BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0102014268; 0109014269; & 0109014270:

R ANNIE MCCOY,	)	Case Nos. 379-2011, 380-2011,
	)	381-2011
Charging Party,	)	
	)	
vs.	)	**HEARINGS OFFICER DECISION**
	)	**AND NOTICE OF ISSUANCE OF**
RIVERSTONE HEALTH FOUNDATION	)	**ADMINISTRATIVE DECISION**
(aka RIVERSTONE HEALTH, fka	)	
YELLOWSTONE CITY-COUNTY HEALTH	)	
DEPARTMENT), JOHN FELTON AND	)	
PHYLLIS JENKINS,	)	
	)	
Respondents.	)	

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I. INTRODUCTION

R. Annie McCoy filed a human rights complaint alleging that RiverStone Health discriminated against her in employment when it discharged her for refusing to take the influenza vaccine. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on April 19, 20 and 21, 2010 in Billings, Montana. Alex Rate and Ryan Sudbury, attorneys at law, represented McCoy. Bruce Fain, attorney at law appeared on behalf of Riverstone. McCoy, her father Joe McCoy, her husband Gregory Meissmer, Dr. William Kahn, M.D., Michael Dennis, Ph.D., Dr. Frederick Carr, M.D., Dr. John Felton, M.D., and Dr. Edward Septimus, M.D., all testified under oath.

The parties stipulated to the admission of Charging Party's Exhibits 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 17, 20, 21, 22, 23, and Respondent's 101 through 112, 115 through 117, 119, 122, 128, 132, 139, 140, and 141. In addition, Charging Party's Exhibits 6 and 14 and Respondent's 136 were admitted at hearing.

Prior to hearing, the charging party agreed to dismiss the complaint against Phyllis Jenkins (by conceding that she could not be held liable). The charging party also dropped her claim that Riverstone had made an improper disability related inquiry when it created a medical exception to the mandatory immunization requirement.

Counsel for each party submitted post-hearing briefs, the last of which was submitted on April 18, 2011 at which time the record closed. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

A complete statement of issues appears in the final pre-hearing order issued in this matter. That statement of issues is incorporated here as if fully set forth.

III. FINDINGS OF FACT

1. McCoy began working for Yellowstone City-County Health Department (n/k/a RiverStone) in 1996.

2. RiverStone, through the mandates from the local board of health, is required to protect the public from the introduction of infectious diseases. Mont. Code Ann. § 50-2-116(g). RiverStone is tasked by statute with fighting and eliminating infectious diseases like influenza. Mont. Code Ann. § 50-2-116(f).

3. McCoy, pursuant to RiverStone's policy, received a Hepatitis B vaccination in 1996.

4. McCoy has submitted to the annual RiverStone TB test since 1996.

5. McCoy does not object to the administration of the mandatory TB Test.

6. McCoy began taking classes in 2003 to earn a degree to become a Licensed Practical Nurse ("LPN").

7. After graduating from the LPN program, McCoy was promoted from a home health aid in RiverStone's hospice program to an LPN.

8. McCoy was hired as an LPN at the Women's Prison in February 2007. Hrg. Transcr.

9. RiverStone is the local public health agency for Yellowstone County and as a result is tasked with various public health powers and duties (food inspections, licensing and permitting of septic systems, daycare inspections, public accommodation inspections, trailer park inspections, health promotion and disease prevention).

10. Included in RiverStone's powers and duties is the statutory obligation to protect the public from communicable diseases. RiverStone is tasked with fighting and eliminating infectious diseases like influenza. Hrg. Transcr. 195:17 to 196:8.

11. RiverStone's patients, including those patients in the Yellowstone County Detention Center where McCoy worked, are generally more at risk for complications associated with infectious disease as the patient population is a more vulnerable population than those found in other healthcare settings.

12. RiverStone serves as a leader in areas of public health policy.

13. RiverStone's Public Health Policy Development Committee began discussing a mandatory employee influenza vaccination policy during the summer of 2007.

14. The first mandatory influenza vaccination policy was in force in November 2007, which mandated all new employees had to be vaccinated to influenza from the 2007-2008 influenza season.

15. The Public Health Policy Development Committee determined in November of 2008 that a mandatory influenza vaccination policy should be made effective as of the 2009 influenza season.

16. The decision to implement a mandatory influenza vaccination policy was made as RiverStone's seasonal influenza vaccination rates for employees ranged from 60% to 74% from 2006 through 2008.

17. RiverStone desired to increase its employee vaccination rates to prevent the transmission of influenza from healthcare worker to patients and the public.

18. On February 26, 2009, RiverStone adopted a policy providing that all employees are to comply with the mandatory influenza immunization as a condition of continued employment. Respondent Exhibit 112.

19. The Board amended the policy on September 24, 2009, in response to the H1N1 pandemic to account for different types of influenza in the future, not simply seasonal influenza. The H1N1 influenza was, at the time RiverStone adopted its policy, considered an imminent pandemic that could result in hundreds of thousands if not millions of deaths around the world. RiverStone's decision to require mandatory vaccination in light of the perceived pandemic of H1N1 influenza was eminently reasonable.

20. Vaccinations are the front line defense for vaccine preventable illnesses as a public health intervention.

21. The primary purpose of RiverStone's vaccination policy was to improve patient safety. RiverStone's goal is to protect patients and employees by improving vaccination rates amongst its employees.

22. Another purpose and goal of RiverStone's mandatory vaccination policy is to reduce employee absentee rates and to ensure adequate staffing to respond to patient needs and potential public health emergencies.

23. It is not feasible for RiverStone to accommodate employees who will not comply with the vaccination requirements as there are not enough positions available to shift individuals to non-patient areas to accommodate those who may not want to be vaccinated.

24. RiverStone is staffed only to its level of need and cannot temporarily shift employees.

25. Regardless of where a RiverStone employee is employed, all RiverStone employees must be available to assist in the event of a public health emergency.

26. The level of absenteeism in the healthcare workforce can be significant during the respiratory virus season, and this time is when there is the heaviest patient load and sickest patients.

27. In order to provide appropriate care for sick patients during the respiratory virus season, a healthy workforce is a necessity.

28. Vaccinated individuals experience fewer respiratory illnesses and miss fewer days lost from work.

29. As Dr. Septimus testified, and the hearings officer finds, healthcare workers should be vaccinated against influenza:

(1) to prevent transmission of the illness to patients;

(2) to reduce the risk of healthcare professionals becoming infected with influenza;

(3) to create a type of "herd" immunity that protects both healthcare workers and patients who are unable to receive the vaccine or are unlikely to respond with a sufficient antibody response;

(4) to maintain critical societal workforce during disease outbreaks;

(5) to set an example regarding the importance of vaccination for every person.

30. Accommodating employees refusing to comply with RiverStone's mandatory vaccination policy would place an unreasonable burden on RiverStone and would be ineffective to protect patients and the public. Nasal swab influenza testing is inaccurate and produces many false negatives where an individual is infected with influenza but the test produces a negative result. An employee infected with influenza will shed the virus potentially transmitting influenza to others prior to the display of symptoms. The current standard for advance testing of influenza, in an attempt to detect it prior to the appearance of symptoms, is ineffective. Requiring a sick healthcare worker to stay home is not effective because they may be contagious for many days prior to feeling ill. The wearing of surgical masks may prevent droplet transmission, but there are no reliable controlled studies to look at the efficacy of using surgical masks in the acute care setting. At this time, given present medical understanding of the means of transmission of influenza, mandatory vaccination is a reasonable and indeed necessary methodology for accomplishing the compelling goal of eliminating or significantly reducing the spread of influenza.

31. Healthcare professionals must ensure that they do no harm to their patients when providing medical care.

32. RiverStone was taking a leadership stand by insisting that the transmission of influenza to patients by healthcare workers is unacceptable, and the

implementation of the vaccination program is a reasonable, safe, and effective means in which to prevent the transmission of influenza from healthcare worker to patient.

33. Implementation of the mandatory vaccination policy has demonstrated positive public health benefits. RiverStone has improved employee vaccination rates by instituting the mandatory vaccination policy, with compliance rates of 100%.

34. Allowing an exception to the mandatory vaccination policy for philosophical beliefs would result in reduced vaccination rates and jeopardize sustainability of the policy.

35. The influenza vaccine is historically safe and significant side effects to the vaccine are rare.

36. Vaccinations have resulted in tremendous public health improvements. Over time, all 50 states now have some mandatory requirement for school-age children to be immunized because of the public health value of having further immunity for children and adults.

37. In the United States, the most common cause of vaccine preventable deaths is influenza.

38. High risk individuals, such as children and the elderly, groups in which the vaccine itself is least effective, benefit the most from the institution of mandatory vaccination programs for healthcare providers.

39. Vaccination rates among healthcare workers are historically low.

40. A vaccinated individual cannot be infected with influenza from the injected killed virus.

41. On September 18, 2009, McCoy provided an objection to the impending immunization policy. McCoy stated that she objected to the policy because she did not believe the vaccine was in her "personal best interest" and that she felt that no one "has the right to make medical decisions" for her in regards to her health. Charging Party Exhibit 1.

42. Phyllis Jenkins provided a response to McCoy which noted the Board had adopted the policy and that all employees would be expected to comply. Charging Party Exhibit 2.

43. On October 5, 2009, McCoy again noted that she had "very personal reasons for objecting to the Flu Vaccine" and that she was "advocating for choice" and to be "exempt from receiving the Flu Vaccine." McCoy specifically stated that she did not "have an allergy or religious reasoning" but, a strong personal preference that her job was in jeopardy if she did not comply. Charging Party Exhibit 4.

44. McCoy received a response on October 14, 2009, which noted that the policy was adopted by RiverStone's Board and would be enforced. Charging Party Exhibit 5.

45. McCoy was terminated for failing to comply with RiverStone's mandatory vaccination policy.

46. The mandatory vaccination policy is a reasonable condition of employment.

47. On December 7, 2009, RiverStone received a grievance from McCoy concerning her termination. McCoy's objections centered around objections to: the form of the declination; the enforcement of the policy against current employees, although she suggested it could be a condition of employment for new hires; her perception that others were making health care decisions for her; that there was no state mandate to require the immunization policy. Charging Party Exhibit 9.

48. McCoy's claim is not related to religion.

49. McCoy believes any firmly held belief should be entitled to protection. McCoy stated that this encompass and protect a healthcare worker's objection to RiverStone's hygiene policy.

50. McCoy's position with regard to the influenza vaccine is based purely upon her set of non-religious evolved beliefs. While her beliefs may be "firm," testimony from her father made clear her beliefs may be changed by reasoned argument.

51. The inconsistency and fluidity of McCoy's position is evident from the testimony. First, her continued consent to continued TB testing, which procedure using an injected protein is similar to an influenza vaccination demonstrates the inconsistency of her position. Second, McCoy advocates for "education," but ignores scientific evidence concerning the efficacy and safety of the vaccine. Third, the evolving nature of her belief is evident in that it began developing only during her

LPN training. Fourth, McCoy argued that the policy, which should not be applied to her, could be applied to "new employees," employees with more regular conduct, and incarcerated individuals. Charging Party's Exhibit 9.

52. McCoy has failed to present any evidence regarding lost wages, but has presented evidence regarding emotional distress damages.[1]

53. In the days following McCoy's termination, she decided that she needed to move on and get busy looking for another job and filing for unemployment. McCoy had to quit obsessing about her termination and move on.

54. Within one week, McCoy began to look for new employment.

55. McCoy, months prior to her termination, was aware of the consequences of her failure to comply with RiverStone's mandatory vaccination policy.

56. There is no evidence that RiverStone ever acted in any manner other than good faith and without malice.

IV. OPINION[2]

A. *Felton Was Acting Within the Scope and Course of His Employment In Implementing The Board's Policy of mandatory vaccination and, therefore, is immune from suit.*

As the hearings officer indicated in his final prehearing order, the respondent's motion for summary judgment regarding the liability of John Felton was granted before hearing. Summary judgment is appropriate where there is no material factual dispute and as a matter of law the moving party is entitled to judgment on the issue.

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[1] Strictly speaking, this finding is not pertinent to the instant decision as the hearings officer has not found that the employer unlawfully discriminated against McCoy. However, the issue of lost wages and emotional distress damages was litigated and McCoy, while going to great lengths to put on evidence regarding emotional distress, failed to present any evidence regarding lost or diminished wages as she never testified about the wages she earned as an employee of RiverStone. For this reason, the hearings officer feels compelled to make a finding of fact with respect to the lost or diminished wages because even if unlawful discrimination had occurred, the hearings officer would have no evidence upon which to base a finding of damages for lost or diminished wages.

[2] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Matter of Peila, 249 Mont. 272, 815 P.2d 139 (1991).

Here, there was no factual dispute that Felton, as director of RiverStone, acted as mandated by his job duties and implemented the Board's policy of mandatory vaccination. Furthermore, there was no factual dispute that Felton had no say in and had nothing to do with the adoption of the policy. Governmental employees acting within the scope and course of their employment are immune from liability. Mont. Code Ann. §2-9-305 (5); *German v. Stephens*, 2006 MT 130, ¶43, 332 Mont. 303, 137 P.3d 545; *Kenyon v. Stillwater County*, 254 Mont. 142, 146-47, 835 P.2d 742, 745 (1992). Felton, therefore, was immune from liability in this case and granting summary judgment on this issue was appropriate.

B. *McCoy Is Not a Member of a Protected Class and In Any Event the Reasonable Demands Of Her Position Required that She Be Vaccinated.*

Montana prohibits discrimination by government employers based upon religion or creed when the reasonable demands of the position do not require such a distinction. Mont. Code Ann. §49-2-303 (a); Mont. Code Ann. §49-2-308 (1); Mont. Code Ann. §49-3-201. McCoy argues that Mont. Code Ann. §49-2-303 (a) use of both the terms "creed" and "religion," buttressed by a compiler's note that creed is to be distinguished from religion, must be interpreted to be broad enough to encompass any firmly held belief, including her belief that she should not be subjected to vaccinations. RiverStone argues that the term "creed" does not encompass any firmly held belief but rather only those beliefs that are tantamount to religious beliefs and that even if creed could be interpreted as McCoy suggests, as a matter of fact her belief does not rise to the level of a creed. The respondent also argues that in any event, as matter of business necessity, implementation of the mandatory vaccination program was reasonable. On this issue, the charging party argues that the respondent has failed in its defense of business necessity.

As the respondent correctly argues, there is no factual basis for finding that McCoy's distrust of vaccinations amounts to a "creed" even if a strongly held belief could be considered as a creed within the meaning of the statute. Beyond this, the hearings officer also agrees with the respondent that as a matter of law McCoy's firmly held belief does not equate to a "creed" under Mont. Code Ann. §49-2-303 (a). Finally, even if McCoy's dislike of vaccinations amounted to a creed, the employer was not required to accommodate it. The potentially devastating consequences of influenza, and in particular the threat of H1N1 facing the world at the time of RiverStone's implementation of the mandatory vaccination policy, Riverstone's statutory obligation to protect the public health, and the credible expert

testimony of Dr. Septimus demonstrate this.

1. *McCoy's Philosophical Belief Against vaccination Does Not Amount To A Creed.*

McCoy's belief is somewhat of a moving target and even McCoy herself has difficulty labeling it. At one point she refers to her belief as a "fundamental belief." Charging Party's opening brief, page 8. At another point, she refers to her belief as a philosophical belief. She also attempts to pigeon hole her belief as "her right to make medical decisions affecting her own body. . ." Charging Party's opening brief, page 14. It appears that McCoy is arguing that any belief, whether or not tantamount to a religious belief, is protected under the Montana Human Rights Act. Her position as a matter of law is not correct and McCoy is not a member of a protected class.

A charging party makes out a prima facie case of discrimination by showing that she is a member of a protected class, that she was otherwise qualified for continued employment, and that she was denied continued employment because of her membership in a protected class. *Vortex Fishing Systems, Inc., v. Foss*, 2001 MT 312, ¶17, 308 Mont. 8, 38 P.3d 836. Mon. Code Ann. §49-2-303 prohibits employers from discriminating against an employee in a term or condition of employment because of "race, creed, religion, color or national origin." As both parties correctly note, the act does not define "creed." And neither party has identified Montana case law that defines the term.

"Creed," however, has an established denotation in the case law. "Creed" should not include every statement of opinion or belief to which the proponent is committed, nor should it include opinions which may be changed by reasoned argument. *Cooper v. University of Washington*, 2007 WL 3356809 (W.D. Wash. Nov. 8, 2007). The term creed "has been defined as confession or articles of faith, formal declaration of religious belief, any formula or confession of religious faith, and a system of religious belief." Black's Law Dictionary (6th Ed. 1991). *See also*, *Rasmussen v. Glass*, 498 N.W. 2d 508, 511(Minn. Ct. App. 1993)(holding that the term "creed" as used in a city ordinance that prohibited "all discriminatory practices based on race, color, creed, religion, ancestry national origin, sex, including sexual harassment, affectional preference, disability, age, marital status, . . ." protected only religious beliefs and does not include political, sociological and philosophical beliefs). In *Glass*, the Minnesota Court of Appeals specifically held that abortion clinic personnel 's "seriously maintained set of principles and opinions" regarding the propriety and legitimacy of abortion did not amount to a creed that would have brought the abortion personnel within a protected class of persons under the city ordinance. The term "creed" as used in the case law identified to this hearings officer refers to

religious beliefs.

Webster's Third International Dictionary defines creed as:

> **1**: a brief authoritative doctrinal formula...intended to define what is held by a Christian congregation, synod, or church to be true and essential and exclude what is held to be false belief **2** cap: that portion of a Christian liturgy...**3a**: a formulation or system of religious faith...**b**: a religion or religious sect...**c**: a formulation of epitome of principles, rules, opinions, and precepts formally expressed and seriously adhered to and maintained…

Apparently cognizant of the above limitations in case law upon the term "creed," the charging party relies heavily on 1977 legislative changes to the Montana Human Rights Act to broaden the term "creed" to encompass her objection to mandatory vaccination. The bill summary to those changes noted that "In many antidiscrimination provisions of the code the term "religion" is used. In others, the term "creed" is used. The terms are apparently used interchangeably. However, there is a distinction since "creed" is the broader term encompassing any set of fundamental beliefs. Therefore, to clarify intent "religion" is added wherever only "creed" appears and "creed" is added wherever only "religion" appears."

The charging party ascribes a great deal of significance to this summary, but in doing so overstates the force of the summary. It does not say that any set of beliefs is accorded protection. It states that any set of *fundamental* beliefs is accorded protection. The hearings officer agrees with the respondent that this bill summary cannot be interpreted to extend protection under our antidiscrimination laws to any seriously held secular belief whether or not the belief occupies a position in the life of the believer that would make the belief tantamount to a religious belief. As the supreme court of Wisconsin has recognized, although the term "creed" could be defined in general terms, "in its commonly accepted sense and in the preferred dictionary definition, [creed] does, however, refer to religion." *Augustine v. Anti-Defamation League of B'Nai Brith*, 75 Wis. 207, 213, 249 N.W. 2d 547, 550-51 (Wis. 1977).

It is far more likely that the legislature in utilizing the distinction was simply giving voice to the notion that certain beliefs, while not found within traditional organized religions (and therefore not protectable under the term "religion") are nonetheless found to legitimately occupy a status in a believer's life

that is tantamount to the position that religion fills in the life of a member of a traditional organized religion. As the respondent correctly notes, "the general requirement is that the ideas at issue [creed] take the place of religion and are more than just strongly held positions. Simply holding a firm or passionate belief does not mean the ideas are worthy of religious -like protection, especially if based upon purely secular considerations." Respondent's opening post hearing brief, page 8. *See, e.g., Africa v. Com. Of Pa.,* 662 F.2d 1025, 1034 (3rd cir. 1981); *Freidman v. So. Cal. Permanente Group*, 102 Cal. App. 4th 39, 125 Cal Rptr. 2d 663 (2002)(charging party's firmly held belief in **VEGANISM** was not a religious creed within the meaning of the California antidiscrimination statutes such that an employer's requirement that the charging party be vaccinated against mumps, which requirement conflicted with his **veganism** because mumps vaccines are made with chicken embryos, violated the antidiscrimination statutes). McCoy has candidly admitted that her strong aversion to vaccination does not amount to a religious belief nor is it couched in a particular religious belief.

McCoy also tries to tie her opposition to vaccination to a fundamental belief regarding her medical autonomy; that is, that she is the only one who has the power to make medical decisions about her body, including whether or not she will receive a vaccination. The hearings officer fails to see the argument. Simply telling an employee that they must be vaccinated in order to safely carry out their job duties does not take away that individual's medical autonomy. That person is still free to choose whether or not to be vaccinated. McCoy's belief is not a "creed" as that term is used on the Montana Human Rights Act. Therefore, she is not within a protected class and her case must on that basis alone fail.

2. *There is No Factual Basis To Find that McCoy's Distrust of Vaccines Is A Creed.*

Aside from the legal question, the hearings officer agrees with the respondent that McCoy's belief as a matter of fact does not amount to such a fundamental belief that it could be entitled to status as a creed. This is so for two reasons. First she has continued to take the TB test even though it involves placing a killed virus under the first layer of skin in order to ascertain the presence of tuberculosis. Vaccination with the various influenza vaccinations here is different only in that the penetration is through the skin and into a muscle. Like the TB test, it involves placing a killed protein into the body.

Secondly, her belief has been evolving over time which, under the facts of this case, militates against a factual finding that her belief constitutes a fundamental set of beliefs for McCoy. McCoy apparently had no problem taking a

hepatitis vaccine in 1996 and her belief of the importance of avoiding vaccinations changed over the course of her grievance to the her employer. When she first grieved the requirement that she submit to the vaccination, she stated that she did not believe that taking the vaccine was in her "personal best interests" and that she had a "strong personal preference" against the vaccine. Charging party's Exhibit 1. She later told her employer that her objection was based upon her belief that others 'should not make health care decisions for her." Charging party's exhibit 4. She then again changed her argument to suggest that her objection was based upon the fact that the mandatory influenza vaccination was not a requirement of her employment when she began working at RiverStone and that she believed employees hired before the implementation of the policy should have been grand-fathered in. Charging party's Exhibit 9. Her evolving belief in the importance of avoiding vaccinations convinces the hearings officer sitting as the trier of fact that McCoy's belief is not fundamental as she suggests it is.

3. *Even If McCoy's Concerns About Vaccination Could be Accorded the Status Of A Creed, RiverStone Was Not Required To Accommodate Her Demand That She Not Be Vaccinated.*

Even if McCoy's belief was entitled to protection as a creed, the employer would not in any event have been obligated to accommodate her. Riverstone's implementation of the vaccination policy was imminently reasonable in light of the circumstances facing it at the time the decision to implement the policy of mandatory vaccination occurred. Riverstone had no effective alternative to the mandatory vaccination that would have carried out its business and statutory obligations of protecting the public from the introduction of infectious diseases. Therefore, even if McCoy's belief rose to the level of a creed, RiverStone did not violate the Human Rights Act or the Governmental Code of fair Practices.

At the outset, in light of the anticipated pandemic of H1N1influenza facing not only RiverStone but indeed the world in 2009, it seems rather intuitive that the need for employee vaccination would justify Riverstone's refusal to accommodate McCoy. History records several instances of the utter devastation inflicted upon the human race when diseases such as influenza are not fully combated. For example, in the 1918 influenza pandemic, it is estimated that between 20 and 50 million people died around the world, 675,000 of them Americans. United States Department of Health and Human Services, www.1918pandemicflu.gov. Undoubtedly, experiences such as these have led courts for over 100 years to repeatedly uphold statutorily imposed mandatory vaccination programs in the face of challenges that such statutes violate constitutional rights. *See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 38*

(1905)(holding that legislation mandating that town citizens be vaccinated against small pox does not invade "any right secured by the Federal Constitution)*; Zucht v. King*, 225 S.W. 267, 272 (Ct. App. Tx. 1921)(holding that an ordinance directing that school age children be vaccinated did not violate the child's right to free exercise of religion, noting that such a classification "has a reasonable, if not commendable, basis and has been sustained time and time again"); *Cude v. State,* 237 Ark. 927, 377 S.W. 2d 816, 819 (1964) ("According to the great weight of authority, it is within the police power of the state to require that school children be vaccinated against small pox, and that such requirement does not violate the constitutional rights of anyone, on religious grounds or other wise")*; Sherr v. Northport-East Northport Union Free Sch. Dist*, 672 F.Supp. 81, 88 (E.D.N.Y. 1987)("[I]t has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs"); *Workman v. Mingo Cty. Brd. of Education, 2011 U.S. App. LEXIS 5920 (unpublished opinion)* (holding that West Virginia's mandatory immunization program did not violate the plaintiff's free exercise of her religion, citing *Sherr, supra,* and *Cude, supra*.[3]

The Montana Supreme Court has long recognized the utility of looking to federal cases when interpreting the Montana Human Rights Act. ***Citation.*** Religious accommodation cases are useful here and there are several that deal with the various burdens of proof placed upon the parties and in particular the burden placed upon an employer to show that it did not discriminate once an employee has established a prima facie case of discrimination. *See, e.g., EEOC v. Firestone Fibers and Textile Co.*, 515 F.3d 307, 312 (4th Cir. 2008). If an employee establishes a prima facie case of discrimination, an employer may escape liability by demonstrating that it either attempted to accommodate the employee or that doing so would have caused an undue hardship. *Id., citing Trans World Airlines v. Hardison,* 432 U.S. 63, 75 (1977). Accommodating an employee's religious beliefs (and by analogy, her creed) does "not impose a duty on the employer to accommodate at all costs." *Firestone*, 515 F. 3d at 313. Id. at 313. The accommodation need only be reasonable. *Id*.

The statutory mandates with which RiverStone is charged, the

[3]In citing these cases, the hearings officer recognizes that these cases involve the police power of the state in the face of perceived violations of constitutional rights and that the case at bar focuses on an employer, that has no police power, and statutory rights, not constitutional rights. However, these cases are instructive because they identify the great weight that must be assigned to the importance of vaccination programs particularly those implemented by a public health entity.

circumstances in which RiverStone found itself at the time of the adoption of the policy, along with the compelling testimony of Dr. Septimus overwhelmingly demonstrates that accommodating McCoy would have posed more than an unreasonable hardship upon the employer. It would have been utter anathema to RiverStone's central function to protect the health of the public. By statute, a local health board is required to protect the public form the introduction of infectious diseases and to fight and attempt to eliminate such diseases. Mont. Code Ann. 50-2-116 (g) and (f). Riverstone's policy did not just come out of the blue sky. It was adopted in part as a proactive response to the threat of the H!N1 pandemic threatening the globe in 2009. The purpose was straightforward: to protect both patients and employees from the threat of influenza.

The substantial evidence in this case demonstrates that in light of the threat of influenza, including the possible spread of H1N1, in 2009 and the known methods of transmission of the disease, it was reasonable on the part of the employer to conclude that nothing short of mandatory vaccination could accomplish that goal. Riverstone's clientele, which they are statutorily mandated to care for, are more at risk for the spread of infectious disease than might be other populations. At Riverstone, McCoy worked in a prison population, a population especially susceptible to the spread of infectious diseases. RiverStone was not in a position financially or otherwise to take employees, particularly an LPN like McCoy, off the front lines and keep them away from patients. All employees had to be in a position to deal face to face with clientele. And riverstone was not in a position to have a part of its workforce sidelined due to influenza.

Simply telling employees to wear a mask was not adequate. As Dr. Septimus cogently explained, perhaps as many as 25% to 50% of employees can have influenza and be spreading the disease without knowing they have the illness because they are not yet symptomatic. Record transcript, page 236, lines 10 through 25, page 237 lines 1 through 15. There were no good medical studies to demonstrate that the use of mask alone was sufficient to ensure the protection fo the public. In addition, at the time it adopted the policy, RIVERSTONE was cognizant of the fact that under its voluntary vaccination program, the rates of employee vaccination remained at about 74%, leaving perhaps as many as 25% of the employees susceptible to contracting a disease that almost certainly could be prevented through vaccination.

Mandatory vaccination programs have raised compliance among employees to at least 95% (record transcript page 233, lines 13 through 15), a number that would represent a substantial reduction in at risk health workers over Riverstone's

voluntary policy. Several organizations, including the Shea Paper, have concluded that mandatory vaccination is the only efficacious way at this point in time way to ensure adequate protection of both patient and care givers. Many notable health institutions, such as the Johns Hopkins University, the Virginia Mason Hospital in Seattle, Washington, the Barnes Jewish Hospital System have become part of more than 200 healthcare hospitals to require mandatory vaccination. Record transcript, page 234, lines 1 through 7.

In an effort to show that RiverStone did not adequately attempt to accommodate McCoy, McCoy has relied on the testimony of Dr. Kahn. Kahn's expert testimony is rejected. As Dr. Septimus pointed out, Kahn was mistaken about the efficacy of the vaccine in person over 65 years old versus healthy adults. Kahn's basis of testimony was flawed and is therefore rejected.

The reality of the situation is that in light of the potential pandemic of H1N1 facing the world in 2009, the known science on the transmission of the disease, the weight of the medical literature and RiverStone's statutorily mandated requirements to protect the public from transmission of infectious diseases, Riverstone's mandated vaccination policy was not only reasonable, it was necessary. Implementing McCoy's requested accommodation in light of her job position and the requirements of all employees in the RiverStone Health system would have presented an undue hardship on the employer. Therefore, even if her opposition to vaccines could be considered a creed, her request to be excused form vaccination would have presented an undue hardship on the employer.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Mont. Code Ann. § 49-2-509(7).

2. McCoy's philosophical beliefs against vaccination are not protected by the Montana Human Rights Act. As a matter of law, the belief does not rise to the level of a creed. As matter of fact, McCoy's changing position on her belief demonstrates that her belief does not rise to eh level of a creed.

3. Even if McCoy's belief were found to be a creed, the employer could not have accommodated her without undue hardship to its program.

4. As McCoy has not proven discrimination, her claim for damages is moot.

5. Because McCoy has failed to prevail in her claim of discrimination, this

matter must be dismissed. Mont. Code Ann. §49-2-507.

VI. ORDER

Based upon the foregoing, judgment is entered in favor of RiverStone and McCoy's complaint is dismissed.

DATED this ____ day of July, 2011.

/s/GREGORY L. HANCHETT
Gregory L. Hanchett, Hearings Officer
Hearings Bureau
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Alex Rate and Ryan Sudbury, attorneys for R Annie McCoy; and Bruce Fain, attorney for Riverstone Health:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Katherine Kountz
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).