

It's Officially Flu Season – Get Your Shot, Not Your Suit

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This is not the first time you've heard from us about flu shots in the workplace (see our [January 25, 2018 post](#)). And here we are again. Each flu season, employers find themselves in the hot seat when well-intentioned attempts to implement a policy backfire. This year is no exception.

On September 28, the Equal Employment Opportunity Commission (the "EEOC") filed suit in Tennessee federal court against a hospital alleging religious discrimination due to the hospital's handling of a flu shot accommodation request. See *Equal Employment Opportunity Commission v. Saint Thomas Health*, 18-cv-00978.

The case is interesting because it involves a less traditional employment relationship (albeit one that is common to hospital employers). According to its website, the defendant, Saint Thomas Health, is a "family of Middle Tennessee hospitals and physician practices united by a single mission: to provide spiritually centered, holistic care that sustains and improves the health of the communities we serve." It consists of nine hospital and is the "leading faith-based health care system in Tennessee and is a part of Ascension, the largest non-profit health system in the U.S. and the world's largest Catholic health system." Thus, the defendant employer in this litigation is, itself, a religious employer.

In this case, the employee at issue, Julian May, was an employee of TouchPoint Support Services, which provides food and environmental services at one of Saint Thomas' hospitals. May began working at the Saint Thomas hospital in Murfreesboro in February 2012 as a floor tech. Even though May was an employee of TouchPoint, he was required to follow the policies of Saint Thomas.

And follow he did for the first few years of employment, until Saint Thomas changed its response. May, a member of the Moorish Science Temple of America, "believes his religion requires him not to take a flu shots [sic], but to rely on natural medicine." As a result, and in response to Saint Thomas' requirement that employees (including TouchPoint employees) receive an annual flu shot, May requested a religious accommodation, allowing May to wear a protective mask in place of the flu shot. In 2013 and 2014, Saint Thomas received, reviewed and approved May's requests.

But, in November 2015 when May made this same request, Saint Thomas denied the request. Saint Thomas informed May that he needed to receive a flu shot and May, in turn, informed Saint Thomas that he could not due to his religion. Saint Thomas maintained that May could not return to work without receiving a flu shot. Thereafter, TouchPoint terminated May at the end of November 2015. This lawsuit followed with the EEOC claiming Saint Thomas violated federal law by failing to provide a religious accommodation to May.

In the press release, Delner Franklin-Thomas, director of the EEOC's Memphis District Office, highlighted the mystery in this case noting, "[f]or several years, STH accommodated the employee's

religious belief. Then, STH refused to accommodate his religious belief.” He went on to state “[a]n employer should not force an employee to choose between employment and his religious belief unless doing so would cause an undue hardship to the employer.”

What Are the Take-Aways?

- A change in course, such as Saint Thomas’ actions here, will not be viewed kindly by an agency or employee-side lawyer.
- Even indirect employers can be responsible for flu shot policies run awry when those policies are enforced over the employees of a distinct company.
- Religious employers are not exempt from religious discrimination claims.

In sum, this remains a tricky area – ripe for employer missteps. Employers (and their managers) should proceed carefully and consult legal counsel as needed.