

No. _____

IN THE
Supreme Court of the United States

TOGETHER EMPLOYEES, ET AL.,

Applicants,

V.

MASS GENERAL BRIGHAM INCORPORATED,

Respondent.

**To the Honorable Stephen Breyer,
Associate Justice of the United States Supreme Court
and Circuit Justice for the First Circuit**

**APPENDIX OF EXHIBITS TO
EMERGENCY APPLICATION FOR
WRIT OF INJUNCTION PENDING APPEAL**

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November 23, 2021

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EXHIBIT 1

United States Court of Appeals For the First Circuit

No. 21-1909

TOGETHER EMPLOYEES, by individual representatives; ROBERTA
LANCIONE; JOYCE MILLER; MARIA DIFRONZO; MICHAEL SACCOCCIO;
ELIZABETH BIGGER; NATASHA DICICCO; NICHOLAS ARNO; RUBEN ALMEIDA,

Plaintiffs, Appellants,

v.

MASS GENERAL BRIGHAM INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. F. Dennis Saylor, IV, U.S. District Judge]

Before

Howard, Chief Judge,
Lynch and Kayatta, Circuit Judges.

Ryan McLane, Lauren Bradford, and McLane & McLane, LLC on
brief for appellants.

Katherine E. Perrelli, Lynn A. Kappelman, Kristin McGurn,
Dawn Reddy Solowey, and Seyfarth Shaw LLP on brief for appellee.

November 18, 2021

LYNCH, Circuit Judge. Our ruling concerns a motion for injunction pending appeal of the denial of a request for preliminary injunctive relief. Appellants, employees of Mass General Brigham, Inc. (MGB), challenge their employer's application of its mandatory vaccination policy to them individually. They do not challenge the policy itself, only MGB's denial of their individual requests for exemptions. They acknowledge that MGB has granted religious or medical exemptions to at least 234 employees. Their complaint is that they are not among that group.

MGB operates fourteen hospitals and many other medical facilities across Massachusetts, including Massachusetts General Hospital and Brigham and Women's Hospital. It employs approximately 6,500 physicians, 9,100 nurses, as well as another 78,000 individuals and treats approximately 1.5 million patients each year. In June 2021, MGB decided to require all of its employees to be vaccinated against COVID-19 unless they qualify for a medical or religious exemption. MGB required employees to receive their first doses or exemptions by October 15, 2021.

The appellants, eight MGB employees, each sought individual religious exemptions, which MGB denied.¹ Some also

¹ The appellants also include an unincorporated membership association, Together Employees, made up of other MGB employees. The district court held that Together Employees likely lacked

sought individual medical exemptions, which MGB denied as well. When the employees still refused to get vaccinated, MGB placed them on unpaid leave. The appellants sued MGB under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), arguing that MGB acted unlawfully when it denied their individual exemption requests. The district court orally denied a motion for a preliminary injunction, which would have required the reinstatement of the appellants from unpaid leave status. After the vaccination deadline MGB imposed had passed, one appellant resigned, another got vaccinated, and the remaining six had their employment terminated. The appellants now seek an injunction pending appeal. Finding that the appellants have not met their burden to show they are entitled to an injunction pending appeal, we deny the motion.

I. Background

A. MGB's Vaccination Policy and Exemption Process

MGB required all of its employees to be vaccinated to guard against the "unique threat of severe illness and death associated with COVID-19 especially in hospitalized patients" and the risks of COVID-19's virulent delta variant; to maintain

associational standing. Together Emps. v. Mass Gen. Brigham Inc., No. 21-cv-11686-FDS, 2021 WL 5234394, at *5 (D. Mass. Nov. 10, 2021); see Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13, 33-34 (1st Cir. 2019). The appellants do not challenge that holding here. We therefore do not consider the association's claims in evaluating this motion.

adequate levels of healthy staff; to inspire public trust; and to prepare for an anticipated rise in COVID-19 cases.

MGB permitted employees to seek exemptions based on medical conditions and religious beliefs. The processes for seeking each type of exemption was similar, but not identical, as we describe below.

MGB allowed employees to seek medical exemptions based on conditions that the Centers for Disease Control and Prevention (CDC) established as potential medical contraindications to receiving a COVID-19 vaccine. A history of severe or immediate allergic reaction to a component of a COVID-19 vaccine is a contraindication, and a recent administration of COVID-19 monoclonal antibodies or a history of multisystem inflammatory syndrome are indications for temporary deferral of vaccination. MGB also allowed employees to seek medical exemptions based on other conditions. Employees applied for a medical exemption by having a medical provider sign an MGB-provided form. Two panels of clinicians -- one focused on occupational health and the other focused on infection control -- reviewed those forms case by case.

MGB also allowed employees to seek religious exemptions by identifying a sincerely held religious belief and explaining why that belief precluded vaccination. MGB allowed employees to use an online form to submit a written narrative of unlimited

length to explain their requests.² The form asked employees to "(1) identify [their] sincerely held religious belief, practice[,], or observance and (2) explain why it prevents [them] from receiving a COVID-19 vaccine." It also explained that employees "may be required to provide additional information or supporting documentation to support [their] request[s] for an exemption." A committee consisting of an attorney and several trained human-resources professionals reviewed the requests.

B. Application of the Policies to Appellants

i. Denials of Religious Exemption Requests

We describe the eight appellants who sought and were denied religious exemptions.

(1) Ruben Almeida said that he could not be vaccinated because he "need[s] to glorify God at all times, by keeping [his] body as pure of any foreign substances as humanly possible" and that he "never partake[s] of any substances that could potentially harm [his] body[] [or] alter [his] mind." MGB requested more information about whether Almeida has consistently refused to use "man-made medications" and about his history of accepting prior vaccinations. In response, Almeida explained that he has been granted religious exemptions for flu shots, that he has used

² The appellants complain that the online form displayed a limited number of words at one time to the user completing it. But MGB's exhibits confirm that MGB received the entirety of the appellants' explanations of their religious claims.

medications in the past "to alleviate an acute health situation," and that his religion prevents him from using a "substance [that] is detrimental to [his] health or could potentially cause harm without its benefit outweighing the risk." MGB then denied the exemption.

(2) Nicholas Arno said that he could not be vaccinated because he "strongly oppose[s] vaccines of any kind that interfere with our bodies['] own immune systems that God created." MGB requested more information about how Arno's beliefs prevent him from being vaccinated and about how he reconciles his beliefs with public statements made by leaders of his religion in support of vaccination. Arno timely replied, repeating that "God created DNA in the body to instruct our genetic code, [and that] it was not intended to receive instruction from anything outside of that. Anything other than that would violate God's will for humanity." MGB then denied the exemption, stating that Arno had failed to provide the information it had requested by the appropriate deadline.

(3) Elizabeth Bigger said that "[a]ll currently available COVID 19 vaccines were developed and tested with the use of aborted fetal cells," and that she "will not allow any vaccine or medical therapy developed with aborted fetal cells to be injected into [her] body. Benefitting in any way from an abortion, no matter when it occurred, or how the fetal cells were used, would

violate [her] beliefs as a Christian." Bigger also included supporting links. MGB told Bigger that none of the vaccines contained fetal cells and requested more information about Bigger's objections and history of vaccination. Bigger responded that "it does matter to [her] that these vaccines used fetal cells [only] in their testing and development. [She] refuse[s] to benefit from any abortion which has occurred, even if the abortion occurred decades ago." She also explained that while she has accepted vaccines that "were not manufactured with aborted fetal cells," she would refuse other vaccines so manufactured and she has refused to allow her daughter to receive such vaccines. MGB then denied the exemption.

(4) Natasha DiCicco said that "it is [her] sincerely held religious and spiritual belief to treat [her] body as a temple and refrain from putting anything into [her] body that [she], in good conscience, [has] moral objections or health concerns with." MGB emailed DiCicco denying the exemption because she "did not identify [her] sincerely held religious beliefs nor did [she] explain how those beliefs prevent [her] from receiving a vaccine." It also, however, offered her the opportunity to explain why her religion prevents her from being vaccinated and to provide supporting documents. DiCicco repeated and elaborated on her prior statement and provided a letter from her pastor, Reverend Ronald A. Barker of Saint Joseph Catholic Parish. Barker explained that,

while the Catholic Church "generally encourages" vaccination, it also teaches that an individual must make a personal decision about whether to be vaccinated in light of her own conscience. MGB again denied the exemption.

(5) Maria DiFronzo said that "it is immoral to be forced to receive a vaccine with even the most remote connection to abortion" and that "it is against [her] conscious [sic] to derive benefit from an aborted baby." MGB told DiFronzo that none of the vaccines contained aborted fetal cells and requested more information about DiFronzo's objections and history of vaccination. DiFronzo explained that "[her] sincere religious beliefs prevent [her] from putting anything into [her] body that [she has] moral obligation [sic] or health concerns about." She also said that "all three [COVID-19] vaccines did benefit in some way (either during research, production, or testing) from the fetal tissue of an aborted fetus." MGB then denied the exemption.

(6) Roberta Lancione said that because she "believe[s] life begins at conception and abortion takes the life of an innocent human being," she is "opposed to taking the Johnson and Johnson vaccine as it was developed, tested, and produced with aborted fetal cell lines." She also said that she opposes the Pfizer and Moderna vaccines, which use mRNA technology, because she "believe[s] that through God's creation [she] was made complete and that God demands that we do not change anything as synthetic

biology poses to do." Lancione explained that she had previously "never thought to question how drugs were developed by scientists and pharmaceutical companies," but that "COVID vaccine mandates [had] opened [her] eyes." MGB told Lancione that none of the vaccines contained fetal cells and requested more information about Lancione's objections and history of vaccination. Lancione then said that she objected to all three COVID-19 vaccines because the research, development, or production of all three involved cell lines from aborted fetuses. She also said that she had been granted medical exemptions from mandatory flu shots, so she had never before sought a religious exemption. MGB then denied the exemption.

(7) Joyce Miller said that she would "decline all attempts to access, influence and or otherwise alter any and all of [her] God-given biological material and/or biological systems which are unique, flawless and original design and craftsmanship of [her] Creator and of which [her] Creator has granted [her] sole possession, proprietorship and use of." MGB asked Miller why her religious beliefs prevent her from receiving a COVID-19 vaccine but not a flu vaccine. Miller explained that she had refused flu shots until MGB made them mandatory, that she was unaware she could seek a religious exemption from flu shots until recently, and that she received them only under duress. She also elaborated on how

her Catholicism and conscience informed her decision to refuse vaccination. MGB then denied the exemption.

(8) Michael Saccoccio said that his "consscience [sic] is opposed to the vaccine on the ethical-moral grounds that it has been produced by the illegitimate and immoral action of using aborted human fetuses." MGB told Saccoccio that none of the vaccines contained fetal cells and requested more information about Saccoccio's objections and reasons for not refusing a flu shot. Saccoccio explained that "[p]artaking in a vaccine confirmed using aborted fetuses makes [him] complicit in an action that offends [his] religious faith," and that his "conscience has allowed [him] to take the traditional vaccines (those using an attenuated virus, not untested genetic therapy) in the past as these vaccines have not undergone the same morally grotesque confirmation process." MGB then denied the exemption.

ii. Denials of Medical Exemption Requests

Four appellants who sought religious exemptions also sought medical exemptions. None asserted that he or she had a CDC-recognized contraindication.

(1) DiFronzo said she was pregnant. MGB denied her requested exemption because MGB's medical staff and the CDC recommended that pregnant people get vaccinated against COVID-19.³

(2) Lancione said that she had previously experienced allergic swelling (angioedema) after receiving a flu shot and that she was being treated for chronic lymphocytic leukemia. MGB denied her requested exemption because she did not "demonstrate a sufficient medical reason or contraindication to support an exemption." It offered to refer her to allergists at Massachusetts General Hospital or Brigham and Women's Hospital to discuss her concerns.

(3) Miller said that being vaccinated would cause her "severe mental anguish" and anxiety. MGB denied her requested exemption because she did not "demonstrate a sufficient medical reason or contraindication to support an exemption."

(4) Saccoccio said that he had anxiety and post-traumatic stress disorder. MGB denied his requested exemption because he did not "demonstrate a sufficient medical reason or contraindication to support an exemption." Saccoccio got a chance to present additional medical information to MGB following that decision, but the committee maintained its denial.

³ MGB had previously said that it would offer temporary exemptions during an employee's pregnancy. After the CDC changed its guidance on vaccinations during pregnancy, MGB changed its policy.

After MGB denied the appellants' exemption requests, it put the appellants on unpaid leave. At least one appellant has since resigned and at least one chose to get vaccinated. MGB later terminated the employment of all of the non-vaccinated appellants.

C. Procedural History

Dissatisfied with their individual exemption decisions, the appellants filed suit against MGB in the District of Massachusetts. The appellants asserted causes of action for failure to make reasonable accommodations and failure to engage in an interactive process under the ADA, for religious discrimination and failure to engage in an interactive process under Title VII, and for unlawful retaliation under both statutes. They did not challenge the vaccine policy itself.

The district court orally denied the appellants' motion for a preliminary injunction following two motion hearings and extensive briefing. Days later, it memorialized that decision in a well-reasoned forty-one page opinion. Together Emps. v. Mass Gen. Brigham Inc., No. 21-cv-11686-FDS, 2021 WL 5234394 (D. Mass. Nov. 10, 2021).

The district court held that the plaintiffs were unlikely to succeed on the merits of any of their claims. As to the ADA claims, the district court held that the appellants could likely not show that they were disabled under the ADA, id. at *6-7, that they were qualified to do their jobs because they pose a

direct threat to patients, id. at *7-9, that their requested accommodations were reasonable, id. at *9-11, that they could defeat MGB's assertion of undue hardship, id. at *11-14, and that the exemption process was legally inadequate, id. at *14-15. As to the Title VII claims, the district court assumed that the plaintiffs had demonstrated sincere religious beliefs that prevented them from taking the COVID-19 vaccine, and held that the appellants could likely not show that they could defeat MGB's assertion of undue hardship, nor that the exemption process was legally inadequate. Id. at 15-18. As to both categories of claims, the district court held that the appellants had not provided sufficient evidence that they had exhausted their administrative remedies or made "a showing of irreparable injury sufficient in kind and degree to justify the disruption of the prescribed administrative process." Id. at *19 (quoting Bailey v. Delta Air Lines, Inc., 722 F.2d 942, 944 (1st Cir. 1983)). Finally, as to the retaliation claims, the district court held that the appellants could likely not establish a causal connection between their protected activity and any adverse employment action. Id. at *20.

The district court also held that the appellants were unlikely to demonstrate irreparable harm, that the balance of the equities favored them, or that the public interest supported an injunction. Id. at *20-21.

As said, the matter before us concerns a motion for injunction pending interlocutory appeal of that denial of a preliminary injunction. See Fed. R. App. P. 8(a).

II. Analysis

To be entitled to an injunction pending appeal, the appellants must make a strong showing that they are likely to succeed on the merits, that they will be irreparably injured absent emergency relief, that the balance of the equities favors them, and that an injunction is in the public interest. Respect Me. PAC v. McKee, 622 F.3d 13, 15 (1st Cir. 2010). The first two factors are the most important. Cf. Nken v. Holder, 556 U.S. 418, 434 (2009). If the appellants cannot demonstrate irreparable harm, we need not discuss the other factors. See Matos ex rel. Matos v. Clinton Sch. Dist., 367 F.3d 68, 73 (1st Cir. 2004).

A preliminary injunction preserves the court's ability to grant final relief. See 11A C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure § 2948.1 (3d ed. Apr. 2021 update). We require a showing of irreparable harm before granting a preliminary injunction since that harm would "impair the court's ability to grant an effective remedy" following a decision on the merits. See id. Because adequate legal remedies foreclose injunctive relief, the appellants cannot demonstrate irreparable harm without showing that they have inadequate remedies at law. See Doe v. Mills, 16 F.4th 20, 36 (1st Cir. 2021) (citing

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1019 (1984)). Here, they cannot make that showing, which ends our inquiry.

"When litigants seek to enjoin termination of employment, money damages ordinarily provide an appropriate remedy." Id. To obtain an injunction, therefore, the appellants must show a "genuinely extraordinary situation." Sampson v. Murray, 415 U.S. 61, 92 n.68 (1974). "[I]nsufficiency of savings or difficulties in immediately obtaining other employment -- external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself -- will not support a finding of irreparable injury, however severely they may affect a particular individual." Id. That rule governs both the Title VII and ADA claims because they both arise from the termination of employment.

All the harms the appellants point to fall within the category of "external factors common to most discharged employees." They say that unpaid leave or discharge will deprive them of their salaries and health insurance. Nothing about those consequences is unusual. The appellants also allege that they will face psychological injuries if they are terminated. Our precedents also foreclose that argument. "[T]he fact that an employee may be psychologically troubled by an adverse job action does not usually constitute irreparable injury warranting injunctive relief." DeNovellis v. Shalala, 135 F.3d 58, 64 (1st

Cir. 1998). Money damages would adequately resolve all of the alleged harms.⁴ Moreover, as the deadline for being vaccinated has passed, the appellants cannot point to an "impossible choice" as a special factor here; they have already made their choices.⁵

To the extent the appellants argue that MGB's actions impair their religious liberty rights under the Constitution, that argument fails. As appellants concede, MGB is not a state actor governed by the First Amendment. If MGB's actions turn out to be unlawful, they are remediable through money damages.

III. Conclusion

The appellants' motion for injunction pending appeal is denied.

⁴ That the appellants did not seek money damages in their complaint is of no moment. They may not create irreparable harm through artful pleading.

⁵ We note as well that both the weakness of the appellants' irreparable harm arguments and the district court's factual findings underlying its conclusion that the appellants have not shown irreparable harm undermine the appellants' likelihood of success on the merits. To be entitled to an injunction, the appellants must show that their legal remedies are inadequate. The district court's factual findings, which again will be reviewed for clear error, impede the appellants' ability to make that showing.

United States Court of Appeals For the First Circuit

No. 21-1909

TOGETHER EMPLOYEES, by individual representatives; ROBERTA LANCIONE; JOYCE MILLER; MARIA DIFRONZO; MICHAEL SACCOCCIO; ELIZABETH BIGGER; NATASHA DICICCO; NICHOLAS ARNO; RUBEN ALMEIDA,

Plaintiffs, Appellants,

v.

MASS GENERAL BRIGHAM INC.,

Defendant, Appellee.

Before

Howard, Chief Judge,
Lynch and Kayatta, Circuit Judges.

ORDER OF COURT

Entered: November 18, 2021

In accordance with the opinion of even date, appellants' emergency motion for injunction pending appeal is denied.

By the Court:

Maria R. Hamilton, Clerk

cc: Ryan P. McLane, Lauren Elizabeth Bradford, Katherine Eileen Perrelli, Lynn A. Kappelman, Dawn Reddy Solowey, Kristin G. McGurn

EXHIBIT 2

From: ECFnotice@mad.uscourts.gov
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Date: Monday, November 8, 2021 9:27:49 AM

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United States District Court

District of Massachusetts

Notice of Electronic Filing

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Case Name: Together Employees et al v. Mass General Brigham Incorporated

Case Number: [1:21-cv-11686-FDS](#)

Filer:

Document Number: 39(No document attached)

Docket Text:

Chief Judge F. Dennis Saylor, IV: ELECTRONIC ORDER entered denying [37] Emergency MOTION for Injunctive Relief Pending Appeal. (McKillop, Matthew)

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EXHIBIT 3

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**TOGETHER EMPLOYEES, by
individual representatives, ROBERTA
LANCIONE, JOYCE MILLER, MARIA
DIFRONZO, MICHAEL SACCOCCIO,
ELIZABETH BIGGER, NATASHA
DICICCO, NICHOLAS ARNO, and
RUBEN ALMEIDA,**

Plaintiffs,

v.

**MASS GENERAL BRIGHAM
INCORPORATED,**

Defendant.

**Civil Action No.
21-11686-FDS**

**MEMORANDUM AND ORDER ON PLAINTIFFS’
MOTION FOR PRELIMINARY INJUNCTION [CORRECTED]**

SAYLOR, C.J.

This is a case challenging a mandatory COVID-19 vaccination policy. Defendant Mass General Brigham, Inc. (“MGB”) is a Massachusetts corporation and major hospital and healthcare network that operates, among other facilities, Massachusetts General Hospital and Brigham and Women’s Hospital in Boston. Plaintiff Together Employees is an unincorporated association of 229 employees of MGB who were denied a religious or medical exemption from a COVID-19 vaccination policy. The remaining plaintiffs are eight individual employees whose exemption requests were denied.

On June 24, 2021, MGB announced a mandatory COVID-19 vaccination policy for all its employees. It later set a deadline for that policy, providing that non-complying employees

would be placed on unpaid leave on October 20, 2021, and thereafter terminated on November 5, 2021.

On October 17, 2021, plaintiffs brought this lawsuit, alleging claims of discrimination and retaliation under Title VII and the ADA and seeking to enjoin MGB from enforcing its vaccination policy. The Court held hearings on plaintiffs' motion for preliminary injunction on October 20 and November 4, 2021, and orally denied the motion from the bench. The following memorandum sets forth the reasoning of the Court in greater detail.

I. Background

Except where noted, the Court relies on the parties' briefs, affidavits, documentary evidence, and oral argument to decide the present motion.

A. Factual Background

Plaintiff Together Employees is an unincorporated association of 229 employees who were denied a religious or medical exemption from the MGB COVID-19 vaccination policy. The remaining plaintiffs are individual employees of MGB who were denied religious or medical accommodations. (Pl. Exs. J-M; O-R).¹

Defendant Mass General Brigham, Inc. is a Massachusetts corporation with a principal place of business in Massachusetts. MGB owns and operates hospitals and other facilities throughout the Commonwealth of Massachusetts. (Klompas Dec. ¶¶ 5-7). Among other things, it owns and operates Massachusetts General Hospital; Brigham and Women's Hospital; Faulkner Hospital; McLean Hospital; Massachusetts Eye and Ear Hospital; Newton-Wellesley Hospital; Cooley Dickinson Hospital; and Spaulding Rehabilitation Hospital. Each year, MGB provides

¹ Plaintiffs' exhibits are designated as Exhibits A-S with the complaint; Exhibits A-B with the motion for preliminary injunction; and Exhibits 1-19 filed separately. Because the two exhibits attached to the motion for preliminary injunction are not referenced in this opinion, the Court will refer to plaintiffs' Exhibits A-S and 1-19 where relevant.

medical care for 1.5 million patients. (*Id.* ¶ 6).

1. COVID-19 Pandemic

COVID-19 is a contagious viral disease that can cause serious illness and death. (*Id.* ¶ 19). As of this writing, approximately 750,000 Americans have died from the disease. CTR. FOR DISEASE CONTROL & PREVENTION, COVID-19 MORTALITY OVERVIEW: PROVISIONAL DEATH COUNTS FOR CORONAVIRUS DISEASE 2019 (2021) (last updated Nov. 3, 2021). In the summer of 2021, after several months of declining infection rate, the highly contagious Delta variant of the virus caused a significant further outbreak.

In 2020 and early 2021, three COVID-19 vaccines were approved by the Food and Drug Administration as safe and effective. The three vaccines were developed and produced by Pfizer, Moderna, and Johnson & Johnson. U.S. FOOD & DRUG ADMIN., COVID-19 VACCINES (2021) (last updated Oct. 29, 2021). The Pfizer and Moderna vaccines employ messenger RNA (mRNA) technology; the Johnson & Johnson does not. (*See id.*). Both the federal and Massachusetts state governments prioritized the early vaccination of all hospital workers, recognizing the importance of protecting the healthcare workforce during the pandemic. (Klompas Dec. ¶ 25).

2. MGB's COVID-19 Vaccination Policy

In June 2021, MGB announced it would require its employees to obtain a COVID-19 vaccination. (Pl. Ex. A). In light of the outbreak of COVID-19 caused by the Delta variant, MGB determined that such a vaccination policy was critical to keeping safe its medically vulnerable patient population, employees, and visitors. (Klompas Dec. ¶¶ 20-21, 27). MGB required that employees receive the COVID-19 vaccine by October 15, 2021. (*Id.* ¶ 13). Employees were told that noncompliance with the policy would result in unpaid leave, and ultimately, termination. The announcement also explained that certain exemptions would be

available for medical or religious reasons. (*Id.*).

Employees seeking a religious exemption were required to fill out an online form. (*Id.*).

The form asked several questions and contained a text box stating:

In the space provided, please (1) identify your sincerely held religious belief, practice or observance and (2) explain why it prevents you from receiving a COVID-19 vaccine. Please note that you may be required to provide additional information or supporting documentation to support your request for an exemption.

(Pl. Ex. C). The online form did not provide an option to attach supporting documentation.

However, the text box response field did not have a character limit, and the instructions noted that “the text box would expand as needed.” (Nichols Dec. ¶ 9). The online form advised employees that they “may be required to provide additional information or supporting documentation to support [their] request for an exemption.” (*Id.* ¶ 8).

Employees seeking a medical exemption were provided a form to be completed by a physician. (Hashimoto Dec. ¶ 6). The exemption form contained several check boxes to be filled by the employee’s physician to indicate whether the employee had one of several conditions indicated by the Centers for Disease Control (CDC) that might merit a deferral of vaccination. (*Id.* ¶ 7). One of the check boxes asked the physician to identify “other medical reasons,” and instructed the physician to explain his or her reasoning elsewhere on the form. (*Id.* ¶ 11).

MGB created two separate committees to review requests for exemption. The first committee, the Religious Exemption Review Committee, was “led by a senior attorney in MGB’s Office of the General Counsel and comprised of trained Human Resources professionals.” (Nichols Dep. ¶¶ 11, 19). The members of the committee were “trained in responding to accommodation requests and given additional training in responding to religious

exemption requests.” (*Id.* ¶¶ 10, 19). Employees who raised “substantive religious objection[s]” to the vaccination policy received follow-up questions from the committee, often individualized to the particular objection of the employee. (*Id.* ¶¶ 25-28). Employees who received follow-up questions were directed to send their responses to a dedicated MGB e-mail box and were free to submit whatever supporting documentation they wanted. (*Id.* ¶ 29). In some cases, the committee sent additional follow-up questions to employees after determining more information was needed. (*Id.* ¶ 31).

The second committee, the Medical Exemption Review Committee, was directed by Dr. Dean Hashimoto, the Chief Medical Officer for Workplace Health and Wellness. (Hashimoto Dec. ¶ 3). MGB assembled two panels to review these requests: one focused on occupational health, and the other focused on infection control. (*Id.* ¶¶ 13-15). The Occupational Health Clinical Panel was comprised of three nurse practitioners serving as occupational health clinical directors. (*Id.* ¶ 14). The Infection Control Panel was comprised of five physicians with expertise in infection control and disease. (*Id.* ¶ 15). The two panels worked together with Dr. Hashimoto to develop an interactive process. (*Id.* ¶¶ 24-26). The Occupational Health Clinical Panel would review exemption requests with Human Resources when accommodation issues arose, and would consult as needed with medical experts at MGB. (*Id.* ¶¶ 25, 28). When the panels had additional questions for employees or their physicians, they would solicit additional information by e-mail. (*Id.* ¶¶ 30-31).

3. Plaintiffs’ Requested Accommodations

The eight named individual plaintiffs requested exemptions and accommodations from MGB’s COVID-19 vaccination policy. Either the Religious Exemption Review Committee, the Medical Exemption Review Committee, or both denied all plaintiffs’ requests. (Pl. Exs. O-R). Summarized below are each plaintiff’s objections to the COVID-19 vaccine and the committees’

relevant responses.²

Elizabeth Bigger is a physician specializing in oncology. She requested a religious exemption, contending that she is a Christian who opposes abortion and that she objects to the use of fetal cell lines in the development of the vaccines. (Def. Ex. 29). The Religious Exemption Review Committee denied her request. It stated, among other things, that (1) the Pfizer and Moderna vaccines “did not use a fetal cell line to produce and manufacture the vaccine”; (2) numerous religious organizations publicly support COVID-19 vaccination; and (3) she had a history of receiving other vaccines in the past without objection. (Def. Exs. 30-32).

Natasha DiCicco is a technical supervisor in radiology. She requested a religious exemption, contending that according to her religious beliefs she should “treat [her] body as a temple and refrain from putting anything into [her] body that [she has] moral objections or health concerns with.” (Def. Ex. 33). The committee denied her request, noting that she did not request an exemption from taking the influenza vaccine. (Def. Exs. 34-36).

Nicholas Arno is an electrician. He requested a religious exemption on the basis of his Christian religious belief that he should not use vaccines that “interfere with our bodies [sic] own immune systems that God created.” (Def. Ex. 25). The committee requested additional information, noting that (1) his religion “has publicly supported vaccination”; (2) he had received other vaccinations without objection in the past; and (3) he failed to explain how his religious beliefs prevented him from getting vaccinated. (Def. Ex. 26). The committee denied his request after reviewing additional information. (Pl. Ex. 3).

² The Court briefly notes a few inconsistencies in the record. According to defendant’s exhibits, plaintiffs Saccoccio and DiFronzo requested religious accommodations and were denied. (Def. Exs. 37-40, 49-52). However, the complaint does not allege religious discrimination on the basis of those denials. In addition, although the complaint alleges disability discrimination against plaintiff Saccoccio, his affidavit does not assert that he sought a medical exemption. (Pl. Ex. L).

Ruben Almeida is a technologist in radiology. He requested a religious exemption on the basis of his Christian religious belief that he must keep his “body as pure of any foreign substances as humanly possible.” (Def. Ex. 21). The committee denied his request after raising concerns that he did not avoid the use of “over the counter or prescription man-made medications or other products.” (Def. Exs. 22-24).

Roberta Lancione is a registered nurse. She requested a religious exemption on the basis of (1) her religious objection to use of aborted fetal cell lines in the development of the Johnson & Johnson vaccine and (2) the fact that the function of the Pfizer and Moderna vaccines was adverse to her religious belief that “God’s creation . . . was made complete.” (Def. Ex. 41). The Religious Exemption Review Committee denied her religious exemption after noting that (1) the Pfizer and Moderna vaccines did not use a fetal cell line to produce and manufacture the vaccine and (2) she had in the past submitted to vaccine requirements without objection on the basis of religion. (Def. Exs. 42-44).³ She also requested a medical accommodation on the basis of a history of chronic lymphocytic leukemia and angio-edema in response to other vaccines. (Def. Ex. 11). In denying her medical exemption, the Occupational Health Clinical Panel recommended that she consult an allergist to evaluate whether she should consider using a non-mRNA vaccine. (Def. Ex. 12)

Joyce Miller is a manager of information desks. She requested a religious exemption on the basis of her belief that “all products offered to [her] by [her] employer or workplace be . . . entirely . . . removable from [her] body.” (Def. Ex. 45). After expressing concerns regarding her prior vaccinations against influenza, the Religious Exemption Review Committee denied her

³ Lancione’s response to MGB’s request for more information explained that she had not requested religious exemptions to other vaccines because she had consistently been granted a medical exemption in the past. (Def. Ex. 43).

exemption request. (Def. Exs. 46-48). Her requested medical exemption for “severe mental anguish/anxiety” was denied by the Occupational Health Clinical Panel because she did not “demonstrate a sufficient medical reason or contraindication to support an exemption.” (Def. Exs. 13-14).

Maria DiFronzo is a medical imaging clinical instructor and radiologic technologist. She requested a medical exemption on the basis of her pregnancy. (Def. Ex. 9). The Occupational Health Clinical Panel denied her request on the basis of updated guidance from the CDC recommending that pregnant individuals obtain a COVID-19 vaccination. (Def. Ex. 10).

Michael Saccoccio is a registered nurse. He requested a medical exemption on the basis of his anxiety and post-traumatic stress disorder. (Def. Ex. 15). After a preliminary denial and request from the Occupational Health Clinical Panel for more specific information, his physician informed the panel that his PTSD was due to severe childhood trauma. (Def. Exs. 16-18). The panel then upheld its earlier denial on the ground that Saccoccio had not demonstrated “a sufficient medical reason or contraindication to support an exemption.” (Def. Exs. 16, 19).

B. Procedural Background

On October 17, 2021, plaintiffs brought this lawsuit against MGB. The complaint asserts three claims: (1) failure to make reasonable accommodations in violation of the Americans with Disabilities Act; (2) religious discrimination in violation of Title VII; and (3) retaliation. Also on October 17, 2021, plaintiffs moved for preliminary injunction to enjoin MGB from enforcing the COVID-19 vaccination policy. The motion alleged that plaintiffs face imminent adverse action by being placed on unpaid leave on October 20, 2021, and subsequently terminated on November 5, 2021. The Court held an initial hearing on October 20, 2021, and orally denied the motion for the reasons stated on the record. The parties were directed to submit additional memoranda and affidavits. The Court then held a second hearing on the motion on November 4,

2021, which it again denied from the bench.

II. Legal Standard

A preliminary injunction is an “extraordinary and drastic remedy” that “is never awarded as of right.” *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)). A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction serves the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A plaintiff’s likelihood of success on the merits “weighs most heavily” in the court’s determination; without it, the remaining factors “become matters of idle curiosity.” *Ryan v. U.S. Immigr. & Customs Enf’t*, 974 F.3d 9, 18 (1st Cir. 2020) (citing *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002)). “[A]n inquiring court need not conclusively determine the merits of the movant’s claim; it is enough for the court simply to evaluate the likelihood . . . that the movant ultimately will prevail on the merits.” *Id.*

III. Analysis

A. Standing of Plaintiff Together Employees

Standing to sue is a threshold issue in every federal case. “If a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case.” *United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992). Plaintiffs have the burden of “adducing facts necessary to support standing.” *Id.* at 114.

An unincorporated association has standing to sue on behalf of its members if three requirements are met: “(1) at least one of the members possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded

necessitates the personal participation of affected individuals.” *Id.* at 115.

Here, the complaint alleges that Together Employees is an unincorporated association of 229 unvaccinated MGB employees. It is highly doubtful that Together Employees has standing to sue on behalf of its members, because the claims asserted and relief demanded clearly require the personal participation of each affected employee. At a minimum, each member will have his or her own unique medical or religious issues, which almost certainly will implicate highly personal matters (that, in turn, may raise substantial privacy concerns). It is unclear how Together Employees can properly represent their interests under the circumstances. Furthermore, the use of an unincorporated association as a plaintiff in this context would effectively operate as an end-run around the strict requirements of Fed. R. Civ. P. 23. The Court therefore concludes that Together Employees is not likely to succeed on the merits of its claims.

B. Likelihood of Success on the Merits

1. Claims of Disability Discrimination under the ADA

The Americans with Disability Act prohibits employers from discriminating against “a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a).

Discrimination under the ADA includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business.” 42 U.S.C. § 12112(b)(5)(A).

To establish a claim for failure to reasonably accommodate, “a plaintiff must produce sufficient evidence for a reasonable jury to find that (1) he was disabled within the meaning of the ADA, (2) he was a qualified individual, and (3) the [employer], despite knowing of the

plaintiff's disability, did not reasonably accommodate it.” *Flaherty v. Entergy Nuclear Operations, Inc.*, 946 F.3d 41, 55 (1st Cir. 2019).⁴

a. Disability

A disability is a physical or mental impairment that substantially limits one or more of an individual's major life activities. 42 U.S.C. § 12102(1). Courts apply a three-prong test to determine disability, considering (1) whether plaintiff has a physical or mental impairment; (2) whether the life activities plaintiff relies upon are “major” or “of central importance to daily life”; and (3) whether the impairment substantially limits plaintiff's major life activities. *Carroll v. Xerox Corp.*, 294 F.3d 231, 238 (1st Cir. 2002) (internal citations omitted).

An impairment that is sporadic or in remission can qualify as a disability “if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4)(D). However, “[e]vidence of a medical diagnosis of impairment, standing alone, is insufficient to prove a disability.” *Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182, 187 (1st Cir. 2011). There must also be evidence that the impairment substantially limits one or more of an individual's major life activities.

Major life activities include basic tasks such as working, seeing, hearing, speaking, and breathing. 42 U.S.C. § 12102(2)(A). They also include “the operation of a major bodily function,” including immune system functions, digestion, and normal cell growth. 42 U.S.C. § 12102(2)(B).

⁴ Plaintiffs cite the *McDonnell Douglas* burden-shifting framework, which is used in cases that lack direct evidence of discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). However, the First Circuit has found that the “*McDonnell Douglas* model does not apply to ADA discrimination claims based on failure to reasonably accommodate.” *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 n.3 (1st Cir. 2001) (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999)). Instead, “whether a requested accommodation is reasonable or whether it imposes an undue hardship are questions typically proved through direct, objective evidence.” *Id.*

Here, four named plaintiffs allege disabilities that preclude them from receiving the COVID-19 vaccine. The alleged physical or mental impairments are PTSD (Saccoccio), pregnancy (DiFronzo), angio-edema/leukemia (Lancione), and severe mental anguish (Miller). Without much elaboration, plaintiffs contend that the major life activity affected is “working” and that “the taking of vaccines would significantly limit their major life activities.” (Plaintiffs’ Mem. at 15-17).

There is considerable doubt as to whether any of the named plaintiffs have a “disability” that substantially limits them from “working.” Plaintiffs have only offered conclusory statements that their conditions substantially impair their ability to work. *See Lebron-Torres v. Whitehall Lab’ys*, 251 F.3d 236, 241 (1st Cir. 2001) (concluding that “failure to proffer any evidence specifying the kinds of jobs that [plaintiff’s] . . . condition prevented her from performing dooms her ADA claim”); *Carroll*, 294 F.3d at 239 (finding insufficient evidence of disability where plaintiff did not “show that he or she is significantly restricted in his or her ability to perform a class of jobs or a broad range of jobs in various classes”) (internal quotation marks omitted).

Furthermore, and in any event, all four plaintiffs are, and have been, working for MGB, notwithstanding their various medical conditions.⁵ None of them are medically precluded from taking the vaccine; none have a condition for which the vaccine is contraindicated. And in the case of plaintiff DiFronzo, pregnancy alone is not a “disability” within the meaning of the ADA (although complications resulting from pregnancy may be). *See Navarro v. Pfizer Corp.*, 261 F.3d 90, 97 (1st Cir. 2001); U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2015-1,

⁵ It appears that plaintiff Miller was granted leave under the Family and Medical Leave Act beginning on October 15, 2021. (Pl. Ex. M).

ENF’T GUIDANCE ON PREGNANCY DISCRIMINATION & RELATED ISSUES (2015) (stating that “[a]lthough pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA”).

In *Hustvet v. Allina Health Sys.*, 910 F.3d 399, 411 (8th Cir. 2018), the Eighth Circuit considered whether the plaintiff who requested exemption from the measles, mumps, and rubella vaccine had a disability within the meaning of the ADA. One of the claimed impairments was an “immune system disability” stemming from chemical sensitivities and allergies. *Id.* The court noted that there was insufficient evidence in the record to conclude that the plaintiff’s allergies substantially impaired her ability to perform major life activities—she never sought any medical attention when she experienced a chemical sensitivity, she had never been hospitalized due to an allergic reaction, and she never “had to leave work early because of a reaction.” *Id.* Those facts were “not enough for a reasonable fact-finder to conclude she is disabled.” *Id.*; see *Eubanks v. Mercy Med. Ctr., Inc.*, 2015 WL 9255326, at *6 (D. Md. Dec. 17, 2015) (dismissing ADA claim because plaintiff seeking flu shot exemption did not supply facts showing that her allergies substantially limited major life activity).⁶

In short, plaintiffs have not demonstrated a likelihood of success on their claims that they are “disabled” within the meaning of the ADA.

⁶ The Southern District of New York also recently applied the ADA’s definition of “disability” in a case where plaintiff sought an influenza vaccination exemption from her employer. *Norman v. NYU Langone Health Sys.*, 492 F. Supp. 3d 154, 158 (S.D.N.Y. 2020). The plaintiff asserted that her allergy to the flu vaccine was a disability. *Id.* at 163. She claimed that she had two prior adverse reactions to the influenza vaccine that caused anxiety, difficulty breathing, and stress. *Id.* Although the court assumed that the plaintiff’s allergy could qualify as an impairment that limited the major life activity of breathing, it concluded that she “nevertheless failed to show that this impairment substantially limited her breathing at the time she sought an accommodation” many years later. *Id.* at 163-64. The court left open the possibility that “some reactions to vaccines can be severe enough in intensity, duration, frequency, or after-effects to rise to the level of a disability under the ADA.” *Id.* at 165.

b. Qualified Individual

To succeed on a claim under the ADA, plaintiffs must further prove that they are “qualified” individuals. A qualified individual is a person who, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). To be a qualified individual, an employee must show “(1) ‘that she possesses the requisite skill, experience, education and other job-related requirements for the position’; and (2) ‘that she is able to perform the essential functions of the position with or without reasonable accommodation.’” *Echevarría v. AstraZeneca Pharm. LP*, 856 F.3d 119, 126 (1st Cir. 2017) (quoting *Mulloy v. Acushnet Co.*, 460 F.3d 141, 147 (1st Cir. 2006)). Plaintiffs bear the burden of showing that they are “qualified.” *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997). A “significant degree of deference” is given to an employer’s own business judgment about the necessities of the job. *Jones v. Walgreen Co.*, 679 F.3d 9, 14 (1st Cir. 2012).

Plaintiffs are not, however, qualified individuals if they pose a “direct threat” to the health or safety of other individuals in the workplace. 42 U.S.C. § 12113(b). “Where [plaintiff’s] essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.” *Amego*, 110 F.3d at 144; *see also Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 287 n.16 (1987) (stating, in case concerning Rehabilitation Act, that “[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk”).⁷

⁷ The statute, 42 U.S.C. § 12113(b), states that “the term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.” “Direct threat” is defined as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” § 12111(3). The language concerning “qualification standards” is in a

The EEOC's recent guidance on COVID-19 vaccination mandates for employers is instructive:

To determine if an employee who is not vaccinated due to a disability poses a “direct threat” in the workplace, an employer first must make an individualized assessment of the employee’s present ability to safely perform the essential functions of the job The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. *Statements from the CDC provide an important source of current medical knowledge about COVID-19*, and the employee’s health care provider, with the employee’s consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, *absent undue hardship*, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

See U.S. EQUAL EMP. OPPORTUNITY COMM’N, WHAT YOU SHOULD KNOW ABOUT COVID-19

AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS: § K (2021) (emphasis added).

section of Title I called “defenses,” which suggests that the defendant, not the plaintiffs, bears the burden of proof as to that issue. The First Circuit has concluded, however, that plaintiffs bear the burden of demonstrating that they are not a direct threat in cases where their “essential job functions necessarily implicate the safety of others.” *Amego*, 110 F.3d at 144. The plaintiff in *Amego* cared for disabled patients in a residential program, and one of her essential functions was administering medications to patients, which implicated the safety of others. *Id.* at 137. However, the *Amego* court cautioned that “[t]here may be other cases under Title I where the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden.” *Id.* at 144. Here, although the record is not clear on each of the named plaintiffs’ job responsibilities, it appears that their job functions at MGB implicate the safety of others.

Here, plaintiffs are employees of a major hospital and healthcare network. On this record, it appears very likely that their “essential job functions necessarily implicate the safety of others.” *Amego*, 110 F.3d at 144. Among the four plaintiffs requesting medical accommodations, two are registered nurses, one serves as a manager of information desks, and the remaining is a medical imaging clinical instructor and radiologic technologist. The registered nurses almost certainly interact with patients as part of their job functions. It is unclear from the record how much the instructor/technologist and manager interface with patients, visitors, and staff, but it appears unlikely that they hold back-office positions requiring no physical presence at any hospital. Furthermore, and in any event, defendant notes that “all MGB employees are expected to be deployable to the hospital[s] as needed.” (Klompas Dec. ¶ 28).

Plaintiffs nevertheless contend that they would pose no direct threat in the workplace. They cite to a portion of *Arline* stating that “[t]he fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the [ADA] all persons with actual or perceived contagious diseases.” 480 U.S. at 285 (emphasis omitted). However, in determining whether an individual with a contagious disease is otherwise qualified, the *Arline* court endorsed use of the following factors:

[Findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. at 288. The court also advised that “courts normally should defer to the reasonable medical judgments of public health officials.” *Id.*

Although plaintiffs brush aside the direct-threat analysis by arguing that plaintiffs do not

currently have a contagious disease, that is surely not the end of the inquiry. How COVID-19 is transmitted, how long infected persons are contagious, and the potential risks to other employees, visitors, and staff, are all relevant factors. It is undisputed that COVID-19, and particularly the Delta variant, is a highly contagious disease, transmitted in large part through proximity to infected people. Nor is it disputed that COVID-19 is often serious and sometimes fatal, or that the disease can be transmitted by infected persons who are entirely asymptomatic.

Under the circumstances, it was reasonable for MGB to conclude that unvaccinated employees—who are more likely to become infected—pose a direct threat to patients and others. “[T]his court should not second-guess the hospital’s judgment in matters of patient safety.”

Griel v. Franklin Med. Cen., 71 F. Supp. 2d 1, 9 (D. Mass. 1999), *aff’d sub nom.*, *Griel v. Franklin Med. Ctr.*, 234 F.3d 731 (1st Cir. 2000); *cf. Giles v. Sprouts Farmers Mkt., Inc.*, 2021 WL 2072379, at *6 (S.D. Cal. May 24, 2021) (holding that defendant’s masking policy did not amount to discrimination under Title III of ADA because defendant considered “direct threat posed by Plaintiff by her unwillingness to wear a face mask or face shield”); *Hernandez v. W. Texas Treasures Est. Sales, LLC*, 2021 WL 4097148, at *5 (W.D. Tex. Aug. 19, 2021) (same).

In summary, the Court finds that plaintiffs have not shown a likelihood of success on their claims that they are “qualified” individuals within the meaning of the ADA.

c. Reasonable Accommodation

Even assuming plaintiffs could prove they are qualified individuals, they must further show that the employer was aware of their disabilities and did not reasonably accommodate them. *Flaherty*, 946 F.3d at 55.⁸ Plaintiffs must “demonstrate in the first instance what specific

⁸ The statute provides as follows:

The term “reasonable accommodation” may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals

accommodations [they] needed and how those accommodations were connected to [their] ability to work.” *Ortiz-Martínez v. Fresenius Health Partners, PR, LLC*, 853 F.3d 599, 605 (1st Cir. 2017) (citing *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 89 (1st Cir. 2012)). That is, plaintiffs must “provide sufficient information to put the employer on notice of the need for accommodation” and “explain how the accommodation is linked to plaintiff’s disability.” *Jones*, 696 F.3d at 89. The requested accommodation must be “reasonable on its face.” *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002); *see Reed*, 244 F.3d at 259.

Another “element in the reasonableness equation is the likelihood of success.” *Evans v. Fed. Express Corp.*, 133 F.3d 137, 140 (1st Cir. 1998). Plaintiffs must demonstrate that the proposed accommodations “would enable [them] to the perform the essential functions of [their] job[s]” and would be “feasible for the employer under the circumstances.” *Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 136 (1st Cir. 2009) (quoting *Reed*, 244 F.3d at 259).⁹

Here, the accommodation requested by all four named plaintiffs is simply that they not

with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(a).

⁹ Much confusion has resulted from two conceptually similar ideas: (1) plaintiff’s burden to prove a reasonable accommodation that “is feasible for the employer” and (2) defendant’s burden to prove undue hardship. The First Circuit has attempted to reconcile that tension as follows:

[W]e believe the best way to distinguish between the two burdens is to follow in essence the lead of our sister circuits: In order to prove “reasonable accommodation,” a plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances. If plaintiff succeeds in carrying this burden, the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details.

Reed, 244 F.3d at 259.

receive the vaccine. Defendant's Medical Exemption Review Committee deployed two panels to review plaintiffs' purported disabilities, consulted with "various world-renowned specialists at MGB, including in Obstetrics, Allergy, and Neurology," and adhered to the CDC's guidance regarding the very few recognized medical contraindications to COVID-19 vaccination. (Hashimoto Dec. ¶¶ 28-29). Contraindications to the COVID-19 vaccine include a history of severe allergic reaction to vaccines or certain vaccine ingredients like polyethylene glycol. (Def. Ex. 8). Other considerations include "myocarditis or pericarditis, autoimmune diseases, Guillain-Barré Syndrome, and Bell's palsy." (*Id.*). Given those guidelines, defendant concluded that the four named plaintiffs' purported disabilities were not contraindications to vaccination. And where the claimed disability is not a contraindication for the vaccine, the requested accommodation does not sufficiently relate to the claimed disability. *Hustvet*, 910 F.3d at 411.

According to the present record, the four named plaintiffs did not request any other specific workplace accommodation, such as remote work, masking, social distancing, screening, and testing. Some plaintiffs did not mention such accommodations at all in their affidavits; others made only general allegations concerning religion, such as, "I was more than willing to discuss what accommodation would allow me to practice my religion while at the same time ensure the safety of myself and others while at work." (Pl. Exs. 1-3).¹⁰ It is plaintiffs' burden to demonstrate what specific accommodations they needed and how those accommodations were connected to their ability to work. *See Ortiz-Martínez*, 853 F.3d at 605.

¹⁰ In their memorandum, counsel for plaintiffs contend that "they are willing to abide by any reasonable accommodations," including staying at home if they have an illness, wearing a mask, washing their hands frequently, and screening for COVID-19 daily. (Plaintiffs' Mem. at 12-13). However, statements by counsel are not part of the evidentiary record.

In any event, to the extent plaintiffs are requesting masking, socially distancing, or periodic testing as reasonable accommodations, MGB is justified in concluding that doing so would present an undue hardship. After consulting with experts, MGB determined that “allowing any employee to decide instead just to mask, engage in periodic testing, and socially distance was not adequate to meet [its] urgent health and safety priorities and protect its vulnerable patient population.” (Klompas Dec. ¶ 29). To the extent plaintiffs are requesting remote work as reasonable accommodations, they have not provided evidence that their positions could be performed remotely, or that such accommodations would be reasonable under the circumstances. *See Reed*, 244 F.3d at 259.

In summary, because there is an insufficient nexus between the accommodation requests and plaintiffs’ purported disabilities, it is unlikely that plaintiffs can prove that the requested accommodations were reasonable at this stage.

d. Undue Hardship

If plaintiffs have made the necessary showing that they are disabled, that they are qualified individuals, and that the employer failed to accommodate their disabilities, defendant has the burden of demonstrating an undue hardship on the operation of its business. *Reed*, 244 F.3d at 258-60. The undue hardship inquiry must take into account the context of the particular employer’s business and the nature of operations. *See Barnett*, 535 U.S. at 402.¹¹

Considerations include not only direct economic costs, but indirect ones related to health and safety. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS: § L (2021)

¹¹ The EEOC’s guidelines note that undue hardship is not just “financial difficulty, but . . . reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2003-1, ENF’T GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2002).

(stating that costs include “the burden on the conduct of the employer’s business – including, in this instance, the risk of the spread of COVID-19 to other employees or to the public”).

The First Circuit recently confronted the issue of undue hardship in *Does 1-6 v. Mills*, 2021 WL 4860328, at *10 (1st Cir. Oct. 19, 2021). In *Mills*, unvaccinated healthcare workers sought a preliminary injunction based on, among other things, a Title VII claim against their hospital employers. *Id.* Evaluating the likelihood of success on the merits, the First Circuit concluded that “hospitals need not provide [a COVID-19 vaccination] exemption . . . because doing so would cause them to suffer undue hardship.” *Id.*; *see also Robinson*, 2016 WL 1337255, at *10 (finding that, in Title VII case, “accommodating [plaintiff’s] desire to be vaccine-free in her role [as intake employee at Boston Children’s Hospital emergency department] would have been an undue hardship because it would have imposed more than a *de minimis* cost”). Reputational effects on an employer can also impose an undue hardship. *See Cloutier*, 390 F.3d at 136 (finding undue hardship in Title VII case where accommodation would “adversely affect the employer’s public image”).

On the record before the Court, it appears that MGB has established a reasonable likelihood of success on its contention that providing plaintiffs an exemption from the vaccination policy would impose an undue hardship. MGB is essentially in the business of providing medical care to patients, many of whom are medically vulnerable to COVID-19 infection. It contends that permitting the requested accommodations would create a greater risk of COVID-19 infection in its facilities. (Klompas Dec. ¶ 29). That heightened risk, in turn, would undermine its “responsibility to maintain the highest level of patient care” and “protect patients, staff and visitors.” (Klompas Dec. ¶ 19). It would also place “additional stresses on [defendant’s] already overburdened system created by the highly contagious Delta variant.”

(*Id.*).

After consulting with experts, MGB determined that the alternatives to vaccines, such as masking, periodic testing, and social distancing, would impose an undue hardship. Specifically, it concluded that (1) social distancing from other staff, patients, and visitors is not always practicable; (2) testing is inadequate because, among other reasons, it misses infections on days not tested and conveys a false sense of security to healthcare workers; and (3) vaccinated individuals who become infected with COVID-19 are “at least 50% less likely to transmit infection compared to unvaccinated people.” (Klompas Dec. ¶ 29).¹² The policy also was designed to minimize staff absences, so that defendant’s workforce could continue to combat the COVID-19 pandemic. (Klompas Dec. ¶ 35).¹³ And MGB has a strong interest in maintaining public trust and confidence in its ability to provide a reasonably safe environment for its patients, and to assure the public that they may seek health care in its facilities without an unnecessary risk of infection.

In response, plaintiffs first contend that any undue hardship is hypothetical because defendant never actually contemplated or attempted an accommodation. While it is true that courts are “somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice,” defendant’s undue hardship

¹² In an attempt to rebut the claim of undue hardship, plaintiffs cite to several articles authored by Dr. Michael Klompas, a Hospital Epidemiologist at Brigham and Women’s Hospital, and Dr. Dean Hashimoto, Chief Medical Officer of Workplace Health and Wellness at Mass General Brigham. According to plaintiffs, those articles suggest a low probability of COVID-19 transmission from healthcare workers and emphasize the benefits of masking. (Plaintiffs’ Reply at 8-9). It is notable that the three reports were published in 2020, prior to the emergence of the Delta variant. Those early reports also do not preclude updated findings by defendant and its experts that COVID-19 vaccinations are now necessary to protect patients and staff. (Klompas Dec. ¶ 17-29).

¹³ Although the record does not reflect the actual cost of COVID-19 testing for MGB, it appears likely that the cost of administering tests to hundreds of employees on a routine basis, including the hours spent reviewing and transmitting results, is not insubstantial.

here is far from hypothetical. *Cloutier*, 390 F.3d at 135 (quoting *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975)). Indeed, the First Circuit has noted that it “is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations.” *Id.* (quoting *Draper*, 527 F.2d at 520). That is particularly true here, where MGB owns and operates a hospital network, and is surely capable of balancing the risks of different strategies to combat the spread of disease. Certainly, it is not required to attempt any actions that it has concluded may materially compromise patient safety.

Plaintiffs further contend that defendant would not be unduly burdened because it allows unvaccinated patients into its hospitals, and the addition of a few unvaccinated employees would not materially alter the overall risk. However, unvaccinated patients implicate substantially different concerns than unvaccinated employees. MGB physicians have an ethical duty to treat all patients requiring medical care, including the unvaccinated. *See* AMA, Code of Medical Ethics Op. 1.1.2 (stating that physicians “have an ethical obligation to provide care in cases of medical emergency” and may not decline patients solely based on “infectious disease status”). MGB cannot simply turn away unvaccinated patients. But even if it must accept those patients, it is entitled to manage the risk of infectious disease as best it can. And, in any event, the issue is whether granting *employees* an accommodation from the COVID-19 vaccine would impose an undue hardship; the vaccination status of defendant’s patients or visitors is not material.

Plaintiffs also point to MGB’s alleged profits during the COVID-19 pandemic, arguing that it could not be financially burdened because MGB is “swimming in money” and “brought in \$4.1 billion in revenues last quarter.” (Plaintiffs’ Mem. at 12). For present purposes, and without further comment, it is enough to note that issue of undue hardship cannot be resolved simply by reference to an employer’s financial capabilities.

Plaintiffs next argue that a reasonable accommodation would not unduly burden MGB because it is facing staffing shortages that would only be exacerbated by “[r]idding [itself] of over two hundred employees and having to pay crisis rates and overtime to the employees that have remained.” (Plaintiffs’ Mem. at 13-14). It is for MGB to decide how to operate its business, balance competing interests, and respond to staffing issues; again, the immediate question is simply whether any undue hardship would be imposed by granting the requested accommodation.

Plaintiffs further argue that there is no undue hardship because defendant accommodated the requests of other employees for religious or medical exemptions from the COVID-19 vaccine. The record contains very little information about the basis for accommodations that were granted by defendant. MGB counsel stated during oral argument that it received 2,402 requests for accommodation, including 1,976 religious exemption requests and 426 medical exemption requests (with some overlap). Of those requests for accommodation, MGB apparently granted 234 total. It is unclear on this record why those requests were granted, and what accommodations were provided. At a minimum, the position of the employee is surely relevant; it is likely that an employee working (for example) in billing or accounting is better able to work remotely than a physician treating cancer patients, or a registered nurse administering medications to patients. Regardless, defendant does not have to show that it eliminated all risk from all possible sources of COVID-19 infection. That is simply not possible, given the realities of operating a major hospital organization during a worldwide pandemic.

Finally, plaintiffs argue that they are not currently spreading COVID-19. But it cannot be true, as plaintiffs contend, that MGB faces no undue hardship simply because “none of [plaintiffs] are COVID positive” at this precise moment. (Plaintiffs’ Mem. at 14). The First

Circuit in *Mills* certainly did not conclude as such, nor have other courts confronted with COVID-19 vaccination questions. *Does I-6*, 2021 WL 4860328, at *10; *Barrington*, 2021 WL 4840855, at *4 (discussing “greater *risk* of contracting COVID-19 if [other employees of United Airlines] are required to come in contact with unvaccinated coworkers”) (emphasis added). Moreover, in determining undue hardship, it is appropriate to consider aggregate effects when multiple employees are granted the same accommodation. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 n.15 (1977); U.S. EQUAL EMP. OPPORTUNITY COMM’N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS: § L (2021) (stating that “[a] relevant consideration is the number of employees who are seeking a similar accommodation . . . [that is,] the cumulative cost or burden on the employer”). Therefore, defendant’s undue hardship is not just accommodating one unvaccinated employee with a higher risk of spreading COVID-19, but potentially hundreds.

In summary, defendant has established a likelihood of success on its contention that granting the requested accommodations would cause an undue hardship.

e. Interactive Process

Finally, an employee’s request for accommodation *may* create a duty on the part of the employer to engage in an interactive process, requiring “bilateral cooperation and communication.” *EEOC v. Kohl’s Dep’t Stores, Inc.*, 774 F.3d 127, 132 (1st Cir. 2014).¹⁴ Both the employee and employer must act in good faith, but “empty gestures on the part of the employer will not satisfy the good faith standard.” *Id.* A refusal to give a requested

¹⁴ Courts do not reach the issue of failure to engage in an interactive process when plaintiff cannot demonstrate that the requested accommodation was reasonable under the circumstances. *See Jones*, 696 F.3d at 91 (rejecting claim of failure to engage in interactive process because “[a]n employer’s duty to accommodate does not arise unless (at a bare minimum) the employee is able to perform the essential functions of [his] job with an accommodation”) (quoting *Walgreen Co.*, 679 F.3d at 19).

accommodation does not by itself amount to bad faith, “so long as the employer makes an earnest attempt to discuss other potential reasonable accommodations.” *Id.* at 133. Importantly, “liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts.” *Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 67 (1st Cir. 2020)

Here, defendant contends that it engaged in an interactive process. Dr. Dean Hashimoto, MGB’s Chief Medical Officer of Workplace Health and Wellness, was tasked with developing and leading MGB’s process for considering medical exemptions from the COVID-19 vaccine. (Hashimoto Dec. ¶ 3). Two clinical panels were assembled to review these requests. (*Id.* ¶ 13). The Occupational Health Clinical Panel included the expertise of occupational health clinical directors with substantial experience in disability evaluation and management. (*Id.* ¶ 14). The Infection Control Panel was comprised of five physicians with specialized expertise in infection control and disease. (*Id.* ¶ 15).

Dr. Hashimoto contends that “[e]ach medical exemption request was given an individualized, thoughtful, case-by-case review.” (*Id.* ¶ 25). As necessary, the panels would consult with specialists at MGB in fields such as Obstetrics, Allergy, and Neurology. (*Id.* ¶ 28). Dr. Hashimoto alleges that the CDC’s published guidance concerning medical contraindications to the vaccine was a pivotal standard that the panels used to assess the medical exemption requests. (*Id.* ¶ 29). The panels solicited and provided further individualized information as needed using follow-up e-mails to employees. (*Id.* ¶ 30). For example, upon denying plaintiff Lancione a medical exemption for her angio-edema, the panel recommended she consult an allergist for her concerns. (Def. Ex. 12). When denying medical exemptions to employees, the panels allowed the employees to submit additional information for consideration at an

Occupational Health and Safety e-mail address. (Def. Exs. 10, 12, 14, 16). Plaintiff Saccoccio, after being denied in the first instance, submitted additional materials to the reviewing panel, and the panel considered those materials before affirming its denial. (Def. Exs. 17-19).

Given those assertions, the present record does not support a finding of bad faith on the part of MGB in considering plaintiffs' accommodation requests.¹⁵ The evidence to date indicates that defendant communicated with plaintiffs, followed up for additional information as needed, and rendered individualized decisions on accommodations in accordance with CDC guidelines. Plaintiffs are therefore unlikely to succeed on their claims that defendant failed to engage in an interactive process.

In summary, and for all of the foregoing reasons, plaintiffs have not demonstrated a likelihood of success on the merits on their claims for disability discrimination in violation of the ADA.

2. Claims of Religious Discrimination under Title VII

Plaintiffs further assert that MGB violated Title VII of the Civil Rights Act of 1964 by refusing to grant them religious accommodations under COVID-19 vaccination policy.

Title VII prohibits employers from discriminating against employees on the basis of religion, among other things. 42 U.S.C. § 2000e-2(a). Claims of religious discrimination under Title VII are analyzed under a two-part framework. *Cloutier v. Costco Wholesale Corp.*, 390

¹⁵ Plaintiffs contend that defendant's process was not interactive because it rubber-stamped the CDC's guidance and discouraged network physicians from writing medical exemption requests. However, plaintiffs do not point to any law that would prohibit employers from considering medical guidance during an interactive process. Indeed, the EEOC's guidelines advise that employers may rely on CDC recommendations. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS: § K (2021). Furthermore, defendant's e-mails to network physicians were apparently based on guidance from the Massachusetts Board of Registration of Medicine, which "warned that a physician who grants an exemption outside the acceptable standard of care may be subject to discipline." Mass. Bd. of Registration in Med. Guidance on COVID Exemptions (Sept. 20, 2021), <https://www.mass.gov/news/the-massachusetts-board-of-registration-in-medicine-guidance-on-covid-exemptions>.

F.3d 126, 133 (1st Cir. 2004). First, a 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.* Second, if the plaintiff establishes a *prima facie* case, “the burden then shifts to the employer to show that it offered a reasonable accommodation,” or if it did not, “that doing so would have resulted in undue hardship.” *Id.*

a. Prima Facie Case

To establish a *prima facie* case of religious discrimination based on failure to accommodate, a plaintiff must assert “that a *bona fide* religious practice conflicts with an employment requirement and was the reason for the adverse employment action.” *Sanchez-Rodriguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1, 12 (1st Cir. 2012) (quoting *Cloutier*, 390 F.3d at 133). To qualify as a *bona fide* religious practice, plaintiff must show “both that the belief or practice is religious and that it is sincerely held.” *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56 (1st Cir. 2002).

Title VII defines “religion” as including “all aspects of religious observance and practice, as well as belief.” 42 U.S.C. § 2000e(j). Beliefs need not be “acceptable, logical, consistent, or comprehensible to others” to qualify as religious. *Union Independiente*, 279 F.3d at 56 (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)).

Determining whether a belief is sincerely held is a fact-intensive inquiry, turning on the “factfinder’s assessment of the employee’s credibility.” *Id.* Evidence that an employee acted inconsistently with his or her professed belief is relevant in assessing whether a belief is sincerely held. *Id.* at 57. The factfinder can also consider whether the alleged conflict between an employment requirement and religious belief is a “moving target,” although “such evidence might simply reflect an evolution in [plaintiff’s] religious views.” *Id.* at 57 & n.8.

Here, the Court is presented with a series of affidavits, each alleging that the employee

holds a sincere religious belief that precludes COVID-19 vaccination. Attempting to determine whether plaintiffs have established a *prima facie* case is far from an easy task.

First, there is the question of whether plaintiffs’ assertions constitute *religious* beliefs—as opposed to philosophical, medical, or scientific beliefs, or personal fears or anxieties—that conflict with the vaccination policy. In a somewhat analogous case, the Third Circuit considered whether a hospital employee’s opposition to influenza vaccination constituted a religious belief. *Fallon v. Mercy Cath. Med. Ctr. of Se. Pa.*, 877 F.3d 487, 488 (3d Cir. 2017). The court ultimately determined that plaintiff did not establish a *prima facie* case that his objection to vaccination was a religious belief, reasoning as follows:

It does not appear that [plaintiff’s] beliefs address fundamental and ultimate questions having to do with deep and imponderable matters, nor are they comprehensive in nature. Generally, [plaintiff] simply worries about the health effects of the flu vaccine, disbelieves the scientifically accepted view that it is harmless to most people, and wishes to avoid this vaccine. In particular, the basis of his refusal of the flu vaccine—his concern that the flu vaccine may do more harm than good—is a medical belief, not a religious one. He then applies one general moral commandment (which might be paraphrased as, “Do not harm your own body”) to come to the conclusion that the flu vaccine is morally wrong. This one moral commandment is an “isolated moral teaching”; by itself, it is not a comprehensive system of beliefs about fundamental or ultimate matters.

Id. at 492. While that analysis appears to be entirely correct, the principle articulated is difficult to apply in practice. Few beliefs are entirely isolated from a belief system, and in any event there are not always bright lines that would readily permit beliefs to be sorted into the categories of “religious” and “non-religious.”

An additional complication arises from the fact that the professed religious beliefs here do not appear to comport entirely with the doctrine of any organized religion. It appears that most, if not all, organized religions of any size in the United States do not oppose COVID-19 vaccination. That does not end the inquiry, but surely bears on it to some degree. *See* U.S.

EQUAL EMP. OPPORTUNITY COMM’N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS: § L (2021) (noting that “[a]n employer should not assume that an employee is insincere simply because some of the employee’s practices deviate from the commonly followed tenets of the employee’s religion, or because the employee adheres to some common practices but not others.”); *Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011) (stating, in First Amendment context, that “although sincerity rather than orthodoxy is the touchstone, a prison still is entitled to give *some* consideration to an organization’s tenets. For the more a given person’s professed beliefs differ from the orthodox beliefs of his faith, the less likely they are to be sincerely held”); *Caviezel v. Great Neck Pub. Schs.*, 701 F. Supp. 2d 414, 429 (E.D.N.Y. 2010), *aff’d*, 500 F. App’x 16 (2d Cir. 2012) (concluding, in case about New York vaccination requirements for school children, that plaintiff’s objection to vaccine was not sincerely held religious belief, in part because church to which plaintiff belonged did not oppose vaccination). But courts should also be wary of the real danger, in evaluating both the nature of a belief and its sincerity, that they may tend to favor well-established or widely practiced religions and the expense of new or disfavored ones.

In any event, the basic inquiry is whether the belief at issue is religious, and whether it is sincerely held. The record includes multiple affidavits that allege sincerely held religious beliefs that would preclude the particular employee from receiving the vaccine. It appears that MGB accepted some professions of religious sincerity, but not all, and did not accept those from the named plaintiffs. It is difficult on this record, and at this preliminary stage, for this Court to make any kind of deeper inquiry. The Court is mindful that Title VII’s “capacious definition” of religion “leaves little room for a party to challenge the religious nature of an employee’s professed beliefs,” and that sincerity depends on a fact-intensive assessment of credibility.

Union Independiente, 279 F.3d at 56. Indeed, courts confronted with Title VII religious discrimination issues often assume that plaintiffs have established a *prima facie* case and resolve matters on other grounds. *See, e.g., Robinson v. Children's Hosp. Bos.*, 2016 WL 1337255, at *6 (D. Mass. Apr. 5, 2016) (assuming at summary judgment stage, “that [plaintiff] can establish a *prima facie* case that her refusal to take the influenza vaccination is based on a sincerely held, bona fide religious belief”); *Barrington v. United Airlines, Inc.*, 2021 WL 4840855, at *2 (D. Colo. Oct. 14, 2021) (stating that “the Court will presume that this [*prima facie*] requirement has been met” to examine COVID-19 vaccination policy at TRO stage).

With some misgivings, this Court will do the same here. It will assume, for the sake of argument, that plaintiffs can establish a *prima facie* case that a *bona fide* religious belief prevents them from taking the COVID-19 vaccine.

b. Reasonable Accommodation

Once plaintiffs establish a *prima facie* case, the burden shifts to defendant to show that it offered a reasonable accommodation, or if not, that doing so would have resulted in undue hardship. *Cloutier*, 390 F.3d at 133. “Cases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties’ behavior.” *Sanchez-Rodriguez*, 673 F.3d at 12 (quoting *Rocafort v. IBM Corp.*, 334 F.3d 115, 120 (1st Cir. 2003)). Here, as noted, the only specific request made by plaintiffs for an accommodation is that they not receive the vaccine. And it is undisputed that defendant did not offer any accommodation to plaintiffs, such as increased COVID-19 testing or masking.

c. Undue Hardship

Because defendant did not offer a reasonable accommodation, it must prove that doing so would have resulted in undue hardship. Under Title VII, an accommodation is an undue hardship “if it would impose more than a *de minimis* cost on the employer.” *Cloutier*, 390 F.3d

at 134. For the reasons set forth above, defendant has shown a likelihood of success on the merits of that contention—that is, permitting the named plaintiffs to continue to work at MGB without being vaccinated would materially increase the risk of spreading the disease and undermine public trust and confidence in the safety of its facilities. Those likely harms to MGB—while perhaps difficult to measure in terms of dollar amounts—are certainly not *de minimis*.¹⁶

d. Interactive Process

Finally, plaintiffs argue that defendant failed to engage in a meaningful interactive process. The Supreme Court has noted 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.” *Ansonia Bd. of Educ. v. Philbook*, 479 U.S. 60, 69 (1986) (internal citation omitted). However, “liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts.” *Mills*, 2021 WL 4860328, at *10 (quoting *Trahan*, 957 F.3d at 67).

Here, defendant formed a Religious Exemption Review Committee to evaluate requests for religious exemptions. After initial consideration of accommodation requests, the committee often sent employees follow-up questions that were tailored to the particular religious objections of each employee. (Nichols Dep. ¶¶ 25-28). Employees who received follow-up questions were directed to send their responses to a dedicated MGB e-mail box and were free to submit whatever supporting documentation they wanted. (*Id.* ¶ 29). In some cases, the committee sent additional follow-up questions to employees after determining more information was needed.

¹⁶ To the extent that plaintiffs seek to impose additional financial costs, such as screening and testing of hundreds of employees multiple times per week, the record does not reflect the exact size or nature of the burden. As noted, however, plaintiffs have not specifically requested such an accommodation.

(*Id.* ¶ 31). Given the record at this stage, it seems likely that defendant engaged in an interactive process.

As the First Circuit concluded in *Mills* on similar facts, the evidence suggests that MGB engaged in an interactive process in good faith. 2021 WL 4860328, at *10; *see also Barrington*, 2021 WL 4840855, at *5 (holding that plaintiff was unlikely to succeed in establishing violation of Title VII for failure to engage in interactive process where defendant represented “that employees who had requested accommodation were notified via email of the proposed accommodation and given five days to respond”).

e. Exhaustion of Administrative Remedies

A further potential issue remains. To bring an action for employment discrimination under Title VII, an employee must first file a charge with either (1) the Equal Employment Opportunity Commission (within 180 days of the alleged unlawful employment practice) or (2) a parallel state agency—here, the Massachusetts Commission Against Discrimination (within 300 days of that practice). 42 U.S.C. § 2000e-5(e)(1); *Aly v. Mohegan Council, Boy Scouts of America*, 711 F.3d 34, 41 (1st Cir. 2013).¹⁷ Plaintiffs may seek relief in federal court only if “the EEOC dismisses the administrative charge, does not bring civil suit, or does not enter into a conciliation agreement within 180 days of the filing of the administrative charge.” *Aly*, 711 F.3d at 41. In other words, plaintiffs who have failed to exhaust their administrative remedies are not

¹⁷ Although the parties discuss exhaustion of administrative remedies with respect to Title VII, the same requirements are also present for plaintiffs’ ADA claims. Title I of the ADA incorporates the powers, remedies, and procedures set forth in Title VII of the Civil Rights Act by reference. 42 U.S.C. § 12117(a). Therefore, a plaintiff seeking to bring charges of employment discrimination under the ADA must exhaust administrative remedies under the same standard articulated for Title VII. *See Farris v. Shinseki*, 660 F.3d 557, 562 (1st Cir. 2011) (“Claims of employment discrimination arising under the ADA are subject to the same remedies and procedures as those under Title VII of the Civil Rights Act of 1964. Under Title VII, a[n] . . . employee must exhaust her administrative remedies before initiating a complaint of discrimination in federal court. The same is true for claims under the ADA.”) (internal citations omitted); *Bonilla v. Muebles J. J. Alvarez, Inc.*, 194 F.3d 275, 277-78 (1st Cir. 1999) (applying 42 U.S.C. § 2000e-5(e) exhaustion requirements in Title I ADA employment discrimination case).

entitled to judicial relief under Title VII. *Jorge v. Rumsfeld*, 404 F.3d 556, 564 (1st Cir. 2005).

When the EEOC takes any of the listed actions, the agency issues a right-to-sue notice, notifying the charging party of his right to bring suit within 90 days. 29 C.F.R. § 1601.28 (2020).

There are thus two basic components to administrative exhaustion under Title VII: (1) timely filing a charge with the EEOC (the “timeliness requirement”); and (2) receipt of a right to sue letter from the EEOC (the “verification requirement”). *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Vazquez-Rivera v. Figueroa*, 759 F.3d 44, 48 (1st Cir. 2014). In *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 112-13 (2002), the Supreme Court clarified that the purpose of the time limitation on the charging party is to “encourage . . . raise[ing] a discrimination claim before it gets stale” while the purpose of requiring EEOC verification is “to protect[] employers from the disruption and expense of responding to a claim unless a complainant is serious.”

Title VII provides a private right of action only after the verification requirement has been satisfied. 42 U.S.C. § 2000e-5(f)(1). The statute authorizes federal district courts to grant preliminary relief if requested by the EEOC after the filing of the charge. *Id.* § 2000e-5(f)(2) (“Whenever a charge is filed with the Commission and the Commission concludes . . . that prompt judicial action is necessary . . . the Commission . . . may bring an action for appropriate temporary or preliminary relief”).

That framework is somewhat at odds with the ability of a Title VII plaintiff to obtain preliminary injunctive relief. In *Bailey v. Delta Air Lines, Inc.*, the First Circuit in *dicta* implied that a showing of irreparable harm may justify the granting of a preliminary injunction in a Title VII case even where plaintiffs did not obtain a right-to-sue letter. 722 F.2d 942, 944-45 (1st Cir. 1983) (“We need not decide the jurisdictional issue here, for the plaintiffs in the present case

have made no showing of anything even approaching the irreparable injury required to obtain preliminary relief. . . . [W]e do not reach the question of what circumstances would justify a district court in granting preliminary relief in other cases.”). The court concluded that “the procedural requirements of Title VII should be considered in the equitable balancing process which would attend any grant of injunctive relief” and that to obtain such relief, a claimant would have to, at a minimum, make a showing of “irreparable injury sufficient in kind and degree to justify the disruption of the prescribed administrative process.” *Id.*¹⁸

Here, it is unclear whether plaintiffs have exhausted their administrative remedies. The only information plaintiffs have supplied on this topic is that “the EEOC has already issued right to sue letters for many plaintiffs, stating that it is unlikely that the agency can complete the administrative processing within 180 days.” (Plaintiffs’ Mem. at 18, n. 8). There is insufficient evidence in the record to determine whether each named plaintiff has met the timeliness and verification requirements under Title VII. In any event, plaintiffs have not made “a showing of irreparable injury sufficient in kind and degree to justify the disruption of the prescribed administrative process.” *Bailey*, 722 F.2d at 944.¹⁹

In summary, and for the foregoing reasons, plaintiffs have not shown a likelihood of success on their claims for religious discrimination in violation of Title VII.

3. **Retaliation**

To establish a *prima facie* case of retaliation under Title VII or the ADA, plaintiffs must

¹⁸ The First Circuit has elaborated that the required showing of “genuinely extraordinary” irreparable harm is “subject to a sliding scale analysis, such that the showing of irreparable harm required of a plaintiff increases in the presence of factors, including the failure to exhaust administrative remedies, which cut against a court’s traditional authority to issue equitable relief.” *Gately v. Com. of Mass.*, 2 F.3d 1221, 1232 (1st Cir. 1993); *see DeNovellis v. Shalala*, 135 F.3d 58, 62 (1st Cir. 1998).

¹⁹ On somewhat similar facts, the First Circuit in *Mills* recently affirmed the district court’s conclusion that unvaccinated healthcare workers “had not exhausted their administrative remedies.” 2021 WL 4860328, at *10.

establish (1) that they engaged in protected conduct; (2) that they suffered an adverse employment action; and (3) that there was a causal connection between the protected conduct and adverse action. *Colón-Fontáñez v. Mun. of San Juan*, 660 F.3d 17, 36 (1st Cir. 2011).²⁰ If plaintiffs make such a showing, the burden shifts to defendant to articulate a legitimate, non-retaliatory reason for the challenged employment action. *Walgreen Co.*, 679 F.3d at 20. Then, plaintiffs bear “the ultimate burden of showing that [defendant’s] explanation was, in fact, pretextual” and that the challenged employment action was the result of “defendant’s retaliatory animus.” *Id.* at 21 (quoting *Callazo v. Bristol-Myers Squibb Mfg. Inc.*, 617 F.3d 39, 46 (1st Cir. 2010)).

Here, plaintiffs likely can only meet the first two elements of their *prima facie* case. Requesting a reasonable accommodation is a protected activity. *Colón-Fontáñez*, 660 F.3d at 36. And they have suffered adverse employment actions by being placed on unpaid leave and subsequently terminated. Third, however, they likely cannot show a causal connection between the protected activity and adverse employment action. To establish a causal connection at the preliminary injunction stage, “[m]ere conjecture and unsupported allegations will not suffice. Rather, [plaintiffs] must demonstrate the existence of specific facts that would enable a finding that explanatory reasons offered . . . were mere pretext for [a] true motive of retaliation.” *Shalala*, 135 F.3d at 65 (affirming no likelihood of success on merits of ADEA retaliation claim). Defendant contends that “plaintiffs are subject to unpaid leave and potential termination not because they requested exemption, but because they were not approved and remain non-complaint with the Vaccination Policy.” (Defendant’s Opp. at 28). Defendant further avers that

²⁰ A retaliation claim does not depend on the success of plaintiffs’ disability claims. *See Colon-Fontanez*, 660 F.3d at 36.

it would “welcome Plaintiffs back to work” if they received the COVID-19 vaccine. (*Id.*).

Critically, plaintiffs have not put forth specific facts that demonstrate a true motive of retaliation.

Even if plaintiffs could make a *prima facie* case, defendant has articulated a legitimate, non-retaliatory reason for the challenged employment action. According to defendant, its policy is a neutral one of general applicability, and “consequences for non-compliance are based on the employees’ vaccination status, not whether or not they applied for an exemption (and not on their religion or disability).” (Defendant’s Opp. at 28-29). At this stage, it seems unlikely that plaintiffs will be successful on the merits of their retaliation claim. *See Barrington*, 2021 WL 4840855, at *6-7 (finding, at TRO stage, that Title VII retaliation claim related to COVID-19 vaccine policy would likely fail).

C. Potential for Irreparable Harm

When a plaintiff fails to meet his burden to show a likelihood of success on the merits, “failure to do so is itself preclusive of the requested relief.” *Bayley’s Campground, Inc. v. Mills*, 985 F.3d 153, 158 (1st Cir. 2021). However, for completeness, the Court will consider the remaining factors, which also counsel against injunctive relief.

Irreparable harm is measured “on a sliding scale, working in conjunction with a moving party’s likelihood of success on the merits, such that the strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown.” *Braintree Labs., Inc. v. Citigroup Glob. Mkts., Inc.*, 622 F.3d 36, 42-43 (1st Cir. 2010). “Irreparable harm most often exists where a party has no adequate remedy at law.” *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004).

In *Mills*, the First Circuit held that plaintiffs moving to enjoin a COVID-19 vaccine policy could not show irreparable harm in the form of loss of employment. 2021 WL 4860328,

at *10.²¹ The court noted that money damages are generally an appropriate remedy, and that appellants had failed to show a “genuinely extraordinary situation” as set forth in *Sampson v. Murray*. *Id.*; *see also Shalala*, 135 F.3d at 63 (salary loss, emotional distress, and loss of prestige “[n]either in sum nor in individual parts . . . amount to irreparable injury . . .”).

Another judge in this district recently denied a motion for preliminary injunction by the Massachusetts Correction Officers Federated Union to prevent enforcement of a COVID-19 vaccine requirement. *Mass. Corr. Officers Federated Union v. Baker*, 2021 WL 4822154, at *1 (D. Mass. Oct. 15, 2021). There, the court found that irreparable harm was lacking because “it is well settled that the loss of employment is not considered irreparable for the purposes of an injunction.” *Id.* at *7; *see also Beckerich*, 2021 WL 4398027, at *6 (stating that loss of employment due to failure to comply with COVID-19 vaccine policy was “not considered an irreparable injury” because wrongful termination claims exist for the very reason to recover “monetary damages to compensate their loss of employment”); *Bauer v. Summey*, 2021 WL 4900922, at *18 (D.S.C. Oct. 21, 2021) (finding that economic harm from loss of employment due to COVID-19 vaccination mandate was not irreparable); *Valdez v. Grisham*, 2021 WL 4145746, at *12 (D.N.M. Sept. 13, 2021) (holding that being terminated or prevented from working as nurse based on COVID-19 vaccination mandate does not constitute irreparable harm); *Norris v. Stanley*, 2021 WL 3891615, at *3 (W.D. Mich. Aug. 31, 2021) (finding that plaintiff-employee failed to show irreparable injury would result if defendant-employer terminated her employment for failure to comply with COVID-19 vaccination mandate);

²¹ During oral argument, plaintiffs attempted to distinguish the lack of irreparable harm in *Mills* by arguing that here, plaintiffs made a greater showing in the form of mental anguish, loss of income, and impending homelessness. Even assuming the existence of those harms, they all stem from loss of employment and emotional distress, which do not qualify as irreparable harm under First Circuit precedent.

Johnson v. Brown, 2021 U.S. Dist. LEXIS 200159, at *72 (D. Or. Oct. 18, 2021) (finding no irreparable harm where plaintiffs faced temporary harm to jobs and benefits relating to Oregon executive order requiring healthcare and educational workers to be vaccinated against COVID-19).

Plaintiffs also claim irreparable harm on the ground that two employees are pursuing treatment for emotional distress. However, while an employee “may recover compensation for her emotional distress claim if she prevails on the merits, the fact that an employee may be psychologically troubled by an adverse job action does not usually constitute irreparable injury warranting injunctive relief.” *Shalala*, 135 F.3d at 64.

Finally, plaintiffs contend that they are faced with an “impossible choice” to “forsake their religious convictions, or, in the case of the disability discrimination plaintiffs, potentially put themselves in danger of physical harm.” (Plaintiffs’ Mem. at 21-22). They cite to a variety of state action cases, arguing that irreparable harm results from a “loss of First Amendment freedoms.” (*Id.*). However, MGB is a private employer, not a state actor. There are no First Amendment claims at issue. *See Beckerich*, 2021 WL 4398027, at *6.

Therefore, for the reasons stated, plaintiffs will not suffer irreparable harm in the absence of injunctive relief.

D. Balance of Equities

The Court must next consider the balance of equities. Plaintiffs will certainly experience economic hardship if they lose their jobs (although, again, that injury can be addressed with monetary damages if they prevail). MGB has a strong interest in protecting its patients, visitors, and staff from exposure to COVID-19. As the court noted in *Baker*, “[e]ven considering the economic impact on the Plaintiffs if they choose not to be vaccinated, when balancing that harm against the legitimate and critical public interest in preventing the spread of COVID-19 by

increasing the vaccination rate . . . the Court finds the balance weighs in favor of the broader public interests.” 2021 WL 4822154, at *8. The Court here similarly concludes that the balance of equities weighs in defendant’s favor.

E. The Public Interest

Finally, the Court must consider whether granting a preliminary injunction would serve the public interest. Other courts confronted with similar requests have generally considered the public interest in curbing the spread of the COVID-19 pandemic. *See, e.g., Does 1-6 v. Mills*, 2021 WL 4783626, at *17 (D. Me. Oct. 13, 2021), *aff’d*, 2021 WL 4860328 (1st Cir. Oct. 19, 2021) (finding that vaccine mandate promotes public interest); *Bimber’s Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 789 (W.D.N.Y. 2020) (holding that injunction against “enforcing measures employed specifically to stop the spread of COVID-19 is not in the public interest”); *Harris v. Univ. of Mass.*, 2021 WL 3848012, at *8 (D. Mass. Aug. 27, 2021) (concluding that enjoining vaccine mandate at University of Massachusetts is not in public interest); *Beckerich*, 2021 WL 4398027, at *7 (reasoning that “ending the COVID-19 pandemic” is in public’s best interest).

Here, enjoining defendant from enforcing a vaccination mandate intended to curb the spread of COVID-19 is not in the public interest. This virus “has infected and taken the lives of thousands of Massachusetts residents,” and dismantling this vaccination policy would undermine defendant’s efforts to combat the pandemic. *Harris*, 2021 WL 3848012, at *8. That factor similarly weighs against the issuance of a preliminary injunction.

IV. Conclusion

For the foregoing reasons, and the reasons set forth on the record during the hearings on October 20 and November 4, 2021, plaintiffs have not shown a likelihood of success on the merits of their claims, that they will suffer immediate irreparable harm if the injunction does not issue, that the balance of equities favors issuance of the injunction, or that an injunction would be

in the public interest. Accordingly, plaintiffs' motion for a preliminary injunction is DENIED.

So Ordered.

Dated: November 10, 2021

/s/ F. Dennis Saylor IV
F. Dennis Saylor IV
Chief Judge, United States District Court

EXHIBIT 4

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

<div style="border-bottom: 1px solid black; padding-bottom: 2px;">TOGETHER EMPLOYEES, by</div> Individual Representatives,)	
ROBERTA LANCIONE)	
JOYCE MILLER, MARIA DIFRONZO,)	
MICHAEL SACCOCCIO,)	
ELIZABETH BIGGER,)	
NATASHA DICICCO,)	
NICHOLAS ARNO and)	CIVIL ACTION NO.
RUBEN ALMEIDA,)	
Plaintiffs)	
)	
v.)	
)	
MASS GENERAL BRIGHAM)	
INCORPORATED)	
<u>Defendant</u>)	

COMPLAINT AND JURY DEMAND

INTRODUCTION

1. The issue in this case is defendant Mass General Brigham Incorporated’s violations of Title VII and the Americans with Disabilities Act (“ADA”) in wrongfully denying religious and disability accommodations to its employees.

2. Rather than adhering to federal law, the defendant instead created its own system-wide “position” and “new process” as to the granting of religious and medical accommodations for a newly imposed vaccination policy.

3. Defendant wrongly denied hundreds of its employees, many of whom fought on the front lines saving lives and fighting the spread of COVID-19 from the beginning of the pandemic to present, reasonable religious and disability accommodations that are protected by the aforementioned federal laws.

4. All plaintiffs have submitted a “Charge of Discrimination” form to the EEOC, with some already having obtained a “Notice of Right to Sue,” stating that the EEOC will likely be unable to complete administrative processing within 180 days.
5. Plaintiffs bring this action prior to the remedy provided under 42 U.S.C. 2000e-5(f)(2) by motion for preliminary injunction and by a showing of irreparable harm, justifying the need to seek immediate preliminary injunctive relief in advance of the EEOC’s completion of its investigation or issuance of right to sue letters.¹”

PARTIES

6. Plaintiff, Together Employees is an unincorporated association comprised of, at the date of this filing, 229 employees of Mass General Brigham Incorporated, all who requested religious accommodations, disability accommodations (or both) and were denied without a showing of undue hardship.
7. Plaintiff Roberta Lancione is an employee of defendant who was denied both a religious disability accommodation after submitting requests for both and documentation to the defendant detailing her history of angio-edema from prior vaccination and her current treatment for Chronic Lymphocytic Leukemia and of her sincerely held religious beliefs.
8. Plaintiff Joyce Miller is an employee of defendant who was denied a disability

¹ The First Circuit has held that plaintiffs who show irreparable injury to justify injunctive relief prior to the remedy provided under Title VII need not wait for the EEOC’s final review as outlined in 42 U.S.C. § 2000e-5(f)(2). *Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1st Cir. 1983).

accommodation and a religious accommodation after submitting a request to the defendant detailing her sincerely held religious beliefs and a signed form from her physician to support her request for disability accommodations.

9. Plaintiff Maria DiFronzo is an employee of defendant who was denied a disability accommodation after submitting evidence that she is pregnant.
10. Plaintiff Michael Saccoccio is an employee of defendant who was denied a disability accommodation after submitting three letters from two doctors detailing his inability to receive the vaccine.
11. Plaintiff Elizabeth Bigger is a physician and employee of defendant and a was denied a religious accommodation after submitting a request detailing her sincerely held religious beliefs.
12. Plaintiff Natasha DiCicco is an employee of defendant who was denied a religious accommodation after requesting an accommodation and detailing her sincerely held religious beliefs to the defendant.
13. Plaintiff, Nicholas Arno, is an employee of defendant who was denied a religious accommodation after requesting an accommodation and detailing his sincerely held religious beliefs to the defendant.
14. Plaintiff, Ruben Almeida, is an employee of defendant who had been given religious accommodation by defendant in the past yet was denied a religious accommodation after sending a request and detailing his sincerely held religious beliefs to the defendant.
15. Defendant, Mass General Brigham Incorporated is a Massachusetts

Corporation with a principal address listed as 800 Boylston Street in Boston, Massachusetts. It has fourteen hospitals and several other medical facilities throughout the Commonwealth of Massachusetts.

JURISDICTION, VENUE AND STANDING

16. Plaintiffs bring this action for disability discrimination and retaliation under the Americans with Disabilities Act (hereinafter “ADA”) and religious discrimination and retaliation under Title VII of the Civil Rights Act, with all claims arising within the context of plaintiff’s employment by the defendant.
17. All plaintiffs are employees of the defendant in various hospitals and facilities and either had their religious or medical accommodations wrongfully denied by the defendant.
18. Plaintiffs are seeking declaratory and preliminary injunctive relief under 28 U.S.C. § 2201 and § 2202.

FACTUAL BACKGROUND

19. On June 24, 2021, defendant’s President and CEO, Ann Klibanski, announced that all employees would be required to receive one of three COVID-19 vaccines. A true copy of the announcement is included herewith as Exhibit A.
20. The announcement initially stated that exemptions would be available for “medical and religious reasons” and for “employees who are pregnant or who intend to become pregnant.”

21. Defendant provided its employees with a “Covid Vaccine Medical Exemption Request Form 2021” for those seeking medical accommodations, which allowed for a temporary exemption for pregnancy stating, “According to the CDC and American College of Obstetrics and Gynecology, the COVID-19 vaccination is safe and effective for pregnant women and to protect the baby after it is born. However, pregnancy is a unique personal circumstance. We encourage those pregnant to discuss this issue with their medical provider.” A true copy of the Covid Vaccine Medical Exemption Request Form 2021 is included herewith as Exhibit B.

22. For any employees seeking religious exemptions to the new policy, defendant purportedly established a committee to review the submitted religious exemptions.

23. The defendant’s required religious exemption form was an online form with several check box questions and a small, one line text box with directions stating “In the space provided, please (1) identify your sincerely held religious belief, practice or observance and (2) explain why it prevents you from receiving a COVID-19 vaccine. Please note that you may be required to provide additional information or supporting documentation to support your request for an exemption.” A true copy of the exemption form is attached herewith as Exhibit C.

24. The form contained no option to provide any supporting documentation, such as a personal statement or a clergy letter.

25. Defendant then denied the plaintiffs' requests prior to allowing them to provide supporting documents for their accommodation requests.

26. These denials contained virtually no discussion, other than to state that plaintiffs failed to state a sincerely held religious belief, or clearly misconstruing plaintiffs' beliefs to fit a reason for denial, followed by a link to where plaintiffs could get vaccinated.

27. Defendant's offering of medical and religious exemptions was illusory and not based in accordance with federal law, evidenced by (and not limited to) the following:

- a. Defendant instructed its network physicians not to draft letters in support of medical accommodations for their patients (Exhibit D);
- b. Defendant amended their medical accommodation form, removing the option for a pregnancy accommodation after promising pregnant employees that they would be granted accommodations (Exhibit E);
- c. Defendant would not disclose to its employees the individuals that comprised defendant's exemption committee, their qualifications, or what the review process would entail²;
- d. Defendant refused to accommodate employees that it had accommodated in the past, citing a "new process" that they had created (Exhibit F);

² On occasion, some members of the committee would respond using their names instead of the standard signature "The MGB Vaccination Committee," however the committee members, their qualifications, and the evaluation criteria were never disclosed.

- e. Defendant sent out an email to unit supervisors (Exhibit G) stating that they should encourage employees who had their religious accommodations denied to instead get vaccinated;
- f. This same email provided talking points that supervisors were to use with their subordinates, including assurances that their requests were “carefully reviewed by a committee made up of individuals from across Mass General Brigham,” which was “charged with reviewing requests and determining whether each request *was consistent with the system’s position around granting exceptions*” (emphasis added). Further, supervisors were to assure their subordinates that “each request was evaluated based on all information provided, and because of that there is no appeal process.”
- g. These instructions were given despite defendant deliberately withholding the identity of those who sat on the committee and withholding “the system’s position” for granting accommodations;
- h. Additionally, defendant deliberately failed to provide its employees with an option to provide supporting information with their accommodation requests before its anonymous committee “evaluated based on all information provided” and denied the requests;
- i. Defendant would not allow for any appeals to denials of religious and disability accommodations (Exhibit H), nor did defendant engage in any meaningful interactive process with any of the plaintiffs; and

- j. Defendant granted many accommodations for employees with nearly identical accommodation requests (Exhibit I) yet denied plaintiffs' accommodation requests with no explanation as to why.

MASS GENERAL BRIGHAM'S DISABILITY DISCRIMINATION

28. At least 36 Plaintiffs requested reasonable accommodations for disabilities under the ADA, including Plaintiffs Lancione, Miller, DiFronzo and Saccoccio.
29. Plaintiff DiFronzo is pregnant and requested an accommodation, as was originally offered by defendant. She was subsequently denied an accommodation (Exhibit J).
30. Plaintiff Lancione suffered from angio-edema from prior vaccination and is currently treating for Chronic Lymphocytic Leukemia. Taking these vaccines puts her at risk of serious physical harm, which would significantly impair several major life functions, not the least of which would be working (Exhibit K).
31. Plaintiff Saccoccio obtained three letters from two doctors stating that he should not receive the vaccine because he has severe PTSD and childhood trauma, which would trigger his PTSD and substantially impact his major life functions, not the least of which would be working (Exhibit L).
32. Plaintiff Miller submitted a letter from her doctor supporting her need for an exemption from vaccination and was subsequently denied. She is currently on

a continuous leave of absence due to severe mental and emotional toll that this situation has taken on her and has received behavioral therapy treatment for these issues (Exhibit M).

33. Plaintiff Miller is not the only plaintiff undergoing treatment for the emotional and psychological harm that the denial and impending decision has caused (Exhibit N).

34. Further, defendant did not engage in any meaningful interactive process with plaintiffs who asserted their medical disabilities, which is a protected activity.

35. In lieu of an interactive process and in lieu of any reasonable accommodations, defendant is instead placing plaintiffs on unpaid leave on October 20, 2021, to be terminated on November 5, 2021 if they remain unvaccinated.

MASS GENERAL BRIGHAM'S RELIGIOUS DISCRIMINATION

36. To date, defendant has not stated what their "position on granting exceptions" is for religious accommodations.

37. At least 193 Plaintiffs, including plaintiffs Bigger, DiCicco, Arno and Almeida, whose affidavits are included as Exhibits O-R, submitted a religious accommodation request, which is a protected activity.

38. These plaintiffs have sincerely held religious beliefs, rooted in Biblical Scripture and received by them through prayer.

39. Plaintiffs seek to make daily decisions, including those regarding vaccination and other medical decisions, through prayer and by reading the Bible.
40. These sincerely held and prayerfully developed religious beliefs preclude plaintiffs from taking the COVID-19 vaccines.
41. For plaintiffs to disobey sincerely held religious beliefs would violate their conscience. See *John 14:15 (NIV)*: “If you love me, keep my commands,” *Acts 5:29 (KJV)* “...We ought to obey God rather than men.”
42. All of the plaintiffs had their religious accommodation requests denied, without an opportunity to appeal, and without any meaningful interactive process. (See ¶ 26 regarding denial emails. An example of these type of email exchanges has also been included as Exhibit S).
43. Plaintiffs submitted their request on an online exemption form that did not allow for submission of supporting documents.
44. Not only were plaintiffs unable to submit supporting documents, but they were also not informed as to who was reviewing their submissions. Thus, they had no way of providing supporting documents through any other platform until they were denied.
45. Plaintiffs were therefore reduced to an attempt at describing their personal religious beliefs in a text box which visibly displayed, in the case of plaintiff DiCicco, a total of eight words.

46. Once these forms were submitted (by design, without the option to submit supporting documents), defendant then denied plaintiffs requests for religious accommodations.
47. Defendant then emailed its department supervisors, instructing them to use talking points with subordinates who had been denied religious exemptions, stating “each request was evaluated based on all information provided, and because of that there is no appeal process.”
48. In other words, defendant is simply paltering: It claims that it evaluated accommodation requests based on “all the information provided,” which in itself is true, however, only because defendant made it impossible for plaintiffs to provide supporting documents by not allowing for their submission on the exemption form and by not informing plaintiffs of who was reviewing their request so that substantive information could be sent to those individuals.
49. Thus, plaintiffs’ accommodation requests (which defendant effectively reduced to what plaintiffs could fit into a small, one line text box), were then swiftly denied, with the blame placed on the plaintiffs, and the façade of a legitimate process being published to defendant’s supervisors and employees.
50. Each plaintiff who sought a religious exemption was subject to the same procedure and was not afforded an appeal or any meaningful interactive process.

51. Plaintiffs who failed to receive the vaccination are to be placed on unpaid leave on October 20, 2021, and are facing termination on November 5, 2021, if they remain unvaccinated.

COUNT I
(Disability Discrimination – Failure to Make Reasonable Accommodations)

52. Plaintiffs repeat and reallege paragraphs 1-43 of this Complaint.

53. Plaintiffs who sought disability accommodations, all of whom are “qualified individuals” under the definition of 42 U.S.C. 12111³, requested reasonable accommodations for their specific disabilities with respect to defendant’s vaccination policy in writing by submitting defendant’s required exemption form.

54. Defendant has (and had) a duty as plaintiffs’ employer under 41 U.S.C. 12112(b)(5)(a) to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”

55. Defendant was and is “obligated to provide a reasonable accommodation (as long as it is not unduly burdensome) where a protected employee has requested an accommodation, or the employer otherwise knew that one was needed.” *Murray v. Warren Pumps, LLC*, 821 F.3d 77, 84 (1st Cir. 2016).

56. Defendant failed to provide any reasonable accommodations upon reasonable requests by plaintiffs.

57. Defendant failed to assert an undue hardship that would be caused by

³ Plaintiffs “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” *Id.*

accommodating plaintiffs' disabilities.

58. Despite failing to assert an undue hardship, defendant in fact would not be "unduly burdened" or face hardship in accommodating plaintiffs' requests⁴, not only because it would not financially or operationally burden defendant to accommodate plaintiffs⁵, but because defendant did accommodate some employees while others (including plaintiffs), it chose not to, despite the accommodation requests being similar or nearly identical.

59. Defendant also failed to engage in any meaningful discussion, interactive process or appeal with the plaintiffs who requested reasonable accommodations.

60. All plaintiffs were and are ready, willing and able to abide by any reasonable accommodations to defendant's policy including those safety precautions already in effect.

61. Plaintiffs are all facing adverse employment action, namely being placed on unpaid leave and subsequently terminated, due to their inability to adhere to the defendant's policy because of their disabilities.

COUNT II (Religious Discrimination)

⁴ Defendant's most recent 990T form available via the IRS (https://apps.irs.gov/pub/epostcard/cor/043230035_201909_990T_2020120117460444.pdf) shows that it has assets of over six **billion** and as of August 10, 2021, defendant brought in revenues of \$4.1 billion in the third quarter of 2021 alone: <https://www.beckershospitalreview.com/finance/mass-general-brigham-posts-2-9b-gain-over-9-months.html>. Therefore, under § 12111's definition of "undue hardship," requiring significant difficulty or expense, defendant cannot (and did not) assert that the accommodations would be unduly burdensome.

⁵ <https://www.massnurses.org/bargaining-unit-listings/p/openBulletin/12231>

62. Plaintiffs repeat and reallege paragraphs 1-61 of this Complaint.

63. Title VII prohibits “discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” *Xiaoyan Tang v. Citizens Bank, N.A.*, 821 F.3d 206, 215 (1st Cir. 2016) quoting from 42 U.S.C. § 2000e–2(a)(1).

64. Defendant had a duty to “[O]ffer a reasonable accommodation to resolve a conflict between an employee's sincerely held religious belief and a condition of employment, unless such an accommodation would create an undue hardship for the employer's business.” *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004).

65. Once an employee demonstrates that their religious belief conflicts with an employment condition, “the burden then shifts to the employer to show that it offered a reasonable accommodation or, if it did not offer an accommodation, that doing so would have resulted in undue hardship.” *Id.*

66. Plaintiffs requesting religious accommodations submitted a request for religious accommodation to the defendant's vaccination policy, informing defendant that its vaccination policy was in conflict with their sincerely held religious beliefs.

67. These requests were submitted via an online form, as required by defendant.

68. Defendant neither offered to accommodate the plaintiffs nor showed that an accommodation would have resulted in “undue hardship.”

69.Despite failing to assert an undue hardship, defendant in fact would not be “unduly burdened” or face hardship in accommodating plaintiffs’ requests, not only because it would not financially or operationally burden defendant to accommodate plaintiffs, but because defendant did accommodate some employees while others (including plaintiffs), it chose not to, despite the accommodation requests being similar or nearly identical.

70.Defendant also failed to engage in any meaningful discussion, interactive process or appeal with the plaintiffs who requested reasonable accommodations.

71.All plaintiffs were and are ready, willing and able to abide by any reasonable accommodations to defendant’s policy including those safety precautions already in effect.

72.Plaintiffs are all facing adverse employment action, namely being placed on unpaid leave and subsequently terminated, due to their inability to adhere to the defendant’s policy because of their religious beliefs.

COUNT III (Retaliation)

73.Plaintiffs repeat and reallege paragraphs 1-72 of this Complaint.

74.All plaintiffs were engaged in a protected activity, whether requesting accommodation for religious beliefs or for disability.

75.Defendant has taken adverse action against plaintiffs, informing them that they will be placed on unpaid leave on October 20, 2021 and terminated on November 5, 2021 if they do not comply with defendant’s policy, which would

result in either a violation of conscience (Title VII plaintiffs) or a risk to their physical safety (ADA plaintiffs).

76. The adverse action taken by defendant would not have occurred but for a retaliatory motive against plaintiffs for requesting their respective accommodations.

PRAYER FOR RELIEF

77. Declaration that defendant violated Title VII in discriminating against plaintiffs by failing to offer reasonable accommodation for their religious beliefs;

78. Declaration that defendant discriminated against plaintiffs by failing to reasonably accommodate for plaintiffs' disabilities.

79. Declaration that plaintiffs were engaged in protected activity when they requested reasonable accommodation and when they refused to comply with a perceived Title VII and ADA violation;

80. Enjoin defendant from taking adverse employment action against plaintiffs;

81. Enjoin defendant from enforcing its vaccination policy against plaintiffs until either their religious beliefs and disabilities are accommodated, the EEOC completes its investigation and/or issues every plaintiff a right to sue, or a verdict is rendered by a jury; and

82. Attorney fees and costs, plus any other relief this Court deems proper.

Plaintiffs, by their attorneys,

/s/ Ryan P. McLane

Ryan P. McLane, Esq. (BBO: 697464)

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EXHIBIT A

Mass General Brigham mandates COVID-19 vaccination for all employees

June 24, 2021 Press Releases Our People COVID-19



Mass General Brigham today announced that it will require its 80,000 employees to be vaccinated against COVID-19 once the U.S. Food and Drug Administration (FDA) grants approval of one of the three vaccines. More than 85 percent of Mass General Brigham employees have already been vaccinated—one of the highest rates nationwide among health care systems.

“Over the past 16 months we have come together as a system to care for our patients and each other as never before and the efforts of our employees have been extraordinary and inspiring. The evidence of COVID-19 vaccine safety and effectiveness is overwhelming. Getting vaccinated is the single most important and responsible step each of us can take to put an end to this devastating pandemic and protect patients, families, and each other.”

Anne Klibanski, MD

President and Chief Executive Officer
Mass General Brigham

As the largest academic health system and private employer in Massachusetts, Mass General Brigham has administered more than 450,000 vaccine doses to patients and employees, helping to make Massachusetts among the top-vaccinated areas in the country. Clinical data and trends clearly demonstrate that the vaccines have proven central to reducing the spread of the virus, hospitalizations and deaths across the Commonwealth.

Mass General Brigham joins many other leading health care systems in the United States in making COVID-19 vaccination a requirement, ensuring that patients are being cared for in the safest clinical environment possible. The decision is consistent with Mass General Brigham’s approach to the flu vaccine, which became a requirement in 2018. As with other vaccines, employees will be able to request exemption for medical and religious reasons and employees who are pregnant or who intend to become pregnant may also request an exemption. A deadline for vaccination will be determined after FDA approval.

Since the beginning of the pandemic, Mass General Brigham has treated nearly 19,000 COVID-19 positive inpatients and administered more than 1.1 million COVID-19 tests. At the same time, Mass General Brigham researchers have worked around the clock to develop and assess new approaches to test for, treat, and prevent COVID-19.

Media Contact

Mass General Brigham:

Rich Copp rcopp@partners.org

Bridget Perry bperry7@partners.org

About Mass General Brigham

Mass General Brigham is an integrated academic healthcare system, uniting great minds in medicine to make life-changing impact for patients in our communities and people around the world. Mass General Brigham connects a full continuum of care across a system of academic medical centers, community and specialty hospitals, a health insurance plan, physician networks, community health centers, home care, and long-term care services. Mass General Brigham is a non-profit organization that is committed to patient care, research, teaching, and service to the community. In addition, Mass General Brigham is one of the nation's leading biomedical research organizations and a principal teaching affiliate of Harvard Medical School. For more information, please visit massgeneralbrigham.org.

Related Articles



Press Releases 10.14.2021

[Mass General Brigham Announces \\$25 million in New Funding for Scholars Program](#)



Press Releases 10.14.2021

[Mass General Brigham Names Marcela del Carmen President of Mass General Physicians Organization](#)



[Press Releases](#)

EXHIBIT B



COVID VACCINE MEDICAL EXEMPTION REQUEST FORM 2021

Please Print:

First Name: _____ Last Name: _____

PeopleSoft/Employee ID #: _____ Date of Birth: ____/____/____

Please have your provider return this completed form to Occupational Health at the email listed at the bottom of the form.

Dear Health Care Provider,

Mass General Brigham and its affiliates are committed to providing a safe work environment and to patient safety. Transmission of the SARS-CoV-2 virus can carry a significant risk for patients, co-workers, and visitors. COVID-19 vaccination is an important tool to help control the pandemic and is strongly recommended by the CDC. **Therefore, all Mass General Brigham personnel are required to receive the COVID-19 vaccination or have an approved exemption.** Medical exemption is allowed only for recognized medically supported reasons.

Your patient has indicated that they have a medical reason or contraindication not to be vaccinated. Please document if you believe that there is a medical reason or contraindication below.

- ☐ **History of severe or immediate allergic (anaphylactic) reaction to a previous dose or component of a COVID-19 vaccine.** We encourage consultation with an allergy specialist.

Vaccine name or vaccine component: _____ Date Received: _____

Description of reaction: _____

- ☐ **Temporary exemption due to current pregnancy:** Estimated delivery date: _____

According to the CDC and American College of Obstetrics and Gynecology, the COVID-19 vaccination is safe and effective for pregnant women and to protect the baby after it is born. However, pregnancy is a unique personal circumstance. We encourage those pregnant to discuss this issue with their medical provider.

- ☐ **Temporary exemption due to administration of COVID-19 monoclonal antibodies:**

Date of last dose administered: _____

- ☐ **Temporary exemption due to history of multisystem inflammatory syndrome:**

Date of diagnosis: _____

Other medical reasons (Please describe below): Requests will be reviewed on a case-by-case basis. Clarification from the requesting employee and/or their physician may be requested in writing or by phone.

I certify that my patient has the above contraindication and requests the medical exemption.

Provider Name: _____

(Please print clearly)

Date: _____

Provider Signature: _____

License #: _____

Telephone #: _____

Please email this completed form to PHSOHSCOV19@partners.org

EXHIBIT C

Exemption Request

Mass General Brigham is dedicated to providing a safe environment for all of its patients. Influenza infection can carry a significant risk for patients, visitors and staff. Therefore, all Workforce members are required to receive an annual vaccination for influenza unless an exemption is approved.

COVID-19 carries a significant risk of transmission, serious illness or death for patients, visitors and staff. Therefore, all Mass General Brigham employees are required to receive COVID-19 vaccination unless medically contraindicated or it is prohibited by a sincerely held religious belief or practice.

Mass General Brigham permits an exemption to mandatory influenza vaccination and/or Covid-19 vaccination for employees whose sincerely held religious beliefs prohibit vaccination.

Please complete the below form to request religious exemption(s). You can request an exemption for one or both vaccines, please complete all appropriate sections.

ID Number

* must provide value

100083269

User Name

* must provide value

naf11

First Name

* must provide value

Natasha

Last Name

* must provide value

Dicicco

Email Address

* must provide value

NADICICCO@PARTNERS.ORG

Affiliate Name

* must provide value

MGH

Please choose the exemption you are requesting?

* must provide value

☒ COVID

☒ Flu

In the space provided, please (1) identify your sincerely held religious belief, practice or observance and (2) explain why it prevents you from receiving a COVID-19 vaccine. Please note that you may be required to provide additional information or supporting documentation to support your request for an exemption.

It is my sincerely held religious and spiritual

Employee attestation regarding Covid-19 vaccination religious exemption

* must provide value

- ☒ My religious beliefs, practices, and observances which form the basis for my exemption request are sincerely held.
- ☒ My religious beliefs, practices and observances prevent me from receiving a COVID-19 vaccine.
- ☒ I understand that I may be asked to provide additional information to support this request.
- ☒ I understand that if my request for exemption is approved I will be required to follow all applicable infection control policies and procedures, including wear an approved mask.
- ☒ I understand that, if approved, this exemption will last for the current COVID-19 vaccination process only.

In the space provided, please (1) identify your sincerely held religious belief, practice or observance and (2) explain why it prevents you from receiving an influenza vaccine. Please note that you may be required to provide additional information or supporting documentation to support your request for an exemption.

It is my sincerely held religious and spiritual

Employee attestation regarding influenza vaccination religious exemption:

* must provide value

- ☒ My religious beliefs, practices, and observances which form the basis for my exemption request are sincerely held.
- ☒ My religious beliefs, practices and observances prevent me from receiving an influenza vaccine.
- ☒ I understand that I may be asked to provide additional information to support this request.
- ☒ I understand that if my request for exemption is approved I will be required to follow all applicable infection control policies and procedures, including wear an approved mask.
- ☒ I understand that, if approved, this exemption will last for the current influenza vaccination process only.

Please sign as acknowledgment

* must provide value

~ Add signature

Submit

EXHIBIT D



Lauren Bradford <laurenbradfordesq@gmail.com>

Fwd: Covid vaccine exemption d/t seizures

[REDACTED]@gmail.com>
To: Lauren Bradford <laurenbradfordesq@gmail.com>

Thu, Sep 23, 2021 at 5:38 PM

Sent from my iPad

Begin forwarded message:

From: [REDACTED], M.D."

[REDACTED]@mgh.harvard.edu>

Date: August 18, 2021 at 6:11:16 PM EDT
To:

gmail.com>

Subject: Re: Covid vaccine exemption d/t seizures

Many thanks for writing.

Believe me, I understand your situation 100%.

As specialists, our Division has already told us that we cannot offer any medical exemptions for the Covid vaccine - not even for anaphylaxis or severe allergic reactions or primary or secondary immunodeficiencies.

Perhaps Dr [REDACTED] can give you an exemption, but unless there is a direct link between the vaccine and a lowered seizure predisposition (which I don't believe there is not enough data to support that), I don't think even your PCP will be able to write it.

I am sorry for the tight scrutiny with regards to this matter.

I hope that you and yours are otherwise well, and are continuing to stay safe.

Sincerely,

[REDACTED]

On Aug 18, 2021, at 4:15 PM, <gmail.com> wrote:

External Email - Use Caution

Hi [REDACTED]

Hope you're summer has been going well! I just have a question regarding the covid vaccine and if you are able to assist with getting a medical exemption from receiving the vaccine? I am required to have it by the end of the fall. I work at UMass Memorial Medical Center in Worcester, but I do not do any patient care or come into contact with anyone but a few colleagues. I am so worried about getting the vaccine, because I don't want it to trigger a seizure. I haven't had a seizure since 2009 and am honestly terrified of getting the vaccine and having it trigger a seizure. I've been doing some research and there are currently no studies in patients with epilepsy and the covid vaccine.

Thanks so much!

Name: Lori A Munro | [REDACTED] | PCP: [REDACTED], MD

RE: Non-Urgent Medical Question

Melissa Ann Burke

All messages have been loaded.

[REDACTED] Aug 19, 4:35 PM

Dear Lori,

The American College of Cardiology and MassGeneral Brigham is strongly discouraging cardiologists to write such letters at this time. I will have to defer back to your PCP.

Thank you for your understanding,

[REDACTED]

Showing 1 of 1

Conversations remain active for 30 days. Once 30 days have passed since the most recent message, you will need to send a new message instead.

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EXHIBIT E



COVID VACCINE MEDICAL EXEMPTION REQUEST FORM 2021

Please Print:

First Name: _____ Last Name: _____

PeopleSoft/Employee ID #: _____ Date of Birth: ____/____/____

Please have your provider return this completed form to Occupational Health at the email listed at the bottom of the form.

Dear Health Care Provider,

Mass General Brigham and its affiliates are committed to providing a safe work environment and to patient safety. Transmission of the SARS-CoV-2 virus can carry a significant risk for patients, co-workers and visitors. COVID-19 vaccination is an important tool to help control the pandemic and is strongly recommended by the CDC. **Therefore, all Mass General Brigham personnel are required to receive the COVID-19 vaccination or have an approved exemption.** Medical exemption is allowed only for recognized medically supported reasons.

The CDC encourages all pregnant people or people who are thinking about becoming pregnant and those breastfeeding to get vaccinated to protect themselves from COVID-19. The vaccines are safe and effective, and it has never been more urgent to increase vaccinations as we face the highly transmissible Delta variant and see severe outcomes from COVID-19 among unvaccinated pregnant people.

Your patient has indicated that they have a medical reason or contraindication not to be vaccinated. Please document if you believe that there is a medical reason or contraindication below.

- ☐ **History of severe or immediate allergic (anaphylactic) reaction to a previous dose or component of a COVID-19 vaccine.** We encourage consultation with an allergy specialist.

Vaccine name or vaccine component: _____ Date Received: _____

Description of reaction: _____

- ☐ **Temporary exemption due to administration of COVID-19 monoclonal antibodies:**

Date of last dose administered: _____

- ☐ **Temporary exemption due to history of multisystem inflammatory syndrome:**

Date of diagnosis: _____

Other medical reasons (Please describe below): Requests will be reviewed on a case-by-case basis. Clarification from the requesting employee and/or their physician may be requested in writing or by phone.

I certify that my patient has the above contraindication and request the medical exemption.

Provider Name: _____
 (Please print clearly)

Date: _____

Provider Signature: _____

License #: _____

Telephone #: _____

Please email this completed form to PHSOHSCOV19@partners.org

EXHIBIT F



MGB Religious Exemptions Committee



To: [REDACTED] R.N. + 1

Mon 10/4/2021 2:00 PM [View more](#)

Dear [REDACTED],

You have received religious exemptions in the past, however, they do not carry over from one year to the next. We have implemented a new process this year to evaluate requests for religious exemptions and this year your request is denied.

Kindest Regards,

Dee Dee



[REDACTED]



Fri 10/1/2021 10:21 PM [View more](#)

I'm very confused. Can you please explain?
Thank you

[REDACTED]

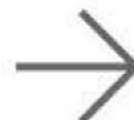


EXHIBIT G

From: MGB Manager Update
Sent: Wednesday, September 15, 2021 4:53 PM
To: MGB Manager Update
Subject: Today's Focus: COVID-19 vaccine exemption denials; Updated information in PeopleSoft



Mass General Brigham

Focus

Information and insights for managers

COVID-19 vaccine requirement and exemption denials

Human Resources continues to appreciate the work that you, our managers, are doing during these challenging times. We know that high hospital capacity, increasing demand for patient care and rollout of several system-wide initiatives are adding to your already heavy workload – and we appreciate all that you are doing to help.

This week, employees who have applied for medical or religious exemption from the COVID-19 Vaccination Policy will hear whether their exemption requests have been accepted. Some of these exemption requests will be denied – a reflection of our medical experts' determination that the COVID-19 vaccine is safe, effective and imperative for keeping our patients, their families and each other safe.

Upon receiving a denial, some employees may be emotional and upset, and look to you, their manager, for support. We ask that you take the time to speak with them, to listen to their concerns and, when appropriate, encourage them to receive the vaccine.

The following talking points may be helpful in your conversation:

- I understand you are upset because your exemption request was denied. Please tell me more about how you are feeling, and the concerns you have about our COVID-19 Vaccine Policy.
- I understand that you are upset but I want to assure you that your request was carefully reviewed by a committee made up of individuals from across Mass General Brigham. The committee was charged with reviewing requests and determining whether each request was consistent with the system's position around granting exceptions.
- Each request was evaluated based on all information provided, and because of that there is no appeal process.
- If you intend to comply with Mass General Brigham's COVID-19 Vaccine Policy, there are some upcoming deadlines of which you should be aware. Two out of the three available vaccines require two doses to be fully vaccinated by October 15. If you are receiving one of these, you must receive the first dose by September 16 (Moderna) or September 23 (Pfizer). I want to ensure you understand how quickly these deadlines are approaching.
- You can find a schedule of vaccine clinics on the Pulse.

We have prepared a list of [Frequently Asked Questions](#) to help you answer questions from employees whose request for religious exemption has been denied.

PeopleSoft data – now fully updated

As of yesterday, employee vaccination data is updated in PeopleSoft and will continue to be updated daily. A reminder that it may take up to 48 hours for a vaccine received at Occupational Health or a Mass General Brigham provider to appear in the system. Likewise, proof of a vaccine obtained elsewhere may take up to 48 hours to appear in PeopleSoft.

The data shown in PeopleSoft is actual data at the employee level and different from data shared with you previously, which was aggregate data from Epic.

Notifications are being sent today from ibridgereport@partners.org, containing information about your direct reports who are not vaccinated, have not consented to share their Epic data with PeopleSoft or submitted documentation of vaccines obtained elsewhere to Occupational Health. The following chart will help you determine what the various PeopleSoft statuses mean for your employees:

PeopleSoft COVID-19 vaccine status	Description
Non-compliant	Has not received two vaccines (or one dose of Johnson & Johnson) Has not consented to sharing Epic data with Occupational Health Has not submitted proof of vaccine obtained elsewhere to Occupational Health.
Epic-pending	The employee has consented to sharing their Epic record for the COVID-19 vaccine, but there is no data found. Reminder, it may take up to 48 hours for a vaccine received at Occupational Health or a Mass General Brigham provider to appear in PeopleSoft. These individuals are non-compliant with the COVID-19 Vaccine Policy.
Exempt	Approved for either a medical or religious exemption.
Exempt-remote	Employees working outside the United States, or POIs who are never onsite at a Mass General Brigham location.
Vaccinated (Compliant)	Both doses received and data has flowed to PeopleSoft

For many employees – consent needed

We believe there are a large number of employees who have received the vaccine but appear non-compliant in PeopleSoft because they have either failed to consent to sharing their Epic COVID-19 vaccine data or have yet to submit documentation of a vaccine received elsewhere. Please share the following information with those who are appearing “non-compliant” in PeopleSoft:

To consent to sharing Epic COVID-19 vaccine data (vaccine received at Mass General Brigham) with PeopleSoft, [click here](#).

To submit proof of vaccination(s) received elsewhere, [click here](#).

EXHIBIT H

2nd request



MGB Religious Exemptions
Committee

...

To: [REDACTED]; MGB Religious
Exemptions Committee

Fri 10/15/2021 11:35 AM [View less](#)

Dear [REDACTED],

We will not be providing additional information related to denials or approvals other than the request was reviewed (including any additional documentation provided prior to the decision), and it was either approved or denied.

Kindest Regards,

Dee Dee

...



To: Chen, Dee Dee A.

Wed 10/13/2021 2:18 PM

...

EXHIBIT I

Attn: MGB Religious Exemptions Committee

[REDACTED]

I, [REDACTED] submitted my religious exemption request for the Influenza and COVID 19 vaccines and was denied without an opportunity for an appeal. I have been employed at Brigham and Women's Hospital since January of 2014 and have been granted religious exemption every year given the fact that vaccines are against my sincerely held religious beliefs as they can damage my ever-changing soul, hindering my ability to reincarnate. Since then my sincerely held beliefs have not changed, my reasoning for requesting religious exemption from vaccination has not changed, the documentation supporting my beliefs I have previously submitted to BWH has not changed. Yet, this year my request for religious exemption of the influenza and COVID 19 vaccines was denied. Therefore, this document serves to notify that I, [REDACTED] am appealing my denial with the provided additional information to support my request.

Baptized as Christian, as a choice of my parents, I was raised and brought up within the traditional Christian faith. As time passed, my parent's faith also changed, taking me along their religious and spiritual journey. I was taught to seek my own personal truth and to stay true to my sincerely held beliefs. I have experienced great heartache in my lifetime, from the devastating loss of my Mother as a young man, a life-altering divorce, later followed by immense suffering watching my current wife struggle with infertility. In addition to personal challenges, I have also witnessed great suffering during my twenty-year career as a registered nurse. Many years ago I set out on my own personal journey to try to make sense of all of this heartache. Through all of my hardships I sincerely believe that my soul is ever-changing, nothing in this life is set in stone or absolutely permanent. I sincerely believe that all forms of life are essential and are to be reincarnated. I do not eat any meat or animal products. I do not use animal products or products that have been tested on animals. I sincerely believe in living consciously and truly believe in the power of good karma, bringing forth a better rebirth. It is my sincerely held religious belief that vaccines damage my ever-changing soul and hinder my reincarnation. My ability to reincarnate allows me to continue on my journey to enlightenment where I will be granted the ability to obtain understanding of all my suffering. As noted in the Four Noble Truths; there is truth of suffering, truth of the cause of suffering, truth of the end of suffering and most importantly to me, the truth of the path that leads to the end of suffering.

My religious journey has been built upon a foundation of seeking the truth of suffering. My sincerely held beliefs provide me great comfort that suffering shall not be for nothing. In closing, I once again affirm that I request religious exemption of the influenza and COVID 19 vaccines based upon my sincerely held religious beliefs that they damage my soul and hinder my reincarnation.

Of note, I am aware that my Christian colleagues who requested religious exemption were formally offered the opportunity to provide additional information to support their initial denial where I was not. I find that discriminatory and had to navigate this appeal process without any institutional guidance.

Sincerely,

[REDACTED]

EXHIBIT J

Affidavit of Maria DiFronzo

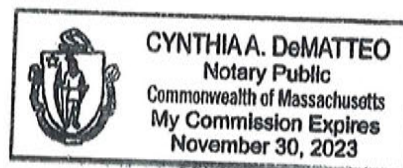
Now comes the affiant, after being duly sworn and cautioned states as follows:

- 1) I am currently employed at Massachusetts General Hospital in Boston, Massachusetts.
- 2) I am a Medical Imaging Clinical Instructor and Radiologic technologist. I have been employed for just over 5 years.
- 3) I am currently pregnant.
- 4) I was originally offered a "pregnancy exemption" from Massachusetts General Hospital. My exemption was signed by my doctor and submitted to Occupational Health on August 11th, 2021.
- 5) On August 24th, 2021 I received an email from Occupational Health informing me that my exemption was denied due to pregnancy no longer being an accepted exemption.

Maria DiFronzo

On this 7 day of October, 2021,
Before me, the undersigned Notary Public, personally appeared
Maria DiFronzo, proved to me through
satisfactory evidence of identification, which were MA D.C.,
to be the person whose name is signed on the preceding or attached document
in my presence.

Cynthia A. DeMatteo



Affidavit of Maria DiFronzo

Now comes the affiant, after being duly sworn and cautioned states as follows:

1. I am currently employed at Massachusetts General Hospital in Boston, Massachusetts.
2. I am a Medical Imaging Clinical Instructor and Radiologic technologist. I have been employed here for just over 5 years.
3. I requested a religious exemption based on my deeply held religious beliefs.
4. After I submitted my religious exemption The MGB Vaccine Committee requested more information.
5. I supplied The MGB Vaccine Committee with a 2-page essay explaining why my deeply held religious beliefs prevented me from receiving the vaccine. This essay clearly answered the questions asked of me by The MGB Vaccine Committee. I also told The MGB Vaccine Committee that I would be happy to provide any other documentation they may need.
6. I received an email from The MGB Vaccine Committee a few days later informing me that my request had been denied.
7. I responded to The MGB Vaccine Committee asking for more information on why my religious exemption was denied. I also requested to know if any other employee had their exemption accepted. The MGB Vaccine Committee responded and said they would not provide any information on the decision.

Maria DiFronzo

On this 7 day of October, 2021,
Before me, the undersigned Notary Public, personally appeared
Maria DiFronzo, proved to me through
satisfactory evidence of identification, which were MTDL,
to be the person whose name is signed on the preceding or attached document
in my presence.

Cynthia A. DeMatteo

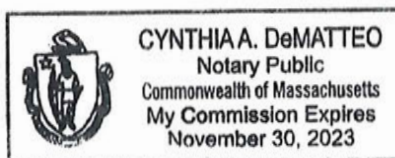


EXHIBIT K

Affidavit of Roberta Lancione

In accordance with 28 U.S.C. § 1746, I, Roberta Lancione, declare under the penalty of perjury of the laws of the United States of America, and state upon personal knowledge that:

1. I am currently employed at Massachusetts Eye and Ear in Boston, MA.
2. I am a registered nurse and have been employed here for 8 years.
3. I have a sincerely held religious belief which prevents me from receiving the Covid-19 vaccine.
4. I submitted a religious exemption/ accommodation request to MGB on 9/3/21.
5. On 9/9/21 I received an email from MGB Religious Exemption Committee requesting additional information as my beliefs relied on "inaccurate information". Which I provided.
6. On 9/16/21 I received an email that my Religious Request was reviewed and denied; I replied requesting a written explanation as to how / why MGB determined my religious beliefs do not satisfy their vaccine exemption criteria.
7. I have not received a response.
8. On 10/4 a system wide email was sent stating religious requests were thoughtfully considered and decisions are final. There will be no appeals.
9. On 9/27/21 a system wide email was sent titled "Know the Facts" stating "no appeal for religious exemption, all staff must receive vaccine by 10/15, non compliant staff will be terminated, we have begun posting roles to replace non compliant staff, The Federal mandate will mean you must be vaccinated to work at any company with more than 100 employees, and the Federal government will require vaccination for healthcare workers."
10. No executive order has yet been signed in regards to this Federal Mandate they refer to.
11. Since that date I have received DAILY MGB emails- Covid 19 Policy Non-Compliance -deadline dates - 1st dose of Pfizer/ Moderna or J&J by 10/15, if employee remains noncompliant employee will be placed on unpaid administrative leave which was extended to 10/20 with subsequent termination on 11/5/21.
12. My husband passed away suddenly three years ago leaving me in an unfortunate financial position as he had no life insurance or pension. I depend on my weekly paycheck to support myself until social security eligibility in three years.
13. I have been a nurse for forty one years and the thought of losing not just my job, but what I consider my life's work for refusal to take a vaccine that goes against my sincerely held religious beliefs is unconscionable.

Roberta Lancione
10/14/2021

Affidavit of Roberta Lancione

In accordance with 28 U.S.C. § 1746, I, Roberta Lancione, declare under the penalty of perjury of the laws of the United States of America, and state upon personal knowledge that:

1. I am currently employed at Massachusetts Eye and Ear in Boston, MA.
2. I am a registered nurse and have been employed here for 8 years.
3. I submitted a Covid Vaccine Medical Exemption Request filled out by my Hematologist/Oncologist from Tufts Medical Center, Andreas Klein MD.
4. My medical reasons for exemption are angio-edema after prior influenza vaccine and current treatment for Chronic Lymphocytic Leukemia (CLL) with Venclexta.
5. My request for medical exemption from Covid-19 vaccine due to allergy concerns was denied. MGB stated it was "reviewed by a clinical panel" and "the medical information you provided does not demonstrate a sufficient medical reason or contraindication to support exemption."
6. MGB's recommendation is "that you consult an allergist for specific concerns, as well as evaluate whether a non- mRNA vaccine should be considered as a possible option."
7. In the past, as well as for 2021 my MGB medical exemption for influenza vaccine was approved.
8. No mention of my concerns about how the vaccine could affect my CLL was addressed in the committee's response.
9. I am being mandated to receive a vaccine that I feel will put my health and possibly my life in grave danger.
10. My husband passed away suddenly three years ago leaving me in an unfortunate financial position as he had no life insurance or pension.
11. The thought of losing my livelihood is causing immense stress as I depend on my weekly paycheck to support myself until social security eligibility in three years.

Roberta Lancione
10/14/2021

EXHIBIT L

Affidavit of Michael P. Saccoccio

Now comes the affiant, after being duly sworn and cautioned states as follows:

1. I am currently employed at MGB Salem Hospital in Salem, Massachusetts.
2. I am a registered nurse and have been employed here for three years.
3. I submitted a religious exemption and it was denied.
4. I was told the decisions of the religious exemption committee are final and there was no appeal process.
5. I asked for an explanation as to why my religious exemption was denied and received no valid explanation.
6. I submitted a letter of support from the pastor of my parish.
7. I have a sincerely held religious belief which precludes me from receiving the COVID vaccine.
8. I was told by the religious exemption committee that my information was inaccurate with regard to fetal cell lines being used in the testing and production of the COVID vaccines. This was not true.
9. I have been told if I do not receive the COVID vaccine I will be placed on unpaid suspension after October 15 and my employment will be terminated "within a few weeks" thereafter.
10. I have a birth defect which requires me to have health insurance.
11. I am the primary caregiver for my 90 year old disabled father who had multiple small strokes 48 hours after receiving his first COVID shot. He was hospitalized for 12 days and nearly died. He has never been the same man. I pay the mortgage for both of us.
12. I am strongly opposed to the COVID 19 vaccine and do not feel I should be forced to have it injected into my body against my religious beliefs.

Michael Saccoccio 9/29/2021

S Chellor 09/29/2021

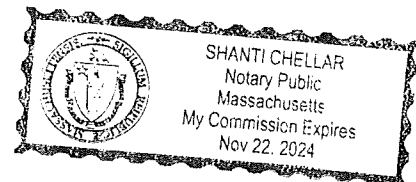


EXHIBIT M

In accordance with 28 U.S.C. § 1746, I, JOYCE MILLER, declare under the penalty of perjury of the laws of the United States of America, and state upon personal knowledge that:

1. I am currently employed at Massachusetts General Hospital in Boston, MA.
2. I am a Manager and have been employed here for 17 years.
3. I submitted a medical exemption signed by my doctor on 8/15/21 and it was denied on 9/9/21.
4. As a result of the denial, my doctor completed and signed a Leave of Absence Request stating the same medical reasons.
5. I have been told if I do not receive the covid vaccine by 10/15 I will be terminated.
6. I carry the health insurance for my family and will be uninsured upon termination.
7. I am strongly opposed to the covid-19 vaccine and do not feel I should be forced to have it injected into my body.
8. I am being forced to choose between receiving an unwanted medical procedure or losing my livelihood and everything I have worked for.

 10/09/21

In accordance with 28 U.S.C. § 1746, I, JOYCE MILLER, declare under the penalty of perjury
of the laws of the United States of America, and state upon personal knowledge that:

1. I am currently employed at Massachusetts General Hospital in Boston, MA.
2. I am a Manager and have been employed here for 17 years.
3. I submitted a religious exemption due to my sincerely held religious beliefs on 8/12/21 and it was denied on 9/14/21. I was told there is no appeal process.
4. I asked for the process being used to determine someone's sincerely held religious beliefs and my company refused to provide the policy.
5. I asked for a more detailed explanation for the denial on 9/14/21 and my company replied on 9/24/21 stating they will not be providing additional information.
6. I have been told if I do not receive the covid vaccine by 10/15 I will be terminated.
7. I carry the health insurance for my family and will be uninsured upon termination.
8. I am strongly opposed to the covid-19 vaccine and do not feel I should be forced to have it injected into my body against my religious beliefs.
9. I am being forced to choose between receiving an unwanted medical procedure or losing my livelihood and everything I have worked for.

JMILLER

10/09/21

Pt is having severe anxiety affecting her sleep and therefore impacting her concentration at work, unable to complete daily work tasks and finds it hard interacting with people during the day.

5. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

6. Will the employee need to attend medically necessary follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? Yes ☐ No ☒
If yes, please answer questions 6a and 6b.

6a. Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period: _____

6b. Estimate the part-time or reduced work schedule the employee needs, if any:

_____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? Yes ☐ No ☒
If yes, please answer questions 7a and 7b.

7a. Is it medically necessary for the employee to be absent from work during the flare-ups? Yes ☐ No ☐

If yes, please explain: _____

7b. Based on the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: _____ times per _____ week(s) or per _____ month(s) and

Duration: _____ hours or _____ day(s) per episode

8. ADDITIONAL INFORMATION

Provider Signature: _____

Print Name: Amanda Gray MD

Practice/Specialty: internal medicine

Date: 10/4/21

Address: 26 City Hall Mall, Medford

Phone: 781-306-5320

Fax 781-306-5083

Joyce Miller
65 Winterberry Lane
Tewksbury, MA 01876

October 8, 2021

Dear Joyce:

This letter is to inform you that your request for a Personal Illness leave under the Family Medical Leave Act (FMLA) beginning 10/15/2021 and returning on 1/03/2022 has been approved.

MA PFML: You may also be eligible for a Personal Illness leave under Massachusetts Paid Family and Medical Leave (MAPFML). Unum administers the MAPFML medical benefit and will notify you of pay and job protection. MAPFML leave runs concurrently with other federal and state laws, including FMLA. If you live and work outside of Massachusetts, your state may offer a paid leave program. Contact the HR Support Center for more details or visit Ask My HR and search "Remote".

This letter contains information about your pay, benefits, and return to work instructions.

Personal Medical Leave Program: MAPFML benefits are provided to employees working in Massachusetts who are eligible for benefits under the state law. In addition to MAPFML, short-term disability (STD) is provided to benefit-eligible employees for personal illness. MAPFML personal medical leave and Short-term disability (STD) are both administered by Unum, who will coordinate both programs to ensure you receive the maximum benefit. You may be eligible to supplement the benefits received under the personal medical leave program with accrued paid time off to receive up to 100% income replacement.

Your STD benefit is 60% and the policy number is 955959.

Please contact Unum at 1-877-217-5491 to initiate a claim. If approved, benefits begin on the second workweek of your leave.

Pay: Payments from the personal medical leave program and accrued paid time off bank(s) will be paid through your regular paycheck. For more details review the enclosed pay procedures.

Benefits: Benefits: During your FMLA absence, your current benefits will continue as if you were actively working. You will continue to have benefit deductions through your weekly pay. During any unpaid portion of your leave, weekly benefit deductions will be recorded and collected when you return from leave.

Continuing Disability: If your disability will keep you from work for longer than 6 months, you may apply for Long Term Disability benefits. Unum will contact you about this process and may request updated medical information. If you have questions regarding Long Term Disability and the impact on benefits, please contact Rhonda Killoren in the Mass General Brigham Benefits office at 617-724-9855.

Life Insurance Coverage: You may be eligible to continue your Life insurance coverage(s) and have your premium waived while you are disabled. If you are not enrolled in Long-Term Disability Plan offered through Mass General Brigham please contact MetLife at 800-300-4296 to start the coverage continuation process for supplemental life and/or basic life insurance. If you are enrolled in the Long-Term Disability Plan offered through Mass General Brigham, MetLife will start the claim process on your behalf for supplemental life and/or basic life insurance. In order to be eligible, you must be totally disabled for at least 6 months before initiating this process.

Return to Work: Please contact your manager at least two weeks prior to your anticipated return to discuss your schedule. For the duration of your leave, you will be in the centralized timekeeping workgroup. When you return from leave, you will be returned to your regular workgroup.

When you return from leave, you will return to your current or equivalent position. Prior to returning from a medical leave, you must provide Occupational Health Services (OHS) with a written medical clearance from your healthcare provider. You must call OHS to schedule an appointment at least 72 hours prior to your scheduled return to work date to have your return to work clearance paperwork reviewed. OHS is open Monday through Friday between 7am and 5pm.

Entity	Phone
BWH	617-732-8501
BWFH	617-983-4628
McLean	617-855-2438
MGH	617-726-2217
Newton Wellesley	617-243-6168
NSMC Salem	978-354-2353

If you cannot return on your anticipated return date: If you cannot return on your anticipated return date, you must contact your manager prior to this date to discuss your options. Returning to your position may not be guaranteed if you extend beyond FMLA job protected leave. If you do not return to work on your anticipated return date and do not contact your manager, you will be considered to have resigned voluntarily and your employment will be subject to termination.

We at MGH understand that this may be a difficult time for you, and we will do our best to offer support to you during this time. Please don't hesitate to call your manager or me if you have any questions or concerns during your leave.

Best Regards,

Rachael Landry
HR Sr. Leave Specialist
CC: Nolan, Jacqueline

GHC ID#: 100037469

Important FMLA Information Checklist

Continuous Leave

Review	A letter approving your FMLA leave time is enclosed. Please review the contents and understand your responsibilities as outlined in the letter.	<input type="checkbox"/>
	Your FMLA leave time has been approved only for the condition listed on the Health Care Provider Form.	<input type="checkbox"/>
	Please notify us as soon as possible if the dates of your scheduled leave change or are extended, or if your family member no longer requires care. This is required by the FMLA. Failure to notify us in a reasonable timeframe may lead to corrective action, up to and including termination, under your employer's absenteeism/attendance policy.	<input type="checkbox"/>
	Contact the Leave Coordinator if you have any questions at 857-282-9326.	<input type="checkbox"/>
FMLA Time*	As of the start date of this leave, you have the following number of hours, days, or weeks remaining of FMLA entitlement: 12 WEEKS	<input type="checkbox"/>
	If your FMLA entitlement runs out and you are not yet able to return to work, you will need to have a discussion with your manager about accommodating additional time.	<input type="checkbox"/>
	Provided that your anticipated leave schedule does not change, the following number of hours, days, or weeks will be counted against your FMLA leave entitlement: 80 days .	<input type="checkbox"/>
Returning to Work	Two weeks prior to your scheduled return date you must contact your manager to discuss your return to work plan or your need for additional time away from work. See approval letter for additional information regarding the return to work process. Please contact your leave coordinator if you need to extend your leave.	<input type="checkbox"/>
	If you do not plan on returning at the end of your leave please reach out to your manager with as much advanced notice as possible so they may plan accordingly. You may reach out to your Leave Coordinator or Human Resources with any questions you have about not returning to employment.	<input type="checkbox"/>

*Under the Family and Medical Leave Act, you are allowed up to 12 weeks of unpaid job protected leave in a rolling year. Any FMLA time used in the past 12 months, measured from your current leave start date will be deducted from the 12 weeks balance.

Miller, Joyce Marie, 100037469

EXHIBIT N



Employee's Serious Health Condition* Health Care Provider Certification Form

SECTION 1: For Completion by Employee

Employee Name & ID: _____

First

Middle

Last

Employee ID#

Questions? Please submit an online request at askmyhrportal.com or call the HR Support Center at 833-275-6947.

SECTION 2: For Completion by the HEALTH CARE PROVIDER:

*A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves *inpatient care* or *continuing treatment* by a health care provider. For more information, see table on the health care provider checklist.

Please answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" is not sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b). Please be sure to sign the form at the bottom of the page. Once completed, have it faxed to the leave coordinator at 617-726-1887.

1. Indicate the type of leave needed by the employee: CONTINUOUS ☒ INTERMITTENT ☐

2. Requested Leave Start Date: 10 / 13 / 2021 Estimated Return to Work Date: 11 / 01 / 2021

3. **Mark below as applicable:**

- Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility? Yes ☐ No ☒ If yes, give dates of admission: _____
- Indicate the date(s) you treated the patient for condition: 10/5/2021
- Will the patient need to have treatment visits at least twice per year due to the condition? Yes ☒ No ☐
- Was medication, other than over-the-counter medication, prescribed? Yes ☐ No ☒
- Was the patient referred to other health care provider(s) for evaluation or treatment (e.g. physical therapist?) Yes ☒ No ☐ If yes, state the nature of such treatments and expected duration of treatment:
Behavioral health - therapist / psychiatrist

4. Please answer based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition?: Yes ☒ No ☐

If yes, please answer question 4a.

4a. If yes, identify the job functions the employee is unable to perform:

Due to inability to concentrate related to extreme anxiety and insomnia, she is not able to perform all of her usual job functions

5. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

██████ is suffering from extreme situational anxiety and needs to work with therapist to help get her past current anxiety. She has therapy scheduled for weekly visits for next 3 weeks as she works thru her stressful situation.

6. Will the employee need to attend medically necessary follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? Yes ☐ No ☐ Unsure ←

If yes, please answer questions 6a and 6b.

6a. Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period: _____

6b. Estimate the part-time or reduced work schedule the employee needs, if any:

_____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? Yes ☐ No ☐ Unsure

If yes, please answer questions 7a and 7b.

7a. Is it medically necessary for the employee to be absent from work during the flare-ups? Yes ☐ No ☐

If yes, please explain: _____

7b. Based on the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: _____ times per _____ week(s) or per _____ month(s) and

Duration: _____ hours or _____ day(s) per episode

8. ADDITIONAL INFORMATION

Provider Signature: RSPatel mmy
 Print Name: Rebecca S Patel
 Practice/Specialty: Internal Medicine

Date: 10/13/2021
 Address: 332 Hanover St. Boston 02113
 Phone: 617-643-8000

EXHIBIT O

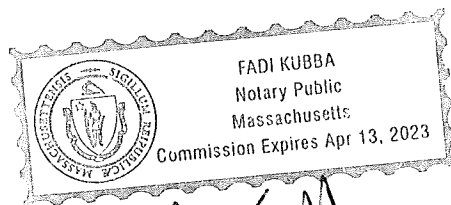
Affidavit of Elizabeth Bigger, MD

Now comes the affiant, after being duly sworn and cautioned states as follows:

1. I am currently employed at Massachusetts General Hospital in Boston, Massachusetts.
2. I am a hospital physician and have been employed here for 7 years.
3. I work in the Department of Medicine, Division of Hematology/Oncology.
4. I have a sincerely held religious belief which prevents me from receiving this vaccine, I filed a religious exemption in accordance with this.
5. The religious exemption committee responded by harshly questioning the sincerity of my beliefs, and said that my request included "incorrect information." In their response, they misquoted my statement and included incorrect information themselves. They asked for additional information.
6. I submitted a follow up statement affirming my sincerely held religious beliefs and included published data to verify the accuracy of my initial statement.
7. They denied my request for religious exemption on September 14.
8. I asked if there was an appeal process, and was told there was no appeal process.
9. I asked why my request was denied, and asked for the process used to determine someone's sincerely held religious beliefs. The committee refused to provide the policy or answer these questions.
10. The committee and my employer refused to consider options to reasonably accommodate my religious beliefs.
11. I have been told that if I do not receive the COVID19 vaccine by October 15, I will be placed on unpaid leave on November 1st and ultimately terminated. I have been told that I will not qualify for unemployment if terminated.
12. I carry the health insurance for my family, including my 2 year old daughter, and will be uninsured upon termination.
13. I will not be able to afford the mortgage of my house and will have to sell my house if terminated.
14. I am being forced to choose between receiving an unwanted medical procedure which violates my sincerely held religious beliefs or losing my livelihood, insurance, and home.



Elizabeth Bigger, MD
9/25/21



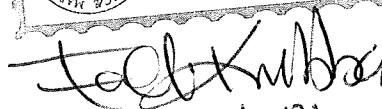

9/25/2021

EXHIBIT P

Affidavit of Natasha Ann Di Cicco

Now comes the affiant, after being duly sworn and cautioned states as follows:

1. I am currently employed at MGB in Boston, MA.
2. I have been employed at MGB for 6 years. 2 years as a Radiological Technologist and 4 years as a Technical Supervisor.
3. I applied for a religious exemption for the COVID-19 vaccines and Flu shot. 4. Prior to applying for a religious exemption, my husband and I consulted with our family and religious adviser (Pastor).
5. On September 10, 2021 The MGB Vaccine Committee denied my request for a religious exemption.
6. The email that accompanied my denial stated that I could provide more information.
7. On September 10, 2021 I provided additional information about my sincerely held religious / spiritual beliefs and practices, a screen shot of my original request showing that I put in for both COVID-19 vaccination and Flu shot, a signed letter from my Pastor that included the Church's seal, and information detailing me and my family's long history with my Church.
8. On September 14, 2021 The MGB Vaccine Committee denied my religious exemption again, with no explanation or reason, no instructions on the appeal process and no information about the Committee.
9. On September 14, 2021, I emailed The MGB Vaccine Committee and requested an explanation as why my request was denied, details on the appeal process, and various other information regarding the Committee including: a list of members, meeting minutes, number of exemptions approved, deliberation details, confirmation that my entire packet was received and details on the Committee.
10. On September 16 2021, The Committee emailed me back and informed me there was no appeal process and that I could submit additional information that may be reviewed; however, there was no guarantee of further review or reply. The Committee did not provide any of the other information that I had requested.
11. On September 17 2021, I emailed the Committee more information regarding my sincerely held religious beliefs, practices and/or observations. Along with my Pastor's letter, publicized statements from my church and a copy of my 2015 marriage certificate to prove my Pastor is from my church that I have long attended. My email again requested that the Committee provide me the information that I previously requested.
12. On September 10, 2021 after MGB was made aware of my sincerely held religious beliefs and practices, after being denied a reasonable accommodation to freely practice my sincerely held religious beliefs, and after I had sent additional information to the MGB Vaccination Committee, I was sent an harassing and threatening email informing me that if I was an employee that was not vaccinated by November 5, 2021 I will be terminated.

13. On September 23, 2021 The Committee emailed me back and stated: we will not be providing additional information related to denials or approvals, other than the request was reviewed and it was either approved or denied.
14. On September 24, 2021 I emailed the Committee and requested that all my previous communications and documents be reviewed again, along with additional publications from my church.
15. I still have not received any information on the basis for which my religious exemption was denied.
16. I will not allow anyone to bully me, intimidate me, or threaten me into changing my religious beliefs or practices, nor will I allow these measures to be used to non-consensually penetrate my body. Unfortunately, MGH has tried to do this to me and it is unacceptable.
17. I have lost enough sleep, cried enough tears and sought out enough counseling regarding this request.
18. The MGB Vaccine Committee is asking that I give up my long practiced religious beliefs or be terminated.
19. They are asking that I give up my soul if I want to continue my employment.
20. Consistent with my sincerely held religious beliefs I will not put anything in my body unless: it is voluntary, I am able to do so in good faith, I am able to do so in good conscience, I do not morally object to it, and I am not forced to act in contrary to my deeply held religious/spiritual beliefs and practices.
21. Unfortunately, the COVID-19 vaccines do not meet these standards.
22. I carry the health insurance for my family and termination of my employment would be detrimental and result in the loss of our health coverage and create a financial hardship on my family.

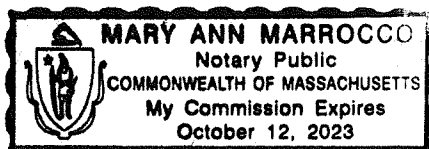
October 3, 2021

Natasha DiCicco
Natasha Ann DiCicco

Commonwealth of Massachusetts

Middlesex, SS.

Then personally appeared before me the above-named Natasha Ann DiCicco personally known to me and acknowledged the above Affidavit to be her free act and deed, this third day of October, 2021.



Mary Ann Marrocco
Notary Public

My Commission Expires 10/12/2023

EXHIBIT Q

Affidavit of Nicholas Arno

Now comes the affiant, after being duly sworn and cautioned states as follows:

1. I am currently employed at Massachusetts General Hospital in Danvers, MA.
2. I am an Electrician and have been employed here for two years.
3. I have been told that if I do not receive the COVID19 vaccine by October 15th, I will be put on unpaid leave until November 5th. On November 5th, if I am still unvaccinated I will be terminated.
4. I am a single father of a five year old son. I carry health insurance for him and will lose our health coverage upon termination.
5. I purchased my first home last December and will be unable to pay my mortgage without employment.
6. I have a sincerely held religious belief which precludes me from receiving this vaccine. I submitted a religious exemption due to my sincerely held religious beliefs and it was denied.
7. I was told there was no appeal process.
8. I asked for the process being used to determine someone's sincerely held religious beliefs and my company refused to provide the policy.
9. I am being forced to choose between receiving an unwanted medical procedure and violating my beliefs or losing my livelihood and everything I have worked for.
10. I am strongly opposed to the covid-19 vaccine and do not feel I should be forced to have it injected into my body in violation of my religious beliefs.

Nich / Arno 9/27/2021
Signature Date

NOTARY:

On this 27 day of September 2021, before me, the undersigned notary public, personally appeared

Nicholas Arno (name of document signer), proved to me through satisfactory evidence of identification, which were Drivers License, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

Notary Signature: Jenelle L. Palladino

Date: 9/27/21

My commission expires on: 9-25-26

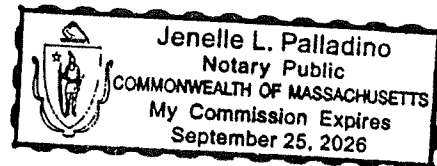


EXHIBIT R

Affidavit of Ruben Alejandro Almeida

Now comes the affiant, after being duly sworn and cautioned states as follows:

1. I am currently employed at Massachusetts General Hospital (MGB) in Boston, Massachusetts.
2. I am a licensed Technologist in Radiology and MRI, certified by the ARRT (American Registry of Radiologic Technologists and have been employed at MGH for 15 years.
3. I submitted a religious exemption due to my sincerely held religious beliefs and it was denied.
4. I was told there was no appeal process.
5. I asked for the process being used to determine someone's sincerely held religious beliefs and my company refused to provide the policy.
6. I have a sincerely held religious belief which precludes me from receiving this vaccine.
7. MGH has granted my religious exemption multiple years in the past.
8. I have been told if I do not receive the covid vaccine I will be placed on unpaid leave October 15th with all access to MGB shut off and terminated November 5th if I still do not comply.
9. I carry the health insurance for my family and will be uninsured upon termination.
10. I am a Landlord and my loss of employment will also impact my tenant who relies on my affordable rate for him to have a home to live in.
11. I am strongly opposed to the covid-19 vaccine and do not feel I should be forced to have it injected into my body against my religious convictions.
12. I am being forced to choose between receiving an unwanted medical procedure or losing my livelihood and everything I have worked for and the job I love.

Ruben Alejandro Almeida

Ruben Almeida
Teresa A. Nace 9/25/21

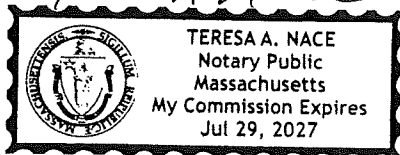


EXHIBIT S



From: [REDACTED]

Sent: Friday, October 15, 2021 9:12 AM

To: Chen, Dee Dee A. <DDCHEN@PARTNERS.ORG>; MGB Religious Exemptions Committee
<MGBReligiousExemptions@PARTNERS.ORG>

Subject: Confidential

Hi again Dee Dee,

Again, could you please send me this information regarding this new process that you referred to?

Or refer me to who is responsible to provide this information to the employees.

This is a time sensitive as I'm sure you can understand so can you please either assist me or let me know who can.

Thank you,

[REDACTED]

Sent: Wednesday, October 13, 2021 2:18 PM

To: Chen, Dee Dee A. <DDCHEN@PARTNERS.ORG>

Subject: Fw: 2nd request

[REDACTED] October 6, 2021 2:53 PM

To: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Subject: Re: 2nd request

Thank you for that information but I'm asking about this in particular; "We have implemented a new process this year."

Process in past vs. "new process"

Thank you Dee Dee

[REDACTED]

From: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Sent: Wednesday, October 6, 2021 1:51 PM

[REDACTED] MGB Religious Exemptions
Committee <MGBReligiousExemptions@PARTNERS.ORG>

Subject: RE: 2nd request

[REDACTED],

Your request for an exemption was carefully reviewed by an MGB-wide committee that thoroughly evaluated each submission based upon the information provided and following appropriate legal requirements. The decisions of the committee are final, and there is no appeal process.

Kindest Regards,

Dee Dee

[REDACTED]

Sent: Wednesday, October 06, 2021 12:48 PM

To: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Subject: 2nd request

2nd request for explanation

[REDACTED]

[REDACTED]

Sent: Monday, October 4, 2021 2:26 PM

To: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Subject: Further info required

Still not following

Please explain "new process" implementation

[REDACTED]

From: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Sent: Monday, October 4, 2021 1:59 PM

[REDACTED] MGB Religious Exemptions
Committee <MGBReligiousExemptions@PARTNERS.ORG>
Subject: RE: RE:

[REDACTED],

You have received religious exemptions in the past, however, they do not carry over from one year to the next. We have implemented a new process this year to evaluate requests for religious exemptions and this year your request is denied.

Kindest Regards,

Dee Dee

[REDACTED]
Sent: Friday, October 01, 2021 10:22 PM
To: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>
Subject: Re: RE:

I'm very confused. Can you please explain?
Thank you

[REDACTED]

From: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>
Sent: Friday, October 1, 2021 2:00 PM
[REDACTED]; MGB Religious Exemptions
Committee <MGBReligiousExemptions@PARTNERS.ORG>
Subject: RE:

[REDACTED],

Religious exemptions do not carry over from one year to the next. We have implemented a new process this year to evaluate requests for religious exemptions.

As your request for a religious exemption from COVID-19 and/or flu vaccination has been reviewed and was denied, we hope that you reconsider and receive the vaccine within the required time periods.

Kindest Regards,

Dee Dee

From: [REDACTED] <[REDACTED]>
Sent: Thursday, September 30, 2021 1:25 PM
To: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Subject:

Religious exemption is on file.

Thank you,

[REDACTED]

From: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Sent: Monday, September 27, 2021 10:28 AM

To: [REDACTED]; MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Subject: RE: MGH Religious Exemption Request

Dear [REDACTED],

Thank you for providing additional information.

Unfortunately, your request for a religious exemption from COVID-19 and/or flu vaccination has been reviewed by the exemptions committee and is denied. Information about ongoing vaccine clinics can be found [here](#).

Kindest Regards,

Dee Dee

From: [REDACTED] >

Sent: Friday, September 24, 2021 3:38 PM

To: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Subject: Re: MGH Religious Exemption Request

Good afternoon Dee Dee,

Thank you for your response.

My beliefs are between me and God who teaches my beliefs are not to be scrutinized nor denied by any man. He is my Supreme Ruler, not the Pope, nor the President, not any human. The government can not be the arbiter of which Catholic is correct. This would violate the establishment clause of the First Amendment as well as Article II.

The Bible informs all believers that our body is a Temple. Receiving a medical treatment against my will violates my body, and removes my free will as God has intended for me. I recognize God as my

ultimate authority in all things and that He has delegated to each of us authority over our own lives and choices, matters of health, including that of vaccines. I hold that the serious and potentially eternal consequences attached to my choices strongly outweigh any dictate of government to the contrary. "My Body, My Choice".

I have been granted religious exemptions in the past as is noted in my MGH record. My beliefs have further evolved and have allowed me to possess even greater knowledge in this area, which is why I continue on this path of not harming my body. My faith requires that when I recognize an action to be wrongful, that I repent. Having committed a sin in the past is not an excuse to continue doing so. We are commanded to go and sin no more.

Thank you for your time.

Sincerely,

[REDACTED]

From: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Sent: Friday, September 24, 2021 1:57 PM

To: [REDACTED]; MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>

Subject: RE: MGH Religious Exemption Request

Dear [REDACTED],

Your request for a religious exemption from COVID-19 and/or flu vaccination has been received, but requires additional information. You named your religion as a practicing Catholic, but did not explain how your religious beliefs prevent you from receiving a COVID-19 and/or flu vaccine. Moreover, your religion has publicly supported vaccination. Please provide an additional explanation so that we may further consider your request. In particular, please explain how, in light of your religion's public support of vaccination, your faith prevents you from receiving a vaccine. Please also provide any supporting documentation that you believe will be relevant to further consideration of your request, including evidence that you have a history of religious exemption to vaccines. If you have received vaccines in the past, please explain why your religion did not prevent you from receiving vaccines in the past and now will not allow for COVID-19 and/or flu vaccination. If your response is not received by September 27 your request for an exemption will be denied. Information about ongoing vaccine clinics can be found [here](#).

Kindest Regards,

Dee Dee

From: [REDACTED] >
Sent: Wednesday, September 22, 2021 6:39 PM
To: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>
Subject: Re: MGH Religious Exemption Request

Thank you Dee Dee.

I did not meet this deadline due to an unforeseen circumstance. My smartphone, which I use for email, broke.

As soon as I had an alternate device, I submitted.

Thank you,

[REDACTED]

From: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>
Sent: Wednesday, September 22, 2021 2:37 PM
To: MGB Religious Exemptions Committee <MGBReligiousExemptions@PARTNERS.ORG>
Subject: MGH Religious Exemption Request

Dear MGH Colleague,

Your request for a religious exemption from COVID-19 vaccination has been received, but requires additional information. The deadline to submit a request for a religious exemption from the COVID vaccine was September 3, 2021. Please provide an explanation why you did not meet this deadline? If your response is not received by September 27, your request will be denied.

Kindest Regards,

Dee Dee (on behalf of MGB Religious Exemption Review Committee)

The information in this e-mail is intended only for the person to whom it is addressed. If you believe this e-mail was sent to you in error and the e-mail contains patient information, please contact the Mass General Brigham Compliance HelpLine at <http://www.massgeneralbrigham.org/complianceline> . If the e-mail was sent to you in error but does not contain patient information, please contact the sender and properly dispose of the e-mail.

Please note that this e-mail is not secure (encrypted). If you do not wish to continue communication over unencrypted e-mail, please notify the sender of this message immediately. Continuing to send or respond to e-mail after receiving this message means you understand and accept this risk and wish to continue to communicate over unencrypted e-mail.

EXHIBIT 5

No. 21-1909

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

TOGETHER EMPLOYEES, by individual representatives ROBERTA
LANCIONE, JOYCE MILLER, MARIA DIFRONZO, MICHAEL SACCOCCIO,
ELIZABETH BIGGER, NATASHA DICICCO, NICHOLAS ARNO AND
RUBEN ALMEIDA

Plaintiffs–Appellants

v.

MASS GENERAL BRIGHAM INCORPORATED

Defendant–Appellee.

On Appeal from the United States District Court for the District of Massachusetts
In Case No. 1:21-cv-11686-FDS before The Honorable F. Dennis Saylor, IV

**PLAINTIFFS-APPELLANTS' EMERGENCY MOTION
FOR INJUNCTION PENDING APPEAL**

Ryan McLane, *Counsel of Record*

Lauren Bradford

McLANE & McLANE, LLC

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Feeding Hills, MA 01030

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Attorneys for Plaintiffs-Appellants

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42 U.S.C. § 12102(1)(A)-(C).....6

RELIEF SOUGHT

Plaintiffs were given until Friday, November 5, 2021, to take a vaccine that either violates their sincerely held religious beliefs or places them in significant physical or mental danger. The relief sought in the instant Motion is needed **imminently** to protect plaintiffs' ability to practice their religion unburdened and to prevent irreparable harm. Plaintiffs have moved expeditiously and with extreme urgency: No written order was issued on either November 4, 2021 after the preliminary injunction hearing, or the following day, November 5, 2021. Plaintiffs then filed a Notice of Appeal, an Emergency Motion for Decision on Injunction Pending Appeal and emailed all of the initial First Circuit case opening documents to a case manager. Plaintiffs are now filing this Motion for Injunction Pending Appeal as soon as a case is opened on the First Circuit Court's Docket.

Plaintiffs-Appellants TOGETHER EMPLOYEES, by individual representatives ROBERTA LANCIONE, JOYCE MILLER, MARIA DIFRONZO, MICHAEL SACCOCCIO, ELIZABETH BIGGER, NATASHA DICICCO, NICHOLAS ARNO AND RUBEN ALMEIDA, ("Plaintiffs") on an emergency basis, move this Court, in accordance with Fed. R. App. P. 8(a)(2) and 1st Cir. Local Rule 27.0(b), for an injunction pending appeal (IPA) of the District Court's November 4, 2021 Order on Plaintiff's Motion for Preliminary Injunction (Entry was made orally on the record by Judge F. Dennis Saylor, with a written

memorandum and docket entry expected, Dkt. 35 provides the Order denying the Motion), which is the subject of plaintiffs' Notice of Appeal to this Court (attached as **EXHIBIT 1**), restraining and enjoining Defendant–Appellee, and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, from preventing plaintiffs from returning to their positions and allow plaintiffs to continue to work under the same accommodations that defendant has allowed other employees similarly situated.

JURISDICTION AND TIMING

Plaintiffs filed this action on October 17, 2021 (**EXHIBIT 2**, Complaint), and immediately moved for preliminary injunctive relief in accordance with *Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1983). (Dkt. 2). The District Court held an initial hearing on plaintiffs' Motion, with a second hearing to be scheduled after parties had a chance to establish a record. (Tr. 10/20/21 65:2-7). The Court denied plaintiffs' Motion, setting a scheduling hearing for October 25, 2021. (Dkt. 11). At the scheduling hearing, the Court denied plaintiffs' requests for both the ability to conduct one deposition on an expedited basis, and for the ability to hold an evidentiary hearing (Dkt. 17). The full hearing was scheduled for November 4, 2021. At the November 4, 2021 hearing the District Court again denied plaintiffs' Motion. (Dkt. 35). In conjunction with plaintiffs' Motion for Preliminary Injunction and pursuant to Fed. R. App. P. 8(a)(1)(C), Plaintiffs also requested alternative relief in

the form of an injunction pending appeal should the court deny the preliminary injunction. (**EXHIBIT 3**, Injunction Pending Appeal). The District Court also denied plaintiffs' Motion for Injunction Pending Appeal. (Dkt. 38).

URGENCIES JUSTIFYING EMERGENCY RELIEF

The defendant has admittedly both accommodated employees and at the same time asserted that it would be a hardship to do so (this includes accommodating employees who interact with patients: see Exhibit 18, Dkt. 32). Therefore, the primary issue before this Court is whether the defendant may simply claim "undue hardship" to deny hundreds of religious and disability accommodation requests, or whether defendant must follow the law and meet the burden of demonstrating that it would actually be an undue hardship to accommodate its employees. Though this may seem obvious, the Trial Judge adopted, intentionally or not, a burden-shifting approach by accepting defendant's lack of evidence of hardship on the preliminary injunction record as **plaintiffs'** failure to meet their burden at the preliminary injunction stage. In other words, it was held against plaintiff that more evidence was not on the record supporting defendant's burden of showing of undue hardship. The defendant was thus absolved of its burden of showing that accommodating plaintiffs' religious beliefs would be an undue hardship, even after plaintiffs established a prima facie case under Title VII and the ADA. This is in direct confrontation with Title VII and

ADA principles. See *Sanchez-Rodriguez v. AT&T Mobility Puerto Rico, Inc.*, 673 F.3d 1, 8 (1st Cir. 2012) “once an employee has made out a prima facie case of discrimination, the **employer must show that it offered a reasonable accommodation or that a reasonable accommodation would be an undue burden.**” Defendant has now likely terminated plaintiffs’ employment in defiance of Title VII and the ADA.

Defendant’s actions were not inconspicuous: they were brazen. Defendant itself provided as Exhibits its exchange with one of the plaintiffs who sought religious accommodation. (Exhibits 29-32, Dkt. 31). The exchange was outlined for the Trial Court in Plaintiffs’ Reply to Defendant’s Opposition to Plaintiffs’ Motion for Preliminary Injunction and at the November 4, 2021 hearing:

1. Exhibit 29: Dr. Biggers clearly and sincerely states that she has refused any vaccines with a connection to aborted fetal tissue, provided a Scriptural basis for her belief and clearly identified, using scientific sources, the role that aborted fetal tissue plays in the current vaccines (never stating that the vaccines **contained** aborted fetal tissue) and her religious opposition to taking them.
2. Exhibit 30: an anonymous individual from [defendant’s] vaccination committee misconstrues Dr. Biggers’ accommodation request, stating that Dr. Biggers claimed that the vaccines contained aborted fetal tissue.

3. Exhibit 31: Dr. Biggers stated that she was disappointed that her request was denied and corrected the reviewer as to what she actually stated in the request, providing further information as to aborted fetal tissue's role in the production, manufacture and testing of the vaccines.
4. Exhibit 32: the anonymous reviewer responds to Dr. Biggers, simply stating that her request has been denied and that she should get vaccinated.

Examples like this abound, even in the limited record produced to the District Court (plaintiff warned that affidavits provided by defendant would be self-serving and unhelpful to the Court, and they were. See: Tr. 10/20/21 at 14:19-25 and 15:1-2). The main issue was never addressed: **why was it a hardship for defendant to accommodate only the plaintiffs, but not other employees, even those that interacted with patients?** Despite the issue being raised in plaintiffs' Complaint (Compl. ¶ 58), in plaintiffs' Memorandum in Support of their Motion for Preliminary Injunction (Mem., p. 18), in plaintiffs' Reply (Rep., pp. 7, 9-10) at the October 20, 2021 hearing (Tr. 10/20/21, 13:18-25, 14:1-2) and again at the November 4, 2021 hearing, this question was never answered by the defendant, nor did the Trial Judge seem interested in obtaining one. During oral argument, the Judge stated that he was unsure what was meant by the argument and asserted a hypothetical that it might hurt the plaintiffs' case, before ultimately deciding that plaintiffs' beliefs were

sincere. Thus, the defendant has not shown that it will, in fact, face an undue hardship by accommodating the plaintiffs.

With respect to the ADA claims, defendant simply copied a list of contraindications from the CDC, and whoever applied for a “medical exemption” and had one of the check listed contraindicators was approved. Those who did fit the check list were denied. (Hashimoto Dec. ¶¶29 and also Compl., Ex. D). Doctors within the defendant’s network were **instructed by the defendant** not to sign the medical exemption form for their patients, **even in the case of anaphylaxis**. (Compl., Ex. D). Naturally, the next question *should* be: what about other physical and mental disabilities within the definition under 42 U.S.C. § 12102(1)(A)-(C)? Unfortunately, the defendant’s non-acceptance of mental disabilities, and lack of explanation regarding anything outside of the CDC’s check list were not considered to be relevant, despite numerous plaintiffs suffering from physical and mental disabilities that would prevent them from either getting the vaccine or would have a significant negative impact on their major life activities.

Oddly, this case does not involve a dispute about what accommodations are available to plaintiffs or whether accommodation of plaintiffs sincerely held religious beliefs and disabilities can be conditioned on compliance with certain reasonable requirements. We know the answer to those issues because the defendant is already providing these accommodations and conditions. **The dispute is about**

whether defendants *can* accommodate plaintiffs. The answer is **yes**. Recently, the Northern District of New York held when it enjoined a blanket “undue hardship” scheme which prevented healthcare workers from obtaining religious accommodations: **“‘Title VII does not demand mere neutrality with regard to religious practices . . . rather, it gives them favored treatment.’ Thus, under certain circumstances, Title VII ‘requires otherwise-neutral policies to give way to the need for an accommodation.’”** *Dr. A v. Hochul*, No. 1:21-CV-1009, 2021 WL 4734404, *9 (N.D.N.Y. Oct. 12, 2021) (quoting *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775-776 (2015)) (emphasis added). This Court should require defendant to accommodate plaintiffs’ sincerely held religious beliefs and order that Defendants extend such protections (the Trial Judge, during the reading of the Order onto the record, accepted the sincerity of plaintiffs’ beliefs, thus there is no issue as to sincerity- only hardship).

On October 25, 2021, the District Court for the Northern District of Texas extended a TRO against United Airlines in *Sambrano v. United Airlines*, N.D. Tex, 4:21-cv-1074 (2021). The Court stated “[t]hus, if the TRO expires without an injunction in place... nothing would prevent hundreds of workers from ostensibly either: (1) being compelled to take a vaccination in violation of their religious beliefs or medical restrictions, or (2) being placed on indefinite unpaid leave.” Here,

plaintiffs have it worse, to be terminated if they did not receive their vaccine by November 5, 2021.

On October 29, 2021, the District Court for the Northern District of Illinois, in a nearly identical set of facts, *Jane Does 1-14 v. Northshore Univ. Health. Syst.*, N.D. Il. 1:21-cv-05683 (2021), issued a TRO against Northshore University Health System, despite claims of undue hardship.

Plaintiffs are set to be terminated and deprived of their ability to feed their families. Worse, many named plaintiffs are the sole caregivers for their family members, are currently undergoing significant psychological damage, are going to be unable to pay their mortgage and will be cut off from their benefits, such as health insurance. They are facing the very real choice of feeding their family or forsaking their religious beliefs and/or putting themselves in harm's way. **Relief on this matter cannot wait. Plaintiffs seek only to continue to fight on the front lines against the spread of COVID-19, and not to be left out in the cold.**

LEGAL ARGUMENT

V. DEFENDANT BEARS THE BURDEN OF SHOWING UNDUE HARDSHIP.

The Trial Judge, at the November 4, 2021 hearing, conclusively stated that the plaintiffs' religious beliefs were sincere. Additionally, Judge assumed ADA plaintiffs had some level of disability. Plaintiffs therefore unquestionably established a prima facie case under Title VII: "(1) a bona fide religious practice

[conflicted] with an employment requirement, (2) [plaintiffs] brought the practice to the [defendant's] attention, and (3) the religious practice was the basis for the adverse employment decision.” *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002). Plaintiffs established a prima facie case on disability discrimination as well: they (1) [have] a disability within the meaning of the ADA; (2) [are] qualified to perform the essential functions of the job, with or without reasonable accommodations; and (3) [were] subject to an adverse employment action based in whole or part on his disability. *Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182, 186 (1st Cir. 2011). For all of plaintiffs’ claims, the issue then became whether it would be an undue hardship for defendant to accommodate the plaintiffs.

VI. DEFENDANT DID NOT DEMONSTRATE THAT IT WOULD BE A HARDSHIP TO ACCOMMODATE THE PLAINTIFFS

During the Trial Judge’s questioning of plaintiffs’ counsel, the Judge said (despite plaintiffs’ submission of Exhibit 18 prior to the hearing, to the effect of) “we don’t know what type of people these are. Isn’t there a difference to a nurse versus a back-office person?” (Tr. 11/4/21: transcript ordered). The importance of this is that the facts that were unknown to the Trial Judge were facts that were to be supplied by the defendant to meet its burden of showing that it would be an undue hardship for it to accommodate the plaintiffs. See *Sanchez-Rodriguez*, *supra*. This was the essence of the preliminary injunction hearings. On the October 20, 2021

hearing, the Trial Judge stated “[i]t is not at all clear what, if any, accommodation can be made here or what would be reasonable. Again, it is a hospital that at least some of the plaintiffs are providing direct patient care. This is a highly infectious disease in which testing and masks and PPE do provide limited protections, and it’s unclear to me whether or not reasonable accommodations can be made here, and that’s one of the things that I want to explore at the later hearing.” (Tr. 10/20/21, 70:4-13). At the “later hearing,” the defendant stated to the Trial Judge that 234 out of over 2,400 (which amounts to just under 10%) total accommodation requests were granted. Naturally, these employees are receiving accommodations for their religious beliefs and disabilities. As stated earlier, plaintiffs’ Exhibit 18 provides an example of one employee’s accepted religious accommodation request. Within her “personal statement,” the employee specifically mentions her interactions with patients.

The District Court made its preliminary decision based upon assurances that defendant’s “process for evaluating reasonable accommodation requests was thorough, thoughtful, and robust.” Tr. 10/20/21 at 49:23-25. One is left to wonder how “robust” this process was when plaintiffs, who have been determined to have been sincere (see Tr. 10/20/21, 11:17-20, plaintiff Almeida has been granted religious accommodations for eight years, only to be denied this year), have now

been denied religious and disability accommodation. What places this issue in plaintiffs' favor is the fact that defendant **is accommodating other employees.**

The fact that defendant is already accommodating employees is clear evidence that defendant would **not** suffer undue hardship, however the issue was not addressed by defendant, who simply stated that it would be an undue hardship to accommodate “**further exemptions,**” “[allow] **additional unvaccinated employees,**” expressing the need to “**minimize the number of unvaccinated staff,**” and that it would be an undue hardship for the defendant “to allow *large numbers* of employees to remain unvaccinated.” (See Nichols Dec. ¶ 14, Hashimoto Dec. ¶ 18, Def. Opp., Dkt. 27, pp. 19-20).

42 U.S.C. § 2000e-2(a)(1) states that it is unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” § 2000e(j) continues “... unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”

Defendant did not demonstrate that it was “unable to reasonably accommodate” the plaintiffs religious beliefs (or their disabilities), thus plaintiff

established a likelihood of success on the merits. Further, plaintiffs have demonstrated that they can perform the essential functions of their job with respect to the accommodations requested. See *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 142 (1st Cir. 1997).

VII. PLAINTIFFS ARE SUFFERING IRREPARABLE HARM.

While it is generally true that a loss of employment does not constitute irreparable harm, **this case involves exercise of religion** and several other hardships that were demonstrated in the record. “If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel.” *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996). Additionally, this would not likely be a short-term loss of income. Most Massachusetts Hospitals have policies in place similar to that of the defendant. The practical aspects of seeking employment and needing to explain that you were previously terminated would effectively prevent these plaintiffs from working in the Commonwealth (if the injunction is granted, plaintiffs can continue to work for the defendant, and if denied, potential employers will not know that the termination was unlawful until the litigation has run its course). Plaintiffs additionally outlined, and provided onto the record, evidence of plaintiffs currently undergoing mental health treatment over this decision that they have to make, the loss of benefits that they would receive, their inability to pay their mortgage

(Bigger Aff. Compl, Dkt. 1 Ex. O), take care of their elderly relatives (Saccoccio Aff. Compl, Dkt. 1 Ex. L), and their children (Arno Aff. Compl, Dkt. 1 Ex. Q).

It is unclear what could be meant by “irreparable harm” if the aforementioned are not included within the meaning. **“The harm [plaintiffs] would suffer is not only, as [defendant] argues, the loss of [their] job[s] *per se*, but also the penalty for exercising [their First Amendment] rights. The chilling effect of that penalty cannot be adequately redressed after the fact.”**

Romero Feliciano v. Torres Gaztambide, 836 F.2d 1, 4 (1st Cir. 1987), referring to the loss of First Amendment freedoms. Though there is no state action here, the same “chilling effect” is present (emphasis added). See also *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

This also distinguishes the instant case from *Does 1-6 v. Mills*, No. 21-1826, 2021 WL 4860328 (1st Cir. Oct. 19, 2021). In *Mills*, this Court determined that it would not address the Title VII claims as the plaintiffs demonstrated only a loss of ability to work. Here, plaintiffs have established far more than simply economic damages, easily distinguishing the two (also *Mills* was primarily a Constitutional claim, as many employers were willing to accommodate plaintiffs, only the State law precluded them from doing so).

III. PLAINTIFFS SATISFY THE REMAINING INJUNCTION PENDING APPEAL REQUIREMENTS.

As *Dr. A* recognized when it enjoined New York’s undue hardship scheme, “the public interest lies with enforcing the guarantees enshrined in the Constitution **and federal anti-discrimination laws.**” *Dr. A*, 2021 WL 4734404, at *10. (Emphasis added).

Additionally, **the balance of the hardships clearly favors plaintiffs**, as the defendant is already accommodating employees, thus it will not be more than a de minimis cost, and defendant clearly does not consider them a threat. Further, these plaintiffs are in the unique position of **actually helping fight the spread of the virus on the front lines**. Having additional staff taking the same safety precautions that defendant allows other to take versus going homeless or forsaking one’s religious beliefs is not much of a comparison.

CONCLUSION

Plaintiffs are likely to succeed, because the defendant is already providing accommodations to employees who are similarly situated to the plaintiffs, and the District Court has accepted plaintiffs’ accommodation requests as sincere and valid. Defendant therefore cannot show undue hardship because it is already doing the very thing it claims as a hardship. Further, the irreparable harm faced by the plaintiffs far outweighs the harm to the defendant, who should be immediately enjoined pending this appeal, to avoid plaintiffs suffering further irreparable harm.

Respectfully submitted,

Dated: November 8, 2021

/s/ Ryan P. McLane

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/s/ Ryan P. McLane

Ryan P. McLane

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Ryan P. McLane
Ryan P. McLane
Attorney for Plaintiff-Appellant

EXHIBIT 6

No. 21-1909

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

TOGETHER EMPLOYEES, by individual representatives ROBERTA
LANCIONE, JOYCE MILLER, MARIA DIFRONZO, MICHAEL SACCOCCIO,
ELIZABETH BIGGER, NATASHA DICICCO, NICHOLAS ARNO AND
RUBEN ALMEIDA

Plaintiffs–Appellants

v.

MASS GENERAL BRIGHAM INCORPORATED

Defendant–Appellee.

On Appeal from the United States District Court for the District of Massachusetts
In Case No. 1:21-cv-11686-FDS before The Honorable F. Dennis Saylor, IV

**PLAINTIFFS-APPELLANTS’ REPLY TO DEFENDANT-APPELLEE’S
OPPOSITION TO PLAINTIFF’S MOTION FOR INJUNCTION PENDING
APPEAL**

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INTRODUCTION

What makes the defendant a “world-renowned” health system is the heroes that it employs. Heroes like the plaintiffs. For defendant to take credit for its successes and its life saving measures would require giving credit to those hundreds that it is now terminating due to their religious beliefs and disabilities. And while the plaintiffs are asserting disability and religious discrimination claims, it appears as though the defendant is arguing (and the Court has accepted, see the first sentence of the Court’s Order, ECF 45 p. 1), that this is somehow a challenge to the defendant’s vaccination policy itself, which it is not.

Plaintiffs provided an exhibit of a patient seeking medical exemption paperwork from her doctor out of fear of having a seizure, to which her doctor, part of defendant’s network, stated “Believe me, I understand your situation 100%. As specialists, **our Division has already told us that we cannot offer any medical exemptions for the Covid vaccine – not even for anaphylaxis or severe allergic reactions or primary or secondary immunodeficiencies.**” (Compl., ECF 1, Ex. D. Emphasis added). A second email to a different patient stated, “The American College of Cardiology and Mass General Brigham **is strongly discouraging** cardiologists to write such letters at this time.” *Id.* Yet, the District Court’s Order issued on November 10, 2021 (corrected on 11/12/21) provided in a footnote that “Furthermore, defendant’s e-mails to network physicians were **apparently** based

on **guidance** from the Massachusetts Board of Registration of Medicine, which “warned that a physician who grants an exemption outside the acceptable standard of care may be subject to discipline,” citing to Board guidance that was issued **after the emails contained in Exhibit D were exchanged**. (Order, ECF 45, p. 27. Emphasis added). How the Court came to this conclusion, which provided ammunition for the defendant’s footnotes of its own opposition, is a mystery.

Plaintiffs provided as Exhibit 18 ahead of the November 4, 2021 hearing¹ a personal statement sent by an MGB employee named Terri Wentzell, and the email she received approving her religious accommodation. This has incredible significance, showing that defendant is not faced with an undue hardship, as it is accommodating other employees, and, more specifically, offering accommodation to employees who interact with patients. (Pl. Ex. 18). Yet defendant, in its opposition, stated that “Plaintiffs suggest **without citation to evidence** that they are somehow “similarly situated” to those employees that MGB did approve for religious or disability exemptions.” (Def. Opp., p. 19. Emphasis added). Defendant then buries within footnote 15 that plaintiffs “repeatedly cite to a single employee...” which is reference to citation to Exhibit 18. Better put, a **citation to**

¹ This hearing was referred to in defendant’s opposition as an “evidentiary hearing,” yet no evidence was presented at the hearing. Plaintiffs specifically requested an evidentiary hearing and an expedited deposition to fully establish the record and require defendant to provide evidence of its accommodation process yet they were denied. (ECF 17). The evidentiary record was submitted as Exhibits prior to the November 4, 2021 hearing.

evidence. Plaintiffs have established a more thorough record of the defendant's own processes than it has. Defendant has failed to show that it would be burdened specifically by accommodating plaintiffs. The District Court, instead of determining that the defendant failed to meet its burden, instead amended its rationale for denial from one hearing to the next.

First, while issuing his Order from the bench denying plaintiffs Motion on October 20, 2021, the Trial Judge stated "... it's unclear to me whether reasonable accommodations could be made here, and that's one of the things that I want to explore at the later hearing." (Tr. 10/20/21, 70:10-13). During the later hearing, plaintiffs pointed out that defendant **was providing accommodations, while simultaneously claiming it was a hardship to do so**, to which the Trial Judge stated "We don't know -- it's not in the record, we don't know, you know, I'm not sure it's even in the record whether that's true or not. Let's assume it is true. We don't know whether those are back-office finance people²." (Tr. 11/4/21, 12:16-20). Later during that same November 4, 2021 hearing, defendant admitted that it

² This is also a source of confusion for plaintiffs and should be for this Court. The Order cites as an implied justification for denial of an accommodation that these same back-office employees might be a direct threat, because "all MGB employees are expected to be deployable to the hospital[s] as needed." (Order, ECF 45, p. 16, citing Klompas Dec. ¶ 28). Thus, while attempting to justify the defendant's accommodation of certain employees in that those receiving accommodations **might be** back-office employees, and therefore less of a threat, the Court also provides that those same people could pose a direct threat while working at home, simply because they need to be ready to appear in person. This back-and-forth reasoning, always to the defendant's benefit, is present in nearly every issue addressed in the Order.

had accommodated at least 234 employees. (Order, ECF 45, p. 24). When asked whether they “knew anything” about the accommodated employees, the defendant stated “We don’t. they’re not in the record at this point.”³ (Tr. 11/4/21, 73:1-7). Then, while issuing his ruling from the bench, the Judge stated, “So I think the hospital, again based on this record has established that it would cause an undue hardship for them to have **substantial numbers of unvaccinated employees**, both because of the monetary costs and additional staffing burden, **whatever that is**, but also the nonmonetary costs as well.” (Tr. 11/4/21, 82:23-25 and 83:1-3). There has been no offering of what a “substantial number” is, or what the threshold for accommodations would be, which would be necessary to a determination of whether defendant met its burden of showing undue hardship. The end result was that the defendant did not actually have to meet a burden at all and is able to carry on doing the very thing it claims is not feasible, discriminating against the plaintiffs in the process.

³ Plaintiff correctly stated in a footnote that a named plaintiff has resigned instead of being terminated and another has capitulated out of necessity (and is unfortunately experiencing the very mental traumas that he sought accommodations for, however the record will need to be updated with the District Court). There is no denial of this fact, though plaintiffs contend that it is irrelevant, and the names can be provided to the Court upon request. However, with the issue of full disclosure now on the table, perhaps the defendant would confirm what it is failing to deny: that the accommodations that it has provided are not simply “back office” employees, but are employees that are directly in contact with patients.

LEGAL ARGUMENT

I. PLAINTIFFS MET THEIR BURDEN OF REQUESTING ACCOMMODATION AS THE DEFENDANT CONTROLLED THE PROCESS AND PROVIDED THE REQUIREMENTS FOR COMPLIANCE.

The defendant provided the procedure for obtaining an accommodation, which was reduced to forms. (Def. Ex. 2). On the religious exemption form, employees were required to submit explanations of their religious beliefs in a text box roughly two inches long⁴. (Compl., ECF 1, Ex. C). Each employee had to check a box agreeing that, if approved “... I will be required to follow all applicable infection control policies and procedures, including wear an approved mask.” *Id.* The plaintiffs were then offered an “interactive process,” which involved an anonymous member of a “committee” emailing the plaintiffs with questions, commonly distorting and challenging the plaintiffs’ asserted religious beliefs (see Def. Ex. 42-43) or, in over 90% of all accommodation requests, a denial of accommodation. (Tr. 11/4/21, 58:7-16, 71:9-12, Nichols Dec. ¶ 10-12). **Defendant has not provided what criteria was used in determining whether to grant accommodations.**

⁴ The District Court accepted, at face value, Ramona Nichols’ declaration stating that the instructions on the application provided that the text box “would expand as needed”. The exemption application form submitted by plaintiff DiCicco (Exhibit C) shows that to be false. Ms. Nichols offered Exhibit 20, which was a separate flu vaccine exemption application. Further, you can see from Exhibit C that the entirety of the readable text consisted of “It is my sincerely held religious and spiritual...” In short, a total of eight words visible.

If this were not troubling enough, the District Court posited the idea (echoed by the defendant in its Opposition) that plaintiffs requested only exemption from the vaccine itself, citing *Ortiz-Martinez v. Fresenius Health Partners, PR, LLC* 853 F.3d 599, 605 (1st Cir. 2017) and claiming that “[i]t is the plaintiffs’ burden to demonstrate what specific accommodations they needed and how those accommodations were connected to their ability to work.” (Order, ECF 45, p. 19).

The District Court therefore punished the plaintiffs in its analysis for failing to request more specific accommodations on a form that did not allow them to (which they had to use), from an individual that was never identified. The form also required them to abide by the hospital’s infection control procedures, which the defendant would inevitably provide to them. (Compl., ECF 1, Ex. C). Thus, the accommodation was to be provided by the defendant, by defendant’s own rules and process. This should be held against the defendant, not the plaintiff, demonstrating that the process was not set up to accommodate its employees, but to “minimize the number of unvaccinated staff at MGB.” (Nichols Dec. ¶ 14).

The District Court even quoted *Rocafort v. IBM Corp.*, 334 F.3d 115, 120 (1st Cir. 2003), stating that “[c]ases involving reasonable accommodation turn heavily on their facts and an appraisal of the reasonableness of the parties’ behavior.” The defendant’s construction of a process designed to prevent the plaintiffs from

receiving their accommodations (and resulting in 90% of all requests being denied) is hardly reasonable behavior.

II. PLAINTIFFS' CLAIMS HAVE BEEN MISCHARACTERIZED AS ONE CHALLENGING A VACCINE MANDATE AND DEFENDANT RELIES ON AUTHORITY THAT IS CLEARLY DISTINGUISHED FROM THE MATTER AT HAND.

1. This is not a challenge to the vaccination policy.

The very first sentence of the District Court's Order says "[t]his is a case challenging a mandatory COVID-19 vaccination policy." (Order, ECF 45, p. 1). It also provided that plaintiffs are "seeking to enjoin the defendant from enforcing its vaccination policy", implying a challenge to the policy itself, when the Complaint actually requested that defendant be enjoined from enforcing its vaccination policy **"against plaintiffs until either their religious beliefs and disabilities are accommodated,** the EEOC completes its investigation and/or issues every plaintiff a right to sue, or a verdict is rendered by a jury." (Compl., ECF 1, ¶ 81). Defendant, in its introduction, claimed that "[a]t stake in this case is the lifesaving effort of [MGB], a world-renowned health system, to protect its vulnerable patient population, its staff, visitors and the public from COVID-19 infection amidst a deadly ongoing global pandemic." Quite the contrary, plaintiffs have asserted, almost ad nauseum, that **they want to help fight the disease and are not challenging the policy itself,** but rather the defendant's discrimination.

Plaintiffs also never implied that this case involved state action, and specifically articulated to the Court that their cases cited emphasized the seriousness that Courts give to the ability to practice one's religion freely. (Tr. 11/4/21, 32:25 and 33:1-16). The District Court, failing to address the position that the choice between forsaking one's religious beliefs and feeding their family is not only the reason for the emotional distress (and not simply just "losing a job"), but in and of itself irreparable harm, simply mischaracterized this as plaintiffs arguing that defendant is a state actor, which was never the case. (Order, ECF 45, p. 39).

2. Defendant and the District Court relied upon cases easily distinguished from the instant case.

Both defendant and the District Court rely on cases that are easily distinguished from the matter at hand:

Beckerich v. St. Elizabeth Med. Ctr., 2021 WL 4398027 (E.D. Ky. Sept. 24, 2021), defendant claims that court "grappled with weighing similar harms," when in reality no adverse action was taken against the employees in that case, and a majority of the plaintiffs actually had their religious accommodations granted and simply lacked standing.

Johnson v. Brown, 2021 WL 4846060 (D. Or. Oct. 18, 2021) which dealt with healthcare workers challenging a state-ordered COVID-19 vaccine mandate and not discrimination claims against a private employer.

Does 1-6 v. Mills, 2021 WL 4860328 (1st Cir. Oct. 19, 2021). This case is distinguished from *Mills*, as this Court first found that the *Mills* plaintiffs asserted only a loss of their job and loss of income, stating that the *Mills* plaintiffs' claims of undue hardship amounted to a case of "insufficiency of savings or difficulties in immediately obtaining other employment," citing *Sampson v. Murray*, 415 U.S. 90, 91 (2019). Here, our plaintiffs asserted numerous other and separate irreparable harms. (Tr. 11/4/21, 31:16-25, and 32:1-24). This case does not challenge state action or the constitutionality of a state statute, nor is defendant barred from offering accommodation by a state statute. Here, the defendant **is accommodating religious beliefs and disabilities** and cannot claim undue hardship for doing the very thing it claims is not feasible. This is important: the *Mills* determination found that the hospital would suffer hardship for accommodating employees at all. **If this is a hardship to MGB, why did it go through the charade of an accommodation process if it was simply going to deny the accommodation requests?** And if it was not a charade, then **what makes accommodating the 267 plaintiffs a hardship as opposed to the other 234?** This question goes unanswered, and no evidence has been submitted that accommodating the 267 specific plaintiffs would actually pose a hardship. Lastly, the statute at issue in *Mills* has been in effect for over a year, whereas plaintiffs' claims in the instant matter are only a little more than a month old.

III. DEFENDANT FAILED TO EXPLAIN UNDUE HARDSHIP IN ITS OPPOSITION DESPITE ACCOMMODATING OTHERS

Defendant spent one paragraph in its Opposition on the largest issue: that it is doing the very thing it claims is not feasible: accommodating employees' religious beliefs and disabilities in the workplace. It posits the argument that because plaintiffs want their religious beliefs and disabilities accommodated in accordance with the law, that they are assuming that "it cannot be an undue burden to approve *all* of the requested exemptions." (Def. Opp., pp. 19-20). It then quotes a portion of the District Court's Order that says that defendant "does not have to show that it eliminated all risk from all possible sources of COVID-19 infection. That is simply not possible, given the realities of operating a major hospital organization during a worldwide pandemic." (Order, ECF 45, p. 24). It is unclear what argument is being made, as plaintiffs are not claiming that "all" exemption requests must be accepted (just 267 out of over 2,400) nor are they seeking for the defendant to eliminate all sources of COVID-19 infection. What they are seeking is for the defendant to abide by the law.

CONCLUSION

This case is easily distinguished from *Mills*, and the defendant has not demonstrated that it would be an undue hardship to accommodate the plaintiffs. This Court should ALLOW plaintiffs' Motion for Injunction Pending Appeal.

Respectfully submitted,

Dated: November 15, 2021

/s/ Ryan P. McLane

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/s/ Ryan P. McLane

Ryan P. McLane

Attorney for Plaintiff-Appellant

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I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Ryan P. McLane
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