

*Religious Discrimination***EEOC Sues Massachusetts Medical Center Over Its Mandatory Flu Vaccination Policy**

A Massachusetts hospital discriminated against a Christian human resources employee who declined a flu shot for religious reasons and who raised concerns about the alternative of wearing a face mask at work, the EEOC alleges in a novel lawsuit (*EEOC v. Baystate Med. Ctr., Inc.*, D. Mass., No. 3:16-cv-30086, complaint filed 6/2/16).

According to the Equal Employment Opportunity Commission, Baystate Medical Center Inc. placed Stephanie Clarke on unpaid leave and then fired her because she sought a religious accommodation from its mandatory influenza immunization policy for employees. That violated federal anti-bias law, the agency alleges in a complaint filed June 2 in the U.S. District Court for the District of Massachusetts.

The hospital also fired Clarke because she failed to wear a face mask—which hospital policy required of all employees who refused immunization—at all times while working and complained that the hospital was discriminating against her, the EEOC asserts. Clarke never worked around patients and she occasionally pulled down the mask when people said they couldn't understand her, according to the commission.

The lawsuit, filed under Title VII of the 1964 Civil Rights Act, involves a “unique issue” on which there really is no binding case law, attorney Alan Phillips of Asheville, N.C., told Bloomberg BNA June 3. Although a Canadian arbitrator decided the issue in 2015, Phillips said “there's no real court precedent” in the U.S. of which he's aware.

Joel Rosen of Rosen Law Office in Andover, Mass., agreed that the case presents a somewhat novel issue. “There are a lot of cases” involving employee vaccination policies, “but they mostly involve whether it's a bargained-for term in a union contract,” he told Bloomberg BNA June 3. He represents doctors and dentists in medical practices.

Policy Requires Vaccination or Mask. According to the complaint, Baystate's immunization policy applies to all employees, even those like Clarke whose office was located in the hospital's administrative services building and who weren't required to have patient contact. Employees who failed to comply with the policy for reli-

gious or other reasons were required to wear a face mask or they were placed on unpaid leave, without job protection, until they complied with the policy or the flu season ended, the EEOC asserts.

Clarke was hired in December 2014 as a talent acquisition consultant and raised a religious objection to the policy in October 2015 when her supervisor told her and her fellow employees they needed to be vaccinated by the following month.

Clarke brought her concern about being unable to effectively communicate because of the mask to hospital management, but she was nevertheless suspended without pay after her supervisor noticed she wasn't always wearing her mask over her nose and mouth. She complained of religious discrimination and a few weeks later was told she couldn't return to work until she either received the flu vaccine or promised to wear the face mask at all times.

When she maintained her objection, the hospital told her it viewed her as having resigned.

“Federal law requires employers to fairly balance an employee's right to practice his or her religion and the operation of the business,” Jeffrey Burstein, regional attorney for the EEOC's New York district office, said in a June 2 statement announcing the lawsuit. “For an accommodation to be meaningful under Title VII, it both must respect the employee's religious beliefs and permit her to do her job effectively,” he said.

Baystate Health's director of public affairs, Benjamin Craft, told Bloomberg BNA in a June 3 e-mail that the Springfield, Mass.-based hospital doesn't “comment specifically on pending litigation.” He added, however, that the safety of the patients “is our highest priority, so we take all reasonable steps to minimize any risk of transmission of infectious illness such as flu. That includes a requirement to be vaccinated against flu or wear a mask at all our facilities during flu season.”

'Cautiously Delighted.' Phillips noted that employee objections to wearing a face mask is a frequently recurring issue in the area of mandatory employer vaccination policies but “one the EEOC has struggled with.” He said he's “cautiously delighted” that the agency has decided to pursue the case and hopes it results in some useful guidance from the court on the subject.

The case really boils down to whether the hospital reasonably accommodated Clarke under Title VII, he said. That standard is based on “mainstream medical science,” which favors the EEOC's claims, Phillips said.

Face masks don't actually work for the intended purpose because "they don't block or filter viruses out of the air," which is acknowledged by the federal Centers for Disease Control and Prevention, according to Phillips. Moreover, the flu vaccine itself has a low efficacy rate, he said.

"If the EEOC does a good job" in presenting its claims and looks to the Canadian arbitrator's ruling, "the case should be a slam-dunk, no-brainer" for the agency, Phillips predicted.

Hospital Has Duty to Patients. But Rosen told Bloomberg BNA that the hospital's first duty is to patient safety. The court may find in its favor if it thinks Clarke's request for accommodation may have compromised the hospital's ability to protect patients from exposure to the flu virus, he said.

The hospital also may question the sincerity of Clarke's alleged religious belief, Rosen said. The Bible doesn't say anything about vaccinations, and the EEOC's complaint seems to say Clarke's objection was based on her interpretation of the Bible, he said.

However, Rosen said he thinks a court would side with the EEOC on that issue.

Instead, the case likely will turn on whether the hospital made a reasonable effort to accommodate Clarke's religious objection, he said. That will involve questions such as what conversations the hospital had with Clarke, whether it offered to let her work from home and whether it discussed allowing her to remove the mask when she needed to communicate with someone, Rosen said, noting there could have been a few potential accommodations.

If it's true that Clarke didn't work around patients, the hospital may have a tougher case to defend, he said.

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