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REPLY TO FLORIDA

September 29, 2021

VIA EMAIL ONLY

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Brent Hubbard
President and COO
Mercy Hospitals Springfield
Via Executive Assistant:
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Phil Wheeler
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RE: Unlawful Denial of Religious Exemption Requests by Mercy Health

Dear Messrs. Britton, Hubbard and Wheeler:

On September 16, 2021, the Law Offices of Joseph A. Morrey (in association with Liberty Counsel) wrote to Mercy Health (“Mercy”) regarding an employee whose religious exemption request was improperly denied. See attached correspondence. To date, we have received no response on [REDACTED] request. This letter incorporates by reference the general factual allegations and legal analysis contained therein. **I am requesting a response by Monday, October 4, 2021 at 5:00 PM**, or Liberty Counsel will take additional action.

In addition to [REDACTED], numerous employees have contacted Liberty Counsel because Mercy is taking adverse employment action against them. Mercy refuses to reasonably accommodate their sincerely-held religious beliefs that prohibit them from getting the COVID shots. Some have been terminated already; still others have been threatened by supervisors, despite religious exemption requests being approved. The following are slated to be suspended as of 5:00 PM tomorrow, September 30, and to be terminated thereafter by Mercy:

- 1. [REDACTED]
- 2. [REDACTED]
- 3. [REDACTED]
- 4. [REDACTED]
- 5. [REDACTED]
- 6. [REDACTED]
- 7. [REDACTED]

- 8. [REDACTED]
- 9. [REDACTED]
- 10. [REDACTED]
- 11. [REDACTED]
- 12. [REDACTED]
- 13. [REDACTED]
- 14. [REDACTED]

In general, when Mercy has received religious accommodation requests, it has insisted on “more information” and “more explanation” of the employee’s religious beliefs, regardless of the fact that the employee’s original religious exemption provided ample explanation. In short, in many instances, Mercy has demanded ever more “explanation,” with nothing being sufficient to satisfy Mercy’s “Review Committee.” Mercy does not make Catholic faith an occupational requirement for all employees. And, Mercy claims that “Mercy does not exclude people or treat them differently because of race, color, national origin, sex, **religion**, age, disability, sexual orientation, or gender identity.¹” However, despite the name “Mercy” and corollary religious marketing,² there has been no “mercy” for the above employees and likely many others.

In its responses, Mercy appears to be attempting to “expose” claimed inconsistencies between its employees’ currently expressed beliefs and their prior medical decisions and/or between their expressed beliefs and the beliefs of other religious persons. At best, Mercy is improperly trying to dissuade its employees from continuing to seek a religious exemption by suggesting employee past conduct or understanding is disqualifying. At worst (and more likely), these questions and demands are designed to manufacture pretexts for denying religious exemptions.

While Mercy Health has cited the USCCB’s recitation of Pope Francis’ discussion of the morality of the COVID shots despite their testing or manufacturing with aborted fetal cell lines, Mercy Health neglected to include or take action consistent with the admonition by Pope Francis that “**vaccination is not, as a rule, a moral obligation and that, therefore, it must be voluntary.**”³ (Emphasis added).

Mercy has no legal authority to dictate what employee’s religion is or ought to be, or to be the arbiter of the validity or reasonableness of any employee’s religious beliefs. Nor does Mercy have the authority to demand that a third party validate any employee’s religious beliefs. An employee’s religious beliefs need only be sincere to merit legal protection and require Mercy’s accommodation. And given Mercy’s barely concealed animus towards the religious beliefs of its employees, any employee who would risk Mercy’s retaliation by making a religious exemption request should be presumed sincere, and the law requires it.

Title VII of the Civil Rights Act of 1964 prohibits Mercy from discriminating against its employees on the basis of their sincerely held religious beliefs. *See* 42 U.S.C. §2000e-2(a) (“It shall be an unlawful employment practice 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”); *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (same). Title VII defines “religion” as “all aspects of religious observance and practice, as well as belief.” 42 U.S.C. §2000e(j). Moreover, as the EEOC has made clear, Title

¹ <https://www.mercy.net/about/legal-notices/nondiscrimination-notice/>

² “As the Sisters of Mercy before us, we bring to life the healing ministry of Jesus through our compassionate care and exceptional service,” available at <https://mercyhealthfoundation.net/about/>, last visited September 29, 2021.

³ See Note 5, *CONGREGATION FOR THE DOCTRINE OF THE FAITH: Note on the morality of using some anti-Covid-19 vaccines*, available at https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20201221_nota-vaccini-anticovid_en.html, last visited September 16, 2021.

VII's protections also extend to nonreligious beliefs if related to morality, ultimate ideas about life, purpose, and death. *See* EEOC, *Questions and Answers: Religious Discrimination in the Workplace* (July 22, 2008), <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> (“Title VII’s protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs. Religious beliefs include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic ‘moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.’ Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns ‘ultimate ideas’ about ‘life, purpose, and death.’”).

Mercy is not permitted to determine which religious adherent has a “correct” or “proper” or “valid” understanding of religious doctrine, or whether any employee’s sincerely held religious beliefs are shared broadly among other faithful. As the Supreme Court has recognized, employees’ “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [legal] protection.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (same). Additionally, though membership in or adherence to the tenets of an organized religion is plainly sufficient to provide protection for an individual’s sincerely held religious beliefs, it is not a necessary precondition. *See Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 (1989) (“**Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection [for sincerely held religious beliefs], one must be responding to the commands of a particular religious organization.**” (emphasis added)); *see also Office of Foreign Assets Control v. Voices in the Wilderness*, 329 F. Supp. 2d 71, 81 (D.D.C. 2004) (noting that the law provides protection for “sincerely held religious beliefs,” “not just tenets of organized religion”).

Mercy is simply not permitted to require employees to engage in “creative writing” nor a doctoral dissertation to the satisfaction of Mercy’s “Review Committee.”

LEGAL DEMAND

As summarized and analyzed in previous correspondence, Mercy’s denials of the religious exemption requests of Employees 1-14 are unlawful. Mercy cannot compel any employee’s compliance with Mercy’s mandatory COVID-19 vaccination policy against the employee’s sincerely held religious beliefs, and cannot single out religious exemption requests for disfavored treatment. Moreover, it is unlawful for Mercy to deny any employee’s request for religious accommodation based on the absence of a third party’s endorsement, or based on the religious beliefs of any other person or organization.

Liberty Counsel prefers to avoid the need for further legal action, and trusts that the points and authorities presented in this and previous correspondence demonstrate to Mercy that its pretextual and discriminatory denials of its employees’ requests for religious accommodation are unlawful. Should Mercy continue its unlawful denials, however, Liberty Counsel will be forced to conclude that Mercy is disregarding its obligations to provide accommodations to employees with

sincerely held religious objections to the COVID-19 vaccines in violation of both federal and state law.

Liberty Counsel is giving Mercy a final opportunity to grant the religious exemption requests of Employees 1-14 without litigation. To avoid litigation in due time, Mercy must provide, prior to Monday, October 4, 2021, at 5:00 P.M., Mercy's assurances that:

- 1) Mercy has granted the religious exemption requests of Employees 1-14 and notified them of their granted exemptions;**
- 2) Mercy has reinstated the employment of [REDACTED], with the same compensation and benefits as before termination.**
- 3) Mercy will not deny (and will reverse any prior denial of) any religious exemption request based solely on the employee's patient-facing position;**
- 4) Mercy will not deny (and will reverse any prior denial of) any religious exemption request based on evaluation criteria less favorable to religious exemption requests than to medical, pregnancy, or any other category of exemption allowed by Mercy;**
- 5) Mercy will not deny (and will reverse any prior denial of) any religious exemption request based on the absence of approval or acknowledgement of the employee's religious beliefs by a third party;**
- 6) Mercy will not deny (and will reverse any prior denial of) any religious exemption request based on any stated or perceived different beliefs by any religious denomination or organization;**
- 7) Mercy will not deny (and will reverse any prior denial of) any religious exemption request based on an employee's past vaccination or other health decisions or the employee's theological reasons for those decisions; and**
- 8) Mercy will not deny any religious exemption request without providing specific reasons for the denial, and will provide specific reasons for denial at the request of any previously denied employee.**

Mercy's failure to respond positively or timely, or Mercy's taking of any adverse or retaliatory action against Employees 1-14 (or further adverse or retaliatory action against Employees 1-14), or any other employee who has requested religious accommodation, will indicate to Liberty Counsel that Mercy will not comply with its legal obligations against discrimination without judicial intervention. In that event, we will proceed directly without further warning with additional actions to vindicate the legal rights of Employees 1-14, and other Mercy employees.

EVIDENCE PRESERVATION DEMAND

In connection with the foregoing Legal Demand, Liberty Counsel also demands that Mercy preserve all records, data, documents, devices, and things in its possession or the possession of its employees, including private wireless phones and devices and records and data found thereon, from January 1, 2020 to the present (and continuing), constituting, reflecting, or reasonably related to the following:

1. The conception, formation, membership, staff, volunteers, administration, policies, guidelines, communications, analyses, opinions, deliberations, decisions, meetings, and other official or unofficial actions of the Mercy Healthcare COVID-19 Vaccination Exemption Review Committee;
2. All requests for exemption from or workplace religious accommodation with respect to receiving a COVID-19 vaccine submitted to the COVID-19 Vaccination Declination Consideration Committee or any other person or persons employed by or under the direction and control of Mercy, from Employees 1-14, or any other Mercy employee, and all communications, analyses, opinions, deliberations, decisions, meetings, and other official or unofficial actions of the Mercy Healthcare COVID-19 Vaccination Exemption Review Committee, or such other person or persons concerning such exemption or accommodation requests; and
3. Any training received by any Mercy Healthcare COVID-19 Vaccination Exemption Review Committee member, consultant, employee, or volunteer, or any Mercy employee, consultant, volunteer, or board member regarding the conception, enactment, and administration of Mercy's mandatory COVID 19 vaccination policy, including without limitation the review, consideration, and disposition of requests for religious exemption or accommodation from the policy.

The records, data, and documents subject to this demand include all paper and other physical files and all electronically stored information (ESI), including but not limited to e-mail, text, SMS, MMS, social media, and other electronic communications, whether maintained on a personal or business device or account, including on personal wireless devices, personal e-mail accounts, and personal social media accounts; and further including without limitation word processing documents, spreadsheets, databases, calendars, telephone logs, contact information, usage files, and access information from networks, databases, computer systems (including legacy systems, hardware, and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges, and other storage media, laptops, personal computers, tablets, digital assistants, handheld wireless devices, mobile telephones, paging devices, and audio systems (including voicemail).

Liberty Counsel expects Mercy to preserve records, data, documents, devices, and things from January 1, 2020, to the present (and continuing) in Mercy's possession and in the possession of any third party under its control. If Mercy knows or reasonably determines that any older records, data, documents, devices, or things are potentially relevant, however, Mercy should preserve such materials from the relevant earlier period as well.

ESI is an important and irreplaceable source of evidence in connection with this matter. Liberty Counsel cautions Mercy that this preservation demand should be afforded the broadest possible interpretation with respect to ESI, and that responsive ESI can reside not only in areas that are reasonably accessible but also in areas that Mercy may deem not reasonably accessible. Liberty Counsel demands that Mercy preserve all responsive ESI, even if Mercy does not anticipate an obligation to produce such ESI in future litigation.

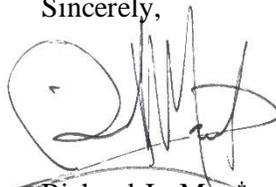
Preservation of ESI may require more than simply refraining from efforts to destroy or dispose of such evidence. Mercy may have to affirmatively intervene in automatic processes to prevent data loss due to routine operation and overwriting. For instance, sources of ESI can be altered and erased simply through continued use of a computer or other device. Booting a drive, examining its contents, or running any application can irretrievably alter the evidence it contains and may constitute unlawful spoliation of evidence. Mercy should take care to employ proper techniques and protocols, hiring an expert to assist if necessary.

Mercy should be aware that employees or others may seek to hide, destroy, or alter ESI, and Mercy must act to prevent or guard against such actions. Users may seek to delete or destroy information they regard as personal, confidential, or embarrassing and, in so doing, may also delete or destroy responsive ESI. Though Liberty Counsel expects Mercy will act swiftly to preserve data on office workstations and servers, Mercy should also determine whether any home or portable systems contain potentially responsive ESI. Mercy must preserve the contents of the systems, devices, and media used for those purposes as well.

I am available to discuss reasonable preservation steps; however, Mercy should not delay in taking proper precautions to preserve relevant records, data, documents, and things if they may be lost or corrupted as a consequence of delay. Should Mercy's failure to preserve potentially relevant evidence result in the corruption, loss, or delay in production to which Employees 1-14 may later be entitled, such failure would constitute spoliation of evidence, for which sanctions may be imposed.

Please govern yourselves accordingly.

Sincerely,



Richard L. Mast[†]

CC

Via Email

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