

What recourse do we have in the courts when health care institutions or professionals refuse to provide care that they oppose? Must the courts give providers carte blanche to deny services for religious reasons, no matter what the cost to their patients' health? Or can we rely on the courts to ensure that health care providers cannot sacrifice their patients' health in the name of religious principle? This piece examines how the courts have responded when confronted with conflicts between a health provider's refusal to treat and a patient's health care needs. In general, these cases offer some hope for patients who need services that providers seek to deny on religious grounds.

The cases have typically arisen in three contexts: (1) when a patient sues a public or quasi-public hospital, asserting that the hospital has a constitutional obligation to provide certain reproductive health services; (2) when an employee sues an employer, claiming a right to refuse for religious reasons to provide health services that are required as part of the job; (3) when a patient sues a doctor or hospital for medical malpractice or another tort because of the provider's refusal on religious grounds to provide medical care the patient needs. Although such cases are relatively few in number, some patterns emerge. Perhaps most significant, the courts have typically (though not always) ruled in a way that safeguards patients' health. In so doing, the courts have employed a range of legal approaches, some of which are promising avenues for advocates in future cases. Throughout, the courts have shown particular sensitivity to the facts presented by the cases before them and seem especially likely to find a way to protect patients if the evidence of harm is compelling. On occasion, the courts have gone relatively far afield to ensure that patients' health is not compromised.

CONFLICTS BETWEEN RELIGIOUS REFUSALS AND WOMEN'S HEALTH: HOW THE COURTS RESPOND

Constitutional and Common Law Duties To Provide Reproductive Health Services

The United States Constitution is not the source of any institution's duty to provide reproductive health care. The United States Supreme Court has clearly held that the federal Constitution does not require public hospitals to provide abortions or any other reproductive health services. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Poelker v. Doe*, 432 U.S. 519 (1977). Nor does the federal Constitution require government-funded health insurance programs (such as Medicaid and Medicare) to cover such services. *Harris v. McRae*, 448 U.S. 297 (1980). And the federal Constitution imposes no obligations on private hospitals or insurers.

Some state constitutions, however, afford greater protections than the federal Constitution, including when the issue is access to abortion. Despite federal constitutional precedent to the contrary, *id.*, several state courts have held that their state constitutions require the government to cover abortions in otherwise comprehensive publicly funded health insurance programs for low-income people. *See, e.g., Alaska v. Planned Parenthood*, 28 P.3d 904 (Alaska 2001); *New Mexico Right to Choose/*

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– Justice Sidney M. Schreiber, *Supreme Court of New Jersey*

NARAL v. Johnson, 975 P.2d 841 (N.M. 1998); *Women of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981); *Comm. To Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981). These decisions provide strong support for the proposition that in those states *public* hospitals may not refuse to provide abortions.

Moreover, two state courts have also required private, nonsectarian hospitals to provide abortion services. The New Jersey Supreme Court has held that, as institutions that serve the public and receive valuable benefits such as tax exemptions and public funds, private nonsectarian hospitals must furnish comprehensive medical care, including abortions. See *Doe v. Bridgeton Mem'l Hosp. Ass'n*, 366 A.2d 641 (N.J. 1976). In *Bridgeton*, doctors and patients challenged the policy of three private, nonsectarian hospitals banning the provision of first-trimester, nontherapeutic abortions at their facilities. The New Jersey Supreme Court ruled that the ban violated the common law obligation of quasi-public entities to serve the public.¹ The court wrote that the hospitals' refusal to provide abortions "conflicts with and ignores the underlying principle of a nonsectarian hospital, whose basic purpose is to make available hospital facilities for the care and treatment of the public." *Id.* at 647. This ruling applies as well to public hospitals, which by definition assume a responsibility to serve the public.

The *Bridgeton* court also rejected the hospitals' reliance on a New Jersey refusal clause, which provided that no hospital could be held liable for refusing to provide abortions. Recognizing that the right to abortion is constitutionally protected, and emphasizing that a state law permitting nonsectarian hospitals to refuse to provide abortions would frustrate a constitutional right, the court held the statute unconstitutional as applied to nonsectarian hospitals. *Id.*² It declined to decide whether religiously affiliated hospitals could constitutionally refuse to provide abortions.

The Alaska Supreme Court has likewise held that nonsectarian hospitals may not refuse to provide abortions. In the Alaska case, a pro-choice coalition, a doctor, and ten women sued Valley Hospital, a private, nonsectarian hospital that refused to provide abortions unless "(1) there is documentation by one or more physicians that the fetus has a condition that is incompatible with life; (2) the mother's life is threatened; or (3) the pregnancy is a result of rape or incest." *Valley Hosp. Ass'n v. Mat-su Coalition for Choice*, 948 P.2d 963, 965 (Alaska 1997).

The plaintiffs argued that the policy violated the Alaska Constitution. Although the United States Supreme Court had earlier held that the federal Constitution does not require public hospitals to provide abortions, the Alaska Supreme Court held that the Alaska Constitution protects the right of reproductive choice more broadly. It further held that, because (among other reasons) Valley Hospital is closely regulated by the state and receives significant public funding, it is a quasi-public institution whose policies – like those of a public hospital – must comply with the state constitution. The court concluded that private, nonsectarian hospitals – and, implicitly, public hospitals – cannot ban abortions, notwithstanding their opposition to the procedure.

The court rejected the hospital's reliance on an Alaska refusal clause. The clause stated that hospitals cannot be held liable for refusing to participate in an abortion. *See* ALASKA STAT. § 18.16.010(b). The court recognized, however, that a statute cannot trump the constitutionally grounded right to choose: "[W]e cannot defer to the legislature when infringement of a constitutional right results from legislative action." 948 P.2d at 972. Like the New Jersey Supreme Court in *Bridgeton*, the Alaska Supreme Court decided only that private, nonsectarian hospitals and, implicitly, public hospitals must provide abortions; it did not decide whether sectarian hospitals may refuse.

The Duty to Provide Reproductive Health Services in the Employment Context

In other lawsuits involving refusal clauses, an employee is at odds with his or her employer. The two are battling because the employee has refused to provide services that are part of the job but conflict with his or her conscience. Here, both employee and employer may have sympathetic claims. The devout employee – facing a personal moral conflict between conscience and work – feels unwilling and unable to cast aside religious beliefs simply because he or she has entered the workplace. On the other hand, the employer is concerned both that the health or safety of its clients may be endangered by the employee's refusal to provide services and that the cost of accommodating the employee may be quite high. In these cases, the courts generally weigh the competing concerns carefully and do what they can, within the scope of the refusal clause at issue, to ensure that health and safety are not jeopardized.

Title VII

In many of the cases pitting employee against employer, the employee relies on Title VII of the Civil Rights Act ("Title VII"). *See* 42 U.S.C. §§ 2000e *et seq.* Title VII is a federal law that applies to employers nationwide who have fifteen or more employees. It protects the employees working for those employers from discrimination in various forms, including discrimination on the basis of the employee's religion.³ Under Title VII, the prohibition on discrimination against an employee because of his or her religion includes "all aspects of [his or her] religious observance and practice, as well as belief." *Id.* § 2000e(j). However, Title VII does not require an employer to make concessions to accommodate an employee's faith if those concessions impose significant burdens. Instead, Title VII excuses employers from accommodation requirements if they can demonstrate their inability "to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.*; *id.* § 2000e-2(a)(1).

Title VII thus contemplates a balancing of interests and gives courts leeway to take into account the effect on public health and safety of an employee's refusal

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to provide services. Accordingly, in this context, as long as the employer has offered a reasonable accommodation for the employee – in other words, as long as the employer has made a fair effort to minimize potential conflicts between the employee’s work and his or her religious beliefs – the employer will generally win.

For example, in *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), a Chicago police officer sued the city over the police department’s handling of his refusal to guard abortion clinics. The police department had begun assigning officers to clinics on a regular basis after a mass demonstration at one of the clinics, when a number of officers were needed to make arrests. Officers were asked to protect clinic employees and property and to keep the peace. One officer, Angelo Rodriguez, a Roman Catholic, informed the department that he wished to be exempt from these assignments because he opposed abortion on religious grounds and believed that his presence at a clinic facilitated the provision of abortion. When his supervisors refused to guarantee an exemption from duty, Rodriguez sued, alleging a violation of Title VII.

Both the lower court and the court of appeals dismissed Rodriguez’s claim. They ruled that, because a governing collective bargaining agreement gave Officer Rodriguez the option to transfer, with no reduction in pay or benefits, to another district that housed no abortion clinics, the city had effectively accommodated his religious objections. Because such a transfer would eliminate the conflict between Officer Rodriguez’s conscience and his work duties, the courts held that he had no viable Title VII claim. Although Officer Rodriguez did not want to transfer to another district, both courts emphasized that Title VII “requires only ‘reasonable accommodation,’ not satisfaction of an employee’s every desire.” *Id.* at 777 (quoting *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993)); *Rodriguez v. City of Chicago*, 975 F. Supp. 1055, 1059 (N.D. Ill. 1997).

One of the judges on the appeals court went further. In his concurring opinion, Chief Judge Posner argued that the police department has no duty to accommodate a police officer who wants to pick and choose whom to protect. As Chief Judge Posner explained, allowing workers entrusted with safeguarding the public a right to refuse services because of a moral disapproval jeopardizes confidence in the integrity of the institution:

Mr. Rodriguez, a Chicago police officer, claims, I have no reason to doubt sincerely, that it violates his religious principles to guard abortion clinics. He is entitled to his view. He is not entitled to demand that his police duties be altered to conform to his view any more than . . . a firefighter is entitled to demand that he be entitled to refuse to fight fires in the places of worship of religious sects that he regards as Satanic. The objection to recusal in all of these cases is not the inconvenience to the police department . . . or the fire department, as the case may be,

although that might be considerable in some instances. The objection is to the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect. The public knows that its protectors have a private agenda; everybody does. But it would like to think that they leave that agenda at home when they are on duty. 156 F.3d at 779 (Posner, C.J., concurring).

Chief Judge Posner's theme was echoed in *Shelton v. University of Medicine & Dentistry*, 223 F.3d 220 (3d Cir. 2000). In that case the plaintiff, Yvonne Shelton, worked as a staff nurse in the labor and delivery section of a New Jersey hospital. Although the labor and delivery section does not perform elective abortions, its patients sometimes require emergency procedures to terminate their pregnancies. Labor and delivery nurses are required to assist in those emergency procedures. Shelton's Pentecostal faith prevented her from, in her words, participating "directly or indirectly in ending a life." *Id.* at 222. Accordingly, when a pregnant woman with a ruptured membrane – a life-threatening condition, according to the hospital – came to the hospital and the doctors decided to induce labor, Shelton refused to assist or participate because she feared that the fetus might not survive the delivery. And, when a pregnant patient, standing in a pool of blood, was diagnosed with complete placenta previa, a condition that could prove fatal to the woman and the fetus, Shelton refused to assist with the emergency cesarean section ordered by the doctors. According to the hospital, Shelton's refusal on that occasion delayed the lifesaving operation for half an hour.⁴

After these incidents, the hospital informed Shelton that she could no longer work in the labor and delivery section. It offered her a transfer to a staff nurse position in the newborn intensive care unit and invited her to discuss other available nursing positions with the hospital's human resources department. Shelton was given thirty days to accept the position in the newborn ICU or to apply for another position. She did neither; the hospital fired her; and Shelton sued, alleging (among other things) that the hospital had discriminated against her because of her religion in violation of Title VII.

Both the trial and appellate courts disagreed, ruling that the hospital's proposed accommodation was reasonable. *Id.*, *aff'g* No. 97-CIV-2689 (WGB), 1999 WL 706160 (D.N.J. June 15, 1999). Both courts rejected Shelton's objection that the transfer would have resulted in the loss of eight years of specialized training. And the court of appeals, citing *Rodriguez*, held that public health care providers have a heightened obligation to provide services to all, particularly during emergencies:

It would seem unremarkable that public protectors such as police and firefighters must be neutral in providing their services. We would include public health care providers among such public protectors. Although

“The public knows that its protectors have a private agenda; everybody does. But it would like to think that they leave that agenda at home when they are on duty.”

**– Chief Judge
Richard A. Posner,
United States Court
of Appeals for the
Seventh Circuit**

“Public trust and confidence require that a public hospital’s health care practitioners – with professional ethical obligations to care for the sick and injured – will provide treatment in time of emergency.”

– Judge Anthony J. Scirica, *United States Court of Appeals for the Third Circuit*

we do not interpret Title VII to require a presumption of undue burden, we believe public trust and confidence require that a public hospital’s health care practitioners – with professional ethical obligations to care for the sick and injured – will provide treatment in time of emergency. 223 F.3d at 228.

In a similar case, *Bruff v. North Mississippi Health Services*, 244 F.3d 495 (5th Cir. 2001), Sandra Bruff, a therapist working for a Mississippi hospital, refused on religious grounds to counsel patients about any subject at odds with her religion, particularly how to improve gay or extra-marital relationships. Taking the position that therapists should not abandon their clients whenever they disapprove of their beliefs or conduct, the hospital offered Bruff thirty days and the assistance of its in-house employment counselor to find another position in the hospital system where the likelihood of conflicts of conscience would be reduced. When the thirty days passed and Bruff had not managed to secure another position, the hospital fired her. She sued, alleging a violation of Title VII.

Although a jury initially awarded Bruff more than two million dollars, the court of appeals reversed. The court held that (1) keeping Bruff in her current position while accommodating her religious concerns would impose too high a cost on the hospital; and (2) “the [hospital]’s offer to give Bruff 30 days to transfer to another position . . . was beyond peradventure a reasonable accommodation.” *Id.* at 503.

Reproductive Health Care Refusal Clauses

Unlike Title VII, laws that specifically protect an individual’s refusal to provide reproductive health care (such as abortion or sterilization) generally do not expressly weigh the employee’s moral concerns against the burdens imposed by the refusal to provide care. Instead, most of these laws simply provide that no adverse employment action may be taken against an employee who refuses to provide a reproductive health service for religious reasons. Accordingly, when an employee is protected by a reproductive health care refusal clause, courts may have less leeway to take into account the competing health and safety needs of patients. The courts have taken different approaches to interpreting such refusal clauses: Where possible, some have read the clause narrowly so that it did not apply to the employee in question; some have applied a Title-VII-type balancing analysis; others, confronted with a clearly applicable clause, have deemed the employee’s right to refuse absolute.

Where they can, courts may read the reproductive health care refusal clause narrowly and hold that in fact the employee is not covered by the law. For example, in *Spellacy v. Tri-County Hospital*, Equity No. 77-1788, 1978 WL 3437 (Pa. C.P. Mar. 23, 1978), *aff’d*, 395 A.2d 998 (Pa. Super. Ct. 1978), an admissions clerk at a hospital claimed that it violated her religion to admit patients seeking abortions. She sought protection under Pennsylvania’s refusal clause, which prohibited adverse action against employees who refuse to “perform, participate in, or cooperate in” abortions and further specified that it applied to employees “directly involved” in

the abortion or those “in attendance” whose services are essential to the abortion.⁵ Concluding that admitting patients constitutes neither direct involvement in abortions nor an essential feature of their provision, the court rejected her claim on the ground that the refusal clause did not apply.

Similarly, in another case, University of California students objected to paying the portion of their registration fees earmarked for health services, including abortion counseling, referral, and provision. *Erzinger v. Regents of Univ. of Cal.*, 187 Cal. Rptr. 164 (Ct. App. 1982). The students invoked a provision of a federal law called the Church Amendment that prohibits discrimination against students who refuse to “assist or in any way participate in the performance of abortion.” 42 U.S.C. § 300a-7(b)(1). The court refused to apply the clause, ruling that subsidizing a comprehensive health insurance program that includes abortion is not assisting in the “performance” of abortion within the meaning of the Church Amendment. 187 Cal. Rptr. at 394-95.

Second, courts may apply a Title-VII-type balancing analysis to a reproductive health care refusal clause, even if the law itself makes no reference to weighing accommodation against the hardship that it imposes. At least one court, a Florida appeals court, has done so. In *Kenny v. Ambulatory Centre of Miami*, 400 So. 2d 1262 (Fla. Dist. Ct. App. 1981), an operating room nurse, Margaret Kenny, was demoted for refusing to assist with abortions. She sued her hospital employer under a Florida law providing that no hospital employee who opposes abortion on moral or religious grounds can be required to participate in the procedure, and that the refusal to participate cannot be the ground for any disciplinary or other recriminatory action. *See id.* at 1264. Although the law makes no allowance for the hardship that a refusal might impose, the court rejected a reading of the statute that would have ignored the impact of the refusal on public health. It instead read the statute to mean that “an employer must reasonably accommodate an employee’s religious practices unless he establishes that he would suffer undue hardship.” *Id.* at 1266.

Although the court adopted this standard, it indicated that, to avoid liability under the refusal clause, employers would have to make a genuine effort at accommodation and a real showing of undue hardship. And, in Kenny’s case, it ruled against the hospital. It noted that gynecological procedures comprised only about sixteen percent of the operating room’s work and that the hospital had made no showing that it was unable to arrange the schedules of other nurses to accommodate Kenny’s religious beliefs. Because the hospital had thus failed to show that a reasonable accommodation would result in undue hardship, the court ordered that the hospital reinstate Kenny to her former position and pay her back wages and damages.

But other courts facing reproductive health care refusal clauses may consider their hands tied and decline to take into account the burden imposed by an individual’s refusal to provide services. For example, in *Swanson v. St. John’s Lutheran Hospital*, 597 P.2d 702 (Mont. 1979), Marjorie Swanson, a nurse-anesthetist at a small, remote facility in Montana, refused to assist at tubal ligations and was discharged. She sued under a Montana refusal clause providing that no individual can

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be compelled, against a moral or religious objection, to assist with a sterilization and that no one can be fired for refusing to participate on those grounds. The lower court ruled against her, noting that Swanson's hospital was the only hospital in the area, that substitute nurse-anesthetists would have to be procured from fifty-five to ninety miles away, and that those substitutes would be available only when their regular work schedules permitted.

The Montana Supreme Court disagreed on appeal. Although it acknowledged the burden that accommodating Swanson imposed, it nonetheless ruled that any such burden was irrelevant: "The statutory right [to refuse to participate on religious grounds] is unqualified, and it may not be qualified or limited by the District Court on other considerations." *Id.* at 710. Significantly, however, the Montana Supreme Court emphasized that the nurse-anesthetist had refused to participate in a procedure that was not medically necessary; that she had given the hospital enough time to find a replacement for her; and that the surgery had gone forward as planned. The court left open the possibility that if an employee's refusal came at the last minute and endangered a patient, his or her statutory right to refuse to participate in a sterilization might be "outweigh[ed]." *Id.* at 711.

The Refusal To Treat as Medical Malpractice or a Related Tort

State tort law, such as the law of malpractice, may subject health care providers to liability for refusing to provide services on religious grounds. If a hospital's or doctor's conduct does not meet the standard of care – in other words, if the provision of health care does not rise to the level of care that reasonably prudent health care providers offer under the same circumstances – then the provider may be liable for malpractice. Likewise, the religiously based refusal to counsel or refer patients for treatments that the provider deems objectionable could lead to malpractice liability for failure to obtain the patient's informed consent. Both ethical and legal principles obligate health care providers to give patients full information about their medical condition, their treatment options, and the risks and benefits of alternative courses of action.

Yet malpractice cases have significant limitations for enforcing a duty to treat. In general such cases can only be maintained by patients who can prove that they suffered serious harm as a result of a refusal to provide services. This is problematic because, rather than acting to prevent harm, these cases only compensate individuals after injuries have already occurred. The law of malpractice provides no recourse when a refusal creates a significant risk of serious harm, but the harm is ultimately avoided. Moreover, although successful malpractice cases may have a deterrent effect, that is only likely if plaintiffs win large damages awards; and even then nothing prevents those providers who are willing to risk liability from continuing to refuse to provide services.

It is unclear how malpractice or similar tort claims fare in the face of a refusal clause. Patients might successfully argue that the refusal clause does not apply in the circumstances of their case; or they might argue that the refusal clause is not intended as an inviolable shield against liability, but rather allows denial of care in those circumstances when a patient's health is not at stake. Given the fact-dependent nature of these cases, a court faced with sufficiently compelling facts might well find a way to impose liability notwithstanding a refusal clause.

A striking example of potential malpractice liability is *Brownfield v. Daniel Freeman Marina Hospital*, 256 Cal. Rptr. 240 (Ct. App. 1989), in which a woman who had been raped sued a Catholic hospital whose trauma center staff did not advise her of the availability of emergency contraception to prevent a possible pregnancy. The court held that patients' meaningful exercise of the right to control treatment "is possible only to the extent that patients are provided with adequate information upon which to base an intelligent decision with regard to the option available." *Id.* at 245. The court further held that the woman's "right to control her treatment must prevail over the [religious hospital's] moral and religious convictions." *Id.* at 244. The court concluded that the plaintiff would have a claim for damages for medical malpractice if she could establish: (1) that a skilled health care worker would have provided information about and access to the treatment – either by stocking emergency contraception or by transporting the patient to a site where emergency contraception was available; (2) that she would have chosen it; and (3) that she suffered injury because of the failure to obtain the treatment.

The hospital in *Brownfield* attempted to avoid liability by relying on a state refusal clause that exempts sectarian hospitals from providing abortions. Claiming that emergency contraception acts as an abortifacient, the hospital argued that its actions were protected by the refusal clause. The court rejected the argument, reasoning that emergency contraception was more accurately characterized as a form of contraception, not covered by the law, than as abortion.

Nevertheless, the court dismissed the woman's claim against the hospital because she failed to allege that she had suffered harm resulting from the hospital's refusal to provide her with emergency contraception. (The woman apparently did not become pregnant as a result of the rape.) The *Brownfield* decision thus illustrates both the potential of malpractice and similar tort cases, and their limitations.

Similar lessons can be drawn from malpractice cases involving religiously based refusals to provide services, but where no refusal clause was at issue. In *Hummel v. Reiss*, 608 A.2d 1341 (N.J. 1992), for example, the New Jersey Supreme Court indicated that health care providers can face liability if they fail to meet the standard of care as a result of their religion-based limitations on services. In that case, a religiously affiliated hospital and an obstetrician on its staff failed to advise a pregnant woman whose amniotic sac had ruptured and who suffered from a serious intrauterine infection that she could be transferred to a hospital that would perform an abortion. Instead, the woman waited for almost two weeks until she delivered a child with severe anomalies. Many years later, when that child became an adult, she

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– Presiding Justice
Arleigh M. Woods,
California Court
of Appeal

Health care providers have a duty to impart “material information... to enable the potential parents to decide whether to avoid the conception or birth” of children with severe or fatal anomalies.

— Justice Vernon R. Pearson, *Washington Supreme Court*

sued the doctor and hospital, seeking compensation for extraordinary medical expenses on the ground that the doctor and hospital had failed to provide her mother with the opportunity to make an informed decision about terminating the pregnancy. Although the court rejected liability in the case because the pregnancy had occurred before the availability of legal abortion – and thus before a patient could reasonably have expected any hospital to offer the service – it did not excuse a religious provider’s deviation from the standard of care after *Roe v. Wade*.

Similarly, in *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983), the Washington Supreme Court held that health care providers have a duty to impart “material information . . . to enable the potential parents to decide whether to avoid the conception or birth” of children with severe or fatal anomalies. *Id.* at 491. The court specified that this duty did not affect a physician’s refusal on religious or moral grounds to *perform* an abortion. *Id.* But the court did not exempt from possible liability those physicians who refuse to provide complete information because of religious or moral concerns that parents might choose abortion upon its disclosure.

Another category of cases – those involving end-of-life services, where a patient or his or her surrogate typically seeks termination of medical care over a hospital’s religious objections – is closely aligned with cases involving a provider’s denial of reproductive health services and provides some lines of argument or analogous authority. See, e.g., *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Ct. App. 1986); *Bartling v. Superior Court*, 209 Cal. Rptr. 220 (Ct. App. 1984).

In particular, decisions in the end-of-life context support the proposition that hospitals must advise patients *in advance* that they refuse to provide certain services based on their religious beliefs. If the hospital fails to warn the patient of treatment limitations in advance, then the court could conclude that the hospital has essentially waived any right to deny the service.

For example, in *Matter of Jobes*, 529 A.2d 434 (N.J. 1987), the New Jersey Supreme Court reversed an order allowing a nursing home to refuse to withdraw a feeding tube from a thirty-one-year-old woman in a persistent vegetative state. The critical fact was the nursing home’s failure to advise the plaintiff’s family of its policy at the time of admission. “Mrs. Jobes’ family had no reason to believe that they were surrendering the right to choose among medical alternatives when they placed her in a nursing home Under these circumstances, Mrs. Jobes and her family were entitled to rely on the nursing home’s willingness to defer to their choice among courses of medical treatment.” *Id.* at 450.⁶ The court declined to allow a transfer to another facility, where the evidence showed that it would impose a hardship on the patient and family, but ordered the facility to comply with the family’s directives. See also *In re Requena*, 517 A.2d 886 (N.J. Super. Ct. Ch. Div.), *aff’d*, 517 A.2d 869 (N.J. Super. Ct. App. Div. 1986). This kind of case provides support for the argument that, in the reproductive health care context as well, patients must be informed from the outset of all religion-based restrictions on the scope of care offered.

Conclusion

In sum, the courts provide a possible check on the harm caused by a refusal to treat. The cases are nuanced and fact-dependent, but they suggest that courts generally will not allow providers, relying on refusal clauses, to sacrifice patients' health for religious principle. In the handful of states where the state constitution affords heightened protection to the right to reproductive autonomy, a court may hold that the provision of services by public and quasi-public, nonsectarian hospitals is constitutionally mandated regardless of the existence of a refusal clause. In the employment context, if a refusal clause permits a balancing of interests, then a fair effort by an employer to accommodate an employee's religious beliefs generally provides sufficient ground for a court to rule against the employee. And in malpractice cases, the argument that the refusal law in question does not apply to the employee or hospital denying care may have appeal for the courts. Patients confronted with a clearly applicable refusal clause that does not allow for a balancing of interests will have the least likelihood of success in these kinds of cases. Even then, however, if the facts are compelling enough, the court may find a way to rule for the patient.

Notes

- 1 The court did not reach the alternative ground presented by the plaintiffs – namely that, because the private hospitals received state funding, they were state actors whose refusal to provide abortions was an unconstitutional infringement on the right to reproductive choice.
- 2 Not anticipating the course of federal law, the *Bridgeton* court relied on the federal Constitution in reaching its decision. Nonetheless, the New Jersey Supreme Court today would in all likelihood reach the same result under its state constitution. See, e.g., *Right To Choose v. Byrne*, 450 A.2d 925 (N.J. 1982) (relying in part on *Bridgeton* to support the conclusion that the New Jersey Constitution protects the right to abortion more broadly than does the federal Constitution).
- 3 Title VII has exceptions to its prohibition on discrimination based on an employee's religion. It allows "a religious corporation, association, educational institution, or society" to discriminate in hiring, firing, and other employment decisions in favor of members of a particular faith. See 42 U.S.C. § 2000e-1. It also allows employers to take employment action based on an individual's religion if religion constitutes a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business." *Id.* § 2000e-2(e).
- 4 For more details about Shelton's refusal to provide care, see ACLU REPROD. FREEDOM PROJECT, *Health Care Denied: The Women Who Are Harmed by Religious Refusals*, in RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS (2002).

- 5 43 PA. CONS. STAT. ANN. § 955.2; 16 PA. CODE § 51.41.
- 6 After the *Jobes* case was decided, the federal Department of Health and Human Services issued regulations that require a hospital to inform its patients in advance if it refuses for religious or moral reasons to provide end-of-life care. Specifically, the regulations require that hospitals provide to patients at the time of their admission (1) a statement of the patients' rights under state law to create advanced directives detailing how they wish to be treated if they become incapacitated, *and* (2) a "clear and precise statement of limitation if the [hospital] cannot implement an advance directive on the basis of conscience." 42 C.F.R. § 489.102(a)(1); *see also id.* § 489.102(b)(1).

