

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(GREENBELT DIVISION)**

PAUL ZELL
6012 Hortons Mill Court
Haymarket, VA 20169

Plaintiff,

v.

No. 09-cv-_____

MICHAEL B. DONLEY
Secretary
United States Air Force
The Pentagon
Washington, DC 20330-1000

THE UNITED STATES AIR FORCE
The Pentagon
Washington, DC 20330-1000

THE HEALING STAFF, INC.
10100 Reunion Place Suite 125
San Antonio, Texas 78216

Defendants.

COMPLAINT

1. This action is brought to redress defendants' failure to accommodate plaintiff's exercise of religion, in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, ("RFRA"), and to remedy defendants' discrimination against plaintiff on the basis of his religion, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII").

2. Dr. Paul Zell was fired from his job as a chiropractor at Malcolm Grow Medical Center on Andrews Air Force Base because he followed the dictates of his religion by refusing to be vaccinated. Prior to being fired, Dr. Zell was employed by The Healing Staff, a company with which the United States Air Force had contracted to provide staffing at several facilities, including Malcolm Grow. In Fall 2007, Air Force personnel and The Healing Staff informed Dr. Zell that he was required to receive a vaccination for tetanus, diphtheria, and acellular pertussis (“Tdap vaccination”). Despite being informed of Dr. Zell’s religious objections to vaccinations, neither The Healing Staff nor the Air Force granted him a religious exemption from the vaccination requirement. The Air Force rejected Dr. Zell’s request, although Air Force regulations specifically permit religious exemptions such as the one sought by Dr. Zell. Neither the Air Force nor The Healing Staff made any effort to accommodate Dr. Zell’s request. Instead, the Air Force insisted, erroneously, that the Tdap vaccination was a requirement not subject to religious exemption by the contract between The Healing Staff and the Air Force, and The Healing Staff fired Dr. Zell. By these actions, the Air Force and The Healing Staff violated Dr. Zell’s rights under RFRA and Title VII.

JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 because the plaintiff asserts claims under federal civil rights laws.

4. On April 24, 2009, Dr. Zell received a Final Agency Decision from the Equal Employment Opportunity office of the Air Force, granting him the right to pursue

his Title VII claims in federal court against Michael B. Donley, in his official capacity as the Secretary of the Air Force.

5. On July 9, 2009, Dr. Zell received a Notice of Right to Sue from the Baltimore Field Office of the U.S. Equal Employment Opportunity Commission (“EEOC”), granting him the right to pursue his Title VII claims in federal court against The Healing Staff.

6. Venue is proper in this Court pursuant to 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1391(b), (e). The events and conduct giving rise to the Dr. Zell’s claims occurred in the District of Maryland. Had Dr. Zell’s employment not been terminated, he would have continued working in the District of Maryland.

7. All conditions precedent to the filing of this lawsuit have been performed or have occurred.

PARTIES

8. Plaintiff Dr. Paul Zell is an adult resident of the Commonwealth of Virginia.

9. Defendant Michael B. Donley is the Secretary of the United States Air Force. He is sued in his official capacity as the designated defendant in a Title VII action against the Air Force pursuant to 42 U.S.C. § 2000e-16(c).

10. Defendant United States Air Force is an agency of the United States government. The Air Force owns and operates Malcolm Grow Medical Center on Andrews Air Force Base in Prince George’s County, Maryland.

11. Defendant The Healing Staff, Inc. is a nationwide healthcare professionals staffing firm providing full-time, part-time, per diem and contract staffing to the military, hospitals, and other health facilities. The Healing Staff is a Texas corporation, with its principal place of business in San Antonio, Texas. The Healing Staff is owned by Prospect Capital Corp., a Maryland corporation, with its principal place of business in New York, New York. On information and belief, The Healing Staff has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. In the alternative, upon information and belief, The Healing Staff is an employment agency regularly undertaking to procure employees for an employer. The Healing Staff provided healthcare staffing at Malcolm Grow Medical Center pursuant to a contract with the Air Force.

FACTS

Dr. Zell's religious beliefs

12. For nearly twenty years, Dr. Zell and his wife have shared a sincere religious belief that God does not intend for human beings to put toxic substances such as vaccines in their bodies.

13. As a result of this belief, Dr. Zell repeatedly has refused to receive vaccinations and immunizations and consistently has sought exemptions from vaccination and immunization requirements for himself and his family.

14. For example, when his children were required to receive certain inoculations to enroll in Virginia public schools, Dr. Zell sought and obtained a religious-based exemption from Virginia's vaccination requirements for each of his three children.

15. Dr. Zell's religious beliefs are well-known to his family, friends, and colleagues.

Dr. Zell's Employment at Malcolm Grow Medical Center

16. Dr. Zell began work as a chiropractor at Malcolm Grow Medical Center ("Malcolm Grow") on Andrews Air Force Base in or about October 2003. At the time, he was employed by Aliron International, Inc., which had contracted with the Air Force to supply chiropractic services at Air Force bases.

17. In or about August 2007, The Healing Staff replaced Aliron as the contractor for chiropractic services at Andrews Air Force Base.

18. Based on the recommendation of Air Force personnel, The Healing Staff retained Dr. Zell to continue working as a chiropractor at Malcolm Grow. The Healing Staff did not interview Dr. Zell for this position but simply deferred to the judgment of Air Force personnel.

19. At all times relevant to this lawsuit, Dr. Zell was an employee of The Healing Staff.

20. The Air Force controlled the means and manner of Dr. Zell's work. Air Force personnel directly supervised Dr. Zell's day-to-day work; controlled the hours Dr. Zell worked, monitored and dictated the type of patients Dr. Zell treated, controlled his use of leave, and conducted his performance reviews.

21. The Air Force determined which patients Dr. Zell could see, permitting him to treat only active duty personnel and Presidential appointees. Patients scheduled appointments with Dr. Zell either directly through the Department of Defense's

TRICARE system or with the chiropractic assistants in Dr. Zell's office, who would enter new appointments into the TRICARE computer system. New patients could only schedule appointments with Dr. Zell through TRICARE.

22. All of Dr. Zell's patient visits took place at the chiropractic clinic at Malcolm Grow in space provided by the Air Force.

23. The Air Force supplied the equipment Dr. Zell needed to perform his work.

24. At no point during his employment at Malcolm Grow did Dr. Zell see patients outside of the space provided at Malcolm Grow by the Air Force. Dr. Zell was never asked to work at any other facilities under contract with The Healing Staff.

25. Air Force personnel possessed ultimate supervisory authority over Dr. Zell's chiropractic assistants. Dr. Zell was not responsible for paying the chiropractic assistants and the power to hire or fire his assistants lay with Air Force personnel.

26. At all times relevant to this lawsuit, Dr. Zell was an employee of the Air Force.

Dr. Zell's efforts to obtain religious exemptions from vaccination requirements

27. While working at Malcolm Grow, Dr. Zell repeatedly sought and obtained waivers from Air Force vaccination requirements for Hepatitis B, MMR (measles, mumps, rubella), and varicella (chicken pox). For example, on or about August 5, 2004, and again on or about October 26, 2007, Dr. Zell requested and received a waiver from being vaccinated for Hepatitis B.

28. In the fall of 2007, Dr. Zell was informed by Air Force personnel that he was required to receive the Tdap vaccination.

29. Dr. Zell refused to be vaccinated. He discussed his religious objection to vaccinations with Colonel Dorothy Hogg, Commander of the 79th Medical Operations Squadron at Malcolm Grow, and requested a religious waiver from the vaccination requirement. Colonel Hogg refused to give Dr. Zell a waiver from the Tdap vaccination requirement.

30. Dr. Zell sought a religious waiver from The Healing Staff. The Healing Staff, acting with reckless indifference to Dr. Zell's rights under Title VII, refused to grant a waiver, claiming it was not allowed to do so by its contract with the Air Force Commodity Council.

31. Dr. Zell contacted Kurt Ettrich at the Air Force Commodity Council, who represented that the contract between The Healing Staff and the Air Force required Dr. Zell to obtain the Tdap vaccination and that this requirement was not subject to a religious waiver.

32. The Healing Staff's contract with the Air Force does not contain a requirement that contractors or employees receive the Tdap vaccination. The contract states: "Before start of work, health care workers shall provide proof of immunization from the following diseases according to CDC guidelines: Hepatitis B, measles, mumps, rubella, varicella, and influenza."

33. Air Force regulations, including Air Force Joint Instruction 48-110, § 2-6(b)(3), provide for exemptions from vaccination requirements, including for religious reasons.

34. On information and belief, the Air Force has granted waivers or exemptions to its immunization and vaccination policies to other employees or contractor employees whose religious beliefs and practices prohibited them from being vaccinated.

35. Despite the availability of religious exemptions, neither the Air Force nor The Healing Staff granted Dr. Zell a religious exemption from the Tdap vaccination requirement.

36. Granting Dr. Zell a religious exemption from the Tdap vaccination requirement would not have imposed an undue hardship on the conduct of The Healing Staff's business.

37. Granting Dr. Zell a religious exemption from the Tdap vaccination requirement would not have imposed an undue hardship on the Air Force.

38. Granting Dr. Zell a religious exemption from the Tdap vaccination requirement would not have exposed Dr. Zell, or his patients, or his co-workers, or the public, to a discernibly increased risk of contracting tetanus, diphtheria, or acellular pertussis.

Dr. Zell's Termination

39. Nearly six months after Dr. Zell first refused the Tdap vaccination, on March 11, 2008, The Healing Staff notified him that his employment would be terminated effective April 3, 2008. The Healing Staff's letter to Dr. Zell stated the

“reason for the termination is that our contract with [the Air Force Commodity Council] requires all of our employees to complete the immunizations outlined in the contract.”

Neither the Air Force nor The Healing Staff made any efforts to accommodate Dr. Zell’s religious beliefs.

40. Dr. Zell continued performing his chiropractic duties at Malcolm Grow through April 3, 2008. At no point did the Air Force or The Healing Staff request that he take any special precautions to avoid exposing his patients to tetanus, diphtheria, or pertussis.

41. Other than Dr. Zell’s religious objections to immunizations, his job performance was otherwise satisfactory in all respects. But for Dr. Zell’s refusal to be immunized, he would not have been terminated in April 2008.

42. After his termination from Malcolm Grow, Dr. Zell searched for other employment as a chiropractor. Aside from working occasionally as a fill-in for a vacationing chiropractor, Dr. Zell has been unable to find regular work as a chiropractor. Dr. Zell has suffered emotional distress and mental anguish as a result of losing his job due to the unwillingness of the Air Force and The Healing Staff to accommodate his religious beliefs.

Exhaustion of Administrative Remedies

43. On or about April 9, 2008, Dr. Zell filed a charge with the Washington, D.C. Field Office of the EEOC. At that time, he submitted an intake questionnaire with supporting documents, including a two-page letter summarizing the facts leading to his dismissal, to initiate an employment discrimination claim against The Healing Staff and

the Air Force. Together these documents constituted a request for the EEOC to take remedial action to resolve Dr. Zell's dispute against The Healing Staff and the Air Force.

44. On April 10, 2008, the Washington Field Office forwarded Dr. Zell's file to the Baltimore Field Office of the EEOC for processing.

45. On or about June 20, 2008, Loretta Miller, Investigator in the Baltimore Field Office reached Dr. Zell by phone. She informed him that she had received his file and asked him questions about his claim. At the conclusion of the call she drafted a formal Charge of Discrimination for Dr. Zell.

46. On or about June 24, 2008, Loretta Miller sent a letter to Dr. Zell, enclosing the Charge of Discrimination for his signature, and assigning his case an EEOC charge number and stating, "This is to acknowledge receipt of the above-numbered charge of employment discrimination."

47. On January 27, 2009, Dr. Zell submitted to the EEOC an amended Charge of Discrimination along with additional documents related to his claim.

48. On June 30, 2009, Dr. Zell requested a Notice of Right to Sue from the Baltimore Field Office.

49. On July 9, 2009, Dr. Zell received a Notice of Right to Sue regarding his charge against The Healing Staff.

50. Dr. Zell initiated contact with a counselor at the Air Force's Equal Employment Opportunity ("EEO") Office on or about December 9, 2008.

51. After the Air Force EEO office was unable to resolve Dr. Zell's complaint informally, he filed a formal charge of discrimination on March 10, 2009.

52. On April 24, 2009, Dr. Zell received a letter from Steven M. Shepro, Col. USAF, informing him that the Air Force EEO Office had dismissed his formal complaint of discrimination against the Air Force.

53. The Air Force did not provide Dr. Zell with notice of the 45-day time limit for initiating contact with an EEO counselor; nor was he otherwise aware of those limits.

CLAIMS FOR RELIEF

I

Title VII (Failure to Provide Religious Accommodation) (against The Healing Staff and Michael Donley)

54. The Healing Staff and the Air Force are employers within the meaning of Title VII.

55. In the alternative, The Healing Staff is an employment agency within the meaning of Title VII.

56. Title VII requires an employer or an employment agency to provide reasonable accommodation for an employee's religious observance unless doing so would impose undue hardship on the conduct of the employer's business. 42 U.S.C. §§ 2000e(j); 2000e-16.

57. Both The Healing Staff and the Air Force could have accommodated Dr. Zell's religious objection to vaccination without undue hardship.

58. By refusing to accommodate Dr. Zell's religious objection to vaccination, both The Healing Staff and the Air Force subjected him to discrimination based on religion within the meaning of Title VII.

II

Title VII (Disparate Treatment) (against Michael Donley)

59. Title VII prohibits an employer from “discharg[ing] any individual . . . because of such individual’s . . . religion.” 42 U.S.C. §§ 2000e-2(a)(1); 2000e-16.

60. By granting religious waivers or exemptions of vaccination requirements to persons of other religions but refusing to grant a waiver or exemption to Dr. Zell, and then discharging him for refusing to be vaccinated, the Air Force subjected him to discrimination based on religion within the meaning of Title VII.

61. The Air Force has not articulated a legitimate, non-discriminatory reason for refusing to grant an exemption to Dr. Zell while granting them to others.

III

Religious Freedom Restoration Act (Entitlement to Exemption) (against the Air Force and The Healing Staff)

62. The Religious Freedom Restoration Act provides, in pertinent part:

(a) In general. Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception. Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1.

63. The Healing Staff is a state actor for purposes of the Religious Freedom Restoration Act because it was jointly engaged with the Air Force in substantially burdening Dr. Zell's religious exercise.

64. The Religious Freedom Restoration Act requires the Air Force and The Healing Staff to accommodate Dr. Zell's religious beliefs if a failure to do so would substantially burden his exercise of religion, and if doing so would not seriously compromise a compelling governmental interest.

65. Dr. Zell's refusal to be vaccinated because it violates his sincerely-held belief that God did not intend for humans to put toxins in our bodies constitutes an exercise of religion.

66. The Air Force's and The Healing Staff's refusal to grant Dr. Zell's request for a religious exemption to the vaccination requirement substantially burdened Dr. Zell's exercise of religion by forcing him to choose between following the tenets of his religion and keeping his job.

67. The Air Force and The Healing Staff can accommodate Dr. Zell's exercise of religion without seriously compromising a compelling governmental interest. Air Force regulations permit waivers or exemptions from vaccination requirements and waivers or exemptions have been given to others. The Air Force and The Healing Staff allowed Dr. Zell to continue to treat patients for six months after learning he would not be vaccinated.

68. By refusing to exempt Dr. Zell from required vaccinations the Air Force and The Healing Staff violated his rights under the Religious Freedom Restoration Act.

REQUEST FOR RELIEF

WHEREFORE, plaintiff requests that the court:

- a. Enter judgment, pursuant to Title VII, ordering defendants Donley and The Healing Staff to reinstate Dr. Zell to his previous position or a comparable position;
- b. Enter judgment, pursuant to RFRA, ordering defendant Air Force and The Healing Staff to reinstate Dr. Zell to his previous position or a comparable position;
- c. Enter judgment, pursuant to Title VII and RFRA, ordering all defendants to exempt Dr. Zell from any vaccination requirements in connection with his reinstated position;
- d. Enter judgment, pursuant to Title VII, against defendants Donley and The Healing Staff, jointly and severally, for back pay and compensatory damages in an amount appropriate to the proof adduced at trial.
- e. Enter judgment against all defendants, pursuant to Title VII and the Equal Access to Justice Act, awarding plaintiff his costs and reasonable attorneys' fees; and,

f. Grant such other and further relief as the court deems just and proper.

/s/ Arthur B. Spitzer

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July 22, 2009