COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

22-J-31

BOSTON POLICE SUPERIOR OFFICERS FEDERATION & others[1]

vs.

MAYOR OF BOSTON & another.[2]

MEMORANDUM AND ORDER

SINGH, J. On January 26, 2022, the plaintiffs (unions) lodged this appeal, pursuant to G. L. c. 231, § 118, first par., from the Superior Court's denial of the unions' motion for a preliminary injunction. This court entered a temporary stay and requested briefing from the defendants (city), who submitted a response on February 1, 2022. The city filed a letter of supplemental authority, pursuant to Mass. R. A. P. 16 (l), as appearing in 481 Mass. 1628 (2019), on February 11, 2022. After review of the papers submitted by the parties, this court vacates the Superior Court order denying the motion and orders the entry of a preliminary injunction restraining the city from enforcing its December 20, 2021 "COVID-19 Vaccine Verification Requirement Policy" (vaccine mandate policy) as to the employees represented by the unions.

[1] Boston Police Detectives Benevolent Society and Boston Firefighters Union, Local 718, International Association of Fire Fighters, AFL-CIO.

[2] City of Boston.

Background. On March 10, 2020, the Governor declared a state of emergency throughout the Commonwealth in response to the spread of COVID-19. See Governor's Declaration of a State of Emergency to Respond to COVID-19 (March 10, 2020). Testing for the virus that causes COVID-19 became available by April 2020 and vaccines became available by January 2021. The Governor's state of emergency was lifted on June 15, 2021. See Governor's Order Rescinding COVID-19 Restrictions on May 29 and Terminating State of Emergency Effective June 15 (May 28, 2021).

On August 12, 2021, the city announced its "Vaccine Verification or Required Testing for COVID-19 Policy" (vaccine or test policy),[3] generally requiring city employees to either (1) verify that they are vaccinated against COVID-19 or (2) submit proof of a negative COVID-19 screening test every seven days. The city engaged in negotiations with the unions regarding the vaccine or test policy, and two of the three unions arrived at memoranda of agreement (MOA), one by October 7, 2021, and the other by November 26, 2021; the third remained in negotiations. The city executed the first MOA on October 7, 2021, and the second MOA on December 7, 2021.

[3] At the same time, the city issued to the unions a "Notice of Contemplated COVID-19 Testing/COVID-19 Vaccine Mandate."

On December 20, 2021, the city announced the vaccine mandate policy[4] to take effect on January 15, 2022.[5] In general terms, the vaccine mandate policy amends the vaccine or test policy by eliminating the weekly testing option. Employees who fail to verify that they are vaccinated are subject to progressive discipline, beginning with unpaid leave and ultimately leading to termination from employment.[6]

The unions objected and filed prohibited practice charges with the Department of Labor Relations, alleging violations of G. L. c. 150E, § 10 (a) (1) and (5); a grievance was also filed, alleging that the vaccine mandate policy violated the MOA.

On January 3, 2022, the unions filed a verified complaint in the Superior Court for breach of contract, seeking declaratory and injunctive relief.[7] The complaint alleges that

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[4] At the same time, the city issued to the unions a "Notice of Amended COVID-19 Vaccine Policy; Issuance of Mandate."

[5] The city subsequently extended the date by two weeks. According to the vaccine mandate policy, employees are to verify "full vaccination status" by February 15, 2022. Further, whenever the Centers for Disease Control (CDC) "recommends" that additional doses are "required to complete a series for all adults," employees will be required to verify that they have received the additional doses in order to maintain their fully vaccinated status under the policy.

[6] The policy provides an avenue for obtaining an exemption for medical or religious reasons; these employees, as well as those not fully vaccinated because they are in mid-dose status, must submit proof of a negative COVID-19 screening test every seven days.

[7] The city does not argue that the unions were required, in the circumstances of this case, to exhaust their administrative remedies prior to seeking judicial relief. See Massachusetts

the vaccine mandate policy violates the terms of the MOAs, as well as provisions of the collective bargaining law, G. L. c. 150E. At the same time, the unions moved for a preliminary injunction in order to "maintain the status quo," and keep the vaccine or test policy in place until the dispute could be resolved.

On January 14, 2022, a Superior Court judge denied the plaintiffs' motion for injunctive relief and the unions appealed.

Standard of review. A single justice's review of the denial of a request for a preliminary injunction is for an abuse of discretion, "that is, whether the judge applied proper legal standards and whether there was reasonable support for his evaluation of factual questions." Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 741 (2008), citing Packaging Indus. Group v. Cheney 380 Mass. 609, 615 (1980). See also L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (judge's discretionary decision constitutes abuse of discretion where appellate court concludes that judge made clear error of judgment in weighing factors relevant to decision). "In making [that] determination, [the single justice] examine[s] the same factors as the motion judge: whether the moving party

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Correction Officers Federated Union v. Bristol, 64 Mass. App. Ct. 461, 467-468 (2005).

has shown 'that success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party'" (citation omitted). See Lieber v. President & Fellows of Harvard College (No. 2), 488 Mass. 816, 821 (2022). "In cases in which a public entity is a party, a judge may also weigh the risk of harm to the public interest in considering whether to grant [or deny] a preliminary injunction." Doe v. Worcester Pub. Sch., 484 Mass. 598, 601 (2020).

Where, as here, "the order was predicated solely on documentary evidence [the court] may draw [its] own conclusions from the record." Cheney, 380 Mass. at 616.

Discussion. 1. The merits. The motion judge declined to make a determination regarding the unions' likelihood of success on the merits of their entire complaint. He did observe, however, that, even "[a]ssuming, arguendo, that the City was permitted to unilaterally impose a vaccine mandate on the plaintiff union employees, it unequivocally has an obligation under G. L. c. 150E to engage in collective bargaining regarding the impact of that mandate," and that "[b]ecause the City failed to do so prior to December 20, 2021, the [unions] have established a likelihood of success on the merits at least as to

that cause of action."[8] Regardless whether the unions had demonstrated a likelihood of success on the remaining aspects of their complaint, the crux of the entire action (whether couched in terms of breach of contract or violation of various provisions of collective bargaining law) revolves around the city's duty to bargain over the vaccine mandate policy and its failure to do so. Thus, the unions have established a strong likelihood of success on the merits of their essential claim. See Foster v. Commissioner of Correction (No. 1), 484 Mass. 698, 712 (2020) (movant's likelihood of success is "the touchstone of the preliminary injunction inquiry"). They are therefore entitled to have this factor taken into consideration in the balance of harms inquiry.[9] See Cheney, 380 Mass. at 617 ("when

[8] The city challenges this assessment, arguing that the motion judge failed to consider that exigent circumstances beyond its control excused it from bargaining. The city fully argued this position to the motion judge and the unions fully negated it, persuasively pointing out the lack of any appreciable change in circumstances (using the metrics applied by the city) between the time of the vaccine or test policy and the vaccine mandate policy. The motion judge could also have rejected the city's position of exigent circumstances beyond its control, given the city's ability to set a deadline four weeks out for employees to begin compliance with the vaccine mandate policy, all the while permitting unvaccinated employees to work and interact with the public in the interim. The motion judge's observation concerning the likelihood of success on the merits is well supported in the record, based on the law and the facts presented by both parties.

[9] Here, the unions' likelihood of success was not mentioned in the balance of harms analysis at all. See Foster v. Commissioner of Correction, 488 Mass. 643, 650 (2021) (among factors judge must consider in determining whether injunction

asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits" [emphasis added]).

2. Irreparable harm. The unions argue that the city's unilateral imposition of the vaccine mandate policy causes a number of different harms, both to the unions themselves as well as to the employees they represent. First among them is the harm to the employees who "choose"[10] to vaccinate rather than lose their jobs. The unions argue that, as to these employees, after any successful resolution of the case, they will "have nothing left to grieve and are without a remedy." The motion judge did not address this harm.[11]

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should issue, likelihood of success on merits is "especially important").

[10] It is a Hobson's choice, in other words, an apparently free choice with no real alternative. See Commonwealth v. Ewe, 43 Mass. App. Ct. 901, 902 n.3 (1995).

[11] For its part, the city cites to two trial court decisions to support its contention that compelled vaccination (on threat of termination from employment) does not constitute irreparable harm. In Local 589, Amalgamated Transit Union vs. Massachusetts Bay Transp. Authority, Mass. Sup. Ct., No. 2184CV02779 (Suffolk County December 22, 2021) at 14, the judge stated, "it is difficult to see how a policy that compels [employees] to do what is manifestly in the interest of their health and society's harms them at all, much less irreparably." This sentiment fails to recognize the harm asserted here – the loss of what ordinarily is a free choice concerning bodily integrity and medical decisions. See Shine v. Vega, 429 Mass. 456, 463-464 (1999) (discussing right to forego medical treatment "however unwise [one's] sense of values may be in the eyes of the medical profession" [quotation and citation omitted]).

In State Police Ass'n of Mass. vs. Commonwealth, Mass. Sup. Ct., No. 2184CV02117 (Suffolk County September 23, 2021), at 8-

Instead, the motion judge addressed the harm to the employees who choose not to get vaccinated and who subsequently lose their jobs as a result of the vaccine mandate policy. The motion judge, relying on Sampson v. Murray, 415 U.S. 61 (1974), and Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640 (1987), determined that termination from employment -- as a consequence of noncompliance -- did not constitute irreparable harm sufficient to justify injunctive relief. Under the circumstances presented here, both cases are inapposite.

In Sampson, a probationary Federal employee was terminated from her position for "complete unwillingness to follow office procedure and to accept direction from [her] supervisors." Sampson, 415 U.S. at 65. Asserting that the employer had not afforded her the procedural protections to which she was entitled prior to termination, she sought and obtained

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9, the judge stated that the harms complained of there were, "at bottom, economic harms which can be remedied through the administrative process, and therefore do not comprise irreparable harm warranting injunctive relief." Again, the judge did not grapple with the issue of how one who gets vaccinated in order to avoid termination from employment is adequately compensated for that loss of self-determination. See Cohen v. Bolduc, 435 Mass. 608, 618-621 (2002) (discussing right to self-determination in medical decisions).

In any event, the judgments of these trial courts are necessarily dependent on, and limited by, the particular facts presented and arguments made in those cases.

injunctive relief to prevent her termination. Id. at 66-67. It was in this context that the Court stated:

> "We recognize that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found. Such extraordinary cases are hard to define in advance of their occurrence. We have held that an insufficiency of savings or difficulties in immediately obtaining other employment -- external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself -- will not support a finding of irreparable injury, however severely they may affect a particular individual. But we do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case."

Id. at 92 n.68. Thus, Sampson does not stand for the proposition that loss of a job cannot constitute irreparable harm. Rather, the case acknowledges that an injunction against termination from employment may not be appropriate in the routine case, but that it may well be warranted under extraordinary circumstances.

The "normal situation" in such cases involves an employee seeking to enjoin termination from employment itself, on the basis that the termination was in some sense wrongful.[12] See Sampson, 415 U.S. at 92 n.68. Here, what

[12] There may be strong practical considerations involved when considering injunctions against termination from employment, for

is sought to be enjoined is not an alleged wrongful termination, but rather, the condition of employment likely to lead to termination. Potential termination from employment in a secure job due to refusal to comply with a unilaterally imposed condition -- implicating issues of bodily integrity and self-determination[13] -- without the benefit of entitled union protection, is a "genuinely extraordinary situation." Id. The "circumstances surrounding [the potential] discharge, together with the resultant effect on the employee[s], [] so far depart from the normal situation" here as to constitute irreparable injury. Id.

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example, disruption to the workplace from employees (who would otherwise be terminated for causes such as drug abuse, theft, and harassment) remaining on staff during the pendency of any wrongful termination litigation. However, the requested injunction in this case does not implicate those concerns. Instead, as the motion judge noted, the employees "have been the lifeline of the City and of the Commonwealth throughout this pandemic."

[13] These interests have been recognized in our law to be significant. See Johnson v. Kindred Healthcare, Inc., 466 Mass. 779, 782 (2014) (statutory right to designate health care proxy "reflects the doctrine of informed consent, which promotes an individual's strong interest in being free from nonconsensual invasion of his bodily integrity and protects his human dignity and self-determination" [quotations and citation omitted]). See also Rogers v. Commissioner of Dep't of Mental Health, 390 Mass. 489, 497-498 (1983) (rejecting argument that doctors should be responsible for making treatment decisions for involuntarily committed patients, in view of right of individual to "manage his own person" which encompasses right to make basic decisions with respect to "taking care of himself" [citation omitted]).

The motion judge determined that, even in these circumstances, any employee wrongfully terminated "may file suit against the City and seek, among other things, back pay and other damages." In this manner, the judge reduced the unions' claims of harm to mere economic loss, fully compensable after litigation. While it is true that "economic loss alone does not usually rise to the level of irreparable harm," Hull Mun. Lighting Plant, 399 Mass. at 643, "[t]he preservation of legitimate economic expectations pending the opportunity for trial is a basis for granting preliminary injunctive relief." Loyal Order of Moose, Inc., Yarmouth Lodge #2270 v. Board of Health of Yarmouth, 439 Mass. 597, 603 (2003), quoting Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 29 (1981).[14]

In any event, "[b]oth noneconomic and economic harm are present here." Loyal Order of Moose, Inc., Yarmouth Lodge #2270, 439 Mass. at 603. The likelihood that

[14] Both Loyal Order of Moose, Inc., Yarmouth Lodge #2270, 439 Mass. at 603, and Edwin R. Sage Co. 12 Mass. App. Ct. at 29, involved potential economic loss in the business context, where the court recognized that the risk of harm to the business during the course of litigation warranted an injunction, given the likelihood that the plaintiffs would ultimately prevail. Economic loss in the context of being placed on unpaid leave and ultimately discharged from otherwise secure employment (with all the attendant consequences) presents no less of a threat to "legitimate economic expectations," id., that should be preserved where the plaintiffs have demonstrated likelihood of success on the merits.

employees will feel compelled[15] to get vaccinated in order to maintain their employment, in circumstances where they are deprived of their union protections, cannot be adequately remedied through after-the-fact financial compensation. To be sure, any loss, even loss of limbs, may be monetized and reduced to damages in civil litigation, but the question here is whether there is an "adequate" remedy at law, not simply whether the loss is compensable. See GTE Prods. Corp. v Stewart, 414 Mass. 721, 724 (1993) ("A plaintiff experiences irreparable injury if there is no adequate remedy at final judgment"). Money damages do not adequately compensate the loss of individual self-determination of employees and of the unions' inability to meaningfully protect their interests. The unions have established a substantial risk of irreparable harm.[16]

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[15] Indeed, the vaccine mandate policy is, by its terms, intended to compel compliance.

[16] The unions also argue harm to vaccinated employees who may be required to work mandated overtime due to the termination of unvaccinated employees and the likely staffing shortage in already short-staffed departments; although they are compensated for overtime work, they cannot be compensated for the loss of time with family or for the undue stress caused by excessive mandated overtime. The motion judge apparently credited the unions' evidence, showing that staffing shortages would likely result from imposition of the vaccine mandate policy, but rejected the notion that the associated harms to the employees are cognizable. Our courts, however, have found a whole range of intangible harms sufficient to warrant injunctive relief.

3. Balance of harms. Where the unions have demonstrated a strong likelihood of success on the merits of their complaint, as well as a substantial risk of irreparable harm should an injunction not issue, this risk must be balanced against any similar risk of harm to the city, or to the public interest it seeks to advance, should the injunction issue.[17] See Lieber, 488 Mass. at 821; Doe, 484 Mass. at 601.

The city's argument largely focuses on the benefit to the workforce and the public at large from widespread

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See, e.g., Loyal Order of Moose, Inc., Yarmouth Lodge #2270, 439 Mass. at 603 (finding irreparable harm where municipality's smoking ban compromised "the altruistic purposes of the lodge").

The motion judge likewise rejected the unions' claim that the city's unilateral imposition of the vaccine mandate policy, shortly after reaching agreement specifically not to mandate vaccines, undermines the union's collective bargaining power, diminishing them in the eyes of their members, ultimately dissipating support for the unions. That this is a cognizable injury is well established in the law. See Service Employees Int'l Union, Local 509 v. Department of Mental Health, 469 Mass. 323, 333-334 (2014) (harm to union as organization is cognizable injury sufficient to confer standing in its own right). Rather than having been dismissed altogether, these harms should have been considered in the balance.

[17] Having rejected every harm alleged by the unions, the motion judge engaged in a balance of harms analysis that focused solely on the public interest. The motion judge appeared to weigh the public interest in maintaining the vaccine and test policy (articulated as avoiding staffing shortages of essential employees) against the public interest in implementing the vaccine mandate policy (articulated as protecting the health of these employees and the public at large). Where the unions were not even in the equation, the balance of harms could never have favored them.

vaccination. The unions, whose members are from seventy-seven to eighty-nine percent vaccinated, do not dispute this. The question is not whether the vaccine mandate policy may be beneficial; rather, the question is whether any harm caused by city's inability to enforce the vaccine mandate policy as to the unions outweighs the harms to the unions and the employees they represent, in light of the unions' likelihood of success.

The city argues that "[b]alancing the supposed harm to unions if they are unsuccessful in achieving a desired result against the very real considerations of public health and health in the workplace advanced by the City requires no balancing at all." Yet, a public entity cannot rely on its general public mandate to work in the public interest to trump the concerns of those with meritorious claims of violation of rights; the harm to the aggrieved individual or entity will always appear to pale in comparison to the perceived harm to the larger public good. See Loyal Order of Moose, Inc., Yarmouth Lodge #2270, 439 Mass. at 598 (municipality's smoking ban intended "to protect the public health and welfare," "to assure smoke free air for nonsmokers," and "to recognize that the need to breathe smoke free air shall have priority over the

desire to smoke in an enclosed public area" enjoined where private club showed meritorious claim for relief).

Here, the harm to the city and the public interest caused by the city's inability to enforce the vaccine mandate policy as to the unions, during the pendency of litigation, is quite limited. The city would be unable to require approximately 450 employees (the remaining unvaccinated union members) to show proof of vaccination, but it would be able to require them, pursuant to the existing agreements, to test regularly to minimize the risk that employees infected with the virus would interact in the workplace and with the public. Thus, the city retains the ability to effect public health measures to minimize the spread of the virus.[18]

Additionally, an injunction would promote the public interest in ensuring the procedural protection of employee rights, as well as those rights afforded to unions by the

[18] Relying on the January 10, 2022 Affidavit of Dr. Bisola Ojikutu, M.D., M.P.H., ¶13, the city argues that allowing employees to get tested regularly rather than vaccinated is "insufficient" to prevent the spread of COVID-19. Yet Dr. Ojikutu acknowledges that those who are vaccinated can also contract and transmit the virus. See id. at ¶¶15-16. Despite this, the city's vaccine mandate policy does not require vaccinated employees to do any testing to ensure that they are negative for the virus. Thus, it appears that neither vaccination nor regular testing is a fail-safe method to prevent transmission.

Legislature pursuant G. L. c. 150E. See School Comm. Of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 761-762 (2003) (Commonwealth has "strong public policy favoring collective bargaining between the public employers and employees over the terms and conditions of employment"); Chief Justice for Admin. & Mgt. of the Trial Court v. Commonwealth Employment Relations Bd., 79 Mass. App. Ct. 374, 380 (2011) ("The right of Massachusetts public employees to collective bargaining of the wages, hours, standards of productivity and performance, and other terms and conditions of their employment constitutes a 'strong public policy' for the achievement of fair working arrangements and the orderly provision of societal services").

Finally, an injunction would avoid the risk of loss of essential public employees, a harm suffered by the unions and the public alike. The employees represented by the unions – members of the police and fire departments - "are vital to the City," as the motion judge noted. The potential risk that, in the absence of an injunction, the city will lose a number of its first responders who would not otherwise leave their positions, cannot be discounted.

Given the limited harm to the city and the public health interest it seeks to promote, and the substantial

harm likely to be sustained by the unions in the absence of an injunction, the balance of harms favors the issuance of an injunction to preserve the status quo, in view of the unions' likelihood of success on the merits. See Cheney, 380 Mass. at 616 ("[s]ince the judge's assessment of the parties' lawful rights at preliminary stage of proceedings may not correspond to the final judgment, the judge should seek to minimize the harm . . . by creating or preserving, in so far as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party" [quotation and citation omitted]).

Conclusion. The January 14, 2022 Superior Court order denying the unions' motion for injunctive relief is vacated. An injunction shall enter prohibiting the city from enforcing the December 20, 2021 vaccine mandate policy as to employees represented by the unions until final resolution of this matter.[19] In the interim, the August 12, 2021 vaccine or test policy shall remain in full force and effect with respect to the unions.

[19] Pursuant to G. L. c. 262, §4, the unions are to pay the $90.00 fee for the issuance of the preliminary injunction to the clerk of this court, due on or before February 25, 2022.

So ordered.

By the Court (Singh, J.),

Assistant Clerk

Entered: February 15, 2022