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No. 23-3480

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 03, 2024
KELLY L. STEPHENS, Clerk

BRYAN TESSANNE and RICHARD BRIMER, on their own behalf and on behalf of the class similarly situated,

Plaintiffs-Appellants,

v.

CHILDREN'S HOSPITAL MEDICAL CENTER OF AKRON,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

OPINION

Before: BOGGS, McKEAGUE, and LARSEN, Circuit Judges.

LARSEN, Circuit Judge. Richard Brimer and Bryan Tessanne were employees of Children's Hospital Medical Center of Akron (the Hospital). In response to the Centers for Medicare and Medicaid Services' COVID-19 vaccine mandate, the Hospital instituted a vaccination policy, requiring employees to get vaccinated or obtain medical or religious exemptions. Plaintiffs sought religious exemptions, but the Hospital denied them. The Hospital then terminated their employment for failing to be vaccinated against COVID-19. Plaintiffs sued the Hospital on behalf of themselves and all similarly situated employees, arguing that the denial of their requests for religious exemptions, and the resulting terminations, violated their First Amendment rights. The district court dismissed their claims on the ground that the Hospital was not a government actor. For the reasons stated, we AFFIRM.

I.

In November 2021, the Centers for Medicare and Medicaid Services issued an interim final rule that required certain healthcare facilities to ensure that their covered staff received COVID-19 vaccinations, subject to medical and religious exemptions (the CMS mandate). *See Biden v. Missouri*, 595 U.S. 87, 91 (2022) (per curiam). In response, Children's Hospital Medical Center of Akron adopted a policy requiring such vaccinations for its employees, again subject to medical and religious exemptions. Plaintiffs Brian Tessanne and Richard Brimer worked at the hospital. They each requested accommodations from the vaccination policy for religious reasons. But, the complaint alleges, the Hospital "summarily denied" the requests. The Hospital required its employees to be vaccinated by January 11, 2022. Plaintiffs didn't get vaccinated by that date, so the Hospital suspended them, and all such employees, "stating that they would be terminated effective January 27, 2022 if they remained noncompliant with the policy." And that's what happened—plaintiffs lost their jobs on January 27. Still, the Hospital told plaintiffs that it would keep their jobs open until February 27, 2022. If plaintiffs complied with the vaccination policy by that date, they could return to their jobs. If they didn't, they would "have to re-apply for their jobs if they wish[ed] to return to work at [the Hospital]." Although the complaint does not make this clear, the parties' briefing indicates that plaintiffs failed to comply with the vaccination policy and fully lost their jobs as of February 27. A few months later, the government rescinded the CMS mandate. *See* 88 Fed. Reg. 36485, 36485–01 (June 5, 2023).

Plaintiffs sued the Hospital on behalf of themselves and other similarly situated employees, arguing that the Hospital's policy of summarily refusing requests for religious exemptions violated their rights under the Free Exercise Clause of the First Amendment. They sought damages as well as declaratory and injunctive relief, including reinstatement. The Hospital moved to dismiss the

complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court granted the motion under Rule 12(b)(1), concluding that it lacked subject-matter jurisdiction because the Hospital is not a state actor who is amenable to suit under the First Amendment. The court also denied plaintiffs leave to amend their complaint. Plaintiffs now appeal.

II.

"Every federal appellate court has a special obligation to assure itself . . . of its own jurisdiction[.]" *Mays v. LaRose*, 951 F.3d 775, 781 (6th Cir. 2020) (alterations in original). Here, three jurisdictional doctrines are at play: standing, mootness, and the requirement of a "substantial" federal question.

Standing and Mootness. The Hospital contends that plaintiffs lacked standing to bring their claims for declaratory and injunctive relief. The Hospital didn't raise this argument below, but that is no matter—Article III standing is "jurisdictional and not subject to waiver." *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996).

We assess standing at the time the complaint is filed. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992). "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Here, plaintiffs sought five kinds of relief: (1) an injunction commanding the Hospital not to make their terminations final; (2) an injunction commanding the Hospital to engage in an "interactive process" and grant them an exemption from the vaccine mandate; (3) a declaration that the Hospital violated their First Amendment rights by not granting them a religious exemption from the vaccine mandate; (4) reinstatement to their positions; and (5) damages.

The Hospital is right that plaintiffs lacked standing to bring the first of these claims. Plaintiffs lack standing to seek injunctive and declaratory relief for events that occurred wholly in the past. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–03 (1983). To seek such prospective relief, a plaintiff must be facing an imminent risk of future harm. *Id.* at 102; *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). Here, the Hospital provisionally terminated plaintiffs' employment on January 27, 2022, for failing to be vaccinated; but it gave plaintiffs an extra month to procure the vaccine. This meant that their terminations became completely final on February 28, 2022. Plaintiffs didn't file their complaint until March 3, 2022. At that point they were no longer facing imminent termination; they had already been fired. No order from the court could have staved off their dismissal; it had been accomplished before the court's intervention was sought. Plaintiffs lacked standing to seek this relief.

On the other hand, plaintiffs plainly had standing to bring their claims for reinstatement and damages. Each of these seeks relief for harm done in the past. And the three standing requirements—injury in fact, traceability, and redressability—were clearly met. *See TransUnion*, 594 U.S. at 423.

It is a more nuanced question whether plaintiffs had standing to seek an injunction commanding that the Hospital grant them a religious exemption from the vaccine mandate or a declaration that the Hospital violated their constitutional rights by failing to do so. Plaintiffs had already been fired when they filed their complaint. And former employees generally lack standing to seek court-ordered changes at their previous workplaces because they cannot benefit personally from any relief a court might grant. *See Feit v. Ward*, 886 F.2d 848, 857 (7th Cir. 1989) (former federal employee, allegedly discharged in violation of the First Amendment, could not seek declaratory or injunctive relief because any change to employee speech policy could not benefit

him). But some courts have held that former employees who are seeking reinstatement do have standing to seek such declaratory and injunctive relief because, if successful in gaining reinstatement, they would again be subjected to the employer's allegedly unlawful policies. *See Chen-Oster v. Goldman, Sachs & Co.*, 251 F. Supp. 3d 579, 588 (S.D.N.Y. 2017) (collecting cases); *see also Feit*, 886 F.2d at 857 (noting that the plaintiff had not sought "reinstatement to his former position"). We need not weigh in on this question because these claims face a different problem—mootness. *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 4 (2023) (courts may address standing and mootness "in any order").

Even when a plaintiff has standing at the beginning of a case, events occurring "during the pendency of the litigation" may strip a court's eventual decision of "any practical effect." *Resurrection Sch. v. Hertel*, 35 F.4th 524, 528 (6th Cir. 2022) (en banc) (citation omitted). When that happens, the court loses jurisdiction and "the case is moot." *Id.* (citation omitted). Plaintiffs allege that the federal government's CMS mandate was responsible for the Hospital's actions. But the government rescinded the CMS mandate on June 5, 2023. We have held that recissions of similar pandemic-era policies mooted claims to enjoin them or have them declared unlawful. *See Livingston Educ. Serv. Agency v. Becerra*, No. 22-1257, 2023 WL 4249469, at *1 (6th Cir. June 29, 2023) (Head Start vaccine mandate); *Resurrection Sch.*, 35 F.4th at 528–30 (statewide mask mandate). So an order requiring the Hospital to give plaintiffs vaccine exemptions upon reinstatement could have no practical effect. That makes this claim moot, along with the accompanying claim for declaratory relief.

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