

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

DR. STEPHEN T. SKOLY, Jr.,

Plaintiff,

v.

**DANIEL J. MCKEE, in his official
capacity as the Governor of the State of
Rhode Island; and JAMES McDONALD,
in his official capacity as the Interim
Director of the Rhode Island Department
of Health,**

Defendants.

C.A. 1:22-cv-00058-MSM-LDA

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

By and through undersigned counsel, Plaintiff Skoly moves the Court to immediately restrain the Defendants from preventing Dr. Skoly from practicing dentistry while he is N95 masked.

In a public filing on February 24, 2022, the Defendants admitted they would be acting “capriciously” if they did not allow unvaccinated, N95 masked health care workers to continue their employment. Immunization, Testing, and Health Screening for Health Care Workers, 216-RICR-20-17-7, Cost Benefit Analysis, attached as Exh. Z, at 15.

The Extended Regulation suspending Dr. Skoly from practice expires on March 12, 2022. ECF No. 11-2, at 4. On February 24, 2022, Defendants proposed a permanent regulation to replace the expiring one. Immunization, Testing, and Health Screening for Health Care Workers, 216-RICR-20-17-7 (“Permanent Regulation”), attached as Exh. AA.

The Permanent Regulation acknowledges what—except for their suspension of Dr. Skoly—is Defendants’ actual practice in Rhode Island today.

To achieve patient and co-worker protection from COVID-19 infection, the Permanent Regulation requires that “health care workers [are] to be up to date with a SARS-CoV-2 vaccine **OR** wear a medical grade N95 mask ...” (emphasis added). Rhode Island Government Register Public Notice of Proposed Rulemaking, attached as Exh. BB.¹

That employment be permitted for the vaccinated or N95 masked is Plaintiff Skoly’s Equal Protection argument—that N95 masking or vaccination each protect the vulnerable patient and colleague worker from COVID infection, so that vaccinated workers and masked, unvaccinated workers (such as Dr. Skoly) are each entitled to continue their employment.

With the Permanent Regulation, Defendants acknowledge the correctness of Dr. Skoly’s Constitutional argument.

In fact, other than for Dr. Skoly, the Defendants have accepted “vaccination **or** N95 masking” for months.

¹ The proposed regulation reads:
“Section 7.6.1(B) ... a health care worker shall:
“1. Be up to date with all CDC recommended doses of FDA approved or authorized COVID-19 vaccine (e.g., Moderna, Pfizer, or Johnson & Johnson) or have received all recommended dose(s) of another COVID-19 vaccine approved by the Department (e.g., Novavax);
OR
“2. Wear a medical grade N95 mask at each health care facility where he or she is employed or volunteering, or with which he or she is compensated by a third (3rd) party which has an agreement with the health care facility to provide staffing services during a period in which the COVID-19 prevalence rate in the State is greater than or equal to fifty (50) cases per one hundred thousand (100,000) people per week, as reported by the Department (emphasis added).” Exh. AA.
As noted, N95 masking will be required during periods of high COVID transmission, not year-round. The relevant point, of course, is Defendants’ acknowledgment that, during periods of high transmission, appropriate patient protection is provided by either N95 masking or vaccination.

Defendants admit that they are today permitting over 1,100 unvaccinated health care workers to keep their jobs so long as they are N95 masked. This total consists of 299 workers with medical exemptions and 854 workers who refuse to be vaccinated (but whom, unlike Dr. Skoly, the Defendants have chosen not to suspend from practice). Exh. Z, at 9.

Indeed, in their detailed, 21-page justification for the “vaccination **or** N95 masking” rule, Defendants concede that they would be acting “capriciously” if they did **not** allow N95 masking to be an alternative to vaccination: “Individuals’ beliefs must be respected and thus vaccination mandates **must not be imposed CAPRICIOUSLY**. Thus, a reasonable alternative to being up to date [with vaccines] is to wear a medical grade N95 mask ...” (emphasis added). Exh. Z at 15.

Defendants’ continued suspension of Dr. Skoly is, by their own admission now, not based on science or public safety. Defendants are acting, in their own word, “capriciously.” It would appear that Defendants’ sole remaining motivation to suspend Dr. Skoly is the desire to continue—for as long as permitted—to impose pain and suffering on Dr. Skoly and his patients.

This Court should not permit Defendants’ unconstitutional and malignant conduct to continue.

CONCLUSION

For the reasons set out above, the Court should immediately restrain the Defendants from preventing Dr. Skoly from practicing medicine while he is N95 masked.

March 2, 2022.

Respectfully submitted,

/s/ Brian Rosner

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2022, I caused to be sent via email a true and accurate copy of the within Emergency Motion for Temporary Restraining Order to attorneys for the following parties:

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