

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

CATHERINA LORENA CENZON-DECARLO,

Civil Case No: 09-3120

Plaintiff,

v.

THE MOUNT SINAI HOSPITAL, a New York Not-for-Profit Corporation,

**MEMORANDUM IN
SUPPORT OF MOTION
FOR PRELIMINARY
INJUNCTION**

Defendant.

Plaintiff Catherina Lorena Cenzon-DeCarlo respectfully offers this memorandum in support of her motion for a preliminary injunction against Defendant The Mount Sinai Hospital, ordering it to honor her religious objection against assisting in abortion and to refrain from retaliation against her.

ISSUE PRESENTED

Is an injunction required against Mount Sinai Hospital because it violated federal law prohibiting it from compelling medical personnel to assist in abortions, when its officials forced Mrs. DeCarlo to assist in the dismemberment abortion of a 22-week-old preborn child over her religious objection, the hospital condoned this action and claimed it may engage in similar compulsion in the future, the hospital retaliated against Mrs. DeCarlo for requesting that her rights of conscience be respected, and the hospital has received millions of dollars of federal funds subjecting it to the conscience-protecting requirements of 42 U.S.C. § 300a7(c)?

I. Introduction and Factual Summary¹

This action seeks injunctive and declaratory relief on behalf of Catherina Lorena Cenzon-DeCarlo, a nurse who in May 2009 was forced by The Mount Sinai Hospital to assist in the abortion of a 22-week-old preborn child despite her longstanding religious objection to participating in lethal abortions. Mount Sinai blatantly violated federal law (to which it voluntarily subjected itself) by threatening Mrs. DeCarlo's job and nursing license unless she would assist in the late-term abortion. Then when Mrs. DeCarlo tried to use appropriate channels to seek to have her rights of conscience respected, Mount Sinai condoned the compulsion it had exerted in May, declared that employees could again be subject to such a mandate at Mount Sinai's arbitrary discretion, and even resorted to retaliation and brash bullying tactics to get Mrs. DeCarlo to abandon her rights.

Plaintiff Catherina Cenzon-DeCarlo is a highly capable and experienced nurse at Mount Sinai. *Compl.* ¶¶ 30-32. She received her initial nursing training in the Philippines, her country of origin. *Compl.* ¶ 14. She chose nursing over more lucrative careers because of her passion for helping patients and the fulfillment she receives from performing as an excellent nurse in a variety of procedures. *Compl.* ¶ 11. In the Philippines Mrs. DeCarlo obtained several years of experience in operating room nursing, including extensive experience in labor and delivery maintaining the health of women with pre-eclampsia so that their preborn children could be born alive. *Compl.* ¶ 20. As her career blossomed, Mrs. DeCarlo learned of the tremendous opportunity and freedom that America offers to experienced nurses such as herself. *Compl.* ¶ 21. She obtained language certification and came to the United States in 2001 under an alien worker immigrant visa. *Compl.* ¶ 15, 22. In New York, Mrs. DeCarlo gained further operating room nursing experience at various facilities for several years. *Compl.* ¶ 23, 24. She met and married

¹ The facts of this case are presented fully in the accompanying Verified Complaint and are summarized here.

her husband, an American citizen, and they have a one-year-old child. *Compl.* ¶ 25-26. The DeCarlos are dependent on Mrs. DeCarlo's income from Mount Sinai Hospital. *Compl.* ¶ 27.

In August 2004, Mrs. DeCarlo was hired as an operating room nurse at The Mount Sinai Hospital. *Compl.* ¶ 28. Mrs. DeCarlo desired to work at Mount Sinai because of their expertise in various and complicated surgeries, including liver transplants and neurosurgery. *Compl.* ¶ 29. During her job interview, Mount Sinai officials asked Mrs. DeCarlo about her willingness to assist in abortions. *Compl.* ¶ 33. Mrs. DeCarlo stated her strongly-held religious belief that she may not participate in abortion procedures that kill preborn children. *Compl.* ¶ 34. Mrs. DeCarlo is a Catholic who was raised in a very devout family and was immersed in the religious culture of her community. *Compl.* ¶ 12-13. Mrs. DeCarlo did indicate that she is willing to help in miscarriage cases, which are often administered by dilation and curettage (D&C) in the first trimester of pregnancy. *Compl.* ¶ 34, 55. Mount Sinai's hiring officials expressed no concerns with her objection to assisting in abortion. *Compl.* ¶ 35. They even gave her a form created under hospital policy that claims to respect employee conscience rights to some degree. *Compl.* ¶ 37. She submitted that form expressing her objection to abortion in writing, and she was hired. *Compl.* ¶ 38.

Mrs. DeCarlo has excelled at Mount Sinai. She has received exemplary performance reviews and has earned the respect and professional appreciation of both her superiors and the doctors on whose cases she has worked. *Compl.* ¶ *Compl.* ¶¶ 30-31. Mrs. DeCarlo is recognized at Mount Sinai as having a high level of expertise among her operating room nurse peers, being highly competent in the full array of operating room procedures including specialized and difficult surgeries. *Compl.* ¶ 32. Mrs. DeCarlo is so proficient in specialized surgeries that

Mount Sinai and her colleagues have often called upon her to cover their on-call shifts to handle those surgeries. *Compl.* ¶ 51.

Mrs. DeCarlo works full time and also works 8–9 on-call shifts per month on weekends and holidays. *Compl.* ¶ 40, 53. The shifts are a benefit and privilege of employment for qualified nurses. *Compl.* ¶ 41. Mount Sinai required Mrs. DeCarlo to be willing to work on-call shifts as a condition of hiring her. *Compl.* ¶ 43. Mrs. DeCarlo, her husband and their son rely upon the income that Mrs. DeCarlo earns on these overtime shifts. *Compl.* ¶ 27. Although the on-call schedules are initially filled on a volunteer basis, if there are not enough volunteers Mount Sinai will require employees to fill the shifts. *Compl.* ¶ 27.

Mount Sinai also performs abortions at various times. They are regularly performed on Saturday mornings, and they are scheduled at other times as well, including on-call hours. *Compl.* ¶¶ 54-55. Mount Sinai has a list of several nurses who it regularly uses to assist abortions. *Compl.* ¶ 61. Before May 2009, there were some instances when abortions arose during one of Mrs. DeCarlo's on-call shifts and Mount Sinai simply chose not to call Mrs. DeCarlo to those cases, and there was at least one instance when she was called but upon reminding Mount Sinai about her objection the case was assigned to another nurse. *Compl.* ¶¶ 62-63. Nevertheless, Mrs. DeCarlo has information to believe that Mount Sinai has sometimes forced other nurses to assist abortions. *Compl.* ¶ 64.

On the morning of Sunday, May 24, 2009, Mrs. DeCarlo was working on call. *Compl.* ¶ 65. Although on-call employees may be off campus until called, Mrs. DeCarlo always remains on campus during her shifts and is immediately available. *Compl.* ¶ 68. At 7:15 am, Mrs. DeCarlo walked to the receptionist to see if she was assigned to any surgeries. *Compl.* ¶ 71. The receptionist told her she was assigned to a D&C case, and she naturally assumed it was a

miscarriage. *Compl.* ¶ 72-73. Unbeknownst to Mrs. DeCarlo, however, earlier that morning Dr. Michael Silverstein of Mount Sinai's medical school had scheduled this case, which was a 22-week abortion. *Compl.* ¶ 69. The procedure, called a D&E, would involve dismembering the child alive. *Compl.* ¶ 57, 70.

Mrs. DeCarlo went to the surgery room right away to begin preparation before the patient arrived. *Compl.* ¶ 74. But while she was there the case cart arrived with instruments that Mrs. DeCarlo recognized as being possibly used for non-miscarriage abortions. *Compl.* ¶ 75. She then examined the case paperwork and, despite virtually illegible handwriting, she began to wonder whether the abortion was on a live child, and what the patient's diagnosis was. *Compl.* ¶¶ 76-77. At 7:30 Mrs. DeCarlo called the resident assigned to the case, who told her the patient was diagnosed with pre-eclampsia and the child was still alive. *Compl.* ¶¶ 78-79.

Mrs. DeCarlo was startled. She knew she had been assigned to a case where a living 22-week-old preborn child would be dismembered and killed, despite her known and longstanding objection. *Compl.* ¶ 80. She also knew from personally treating pre-eclamptic patients that there was no need to kill the child to maintain the woman's health. *Compl.* ¶ 81. So she immediately expressed to Dr. Strong that she would not participate in the abortion, and told her not to send the case up to the room until a nurse was assigned who would handle the case. *Compl.* ¶ 82-83.

Mrs. DeCarlo promptly called her nursing supervisor, Ms. Fran Carpo, and expressed her objection to participating in this case. *Compl.* ¶ 84. Ms. Carpo said she would call her supervisor, Ms. Ella Shapiro, to ask whether Mrs. DeCarlo could be excused. *Compl.* ¶ 86. Ms. Carpo said that in the meantime Mrs. DeCarlo should call the receptionist to begin gathering contact information for other nurses who could cover this case. Mrs. DeCarlo did so. *Compl.* ¶ 87. Although this D&E and other gynecology cases are assigned to the "Team 2" on-call team,

the procedure is sufficiently basic that an operating room nurse from any team would have the competency to handle the case. *Compl.* ¶ 58.

Ms. Carpo called Mrs. DeCarlo back and told her that Mrs. DeCarlo must assist in the 22-week D&E abortion. *Compl.* ¶ 88. Mrs. DeCarlo was distraught. *Compl.* ¶ 100, 102. She repeated her longstanding objection and pleaded that Mount Sinai not force her to assist, and instead to call other nurses to the case since so little time had elapsed. *Compl.* ¶ 89-90. Ms. Carpo said that Ms. Shapiro had insisted that Mrs. DeCarlo assist, and had prohibited Ms. Carpo from even trying to call other nurses in. *Compl.* ¶ 91. Ms. Carpo also said that Dr. Silverstein had yelled at her over the phone in opposition to any delay in the case as a result of Mrs. DeCarlo's request for accommodation. *Compl.* ¶ 92.

Ms. Carpo further claimed that the mother could die if Mrs. DeCarlo did not assist in the abortion. *Compl.* ¶ 93. Mrs. DeCarlo explained to Ms. Carpo that the patient could not be in such immediate danger because, based on what Dr. Silverstein had told Ms. Carpo over the phone, the patient was not even on magnesium therapy, which is a medical requirement for preeclamptic patients in crisis. But Ms. Carpo rejected this argument. *Compl.* ¶ 94. Notably, Ms. Carpo herself was qualified to perform this case herself and could have done so without any significant delay in the case. *Compl.* ¶ 96.

Ms. Carpo declared that if Mrs. DeCarlo did not participate in the case, Mrs. DeCarlo would be brought up on charges of "insubordination and patient abandonment." *Compl.* ¶ 97. A charge of patient abandonment would severely jeopardize Mrs. DeCarlo's employment and her nursing license and consequently her career and her and her family's livelihood. *Compl.* ¶ 98. A charge of insubordination would severely jeopardize Mrs. DeCarlo's employment and her future employability. *Compl.* ¶ 99.

Mrs. DeCarlo began to cry and said she would even get her priest on the phone to explain that she could not assist in the killing of a 22-week-old child, and pleaded for this reason to be excused from the case. *Compl.* ¶ 100. Despite all of Mrs. DeCarlo's urgings, Ms. Carpo insisted that Mrs. DeCarlo participate in the abortion case. *Compl.* ¶ 101. Mrs. DeCarlo was devastated. *Compl.* ¶ 102. She and her family could not afford for her to lose her job or her nursing license. *Compl.* ¶ 102. In the face of these threats, Mrs. DeCarlo stated that she was acceding to Ms. Carpo's dictate, but only under protest. *Compl.* ¶ 103.

Mrs. DeCarlo returned to the surgery room and finished her pre-surgery duties. *Compl.* ¶ 104. When the patient arrived Mrs. DeCarlo treated her with utmost respect and professionalism, and made sure that the patient had no knowledge of her opposition to participating. *Compl.* ¶¶ 105-06. Nevertheless, the scrub technician and the anesthesiologist on the case expressed surprise to see Mrs. DeCarlo assisting, and sympathy when they were informed (outside the patient's presence) that Mrs. DeCarlo was being compelled to assist against her will. *Compl.* ¶¶ 107-09.

Compelling Mrs. DeCarlo to assist in this abortion against her religious beliefs exposed Mrs. DeCarlo to brutal psychological harm. *Compl.* ¶ 126. By assisting she was forced to witness the killing of a 22-week-old preborn child by dismemberment. *Compl.* ¶ 110. Because it was included in the requirements of her nursing duties as an assistant on the case, Mount Sinai forced Mrs. DeCarlo to watch the doctor remove the bloody arms and legs of the child from its mother's body by with forceps, and then after the surgery, to view the bloody body parts in the specimen cup, put saline in the cup, and take it to the specimen area. *Compl.* ¶¶ 111-12.

Mount Sinai's protocols on surgery priority show that this procedure did not require Mrs. DeCarlo's involvement. Mount Sinai's protocols contain several categories of surgeries to

identify their urgency and priority, including various levels of emergencies. *Compl.* ¶ 113 & Exhibit B. Surgeries placed in Category I involve “Patients requiring immediate surgical intervention for life or limb threatening conditions.” *Compl.* ¶ 114. But none of the Mount Sinai officials or doctors on this abortion case labeled it a surgery requiring immediate surgical intervention for life or limb threatening conditions. *Compl.* ¶ 115. Instead Dr. Silverstein labeled the abortion a Category II, which applies to “Patients requiring surgery within 6 hours of identification and notification.” *Compl.* ¶ 116. As a result Mrs. DeCarlo’s immediate surgical intervention was not required, and at the time of her prompt objection there was plenty of time to find a nurse to assist. *Compl.* ¶ 117.

Mrs. DeCarlo’s observation of the case confirmed that this abortion was not a medical emergency requiring her assistance. *Compl.* ¶ 122. For example, when the patient was brought into the room for surgery, her blood pressure was not at a crisis value, and other standard measures for patients in crisis had not been taken on this patient. *Compl.* ¶ 123. Pre-eclamptic patients can be kept stable until later in pregnancy when labor can be induced or a c-section performed so that the child is delivered intact, is not directly killed, and has a chance to survive. *Compl.* ¶ 124. As a result, this abortion did not even rise to the level of a Category II surgery that had to be done within 6 hours. *Compl.* ¶ 119. Likewise, there was no need to perform actions within six hours that intentionally killed the child. *Compl.* ¶ 120. Rather, the patient could have been maintained in stable condition until Mount Sinai assigned a nurse other than Mrs. DeCarlo to the case who would be willing to assist the abortion. *Compl.* ¶ 121.

Being forced to assist in this abortion has caused Mrs. DeCarlo extreme emotional, psychological, and spiritual suffering. *Compl.* ¶ 126. She has experienced nightmares about children in distress, has lost sleep, and has suffered in her personal and religious relationships

because of being forced to assist in this abortion. *Compl.* ¶ 127. Mrs. DeCarlo has had to receive treatment from her attending physician to address her psychological symptoms, and he prescribed medication to help her sleep. *Compl.* ¶ 128.

On the next business day after the abortion, Mrs. DeCarlo brought complaints to her supervisors and her union about having been forced to assist in an abortion. *Compl.* ¶ 129. She then caused a grievance to be filed with her union and supervisors for violation of the collective bargaining agreement between Mount Sinai and the New York State Nurses Association. *Compl.* ¶ 130. But in the initial informal conversations with Mrs. DeCarlo and union representatives, Mount Sinai officials stated that employees must be willing to assist in abortions in circumstances that Mount Sinai determines, including the circumstances that Mrs. DeCarlo suffered on May 24. *Compl.* ¶ 131.

Then Mount Sinai began to retaliate against Mrs. DeCarlo because of her request that it honor her religious objection to assisting in abortion, and because of the grievance procedure that she filed. First Mount Sinai officials failed to assign Mrs. DeCarlo to her usual 8–9 on-call shifts in August. *Compl.* ¶ 134-36. Although Mount Sinai officials claimed this was merely inadvertent, the hospital's subsequent actions last week indicate otherwise. *Compl.* ¶ 137. On July 9, 2009, Mrs. DeCarlo's union representative Crystal Shipp called her and informed her that Mount Sinai wanted to meet on Thursday, July 16, at noon, to discuss the grievance and whether Mrs. DeCarlo may object to assisting in abortion. *Compl.* ¶ 138. Mrs. DeCarlo and her attorney Joseph Ruta presented themselves at the meeting location on July 16, but Ms. Shipp and another representative of the union Ms. Lucille Sollazzo informed Mrs. DeCarlo that neither the union nor Mount Sinai would conduct the meeting if Mr. Ruta was present. *Compl.* ¶ 139-40. Even though nothing in the bargaining agreement prevented Mr. Ruta from being present, Mount Sinai

and the union cancelled the meeting because of his presence, and this cancellation itself deprived Mrs. DeCarlo of a remedy that the agreement provides. *Compl.* ¶ 141-43.

Just a few hours later it became apparent why Mount Sinai wanted to talk to Mrs. DeCarlo without her attorney. That same afternoon of July 16, Mrs. DeCarlo was cornered in the hospital by Beata Mastalerz, her clinical manager. *Compl.* ¶ 144. Ms. Mastalerz asked Mrs. DeCarlo to come into her office, and then told Mrs. DeCarlo that her request to be assigned to on-call shifts in September would be conditioned upon Mrs. DeCarlo being willing to write and sign a statement promising that she was willing to assist in D&C and D&E abortions if the hospital declared that such cases were “emergencies” requiring her assistance. *Compl.* ¶ 145. Mrs. DeCarlo refused to sign such a statement, saying that she had already signed a notice that she objects to assisting in abortion pursuant to written hospital policy. *Compl.* ¶ 147. Ms. Fran Carpo, who would have been at the now-cancelled meeting, then came into the room and attempted to convince Mrs. DeCarlo to write and sign such a statement. *Compl.* ¶ 148. Mrs. DeCarlo began to cry and continued to refuse, telling Ms. Mastalerz and Ms. Carpo that she had always opposed assisting abortion from the day she was hired. *Compl.* ¶ 149. She also objected other nurses also oppose assisting abortion but apparently Mrs. DeCarlo was the only one being required to sign statements agreeing to assist abortions as a condition that she be assigned to on-call shifts. *Compl.* ¶ 149-50. Mrs. DeCarlo asked if she could leave the room to compose herself, but Ms. Mastalerz and Ms. Carpo refused; they insisted that she sit down and they continued to try to convince her to sign away her objection to abortion. *Compl.* ¶ 151. As Mrs. DeCarlo became more distraught she was finally able to convince Ms. Mastalerz and Ms. Carpo to allow her to leave. *Compl.* ¶ 152.

The compelling of Mrs. DeCarlo is troubling in several ways internal to the hospital. Mount Sinai seems to have violated its own policy, HR/ER # 15.3, in forcing Mrs. DeCarlo to assist in this abortion. *Compl.* ¶ 125. On the other hand, Mount Sinai seems to have an official interpretation of HR/ER # 15.3 as actually authorizing it to compel assistance in abortion and condoning the compulsion they exerted against Mrs. DeCarlo. By uniquely requiring Mrs. DeCarlo to sign away her conscience rights on July 16, Mount Sinai condoned and acquiesced in the illegal compulsion it had applied to Mrs. DeCarlo on May 24, and it imposed a policy by which it assumed the discretion to compel health care personnel assistance in abortion at its discretion. *Compl.* ¶ 153.

Mount Sinai is bound to respect Mrs. DeCarlo's conscience rights by virtue of several laws, but most notably 42 U.S.C. § 300a-7(c). Mount Sinai has voluntarily subjected itself to this statute by receiving hundreds of millions of federal Health and Human Services dollars in recent years. *Compl.* ¶ 158-59. The trail of funding that Mount Sinai receives is too long to describe, and is discussed in greater detail below. *Compl.* ¶ 158. This statute, however, states in no uncertain terms that Mrs. DeCarlo is protected from discrimination by Mount Sinai in the conditions or privileges of her employment on the basis of her religious objection to assisting in abortion. *Compl.* ¶ 160.

Mount Sinai blatantly violated Mrs. DeCarlo's rights under 42 U.S.C. § 300a-7(c) on May 24, and it continues to do so by condoning the violation and insisting that it can compel her or other employees again or penalize them by removing them from on-call shifts. *Compl.* ¶¶ 163-65. Abortions can arise on call or during regular hours, and Mount Sinai claims the discretion to determine that any one of those medically require the compulsory assistance of nurses who object. *Compl.* ¶¶ 132, 153. Mrs. DeCarlo and her fellow employees are now

therefore under a constant threat that they might be forced to assist even gruesome late-term abortions like the one Mrs. DeCarlo was forced to help. *Compl.* ¶ 172.

As a result of these facts and as explained below, Mrs. DeCarlo is entitled to a preliminary injunction ordering Mount Sinai to honor her conscience rights and refrain from penalizing her due to her protected religious objection to assisting abortion.

II. Argument: An Injunction Should Immediately Issue

Defendant's willful disregard of their duties under 42 U.S.C. § 300a-7(c) have harmed Mrs. DeCarlo and threatens to harm her and all employees at Mount Sinai in the future. Another abortion could arise tomorrow that Mount Sinai determines is a justification to force employees to assist against their religious objections. Mount Sinai has assumed a public trust in accepting millions of dollars of public funds. As such, Mount Sinai must not and cannot force employees to assist in procedures they consider to be brutal murder. But rather than honoring that trust it has resorted to brash bullying tactics against the one employee to ask that her rights of conscience be respected.

The standards for granting a preliminary injunction are well established in this Circuit. A preliminary injunction may be issued provided that the moving party demonstrates "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Gold v. Feinberg*, 101 F.3d 796, 800 (2d Cir. 1996) (internal quotations omitted).

A. Mrs. DeCarlo has shown irreparable harm.

Mount Sinai's violation of federal law have harmed Mrs. DeCarlo in a most personal and graphic fashion. Knowing her deeply-held religious objection to being involved in abortion,

Mount Sinai nevertheless forced her to assist a particularly disturbing case in which a 22-week-old preborn child was dismembered piece by piece. She had to watch the innocent child's arms and legs be removed from the woman, and then as part of her assisting duties she had to treat the dismembered parts with saline and deliver them to the specimen room.

This experience severely traumatized Mrs. DeCarlo. She has felt intense emotional, psychological and spiritual suffering from having to participate in something she considers profoundly immoral and unjust. She has missed several days of work, has had trouble sleeping, and has had nightmares about the killing of this child. She has even had to deal with feelings of estrangement from God and family members.

Mount Sinai callously imposed this harm on Mrs. DeCarlo over and against her tears and urgings and known religious beliefs. Her supervisor did not cover the case even though she knew the trauma she was imposing on Mrs. DeCarlo. Mount Sinai prohibited other nurses from even being called to see if they could handle the case. Since this troubling incident, Mrs. DeCarlo has learned that other nurses have been forced by Mount Sinai to assist in abortions against their will. And in the face of Mrs. DeCarlo's subsequent grievance, Mount Sinai has condoned its actions against her and decided that it indeed has the discretion to compel nurses (and presumably other employees too) to assist abortion in the future. The hospital has even suggested that it could remove Mrs. DeCarlo from the ability to work on-call shifts each month, even though she has always performed those shifts in an impeccable fashion.

All of this amounts to palpable and irreparable harm requiring injunctive relief.

B. Mrs. DeCarlo has shown a likelihood of success on the merits.

By its policy of being able to and actually forcing nurses to assist in abortions against their religious objections, Mount Sinai has violated the explicit provisions of federal law. Mount

Sinai assumed a public trust by accepting millions of dollars in federal health related grants. Yet the hospital violated this trust by forcing Mrs. DeCarlo to assist in a 22-week-abortion that dismembered a living child. Rather than apologizing, Mount Sinai maintains that the compulsion was acceptable and could occur again at its discretion.

1. Mount Sinai has a legal duty not to compel assistance in abortion.

The Church Amendment (named after its 1973 sponsor Senator Frank Church) sets forth Mount Sinai's duty in a straightforward manner:

(c) Discrimination prohibition

(1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act [42 U.S.C. § 201 et seq.], the Community Mental Health Centers Act [42 U.S.C. § 2689 et seq.], or the Developmental Disabilities Services and Facilities Construction Act [42 U.S.C. § 6000 et seq.] after June 18, 1973, may--

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

(2) No entity which receives after July 12, 1974, a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services may--

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

42 U.S.C. § 300a-7(c). The Church Amendment “appl[ies] to discrimination” committed against plaintiffs by fund recipients. *Erzinger v. Regents of University of California*, 137 Cal. App. 3d 389, 394, 187 Cal. Rptr. 164, 167 (Ct. App. 1982). Compensatory and punitive damages are available to health care personnel whose rights under the Church Amendment are violated by fund recipients. *Carey v. Maricopa County*, 602 F. Supp. 2d 1132, 1144 (D. Ariz. 2009).

2. Mount Sinai is subject to the Church Amendment.

Mount Sinai has voluntarily subjected itself to this statute by receiving millions of dollars in federal funding on a yearly basis. The most recent report from HHS shows that Mount Sinai received over \$211 million in federal discretionary grant dollars *in fiscal year 2007 alone*, ranking it 29th in the nation among grant recipients. *Compl. Exhibit C*.² Mount Sinai seems to receive a similar amounts of federal health funding every year, including 2008 and 2009.

These hundreds of millions of dollars flow back and forth within Mount Sinai in a “seamless” fashion.³ Mount Sinai is a self-contained entity with a hospital, medical school and foundation within their Manhattan campus, and a satellite hospital in Queens. The federal funding dollars support facilities, salaries, research and community projects.

Mount Sinai’s individual grants are far too numerous to describe in detail. But several are noted here:

² Exhibit C was obtained from http://taggs.hhs.gov/AnnualReport/FY2007/documents/TAGGS_2007_Annual_Report.doc (last viewed July 17, 2009).

³ The Mount Sinai Hospital webpage, *available at* <http://www.mountsinai.org/Who%20We%20Are/School%20of%20Medicine> (last viewed July 17, 2009).

- Mount Sinai regularly receives family planning grant funds as a delegate and clinic recognized by HHS's Office of Population Affairs. *Compl.* Exhibit D at 6.⁴ Those funds originate in subchapter VIII of the Public Health Services Act, 42 U.S.C. § 300–300a-8.
- Mount Sinai received over \$175,000 in 2007 and 2008 in grants for HIV-related dental health services. *Compl.* Exhibit E.⁵ Those funds are managed by HHS's Health Resources and Services Administration and they originate from subchapter XXIV of the Public Health Services Act, 42 U.S.C. § 300ff–300ff-121.
- Mount Sinai participates in grant awards under the titles of the Center for Achieving and Sustaining Improved Health in Harlem, and Collaborations for Health Improvement in East Harlem—Project Heed. *Compl.* Exhibit F.⁶ The grant program started in 2002 but has continued through 2009 and has totaled over \$14 million. The grants are awarded through the National Institutes of Health's National Center on Minority Health and Health Disparities, and are authorized by subchapter III of the Public Health Services Act, 42 U.S.C. §§ 241, 285, & 287c-31–c-33.
- Mount Sinai received a \$333,902 grant in late 2005 for construction and renovation of its branch hospital in Queens, New York. *Compl.* Exhibit G.⁷ The grant was received through HHS's Health Resources and Services Administration and was funded through various subchapters of the Public Health Services Act. See 118 Stat. 2809, 3122-23 (2005).

3. Mount Sinai violated its duty not to compel assistance in abortion.

Mount Sinai has violated its duties under the Church Amendment. It did and continues to “discriminate in the employment, promotion, or termination of employment of . . . health care personnel,” and “in the extension of . . . privileges to any health care personnel, because he . . . refused to . . . assist in the performance of . . . abortion on the grounds that his . . . assistance . . . would be contrary to his religious beliefs or moral convictions.” 42 U.S.C. § 300a-7(c)(1).⁸

⁴ Exhibit D was obtained from <http://www.hhs.gov/opa/familyplanning/grantees/services/> and http://www.hhs.gov/opa/familyplanning/grantees/services/titlexgdcs_regii.pdf (last viewed July 17, 2009).

⁵ Exhibit E was obtained from <http://hab.hrsa.gov/programs/dentallist.htm> (identifying Mount Sinai), <http://hab.hrsa.gov/treatmentmodernization/dentalrosters.htm> (2007 award amount), and <http://hab.hrsa.gov/treatmentmodernization/dentalrosters2008.htm> (2008 award amount) (last viewed July 17, 2009).

⁶ Exhibit F was obtained through conducting a search at <http://taggs.hhs.gov> (last viewed July 17, 2009)

⁷ Exhibit G was obtained through conducting a search at <http://taggs.hhs.gov> (last viewed July 17, 2009)

⁸ By extension, the compulsion also violated section (c)(2)'s protection of religious beliefs not just against abortion but against “any lawful health service.” Section (c)(2) applies by virtue of the funding that Mount Sinai receives “for biomedical or behavioral research,” which in some ways overlaps the funding that triggers (c)(1).

Mount Sinai's actions violate its duties in the most literal way possible. Mount Sinai conditioned Mrs. DeCarlo's job and nursing license (by threats of insubordination and patient abandonment charges) on her assisting in a 22-week dismemberment abortion. This is a straightforward case of imposing a prohibited condition on an employee's job and good standing, namely that she be willing to succumb to compulsion to assist abortion, and that all employees may be required to offer similar assistance in abortion in the future. Discrimination does not come in a more stark form than this. Nor is there any way to imagine a more blunt violation of the rights that 42 U.S.C. § 300a-7(c) was written to protect.

For similar reasons, Mount Sinai is discriminating by revoking the privilege of being able to work on-call shifts for no reason except the failure to succumb to their illegal mandate that Mrs. DeCarlo assist in abortion. Mrs. DeCarlo has exhibited stellar performance in all on-call shifts—the only basis for Mount Sinai's revocation of her rights is that she wishes to maintain her religious objection protected under 42 U.S.C. § 300a-7(c). Mount Sinai has even especially applied this condition to Mrs. DeCarlo in a retaliatory fashion precisely because she objected to its illegal violation of her rights by filing a grievance. It has subjected her to particular humiliation and bullying by attempting to force her to write out her own abdication of her religious beliefs on the very day that she presented herself for a meeting to discuss her grievance.

These actions amount to direct discrimination and a severely hostile work environment. Mount Sinai officials have pushed Mrs. DeCarlo to tears several times, and she has had to suffer the psychological effects of her compulsion on May 24. Mount Sinai's newly formed posture requiring assistance in abortions at its discretion, and its escalating retaliation measures against Mrs. DeCarlo, both represent an urgent harm not only to Mrs. DeCarlo but to the rights of all Mount Sinai personnel whose religious objections are protected by 42 U.S.C. § 300a-7(c).

C. Mount Sinai's illegal actions raise serious questions and would suffer no hardship from an injunction.

Mount Sinai's letter-by-letter violation of 42 U.S.C. § 300a-7(c) establish her likelihood of success on the merits. They also constitute sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tips decidedly toward Mrs. DeCarlo. Mount Sinai has accepted millions of federal health dollars yet is running roughshod over the rights that Congress explicitly legislated to protect under 42 U.S.C. § 300a-7(c). It should not be allowed to continue to do so at the expense of Mrs. DeCarlo without injunctive relief allowing the Court to consider these questions. If Mount Sinai insists that it must be able to force nurses to assist abortion, then Mrs. DeCarlo asks that the Court issue its order against Mount Sinai in the alternative, allowing it to choose either to comply with 42 U.S.C. § 300a-7(c) or to forego its federal health funding. Mrs. DeCarlo is confident that Mount Sinai will quickly discover that it can respect employee conscience rights after all.

The balance of hardships tips decidedly in Mrs. DeCarlo's favor. No hospital has an interest in forcing a nurse to assist in abortion over her longstanding religious objection. Nor does any hospital have a pressing need to do so at the taxpayer's expense, in direct contradiction to federal statute that it agreed to abide by when it accepted the funds. By accepting federal funding subject to 42 U.S.C. § 300a-7(c), Mount Sinai has conceded that there is no burden preventing it from simply honoring the religious objections to abortion of its health care personnel.

The facts show that no such burden exists. Mount Sinai has a known group of nurses who are willing and regularly assist in abortions. There is nothing preventing it from assigning these nurses to abortions that occur during regular hours and even weekends. Until the incident in May, Mrs. DeCarlo had worked for nearly five years at Mount Sinai without being compelled

to assist in an abortion. In this particular instance there was no need for the immediate abortion, much less a need to specifically force Mrs. DeCarlo to assist. Ms. Carpo, the manager who implemented the dictate against Mrs. DeCarlo, was herself available to assist in this particular abortion. And Mrs. DeCarlo is willing to assist in surgeries, unlike D&E and D&C abortions, that preserve the mother's life without targeting the child for killing. Therefore even in the extremely unlikely scenario that a true emergency were to arise and Mrs. DeCarlo is the only nurse in the entire Mount Sinai Hospital and Medical School system available to assist, the hospital can simply preserve the mother's life in ways that do not directly target the preborn child for termination.

Ordering Mount Sinai to respect its employees' rights under 42 U.S.C. § 300a-7(c), and to refrain from taking Mrs. DeCarlo off of on-call shifts simply restores the status quo that Mount Sinai has willingly subjected itself to for many years at the benefit of hundreds of millions of taxpayer dollars. The balance of hardships in considering this serious legal question tip decidedly in Mrs. DeCarlo's favor.

III. Conclusion

Accordingly, Mrs. DeCarlo respectfully requests that the Court issue a preliminary injunction⁹ ordering Mount Sinai to honor Mrs. DeCarlo's objections and refrain from retaliation against her for the pendency of this case.

⁹ Because the public interest in this case and all of the other factors that weigh in Plaintiff's favor, Plaintiff requests that the Court impose a bond of zero dollars in this instance.

DATED: July 21, 2009,

New York, New York.

Respectfully submitted,



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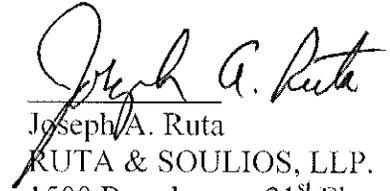
CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2009, the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service upon the following parties and participants:

The Mount Sinai Hospital
One Gustav L. Levy Place
New York, NY 10029

Service on this party was accomplished by means of service on the corporate party's agent the New York Secretary of state at the following address:

Department of State
One Commerce Plaza
99 Washington Avenue, 6th Floor
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