

Healthcare Employer Off the Hook In A Rubella Vaccine Case

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While most of us rarely think about rubella – a largely forgotten disease that should have disappeared with the “MMR” vaccine¹ – it was the focus of a recent Eighth Circuit decision this month. If you are asking yourself how this largely forgotten illness has anything to do with employment, we will tell you: because for Janice Hustvet, it resulted in the termination of her 15-year position with a healthcare employer.

In *Janice Hustvet v. Allina Health System*, Case No. 17-2963, decided on December 7, 2018, the Eighth Circuit held that the employer had legitimately terminated Ms. Hustvet when she refused the MMR vaccine and failed to complete a respirator evaluation.

Ms. Hustvet was an “Independent Living Skills Specialist” at the Courage Center. In that role, she worked with individual clients, all of whom were treated as having “compromised” or “fragile” immune systems. In 2013, the Courage Center merged with the Allina Health System, a large healthcare system.

Following the merger, in March of 2013, the Courage Center announced to its employees that they would become employees of Allina and would have to undergo pre-employment screening, including a “pre-placement health assessment screen.” That health assessment screen included “tracking for immunity to certain communicable diseases” and a Respirator Medical Evaluation (“RME”).

Testing confirmed Hustvet had no immunization for rubella. Allina told Hustvet that she needed to submit the RME and she would need to take the MMR vaccine. Hustvet failed to complete both requirements, claiming that her “health is the utmost concern,” that she previously had severe cases of mumps and measles and had concerns about taking the MMR vaccine. Hustvet also told Allina that she suffered from allergies and sensitivities to chemicals and needed to limit exposure as a result.

Ultimately, Allina terminated Hustvet “explaining that due to her refusal to comply with immunity requirements and her failure to complete the RME, she had voluntarily resigned.” This lawsuit followed, with Hustvet alleging discrimination, unlawful inquiry and retaliation claims under the Americans with Disabilities Act (“ADA”) and the Minnesota Human Rights Act (the “MHRA”). Following cross motions for summary judgment by Hustvet and Allina, the District Court denied Hustvet’s motion for summary judgment and granted Allina’s motion, dismissing all of Hustvet’s claims with prejudice. Hustvet appealed and the Eighth Circuit resoundingly sided with Allina.

Hustvet advanced three categories of claims: (1) that the requested health screening was unlawful, (2) that Allina failed to accommodate her, and (3) that she was retaliated against. In its decision, the Court went claim-by-claim and agreed with Allina on each.

I. Unlawful Examination Claims Examining Hustvet's unlawful examination claims – in which Hustvet claimed Allina had violated the ADA and the MHRA by requiring her to complete the health screen as a condition of employment – the Court concluded that Allina's required health screen was consistent with ADA requirements.

First, the Court found that the decision by Allina to require employees with client/patient contact to undergo a health screen was "job-related and consistent with a business necessity." In this regard, the information that was requested and the exam testing for immunity were both related to "essential, job-related abilities." Specifically:

The undisputed evidence shows that the purposes of Allina's health screen were to (a) ensure that incoming employees who might come into contact with clients had immunity to communicable diseases as recommended by the Centers for Disease Control and Prevention ("CDC") and Joint Commission accreditation requirements, as well as in furtherance of Allina's overarching internal policy of ensuring employee and patient safety by decreasing the risk of communicable disease exposure and transmission; and (b) determine whether it was medically safe for incoming employees who may come into contact with clients to wear a respirator in the event of an emerging disease outbreak.

Second, the Court found that "[t]he fact that rubella has been eliminated in the United States **does not mean** testing for immunity to this specific disease was unnecessary or more intrusive than necessary." (emphasis added). According to the Court, the vaccine was particularly appropriate for healthcare professionals or other individuals working in a healthcare setting.

Thus, the Court affirmed summary judgment dismissing this claim finding "Allina's decision to require those incoming Courage Center employees with client contact to complete an inquiry and exam was job-related, consistent with business necessity, and no more intrusive than necessary." The Court also affirmed the MHRA version of this claim for similar reasons.

II. Failure To Accommodate Claims Hustvet claimed that Allina failed to accommodate "her chemical sensitivities and allergies derive(d) from an immune system disability" and a "seizure disorder." The Court first concluded there was "insufficient evidence in the record to support the conclusion that Hustvet's chemical sensitivities or allergies substantially or materially limit her ability to perform major life activities," and that they were not disabilities under the law.

With regard to the seizure disorder, the Court found Hustvet did not tell Allina that she needed an accommodation due to this disorder or plead it in connection with her case and there was no evidence Allina knew about Hustvet's previous seizure episodes. The Court held, "Allina cannot be faulted for failing to accommodate a disability of which it was not aware" and further, the accommodations sought by Hustvet were not significantly related to her alleged disability.

The Court affirmed the grant of summary judgment for Allina on the failure to accommodate claims under the ADA and the MHRA.

III. Retaliation Claims Finally, the Court rejected Hustvet's retaliation claims because Hustvet could not show that "the proffered non-retaliatory reason for her termination was pretextual." Instead, the record established Allina terminated Hustvet's employment due to the fact that her job required "work with potentially vulnerable clients and she refused to comply with Allina policy by completing the required health screen and becoming immunized to rubella."

What Are the Takeaways?

- **Be Careful with Health Screens.** Employers should take care to ensure the class of employees who will be impacted by a health screen and the specifics of the health screen are no broader than necessary to ensure the screen is job-related and consistent with business necessity.
- **Have a Clear Policy on Vaccination.** A clearly-communicated and fairly-enforced vaccination or screening policy is more likely to be enforced than one that is buried in a policy no employee will ever review.
- **Take Caution When Terminating.** Before an employee is terminated for refusing a vaccine, consult with legal counsel and make sure you have considered issues like allergies and possible religious accommodation issues.

¹The “Measles, Mumps, Rubella” vaccine most of us receive in infancy.