

In the New York State Courts

By Leonard M. Rosenberg

Appellate Division Prohibits District Attorney From Prosecuting Nurses for Their Simultaneous Resignations from Nursing Home, and Their Attorney for Advising Nurses That Resignations Were Legal

Vinluan v. Doyle, ___ N.Y.S.2d ___, 2009 WL 93065 (2d Dep't 2009). Petitioners, a group of nurses and their attorney, commenced an Article 78 proceeding to prohibit the District Attorney from prosecuting the nurses for their simultaneous resignations from a nursing home and from prosecuting their attorney for advising them that it was legal to do so. The nurses were recruited to work in the United States by an agency promising that they would be hired directly by individual nursing homes and provided with free travel, housing, medical coverage, and training. They were also allegedly promised training and assistance in obtaining legal residency and nursing licenses. Instead, the nurses signed contracts with an employment agency (a lower paid and less stable form of employment), and were assigned to work at a nursing home where they cared for chronically ill children who needed the assistance of ventilators to breathe. Some nurses were required to work as clerks in the nursing home because the agency failed to obtain nursing licenses for them. Further, they were allegedly housed in a single-family staff house with only one bathroom, inadequate heat, and no telephone service.

The nurses first made informal oral complaints about working conditions and pay. When those complaints went unheeded, they wrote several letters to the agency and nursing home to outline their concerns. Believing their concerns were not properly addressed, they sought the assistance of an attorney, Felix Vinluan, who advised them that they had the



right to resign from their positions once their shifts ended, though it might be better for them to remain at the nursing home while he pursued other remedies on their behalf. The nurses elected to resign from their positions either immediately following their shift or in advance of their next shift, with notice ranging from eight to seventy-two hours.

Within the next year, the Suffolk County Grand Jury handed down a 13-count indictment against petitioners, charging, among other things, conspiracy to endanger the welfare of a child and endangering the welfare of a physically disabled person. The nurses moved to dismiss the criminal indictment in the Supreme Court, Suffolk County, arguing that the prosecution contravened their Thirteenth Amendment rights. Vinluan also moved to dismiss the criminal indictment, alleging violations of his First and Fourteenth Amendment rights. The motion court denied their motions to dismiss, concluding that there was ample evidence before the grand jury to support all of the counts. Petitioners then commenced an Article 78 proceeding seeking a writ of prohibition. The Appellate Division, Second Department, held that these criminal prosecutions constituted an impermissible infringement upon the constitutional rights of the petitioners, and that the issuance of a writ of prohibition to halt these prosecutions was the appropriate remedy in this matter.

When a petitioner seeks relief in the nature of a prohibition, the court must first determine whether the issue presented is the type for which the remedy may be granted. Rely-

ing on Court of Appeals precedent stating that prohibition is the proper vehicle to prevent defendants from being prosecuted for crimes for which they could not be constitutionally tried, the court found prohibition to be an available remedy.

The court must then determine whether prohibition is warranted by the merits of the claim. Even if there is merit to petitioners' claims that the prosecution violates their constitutional rights, the court must still decide whether a writ of prohibition should issue as a matter of discretion. This entails weighing several factors, including the gravity of the potential harm caused by the threatened excess of power, whether the potential harm can be adequately corrected on appeal or by other proceedings in law or in equity, and whether prohibition would furnish a more complete and efficacious remedy even though other methods of redress are technically available.

The court found that both the nurses and attorney brought forth meritorious claims. Subjecting the nurses to criminal sanctions for their act of resigning effectively subjects them to involuntary servitude in violation of the Thirteenth Amendment, which "bars compulsory labor enforced by the use or threatened use of physical or legal coercion." The court reiterated Supreme Court precedent in recognizing that though "there is great societal value in the enforcement of contracts and collection of debt, . . . the constitutional prohibition against compulsory service means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor." These circumstances did not fall under a narrow class of civic duties that have been traditionally been enforced by means of imprisonment (e.g., military

service), nor did they fall under an exceptional or extreme case justifying a restriction of their Thirteenth Amendment rights. Here, the nurses were engaged in private employment, not public service. Their skills were not so unique or specialized that they could not be performed by any other qualified nurses. Also, the nurses did not abandon their posts in the middle of their shifts, and coverage was obtained. While the Penal Law section underlying the prosecutions proscribes the creation of risk to children and the physically disabled, here, “the greatest risk created by the resignation of these nurses was to the financial health of [the agency].”

The Appellate Division also held that the prosecution violated Vinluan’s constitutionally protected rights of expression and association in violation of the First and Fourteenth Amendments, which require a measure of protection for advocating lawful means of vindicating legal rights. Vinluan’s legal advice was constitutionally protected because he did not advise the nurses to commit a crime. But more importantly, his good-faith legal advice is protected because it was objectively reasonable. The court commented at length on the “profoundly disturbing” potential impact of a decision to prosecute Vinluan’s advice:

It would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. . . . A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right

of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.

The court finally commented that a prosecution which would not only compel the disclosure of privileged attorney-client confidences, but also potentially inflict punishment for the good-faith provision of legal services, goes beyond a First Amendment violation. “It is an assault on the adversarial system of justice upon which our society, governed by the rule of law rather than individuals, depends.”

The court concluded that the writ of prohibition should issue as a matter of discretion upon a weighing of the relevant factors. When petitioners are threatened with prosecution for crimes for which they cannot be constitutionally tried, the potential harm to them is so great and the ordinary appellate process so inadequate to address that harm that prohibition should lie.

Second Circuit Court of Appeals Rules That Hospital Is Joint Employer of Nurse Employed by Staffing Agency and Is Therefore Liable for Overtime Pay, Liquidated Damages and Attorneys Fees Under the Fair Labor Standards Act

Barfield v. New York City Health and Hospitals Corporation, 537 F.3d 132 (2d Cir. 2008). Plaintiff Anetha Barfield was a temporary nurse at defendant Bellevue Hospital Center (the “Hospital”). Plaintiff sued on behalf of herself, and a class of similarly situated temporary employees of the Hospital, for violations of the Fair Labor Standard Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, for the Hospital’s failure to pay overtime wages. Plaintiff was temporarily employed by the Hospital through three separate referral agencies. Through the three referral agencies, plaintiff collectively worked more than 40 hours per week for the Hospital on occasion, although she never worked more than 40 hours

per week for the Hospital through any single agency. The parties cross-moved for summary judgment before the District Court on the issue of liability. The District Court granted summary judgment in favor of plaintiff and awarded her unpaid overtime wages and liquidated damages. The District Court, however, reduced plaintiff’s claim for attorney’s fees based on plaintiff’s failure to certify a class.

Plaintiff appealed the reduction of attorney’s fees, and the Hospital appealed the court’s finding that, as a matter of law, the Hospital was a joint employer with the referral agency under the FLSA, and also appealed the award of liquidated damages. The Court of Appeals affirmed the District Court’s ruling in its entirety.

It was undisputed that plaintiff was paid by the referral agencies. The central issue was whether the Hospital was also plaintiff’s employer under the FLSA. The court held that “even when the historical facts and the relevant factors are viewed in the light most favorable to [the Hospital], [the Hospital]’s status as [plaintiff]’s joint employer is established as a matter of law.” The court concluded that under the traditional four-factor test set forth in *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), the Hospital exercised sufficient functional control over plaintiff’s work to qualify as her joint employer. The Second Circuit also held that the following six factors, outlined in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003), indicated that the Hospital was a joint employer of plaintiff: (1) plaintiff worked on the Hospital’s premises and used the Hospital’s equipment; (2) the referral agencies did not shift as a unit from one putative joint employer to another, but instead each agency employee was assigned to the same hospital; (3) plaintiff performed work integral to the Hospital’s operation; (4) plaintiff’s work responsibilities at the Hospital stayed the same regardless of which agency referred

her for a particular assignment; (5) the Hospital effectively controlled on-site terms and conditions of plaintiff's employment; and (6) plaintiff worked exclusively for the Hospital.

The court also rejected the Hospital's claim that plaintiff's own actions, specifically using three separate agencies to work more than 40 hours per week when she knew that the Hospital had a policy against temporary employees working more than 40 hours per week, precluded an award for summary judgment in her favor. The court ruled that evidence in the record that the Hospital confirmed and approved all of plaintiff's hours precluded the Hospital from relying on this defense.

The court affirmed the District Court's award of liquidated damages to plaintiff, finding that the Hospital failed to meet its heavy burden of demonstrating it took active steps to ascertain the dictates of the FLSA and then act to comply with them. In so finding, the court noted that liquidated damages are the norm and single damages the exception under FLSA.

The District Court reduced plaintiff's claim for attorney's fees because plaintiff failed to certify the collective class, as the "limited anecdotal hearsay" proffered by plaintiff was inadequate to demonstrate that plaintiff and potential class members together were victims of a common policy or plan that violated the law. Plaintiff argued that her attorney's fees should not have been reduced because she prevailed on her FLSA violation against the Hospital and the certification of the class was not relevant to an award of attorney's fees under the FLSA. The Court of Appeals affirmed, holding that the District Court's assessment of the "degree of success" achieved in a case was not limited to whether a plaintiff prevailed on individual claims. Accordingly, the reduction of plaintiff's attorney's fees was not an abuse of the District Court's discretion since plaintiff's collective class was not certified.

A Medical College's Submission of Negative Evaluation of Anesthesiology Resident to American Board of Anesthesiologists Was Not Defamatory or in Breach of Contract; Alleged Agreement to Provide Neutral Reference in Exchange for Resignation Against Public Policy

Pandian v. New York Health and Hospitals Corp., 54 A.D.3d 590, 863 N.Y.S.2d 668 (1st Dep't 2008).

Plaintiff, an anesthesiology resident in the Medical College, received negative performance evaluations both before and after an incident in which he was reported to have fallen asleep during surgery. Plaintiff alleged that the parties orally agreed that plaintiff would resign in exchange for withdrawal of disciplinary charges against him and a promise of a "neutral" reference in response to any employment or other residency inquiry.

Thereafter, in response to inquiry from the American Board of Anesthesiologists (the "Board"), the Medical College apparently disclosed the incident that led to plaintiff's resignation. Plaintiff then sued the Medical College, alleging that negative evaluations of him and its communications to the Board were defamatory, and in breach of the parties' agreement to provide only a "neutral" response to inquiries. The court affirmed dismissal of plaintiff's breach of contract claim because plaintiff did not allege that defendants agreed to exclude the incident in evaluations sent to the American Board of Anesthesiologists. The court also held that since the Medical College was required to provide evaluations to the Board to ensure the competency of anesthesiologists, plaintiff's alleged agreement would subvert the objective of evaluating residents and thus would be against public policy.

In affirming dismissal of plaintiff's defamation claim, the court determined that plaintiff failed to

demonstrate that the Medical College was motivated by actual malice in making the negative statements in plaintiff's evaluations.

Likewise, in affirming dismissal of plaintiff's claim for interference with prospective economic advantage, the court concluded that plaintiff failed to allege a motive of malice or the infliction of injury by unlawful means in defendant's submission of the negative evaluation of plaintiff to the Board. Similarly, the court found that plaintiff's claim for intentional infliction of emotional distress was meritless since plaintiff did not demonstrate that defendant acted in an outrageous and egregious manner in its submission of the evaluation.

Based on the foregoing, the court ruled that plaintiff failed to satisfy any of the necessary criteria to assert a claim against the Medical College, and accordingly, dismissed plaintiff's complaint in its entirety.

Employment Policy Requiring Hospital Employees to Speak English in Certain Situations While on Duty Does Not Violate Federal or State Anti-Discrimination Laws

Pacheco v. N.Y. Presbyterian Hosp., No. 02-CV-9438, 2009 WL 55886 (S.D.N.Y. Jan. 9, 2009). In this suit, plaintiff alleges that the Hospital had discriminated against him and a class of Hispanic employees in violation of Title VI and Title VII, § 1981a, the New York State Human Rights Law and New York City Human Rights Law by prohibiting employees from speaking Spanish at certain times while working in the Hospital's Ambulatory Referral Registration Area (ARRA), and that the Hospital retaliated against him after he complained. The court granted summary judgment dismissal of the complaint.

After receiving complaints that patients believed employees were speaking about and laughing at them in a language other than English, ARRA management required employees to speak English while in the

vicinity of patients. ARRA employees, however, were encouraged to assist Spanish-speaking patients by talking to them in Spanish, and were never prohibited from speaking Spanish while off duty. Further, no Hospital representative had ever made disparaging remarks to plaintiff about his national origin.

Plaintiff alleged that after complaining about the language-restriction policy, an ARRA manager retaliated against him by changing his schedule, telling him he would be assigned to weekend work, and requiring him to complete an assignment shortly before his shift ended. Plaintiff also alleged that the manager criticized his work.

Believing his complaint to the Human Resources Department was ignored, plaintiff sought and obtained a transfer back to his prior position where he received the same salary, benefits, and seniority he had in the ARRA. Plaintiff alleged he was compelled to seek this transfer, and that by doing so his opportunity for positions in other departments, as well as promotions, was hindered.

In asserting his Title VII claim, plaintiff alleged that the Hospital's language-restriction policy involved disparate treatment, disparate impact, hostile work environment, and retaliation.

While Title VII does not expressly identify language as a protected class, an English-only employment policy can, in certain circumstances, give rise to a Title VII racial discrimination claim if the "employer's practices reflect an intent to discriminate on the basis of the classifications protected by Title VII, including race and national origin." In evaluating such claims, courts consider whether there is evidence, aside from the language policy, of the employer exhibiting discriminatory conduct, or whether the employer's policy applied only to work-related communications and was justified by business necessity.

In this case, the court found that, even assuming plaintiff made out a prima facie case of discrimination, he could not establish that the Hospital's language-restriction policy was anything other than a legitimate, non-discriminatory business necessity. The Hospital did not have a "blanket prohibition against any non-English practice," and the requirement to speak English only was limited to situations where employees were on-duty and within hearing range of patients in the ARRA.

The disparate treatment claim also failed because plaintiff could not establish any adverse employment action, either because of his status as a protected class or in retaliation for his complaint about the Hospital's purported discriminatory conduct. There was no evidence that plaintiff's voluntary lateral transfer was a "materially adverse change in the terms and conditions of [his] employment." Similarly, the slight change to plaintiff's work schedule, the alleged criticism, and the request to complete an assignment shortly before his shift ended fell far short of being materially adverse, which requires more than a mere inconvenience or alteration to job responsibilities.

To establish his disparate impact claim, plaintiff had to demonstrate that the Hospital's language-restriction policy, even if facially neutral, imposed a significant adverse or disproportionate impact on a protected class. This requires a burden-shifting analysis where a plaintiff must identify a causal connection between an employment policy or practice and an existing disparity in the workplace. Once a defendant establishes there was a business justification for the policy or practice, a plaintiff must show there was an alternative, non-discriminatory practice that could satisfy the business need without the disparate effect.

In finding for the Hospital, the court stated that plaintiff failed to demonstrate any less discriminatory

alternative to the Hospital's policy that employees in the ARRA speak English in certain circumstances, namely, while in the presence of patients.

The court rejected plaintiff's hostile work environment claim because plaintiff could not point to any misconduct so severe or pervasive that it created an objectively hostile or abusive work environment. Plaintiff, who admitted to being fully bilingual in English and Spanish, could not allege difficulty in speaking English in the limited circumstances required by ARRA management. Similarly, plaintiff admitted he suffered no disparaging remarks about his national origin while working in the ARRA.

National Childhood Vaccine Injury Act (NCVIA) Defense Brings Dismissal of Medical Malpractice Action

Crucen ex rel. Vargas v. Leary, 55 A.D.3d 510, 867 N.Y.S.2d 49 (1st Dep't 2008). Plaintiffs brought a medical malpractice action arising from vaccinations the infant plaintiff received at defendant hospitals. The complaint alleged that the defendants administered the vaccines, failed to properly treat the conditions arising subsequent to the vaccinations, and failed to obtain informed consent. Defendants successfully moved to dismiss the complaint on the grounds that the National Childhood Vaccine Injury Act of 1986 (NCVIA) provides a no-fault compensation program for "vaccine related injury or death." The Appellate Division affirmed the dismissal.

In reaching its decision, the court first analyzed whether the NCVIA statute applied. 28 U.S.C. § 300aa provides, in relevant part, that no person may institute a civil action in state or federal court for damages in excess of \$1,000 against a "vaccine administrator or manufacturer" arising from a "vaccine-related injury or death associated with the administration of a vaccine," and no court may award damages in excess of \$1,000 unless a

petition has been filed for compensation under the National Vaccine Injury Compensation Program. 28 U.S.C. § 300aa-11(a)(2)(A). The statute further states that if such a civil action is filed in state or federal court, the court must dismiss the action. 28 U.S.C. § 300aa-11(a)(2)(B).

Because plaintiffs alleged that each defendant either directly administered covered vaccines or treated plaintiff for injuries that arose shortly thereafter and were attributed to the vaccinations, the defendants were “vaccine administrators” under NCVIA. Additionally, the alleged injuries and the alleged failure to properly diagnose and treat conditions allegedly caused by vaccinations were “vaccine-related,” within the meaning of the NCVIA. Accordingly, the court ruled that defendant medical service providers were protected by the NCVIA.

Because plaintiffs admitted that they did not file a petition for compensation under the NCVIA, the court dismissed the complaint in compliance with the clear mandate of the statute.

Finally, the court rejected plaintiffs’ contention that defendants should be estopped from raising NCVIA as a defense because they failed to inform plaintiffs of the program, as required by 42 U.S.C. § 300aa-26(d). The court found that estoppel cannot operate to create a right where none exists.

District Court Dismisses Equal Protection Challenge to Kendra’s Law, but Declines to Dismiss Americans with Disabilities Act Claim

Mental Disability Law Clinic v. Hogan, No. CV-06-6320, 2008 WL 4104460 (E.D.N.Y. 2008). Plaintiff, the Mental Disability Law Clinic at Touro Law Center (the Law Clinic), filed class actions on behalf of its constituents under the Protection and Advocacy for Mentally Ill Individuals Act (PAMII). Plaintiff alleges that New

York Mental Hygiene Law (MHL) § 9.60 (commonly known as Kendra’s Law) violates the Equal Protection Clause of the Fourteenth Amendment and the American with Disabilities Act. MHL § 9.60 provides for court ordered “assisted” outpatient mental health treatment (AOT) for persons who have been hospitalized twice within the past three years or who have acted violently toward themselves or others as a result of mental illness. Plaintiff alleges that if Kendra’s Law did not contain the eligibility requirements of MHL § 9.60(c)(4), individuals subject to hospitalization could avoid inpatient care by complying with a regimen of AOT.

The District Court denied defendants’ motion to dismiss for lack of standing. In reaching that conclusion, the District Court explained that Congress has authorized PAMII organizations, such as the Law Clinic, to sue if they can meet the traditional test of associational standing.

With respect to defendants’ motion to dismiss plaintiff’s Equal Protection claim requiring that “all persons similarly situated should be treated alike,” the District Court applied a rational basis scrutiny rather than the strict scrutiny suggested by plaintiff. The court noted that “Kendra’s law does not impinge upon an individual’s fundamental right to liberty because it does not speak to whether individuals who fail to meet its criteria will otherwise be committed.” Under the rational basis standard, the District Court found that “[a]lthough the law undoubtedly overlooks some who may benefit from intervention through AOT . . . there is no indication of irrationality in the legislature’s actions, which appear to be an attempt to balance the state’s interest in addressing services to those most at risk for relapse or violence with the civil liberties of other individuals with mental illness.”

The District Court reached a different conclusion with respect to plaintiff’s ADA claims. In order to

make out a claim under Title II of the ADA, a plaintiff must show that (1) she is a qualified individual with a disability; (2) that the defendants are subject to the ADA; and (3) that plaintiff was denied the opportunity to participate in or benefit from defendants’ services, programs, or activities, or was otherwise discriminated against by defendants, by reason of plaintiff’s disabilities. Here, plaintiff alleged violations of the ADA’s so-called “integration mandate,” a regulation implementing provisions of Title II, which requires that: “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”

In interpreting this mandate, the Supreme Court has held that “unnecessary segregation of individuals with mental illness is discriminatory per se and a violation of the ADA; no demonstration of differential treatment between individuals with mental illness and those without is required” (citing *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999)). Based on *Olmstead*, the District Court held that plaintiff stated a claim under the ADA, as individuals who, at the time of an evaluation for inpatient commitment, would and could benefit from AOT but for the requirements of MHL § 9.60(c)(4), are unnecessarily segregated if hospitalized.

Decedents’ Niece Lacks Standing to Sue Hospital and Its Board of Trustees for Their Alleged Failure to Use Testamentary Bequests in the Manner Specified by Decedents’ Wills

Rettek v. Ellis Hospital, 2009 WL 87592, 08-CV-844 (N.D.N.Y. Jan. 12, 2009). Plaintiff commenced a diversity action, asserting claims for breach of trust, breach of fiduciary duty, imprudent investment under the New York State Not-for-Profit Corporations Law (N-PCL), wrongful modification of the terms of a gift under N-PCL, and seeking the imposition of

a constructive trust, and accounting, and a declaratory judgment against defendant, Ellis Hospital, for the Hospital's alleged failure to use the residuary of her aunt's and uncle's estates in the manner directed in their wills.

Plaintiff's aunt and uncle, the Belangers, directed in their respective wills that 75% of the residuary of each of their estates would pass to Ellis Hospital, "to be used in improving the facilities of the present Nurses Training School" or, if that facility was no longer available to receive the funds, "for an extended care unit or nursing home accommodations. . . ." Plaintiff sat on the Board of Trustees of the Hospital for a period of time in recognition of the gifts she had given the Hospital and in honor of her aunt and uncle's generosity. Upon inquiry, however, she learned that there was no "tangible evidence" that the Hospital had used the Belangers' bequests to benefit the Nursing School. In addition, the Hospital had failed, according to plaintiff, to properly invest the funds. Following negotiations involving the New York Attorney General's Charities Bureau, plaintiff, unsatisfied with the negotiations, filed suit.

The Hospital and the named members of the Board of Directors filed a motion to dismiss, which the Northern District of New York granted. The court held that plaintiff lacked standing to sue under either the New York State Estates Powers and Trusts Law (EPTL) or under the New York State Not-for-Profit Corporations Law.

Under EPTL 81.1, the Attorney General has exclusive jurisdiction to challenge the actions of the trustees of a charitable trust or corporation. While narrow exceptions to this exclusive jurisdiction have been recognized, the law is designed "to prevent vexatious litigation . . . by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations." Standing may be

conferred upon a private individual if that individual is part of a class of potential beneficiaries that is "sharply defined and limited in number." Donors themselves or their successors in interest may also, in certain circumstances, be able to enforce the terms of a bequest.

Here, the court held that plaintiff does not fall into either narrow exception to the general rule that only the Attorney General has standing to enforce the terms of a charitable bequest. As neither a beneficiary of her aunt and uncle's largesse nor the donor or a successor in interest, she could not, the court reasoned, enforce the terms of her aunt's and uncle's wills.

Similarly, N-PCL § 522, was held not to confer standing upon plaintiff to enforce the restrictions in her relatives' wills. N-PCL § 522 requires a donee that wishes to lift a restriction on a charitable bequest to either get written permission from the donor to do so or to apply to the courts to have the restriction lifted. The court in this matter held, however, that N-PCL does not even confer standing upon a donor to sue to enforce a restriction. It merely provides a donor with a means to uphold the restriction by withholding their consent to the donee. Since the donor has no standing to bring suit pursuant to N-PCL § 522, the plaintiff in this case, the niece of the deceased donors, clearly lacked standing to sue.

Court Holds That Religious Exemption to Immunization Requirement Is Applicable When Failure to Vaccinate Is Genuine, Sincere, and Rooted in Religious Beliefs

Nassau County Department of Social Services v. R.B., 870 N.Y.S.2d 874 (Nassau Cty., Fam. Ct. 2008). The Nassau County Department of Social Services (DSS) filed neglect petitions against the respondent, alleging failure to exercise a minimum degree of care over her three children. After their placement in foster care, the

respondent informed DSS that her children were never immunized. The respondent refused to consent to their immunization, asserting that it was a violation of her religious beliefs.

DSS moved for an order directing a hearing to determine whether the respondent qualified for the religious immunity exemption pursuant to New York Public Health Law (NYPHL) § 2164(9), and the hearing was held.

The court noted that while requirements for immunization are valid pursuant to the state's general police power to protect and promote the public welfare, the mandatory vaccination of children prior to entering school is not without exception. Public Health Law § 2164(9) allows for such an exception if the child's "parent, parents or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required. . . ."

In order for a parent or guardian to qualify for this exception, he or she must prove by a preponderance of the evidence that his or her opposition is a personal and sincerely held religious belief, and that this belief forms the basis for objection to the vaccination.

During her hearing, the respondent submitted a letter from the leader of her congregation, El Shaddai Yisreal. Therein, the leader explained the congregation's beliefs against manmade medications to cure illness and disease. Specifically, he stated that it is against their god's laws for the congregation's members to "go to doctors or take medications or shots of any kind."

The court held that, while it is difficult to define "religious belief," the respondent's basis for her opposition to vaccinations qualified as such. El Shaddai Yisrael espouses beliefs based on interpretations of biblical references which prohibit the administration of man-made medications to cure illnesses, and that the

“Almighty,” not man, is the healer of mankind. These beliefs were referenced in the letter from the congregation’s leader submitted on behalf of the respondent. The court found that this “deeply rooted view and ‘way of life’ of the Respondent” constituted “a religious belief.”

The court found that the respondent had also satisfied the second requirement for exemption by demonstrating her sincerity in this religious belief, by virtue of her consistent refusal to vaccinate her children, and her testimony that she was willing to place the health of her children at risk rather than have them immunized in violation of her beliefs.

Records Taken by Physician in Examination and Treatment of Patient Are Property of Physician

Chervonskaya v. Bentley, 55 A.D.3d 650, 867 N.Y.S.2d 107 (2d Dep’t 2008). In an action to recover damages for

medical malpractice, the defendant, an imaging service provider, appeals from an order of the Supreme Court, which denied its motion to compel plaintiffs to return all original mammogram films related to plaintiff.

The Appellate Division reversed the motion court and ruled that the films were property of defendant and had to be returned.

In reaching its decision, the court followed established legal precedent that “records taken by a doctor in the examination and treatment of a patient are property belonging to the doctor.” The court further reasoned that the medical release forms signed by plaintiffs indicated that defendant loaned the original mammogram films to plaintiffs and they were required to return those films to defendant as soon as possible. Accordingly, the court ruled that as defendant never relinquished ownership of the

original mammogram films, plaintiffs must return the films to defendant.

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**Health Law Section
FALL MEETING**

October 24, 2009

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