COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-13440

Worcester, ss.

FALLON COMMUNITY HEALTH PLAN, INC.,

Petitioner-Appellant

V.

SHANIKA JEFFERSON and KATIE DISHNICA, ACTING DIRECTOR, DIVISION OF UNEMPLOYMENT ASSISTANCE,

Respondents-Appellees

ON APPEAL FROM WORCESTER DISTRICT COURT

BRIEF OF APPELLANT FALLON COMMUNITY HEALTH PLAN, INC.

Date: May 24, 2023

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CORPORATE DISCLOSURE STATEMENT

Under Supreme Judicial Court Rule 1:21, Appellant Fallon Community Health Plan, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF ISSUES

1. Whether substantial evidence supports the Department of Unemployment Assistance's ("DUA") finding that Appellee Shanika Jefferson complied with Fallon Community Health Plan, Inc.'s mandatory vaccination policy merely by seeking, but not receiving, an exemption for her religious beliefs where the policy, a human resources representative, and Jefferson herself stated that the policy required her to receive either a vaccination or exemption.

2. Whether the DUA erred in finding that Jefferson's religious beliefs excused her from complying with Fallon's mandatory vaccination policy where binding precedent provides that mitigating circumstances alone are insufficient to excuse an otherwise intentional disregard of an employer's interests, and no authority supports a conclusion that religious beliefs are mitigating circumstances in any event.

3. Whether the District Court's reasoning that Fallon's policy was unreasonable provides an alternative basis for upholding the DUA's decision where it directly contradicts one of the DUA's factual findings, disregards fundamental principles of reasonable

accommodation under the antidiscrimination laws, and ignores the reality that Fallon's employees work directly with medically vulnerable members who could face dire outcomes if they contracted COVID-19.

STATEMENT OF THE CASE

I. NATURE OF THIS APPEAL

This is an appeal from a judgment of the Worcester District Court (LoConto, J.) affirming a decision of the Executive Office of Labor and Workforce Development Board of Review ("BOR"). The BOR summarily affirmed a DUA review examiner's decision to award unemployment benefits to Jefferson. As Fallon shows in greater detail below, the review examiner's decision disregarded the evidence in the record and was based on an error of law. Although the District Court attempted to salvage the review examiner's determination by relying on a different rationale, its decision rests on a fact that contradicts the review examiner's express findings and on an erroneous interpretation of the unemployment statute.

II. PROCEDURAL HISTORY

On January 4, 2022, the DUA found that Jefferson was disqualified from receiving unemployment assistance under M.G.L. c. 151A, § 25(e)(2) because she was "discharged because of a knowing violation of a reasonable

and uniformly enforced work rule or policy regarding vaccination requirements." (Record Appendix ("R.A.") 130 (Exhibits to the Record at 25).)[1] Jefferson appealed that decision later that day. (R.A. 131 (Exhibits to the Record at 26).)

On March 16, 2022, a DUA review examiner held a telephonic hearing on Jefferson's appeal. (R.A. 101 (Hearing Appeal Results at 3 ¶ III).) Three witnesses testified at that hearing: Jefferson; Fallon's site director for the location where Jefferson worked, Lisa DeWitt; and a human resources representative for Fallon, Agnieszka Potoczniak. (*Id.*) Fallon also submitted several exhibits at that hearing, including its Pandemic COVID-19 Workforce Response policy, which contained the mandatory vaccination policy the DUA had initially found Jefferson had violated. (R.A. 108-114 (Exhibits to the Record at 3-9).)

Less than two weeks later, the DUA reversed its initial determination. (R.A. 99 (Hearing Appeal Results at 1).) Specifically, the review examiner found that (a)

[1] In addition to providing citations to the record appendix, Fallon provides parallel citations to the relevant document as Fallon described it in the record appendix's table of contents.

Jefferson had not violated Fallon's COVID-19 vaccination policy because she had sought a religious exemption from it, and (b) she did not engage in deliberate misconduct in willful disregard of Fallon's interests because she objected to receiving the vaccination on religious grounds. (R.A. 101–102 (Hearing Appeal Results at 3–4 ¶ III).)

On April 15, 2022, Fallon petitioned the BOR to review the DUA's decision, arguing that the review examiner did not base her decision on substantial evidence and committed an error of law. (R.A. 90–98 (Appeal to the Board of Review at 1–9).) After granting Fallon's petition, the BOR summarily affirmed the review examiner's decision on June 17, 2022. (R.A. 82 (Board of Review Results at 2).)

On July 14, 2022, Fallon appealed the BOR's decision to District Court. (R.A. 6-15 (Petitioner's Petition for Judicial Review at 1-10).) The District Court affirmed the BOR's decision, but it relied on different grounds from the BOR in finding that Jefferson did not knowingly violate Fallon's mandatory COVID-19 vaccination policy. (R.A. 169 (District Court Memorandum of Decision ("Memorandum") at 3); Addendum at 3.) Unlike the BOR, which affirmed the review examiner's finding

that Jefferson had complied with the policy by seeking a religious exemption, the District Court found that the policy was unreasonable. (*Id.*) Fallon timely filed a notice of appeal with the District Court. (R.A. 171 (Petitioner's Notice of Appeal ("Notice") at 1).)

STATEMENT OF THE FACTS

Fallon is an insurance company and healthcare provider. (R.A. 59 (Certified Transcript ("Tr.") at 23:13–14, 24:14).) It provides care to frail, elderly patients, known as "members," through its elder-care agency, Summit Elder Care ("Summit"). (R.A. 47, 59 (Tr. at 11:17, 23:12–18).) In September 2017, Jefferson began working for Fallon as a home health aide with Summit. (R.A. 100 (Hearing Appeal Results at 2 ¶ II(1)).) In that role, Jefferson provided in-person care and assistance to Fallon's elderly members who required long-term care in adult day programs, assisted-living facilities, or their homes. (*Id.*) Fallon's members have multiple comorbidities that, when combined with their advanced age, put them at "extreme risk" if they contracted COVID-19. (R.A. 101 (Hearing Appeal Results at 3 ¶ II(12)).)

In October 2021, the Massachusetts Office of Health and Human Services issued MassHealth Managed Care Entity Bulletin 69. (R.A. 100 (Hearing Appeal Results at 2 ¶

II(3)).) The bulletin mandated that Fallon require its employees to become vaccinated against COVID-19. (*Id.*) In response, Fallon promptly updated its COVID-19 policy and notified its employees of the updated policy by email on October 7, 2021. (R.A. 100 (Hearing Appeal Results at 2 ¶ II(4)).) The purpose of the updated policy was to "to keep [Fallon's] patients and staff safe and to protect against the spread of the COVID-19 virus among [Fallon's] frail, elderly population." (R.A. 101 (Hearing Appeal Results at 3 ¶ II(6)).)

To further that purpose, the updated COVID-19 policy required "employees at Summit . . . sites who provide direct care or have any physical contact or are in proximity with [Fallon's] participants to provide evidence of vaccination against COVID-19 by November 8, 2021." (R.A. 112 (Exhibits to the Record at 7).) Nonetheless, the policy provided that Fallon would not require proof of vaccination under the following circumstances:

> 1) If the vaccine is medically contraindicated and the individual's job is such that the employer can offer a reasonable accommodation to avoid risk of contracting or transmitting COVID-19 on the job; or
>
> 2) If the individual objects to vaccination based on a sincere religious belief and the individual's job is such that the employer can

> offer a reasonable accommodation to avoid risk of contracting or transmitting COVID-19 on the job.

(R.A. 112-113 (Exhibits to the Record at 7-8).)

Fallon's COVID-19 policy provided a detailed nine-step process for requesting such an exemption. (R.A. 113 (Exhibits to the Record at 8).) That process required current employees like Jefferson to submit an exemption request to Human Resources by October 29, 2021. (*Id.*) After reviewing the request, Fallon's chief human resources officer would decide whether Fallon could grant it. (*Id.*) A Human Resources representative would then inform the employee of Fallon's decision. (*Id.*) After explaining the potential bases for an exemption from the vaccination mandate, Fallon's policy stated that a failure to receive a vaccination would result in automatic separation:

> The vaccine requirement is considered a condition of employment for staff members that provide direct care or have any physical contact or are in close proximity with Summit . . . participants; therefore, the vaccination is mandatory. Failure to comply with the requirement will be considered a resignation from employment with Fallon. . . .

(*Id.*)

Like other Summit employees, Jefferson received a copy of Fallon's updated COVID-19 policy on October 7, 2021. (R.A. 72–73 (Tr. 36:20–37:1).) She understood that the policy required her to become vaccinated against COVID-19 or obtain an exemption. (R.A. 72–73 (Tr. at 36:20–37:3).) Specifically, she testified: "When I got the policy, . . . it said . . . you had to get the shot or a religious exemption or a medical exemption." (*Id.*)

On October 19, 2021, Jefferson applied for a religious exemption from Fallon's mandatory vaccination policy. (R.A. 101 (Hearing Appeal Results at 3 ¶ II(7)).) A week later, she met with two Human Resources representatives, Potoczniak and Linda St. John, to discuss her request for an exemption. (R.A. 101 (Hearing Appeal Results at 3 ¶ II(8)); R.A. 65–66 (Tr. 29:15–30:1).) During the meeting, Jefferson offered to test herself for COVID-19 weekly and wear full personal protective equipment (such as a mask, goggles, and bodysuit) to reduce the risk of her transmitting the virus to Fallon's member population. (R.A. 74 (Tr. 38:3–11); *see also* R.A. 101 (Hearing Appeal Results at 3 ¶ II(10)).)

After that meeting, Potoczniak met with other Human Resources employees and DeWitt to determine whether Fal-

lon could offer any accommodations to employees who requested an exemption that would "safely accommodate [them] and also ensure that [the] requirements of [their] positions . . . were met." (R.A. 66-67 (Tr. 30:2–31:11); *see also* R.A. 101 (Hearing Appeal Results at 3 ¶ II(9)).) Because those employees' jobs required them to provide in-person care to Fallon's vulnerable and frail members, Fallon determined "there was no accommodation [it] could provide in lieu of the COVID-19 vaccine." (R.A. 101 (Hearing Appeal Results at 3 ¶¶ II(11)–(12).)

Shortly after Fallon made that determination, Potoczniak and DeWitt informed Jefferson that "her request was not accepted" because Fallon was "unable to accommodate it, and that she had until November 8 to get vaccinated or [Fallon] would have to start separation." (R.A. 66–67 (Trans. at 30:13–16, 31:12–16).) Jefferson did not take any steps to become vaccinated by the deadline, so Fallon terminated her employment on or around November 8, 2021. (R.A. 101 (Hearing Appeal Results at 3 ¶ II (14).)

SUMMARY OF THE ARGUMENT

The DUA disregarded the evidence before it and committed a clear error of law in finding Jefferson eligible

for unemployment assistance. Employees who bring about their separation by knowingly violating a reasonable workplace rule or policy or by engaging in deliberate misconduct in willful disregard of their employer's interests disqualify themselves from receiving unemployment benefits. Although Jefferson's refusal to receive a COVID-19 vaccination violated Fallon's COVID-19 policy and disregarded Fallon's interests in keeping its vulnerable member population healthy and safe, the DUA awarded her unemployment assistance. That decision is untenable for two independent reasons. (*See* Argument, Section III, *infra* at 24–34.)

First, the DUA found that Jefferson complied with Fallon's vaccination policy by requesting an exemption from it. But none of the evidence in the record supports that finding. (*See* Argument, Section III.A, *infra* at 24–30.) In fact, all the evidence establishes that *requesting* an exemption was not enough to comply with the policy if an employee objected to receiving a vaccination; rather, the employee had to *receive* an exemption from Fallon. (*See* Argument, Section III.A, *infra* at 25–26.) Because Fallon denied Jefferson's exemption request, she did not comply with Fallon's policy. The DUA had no evidentiary basis to find otherwise.

Second, the DUA determined that Jefferson's refusal to receive a COVID-19 vaccination was not deliberate misconduct in willful disregard of Fallon's interests because she objected to receiving a vaccination on religious grounds. In other words, the DUA found that Jefferson's religious beliefs were a mitigating circumstance that excused her misconduct. That finding is inconsistent with binding precedent holding that mitigating circumstances alone are insufficient to excuse intentional misconduct. (*See* Argument, Section III.B, *infra* at 30–34.) Even if mitigating circumstances were a recognized excuse, an employee's religious beliefs are not such a circumstance, as the DUA itself has recognized in an internal memorandum. (*See* Argument, Section III.B, *infra* at 32–34.) The DUA's decision disregards these principles and is thus incorrect as a matter of law.

Perhaps recognizing the flaws in the DUA's decision, the District Court affirmed it on alternative grounds—namely, that Fallon's vaccination policy was unreasonable because, by not granting any exemptions to its patient-facing employees, Fallon "obliterated" the concept of religious accommodation under the antidiscrimination laws. Like the DUA's decision, the District

Court's finding disregards the evidence and the law. (*See* Argument, Section IV, *infra* at 35–44.)

In concluding that Fallon's policy was unreasonable, the District Court contradicted the DUA's express finding to the contrary. Specifically, the DUA found that Fallon's expectation that its workers become vaccinated against COVID-19 was reasonable. Established principles of judicial review prohibit a court from supplanting an agency's well-supported factual findings with its own unsupported determinations. (*See* Argument, Section IV.A, *infra* at 34–35.)

Even if the District Court could find facts anew, its legal reasoning is flawed for two separate reasons. First, the District Court necessarily assumed that Fallon violated the reasonable-accommodation provisions of state and federal antidiscrimination laws by not granting any exemptions from its policy. But cases interpreting those provisions have said just the opposite. (*See* Argument, Section IV.B, *infra* at 36–44.) Second, the District Court's reasoning fails to appreciate that the reasonableness of a policy depends on the employee's duties and the consequences of an employee's failure to perform those duties in accordance with her employer's expectations. Here, Fallon, as a healthcare provider,

could not allow unvaccinated employees with patient-care responsibilities like Jefferson to interact with its members and expose them to a heightened risk of contracting COVID-19. (*See* Argument, Section IV.B, *infra* at 43–44.) For these reasons, the district Court's alternative basis for affirming the DUA's decision cannot save it from reversal.

ARGUMENT

I. STANDARD OF REVIEW

The Massachusetts Administrative Procedure Act ("APA") governs this appeal. M.G.L. c. 151A, § 42. Although the APA requires this Court to give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it," M.G.L. c. 30A, § 7, that "deference does not suggest abdication," *Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm'n*, 481 Mass. 506, 511–12 (2019). Accordingly, this Court will reverse a DUA decision where "it is based upon an error of law or is unsupported by substantial evidence." *City of Bos. v. Deputy Dir. of Div. of Emp. & Training*, 59 Mass. App. Ct. 225, 228 (2003) (quoting *Potris v. Comm'r*

of Dep't of Emp. & Training, 42 Mass. App. Ct. 735, 737–38 (1997));[2] *accord* M.G.L. c. 30A, § 14(7)(c),(e).

"'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." M.G.L. c. 30A, § 1(6). That an "administrative record may contain some evidence from which a rational mind might draw an inference in support of the agency's decision does not end [this Court's] inquiry." *Allen of Mich., Inc. v. Deputy Dir. of Div. of Emp. & Training*, 64 Mass. App. Ct. 370, 377 (2005) (citing *New Bos. Garden Corp. v. Bd. of Assessors of Bos.*, 383 Mass. 456, 466 (1981)). Instead, the Court must "examine the entirety of the administrative record and take into account whatever in the record fairly detracts from the supporting evidence's weight." *Id.* (quoting *Cobble v. Comm'r of Dep't of Soc. Servs.*, 430 Mass. 385, 390 (1999)). "While [an agency] is free to evaluate evidence in light of its expertise, it cannot use its expertise as a substitute for evidence in the record." *Fitchburg*

[2] Several cases that Fallon relies on involved the Department of Employment & Training. That agency was the DUA's predecessor. *See Norfolk Cnty. Ret. Sys. v. Dir. of Dep't of Lab. & Workforce Dev.*, 66 Mass. App. Ct. 759, 770 n.1 (2006). When discussing those cases, Fallon refers to the agency as the "DUA" for simplicity.

Gas & Elec. Light Co. v. Dep't of Pub. Utils., 460 Mass. 800, 812 (2011) (quoting *Arthurs v. Bd. of Reg. in Med.*, 383 Mass. 299, 305 (1981)).

As for an agency's legal analysis, this Court's review is de novo, "giving 'substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its . . . enforcement.'" *Craft Beer Guild*, 481 Mass. at 512 (quoting *Com. Ins. Co. v. Comm'r of Ins.*, 447 Mass. 478, 481 (2006)). But no amount of deference can salvage an "incorrect interpretation of a statute." *Id.* (quoting *Com. Ins.*, 447 Mass. at 481). Thus, the DUA's "erroneous construction of G.L. c. 151A" does not bind this Court. *Athol Daily News v. Bd. of Rev. of Div. of Emp. and Training*, 439 Mass. 171, 174 (2003).

II. BACKGROUND ON SECTION 25(E)(2)'S DISQUALIFICATIONS

"The fundamental purpose of the statutory program of unemployment assistance is 'to afford benefits to persons who are out of work and unable to secure work through no fault of their own.'" *Shriver Nursing Servs., Inc. v. Comm'r of Div. of Unemployment Assistance*, 82 Mass. App. Ct. 367, 370 (2012) (quoting *Howard Bros. Mfg. v. Dir. of the Div. of Emp. Sec.*, 333 Mass. 244, 248 (1955)). The Legislature enacted M.G.L. c. 151A, §

25(e)(2) "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer [had] a right to expect." *City of Bos.*, 59 Mass. App. Ct. at 227 (quoting *Still v. Comm'r of Emp. & Training*, 423 Mass. 805, 810 (1996)).

Originally, the only basis for disqualification under Section 25(e)(2) was a discharge for "deliberate misconduct in wilful [sic] disregard of the employing unit's interest." *Allen of Mich.*, 64 Mass. App. Ct. at 378 (quoting M.G.L. c. 151A, § 25(e)(2)). In 1992, the Legislature expanded the grounds for disqualification by amending Section 25(e)(2) to provide that a discharge for "a knowing violation of a reasonable and uniformly enforced rule or policy of the employer" would disqualify an employee from receiving unemployment assistance.[3] *Id.* at 378–79 (quoting M.G.L. c. 151A, § 25(e)(2)). Under both of Section 25(e)(2)'s prongs, "[t]he critical issue in determining whether disqualification was warranted is

[3] As the DUA's counsel recognized, the purpose of adding this disqualification to the unemployment statute was to "make it easier for employers to establish that they had expectations that were violated by employee conduct when they went against the policy." (R.A. 158–159 (District Court Transcript ("Ct. Tr.") at 13:25–14:1).)

[the employee's] state of mind in performing the acts that caused her discharge." *Id.* at 370.

III. THE DUA DISREGARDED THE EVIDENCE BEFORE IT AND COMMITTED AN ERROR OF LAW.

A. The DUA's finding that Jefferson complied with Fallon's COVID-19 vaccination policy contradicts the evidence in the record.

The evidence before the DUA established that Jefferson knowingly violated Fallon's mandatory vaccination policy by refusing to receive a COVID-19 vaccination.[4] An employee knowingly violates a workplace rule where she has a "conscious intent both (a) to commit some action or behavior, and thereby (b) violate the employer's rule or policy." *Shriver Nursing Servs.*, 82 Mass. App. Ct. at 372 (citing *Still*, 423 Mass. at 813). Borrowing from the Supreme Judicial Court's ("SJC") jurisprudence under Section 25(e)(2)'s willful-misconduct prong, this Court has found the following factors relevant to this inquiry: "(1) 'the worker's knowledge of

[4] There is no dispute that Fallon uniformly enforced its COVID-19 policy. (*See* R.A. 157 (Ct. Tr. at 12:16–18).) Fallon notified all its employees who worked on its Summit product line of the requirement to receive a COVID-19 vaccination by email on October 7, 2021. (R.A. 100 (Hearing Appeal Results at 2 ¶ II(4)); *see also* R.A. 62 (Tr. at 26:13–15).) And because all Summit employees interact with vulnerable members face to face, Fallon uniformly denied their requests for a religious exemption. (R.A. 101 (Hearing Appeal Results at 3 ¶¶ II(11), (13)).)

the employer's expectation'; (2) 'the reasonableness of that expectation'; and (3) 'the presence of any mitigating factors.'" *Allen of Mich.*, 64 Mass. App. Ct. at 380 (quoting *Still*, 423 Mass. at 810–11).[5] Fallon presented the DUA with evidence showing that each of these factors required a finding that Jefferson's knowing policy violation disqualified her from receiving unemployment assistance.

First, Jefferson knew that Fallon had implemented a mandatory COVID-19 vaccination policy. (R.A. 100–101 (Hearing Appeal Results at 2–3 II ¶¶ (4), (7), (8)).) She also knew that the policy required her to receive a COVID-19 vaccination or an exemption from Fallon. The policy said that employees were required to provide proof of vaccination, unless Fallon could reasonably accommodate their medical condition or religious belief

[5] Because both prongs of Section 25(e)(2) turn on the same factors, the Court should also find that Jefferson engaged in deliberate misconduct in willful disregard of Fallon's interests when she refused to become vaccinated against COVID-19 for the same reasons it should find that her refusal to receive a vaccination violated Fallon's policy. *See Allen of Mich.*, 64 Mass. App. Ct. at 379 (finding willful disregard of an employer's interests and a knowing policy violation based on same facts); *City of Bos.*, 59 Mass. App. Ct. at 228 (same).

that prevented them from doing so, and that a failure to comply with the policy would result in separation. (R.A. 112-113 (Exhibits to the Record at 7-8).) Jefferson testified that she understood that the policy required her to receive a vaccination or exemption. (R.A. 72 (Tr. at 36:20–37:3).) And when Potoczniak and DeWitt informed Jefferson that Fallon had denied her request for a religious exemption, they told her that Fallon would terminate her employment if she failed to get vaccinated. (R.A. 67 (Trans. at 31:12–16).) Despite Jefferson's awareness of Fallon's policy and the consequences of not becoming vaccinated against COVID-19, she refused to receive a COVID-19 vaccination. (R.A. 101 (Hearing Appeal Results at 3 ¶ II (14)).)

Second, the review examiner expressly found that Fallon's expectation that employees who, like Jefferson, worked with its vulnerable members receive a COVID-19 vaccination was "reasonable." (R.A. 102 (Hearing Appeal Results at 4 ¶ III).) She adequately supported this finding with subsidiary findings that the Massachusetts Office of Health and Human Services required Fallon to implement its mandatory vaccination policy and that Fallon's "witnesses credibly testified that [its] client population is frail and elderly and that there were no

accommodations that [it] could provide to [Jefferson].” (R.A. 100 (Hearing Appeal Results at 2 ¶ II(3)); R.A. 102 (Hearing Appeal Results at 4 ¶ III).) And Jefferson herself acknowledged the importance of minimizing the risk of spreading COVID-19 to Fallon’s medically vulnerable members when she offered to take other, albethey inadequate, precautions to reduce that risk. (R.A. 101 (Hearing Appeal Results at 3 ¶ II(10)).)

Finally, the review examiner did not find that a mitigating circumstance excused Jefferson’s noncompliance with Fallon’s COVID-19 vaccination policy, and none appears in the record.

As the analysis above shows, all three factors required a finding that Jefferson’s knowing policy violation disqualified her from receiving unemployment benefits. Nonetheless, the review examiner determined that Jefferson did not knowingly violate Fallon’s vaccination policy because she had “complied with [it] by submitting a timely request for the religious exemption.” (R.A. 102 (Hearing Appeal Results at 4 ¶ III).) But the review examiner did not make any subsidiary findings to support her conclusion that the mere act of requesting a religious exemption was sufficient to comply with Fallon’s vaccination policy. Nor could she: The record contains

no evidence that would support that finding. On the contrary, all the evidence—including the language of the policy, Jefferson's understanding of the policy, and Fallon's communications with Jefferson about the consequences of her refusal to become vaccinated—established that Jefferson knew that the only way to comply with the mandate was to receive a vaccination or an exemption. Since Jefferson received neither, she knowingly violated Fallon's policy.

In addition to the absence of any evidence that would support the review examiner's conclusion that Jefferson had complied with Fallon's policy, the review examiner's subsidiary findings undermine that conclusion by showing that no rational mind could agree with it. Under the review examiner's interpretation, Jefferson's submission of her exemption request would have brought her into compliance with the policy. As a necessary consequence, Fallon would not have had grounds to discharge her for violating the policy. So, she would have continued working, delivering care and assistance to Fallon's elderly and frail members while unvaccinated. That result would be absurd given the review examiner's findings that Fallon could not provide an accommodation "in lieu of the COVID-19 vaccine" because its "very frail

patient population" is at "extreme risk." (R.A. 101 (Hearing Appeal Results at 3 ¶¶ II(11)–(12)).) At bottom, Jefferson's religious-accommodation request protected her from termination no more than it would have protected an elderly member with multiple comorbidities from the potentially devastating effects of contracting COVID-19 from an unvaccinated home health aide. The review examiner's finding that Jefferson's mere act of requesting a religious exemption satisfied the policy ignored that reality.

In *Allen of Michigan*, this Court reversed a similar DUA determination that lacked substantial evidentiary support and failed to appreciate the realities of the employer's business. 64 Mass. App. Ct. at 382. There, a hospice provider communicated to its nurses its "expectation" that they would visit a patient at a triage nurse's request. *Id.* at 379. Disregarding that expectation, a nurse refused repeated instructions from a triage nurse to visit a patient. *Id.* The review examiner found that the nurse was eligible for benefits because, as is relevant here, the hospice provider did not have a rule or policy requiring nurses to visit patients at a triage nurse's request. *Id.* at 379–81. This Court dis-

agreed. *Id.* It found that the hospice provider's "expectation" that its nurses would visit patients at a triage nurse's request was a reasonable rule or policy and that the nurse was aware of it. *Id.* at 379. It also criticized the review examiner's decision as "ignor[ing] the mission of the employer and the role of hospice nurses." *Id.* at 381.

The same is true here. Fallon's COVID-19 policy provided for three possible outcomes: vaccination, accommodation, or separation. Jefferson knew this, and the review examiner's interpretation of the policy as including a fourth outcome that would allow Jefferson to comply with the policy and continue working by merely applying for an exemption disregards not only the evidence in the record, but also Jefferson's patient-care responsibilities. Thus, the DUA's decision cannot stand.

B. The DUA committed an error of law in finding that Jefferson did not engage in deliberate misconduct by refusing to receive a COVID-19 vaccination.

The DUA erroneously reasoned that Jefferson did not engage in deliberate misconduct in willful disregard of Fallon's interests by refusing to receive a COVID-19 vaccination because she objected to it on religious grounds. An employee who engages in "any 'intentional

conduct or inaction which [she] knew was contrary to the employer's interest'" disqualifies herself from receiving unemployment assistance. *Gupta v. Deputy Dir. of Div. of Emp. & Training*, 62 Mass. App. Ct. 579, 585 (2004) (quoting *Still*, 423 Mass. at 810). The same factors relevant to whether an employee knowingly violated an employer's policy—specifically, "the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors"—are also relevant to this analysis. *Id.* (quoting *Torres v. Dir. of the Div. of Emp. Sec.*, 387 Mass. 776, 780 (1982)).

As Fallon demonstrated above, Jefferson knew of its COVID-19 vaccination policy and that policy was reasonable. Although the review examiner did not expressly find any mitigating circumstances, she found that Jefferson did not engage in deliberate misconduct in willful disregard of Fallon's interests because she "was not getting vaccinated for sincerely held religious beliefs." (R.A. 102 (Hearing Appeal Results at 4 ¶ III).) In other words, the review examiner determined that Jefferson's religious beliefs excused her refusal to become vaccinated against COVID-19 in willful disregard of Fallon's interests. (*Id.*) That's not the law.

In *Still*, the SJC stated that "mitigating circumstances alone will not negate a showing of intent or thereby excuse a 'knowing violation.'" *See Still*, 423 Mass. at 815 (quoting M.G.L. c. 151A, § 25(e)(2)). Applying *Still* in *Allen of Michigan*, this Court held that a hospice nurse's claimed mitigating circumstance (namely, the refusal of a patient's family to accept her services) did not excuse her policy violation and willful disregard of her employer's interests (specifically, her failure to follow a triage nurse's repeated instructions to visit the patient). 64 Mass. App. Ct. at 380. By disregarding these cases, the review examiner erred in finding that Jefferson's religious beliefs excused her refusal to become vaccinated against COVID-19.

Even if mitigating circumstances were sufficient to excuse Jefferson's deliberate misconduct, her religious beliefs are not such a circumstance. In *Still*, the SJC described mitigating circumstances as facts that may "offer support for a conclusion that the employee's act was essentially spontaneous and unplanned." 423 Mass. at 815. Jefferson's refusal to receive a COVID-19 vaccination was neither spontaneous nor unplanned; it was a deliberate, conscious decision that Jefferson made with full awareness of its consequences.

Consistent with *Still*'s description of mitigating circumstances as requiring spontaneous or unplanned misconduct, the DUA has recognized that an employee's religious beliefs do not mitigate a refusal to comply with an employer's vaccination policy. In an interoffice memorandum entitled *Adjudication of Separation Issues Related to Vaccination Requirement*, the DUA provided review examiners with instructions for determining whether an employee's refusal to receive a COVID-19 vaccination disqualifies her from receiving unemployment assistance without *any* reference to an employee's religious beliefs as a mitigating circumstance. *See* DUA, *Adjudication of Separation Issues Related to Vaccination Requirement*, Interoffice Memorandum No. UIPP 2021.10, at 2 (Oct. 14, 2021), available at https://www.mass.gov/doc/202110-adjudication-of-separation-issues-due-to-vaccination-requirement/download.[6] Rather, it stated that an employee who refuses to comply with a vaccination mandate because of her religious beliefs will be ineligible for benefits

[6] This memorandum is entitled to substantial deference. *See LeBeau v. Comm'r of Dep't of Emp. & Training*, 422 Mass. 533, 537 (1996) (deferring to DUA's interpretation of unemployment laws in its Service Representative Handbook).

if her employer provided her with an opportunity to request a religious exemption. *See id.* In finding that Jefferson's religious beliefs excused her disregard of Fallon's interests, the review examiner strayed from this memorandum and committed an error of law.

In sum, the review examiner found that Jefferson's religious beliefs were a mitigating circumstance that excused her deliberate refusal not to receive a COVID-19 vaccination in willful disregard of Fallon's interests. That is inconsistent with *Still*, *Allen of Michigan*, and the DUA's own memorandum on vaccination requirements. Those authorities require the Court to reverse the DUA's decision.

IV. THE DISTRICT COURT'S ALTERNATIVE REASON FOR AFFIRMING THE DUA'S DECISION CONTRADICTS THE DUA'S FACTUAL FINDINGS AND IS ERRONEOUS AS A MATTER OF LAW.

A. The District Court's finding that Fallon's COVID-19 vaccination policy was not reasonable contradicts the DUA's factual finding that it was.

Although the review examiner found that Fallon's expectation that its employees receive a COVID-19 vaccination was reasonable, and all her subsidiary finding supported that conclusion, the District Court inexplicably found that Fallon's policy was "not reasonable on [its] face and in the manner in which it was implemented"

(R.A. 169 (Memorandum at 3); Addendum at 3.) Nothing in the APA allows a court to supplant an agency's substantiated factual findings with its own unsupported determinations. In fact, the opposite is true: Principles of agency deference preclude courts from "determin[ing] facts anew." *Allen of Mich.*, 64 Mass. App. Ct. at 377. Simply put, this Court cannot affirm the DUA's eligibility determination based on the District Court's rogue factual findings.

B. The District Court erred as a matter of law in finding that Fallon's COVID-19 vaccination policy was unreasonable because it incorrectly found that Fallon violated the antidiscrimination laws and it disregarded Jefferson's patient-care duties.

Even if the District Court's factual finding that Fallon's policy was unreasonable had evidentiary support, the District Court's legal reasoning is flawed as a matter of law, both in the faulty premises it relied on and the critical premise it omitted.

The District Court based its unreasonableness finding on the DUA's argument that Fallon's policy "'obliterated' the religious exemption" because "[n]o Fallon employee was granted a similar exemption request." (R.A. 169 (Memorandum at 3); Addendum at 3; *see also* R.A. 158 (Ct. Tr. at 13:10–11).) No legal authority supports that

argument. Indeed, the DUA's interoffice memorandum, which provides an eligibility standard that does not depend on how the employer handled other employees' exemption requests, undermines it. That memorandum provides:

> **The claimant will be ineligible for benefits unless the facts establish that the claimant's refusal of vaccination was due to a substantiated medical condition that prevented vaccination or a sincerely held religious belief, and no opportunity to request or apply for reasonable accommodation was offered by the employer.**
>
> If an employer's vaccine policy permitted such requests and a claimant's request for an exemption or accommodation was denied, Adjudicators should not "second guess" the employer's decision.

See DUA, *Adjudication of Separation Issues Related to Vaccination Requirement* at 2 (bolding in original). By importing an additional requirement that an employer grant an unidentified percentage of exemption requests that the DUA would deem acceptable, the District Court rewrote the DUA's eligibility standard and second-guessed Fallon's denial of Jefferson's request, committing a clear error of law along the way.

The District Court's "obliteration" reasoning is flawed for an additional reason. It essentially posits

that Fallon violated the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964 and Chapter 151B of the Massachusetts General Laws by not granting any patient-facing employee's request for a religious exemption from its vaccination mandate.[7] But as the DUA acknowledged in its interoffice memorandum, its employees are "not sufficiently trained or authorized to make determinations regarding an employer's compliance with the reasonable accommodation provisions of . . . Title VII . . . [or] MGL c. 151B." *Id.* at 3. And that lack of

[7] During the hearing before the District Court, the DUA's counsel mistakenly surmised that Fallon's policy provided disability and religious exemptions to "basically uphold[ ] . . . First Amendment principles in dealing with this sort of novel issue with [its] workforce." (R.A. 157 (Ct. Tr. at 12:5–8).) That is incorrect. The First Amendment says nothing about disability discrimination and does not apply to private employers like Fallon in any event. *See* U.S. Const. amend. XIV, § 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see also Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 817 n.5 (4th Cir. 2004) ("[T]he First Amendment does not apply to private employers."). Presumably, the DUA's counsel intended to refer to the Americans with Disabilities Act, Title VII, and Chapter 151B as the source of the requirement that employers reasonably accommodate their employees' disabilities and religious beliefs.

training and authorization contributed to the DUA's unsound reasoning and the District Court's commission of an error of law by adopting it.

The problem with the DUA's argument that Fallon obliterated (and thus violated) Title VII's and Chapter 151B's religious-accommodation provisions is that it disregards the concept of undue hardship. Title VII and Chapter 151B do not require an employer to accommodate an employee's sincerely held religious beliefs at all costs. Rather, an employer must accommodate those beliefs, unless doing so would impose an "undue hardship" on its business. 42 U.S.C. § 2000e(j); M.G.L. c. 151B, § 4(1A). Under both statutes, an accommodation that would jeopardize public health and safety is an undue hardship. U.S. Equal Employment Opportunity Commission, *Compliance Manual on Religious Discrimination*, EEOC-CVG-2021-3 § 12-IV(B)(2) & nn. 254, 256 (Jan. 15, 2021), available at https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination; *accord* M.G.L. c. 151B, § 4(1A). Applying these precepts, courts have found that healthcare providers would suffer an undue hardship unless they did exactly what Fallon did here, that is, granted *no* religious exemptions from a vaccination mandate to patient-facing employees.

In *Robinson v. Children's Hospital Boston*, a hospital required its employees to receive an influenza vaccination. No. CV 14-10263-DJC, 2016 WL 1337255, at *2 (D. Mass. Apr. 5, 2016). Although the policy allowed for medical exemptions, it did not permit religious exemptions because the hospital determined that "additional exemptions would increase the risk of transmission." *Id.* After the hospital denied an employee's request for a religious exemption, she filed suit, alleging that the hospital had discriminated against her by not accommodating her religious beliefs. *Id.* The court granted the hospital's motion for summary judgment, reasoning that "granting [the employee's] request would have been an undue hardship because it would have increased the risk of transmitting influenza to [the hospital's] already vulnerable patient population." *Id.* at *9.

More recently, in *Does 1-6 v. Mills*, the First Circuit upheld a regulation that required healthcare workers to be vaccinated against COVID-19. 16 F.4th 20, 24 (1st Cir. 2021), *cert. denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022). The regulation permitted medical exemptions, but it did not allow for religious exemptions. *Id.* A group of healthcare workers who objected to

the COVID-19 vaccine on religious grounds sought to enjoin enforcement of the regulation, arguing, among other things, that it violated Title VII by not accommodating their religious beliefs. *Id.* The First Circuit denied their request for injunctive relief, reasoning that the healthcare workers did not show a likelihood of success on the merits of their claim because, among other reasons, the hospitals they worked for "need not provide the exemption [they] request because doing so would cause them to suffer undue hardship." *Id.* at 36.

In stark contrast to the DUA's obliteration argument, *Robinson* and *Does 1-6* show that not granting any religious exemptions from a vaccination policy is consistent with the concept of religious accommodations. Thus, Fallon did not violate (or, in the DUA's words, "obliterate") the religious-accommodation provisions of Title VII and Chapter 151B. Without the premise that Fallon violated those laws, the DUA's obliteration argument crumbles. Accordingly, the District Court erred as a matter of law in adopting that reasoning.

Not only does the District Court's obliteration finding rest on faulty premises, but it also disregards a premise that compels an opposite conclusion—namely, that the nature of Jefferson's job, which required her

to provide care and assistance to medically vulnerable individuals in person, made Fallon's vaccination policy reasonable on its face and as applied to her.

In *City of Boston*, this Court reversed a similar DUA decision that failed to consider the nature of an employee's work in awarding him benefits. 59 Mass. App. Ct. at 225–26. There, a police officer tested positive for cocaine and received a voluntary suspension to allow him to enter a drug-rehabilitation program. *Id.* at 226. After the officer's suspension began, but before he entered the rehabilitation program, he smoked marijuana. *Id.* at 226–27. When he later tested positive for marijuana, the police department terminated his employment under a rule providing that "the penalty for a second instance of ingestion of a controlled substance [was] termination." *Id.*

In awarding the officer unemployment benefits, the DUA found that the department had not reasonably applied its rule prohibiting drug use to the police officer. *Id.* at 228. It reasoned that terminating the police officer for his drug use before he entered the rehabilitation program "negat[ed] the intent of the discharge and treatment aspects of rule." *Id.*

Reversing the DUA's decision, this Court found that the DUA's interpretation of the rule was erroneous as a matter of law. *Id.* Unlike the DUA, the Court recognized that the nature of a police officer's work distinguished it from other employees' jobs because "[p]ossession of controlled substances is a crime which police officers are called upon to detect and bring to prosecution" and that "police officers must understand that difference." *Id.* at 229. Thus, it found that the police officer had knowingly violated the department's rules prohibiting drug use and was disqualified from receiving unemployment benefits. *Id.* at 229–30.

Another instructive precedent is *Shriver Nursing Services*. 82 Mass. App. Ct. at 372–75. In that case, a nurse who was responsible for monitoring a cerebral palsy patient overnight fell asleep on the job in violation of a rule prohibiting sleeping while on duty. *Id.* at 368. When her employer confronted her about that infraction, she resigned to avoid termination. *Id.* at 369. The DUA awarded the nurse unemployment benefits, reasoning that she did not intend to fall asleep on the job and thus did not knowingly violate her employer's rule prohibiting such conduct. *Id.* at 370–71.

On appeal, this Court reversed the DUA's determination. *Id.* at 375. In doing so, it distinguished its earlier decision in *Wedgewood v. Director of Division of Employment Security*, 25 Mass. App. Ct. 30 (1987), where the Court found that a custodian who had fallen asleep on the job had not engaged in deliberate misconduct in violation of his employer's interests and determined he was eligible for benefits. *Id.* at 373. Specifically, the Court in *Shriver Nursing Services* reasoned that "sleepiness in that instance would cause an interruption in custodial chores while here it would expose a patient to catastrophic danger." *Id.* at 374 n.9.

As *City of Boston* and *Shriver Nursing Services* demonstrate, the nature of an employee's duties and the attendant consequences if she failed to perform them pursuant to her employer's policies are relevant to determining whether a policy violation disqualifies her from receiving unemployment assistance. Despite these precedents, the District Court failed to consider the review examiner's findings that Fallon could not safely accommodate Jefferson's religious beliefs because her work required her to provide in-person assistance to medically vulnerable individuals. (R.A. 101(Hearing Appeal Results at 3 ¶¶ II(11)–(14)).) Given Jefferson's

duties and the potentially disastrous consequences if she transmitted COVID-19 to one of Fallon's members, Fallon's COVID-19 vaccination policy was reasonable both on its face and as applied to Jefferson. The District Court erred in concluding otherwise, and its decision does not provide an alternative basis for affirming the DUA's determination.

CONCLUSION

To protect its frail and elderly members from the potentially devastating effects of contracting COVID-19, Fallon required its employees to become vaccinated against the virus. Jefferson refused to do so with full awareness of Fallon's expectation and the consequences of her decision. She thus disqualified herself from receiving unemployment assistance. Because the DUA and District Court incorrectly found otherwise, this Court should reverse the District Court's judgment and remand the case to the District Court for entry of a new judgment requiring the DUA to enter an order denying Jefferson unemployment benefits.

Respectfully submitted,

APPELLANT FALLON COMMUNITY HEALTH PLAN, INC.

By its attorneys,

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Date: January 12, 2023

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

DISTRICT COURT DEPARTMENT
WORCESTER DIVISION
CIVIL DOCKET NO. 2262CV0731

FALLON COMMUNITY HEALTH
PLAN, INC.,
Petitioner

v.

SHANIKA JEFFERSON and
CONNIE C. CARTER,
INTEREM DIRECTOR,
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE
Respondent

MEMORANDUM OF DECISION

This matter came before the court on September 21, 2022, on the petition of Fallon Community Health Plan, Inc. ("Fallon") for judicial review of the decision of the Board of Review affirming the decision of the Department of Unemployment Assistance review examiner's allowance of Shanika Jefferson's ("claimant") claim for unemployment insurance benefits. After review of the record and the arguments of counsel, the court affirms the decision of the Board of Review and makes the following findings and rulings. The salient facts are not in dispute, and the court adopts the findings of fact made by the review examiner dated March 26, 2022, following a telephonic hearing held on March 16, 2022. The review examiner found that Fallon had not met its burden of proof in accordance with G.L. c.151A § 25 (e)(2), that is, that "the employer must establish by substantial and credible evidence that it discharged the claimant due to deliberate misconduct and willful disregard of its interest or due to a knowing violation of a reasonable and uniformly enforced policy or rule, provided that such violation is not the result of the employees incompetence." The review examiner found that Fallon's expectation that its employees get vaccinated against the Covid-19 virus was reasonable. Fallon acknowledged that its client population is frail and elderly, and notwithstanding the claimant's willingness to get tested and wear a mask and goggles, it determined that no accommodation could be provided to the claimant. As a result, the review examiner

found that the claimant is entitled to receive benefits in accordance with section 25 (e)(2) of the law. After the review of the recorded testimony and evidence from the hearing, the review examiner's decision and the employer's appeal, the Board of Review concluded that the review examiner's decision was based on substantial evidence and free from any error of law affecting substantive rights.

The court's review of the Board's decision incorporates the standard of review applicable to agency decisions pursuant to G.L. c. 30A, § 14(7). The court may affirm the Board's decision, remand the matter to the Board, or set aside or modify the decision if it determines that the "substantial rights of any party have been prejudiced" by the Board decision which is: in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the Board; based upon an error of law; made upon unlawful procedure; unsupported by substantial evidence; unwarranted by facts found by the court on the record (where the court has allowed additional evidence under, G.L. c. 30A, § 14(6)); or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. G.L. c. 151A, § 42. The court's review is confined to the administrative record, and the burden is on the plaintiff "to demonstrate its invalidity." The court is required to "give due weight to the experience, technical competence, and specialize knowledge of the agency, as well as the discretionary authority conferred upon it." Lincoln Pharmacy of Milford, Inc. v. Commissioner of the Division of Unemployment Assistance, 74 Mass. App. Ct. 428, 431 (2009). "The agency's decision may only be set aside if the court determines that the decision is unsupported by substantial evidence or is arbitrary or capricious, an abuse of discretion, or not in accordance with law." G.L. c. 30A, § 14(7). "To satisfy the substantial evidence requirement, the agency's conclusion need not be based upon the clear weight of the evidence or even a preponderance of the evidence, but only upon reasonable evidence, that is, such evidence as a reasonable mind might accept as adequate to support a conclusion." Gupta v. Deputy Director of the Division of Employment & Training, 62 Mass. App. Ct. 579, 582 (2004). The review by this court is not a de novo determination of the facts and the court must "defer to the agency's interpretation and application of the statute within which it operates." Tri-County Youth Programs, Inc. v. Acting Deputy Director of the Division of Employment and Training, 54 Mass. App. Ct. 405, 408 (2002).

The review examiner found that the evidence presented at the hearing was insufficient to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule, in that the claimant complied with the policy by submitting a timely request for the religious exemption. Additionally, the review examiner found that Fallon failed to establish by substantial and credible evidence that the claimant was discharged due to deliberate misconduct and willful disregard of its interests. Fallon argued that the board impermissibly second-guessed its business judgment and that this is contrary to its role. It cites a DUA interoffice memorandum addressing employees' eligibility for unemployment benefits where they refused to receive a Covid 19 vaccine as stated:

> The claimant will be ineligible for benefits unless the facts established by the claimant's refusal of vaccination was due to a substantiated medical condition that prevented vaccination or a sincerely held religious belief, and no opportunity to request or apply for reasonable accommodation was offered by the employer. If an employer's vaccine policy permitted such requests and a claimant's request for an exemption or a combination was denied, adjudicators should not second guess the employer's decision. DUA, Interoffice Memorandum, UIPP2021.10.

Here, there was no second guessing by the review examiner. The sincerity of the claimant's religiously held beliefs and the documentation in support was never in question. For the prohibition of benefits to apply under 25 (e)(2), the policy has to be both knowing and reasonable, facially and as implemented. As argued by the Department, the policy "obliterated" the religious exemption. No Fallon employee was granted a similar exemption request. In this case the sincerely held religious belief of the claimant could not have resulted in an exemption. The claimant was not getting vaccinated for sincerely held religious beliefs, an act that was not deliberate misconduct or willful disregard of the employer's interest. The policy was not reasonable on his face and in the manner in which it was implemented. The court affirms the decision of the Board of Review.

October 5, 2022

Paul F. LoConto, Justice

JUDGMENT FOR DEFENDANT(S)	DOCKET NUMBER 2262CV000731	Trial Court of Massachusetts District Court Department Civil Session

Fallon Community Health Plan, Inc. v. Shanika Jefferson

PLAINTIFF(S) WHO ARE PARTIES TO THIS JUDGMENT	COURT NAME & ADDRESS
Fallon Community Health Plan, Inc.	Worcester District Court 225 Main Street Worcester, MA 01608
DEFENDANT(S) WHO ARE PARTIES TO THIS JUDGMENT	
Shanika Jefferson Connie Carter In his/her official capacity as Interim Director, Division of Unemployment Assistance	
ATTORNEY (OR PRO SE PARTY) TO WHOM THIS COPY OF JUDGMENT IS ISSUED	NEXT COURT EVENT (IF ANY)
Francesco A DeLuca, Esq. Epstein Becker and Green, P.C. 125 High St Suite 2114 Boston, MA 02110	**No Future Event Scheduled**

JUDGMENT FOR DEFENDANT(S)

On the above action, after trial by a judge, IT IS ORDERED AND ADJUDGED by the Court (Hon. Paul F LoConto) that the decision of the defendant agency or official is **AFFIRMED**.

Memorandum of Decision

NOTICE OF ENTRY OF JUDGMENT

Pursuant to Mass. R. Civ. P. 54, 58, 77(d) and 79(a), this Judgment has been entered on the docket on the "Date Judgment Entered" shown below, and this notice is being sent to all parties.

DATE JUDGMENT ENTERED	CLERK-MAGISTRATE/ASST. CLERK
10/07/2022	X

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 151A. Unemployment Insurance (Refs & Annos)

M.G.L.A. 151A § 25

§ 25. Disqualification for benefits

Effective: December 31, 2018
Currentness

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for--

(a) Any week in which he fails without good cause to comply with the registration and filing requirements of the commissioner. The commissioner shall furnish copies of such requirements to each employer, who shall notify his employees of the terms thereof when they become unemployed.

The employer, upon the retirement of an individual from employment pursuant to a pension program, plan or agreement requiring retirement on the ground of age, and any labor union or association which is a party to any such program, plan or agreement, shall notify such individual in writing that he is not, by reason of such retirement, disqualified from receiving unemployment compensation benefits.

(b) Any week with respect to which the commissioner finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he was last employed; provided, however, that nothing in this subsection shall be construed so as to deny benefits to an otherwise eligible individual (1) who becomes involuntarily unemployed during the period of the negotiation of a collective bargaining contract, in which case the individual shall receive benefits for the period of his unemployment but in no event beyond the date of the commencement of a strike; or (2) who is not recalled to work within one week following the termination of the labor dispute; and provided, further, that this subsection shall not apply if it is shown to the satisfaction of the commissioner that:--

(1) The employee is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and that

(2) The employee does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute, except that an individual for whom no work is available and who is not a member of or eligible to membership in the group or organization which caused the stoppage, shall not be considered as belonging to the same grade or class of workers as those who are responsible for the stoppage of work; provided, further, that if, in any case, separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in

separate departments of the same premises, each such department may, for the purposes of this subsection, be deemed a separate factory, establishment or other premises.

(3) For the purposes of this chapter, the payment of regular union dues or assessments shall not be construed as participating in or financing or being directly interested in a labor dispute.

(4) The individual has, subsequent to his unemployment because of a labor dispute, obtained employment, and has been paid wages of not less than the amount specified in clause (a) of section twenty-four; provided, however, that during the existence of such labor dispute the wages of such individual used for the determination of his benefit rights shall not include any wages such individual earned from the employer involved in such labor dispute.

In addition to the foregoing, an employee shall not be denied benefits as the result of an employer's lockout and shall be eligible for the extended benefits authorized under subsection (d) of section 30, whether or not there is a stoppage of work, if such employees are ready, willing and able to work under the terms and conditions of the existing or expired contract pending the negotiation of a new contract unless the employer shows by a preponderance of evidence that the lockout is in response to: (a) acts of repeated and substantial damage to the employer's property, or (b) repeated threats of imminent, substantial damage; provided, however, that such damage or threats of damage are caused or directed by members of the bargaining unit with the express or implied approval of the officers of such unit, and the employer has taken all reasonable measures to prevent such damage to property and such efforts have been unsuccessful.

A lockout, as used in this subsection, shall exist whether or not such action is to obtain for the employer more advantageous terms when an employer fails to provide employment to his employees with whom he is engaged in a labor dispute, either by physically closing his plant or informing his employees that there will be no work until the labor dispute has terminated.

(c) Any week in which an otherwise eligible individual fails, without good cause, to apply for suitable employment whenever notified so to do by the employment office, or to accept suitable employment whenever offered to him, and for the next seven consecutive weeks in addition to the waiting period provided in section twenty-three, and the duration of benefits for unemployment to which the individual would otherwise have been entitled may thereupon be reduced for as many weeks, not exceeding eight, as the commissioner shall determine from the circumstances of each case.

“Suitable employment”, as used in this subsection, shall be determined by the commissioner, who shall take into consideration whether the employment is detrimental to the health, safety or morals of an employee, is one for which he is reasonably fitted by training and experience, including employment not subject to this chapter, is one which is located within reasonable distance of his residence or place of last employment, is 1 which reasonably accommodates the individual's need to address the physical, psychological and legal effects of domestic violence, and is one which does not involve travel expenses substantially greater than that required in his former work.

No work shall be deemed suitable, and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:--

(1) If the position offered is vacant due directly to a strike, lockout or other labor dispute;

(2) If the remuneration, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(3) If acceptance of such work would require the individual to join a company union or would abridge or limit his right to join or retain membership in any bona fide labor organization or association of workmen.

An individual who is certified as attending an industrial retraining course or other vocational training course as provided under section thirty shall not be denied benefits by reason of the application of the first paragraph of this subsection relating to failure to apply for, or refusal to accept, suitable work.

(d) Any period with respect to which he is receiving or has received or is about to receive compensation for total disability under the workers' compensation law of any state or under any similar law of the United States, but not including payments for certain specified injuries under section thirty-six of chapter one hundred and fifty-two; or payments for similar specified injuries under workers' compensation laws of any state or under any similar law of the United States.

(e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and has earned an amount equivalent to or in excess of 8 times the individual's weekly benefit amount after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent, (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence, or (3) because of conviction of a felony or misdemeanor.

No disqualification shall be imposed if the individual establishes to the satisfaction of the commissioner that the reason for the individual's discharge was due to circumstances resulting from domestic violence, including the individual's need to address the physical, psychological and legal effects of domestic violence.

No disqualification shall be imposed if such individual establishes to the satisfaction of the commissioner that he left his employment in good faith to accept new employment on a permanent full-time basis, and that he became separated from such new employment for good cause attributable to the new employing unit. An individual shall not be disqualified under the provisions of this subsection from receiving benefits by reason of leaving his work under the terms of a pension or retirement program requiring retirement from the employment notwithstanding his prior assent, direct or indirect, to the establishment of such program. An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

An individual shall not be disqualified under the provisions of this subsection from receiving benefits by reason of leaving work to enter training approved under Section 236(a)(1) of the Trade Act of 1974, [1] provided the work left is not suitable employment, as defined in this paragraph. For purposes of this paragraph, the term “suitable employment” means with respect to an individual, work of a substantially equal or higher skill level than the individual's past adversely affected employment, as defined for purposes of the Trade Act of 1974, and wages for such work at not less than eighty per cent of the individual's average weekly wage as determined for the purposes of the Trade Act of 1974.

Notwithstanding any general or special law to the contrary, no disqualification shall be imposed if an individual establishes to the satisfaction of the commissioner that the individual is employed as a crewmember of a commercial fishing vessel and is unable to work for a period of time due to the general closing of the individual's employer's fishing vessel for that period of time as a result of the employer's inability to conduct fishing operations because of federal fisheries management restrictions.

An individual shall not be disqualified, under the provisions of this subsection, from receiving benefits if it is established to the satisfaction of the commissioner that the reason for leaving work and that such individual became separated from employment

due to sexual, racial or other unreasonable harassment where the employer, its supervisory personnel or agents knew or should have known of such harassment.

For the purposes of this paragraph, the term “sexual harassment” shall mean sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance; or (c) such advances, requests or conduct have the purpose or effect of creating an intimidating, hostile, humiliating or sexually offensive work environment. The department shall promulgate regulations necessary to carry out the provisions of this paragraph.

An individual shall not be disqualified from receiving benefits under this clause if the individual establishes to the satisfaction of the commissioner that the reason for the individual's leaving work was due to domestic violence, including:

(1) the individual's reasonable fear of future domestic violence at or on route to or from the individual's place of employment;

(2) the individual's need to relocate to another geographic area in order to avoid future domestic violence;

(3) the individual's need to address the physical, psychological and legal effects of domestic violence;

(4) the individual's need to leave employment as a condition of receiving services or shelter from an agency which provides support services or shelter to victims of domestic violence;

(5) any other respect in which domestic violence causes the individual to reasonably believe that termination of employment is necessary for the future safety of the individual or the individual's family.

A temporary employee of a temporary help firm shall be deemed to have voluntarily quit employment if the employee does not contact the temporary help firm for reassignment before filing for benefits and the unemployment benefits may be denied for failure to do so. Failure to contact the temporary help firm shall not be deemed a voluntary quitting unless the claimant has been advised of the obligation in writing to contact the firm upon completion of an assignment.

For the purposes of this paragraph, “temporary help firm” shall mean a firm that hires its own employees and assigns them to clients to support or supplement the client's workforce in work situations such as employee absences, temporary skill shortages, seasonal workloads and special assignments and projects. “Temporary employee” shall mean an employee assigned to work for the clients of a temporary help firm.

An individual in partial unemployment who leaves work from other than the most recent base period employer while receiving benefits under this chapter shall not be disqualified pursuant to the provisions of this subsection from receiving benefits, if such individual establishes to the satisfaction of the commissioner that the reason for leaving was to enter training for which the individual has received the commissioner's approval under section thirty.

Notwithstanding the provisions of this subsection, no waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount after having left work to accompany or join one's spouse or another person at a new locality.

(f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

(g) Any week which commences during the period between two successive sports seasons or similar periods if such individual performed services substantially all of which consisted of participating in sports or athletic events or training or preparing to so participate if such individual performed such services in the first of such seasons or similar periods and there is a reasonable assurance that such individual will perform such service in the later of such seasons or similar periods.

(h) Any period, after December thirty-first, nineteen hundred and seventy-seven, on the basis of services performed by an alien, unless such alien was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act; [2] provided, that any modifications to the provisions of section 3304(a)(14) of the Federal Unemployment Tax Act [3] which specify other conditions or other effective dates than stated herein for the denial of benefits based on services performed by aliens and which modifications are required to be implemented under state law as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, [4] shall be deemed applicable under the provisions of this section.

Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits.

In the case of an individual whose application for benefits would otherwise be approved, no determination that benefits to such individual are not payable because of this alien status shall be made except upon a preponderance of the evidence.

(i) Any period during which the individual applying for or receiving benefits has a default or arrest warrant outstanding against him, to the extent that federal law allows such benefits not to be paid. In order to determine if an individual has an outstanding default or arrest warrant against him, the department shall transmit to the department of criminal justice information services a list of applicants and beneficiaries along with sufficient identifying information about such applicants and beneficiaries on at least a quarterly basis. The department of criminal justice information services shall send to the department a list of the applicants or beneficiaries who have a default or arrest warrant outstanding. Evidence of the outstanding default or arrest warrant appearing in the warrant management system established by section 23A of chapter 276 shall be sufficient grounds for such action by the department. The department shall notify individuals against whom there is a default or arrest warrant outstanding that their benefits shall be denied or suspended unless the individual furnishes proof within 30 days of such notice that such warrant has been recalled or that there is no such warrant outstanding for the individual. Notice of potential denial or suspension shall be deemed sufficient if the notice is mailed to the most recent address furnished to the department. If proof that such warrant has been recalled or that there is no such warrant outstanding is furnished within 30 days, and if the applicant would otherwise be entitled to benefits, such benefits shall be provided from the time that they would have been provided had there not been a denial or suspension of benefits. If no such proof is furnished within 30 days, the individual shall be notified that benefits are denied or suspended subject to the provisions of subsection (b) of section 39. If a hearing is requested, within the ten-day period provided by said subsection (b) of said section 39, no suspension of benefits shall occur until a hearing has taken place and a determination by the commissioner or his authorized representative has been made. If a hearing is requested, the law enforcement agency responsible for the warrant shall be notified of the time, place, date of hearing and the subject of the warrant. An affidavit from the law enforcement agency responsible for the warrant or from the colonel of the state police may be introduced as prima facie evidence of the existence of a warrant without the need for members of that law enforcement agency to attend any hearings held under this section. A person whose benefits have been denied or suspended due to an outstanding warrant may petition for reinstatement of such benefits at any time if such person can furnish sufficient proof as determined by

the department that such warrant has been recalled. Such benefits will be provided from the time the warrant was recalled. The department shall promulgate regulations to implement this section.

(j) Any week in which the individual fraudulently collects benefits while not in total or partial unemployment. Whoever fraudulently collects benefits while not in total or partial unemployment, may be disqualified for each otherwise compensable week for each such week of erroneous payment; provided, however, that the amount in question shall be reduced by any earnings disregard in subsection (d) of section 29; provided further, that in the discretion of the commissioner, an amount erroneously paid may be deducted first from any future payments of benefits accruing to the individual under this chapter; provided further, that the amount deducted each week shall not exceed 25 per cent of the individual's weekly unemployment benefit rate; and provided further, that the individual shall have had actual notice of the requirement to report his earnings and the notice shall have met the requirements of clause iii of subsection (d) of section 62A. Any individual subjected to a deduction under this section may file an appeal and obtain review in accordance with sections 39 to 42, inclusive, and section 71.

(k) The department of unemployment assistance shall promulgate regulations providing that any employee discharged for deliberate misconduct consisting of: (i) stealing from such employee's place of employment; (ii) illegal drug use while at work; or (iii) drunkenness while at work shall be determined to be ineligible for benefits without regard to whether or not the employer had a written policy against such conduct.

Credits

Added by St.1941, c. 685, § 1. Amended by St.1945, c. 356; St.1948, c. 421; St.1951, c. 763, §§ 9, 10; St.1953, c. 401; St.1953, c. 464; St.1956, c. 719, § 4; St.1958, c. 677; St.1959, c. 533; St.1959, c. 554; St.1961, c. 93; St.1961, c. 247; St.1963, c. 447, § 2; St.1964, c. 355; St.1966, c. 382; St.1967, c. 480, § 3; St.1968, c. 323, § 5; St.1968, c. 625; St.1969, c. 614, § 2; St.1971, c. 940, § 14; St.1973, c. 899, § 2; St.1975, c. 684, § 78; St.1976, c. 473, § 19; St.1977, c. 720, § 27; St.1980, c. 131, § 10; St.1982, c. 489, § 5; St.1985, c. 572, § 6A; St.1986, c. 588, § 1; St.1987, c. 473, § 1; St.1987, c. 663, § 1; St.1990, c. 154, § 21; St.1990, c. 177, § 280; St.1992, c. 26, §§ 19, 20; St.1992, c. 286, § 217; St.1993, c. 88, § 1; St.2000, c. 166, § 10; St.2001, c. 69, §§ 3 to 5; St.2003, c. 142, §§ 8, 9, eff. Jan. 1, 2004; St.2010, c. 256, § 100, eff. Nov. 4, 2010; St.2012, c. 139, § 126, eff. July 1, 2012; St.2014, c. 144, §§ 62, 63, eff. Mar. 24, 2015; St.2018, c. 338, § 1, eff. Dec. 31, 2018.

Notes of Decisions (410)

Footnotes

1 19 U.S.C.A. § 2296.

2 8 U.S.C.A. §§ 1153(a)(7); 1182(d)(5).

3 26 U.S.C.A. § 3304(a)(14).

4 26 U.S.C.A. § 3301 et seq.

M.G.L.A. 151A § 25, MA ST 151A § 25
Current through Chapter 230 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 151A. Unemployment Insurance (Refs & Annos)

M.G.L.A. 151A § 42

§ 42. Judicial review; procedures; appeals; rules

Currentness

The commissioner or any interested person aggrieved by any decision in any proceeding before the board of review may obtain judicial review of such decision by commencing within thirty days of the date of mailing of such decision, a civil action in the district court within the judicial district in which he lives, or is or was last employed, or has his usual place of business, and in such proceeding, every other party to the proceeding before the board shall be made a defendant. If an appeal to the board of review is deemed denied pursuant to subsection (a) of section forty-one because the board failed to act upon such appeal, judicial review may be obtained by commencing a civil action as prescribed in the preceding sentence, except that the time for commencing such action shall run from the date such appeal is deemed denied. The commissioner shall be deemed to have been a party to any such proceeding before the board. The complaint shall state the grounds upon which such review is sought. The plaintiff shall serve a copy of the complaint upon each defendant by registered or certified mail, return receipt requested, within seven days after commencing the action for judicial review.

The commissioner shall make every reasonable effort to file with the court a certified copy of the decision of the board of review, including all documents and a transcript of all testimony taken at the hearing before said board or the commissioner as the case may be, within twenty-eight days after service of the complaint upon the commissioner or within twenty-eight days after the commencement of the action for judicial review by the commissioner. Each defendant shall file an answer within twenty-eight days after receipt of the complaint, except that the commissioner may, by way of answer, file in court within such time period a certified copy of the record of the proceeding under review.

Except as otherwise provided in this section, or if inconsistent with the provisions of this section, such proceeding shall be governed by the Rules of Civil Procedure for the district courts and the municipal court of the city of Boston. The findings and decisions of the board shall be reviewed in accordance with the standards for review provided in paragraph (7) of section fourteen of chapter thirty A. Any proceeding under this section shall be given precedence over all other civil cases.

An appeal may be taken from the decision of the justice of the district court directly to the appeals court. Notice of appeal shall be filed in the office of the clerk of the district court within thirty days after entry of the judgment by the clerk. The completion of such appeal shall be made in accordance with the Massachusetts Rules of Appellate Procedure. Benefits shall be paid or denied in accordance with the decision of the trial court justice during the pendency of such appeal.

Credits

Added by St.1941, c. 685, § 1. Amended by St.1943, c. 534, § 6; St.1947, c. 434; St.1951, c. 763, § 18; St.1954, c. 681, § 12; St.1971, c. 957, § 3; St.1973, c. 1114, § 18; St.1975, c. 377, §§ 2, 3; St.1976, c. 473, § 15; St.1978, c. 478, § 79; St.1983, c. 451, § 10; St.1985, c. 314, § 3; St.1990, c. 154, § 30; St.1990, c. 177, § 293.

Notes of Decisions (116)

M.G.L.A. 151A § 42, MA ST 151A § 42
Current through Chapter 230 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title III. Laws Relating to State Officers(Ch. 29-30b)
Chapter 30A. State Administrative Procedure (Refs & Annos)

M.G.L.A. 30A § 7

§ 7. Judicial review of regulations

Currentness

Unless an exclusive mode of review is provided by law, judicial review of any regulation or of the sufficiency of the reasons for its adoption as an emergency regulation may be had through an action for declaratory relief in the manner and to the extent provided under chapter two hundred and thirty-one A.

Credits
Added by St.1954, c. 681, § 1. Amended by St.1973, c. 1114, § 1; St.1974, c. 361, § 3.

Notes of Decisions (80)

M.G.L.A. 30A § 7, MA ST 30A § 7
Current through Chapter 230 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title III. Laws Relating to State Officers(Ch. 29-30b)
Chapter 30A. State Administrative Procedure (Refs & Annos)

M.G.L.A. 30A § 14

§ 14. Judicial review

Effective: October 27, 2015
Currentness

Except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof, as follows:--

Where a statutory form of judicial review or appeal is provided such statutory form shall govern in all respects, except as to standards for review. The standards for review shall be those set forth in paragraph (7) of this section, except so far as statutes provide for review by trial de novo. Insofar as the statutory form of judicial review or appeal is silent as to procedures provided in this section, the provisions of this section shall govern such procedures.

Where no statutory form of judicial review or appeal is provided, judicial review shall be obtained by means of a civil action, as follows:

(1) Proceedings for judicial review of an agency decision shall be instituted in the superior court for the county (a) where the plaintiffs or any of them reside or have their principal place of business within the commonwealth, or (b) where the agency has its principal office, or (c) of Suffolk. The court may grant a change of venue upon good cause shown. The action shall, except as otherwise provided by law, be commenced in the court within thirty days after receipt of notice of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for rehearing. Upon application made within the thirty-day period or any extension thereof, the court may for good cause shown extend the time.

(2) Service shall be made upon the agency and each party to the agency proceeding in accordance with the Massachusetts Rules of Civil Procedure governing service of process. For the purpose of such service the agency upon request shall certify to the plaintiff the names and addresses of all such parties as disclosed by its records, and service upon parties so certified shall be sufficient. All parties to the proceeding before the agency shall have the right to intervene in the proceeding for review. The court may in its discretion permit other interested persons to intervene.

(3) The commencement of an action shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper. Notwithstanding the foregoing, if the sex offender registry board issues a stay of a final classification in a sex offender registry board proceeding, then such stay shall be for not more than 60 days but if a court issues a stay of a final classification in a court appeal held pursuant to

section 178M of chapter 6, then such hearing shall be expedited and such stay shall be for not more than 60 days, without written findings and good cause shown.

(4) The agency shall, by way of answer, file in the court the original or a certified copy of the record of the proceeding under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess any one unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court.

(6) If application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of such additional evidence and shall file with the reviewing court, to become part of the record, the additional evidence, together with any modified or new findings or decision.

(7) The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is--

(a) In violation of constitutional provisions; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

(c) Based upon an error of law; or

(d) Made upon unlawful procedure; or

(e) Unsupported by substantial evidence; or

(f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or

(g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

The court shall make the foregoing determinations upon consideration of the entire record, or such portions of the record as may be cited by the parties. The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.

If the court finds that the action of the appointing authority in discharging, removing, suspending, laying off, lowering in rank or compensation or abolishing his position, or the action of the commission confirming the action taken by the appointing authority, was not justified, the employee shall be reinstated in his office or position without loss of compensation and the court shall assess reasonable costs against the employer.

Credits

Added by St.1954, c. 681, § 1. Amended by St.1957, c. 193, § 1; St.1968, c. 637, § 1; St.1973, c. 1114, § 3; St.1976, c. 411, §§ 1, 2; St.1998, c. 463, § 33; St.2015, c. 108, eff. Oct. 27, 2015.

Notes of Decisions (982)

M.G.L.A. 30A § 14, MA ST 30A § 14

Current through Chapter 230 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details

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Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title III. Laws Relating to State Officers(Ch. 29-30b)
Chapter 30A. State Administrative Procedure (Refs & Annos)

M.G.L.A. 30A § 1

§ 1. Definitions

Effective: August 1, 2010
Currentness

For the purposes of this chapter--

(1) "Adjudicatory proceeding" means a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing. Without enlarging the scope of this definition, adjudicatory proceeding does not include (a) proceedings solely to determine whether the agency shall institute or recommend institution of proceedings in a court; or (b) proceedings for the arbitration of labor disputes voluntarily submitted by the parties to such disputes; or (c) proceedings for the disposition of grievances of employees of the commonwealth; or (d) proceedings to classify or reclassify, or to allocate or reallocate, appointive offices and positions in the government of the commonwealth; or (e) proceedings to determine the equalized valuations of the several cities and towns; or (f) proceedings for the determination of wages under section twenty-six T of chapter one hundred and twenty-one.

(2) "Agency", any department, board, commission, division or authority of the state government or subdivision of any of the foregoing, or official of the state government, authorized by law to make regulations or to conduct adjudicatory proceedings, but does not include the following: the legislative and judicial departments; the governor and council; military or naval boards, commissions or officials; the department of correction; the department of youth services; the parole board; the division of dispute resolution of the division of industrial accidents; the personnel administrator; the civil service commission; and the appellate tax board.

(3) "Party" to an adjudicatory proceeding means:-- (a) the specifically named persons whose legal rights, duties or privileges are being determined in the proceeding; and (b) any other person who as a matter of constitutional right or by any provision of the General Laws is entitled to participate fully in the proceeding, and who upon notice as required in paragraph (1) of section eleven makes an appearance; and (c) any other person allowed by the agency to intervene as a party. Agencies may by regulation not inconsistent with this section further define the classes of persons who may become parties.

(4) "Person" includes all political subdivisions of the commonwealth.

(4A) "Proposed regulation", a proposal by an agency to adopt, amend or repeal an existing regulation.

(5) "Regulation" includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced

or administered by it, but does not include (a) advisory rulings issued under section eight; or (b) regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not substantially affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities; or (d) regulations relating to the use of the public works, including streets and highways, when the substance of such regulations is indicated to the public by means of signs or signals; or (e) decisions issued in adjudicatory proceedings.

(5A) "Small business", a business entity or agriculture operation, including its affiliates, that: (i) is independently owned and operated; (ii) has a principal place of business in the commonwealth; and (iii) would be defined as a "small business" under applicable federal law, as established in the United States Code and promulgated from time to time by the United States Small Business Administration.

(6) "Substantial evidence" means such evidence as a reasonable mind might accept as adequate to support a conclusion.

Credits

Added by St.1954, c. 681, § 1. Amended by St.1959, c. 511, § 1; St.1965, c. 725; St.1966, c. 14, § 42; St.1966, c. 497; St.1968, c. 120, § 1; St.1969, c. 808, § 2; St.1969, c. 838, § 8; St.1970, c. 712, § 2; St.1974, c. 361, § 1; St.1974, c. 835, § 50; St.1975, c. 817, § 1; St.1978, c. 552, § 13; St.1979, c. 795, § 3; St.1985, c. 572, § 5; St.1998, c. 161, § 232; St.2010, c. 240, §§ 65, 66, eff. Aug. 1, 2010.

Notes of Decisions (227)

M.G.L.A. 30A § 1, MA ST 30A § 1

Current through Chapter 230 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details

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Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter VI. Equal Employment Opportunities (Refs & Annos)

42 U.S.C.A. § 2000e

§ 2000e. Definitions

Currentness

For the purposes of this subchapter--

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

CREDIT(S)

(Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub.L. 95-555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub.L. 95-598, Title III, § 330, Nov. 6, 1978, 92 Stat. 2679; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 102-166, Title I, §§ 104, 109(a), Nov. 21, 1991, 105 Stat. 1074, 1077.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 11126

Ex. Ord. No. 11126, Nov. 1, 1963, 28 F.R. 11717, as amended by Ex. Ord. No. 11221, May 6, 1965, 30 F.R. 6427, Ex. Ord. No. 12007, Aug. 22, 1977, 42 F.R. 42839, formerly set out as a note under this section, which related to the Interdepartmental Committee on the Status of Women and the Citizens' Advisory Council on the Status of Women, was revoked by Ex. Ord. No. 12050, Apr. 4, 1978, 43 F.R. 14431, formerly set out as a note under this section.

EXECUTIVE ORDER NO. 11246

<Sept. 24, 1965, 30 F.R. 12319, as amended by Ex. Ord. No. 11375, Oct. 13, 1967, 32 F.R. 14303; Ex. Ord. No. 11478, Aug. 8, 1969, 34 F.R. 12985; Ex. Ord. No. 12086, Oct. 5, 1978, 43 F.R. 46501; Ex. Ord. No. 13279, Dec. 12, 2002, 67 F.R. 77141; Ex. Ord. No. 13665, § 2, Apr. 8, 2014, 79 F.R. 20749; Ex. Ord. No. 13672, § 2, July 21, 2014, 79 F.R. 42971.>

Equal Opportunity in Federal Employment

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Prior Version Held Unconstitutional as Applied by Pielech v. Massasoit Greyhound, Inc., Mass., Mar. 11, 2004

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 151B. Unlawful Discrimination Because of Race, Color, Religious Creed, National Origin, Ancestry or Sex (Refs & Annos)

M.G.L.A. 151B § 4

§ 4. Unlawful practices

Effective: October 13, 2018
Currentness

It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry or status as a veteran of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1A. It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day and the employer shall make reasonable accommodation to the religious needs of such individual. No individual who has given notice as hereinafter provided shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided, however, that any employee intending to be absent from work when so required by his or her creed or religion shall notify his or her employer not less than ten days in advance of each absence, and that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time. Nothing under this subsection shall be deemed to require an employer to compensate an employee for such absence. “Reasonable Accommodation”, as used in this subsection shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employee shall have the burden of proof as to the required practice of his creed or religion. As used in this subsection, the words “creed or religion” mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization.

Undue hardship, as used herein, shall include the inability of an employer to provide services which are required by and in compliance with all federal and state laws, including regulations or tariffs promulgated or required by any regulatory agency having jurisdiction over such services or where the health or safety of the public would be unduly compromised by the absence of such employee or employees, or where the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the period of absence, or where the employee's presence is needed to alleviate an emergency situation. The employer shall have the burden of proof to show undue hardship.

1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1C. For the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law.

1D. For an employer, an employment agency, the commonwealth or any of its political subdivisions, by itself or its agents, to deny initial employment, reemployment, retention in employment, promotion or any benefit of employment to a person who is a member of, applies to perform, or has an obligation to perform, service in a uniformed military service of the United States, including the National Guard, on the basis of that membership, application or obligation.

1E. (a) For an employer to deny a reasonable accommodation for an employee’s pregnancy or any condition related to the employee’s pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child if the employee requests such an accommodation; provided, however, that an employer may deny such an accommodation if the employer can demonstrate that the accommodation would impose an undue hardship on the employer’s program, enterprise or business. It shall also be an unlawful practice under this subsection to:

(i) take adverse action against an employee who requests or uses a reasonable accommodation in terms, conditions or privileges of employment including, but not limited to, failing to reinstate the employee to the original employment status or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other applicable service credits when the need for a reasonable accommodation ceases;

(ii) deny an employment opportunity to an employee if the denial is based on the need of the employer to make a reasonable accommodation to the known conditions related to the employee’s pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child;

(iii) require an employee affected by pregnancy, or require said employee affected by a condition related to the pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child, to accept an accommodation that the employee chooses not to accept, if that accommodation is unnecessary to enable the employee to perform the essential functions of the job;

(iv) require an employee to take a leave if another reasonable accommodation may be provided for the known conditions related to the employee's pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child, without undue hardship on the employer's program, enterprise or business;

(v) refuse to hire a person who is pregnant because of the pregnancy or because of a condition related to the person's pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child; provided, however, that the person is capable of performing the essential functions of the position with a reasonable accommodation and that reasonable accommodation would not impose an undue hardship, demonstrated by the employer, on the employer's program, enterprise or business.

(b) As used in this subsection, the following words shall have the following meanings unless the context clearly requires otherwise:

"Reasonable accommodation", may include, but shall not be limited to: (i) more frequent or longer paid or unpaid breaks; (ii) time off to attend to a pregnancy complication or recover from childbirth with or without pay; (iii) acquisition or modification of equipment or seating; (iv) temporary transfer to a less strenuous or hazardous position; (v) job restructuring; (vi) light duty; (vii) private non-bathroom space for expressing breast milk; (viii) assistance with manual labor; or (ix) a modified work schedule; provided, however, that an employer shall not be required to discharge or transfer an employee with more seniority or promote an employee who is not able to perform the essential functions of the job with or without a reasonable accommodation.

"Undue hardship", an action requiring significant difficulty or expense; provided, however, that the employer shall have the burden of proving undue hardship; provided further, that in making a determination of undue hardship, the following factors shall be considered: (i) the nature and cost of the needed accommodation; (ii) the overall financial resources of the employer; (iii) the overall size of the business of the employer with respect to the number of employees and the number, type and location of its facilities; and (iv) the effect on expenses and resources or any other impact of the accommodation on the employer's program, enterprise or business.

(c) Upon request for an accommodation from the employee or prospective employee capable of performing the essential functions of the position involved, the employee or prospective employee and the employer shall engage in a timely, good faith and interactive process to determine an effective, reasonable accommodation to enable the employee or prospective employee to perform the essential functions of the employee's job or the position to which the prospective employee has applied. An employer may require that documentation about the need for a reasonable accommodation come from an appropriate health care or rehabilitation professional; provided, however, that an employer shall not require documentation from an appropriate health care or rehabilitation professional for the following accommodations: (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting more than 20 pounds; and (iv) private non-bathroom space for expressing breast milk. An "appropriate health care or rehabilitation professional" shall include, but shall not be limited to, a medical doctor, including a psychiatrist, a psychologist, a nurse practitioner, a physician assistant, a psychiatric clinical nurse specialist, a physical therapist, an occupational therapist, a speech therapist, a vocational rehabilitation specialist, a midwife, a lactation consultant or another licensed mental health professional authorized to perform specified mental health services. An employer may require documentation for an extension of the accommodation beyond the originally agreed to accommodation.

(d) Written notice of the right to be free from discrimination in relation to pregnancy or a condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, including the right to reasonable accommodations for conditions related to pregnancy pursuant to this subsection, shall be distributed by an employer to its employees. The notice shall be provided in a handbook, pamphlet or other means of notice to all employees including, but not limited to: (i) new employees at or prior to the commencement of employment; and (ii) an employee who notifies the

employer of a pregnancy or an employee who notifies the employer of a condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child not more than 10 days after such notification.

(e) Subject to appropriation, the commission shall develop courses of instruction and conduct public education efforts as necessary to inform employers, employees and employment agencies about the rights and responsibilities established under this subsection not more than 180 days after the appropriation.

(f) This subsection shall not be construed to preempt, limit, diminish or otherwise affect any other law relating to sex discrimination or pregnancy or in any way diminish the coverage for pregnancy or a condition related to pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child under section 105D of chapter 149.

2. For a labor organization, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or status as a veteran of any individual, or because of the handicap of any person alleging to be a qualified handicapped person, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide occupational qualification.

3. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry or status as a veteran, or the handicap of a qualified handicapped person or any intent to make any such limitation, specification or discrimination, or to discriminate in any way on the ground of race, color, religious creed, national origin, sex, gender identity, sexual orientation, age, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry, status as a veteran or the handicap of a qualified handicapped person, unless based upon a bona fide occupational qualification.

3A. For any person engaged in the insurance or bonding business, or his agent, to make any inquiry or record of any person seeking a bond or surety bond conditioned upon faithful performance of his duties or to use any form of application in connection with the furnishing of such bond, which seeks information relative to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of the person to be bonded.

3B. For any person whose business includes granting mortgage loans or engaging in residential real estate-related transactions to discriminate against any person in the granting of any mortgage loan or in making available such a transaction, or in the terms or conditions of such a loan or transaction, because of race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age or handicap. Such transactions shall include, but not be limited to:

(1) the making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or

(2) the selling, brokering, or appraising of residential real estate.

In the case of age, the following shall not be an unlawful practice:

(1) an inquiry of age for the purpose of determining a pertinent element of credit worthiness;

(2) the use of an empirically derived credit system which considers age; provided, however, that such system is based on demonstrably and statistically sound data; and provided, further, that such system does not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any mortgage loan, to a limited age group;

(4) the failure or refusal to grant any mortgage loan to a person who has not attained the age of majority;

(5) the failure or refusal to grant any mortgage loan the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table.

Nothing in this subsection prohibits a person engaged in the business of furnishing appraisals of real property from taking into consideration factors other than those hereinabove proscribed.

3C. For any person to deny another person access to, or membership or participation in, a multiple listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against such person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age, or handicap.

4. For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.

4A. For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.

5. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

6. For the owner, lessee, sublessee, licensed real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other person having the right of ownership or possession or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such a person, or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withhold from any person or group of persons such accommodations because of the race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status of such person or persons or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap; (b) to discriminate against any person because of his race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, or marital status or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap in the terms, conditions or privileges of such accommodations or the acquisitions thereof, or in the furnishings of facilities and services in connection therewith, or because such a person possesses a trained dog guide as a consequence of blindness, or hearing impairment; (c) to cause to be made any written or oral inquiry or record concerning the race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or marital status of the person seeking to rent or lease or buy any such accommodation, or concerning the fact that such person is a veteran or a member of the armed forces or because such person is blind or hearing impaired or has any other handicap. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

For purposes of this subsection, discrimination on the basis of handicap includes, but is not limited to, in connection with the design and construction of: (1) all units of a dwelling which has three or more units and an elevator which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one; and (2) all ground floor units of other dwellings consisting of three or more units which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one, a failure to design and construct such dwellings in such a manner that (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all the doors are designed to allow passage into and within all premises within such dwellings and are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (iii) all premises within such dwellings contain the following features of adaptive design; (a) an accessible route into and through the dwelling; (b) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (c) reinforcements in bathroom walls to allow later installation of grab bars; and (d) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

7. For the owner, lessee, sublessee, real estate broker, assignee or managing agent of other covered housing accommodations or of land intended for the erection of any housing accommodation included under subsection 10, 11, 12, or 13 of section one, or other person having the right of ownership or possession or right to rent or lease or sell, or negotiate for the sale or lease of such land or accommodations, or any agent or employee of such a person or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or lease or otherwise to deny or withhold from any person or group of persons such accommodations or land because of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed forces, blindness, hearing impairment, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment or other

handicap of such person or persons; (b) to discriminate against any person because of his race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed services, blindness, or hearing impairment or other handicap, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment in the terms, conditions or privileges of such accommodations or land or the acquisition thereof, or in the furnishing of facilities and services in the connection therewith or (c) to cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, marital status, veteran status or membership in the armed services, blindness, hearing impairment or other handicap or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment, of the person seeking to rent or lease or buy any such accommodation or land; provided, however, that this subsection shall not apply to the leasing of a single apartment or flat in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence. The word “age” as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

7A. For purposes of subsections 6 and 7 discrimination on the basis of handicap shall include but not be limited to:

(1) a refusal to permit or to make, at the expense of the handicapped person, reasonable modification of existing premises occupied or to be occupied by such person if such modification is necessary to afford such person full enjoyment of such premises; provided, however, that, in the case of publicly assisted housing, multiple dwelling housing consisting of ten or more units, or contiguously located housing consisting of ten or more units, reasonable modification shall be at the expense of the owner or other person having the right of ownership; provided, further, that, in the case of public ownership of such housing units the cost of such reasonable modification shall be subject to appropriation; and provided, further, that, in the case of a rental, the landlord may, where the modification to be paid for by the handicapped person will materially alter the marketability of the housing, condition permission for a modification on the tenant agreeing to restore or pay for the cost of restoring, the interior of the premises to the condition that existed prior to such modification, reasonable wear and tear excepted;

(2) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling; and

(3) discrimination against or a refusal to rent to a person because of such person's need for reasonable modification or accommodation.

Reasonable modification shall include, but not be limited to, making the housing accessible to mobility-impaired, hearing-impaired and sight-impaired persons including installing raised numbers which may be read by a sight-impaired person, installing a door bell which flashes a light for a hearing-impaired person, lowering a cabinet, ramping a front entrance of five or fewer vertical steps, widening a doorway, and installing a grab bar; provided, however, that for purposes of this subsection, the owner or other person having the right of ownership shall not be required to pay for ramping a front entrance of more than five steps or for installing a wheelchair lift.

Notwithstanding any other provisions of this subsection, an accommodation or modification which is paid for by the owner or other person having the right of ownership is not considered to be reasonable if it would impose an undue hardship upon the owner or other person having the right of ownership and shall therefore not be required. Factors to be considered shall include, but not be limited to, the nature and cost of the accommodation or modification needed, the extent to which the accommodation or modification would materially alter the marketability of the housing, the overall size of the housing business of the owner or other person having the right of ownership, including but not limited to, the number and type of housing units, size of budget and available assets, and the ability of the owner or other person having the right of ownership to recover the cost of the accommodation or modification through a federal tax deduction. Ten percent shall be the maximum number of units for which an owner or other person having the right of ownership shall be required to pay for a modification in order to make units fully accessible to persons using a wheelchair pursuant to the requirements of this subsection.

In the event a wheelchair accessible unit becomes or will become vacant, the owner or other person having the right of ownership shall give timely notice to a person who has, within the previous twelve months, notified the owner or person having the right of ownership that such person is in need of a unit which is wheelchair accessible, and the owner or other person having the right of ownership shall give at least fifteen days notice of the vacancy to the Massachusetts rehabilitation commission, which shall maintain a central registry of accessible apartment housing under the provisions of section seventy-nine of chapter six. During such fifteen day notice period, the owner or other person having the right of ownership may lease or agree to lease the unit only if it is to be occupied by a person who is in need of wheelchair accessibility.

Notwithstanding any general or special law, by-law or ordinance to the contrary, there shall not be established or imposed a rent or other charge for such handicap-accessible housing which is higher than the rent or other charge for comparable nonaccessible housing of the owner or other person having the right of ownership.

7B. For any person to make print, or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of multiple dwelling, contiguously located, publicly assisted or other covered housing accommodations that indicates any preference, limitation, or discrimination based on race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, national origin, genetic information, ancestry, children, marital status, public assistance recipiency, or handicap or an intention to make any such preference, limitation or discrimination except where otherwise legally permitted.

8. For the owner, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, commercial space: (1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such commercial space because of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry handicap or marital status of such person or persons. (2) To discriminate against any person because of his race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status in the terms, conditions or privileges of the sale, rental or lease of any such commercial space or in the furnishing of facilities or services in connection therewith. (3) To cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status of a person seeking to rent or lease or buy any such commercial space. The word “age” as used in this subsection shall not apply to persons who are minors, nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in self-contained retirement communities constructed expressly for use by the elderly and which are at least twenty acres in size and have a minimum age requirement for residency of at least fifty-five years.

9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information, or (iv) a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.

9 ½. For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses.

9A. For an employer himself or through his agent to refuse, unless based upon a bonafide occupational qualification, to hire or employ or to bar or discharge from employment any person by reason of his or her failure to furnish information regarding his or her admission, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such person has been discharged from such facility or facilities and can prove by a psychiatrist's certificate that he is mentally competent to perform the job or the job for which he is applying. No application for employment shall contain any questions or requests for information regarding the admission of an applicant, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from such public or private facility or facilities and is no longer under treatment directly related to such admission.

10. For any person furnishing credit, services or rental accommodations to discriminate against any individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program.

11. For the owner, sublessees, real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession or right to rent or lease or sell such accommodations, or any agent or employee of such person or organization of unit owners in a condominium or housing cooperative, to refuse to rent or lease or sell or otherwise to deny to or withhold from any person such accommodations because such person has a child or children who shall occupy the

premises with such person or to discriminate against any person in the terms, conditions, or privileges of such accommodations or the acquisition thereof, or in the furnishing of facilities and services in connection therewith, because such person has a child or children who occupy or shall occupy the premises with such person; provided, however, that nothing herein shall limit the applicability of any local, state, or federal restrictions regarding the maximum number of persons permitted to occupy a dwelling. When the commission or a court finds that discrimination in violation of this paragraph has occurred with respect to a residential premises containing dangerous levels of lead in paint, plaster, soil, or other accessible material, notification of such finding shall be sent to the director of the childhood lead poisoning prevention program.

This subsection shall not apply to:

(1) Dwellings containing three apartments or less, one of which apartments is occupied by an elderly or infirm person for whom the presence of children would constitute a hardship. For purposes of this subsection, an "elderly person" shall mean a person sixty-five years of age or over, and an "infirm person" shall mean a person who is disabled or suffering from a chronic illness.

(2) The temporary leasing or temporary subleasing of a single family dwelling, a single apartment, or a single unit of a condominium or housing cooperative, by the owner of such dwelling, apartment, or unit, or in the case of a subleasing, by the sublessor thereof, who ordinarily occupies the dwelling, apartment, or unit as his or her principal place of residence. For purposes of this subsection, the term "temporary leasing" shall mean leasing during a period of the owner's or sublessor's absence not to exceed one year.

(3) The leasing of a single dwelling unit in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence.

11A. For an employer, or an employer's agent, to refuse to restore certain employees to employment following an absence by reason of a parental leave taken pursuant to section 105D of chapter 149 or to otherwise fail to comply with that section, or for the commonwealth and any of its boards, departments and commissions to deny vacation credit to an employee for the fiscal year during which the employee is absent due to a parental leave taken pursuant to said section 105D of said chapter 149, or to impose any other penalty as a result of a parental leave of absence.

12. For any retail store which provides credit or charge account privileges to refuse to extend such privileges to a customer solely because said customer had attained age sixty-two or over.

13. For any person to directly or indirectly induce, attempt to induce, prevent, or attempt to prevent the sale, purchase, or rental of any dwelling or dwellings by:

(a) implicit or explicit representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, gender identity, national or ethnic origin, or economic level or a handicapped person, or a person having a child, or implicit or explicit representations regarding the effects or consequences of any such entry or prospective entry;

(b) unrequested contact or communication with any person or persons, initiated by any means, for the purpose of so inducing or attempting to induce the sale, purchase, or rental of any dwelling or dwellings when he knew or, in the exercise of reasonable care, should have known that such unrequested solicitation would reasonably be associated by the persons solicited with the

entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, gender identity, national or ethnic origin, or economic level or a handicapped person, or a person having a child;

(c) implicit or explicit false representations regarding the availability of suitable housing within a particular neighborhood or area, or failure to disclose or offer to show all properties listed or held for sale or rent within a requested price or rental range, regardless of location; or

(d) false representations regarding the listing, prospective listing, sale, or prospective sale of any dwelling.

14. For any person furnishing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex, gender identity, marital status, age or sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object; provided that in the case of age the following shall not be unlawful practices:

(1) an inquiry of age for the purpose of determining a pertinent element of creditworthiness;

(2) the use of empirically derived credit systems which consider age, provided such systems are based on demonstrably and statistically sound data and provided further that such systems do not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any credit or services, to a limited age group;

(4) the denial of any credit or services to a person who has not attained the age of majority;

(5) the denial of any credit or services the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table; or

(6) the offering of more favorable credit terms to students, to persons aged eighteen to twenty-one, or to persons who have reached the age of sixty-two.

Any person who violates the provisions of this subsection shall be liable in an action of contract for actual damages; provided, however, that, if there are no actual damages, the court may assess special damages to the aggrieved party not to exceed one thousand dollars; and provided further, that any person who has been found to violate a provision of this subsection by a court of competent jurisdiction shall be assessed the cost of reasonable legal fees actually incurred.

15. For any person responsible for recording the name of or establishing the personal identification of an individual for any purpose, including that of extending credit, to require such individual to use, because of such individual's sex or marital status, any surname other than the one by which such individual is generally known.

16. For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business. For purposes of this subsection, the word employer shall include an agency which employs individuals directly for the purpose of furnishing part-time or temporary help to others.

In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:--

(1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

(2) the type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) the nature and cost of the accommodation needed.

Physical or mental job qualification requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

An employer may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

16A. For an employer, personally or through its agents, to sexually harass any employee.

17. Notwithstanding any provision of this chapter, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to:

(a) observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section, except that no such employee benefit plan shall excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any person because of age except as permitted by paragraph (b).

(b) require the compulsory retirement of any person who has attained the age of sixty-five and who, for the two year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such person entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of the employer, which equals, in the aggregate, at least forty-four thousand dollars.

(c) require the retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure or similar arrangement providing for unlimited tenure at an independent institution of higher education, or to limit the employment in a faculty capacity of such an employee, or another person who has attained seventy years of age who was formerly employed under a contract of unlimited tenure or similar arrangement, to such terms and to such a period as would serve the present and future needs of the institution, as determined by it; provided, however, that in making such a determination, no institution shall use as a qualification for employment or reemployment, the fact that the individual is under any particular age.

18. For the owner, lessee, sublessee, licensed real estate broker, assignee, or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession, or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such person or any organization of unit owners in a condominium or housing cooperative to sexually harass any tenant, prospective tenant, purchaser or prospective purchaser of property.

Notwithstanding the foregoing provisions of this section, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to inquire of an applicant for employment or membership as to whether or not he or she is a veteran or a citizen.

Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

Notwithstanding the foregoing provisions of this section, (a) every employer, every employment agency, including the division of employment and training, and every labor organization shall make and keep such records relating to race, color or national origin as the commission may prescribe from time to time by rule or regulation, after public hearing, as reasonably necessary for the purpose of showing compliance with the requirements of this chapter, and (b) every employer and labor organization may keep and maintain such records and make such reports as may from time to time be necessary to comply, or show compliance with, any executive order issued by the President of the United States or any rules or regulations issued thereunder prescribing fair employment practices for contractors and subcontractors under contract with the United States, or, if not subject to such order, in the manner prescribed therein and subject to the jurisdiction of the commission. Such requirements as the commission may, by rule or regulation, prescribe for the making and keeping of records under clause (a) shall impose no greater burden or requirement on the employer, employment agency or labor organization subject thereto, than the comparable requirements which could be prescribed by Federal rule or regulation so long as no such requirements have in fact been prescribed, or which have in fact been prescribed for an employer, employment agency or labor organization under the authority of the Civil Rights Act of 1964, from time to time amended. [1] This paragraph shall apply only to employers who on each working day in each of twenty or more calendar weeks in the annual period ending with each date set forth below, employed more employees than the number set forth beside such date, and to labor organizations which have more members on each such working day during such period.

Period Ending.	***Minimum Employees or Members.***
June 30, 1965	100
June 30, 1966	75

June 30, 1967.....50

June 30, 1968 and thereafter.....25

Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment agency or labor organization to grant preferential treatment to any individual or to any group because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry of such individual or group because of imbalance which may exist between the total number or percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization or admitted to or employed in, any apprenticeship or other training program, and the total number or percentage of persons of such race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry in the commonwealth or in any community, section or other area therein, or in the available work force in the commonwealth or in any of its political subdivisions.

19. (a) It shall be unlawful discrimination for any employer, employment agency, labor organization, or licensing agency to

(1) refuse to hire or employ, represent, grant membership to, or license a person on the basis of that person's genetic information;

(2) collect, solicit or require disclosure of genetic information from any person as a condition of employment, or membership, or of obtaining a license;

(3) solicit submission to, require, or administer a genetic test to any person as a condition of employment, membership, or obtaining a license;

(4) offer a person an inducement to undergo a genetic test or otherwise disclose genetic information;

(5) question a person about their genetic information or genetic information concerning their family members, or inquire about previous genetic testing;

(6) use the results of a genetic test or other genetic information to affect the terms, conditions, compensation or privileges of a person's employment, representation, membership, or the ability to obtain a license;

(7) terminate or refuse to renew a person's employment, representation, membership, or license on the basis of a genetic test or other genetic information; or

(8) otherwise seek, receive, or maintain genetic information for non-medical purposes.

<[There is no paragraph (b).]>

Credits

Added by St.1946, c. 368, § 4. Amended by St.1947, c. 424; St.1950, c. 697, §§ 6 to 8; St.1955, c. 274; St.1957, c. 426, §§ 2, 3; St.1959, c. 239, § 2; St.1960, c. 163, § 2; St.1961, c. 128; St.1963, c. 197, § 2; St.1965, c. 213, § 2; St.1965, c. 397, §§ 4 to 6; St.1966, c. 361; St.1969, c. 90; St.1969, c. 314; St.1971, c. 661; St.1971, c. 726; St.1971, c. 874, §§ 1 to 3; St.1972, c. 185; St.1972, c. 428; St.1972, c. 542; St.1972, c. 786, § 2; St.1972, c. 790, § 2; St.1973, c. 168; St.1973, c. 187, §§ 1 to 3; St.1973, c. 325; St.1973, c. 701, § 1; St.1973, c. 929; St.1973, c. 1015, §§ 1 to 3; St.1974, c. 531; St.1975, c. 84; St.1975, c. 367, § 3; St.1975, c. 637, §§ 1, 2; St.1978, c. 89; St.1978, c. 288, §§ 1, 2; St.1979, c. 710, § 2; St.1980, c. 343; St.1983, c. 533, §§ 4 to 6; St.1983, c. 585, § 7; St.1983, c. 628, §§ 1 to 3; St.1984, c. 266, §§ 5 to 7; St.1985, c. 239; St.1986, c. 588, § 3; St.1987, c. 270, §§ 1, 2; St.1987, c. 773, § 11; St.1989, c. 516, §§ 4 to 7 and 9 to 14; St.1989, c. 544; St.1989, c. 722, §§ 13 to 23; St.1990, c. 177, § 341; St.1990, c. 283, §§ 1, 2; St.1996, c. 262; St.1997, c. 2, § 2; St.1997, c. 19, §§ 105, 106; St.1998, c. 161, § 532; St.2000, c. 254, §§ 6 to 23A; St.2001, c. 11, §§ 1, 2; St.2004, c. 355, § 1, eff. Dec. 22, 2004; St.2006, c. 291, §§ 1, 2, eff. Dec. 6, 2006; St.2010, c. 256, § 101, eff. Nov. 4, 2010; St.2011, c. 199, § 7, eff. July 1, 2012; St.2014, c. 484, § 2, eff. April 7, 2015; St.2016, c. 141, §§ 22 to 24, eff. July 14, 2016; St.2017, c. 54, §§ 1, 2, eff. April 1, 2018; St.2018, c. 69, §§ 103, 104, eff. Oct. 13, 2018.

Notes of Decisions (2712)

Footnotes

1 42 U.S.C.A. § 2000a.

M.G.L.A. 151B § 4, MA ST 151B § 4
Current through Chapter 230 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details

End of Document

DEPARTMENT OF UNEMPLOYMENT ASSISTANCE
UI POLICY & PERFORMANCE
INTEROFFICE MEMORANDUM

Date: October 14, 2021

Rescission(s): None

Reference No.: UIPP 2021.10

TO: All DUA Managers and Staff

FROM: Emmy Patronick, Director of Policy and Performance

SUBJECT: Adjudication of Separation Issues related to Vaccination Requirement

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1. **PURPOSE:**

To provide guidance to staff on adjudication of separation issues related to failure to meet an employer's vaccination requirement(s).

2. **ATTACHMENTS:**
   - None

3. **BACKGROUND:**

Currently, some workers are experiencing a requirement imposed by employers that they be vaccinated as a condition of employment. This raises new scenarios when adjudicating 25(e) issues.

If a claimant is discharged for failure to comply with a vaccination requirement; in accordance with 25(e)(2) a claimant is ineligible for benefits when they have been discharged for a knowing violation of a reasonable and uniformly enforce rule or policy, or for deliberate misconduct in willful disregard of the employing unit's interest.

If a claimant voluntarily separates from employment rather than complying with the employer's rule or policy regarding vaccination, in accordance with 25(e)(1) a claimant is ineligible for benefits unless facts establish that the separation was for good cause attributable to the employing unit or for urgent, compelling, and necessitous reasons.

4. ACTION:

Discharge

When a claimant has been discharged for failure to obtain the required vaccination(s), the fact finding must follow the standard questioning and fact pattern of 25(e)(2).

- Was there a rule?
- Did the claimant know of the rule?
- Was there a violation of the rule?
- Was the claimant consciously aware of the act and the fact that the action was a violation of the employer's rule or policy?
- Was the rule reasonable?
- Was the rule Uniformly enforced?
- Was the rule reasonably applied?

If all the above have been answered "yes", the claimant will be ineligible for benefits.

Otherwise, additional fact finding is needed.

The claimant will be ineligible for benefits unless the facts establish that the claimant's refusal of vaccination was due to a substantiated medical condition that prevented vaccination or a sincerely held religious belief, and no opportunity to request or apply for reasonable accommodation was offered by the employer.

If an employer's vaccine policy permitted such requests and a claimant's request for an exemption or accommodation was denied, Adjudicators should not "second guess" the employer's decision. Specifically, Adjudicators should not ask to review medical documentation that was already reviewed by the employer and found to be insufficient to support a medical exemption. Similarly, where an employer—through a review of documentation or an interview, or some other reasonable process—has found that an employee's professed religious belief either is not sincerely held or does not prevent the employee from being vaccinated, an Adjudicator should not attempt to overturn that decision through paper fact finding. Nor should Adjudicators permit employees to submit documentation or raise arguments that were not made at the time of the discharge.

Importantly, DUA is not the MCAD or the EEOC. Our Adjudicators are not sufficiently trained or authorized to make determinations regarding an employer's compliance with the reasonable accommodation provisions of the ADA, Title VII of the Civil Rights Act of 1964, MGL c. 151B, or any other EEO considerations or legal requirements.

Voluntary Quit

When a claimant voluntarily separates from employer rather than complying with the employer's rule or policy regarding vaccination, the fact finding must follow the standard voluntary quit questioning and fact pattern of 25(e)(1).

- Did the claimant voluntarily leave the job?
- Did the claimant have a reasonable belief that they had no choice but to leave?
- Were there urgent, compelling, and necessitous reasons for the separation?
- Did the claimant establish the separation was for good cause attributable to the employer?

When a claimant voluntarily separates from employment rather than receiving a vaccination, the separation must be viewed as a disagreement with the employer's policies or methods of operation. Unless the claimant can establish that the policy in question violates a statute, regulation or public policy, the claimant will be disqualified under 25(e)(1).

5. **QUESTIONS**: Please email UIPolicyandPerformance@detma.org

U.S. Equal Employment Opportunity Commission

Section 12: Religious Discrimination

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:

EEOC-CVG-2021-3

Concise Display Name:

Section 12: Religious Discrimination

Issue Date:

01-15-2021

General Topics:

Religion

Summary:

This document addresses Title VII's prohibition against religious discrimination in employment, including topics such as religious harassment, and workplace accommodation of religious beliefs and practices.

Citation:

Title VII

Document Applicant:

Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

Previous Revision:

Yes. This document replaces previously existing guidance by the same title issued 7/22/08.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

EEOC	***DIRECTIVES TRANSMITTAL***	Number 915.063
		1/15/21

SUBJECT:	Compliance Manual on Religious Discrimination
PURPOSE:	This sub-regulatory document supersedes the Commission's Compliance Manual on Religious Discrimination issued on July 22, 2008. **The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. Any final document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.**
EFFECTIVE DATE:	Upon Publication.
EXPIRATION DATE:	Until rescinded.

ORIGINATOR:	Office of Legal Counsel

_____

Janet Dhillon, Chair

SECTION 12: RELIGIOUS DISCRIMINATION

Title VII is violated by an employer's failure to reasonably accommodate even if, to avoid adverse consequences, an employee continues to work after his or her accommodation request is denied. "[A]n employee who temporarily gives up his [or her] religious practice to submit to employment requirements [does not] waive[] his [or her] discrimination claim."[239] Thus, the fact that an employee acquiesces to the employer's work rule, continuing to work without an accommodation after the employer has denied the request, should not defeat the employee's legal claim.[240]

In addition, the obligation to provide reasonable accommodation absent undue hardship is a continuing obligation. Employers should be aware that an employee's religious beliefs and practices may evolve or change over time, and that this may result in requests for additional or different accommodations.[241] Similarly, the employer has the right to discontinue a previously granted accommodation that is no longer utilized for religious purposes or subsequently poses an undue hardship.

B. Undue Hardship

An employer can refuse to provide a reasonable accommodation if it would pose an undue hardship. The Supreme Court has defined "undue hardship" for purposes of Title VII as imposing "more than a *de minimis* cost" on the operation of the employer's business.[242] The concept of "more than *de minimis* cost" is discussed below in sub-section 2. Although the employer's showing of undue hardship under Title VII is easier than under the ADA, the burden of persuasion is still on the employer.[243] If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

1. Case-by-Case Determination

The determination of whether a particular proposed accommodation imposes an undue hardship "must be made by considering the particular factual context of each case."[244] Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.[245] For example, an employer with multiple facilities might be better able than another employer to accommodate a Muslim employee who seeks a transfer to a location with a nearby mosque that he can attend during his lunch break.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve.[246] An employer cannot rely on hypothetical hardship when faced with an employee's religious obligation that conflicts with scheduled work, but rather should rely on objective information.[247] A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship.

2. More than "*De Minimis* Cost"

To establish undue hardship, the employer must demonstrate that the accommodation would require the employer "to bear more than a *de minimis* cost."[248] However, "'[u]ndue hardship is something greater than hardship.'"**[249]** Factors to be considered include "the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation."[250] Generally, the payment of administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes, or infrequent or temporary payment of premium wages (e.g., overtime rates) while a more permanent accommodation is sought, will not constitute more than a *de minimis* cost, whereas the regular payment of premium wages or the hiring of additional employees to provide an accommodation will generally require more than *de minimis* cost to the employer.[251]

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs,[252] infringes on other employees' job rights or benefits,[253] impairs workplace safety,[254] or causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work.[255] Whether the proposed accommodation conflicts with another law will also be considered.[256]

EXAMPLE 36

Religious Need Can Be Accommodated

minimis." *See, e.g.*, *EEOC v. Sw. Bell Tel. LP*, No. 3:06CV00176 JLH, 2007 WL 2891379, at *4 (E.D. Ark. Oct. 3, 2007) (denying summary judgment for employer on claim by two employees that they were improperly denied leave for annual religious observance that would have required company to pay overtime wages of approximately $220 each to two replacements, where facility routinely paid technicians overtime, employer failed to contact union about possible accommodation, and policy providing for only one technician on leave per day was not always observed, and there was no evidence that customer service needs actually went unmet on day at issue) (jury verdict for plaintiffs subsequently entered), *appeal dismissed*, 550 F.3d 704 (8th Cir. 2008); *see also Redmond v. GAF Corp*., 574 F.2d 897, 904 (7th Cir. 1987) (ruling that employer could not demonstrate that paying replacement worker premium wages would cause undue hardship because plaintiff would have been paid premium wages for hours at issue).

[252] *See, e.g.*, *Brown v. Polk Cnty.*, 61 F.3d 650, 655 (8th Cir. 1995) (en banc) (holding that allowing employee to assign secretary to type his Bible study notes posed more than *de minimis* cost because secretary would otherwise have been performing employer's work during that time); *see also Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 134-35 (3d Cir. 1986) (no undue hardship where "efficiency, production, quality and morale … remained intact during [employee's] absence").

[253] *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004) ("[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his coworkers or deprive them of contractual or other statutory rights."); *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 517-18 (6th Cir. 2002) (holding that trucking firm had no obligation under Title VII to accommodate a driver's religious request for only male driving partners, where making assignments in this manner would have violated collective bargaining agreement).

[254] *See, e.g.*, *EEOC v. GEO Grp., Inc.*, 616 F.3d 265, 273 (3d Cir. 2010) ("A religious accommodation that creates a genuine safety or security risk can undoubtedly constitute an undue hardship for an employer-prison."). However, an employer should not assume that it would pose an undue hardship to accommodate a religious practice that appears to conflict with a generally applicable safety requirement, but rather should assess whether an undue hardship is actually posed. For example, there are existing religious exemptions to the government enforcement procedures of some safety requirements. *See, e.g.*, Occupational

Safety & Health Admin., U.S. Dep't of Lab., STD 1-6.5: Exemption for Religious Reason from Wearing Hard Hats (June 20, 1994), **https://www.osha.gov/enforcement/directives/std-01-06-005 (https://www.osha.gov/enforcement/directives/std-01-06-005)** (exempting employers from citations for certain violations based on religious objection of employee, but providing for various reporting requirements).

[255] *See, e.g.*, *Bruff v. N. Miss. Health Serv., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001) (requiring coworkers of plaintiff mental health counselor to assume disproportionate workload to accommodate plaintiff's request not to counsel certain clients on religious grounds would involve more than *de minimis* cost); *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (per curiam) (holding that it would be undue hardship to reassign plaintiff's share of potentially hazardous work to coworkers); *EEOC v. BJ Servs. Co.*, 921 F. Supp. 1509, 1514 (N.D. Tex. 1995) (stating employer "was not required to deny other employees their vacation days so that they could work in place of [plaintiff]" and that cost of hiring an additional worker was more than *de minimis*).

[256] *See, e.g.*, *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830-31 (9th Cir. 1999) (holding that employer was not required to accommodate job applicant's religiously based refusal to provide his social security number where employer sought it to comply with Internal Revenue Service and Immigration and Naturalization Service requirements).

[257] *See infra* note 266.

[258] *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 83 (1977) (holding employer "was not required by Title VII to carve out a special exception to its seniority system in order to help [employee] to meet his religious obligations" of observing the Sabbath and not working on certain specified religious holidays); *Virts*, 285 F.3d at 517-18 (holding trucking firm had no obligation under Title VII to accommodate a driver's religious request for only male driving partners, where making assignments in this manner would have violated CBA); *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1153, 1156 (10th Cir. 2000) (holding that because seniority system in the CBA gave more senior employees first choice for job assignments, it would be an undue hardship for employer to grant employee's accommodation request not to be scheduled to work on Saturdays); *Mann v. Frank*, 7 F.3d 1365, 1369-70 (8th Cir. 1993) (finding no violation of the duty to accommodate where the union refused the

2016 WL 1337255
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Leontine K. ROBINSON, Plaintiff,
v.
CHILDREN'S HOSPITAL BOSTON, Defendant.

Civil Action No. 14-10263-DJC
|
Signed 04/05/2016

Attorneys and Law Firms

James E. Small, Jr., James E. Small Jr. P.C., Roxbury, MA, for Plaintiff.

Tracey E. Spruce, Amy E. Serino, Spruce Law LLC, Andover, MA, for Defendant.

MEMORANDUM AND ORDER

CASPER, District Judge

I. Introduction

***1** Plaintiff Leontine K. Robinson ("Robinson") alleges that Children's Hospital Boston (the "Hospital") violated 42 U.S.C. § 2000e-2 and Mass. Gen. L. c. 151B when the Hospital terminated her after she refused a flu vaccination because of her religious beliefs. D. 1. The Hospital now moves for summary judgment. D. 45. For the reasons stated below, the Court ALLOWS the motion.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute on any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." OneBeacon Am. Ins. Co. v. Commercial Union Assur. Co. of Canada, 684 F.3d 237, 241 (1st Cir. 2012) (citation and internal quotation marks omitted). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000). If that party meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). Although the Court gives the nonmoving party "the benefit of all reasonable inferences," that party "cannot rest on 'conclusory allegations, improbable inferences, or unsupported speculation' to defeat a motion for summary judgment." Barry v. Moran, 661 F.3d 696, 703 (1st Cir. 2011) (quoting Welch v. Ciampa, 542 F.3d 927, 935 (1st Cir. 2008)).

III. Factual Background

The following material facts are drawn from the Hospital's statement of undisputed material facts, D. 47, and Robinson's responses to that statement, D. 51-1. [1]

A. The Hospital Implements a Flu Vaccination Policy

***2** The Hospital is a non-profit teaching hospital affiliated with Harvard Medical School. D. 47 ¶ 1. The Hospital's patient population includes some of the most critically ill infants, children and adolescents in the world. Id. ¶ 2. Even in healthy infants and children, the influenza virus can be fatal and the risk of infection and fatality is higher within the Hospital's patient population. Id. ¶ 4.

The American Academy of Pediatrics strongly recommends the vaccination of hospital personnel. Id. ¶ 14. In 2015, it reaffirmed its stance, stating that mandatory immunization of health care workers is ethical and necessary to benefit the health of employees, patients and community members. Id. ¶ 15. Other medical organizations also advocate for mandatory annual influenza immunizations for health care workers. Id. ¶ 16. They include the Centers for Disease Control and Prevention, American Academy of Family Physicians, American Hospital Association, Society for Healthcare Epidemiology of America, Infectious Diseases Society of America, Pediatric Infectious Diseases Society, Association for Professionals in Infection Control and Epidemiology Inc. and American Public Health Association. Id.

The Massachusetts Department of Public Health ("DPH") strongly encourages vaccination among personnel who work at Massachusetts hospitals. Id. ¶ 8. In 2010, to encourage vaccination, DPH began to require hospitals to track and report the influenza vaccination rates of all hospital staff. Id. ¶ 9. DPH also required hospitals to offer the vaccination to all personnel for free. Id. ¶ 10.

In response to DPH's new policy, the Hospital decided in 2011 to require all persons who work in or access patient-care areas to be vaccinated against the influenza virus to achieve the safest possible environment and to ensure the highest possible care for its patients. Id. ¶¶ 11, 17. The Hospital's goal was to get as close to 100% of its health care workers vaccinated as possible. Id. ¶ 18. To achieve that goal, the Hospital's vaccination requirement extended not only to employees, but to anyone affiliated with the Hospital who accessed patient areas, including volunteers, contractors and health care providers with Hospital treating privileges. Id. ¶ 19.

Under the Hospital's policy, the only persons exempt from vaccination were those for whom the influenza vaccine posed a serious health risk. Id. ¶ 20; D. 51-1 ¶ 20. The Hospital did not exempt those who objected on religious grounds because it concluded that additional exemptions would increase the risk of transmission. D. 47 ¶¶ 21, 23; D. 51-1 ¶¶ 21, 23. The Hospital did accommodate individual requests based on religious concerns to receive a pork-free (gelatin-free) vaccine. D. 47 ¶ 22.

B. Robinson Refuses the Influenza Vaccine

Robinson has worked at the Hospital since 1995. D. 47 ¶ 24; D. 51-1 ¶ 24. She has been an administrative associate or served in a similar role in the emergency department. D. 47 ¶ 25; D. 51-1 ¶ 25. Robinson was typically one of the first Hospital employees to interact with patients and their family members when they arrived in the emergency department. D. 47 ¶ 26. Robinson handled intake and registration and affixed patient identification bracelets. D. 47 ¶¶ 27, 29; D. 51-1 ¶¶ 27, 29. These duties required her to touch and sit in close proximity to patients. D. 47 ¶¶ 28-29; D. 51-1 ¶¶ 28-29. Because of this close physical proximity, for patients with highly contagious illnesses, Robinson would affix their bracelets on their paperwork instead. D. 47 ¶ 30; D. 51-1 ¶ 30.

***3** In July 2011, the Hospital announced that except for those exempt for medical reasons, all employees and others working in patient-care areas had to be vaccinated for influenza. D. 47 ¶ 33. In September 2011, the Hospital reminded its employees of the policy. Id. ¶ 36. Robinson received the reminder. Id. ¶ 37; D. 51-1 ¶ 37. Separately, that same month, Robinson received a tetanus vaccination. D. 47 ¶ 35; D. 51-1 ¶ 35.

On November 1, 2011, Robinson contacted Kevin Muhammed ("Muhammed"), who is associated with the Nation of Islam's Ministry of Health. D. 47 ¶¶ 38-39; D. 51-1 ¶¶ 38-39; D. 47-7. The Ministry of Health is a department within the Nation of Islam that deals with its followers' health concerns. D. 47 ¶ 40; D. 51-1 ¶ 40. Robinson requested a vaccination exemption letter and Muhammed sent her forms for her use. Id. ¶¶ 41-42.

On November 8, 2011, Robinson's supervisor Jason Dupuis ("Dupuis") reminded Robinson and others that the deadline to receive the influenza vaccine was December 1, 2011. Id. ¶ 43. Robinson responded that she was declining the vaccine on religious grounds. Id. ¶ 44. Dupuis replied that the only exemption was for medical reasons and referred Robinson to the Hospital's occupational health department for further information. Id. ¶ 45.

On November 15, 2011, Robinson emailed Muhammed to ask whether influenza vaccinations included pork byproducts. D. 47 ¶ 46; D. 51-1 ¶ 46; D. 47-10. Muhammed stated that some vaccines contained pork byproduct and suggested that Robinson get a list of the ingredients in the specific vaccine administered. D. 47 ¶ 47; D. 51-1 ¶ 47; D. 47-10.

C. Robinson Seeks an Alternative to the Vaccine

On November 16, 2011, Robinson spoke with Lucinda Brown ("Brown"), the Hospital's Director of Occupational Health, about her objection to the vaccine. D. 47 ¶ 53. Robinson told Brown that she would not take the vaccine because she was Muslim and the vaccine had pork byproduct. Id. ¶ 54; D 47-11. She also stated that she believed many vaccines are contaminated and she did not feel comfortable receiving the influenza vaccine. Id. ¶ 60; D. 47-11. Later, at her deposition, Robinson explained that in the same month she met with Brown, she separately learned that her religion had a moratorium on all vaccinations. D. 47 ¶ 112; D. 51-1 ¶ 112.

Brown offered Robinson a non-gelatin influenza vaccine but Robinson declined it. D. 47 ¶¶ 55-56; D. 51-1 ¶¶ 55-56. Brown asked why Robinson was willing to take a tetanus vaccine in September 2011, but not the influenza one. Id. ¶ 61. Robinson responded that she had taken the tetanus shot

because she was told that vaccine was mandatory and that failure to take it would be grounds for termination. Id. ¶ 62. Brown told Robinson that the influenza vaccine was also mandatory and that the Hospital would terminate her if she refused. Id. ¶ 63. Brown, however, also stated that if Robinson found a position outside of patient care, she would not be required to take the influenza vaccine. Id. ¶ 64.

A few days after the meeting, Christine Cadegan ("Cadegan"), a nurse in the occupational health department, reiterated that the Hospital could offer a pork-free vaccine and offered Robinson information about its contents. D. 47 ¶¶ 57-58; D. 51-1 ¶¶ 57-58. Robinson did not ask for a list of ingredients because she had no intention of taking the pork-free vaccine. D. 47 ¶ 59; D. 51-1 ¶ 59.

***4** On November 21, 2011, Dupuis reminded Robinson and others of the December 1, 2011 deadline. D. 47 ¶ 65; D. 51-1 ¶ 65. Robinson responded that she was declining the influenza vaccine because of her religious beliefs. D. 47 ¶ 66; D. 51-1 ¶ 66. She was also looking to transfer to another position outside of patient care and encouraged him to contact her if he knew of any positions. D. 47 ¶ 66; D. 51-1 ¶ 66. Dupuis replied he would see what he could find out and stated he was hopeful an amenable solution could be found. D. 47 ¶ 67; D. 51-1 ¶ 67.

On December 1, 2011, the day of the deadline, Robinson told Cadegan that she had a bad allergic reaction to the influenza vaccine in 2007. D. 47 ¶ 68; D. 51-1 ¶ 68. Cadegan encouraged Robinson to submit medical documentation about her allergic reaction in case it supported a medical exemption. D. 47 ¶ 69; D. 51-1 ¶ 69. Cadegan granted Robinson a temporary medical exemption pending review of her medical records. D. 47 ¶ 70; D. 51-1 ¶ 70. On December 19, 2011, the occupational health department concluded that Robinson's medical history did not qualify her for a medical exemption. D. 47 ¶ 71; D. 51-1 ¶ 71.

On December 21, 2011, Robinson met with Carolyn Stetson ("Stetson"), the Hospital's Director of Employee Relations. D. 47 ¶ 72; D. 51-1 ¶ 72; D. 47-15. Robinson requested the opportunity to explore roles in non-patient-care areas of the Hospital. D. 47 ¶ 73; D. 51-1 ¶ 73; D. 47-15. Specifically, she asked for an interview for a medical record clerk position for which she had already applied. D. 47 ¶ 74; D. 51-1 ¶ 74; D. 47-15. Robinson also asked that she be permitted to use her accrued earned time from December 22, 2011 until February 3, 2012 to find employment outside the Hospital. D. 47 ¶ 75; D. 51-1 ¶ 75; D. 47-15.

During the meeting, Stetson called one of her employees and instructed her to assist Robinson's job search. D. 47 ¶ 82; D. 51-1 ¶ 82. That employee told Robinson that she would do whatever she could to help. D. 47 ¶ 84; D. 51-1 ¶ 84. The Hospital granted Robinson's request to use her earned time to look for another position. D. 47 ¶ 79; D. 51-1 ¶ 79. The Hospital also gave Robinson an opportunity to interview for the medical records clerk position, but Robinson was not hired for the position. D. 47 ¶¶ 85-86; D. 51-1 ¶¶ 85-86.

In the period after Robinson's request for an interview, there were no publicly posted positions outside of patient care for which Robinson was qualified. D. 47 ¶ 87; D. 51-1 ¶ 87. Robinson also did not know of any non-patient-care position for which she was qualified but that were not publicly posted. D. 47 ¶ 88; D. 51-1 ¶ 88. Robinson did not apply for any other Hospital position after her request for an interview for the medical records position. D. 47 ¶ 89; D. 51-1 ¶ 89.

Because Robinson was unable to find another position by the end of her leave of absence, the Hospital offered her an additional two weeks of leave. D. 47 ¶ 90; D. 51-1 ¶ 90. Robinson accepted the offer. D. 47 ¶ 90; D. 51-1 ¶ 90. When the two-week period ended, the Hospital treated Robinson's termination as a voluntary resignation, which left her eligible to re-apply for other Hospital positions in the future. D. 47 ¶ 91; D. 51-1 ¶ 91.

IV. Procedural History

Robinson filed this lawsuit on February 4, 2014. D. 1. She asserts two claims against the Hospital: (1) religious discrimination under 42 U.S.C. § 2000e-2 and (2) religious discrimination under Mass. Gen. L. c. 151B. Id. at 4-5. The Hospital has now moved for summary judgment. D. 45. The Court heard the parties on the motion and took the matter under advisement. D. 55.

V. Discussion

***5** Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against any employee on the basis of religion. 42 U.S.C. § 2000e-2. Religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious

observance or practice without undue hardship on the conduct of the employer's business." Id. § 2000e(j).

The First Circuit applies "a two-part framework in analyzing religious discrimination claims under Title VII." Sánchez-Rodríguez v. AT & T Mobility Puerto Rico, Inc., 673 F.3d 1, 12 (1st Cir. 2012). First, the plaintiff must make a "*prima facie* case that a bona fide religious practice conflicts with an employment requirement and was the reason for the adverse employment action." Id. (quoting Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 133 (1st Cir. 2004)) (internal quotation mark omitted). Second, once the plaintiff has established her *prima facie* case, the burden shifts to the employer to show that "it offered a reasonable accommodation *or* that a reasonable accommodation would be an undue burden." Id. (emphasis in original).

Neither party cited a case directly on point. In Chenzira v. Cincinnati Children's Hospital Medical Center, No. 1:11-cv-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012), the court denied a hospital's motion to dismiss a terminated worker's Title VII religious discrimination claim. The employee had refused to take an influenza vaccine because of her veganism, and the court found "it plausible that [she] could subscribe to veganism with a sincerity equating that of traditional religious views." Id. The Chenzira court, however, was careful to state that its ruling "in no way addresses what it anticipates as Defendant's justification for its termination of Plaintiff, the safety of patients at Children's Hospital. At this juncture there simply is no evidence before the Court regarding what, if any, contact Plaintiff might have with patients, and/or what sort of risk her refusal to receive a vaccination could pose in the context of her employment." Id. at *5.

Other cases also have not squarely confronted an employer's Title VII obligations in light of mandatory influenza vaccination policies. In Virginia Mason Hospital v. Washington State Nurses Ass'n, 511 F.3d 908, 911 (9th Cir. 2007), a hospital implemented a mandatory influenza immunization regime as a fitness requirement for all nurses and other employees. The nurses' union filed a grievance and an arbitrator ordered that the mandatory immunization protocol be rescinded based on his interpretation of the collective bargaining agreement. Id. In light of the considerable deference for arbitral decisions and citing the "clearly established public policy requiring employers to bargain with their union-represented employees over conditions of employment," the Ninth Circuit upheld the arbitrator's decision. Id. at 913, 917. In Edwards v. Elmhurst Hospital Center., No. 11-cv-4693-RRM-LB, 2013 WL 839535, at *4 (E.D.N.Y. Feb. 15, 2013), report and recommendation adopted, 2013 WL 828667 (E.D.N.Y. Mar. 6, 2013), the court dismissed a hospital worker's Title VII claim because he failed to allege any adverse employment action for his refusal of the influenza vaccination. In Zell v. Donley, 757 F. Supp. 2d 540, 541 (D. Md. 2010), where the plaintiff claimed that his employer violated Title VII for terminating him because he refused a vaccination for religious reasons, the court did not address the merits but held that the Title VII claims were equitably tolled. [2]

***6** The Equal Employment Opportunity Commission ("EEOC") has offered general guidance on the issue. In an informal discussion letter responding to an unnamed party's inquiries, the EEOC's Office of Legal Counsel wrote that "[f]acts relevant to undue hardship" for a health care worker's request for an exemption from employer-mandated vaccinations "would presumably include, among other things, the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation." [3] The EEOC letter also addressed whether an employer that grants a religious accommodation excusing a health care worker from a mandatory vaccination may impose additional infection control practices on the worker, "such as wearing a mask." [4] The EEOC Office of Legal Counsel indicated that "such practices" could be imposed for legitimate, non-discriminatory reasons and whether the employer's motivation for imposing additional infection control measures was discriminatory or retaliatory "would turn on the facts of a given case." [5]

The Hospital argues that Robinson's claims fail for three independent reasons: (1) the Hospital reasonably accommodated Robinson; (2) any accommodation would have been an undue hardship; and (3) no reasonable jury could find that Robinson had a bona fide religious belief that precluded vaccination. D. 46 at 7-18. Because the Court concludes that the Hospital prevails on summary judgment on the first two grounds, it declines to address the third issue. As the Hospital acknowledges, D. 46 at 14, "assessing the bona fides of an employee's religious belief is a delicate business" and a "quintessential" question of fact. E.E.O.C. v. Unión Independiente de la Autoridad de Acueductos y

Alcantarillados de Puerto Rico, 279 F.3d 49, 56-57 (1st Cir. 2002). "[T]hat no religious group espouses [the belief] or the fact that the religious group to which the individual professes to belong may not accept [the] belief will not determine whether the belief is a religious belief of the employee or prospective employee." 29 C.F.R. § 1605.1. And although inconsistencies between a person's conduct and her professed religious beliefs may suggest insincerity, they also may reflect "an evolution in [the person's] religious views." Unión Independiente, 279 F.3d at 57 & n.8. Accordingly, for summary judgment purposes, the Court assumes that Robinson can establish a *prima facie* case that her refusal to take the influenza vaccination is based on a sincerely held, bona fide religious belief.

A. The Hospital Reasonably Accommodated Robinson

Title VII requires employers "to accommodate, within reasonable limits, the bona fide religious beliefs and practices of employees." Sánchez-Rodríguez, 673 F.3d at 12 (quoting Unión Independiente, 279 F.3d at 55) (internal quotation mark omitted). Claims of religious discrimination under Chapter 151B "ha[ve] been interpreted largely to mirror Title VII" claims. Cloutier, 390 F.3d at 131 (citing Mass. Gen. L. c. 151B, § 4(1A) that defines a reasonable accommodation as one that "shall not cause undue hardship in the conduct of the employer's business"). "[C]ases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties' behavior." Id. (citation and internal quotation marks omitted). In analyzing whether an employer provided a reasonable accommodation, "a court should take a 'totality of the circumstances' approach and consider whether the *combination* of accommodations provided by the employer was reasonable." Id. at 12 (emphasis in original).

Importantly, "[b]y its very terms," Title VII directs that "any reasonable accommodation" by the employer is sufficient to meet its legal obligation. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986). An employee is "not entitled to any specific accommodation ..., only a reasonable one." O'Brien v. City of Springfield, 319 F. Supp. 2d 90, 105 (D. Mass. 2003). To hold otherwise would give the employee "every incentive to hold out for the most beneficial accommodation" even where an employer offers a reasonable accommodation. Philbrook, 479 U.S. at 69. Finally, once the employer has reasonably accommodated the employee's religious needs, the inquiry is over. Id. at 68 (concluding that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end"). An employer "need not further show that each of the employee's alternative accommodations would result in undue hardship." Id.

***7** Courts have held that encouraging a plaintiff to transfer to another position within the company and offering her assistance toward that effort constitute a reasonable accommodation. For example, in Bruff v. Northern Mississippi Health Services, Inc., 244 F.3d 495, 499 (5th Cir. 2001), a counselor who worked for a non-profit hospital that provided counseling to employees from local businesses alleged religious discrimination under Title VII. A patient informed Bruff that she was a lesbian and requested counseling to improve her relationship with her partner. Id. at 497. Bruff declined to counsel the patient on her same-sex relationship, but offered to counsel her on other matters. Id. The patient complained, and Bruff explained to her employer that counseling gay patients about their relationships conflicted with her religious beliefs. Id. Bruff's employer determined that accommodating her request not to counsel on gay relationships was not feasible and placed her on leave without pay. Id. at 498. Her employer ultimately terminated her and a jury found in Bruff's favor. Id. at 499.

The Fifth Circuit reversed and held that Bruff's employer had reasonably accommodated her because it gave her thirty days and directed its in-house employment counselor to find another hospital position where the likelihood of further conflict with her religious beliefs would be reduced. Id. at 501. First, Bruff had declined to apply for any non-counselor positions or take tests that would have identified whether positions she did not consider would have been of interest. Id. at 499, 503. Second, although Bruff had applied to a counselor opening, her employer was not obligated to hire her for that position because a candidate with better credentials had applied. Id. at 498, 502. Third, Bruff did not apply when a second counselor position became available. Id. at 498, 502. The Fifth Circuit rejected Bruff's explanation —that she did not apply because she believed her employer would not seriously consider her—as "pure speculation" and stressed that "[a]n employee has a duty to cooperate

in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end." Id. at 503. Finally, although it was unclear from the record whether the employer's pastoral counseling department had an opening, the court faulted Bruff for failing to consider a transfer there because she speculated about a personal conflict with that department's director and refused to consider that option before the existence of a vacancy could be explored. Id. at 502-03.

In Walden v. Centers for Disease Control & Prevention, 669 F.3d 1277, 1294 (11th Cir. 2012), the Eleventh Circuit reached the same result on a record similar to Bruff. There, the court concluded that the employer had reasonably accommodated the plaintiff, who objected to counseling those in same-sex relationships, because the employer "encouraged her to obtain new employment with the company and offered her assistance in obtaining a new position." Id. The employer had no counseling positions in the Atlanta area, where the plaintiff was based, and the plaintiff did not apply for other positions. Id. That the employer should have considered "the most obvious accommodation"—transfer to a non-counseling position—was irrelevant. Id. (citation and internal quotation mark omitted). Her employer was "only obligated to offer her some reasonable accommodation," not her preferred accommodation. Id. (citing Philbrook, 479 U.S. at 68). The Eleventh Circuit also noted that the employer decided to lay her off rather than to terminate her, which allowed her to retain her tenure if the employer rehired her within a year. Id. at 1294-95.

Here, the Hospital employees worked with Robinson several times to address her objection to the vaccine. First, when Robinson told the Hospital that she allegedly had an allergic reaction to a flu shot in 2007, the Hospital encouraged her to seek a medical exemption and granted her a temporary medical exemption while it reviewed her medical records. D. 47 ¶¶ 68-71. Second, the Hospital met with Robinson and permitted her to attempt to find a non-patient-area position so she would remain employed by the Hospital but be relieved of the mandatory vaccination policy. Id. ¶¶ 72-73. As part of that effort, the Hospital arranged an interview for her for a medical records clerk position, allowed Robinson to use her earned time-off on a nearly two-month leave of absence to search for employment with other employers and directed a human resources employee to assist Robinson's job search. Id. ¶¶ 74-75, 79-85. Third, when Robinson was unable to find another job by the end of her leave, the Hospital offered her an additional two weeks, which she accepted. Id. ¶ 90. Finally, when that two-week period ended, the Hospital deemed her termination a voluntary resignation to preserve her ability to re-apply for other Hospital positions in the future. Id. ¶ 91.

***8** Robinson argues that the Hospital should have done more to help her find a new position at the Hospital. D. 50 at 6-8. Employers, however, are not obligated to create a position to accommodate an employee's religious beliefs. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 83 (1977) (stating that the employer "was not required by Title VII to carve out a special exception to its seniority system in order to help [the plaintiff] to meet his religious obligations"); Finnie v. Lee Cty., 907 F. Supp. 2d 750, 783-84 (N.D. Miss. 2012) (rejecting plaintiff's argument that her employer should have reasonably accommodated her by transferring her to another position; the record showed no open position for which she was qualified); see also Toronka v. Cont'l Airlines, Inc., 411 F. App'x 719, 725 (5th Cir. 2011) (stating that "precedent is plain that an employer is not required to create a new job type to accommodate a disabled employee" under the American with Disabilities Act ("ADA")); Hoskins v. Oakland Cty. Sheriff's Dep't, 227 F.3d 719, 730 (6th Cir. 2000) (rejecting the plaintiff's reasonable accommodation argument under the ADA because "an employer's duty to reassign an otherwise qualified disabled employee does not require that the employer create a new job in order to do so").

As Robinson also acknowledges, other than the medical records position, she did not apply for anything else. D. 47 ¶ 89; D. 51-1 ¶ 89. Although the Hospital had a duty to accommodate her reasonably, Robinson also had a duty to cooperate. Philbrook, 479 U.S. at 69 (noting 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") (citation and internal quotation marks omitted); Bruff, 244 F.3d at 503; E.E.O.C. v. Caribe Hilton Int'l, 597 F. Supp. 1007, 1012 (D.P.R. 1984) (noting that under an employee's duty to cooperate, an employee is "entitled to refuse any offer of new employment or other accommodation if he so desires, but he simply, then, cannot claim that the [employer] has failed to satisfy his needs"). The Court concludes that the combination of the Hospital's efforts—allowing Robinson to seek a medical exemption, providing her reemployment

resources, granting Robinson time to secure new employment and preserving her ability to return to the Hospital by classifying her termination as a voluntary resignation—amounted to a reasonable accommodation under Title VII and Chapter 151B.

B. Granting Robinson's Request Would Have Been an Undue Hardship

The Hospital argues that Robinson's claim must fail for a separate reason because granting her request—no vaccination while keeping her patient-care position—would have created an undue hardship. D. 46 at 11-14. An accommodation constitutes an undue hardship "if it would impose more than a *de minimis* cost on the employer." Cloutier, 390 F.3d at 134 (citing Hardison, 432 U.S. at 84). Undue hardship can be both "economic costs, such as lost business or having to hire additional employees to accommodate a Sabbath observer," and "non-economic costs, such as compromising the integrity of a seniority system" or loosening a company's dress code. Id. at 134-35 (concluding that to allow an employee to wear facial jewelry in violation of her employer's dress code despite her religion's promotion of piercings is an undue hardship because the employer loses control over its public image). Undue hardship can also exist if the proposed accommodation would "either cause or increase safety risks or the risk of legal liability for the employer." E.E.O.C. v. Oak-Rite Mfg. Corp., No. 99-cv-1962-DFH, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001). "Title VII does not require employers to test their safety policies on employees to determine the minimum level of protection needed to avoid injury." Id. at *14.

In Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383 (9th Cir. 1984), Chevron adopted a policy to comply with state occupational safety standards. The policy required all employees with potential exposure to toxic gases, including all machinists like the plaintiff, to shave any facial hair that prevented a tight face-seal when wearing a respirator. Id. The plaintiff informed Chevron that he could not comply with its policy because his religion forbids cutting or shaving any body hair. Id. Chevron suspended the plaintiff without pay and sought to find him another job. Id. After going back and forth about alternative jobs, the plaintiff ultimately accepted a lower-paying job with different responsibilities. Id.

***9** The Ninth Circuit held that Chevron had established that retaining the plaintiff as a machinist unable to use a respirator would have imposed an undue hardship. Id. To require Chevron to retain the plaintiff as a machinist without a respirator would have forced Chevron to revamp its duty assignments to accommodate whether particular assignments led to potential toxic exposure. Id. at 1384. The plaintiff's coworkers also would have been required "to assume his share of potentially hazardous work." Id. "Title VII does not require Chevron to go so far." Id.

In Kalsi v. New York City Transit Authority, 62 F. Supp. 2d 745, 747-48 (E.D.N.Y. 1998), aff'd, 189 F.3d 461 (2d Cir. 1999), the transit authority fired the plaintiff because he refused to wear a hard hat while working as a subway car inspector. The plaintiff, however, alleged that, as a matter of religion, he could not cover his turban and sued for religious discrimination under Title VII. Id.

The court held that accommodating the plaintiff's desire to be hat-free constituted an undue hardship and granted summary judgment against him. Id. at 759. First, the plaintiff's recommendations to make the work safe for him were "significant modifications" at a cost that could not be described as *de minimis*. Id. at 759. Second, the transit authority faced "substantial" "potential costs" if the plaintiff suffered from a catastrophic injury from being hat-free. Id. at 760. Third, the potential for injury extended to other employees as well because car inspectors did not work alone. Id. To have the transit authority bear that risk was an undue burden. Id. Finally, to allow the plaintiff to take unpaid breaks when his work shifted to hat-requiring tasks would be "unworkable," because "the great majority" of an inspector's tasks required a hard hat and the proposal would require a full-time substitute to be immediately available to replace him. Id.

The Hospital contends that granting Robinson's request would have been an undue hardship because it would have increased the risk of transmitting influenza to its already vulnerable patient population. D. 46 at 13-14. On this record, the Court agrees. Health care employees are at high risk for influenza exposure and can be source of the fatal disease because of their job. D. 47 ¶¶ 5-6. Numerous medical organizations support mandatory influenza vaccination for health care workers. Id. ¶¶ 14-16. The medical evidence in this record demonstrates that the single most effective way to prevent the transmission of influenza is vaccination. Id. ¶ 7; Virginia

Mason Hosp., 511 F.3d at 913 (noting "the impressive list of health authorities and experts who recommend that health care workers be immunized because they are in a highly contagious environment and deal with patients who are at high risk of contracting the flu"). In the same vein, the Department requires all licensed state hospitals to provide the influenza vaccine to their employees at no cost and to report their compliance. [6] D. 47 ¶¶ 8-11; 105 C.M.R. § 130.325(E), (I).

***10** Here, in light of the state's requirements and the Hospital's understanding of the medical consensus on influenza vaccination, the Hospital decided to achieve the safest possible environment for its patients. D. 47 ¶ 17. With the exception of those with medical issues, the Hospital sought as close to total compliance as possible by requiring all persons who work in or access patient-care areas to be vaccinated. D. 47 ¶¶ 18-19. Robinson worked in a patient-care area. D. 47 ¶¶ 24-25; D. 51-1 ¶¶ 24-25. She worked closely with patients, regularly sitting near or touching them as she worked on their admission to the Hospital. D. 47 ¶¶ 28-29; D. 51-1 ¶¶ 28-29. Had the Hospital permitted her to forgo the vaccine but keep her patient-care job, the Hospital could have put the health of vulnerable patients at risk. To allow Robinson to avoid relatively more vulnerable patients and not others would have been unworkable as well. It would have forced the Hospital to arrange its work flow around uncertain factors. Bhatia, 734 F.2d at 1384. On this record, accommodating Robinson's desire to be vaccine-free in her role would have been an undue hardship because it would have imposed more than a *de minimis* cost. [7] Cloutier, 390 F.3d at 134.

VI. Conclusion

For the foregoing reasons, the Court ALLOWS the Hospital's motion for summary judgment, D. 45.

So Ordered.

All Citations

Not Reported in Fed. Supp., 2016 WL 1337255

Footnotes

1 Robinson disputes the Hospital's reliance on Dr. Sandora's affidavit, D. 47-1, on the grounds that the doctor, board certified in pediatrics and pediatric infectious diseases who serves as the Hospital's Epidemiologist and Medical Director for Infection Prevention and Control, lacks personal knowledge or the foundation to provide expert testimony regarding the flu vaccine. See, e.g., D. 51-1 ¶ 2. The Court disagrees where the affidavit reveals that Dr. Sandora's statements are based on personal knowledge and/or there is sufficient basis for his expert opinion. Velázquez-García v. Horizon Lines of Puerto Rico, Inc., 473 F.3d 11, 18 (1st Cir. 2007) (stating that where an affidavit contains relevant first-hand information, it is competent to support summary judgment, even if self-serving); Fraser & Wise, P.C. v. Primarily Primates, Inc., 966 F. Supp. 63, 69 (D. Mass. 1996) (noting that "[t]o the extent an affiant is a qualified expert, her testimony need not be based on personal knowledge"); Fed. R. Civ. P. 56(c)(4). Robinson also objects to some of the Hospital's statements of fact, but fails to cite to the record to show a disputed issue as to that statement of fact exists. See, e.g., D. 51-1 ¶ 17 (Robinson's response of "Objection, unsupported" with no record citation). Unless otherwise noted, the Court deems those facts admitted. Cochran v. Quest Software, Inc., 328 F.3d 1, 12 (1st Cir. 2003); D. Mass. Local R. 56.1 (requiring that a "party opposing the motion shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation" and noting that "material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties").

2 In Head v. Adams Farm Living, Inc., 775 S.E.2d 904, 906 (N.C. Ct. App. 2015), a Seventh-Day Adventist alleged that her termination—for refusing to take the influenza vaccine—violated the state's public policy

against religious discrimination, citing N.C. Gen. Stat. § 143–422.2. The Court of Appeals of North Carolina affirmed summary judgment for the defendant because that particular state statute, unlike Title VII, did not require employers to make a reasonable accommodation of their employees' religious beliefs. Id. at 909-10.

In Friedman v. Southern California Permanente Medical Group, 125 Cal. Rptr. 2d 663, 666 (Cal. Ct. App. 2002), the plaintiff argued that his employer violated the California Fair Employment and Housing Act for discriminating against him because he refused a mumps vaccine. The court affirmed dismissing his claim because it concluded that veganism was not a religious creed under the state statute. Id. at 665.

3 U.S. Equal Emp. Opportunity Comm'n, Informal Discussion Letter (Mar. 5, 2012), http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation.html.

4 Id.

5 Id.

6 The Court is aware that 105 C.M.R. § 130.325(F)(1) provides that a hospital "shall not require an employee to receive an influenza vaccine ... if: (a) the vaccine is medically contraindicated, which means that administration of influenza vaccine to that individual would likely be detrimental to the individual's health; (b) vaccination is against the individual's religious beliefs; or (c) the individual declines the vaccine." Robinson does not assert a claim based on 105 CMR § 130.325 and the regulation does not affect the Court's analysis of the Hospital's Title VII liability. As discussed above, Title VII protects an employee from religious discrimination but permits an employer's policy if the employer offers a reasonable accommodation or demonstrates that such accommodation would create an undue hardship. Cloutier, 390 F.3d at 133.

The Court is also aware that DPH announced proposed amendments to 105 CMR § 130.325 in November 2014. In a memorandum explaining the amendments, DPH recognized "that there is still some confusion regarding whether a facility may adopt a more stringent requirement (i.e., require its workers to receive an annual influenza vaccination without an exception for voluntary declinations). [DPH] is proposing to amend the existing language to make explicit that a facility may do so—in other words, that the regulations do not prohibit a widespread mandate at the option of each facility." Memorandum from Madeleine Biondolillo, M.D., Associate Commissioner (Nov. 12, 2014), at 3, http://www.mass.gov/eohhs/docs/dph/legal/hcwimmunization/phc-memo-nov-12-2014.doc. As a result, one amendment seeks to add the following language to 105 C.M.R. 130.325(F): "Nothing in [the regulation] precludes a hospital from requiring all personnel to receive vaccination for influenza." Proposed Changes, at 2, http://www.mass.gov/eohhs/docs/dph/legal/hcw-immunization/proposed-amendments-105-cmr130.docx.

7 "Although the Massachusetts undue hardship standard [under Mass. Gen. L. c. 151B] is 'notably different' and allows for slightly broader religious protection, the two share substantial common ground." Massachusetts Bay Transp. Auth. v. Massachusetts Comm'n Against Discrimination, 450 Mass. 327, 337 (2008) (quoting Pielech v. Massasoit Greyhound, Inc., 441 Mass. 188, 196 (2004)). The Massachusetts statute's "list of circumstances that constitute undue hardship" recognizes "a compromise of the health and safety of the public." Brown v. F.L. Roberts & Co., 452 Mass. 674, 684 (2008) (citing Massachusetts Bay Transp. Auth., 450 Mass. at 336); Mass. Gen. L. c. 151B § 1A. For the same reasons stated above, Robinson's state law claim fails as well.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Francesco A. DeLuca, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and contains 37, total non-excluded pages.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. APPEALS COURT
DOCKET NO: 2022-P-1216

FALLON COMMUNITY HEALTH PLAN, INC, Petitioner-Appellant,	)
v.	)
SHANIKA JEFFERSON and CONNIE CARTER, INTERIM DIRECTOR, DIVISION OF UNEMPLOYMENT ASSISTANCE, Respondents-Appellees.	)

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(e), I hereby certify, under the penalties of perjury, that on January 12, 2023, I have made service of this Brief and Appendix upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party:

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