

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

THE NATIONAL FEDERATION OF THE  
BLIND, INC., on behalf of its members and  
itself,

Plaintiff,

v.

EPIC SYSTEMS CORPORATION,

Defendant.

Civil Action No.: 1:18-cv-12630-RWZ

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff the National Federation of the Blind (“NFB”), through its attorneys, sues Epic Systems Corporation (“Epic”) for declaratory and injunctive relief and alleges as follows:

**INTRODUCTION**

1. This action arises from Defendant’s violation of Mass. Gen. Laws ch. 151B, § 4, by selling and licensing electronic health record (“EHR”) software to hospitals and healthcare facilities across the Commonwealth that is inaccessible to blind users, thereby interfering with those users’ rights to be free from discrimination in employment based on their disability.

**JURISDICTION**

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 (diversity jurisdiction); the parties are citizens of different states and the amount in controversy exceeds \$75,000.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) and (b)(3) because a substantial portion of the events or omissions giving rise to the claim occurred in this district and because Epic is subject to the personal jurisdiction of this Court.

## PARTIES

4. Plaintiff the NFB, the oldest and largest national organization of blind persons, is a non-profit corporation duly organized under the laws of the District of Columbia and its principal place of business is in Baltimore, Maryland. The majority of its tens of thousands of members are blind persons who reside throughout the United States, including Massachusetts. The NFB is a “person” as defined in Mass. Gen. Laws ch. 151B, § 1.

5. The NFB is widely recognized by the public, Congress, state legislators, executive agencies of government, and the courts as a collective and representative voice on behalf of blind Americans. The purpose of the NFB is to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes, and mistaken beliefs that sighted and blind persons hold concerning the limitations created by blindness and that result in the denial of opportunity to blind persons in virtually every sphere of life. The NFB and many of its members have long been actively involved in promoting accessible technology in and out of the workplace so that blind persons can live and work independently in today’s technology-dependent world. As part of its mission and to achieve these goals, the NFB actively pursues litigation and engages in public policy discussions to ensure that the blind receive equal access to employment opportunities, including those that require the use of technology.

6. Defendant Epic is a corporation organized under the laws of Wisconsin. Its principal place of business is located at 1979 Milky Way, Verona, Wisconsin. Epic is a “person” as defined in Mass. Gen. Laws ch. 151B, § 1 and Mass. Gen. Laws ch. 223A, § 1. It transacts business in the Commonwealth and contracts to supply services or things in the Commonwealth because it develops, sells, and/or licenses software to medical providers and health care

institutions in the Commonwealth. These activities provide a basis for subject matter jurisdiction under Mass. Gen. Laws ch. 151B and personal jurisdiction under Mass. Gen. Laws ch. 223A, § 3.

### **FACTUAL BACKGROUND**

7. Blind persons access computer software using screen reading technology. Screen reading technology involves the use of software that converts visual screen components to spoken information or provides output to a refreshable Braille display and allows screen navigation using keyboard commands.

8. To ensure that software is accessible to blind users, software makers must follow recognized software coding standards so that information conveyed visually to a sighted user is conveyed to blind users through screen reading technology or screen enlargement technology for those who use it. The term “accessible” means that blind users are able to independently acquire the same information, engage in the same interactions, and enjoy the same services within the same timeframe as sighted individuals, all with substantially equivalent ease of use.

9. Epic is one of the largest providers of health care software in the United States. According to its website, “[m]ore than 200 million patients have a current electronic record in Epic.” *See* In a nutshell, <https://www.epic.com/about>. While Epic has taken steps to make patient-facing portions of its electronic health record software accessible so that blind patients are able to access their health information with screen reading software, Epic has not made the clinical or administration-facing portions of its software accessible to blind healthcare workers.

10. Despite knowing that its software is inaccessible to blind healthcare workers, Epic sells and licenses its software to healthcare providers in the Commonwealth. On information and belief, Epic is now used by numerous hospitals and other healthcare providers in Massachusetts. The inaccessibility of Epic’s software interferes with blind individuals’ ability to obtain or

perform jobs, and many blind individuals are deterred from applying for employment with healthcare providers that use Epic's software.

11. Among the NFB's members who have been impacted by the inaccessibility of Epic's clinical and administration-facing software is at least one Massachusetts resident who would have standing to sue Epic in his own right for interfering with his employment relationship.

12. Manuel G. Morse is a resident of Massachusetts and a member of the NFB. He lives at [REDACTED]. Mr. Morse is blind and is able to perform the essential functions of his job with a reasonable accommodation. Therefore, he is a qualified person with a handicap within the meaning of Mass. Gen. Laws ch. 151B, §§ 1 and 4.

13. Mr. Morse was hired as a part-time hospital dispatcher at The Brigham and Women's Hospital, Inc. ("BWH") in June 2002. In that role he is responsible for dispatching escorts to move people and things around the hospital.

14. BWH is a non-profit teaching hospital located at 75 Francis Street, Boston, Massachusetts. It is a major Boston-area teaching hospital. On information and belief, BWH has more than six (6) employees and, therefore, is both an employer and a person as defined in Mass. Gen. Laws ch. 151B, § 1.

15. Until May 2015, Mr. Morse was able to perform his job duties by utilizing BWH's then-existing phone and computer systems, which were accessible to him through his use of a screen-access software program called Job Access with Speech ("JAWS"). JAWS converts digital information to synthesized speech or provides output to a refreshable Braille display so that a blind user can perform all of the same functions as a sighted user with the same efficiency and speed.

16. In May 2015, BWH replaced its then-existing software with Epic software, which was inaccessible to Mr. Morse. Mr. Morse asked BWH to “script” the software before it was put into service, but it failed to do so. “Scripting” is the process of using a proprietary programming language to facilitate the interoperability of JAWS with underlying software. Scripting does not require the modification of, or even the review of, underlying software’s source code. While scripting can improve accessibility, it cannot always remediate inaccessible software and is, in any event, less desirable than native accessibility (*i.e.*, when the underlying software is accessible by itself).

17. Because the Epic software was inaccessible to Mr. Morse, BWH placed him on a paid leave of absence, depriving him of the opportunity to perform a job that he otherwise enjoyed.

18. In 2017, Mr. Morse sued BWH, Partners Healthcare Systems, Inc., and Epic in Suffolk County Superior Court, with the support of the NFB. The parties settled the case in early 2018, after BWH finally was able to script the Epic software to make it accessible to Mr. Morse.

19. On October 20, 2018, however, BWH performed a major upgrade to its Epic software, which made the previously-applied scripts non-functional and rendered the software inaccessible to Mr. Morse. BWH again placed Mr. Morse on a paid leave of absence between October 22, 2018, and December 26, 2018.

20. BWH has since found a way to script the upgraded Epic software to ensure basic functionality for Mr. Morse, but it is still not fully accessible. Mr. Morse is unable to complete certain elements of his fast-paced job with the same speed as he was before BWH began using Epic’s software. For example, important tasks like confirming a patient’s name take longer because they are preceded by unnecessary and irrelevant verbiage. Creating a request to transport a patient takes longer because certain keystrokes on Mr. Morse’s system skip boxes that

must be completed before the order can be entered, requiring him to spend time navigating back through the form.

21. It is also inevitable that BWH will upgrade its Epic software in the future. Thus, Mr. Morse is continually faced with the prospect of losing all functionality from the system just as he did after BWH's upgrade in October 2018.

22. One of the NFB's principal missions is to ensure and maintain previously existing equal access to employment opportunities for the blind, and it devotes substantial resources to that mission. It has several divisions relating to employment barriers and has an employment committee devoted to assisting NFB members with employment issues. It also conducts other activities devoted to employment for the blind. For example, it has a National Job Fair at its annual convention, a public employee division, a committee made up of blind federal employees, and a Blind Merchants Division. The NFB is affiliated with three residential training centers for blind individuals with a goal of increasing employment among the blind. The NFB also has been directly involved in the development of technology that helps blind people, including those in the work force, access print materials with its collaboration with Ray Kurzweil to develop the Kurzweil Reading Machine, the first machine to use optical character recognition to convert text to speech.

23. Thus, the NFB has standing to sue as an association on behalf of its members like Mr. Morse because Epic's conduct interferes with their rights to have full and equal access to their jobs such that those members would have standing to sue in their own right. On information and belief, other NFB members have been dissuaded from applying for work in healthcare facilities that use Epic software because it is inaccessible. None of the NFB's members will be required to participate in this action because the NFB seeks only declaratory and injunctive relief and not individualized remedies.

24. The NFB also has standing to sue on its own behalf because Defendant's conduct has forced the NFB to divert resources to ensuring that EHR software is accessible to its members when those resources could be used to advance other aspects of the NFB's mission, including expanding available jobs, instead of fighting to keep previously accessible jobs available.

25. The NFB has been actively working in the legislative and administrative arenas to require software developers to do what they have not done voluntarily, which is make the clinical and administrative-facing EHR software accessible. Among other things, the NFB advocates for the adoption of accessible coding standards, specifically, Web Content Accessibility Guidelines, known as WCAG 2.0 Level AA, which can be applied to both web-based and non-web-based applications.

26. For example, the NFB devoted substantial resources to participating in the public comment period when the Department of Health and Human Services was considering regulations regarding the application of WCAG 2.0 Level AA standards to EHR software. In addition to submitting comments itself, the NFB organized its members to participate in the comment period and kept track of its members who commented.

27. The NFB continues to expend resources on receiving telephone calls and counseling blind healthcare applicants and employees around the country who are having difficulty in obtaining, maintaining, or performing their jobs because of inaccessible EHR software.

28. In addition, the NFB expends resources by litigating with Epic and other EHR manufacturers over their failure to make their products accessible to the blind. *See supra* ¶ 18. Currently, the NFB is supporting one of its members in Texas in a lawsuit against her employer over its use of inaccessible EHR software. *See Drake v. Univ. of Texas Physicians*, Case No. 18-

4687 (S.D. Tex., filed Dec. 12, 2018). The NFB has also supported its members in disputes with institutions of higher education over their use of EHR software in healthcare training programs. The NFB will continue to expend resources on this type of litigation until EHR software is fully accessible to the blind.

29. If manufacturers of EHR software like Epic ensured that their clinical and administrative-facing software was accessible, the NFB could re-allocate its resources to advance other priorities such as improving the accessibility of technology in higher education, advocating for the rights of blind parents, providing assistance to its members engaged in business ventures, supporting blind youth through enrichment programs like summer camps, and maintaining the three training centers with which it is affiliated in Minnesota, Colorado, and Louisiana, respectively.

30. On July 12, 2018, the NFB filed a complaint with the Massachusetts Commission Against Discrimination alleging all of the claims alleged herein.

31. On October 25, 2018, the MCAD granted the NFB's request to withdraw its MCAD complaint so that the NFB could pursue this action under Mass. Gen. Laws ch. 151B, § 9.

## **CLAIM**

### **COUNT I**

#### **Violation of Mass. Gen. Laws ch. 151B, § 4(4A)**

32. Plaintiff incorporates each of the foregoing allegations as if fully restated herein.

33. Mass. Gen. Laws ch. 151B, § 4(4A) makes it unlawful “for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter.”

34. Mass. Gen. Laws ch. 151B, § 4(16) guarantees that individuals in the Commonwealth have the right to be free from discrimination based on disability in the workplace

by making it unlawful “[f]or any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation.”

35. By selling and/or licensing inaccessible software to employers in Massachusetts and by failing to remediate known access barriers in its software, Epic has introduced an artificial job requirement of sight that has a disparate impact on blind individuals, including the NFB’s members, like Mr. Morse, who are otherwise qualified to be employed at hospitals and by healthcare providers that use its software. Epic has thereby interfered with the rights of blind individuals to equal employment opportunities as guaranteed by Mass. Gen. Laws ch. 151B, § 4(16), in violation of Mass. Gen. Laws ch. 151B, § 4(4A).

#### **PRAYER FOR RELIEF**

WHEREFORE Plaintiff, the National Federation of the Blind, respectfully requests that this Court:

- a. Declare that Defendant has violated Mass. Gen. Laws ch. 151B § 4(4A);
- b. Enter a permanent injunction prohibiting Defendant from continuing to sell, install, or contract to sell or install computer software to employers in the Commonwealth that is not independently accessible to blind persons;
- c. Enter a permanent injunction requiring Defendant to immediately remediate any software used in the Commonwealth that is not independently accessible to blind persons;
- d. Award Plaintiff its reasonable attorneys’ fees and costs pursuant to Mass. Gen. Laws ch. 151B, § 9; and
- e. Award any such other and further relief as justice may require.

Respectfully submitted,

/s/ Christine M. Netski

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**CERTIFICATE OF SERVICE**

I, Christine M. Netski, hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 26, 2019.

/s/ Christine M. Netski

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