

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

PLANNED PARENTHOOD OF KANSAS
AND MID-MISSOURI d/b/a
COMPREHENSIVE HEALTH OF
PLANNED PARENTHOOD OF KANSAS
AND MID-MISSOURI,

Plaintiff,

v.

PETER LYSKOWSKI, Acting Director of the
Missouri Department of Health and Senior
Services, in his official capacity,

Defendant.

CASE NO.

COMPLAINT

Plaintiff, by its undersigned attorneys, brings this Complaint against the above-named Defendant, his employees, agents, and successors in office, and in support thereof states the following:

I. PRELIMINARY STATEMENT

1. Plaintiff Planned Parenthood of Kansas and Mid-Missouri d/b/a Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri (“PPKM”) brings this civil rights action, seeking a declaratory judgment and preliminary and permanent injunctive relief, under the United States Constitution and 42 U.S.C. § 1983, to prevent Defendant Department of Health and Senior Services (“DHSS”) from unlawfully revoking PPKM’s license to operate an abortion facility in Columbia, Missouri (the “Columbia Center”).

2. Without relief from this Court, DHSS has said that it will revoke PPKM’s Abortion Facility License as of close of business on November 30. Although this revocation is

not required by Missouri law, and although DHSS has never before revoked PPKM's license in these circumstances, DHSS claims it is doing so because the physician who provides abortions at the Columbia Center will lose her current hospital privileges with Missouri University Health Care ("MU Health Care") on December 1, 2015. That loss of privileges relates in no way to the quality of care provided by the physician or PPKM. Rather, it is a direct result of recent political attacks on Planned Parenthood by anti-abortion activists.

3. DHSS's action does not provide sufficient time for PPKM's physician to attempt to obtain new hospital privileges, or, alternatively, for PPKM to locate a new physician to provide abortions at the Columbia Center and for that physician to obtain hospital privileges, if necessary. DHSS's action therefore violates Plaintiff's procedural due process rights. DHSS's action further violates Plaintiff's equal protection rights by treating it differently from all other similarly situated health care providers without a constitutionally sufficient justification.

4. Plaintiff seeks declaratory and injunctive relief to protect PPKM's property right in its Abortion Facility License.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

6. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

7. Venue in this Court is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in this district and because Defendant, in his official capacity, resides in the Central Division of the Western District of Missouri.

III. PARTIES

A. Plaintiff

8. PPKM is a not-for-profit corporation, organized under the laws of Missouri.

9. PPKM operates the Columbia Center in Columbia, Missouri. The Columbia Center provides general reproductive health care, including family planning services, testing and treatment for sexually transmitted infections, cervical and breast cancer screening services, pregnancy testing, and all-options counseling. The Columbia Center also provides medication abortion through 70 days of pregnancy, as dated from the first day of a woman's last menstrual period.

B. Defendant

10. Defendant Peter Lyskowski is the Acting Director of DHSS, the agency responsible for abortion facility licensure, Mo. Ann. Stat. §§ 197.200, 197.215, 197.220, as well as for adopting the reasonable rules, regulations, and standards necessary to implement Missouri's Ambulatory Surgical Center Licensing Law, Mo. Ann. Stat. § 197.225. Acting Director Lyskowski is sued in his official capacity, as are his agents and successors.

IV. THE STATUTORY AND REGULATORY FRAMEWORK

11. Abortion facilities in Missouri must be licensed as ambulatory surgical centers. § 197.200. One of the statutory licensing requirements for abortion facilities is a requirement that surgical procedures may be performed only by physicians who are privileged to perform surgical procedures in a hospital in the community in which the abortion facility is located, or there must be a working agreement with a hospital in the community guaranteeing the transfer and admittance of patients for emergency treatment. Mo. Ann. Stat. § 197.215(2); *see also* Mo. Code Regs. Ann. tit. 19, § 30-30.020 (requiring the same).

12. Among the regulations implementing the abortion facility licensing statutes is a requirement that “physicians performing abortions at [an abortion facility] have *staff privileges* at a hospital within fifteen (15) minutes’ travel time from the facility or the facility shall show proof there is a working arrangement between the facility and a hospital within fifteen (15) minutes’ travel time from the facility granting the admittance of patients for emergency treatment whenever necessary.” Mo. Code Regs. Ann. tit 19, § 30-30.060(1)(C)4 (emphasis added).

13. DHSS has discretion to maintain a provider’s abortion facility license during a period of time when the provider is out of compliance with a licensure requirement, including the hospital privileges requirement. Mo. Ann. Stat. § 197.220 (“[DHSS] *may* deny, suspend or revoke a license in any case in which the department finds that there has been a substantial failure to comply with the requirements of sections 197.200 to 197.240”) (emphasis added); 19 Mo. Code Regs. Ann. tit. 19, § 30-30.010 (an ASC out of compliance with a requirement may maintain its license with written approval of DHSS).

14. On information and belief, DHSS has not immediately suspended or revoked other facility licenses when facilities have had unanticipated gaps in physician coverage.

V. FACTUAL ALLEGATIONS

A. Events Leading Up to Defendant’s Action

15. PPKM holds an Abortion Facility License for the Columbia Center. This facility is one of only two licensed abortion facilities in the state of Missouri; the other is located in St. Louis.

16. PPKM’s physician who provides abortions in Columbia is a board-certified obstetrician/gynecologist who holds “refer and follow” hospital privileges at MU Health Care.

Under the licensing regulations, these privileges allow her to perform medication abortions but not surgical abortions.

17. In July 2015, a group of anti-abortion extremists calling themselves the Center for Medical Progress (“CMP”) released heavily edited and misleading videos regarding the abortion practices of other Planned Parenthood affiliates in other states. No one from PPKM appears in any of the released CMP videos. Nor does PPKM have a fetal tissue donation program, which is the subject of most of the claims made in the videos.

18. Following the release of the CMP videos, Missouri Senate Pro Tem Tom Dempsey formed a special interim committee named “The Sanctity of Life Committee” (Committee) chaired by state Senator Kurt Schaefer, a Republican from Columbia. Although the Committee was ostensibly formed to investigate the false allegations made in the CMP videos, the Committee’s meetings have focused virtually entirely on the licensing of PPKM’s Columbia health center and its relationship with MU Health Care, including its physician’s privileges.

19. On September 24, 2015, MU Health Care announced that it would revoke PPKM’s physician’s privileges as of December 1, 2015. MU Health Care’s decision related in no way to the quality of care that PPKM’s physician provides.

20. DHSS subsequently informed PPKM that, because PPKM would no longer have a provider with hospital privileges as of December 1, 2015, it would revoke PPKM’s Abortion Facility License as of close of business on November 30, 2015.

21. DHSS’s actions are surprising because when the Columbia Center has had gaps in abortion services in the past due to a need to locate a new physician, and for that physician to apply for and obtain privileges, DHSS has never before immediately revoked the Columbia

Center's Abortion Facility License. Instead, DHSS has permitted PPKM to maintain the license in either active or suspended status while it searched for a new physician.

22. The most recent gap in services at the Columbia Center began in June 2012 when PPKM's prior physician resigned as a result of harassment from protestors. DHSS not only maintained PPKM's license in active status following that physician's resignation, but also inspected the facility and renewed the Abortion Facility License in June 2013. It was not until September 2013 that the license was placed in suspended status due to the lack of a provider. Therefore, DHSS provided a total of 15 months for PPKM to search for a new physician with hospital privileges before taking any action on the license.

23. DHSS has not provided any reason for its current "need" to revoke PPKM's license immediately upon its physician's loss of privileges.

B. Plaintiff's Efforts to Comply with Licensing Requirements

24. Since the end of September, PPKM has been working to convince MU Health Care to reverse its decision regarding its physician's privileges, and although that effort continues, it has not yet been successful. In addition, PPKM's physician has applied for a different category of privileges with MU Health Care (a category of privileges that has not been eliminated).

25. PPKM has also been working diligently since the end of September to locate a new physician to provide abortions at the Columbia Center. PPKM has reached out to physician contacts within the community, and had located two physicians with current hospital privileges who seriously considered providing services at the Columbia Center. However, because of the hostile political environment in Missouri toward abortion, those physicians informed PPKM on Monday November 23 that she is not willing to subject herself or her family to the scrutiny and

potential harassment that come with providing abortion. The second physician similarly informed PPKM that she will not be able to provide abortions at Columbia Center on Sunday November 29. Therefore, PPKM will not have a provider with active hospital privileges on December 1 and will be forced to suspend abortion services until a new provider is located.

26. PPKM continues to search for a new physician. Specifically, PPKM is in the process of going through its entire medical network in Columbia and the wider Mid-Missouri region to identify a provider or providers who either already has local hospital privileges or who is willing to apply for privileges. Despite these efforts, PPKM anticipates that it could take significant time to locate a new provider due to the difficulty of providing abortions in Missouri.

27. In addition, obtaining hospital privileges is a difficult and time-consuming process. The process can take several months, *see Nat'l P'ship for Women & Families, Abortion-Rights Supporters Petition MU to Reinstate Privileges for Abortion Providers*, http://go.nationalpartnership.org/site/News2?abbr=daily2_&page=NewsArticle&id=49254 (Nov. 17, 2015) (quoting Teresa Snow, director of media relations at MU Health Care, stating "The process is lengthy and can take several months to complete."), and hospitals have various requirements that are difficult for physicians who provide abortions to meet. For example, hospitals may require physicians to guarantee a certain number of hospital admissions each year, a requirement that is impossible for those physicians to satisfy because abortion is a very safe procedure and complications requiring hospitalization are extremely rare. Hospitals may also require that physicians maintain active involvement with the hospital, including contributing to its organizational and administrative affairs, another requirement that physicians providing abortions at private facilities are unable to meet, particularly if they travel from out of town to

provide those services. In addition, hospitals may be unwilling to grant privileges to physicians whose practices include abortion services.

28. Because abortion is among the safest procedures in contemporary medical practice, there is no medical reason for physicians who provide abortions to have hospital admitting privileges, and requiring them does not increase patient safety. To the contrary, the requirement instead reduces access to abortion, forcing women to delay their abortions and/or travel greater distances to access abortion, resulting in increased risk and cost of the procedure.

C. The Effect of Defendant's Action on PPKM and Its Patients

29. Should the Columbia Center's license be revoked as of close of business on November 30, applying for a new license once it has a physician with hospital privileges would be expensive and time consuming. PPKM most recently applied to have its license reactivated in March of 2015, and it took four months, until July 2015, for the license to be granted. The process involved significant staff time spent gathering required documentation to submit to DHSS, including credentialing information for the physician and staff, policy and procedure information, training documents, proof of various facility inspections, proof that the staff had been checked against the Missouri Family Care Safety Registry, and proof of registration with federal and state drug enforcement authorities, among other items. A full-day inspection of the facility by DHSS also took place as part of the application process.

30. In addition to the significant time involved in the application, there are significant financial costs as well. During the application process in 2015, in addition to the license application fee that was paid to DHSS, PPKM also incurred legal fees associated with the application process and fees paid to vendors to conduct required tests of the HVAC system and air quality in the facility. In addition to these expenses, the months-long delay associated with

the licensure process resulted in lost revenue for services that could have been provided during that time.

31. Without an injunction preventing Defendant from revoking PPKM's Abortion Facility License, PPKM will suffer significant injury from the time and expense involved in applying for a new Abortion Facility License in the future, once it has a physician with hospital privileges. It will also suffer financial losses due to the inability to provide abortions during the several month process involved in applying for and obtaining a license.

32. These harms will also cause harm to PPKM's patients. First, the time and resources spent by PPKM obtaining a new license could instead be spent on patient care. Moreover, the longer it takes for PPKM to be able to provide abortions again in Columbia, the harder it will be for women in the state to access safe and legal abortion, as women from all corners of the state will have to travel to St. Louis to obtain an in-state abortion.

33. At this time, PPKM seeks only to maintain its Abortion Facility License. Until PPKM has a physician with privileges, it will be unable to provide abortions at the facility.

CLAIM FOR RELIEF

COUNT I

34. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 33 above.

35. Defendant's actions violate Plaintiff's right to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution.

COUNT II

36. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 33 above.

37. Defendant's action violates Plaintiff's right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.

REQUEST FOR RELIEF

WHEREFORE Plaintiff respectfully requests that this Court:

38. Issue a declaratory judgment that Defendant's action is unconstitutional;
39. Issue temporary, followed by preliminary, injunctive relief, without bond, and, if necessary, permanent injunctive relief that protects Plaintiff's constitutional rights;
40. Grant Plaintiff attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and/or
41. Grant such further relief as this Court deems just and proper.

Respectfully submitted this 30th day of November, 2015,

s/ Douglas N. Ghertner

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, I served the above document via email on the following:

Nikki Loethen
General Counsel
Missouri Department of Health and Senior Services
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s/ Douglas N. Ghertner

Douglas N. Ghertner