine mandate, as a state employee, and by not providing a viable religious exemption by the deadline.⁵³

II. Rolovich Appealed Subsequent to His Termination from WSU

A. Background

Rolovich appealed the decision by WSU to terminate him by providing a written appeal on November 2, 2021.⁵⁴ This appeal was prepared by his attorney, Brian Fahling (“Fahling”).⁵⁵ Fahling is well-known for his legal practice regarding constitutional issues, and has appeared on CBS, CNN, FNC, MSNBC, BBC, NPR, and Voice of America due to his work.⁵⁶ In addition, Fahling has served as attorney to U.S. Senators and Congressmen, as well as representing Mississippi and Alabama in amicus briefs to the United States Supreme Court.⁵⁷ The appeal detailed the background information that led to Rolovich’s firing, as well as claims by Rolovich

⁵¹ *Rolovich Employment Contract*, Section 4.1.1.

⁵² *Id.* at Sections 4.1.1. and 4.2.2.

⁵³ *Id.*

⁵⁴ Appeal of Written Notice of Intent to Terminate Nicholas Rolovich, (Nov. 2, 2021).

⁵⁵ Law Office of Brian Fahling, <https://www.bfahlinglaw.com/about>.

⁵⁶ *Id.*

⁵⁷ *Id.*

that WSU should have accepted his religious exemption, in addition to the claim WSU acted in opposition to its Human Resource Service (“HRS”) and Environmental Health and Safety (“EHS”) recommendations.⁵⁸

The appeal began with Rolovich’s summarization of the background of events that led to his firing by WSU.⁵⁹ This included Rolovich’s recollection of the difficulties he had with Athletic Director Chun (“Chun”). Rolovich claimed that on multiple occasions he was brought into Chun’s office and the two discussed whether Rolovich would receive the vaccine.⁶⁰ Rolovich claimed that in multiple meetings Chun accused him of having mental health issues, and he believed Rolovich needed to talk with someone about his issues.⁶¹ In addition, he offered his wife as a resource to talk with Rolovich because she had been involved with a couple different “cults.”⁶² In an August of 2021 meeting, Rolovich stated that Chun told him that receiving a religious exemption from the vaccine mandate would have to meet a “high threshold,” and that any exemptions would be scrutinized to no end.⁶³ In addition to the above, Rolovich claimed that Chun told him at one time that Inslee “did this” solely because of Rolovich.⁶⁴ Rolovich took this to mean that the high threshold for exemptions was due to Rolovich’s refusal to get vaccinated, and Inslee wanted to get back at the highest paid state employee.⁶⁵ In the same meeting, Chun told Rolovich that he had 4 options in regard to the vaccine: 1) get the vaccine; 2) don’t get the vaccine and be fired; 3) claim an exemption; or 4) resign immediately.⁶⁶ Rolovich then alleged Chun called him a con-man and

⁵⁸ Appeal of Written Notice of Intent to Terminate Nicholas Rolovich, Section I.A., (Nov. 2, 2021).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

selfish, and asked why he wouldn't resign immediately.⁶⁷ Within the same conversation, as tensions grew, Chun told Rolovich his only remaining options were to resign or get vaccinated.⁶⁸ Rolovich claimed he was uncomfortable discussing his religious beliefs with Chun, and when he asked Chun how to claim a religious exemption, he was told they did not know.⁶⁹ Rolovich said his questions regarding religious exemptions remained unanswered by Chun, in addition to HRS not having information because Inslee had not yet made his proclamation official.⁷⁰

After Proclamation 21-14.1 was ordered, WSU made their own process for how to apply for a religious exemption, which Rolovich did on September 28, 2021.⁷¹ According to Rolovich, his exemption was going to be granted by HRS, but the athletic department said it could not accommodate his exemption.⁷² The accommodations included masking, social distancing, and testing requirements.⁷³ In addition, the athletic department claimed that Rolovich's religious exemption was not sincerely held because it was not one of the first reasons he gave for his unvaccinated status.⁷⁴ In addition, EHS had written a memo to the athletic department that outlined accommodations that could be made for Rolovich's exemption, which the athletic department also rejected.⁷⁵ The athletic department said accommodating Rolovich's exemption would create undue hardship for the department because of lost donors, bad publicity, and due to the damage that had already been done.⁷⁶

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at Section I.B.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

B. Rolovich Argued that He Had a Sincere Religious Belief and Should Have Been Exempt from the Vaccine Requirements

Rolovich's legal analysis began by arguing that WSU's "blind review process" had accepted his religious exemption initially, and provided a list of potential accommodations.⁷⁷ Rolovich stated that Chun should not have been involved with the decision-making process at all.⁷⁸ Instead, the process was supposed to remove all identifying information of an employee, be reviewed by a review committee, and their recommendation would be sent to HRS which would then inform the supervisor that an exemption had been granted.⁷⁹ The supervisor then would make the determination if the department would be able to accommodate the exemptions.⁸⁰ Rolovich stated that Chun should have never been involved with the process, and made HRS reconsider its determination with information Chun provided.⁸¹ Rolovich argued that WSU violated its own procedures by allowing Chun to provide further information to HRS which then reconsidered its decision.⁸²

In addition to this, Rolovich argued his procedural right to due process guaranteed by the 14th Amendment of the United States Constitution was violated.⁸³ Rolovich alleged that because WSU did not follow its procedure, and altered the blind review, it violated his Constitutional rights.⁸⁴ In addition, Rolovich argued that Chun threatened him in meetings and stated he would do anything in his power to ensure that an exemption for Rolovich was denied.⁸⁵ Rolovich stated that WSU violated the 14th Amendment by allowing a prejudiced decisionmaker (Chun) to taint

⁷⁷ *Id.* at Section II.A

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at Section II.B.

⁸⁴ *Id.*

⁸⁵ *Id.*

its review process.⁸⁶ He also claimed that the meetings over the summer show Chun had animus towards him because of his vaccination status, and that Chun would do what it took to have him terminated for cause, which purportedly violated his Constitutionally protected rights.⁸⁷

Rolovich's next argument was that his First Amendment Free Exercise rights were violated when WSU showed hostility towards his religious exemption.⁸⁸ He claimed Inslee and Chun both showed hostility towards him, and intentionally crafted the religious exemption to be narrow.⁸⁹ This was done to make it as hard as possible for Rolovich to receive one.⁹⁰ In addition, he claimed that WSU's preference for medical exemptions over religious exemptions violates Supreme Court precedent in *Tandon v. Newsom*⁹¹ because WSU is treating a secular activity more favorably than religious exercise.⁹² Rolovich utilized an August 3, 2021 email from Inslee's General Counsel in support of this, when she said "[o]f possible exemptions: medical for sure; and religious (if we have to; if yes, as narrow as possible)" when discussing what exemptions would be available.⁹³ Further, in support, Rolovich stated that WSU approved more than twice as many medical exemptions compared to religious exemptions.⁹⁴

Moreover, Rolovich alleged that because WSU never asked any follow-up questions, it showed it did not question his sincerity.⁹⁵ But, the argument really relied upon court precedent which states sincerity is "generally presumed or easily established" in *Moussazadeh v. Tx. Dep't of Crim. Just.*⁹⁶ Rolovich also used EEOC guidance for religious accommodations which cautions

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at Section II.B.

⁸⁹ *Id.* at Section II.C.

⁹⁰ *Id.*

⁹¹ *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

⁹² *Id.* at Section II.D.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at Section II.E.

⁹⁶ *Moussazadeh v. Tx. Dep't of Crim. Just.*, 703 F.3d 781 (5th Cir. 2012).

employers to assume that a belief is sincere.⁹⁷ Further, the guidance from the EEOC stated the following about when an employer should ask additional questions to an employee about their belief:

“[e]mployer would be justified in seeking additional supporting information” about the employer’s asserted religious belief *only* if the employer has determined that it has “an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice.”⁹⁸

Rolovich further stated the State of Washington was aware of this above guidance because the Press Secretary for Inslee had said in the past that if a religious belief was questioned, further questions would be asked of the employee.⁹⁹ Moreover, Rolovich argued that because WSU never questioned Rolovich’s belief, that meant it believed it was sincere.¹⁰⁰ Rolovich also argued that Chun created a hostile work environment by questioning Rolovich’s character, his faith, and his mental health, all in violation of his First Amendment rights.¹⁰¹

Rolovich’s final argument in his first section was that the WSU had not shown there was “just cause” for his termination.¹⁰² Therefore, he should have been fired without cause, and been paid 60% of his remaining salary, in accordance with Section 4.4 of his contract.¹⁰³

C. Rolovich Argues WSU Violated their Own Policies in His Termination

Rolovich’s next argument focused on how WSU violated its own policies.¹⁰⁴ Further, Rolovich argued that he should not have been terminated for “just cause” because he was initially

⁹⁷ *Appeal*, at Section II.E.

⁹⁸ EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited April 12, 2022).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at Section II.F.

¹⁰² *Id.* at Section II.G.

¹⁰³ *Employment Contract*, at Section 4.4.

¹⁰⁴ *Id.* at Section III.

granted his religious exemption.¹⁰⁵ Rolovich used Washington State case law to support this assertion, in which the Court found a termination cannot be for just cause when an employee exercised a legal right.¹⁰⁶

Rolovich further argued that because WSU did not try to work with him to accommodate him, it violated the law.¹⁰⁷ Rolovich has cited a 9th Circuit precedent in which the Court said “that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business.”¹⁰⁸ Because WSU did not attempt to bilaterally cooperate, Rolovich alleged it violated 9th Circuit case law and EEOC guidance.¹⁰⁹ Rolovich argued WSU had to propose their accommodations, and then work with him to make them work for their situation.¹¹⁰

Rolovich then sets forth a heavily science-based argument to allege that WSU could have accommodated him while keeping their other employees safe.¹¹¹ Rolovich utilized testimony from Dr. Jayanta Bhattacharya to support his assertions.¹¹² Dr. Bhattacharya is a Health Policy professor at Stanford University, and has published 154 scholarly articles.¹¹³ This evidence used by Rolovich and his expert witness to support his unvaccinated status included the following: a 99.7% survival rate from COVID-19 infection; that vaccinated individuals are just as likely to shed live virus and infect others; that asymptomatic spread is rare (which assumes Rolovich would be asymptomatic if he were infected); that WSU can protect its other employees from unvaccinated individuals by using its own policies such as daily testing, staying home when symptomatic, weekly testing

¹⁰⁵ *Id.* at Section III.A.

¹⁰⁶ *Farnam v. CRISTA Ministries*, 807 P.2d 830 (Wash. 1991).

¹⁰⁷ *Appeal*, at Section III.B.

¹⁰⁸ *Heller v. EBB Auto Co*, 8 F.3d 1433 (9th Cir. 1993).

¹⁰⁹ *Appeal*, at Section III.B.

¹¹⁰ *Id.*

¹¹¹ *Id.* at Section III.C.

¹¹² *Id.* at Section III.D.

¹¹³ *Id.*

requirements; variants do not affect the reasonableness of alternative recovery options; WSU did not show that the safety measures that had been in place for the whole pandemic would not suffice going forward; and finally, that Chun could not conclude that Rolovich could not effectively carry out his job which he had been doing with the same protocols for over a year.¹¹⁴

This final argument was expanded upon in greater detail than the other points.¹¹⁵ WSU has argued that coaching required frequent close contact with people and Rolovich's vaccination status would put others at risk.¹¹⁶ Rolovich maintained that he had effectively coached for over a year, and the same precautions could be kept in place.¹¹⁷ The next argument WSU made was that Rolovich could not travel safely with the team for games, practices, recruiting, and other engagements.¹¹⁸ Rolovich argued, again, he has been doing this safely for over a year.¹¹⁹ Further, WSU raised concerns regarding recruiting, donor cultivation, media responsibilities, and Rolovich's integration into a research institution.¹²⁰ Rolovich's arguments for these sections were largely the same as before. He stated that right after he was terminated, Chun was pictured at a donor event, unmasked and indoors, the same action he was worried Rolovich would engage in.¹²¹ Lastly, for integration into WSU, Rolovich argued that expressing his First Amendment rights did not damage the mission or reputation of WSU.¹²² He contended that at a university with free thinking, all ideas and thoughts are accepted, and not just WSU's approved line of thinking.¹²³

¹¹⁴ *Id.*

¹¹⁵ *Id.* at Section III.D.7.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

Rolovich made one final argument in his closing. This argument focused on the idea that WSU cannot use potential reputational damage and other biases to negate Rolovich's free exercise rights.¹²⁴ WSU alleged that accommodating Rolovich would create an "undue burden" on WSU.¹²⁵ The EEOC provided guidance for what an employer may consider when deciding if an accommodation would create an undue burden.¹²⁶ These included whether there would be direct monetary costs, if the accommodation would burden the employer's business, and lastly, employers may not consider "speculative hardships" when considering an accommodation.¹²⁷ Rolovich argued that WSU has relied on all three of these factors when considering his accommodation.¹²⁸ The appeal outlined a number of public and private statements made regarding his vaccination status which included losing donors, a stain on WSU's reputation, it being an embarrassment, creating an awkward situation, and it sending the wrong message about WSU.¹²⁹ Rolovich stated these public messages showed that WSU made its decision based on public perception, and not based in law.¹³⁰

III. Arguments Are Being Made WSU Has Avoided Further Disaster, No Matter the Outcome of Rolovich's Situation

While many have seen the Rolovich saga as a stain on the name of WSU, some do not believe it is all negative, including Jon Wilner ("Wilner"), a sports reporter for PAC-12 Hotline. Wilner believes WSU dodged a bullet by firing Rolovich for refusing to be vaccinated. He further

¹²⁴ *Id.* at Section III.E.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

believes that if Rolovich's lawsuit is successful and he is found to be fired without cause the University is still better off.¹³¹

The crux of Wilner's argument is that no matter the outcome, WSU will be better without Rolovich.¹³² Rolovich chose to defy Inslee's vaccine mandate, with what Wilner believes is a weak religious exemption argument.¹³³ Rolovich did not even announce he would be pursuing litigation against WSU until over 36 hours after his firing.¹³⁴ Wilner believes this showed Rolovich thought WSU would not actually follow through with his firing.¹³⁵ But, as Wilner points out, it was pretty obvious this day was coming, as WSU had denied his religious exemption request, and Rolovich continued to defy Inslee's vaccine mandate for state employees.¹³⁶

This is where Wilner thinks WSU will come out ahead, no matter the resolution.¹³⁷ Rolovich had been coy about his vaccination status, religious exemption status, and overall thoughts on the COVID-19 pandemic.¹³⁸ Rolovich's job as a football coach, according to Wilner, requires leadership and accountability.¹³⁹ Wilner believes Rolovich failed to live up to the standards expected of a coach of a Power 5 football program.¹⁴⁰ Instead of being straightforward and honest with his bosses, his team, and, the media in general, Rolovich chose to proceed under a cloak of dishonesty.¹⁴¹ To Wilner, and likely many others, this created a situation that could have easily been rectified.¹⁴² Rolovich could have been open and honest about his beliefs and

¹³¹ Jon Wilner, *Commentary: Even if Nick Rolovich's Lawsuit is Successful, Washington State Comes Out Ahead, the Saga is Over*, <https://www.spokesman.com/stories/2021/oct/21/commentary-even-if-nick-rolovichs-lawsuit-is-succe/>, (last visited March 6, 2022).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

vaccination status from the beginning.¹⁴³ If that were the case, the reception would likely be much different at this time.¹⁴⁴ Instead, he waited, and ultimately put his players in a bad situation. Each day that went by, his players, who he is supposed to lead, did not know who their coach would be.¹⁴⁵ Wilner believes this is not how a real leader would act in this face of adversity, and for that reason, WSU will come out ahead.¹⁴⁶

If Rolovich's lawsuit is a success, and he is able to prove he was fired without cause, WSU will have to pay him \$3.6 million.¹⁴⁷ That is an amount that Wilner believes is well worth it to get rid of the numerous headaches Rolovich has caused with this saga.¹⁴⁸ Wilner is just a single sports reporter, but it is likely many people share this belief. Rolovich was not worth the trouble he was causing, and if WSU is out \$3.6 million in the short-term, the long-term benefits will be worth it.¹⁴⁹

While it may benefit WSU in the long run, there may be some downsides the previous opinion did not account for. First, any payment being made adds to an already large deficit felt by the WSU Athletic Department.¹⁵⁰ The WSU Athletic Department is facing a \$30 million deficit due to the COVID-19 Pandemic, the same pandemic that forced them to fire Rolovich in the first place.¹⁵¹ But, Rolovich was on the outside for his vaccine stance.¹⁵² Coaches such as Nick Saban, Dabo Swinney, and Lane Kiffin all spoke out and urged their teams and fans to be vaccinated as

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ WSU head coach Nick Rolovich fired from \$3m-a-year post over vaccine refusal, THE GUARDIAN, <https://www.theguardian.com/sport/2021/oct/19/wsuh-head-coach-nick-rolovich-fired-from-3m-a-year-post-over-vaccine-refusal> (last visited March 29, 2022).

¹⁵¹ *Id.*

¹⁵² *Id.*

well.¹⁵³ Instead of doing this, Rolovich was dodgy when his vaccination status came up.¹⁵⁴ He told reporters he would comply with WSU's vaccine mandate, but never expanded upon that answer.¹⁵⁵ According to Kirk Schulz, the President of WSU, fewer than 50 of the school's 10,000 employees were seeking an exemption.¹⁵⁶ In addition it has divided WSU fans. While there was a good amount of vitriol from outside the program from fans and others, players still publicly supported Rolovich.¹⁵⁷ Quarterback Jayden de Laura and wide receiver Travall Harris both said after games that they loved their coach.¹⁵⁸

IV. Former Student-Athlete Kassidy Woods has Filed a Lawsuit Against Rolovich and WSU for Being Removed from the Team

On August 20, 2021, Kassidy Woods ("Woods"), a former receiver on the WSU football team, brought a lawsuit against WSU and Rolovich.¹⁵⁹ Woods claimed he was kicked off of the WSU football team for his involvement in the #WeAreUnited movement.¹⁶⁰ Specifically, Woods alleged Rolovich and WSU violated his First Amendment rights, and that Rolovich's action of kicking him off the team were "racist, intentional, malicious, willful, wanton, and in gross and reckless disregard of Woods' constitutional rights."¹⁶¹ Both WSU and Rolovich denied any wrongdoing in Woods being removed from the team.¹⁶²

To better understand Woods' claims takes an understanding of the #WeAreUnited movement. The #WeAreUnited movement was a coalition started by student-athletes across the

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Colton Clark, *WSU, Former Coach Rolovich Deny Woods' Claims*, MOSCOW-PULLMAN DAILY NEWS, https://dnews.com/sports/wsu-former-coach-rolovich-deny-woods-claims/article_15216f58-ba18-5990-b854-367d81752e9a.html (last visited February 28, 2022).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

Pac-12 which made demands to the Conference.¹⁶³ The movement started before the 2020 college football season, during the height of the COVID-19 pandemic.¹⁶⁴ The coalition's requests centered around student-athlete safety and social justice concerns.¹⁶⁵ Specifically, the student-athletes requested health insurance to be extended to six years after they were finished playing; safety protocols related to COVID-19; a sixth year of eligibility for any player who opted out of the 2020 football season due to COVID-19 concerns; the formation of a permanent civic engagement task force; the ability to use their name, image, and likeness to earn money; and lastly, they asked for the conference to share each sports revenue 50-50 with the student-athletes at each university.¹⁶⁶ These student-athletes chose to form the #WeAreUnited movement to have their voices and concerns heard by the Conference.¹⁶⁷ The student-athletes themselves knew many of the goals would be difficult to obtain, but wanted to try to make a difference for the future.¹⁶⁸ Chase Garbers, a quarterback at the University of California-Berkeley, said that "[t]hey were great ideas to demand. I think it was a negotiation tactic to ask for that big of a list and try to see what you can get out of it, as the other party would obviously negotiate"¹⁶⁹

Woods participated in the #WeAreUnited movement, which demanded not only a great deal from the Pac-12, but also of the individual universities.¹⁷⁰ Woods claimed he was removed from the team prior to the 2020 season because he decided to participate in the #WeAreUnited

¹⁶³ Jeff Faraudo, *Cal Football: The Season May Be Alive, But What About the #WeAreUnited Movement?*, <https://www.si.com/college/cal/news/weareunited-update> (last visited February 28, 2022).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

coalition.¹⁷¹ Woods stated he approached Rolovich in August of 2020 to tell him he planned to opt out of the season due to health concerns.¹⁷² Woods suffers from sickle-cell trait which made him a higher risk individual if he contracted COVID-19.¹⁷³ Woods further claims that Rolovich had told him it would be okay to opt out for health reasons, but anyone opting out for reasons related to the #WeAreUnited movement would cause an issue.¹⁷⁴ Woods taped a phone call in which Rolovich stated that “there’s one way we’ll handle [the opt out] if it’s COVID related, then there’s one way we’re going to handle it if it’s joining the group.”¹⁷⁵

When Woods confirmed with Rolovich that he would be opting out due to health reasons, he was again told something similar to the above.¹⁷⁶ Woods told Rolovich he wanted to stay at WSU and participate in workouts, but that he was not comfortable travelling with the team.¹⁷⁷ Woods was told he could not participate in workouts if he was not on the team, and then was forced to clean out his locker.¹⁷⁸ In addition, he was no longer provided the meals he normally was given to a student-athlete, which WSU later confirmed.¹⁷⁹ WSU and Rolovich have both rejected Woods’ claims he was removed from the team due to his participation with the #WeAreUnited movement.¹⁸⁰ Instead, WSU said he was removed from the team because he entered the transfer portal, which teams are able to do when that occurs.¹⁸¹ Ultimately, there has not been any recent movement with Woods’ claims and lawsuit. WSU and Rolovich finally seemed to find common

¹⁷¹ Colton Clark, *WSU, Former Coach Rolovich Deny Woods’ Claims*, https://dnews.com/sports/wsu-former-coach-rolovich-deny-woods-claims/article_15216f58-ba18-5990-b854-367d81752e9a.html (last visited February 28, 2022).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

ground with Woods's allegations. They opposed them and stated that Woods claims are false.¹⁸² WSU and Rolovich both stated that Woods left the team on his own accord, and all policies were followed when Woods chose to opt out of the season for health reasons.¹⁸³

V. Washington State Claim

At this time, there has been no official lawsuit filed by Rolovich. He has appealed his termination with WSU, but no other public information has been released regarding the current status of the dispute. However, a claim has been filed against the University seeking \$25 million for wrongful termination after he was fired for refusing to get vaccinated against Covid-19.¹⁸⁴ The claim was filed on Rolovich's behalf with the State of Washington's Office of Risk Management on April 27, 2022.¹⁸⁵ Such a claim is a prerequisite for filing a lawsuit against a state agency.¹⁸⁶ A person must wait sixty (60) days to sue after a tort claim is filed with the State.¹⁸⁷

No action at this time has been commenced in either Federal or State Court against Washington State University by Rolovich.

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¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Associated Press, *Nick Rolovich, former Washington State football coach, files \$25M wrongful termination claim*, ESPN.com, Aug. 10, 2022, https://www.espn.com/college-football/story/_/id/34380116/nick-rolovich-former-washington-st-football-coach-files-wrongful-termination-claim.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*