UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JANE DOES 1-6, JOHN DOES 1-3, JACK DOES 1-1000, and JOAN DOES 1-1000

Plaintiff,

v.

JANET T. MILLS, in her official capacity as Governor of the State of Maine, et al.

Defendants.

CIVIL ACTION
Docket No: 1:21-cv-00242

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS MAINEHEALTH, GENESIS HEALTHCARE OF MAINE, LLC, GENESIS HEALTHCARE LLC, AND MAINEGENERAL HEALTH

I. INTRODUCTION

The dispositive issue for Provider Defendants' Motion to Dismiss is that on the face of their Complaint, Plaintiffs demand an exemption to the State of Maine's Vaccine Mandate while continuing to work onsite at their Designated Healthcare Facilities (DHCFs) as the one and only acceptable accommodation for their sincerely held religious beliefs. That accommodation would require their employers to violate state law, and is therefore not, as a matter of law, an accommodation that is available to them under Title VII. Plaintiffs' opposition does not provide any basis for the Court to allow them to proceed with their claims against Provider Defendants in contravention of this settled Title VII jurisprudence.

II. STANDARD OF REVIEW

Plaintiffs are certainly correct that the standards of review for determining requests for injunctive relief and for deciding motions to dismiss are different, but that distinction does not

save their claims against Provider Defendants. Provider Defendants do not ask the Court to apply anything but the correct standard. *See* Defendants' Motion at 5. While the standards of review are different, the law the Court must apply is not. Plaintiffs' claims fail because, even accepting all the allegations as true, they do not state cognizable claims.

III. COUNT IV - Title VII

There are two central flaws in Plaintiffs' Title VII claims, flaws evident from the start of this case and still evident today. First, Plaintiffs continue to conflate accommodation with exemption. They do not seek *any* reasonable accommodation for the religious beliefs that they say prohibit them from complying with the Vaccine Mandate. Instead, they continue to insist that *only one accommodation will do*: a total exemption from the Vaccine Mandate while continuing to perform their jobs. Complaint, ¶¶ 8, 75-76; Doc. 1, ## 6, 22-23.[1]

What Plaintiffs demand is not what the law actually provides. The Supreme Court has made it clear that under 42 USC § 2000e(j) "any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 68 (1986); *see also Antoine v. First Student, Inc.,* 713 F.3d 824, 831 (5th Cir. 2013). By alleging that a total exemption from the Vaccine Mandate is the only acceptable accommodation for their sincerely held religious beliefs, Plaintiffs have eliminated from their case all other possible accommodations. [2]

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[1] Paragraph 8: "All Plaintiffs seek in this lawsuit is to be able to continue to provide the healthcare they have provided to patients for their entire careers, and to do so under the same protective measures that have sufficed for them to be considered superheroes for the last 18 months."
Paragraph 75: "Plaintiffs have offered, and are ready, willing, and able to comply with all reasonable health and safety requirements to facilitate their religious exemption and accommodation from the COVID-19 Vaccine Mandate."
Paragraph 76: "Plaintiffs have all informed their respective employers that they are willing to wear facial coverings, submit to reasonable testing and reporting requirements, monitor symptoms, and otherwise comply with reasonable conditions that were good enough to permit them to do their jobs for the last 18 months with no questions asked."

[2] Plaintiffs (perhaps inadvertently) reinforce their all-or-nothing approach by admitting that further accommodation dialog would have been possible: "[Defendant] MaineHealth … informed Jane Doe 1 that "[i]f you seek an accommodation *other than a religious exemption* from the state mandated vaccine, please let us know." Complaint, ¶ 99; Doc. 1, # 28 (emphasis supplied). This quoted language makes it clear that Provider Defendants understand full

Second, Plaintiffs continue to ignore the settled law that attends religious accommodations in the workplace: they cannot impose an undue hardship on employers. Yet imposing what courts uniformly recognize to be an undue hardship on Provider Defendants by expressly insisting on an exemption to the Vaccine Mandate as the sole acceptable accommodation is exactly the relief Plaintiffs are seeking in this case.

Plaintiffs assert that "Compliance with Title VII is not and cannot be an undue hardship." Pl. Opp. At 25; Doc. 117, # 1360. This statement is both a tautology and a misstatement of the law. If Plaintiffs' argument were simply that Title VII requires an *attempt* to identify a reasonable accommodation for sincerely held religious beliefs, but that compliance does not require an employer to accept an accommodation that creates an undue hardship, Plaintiffs would of course be correct. But that is really just saying compliance with Title VII equals compliance with Title VII, and it gets Plaintiffs nowhere. Moreover, to the extent Plaintiffs argue now that they are alleging the Provider Defendants violated Title VII by not providing an interactive process for them to seek accommodation, *id.* at 26, Doc. 117, # 1361, they are hoist with their own petard. The duty to engage in an interactive process only arises when "the parties could have discovered and implemented a reasonable accommodation through good faith efforts." *Trahan v. Wayfair Maine, LLC*, 957 F.3d 54, 67 (1st Cir. 2020). Here, Plaintiffs have obviated any such process by declaring what the one and only accommodation must be.

If, on the other hand, Plaintiffs' assertion that Title VII compliance cannot constitute an undue hardship as a matter of law means that Provider Defendants were therefore obligated to exempt them from the Vaccine Mandate, it misstates the law. As the Court well knows from the extensive briefing this issue has already received, under *Trans World Airlines, Inc. v. Hardison,*

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well the critical distinction between accommodations generally and Plaintiffs' take-it-or-leave-it, exemption-only demand.

432 U.S. 63, 68 (1977) and numerous other federal court decisions, the term "undue hardship" means anything more than a *de minimis* burden. And further, an accommodation that would increase risk to public health or cause an employer to violate the law – which Plaintiffs concede their only acceptable accommodation does (Complaint, ¶¶ 44-49; 1, ## Doc.15-16) – is an undue hardship as a matter of law. *See* Def. Motion at 7-9; Doc. 107, ## 1208-1210.

Plaintiffs' arguments to the contrary (Plaintiffs' Opp. at 26-28) are unavailing. First, they offer nothing to contradict the numerous cases cited by Provider Defendants holding that exemption from rules that protect the safety of employees and others, or that impose legal requirements on employers, constitutes an undue burden as a matter of law. *See* Defendants' Motion at 7-9; Doc. 107, ## 1208-1210, *and* Defendants' Opposition to Motion for Preliminary Injunction at 11-13; Doc. 50, ## 556-558. Second, while the question of whether an employee's sincerely held religious beliefs can be accommodated without imposing an undue hardship on an employer may be "generally appropriate for resolution outside the pleadings," *McWright v. Alexander,* 982 F.2d 222, 227 (7th Cir. 1992), Plaintiffs have eliminated the need to do so by pleading that Title VII specifically entitles them to an exemption from the Vaccine Mandate while continuing to work as before. Complaint, ¶¶ 8, 75-76; Doc. 1, ## 6, 22-23. Their approach leaves no facts for determination.[3] As the First Circuit noted in denying Plaintiffs' appeal of this Court's denial of their motion for preliminary injunction:

> The hospitals need not provide the exemption the appellants request because doing so would cause them to suffer under hardship. See Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 134 (1st Cir. 2004); see also Trahan v. Wayfair Maine, LLC, 957 F.3d 54, 67 (1st Cir. 2020) (holding that "liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts").

[3] Plaintiffs' claim that the question of undue hardship presents issues of fact is inconsistent with the position they have already taken in their February 28, 2022, Objections to Media Intervenors' Motion to Unseal Plaintiffs' Identities. See pages 5 ("There is little else at issue in this case but whether federal law applies in Maine and whether consideration of a religious exemption for conscientious objectors is available under federal law.") and 18 ("[T]he issues presented are purely legal..."). Doc. 110, ## 1306, 1319.

Does v. Mills et al, 16 F.4th 20, 36 (1st Cir. 2021). Plaintiffs' assertion that Provider Defendants are "not … prohibited" from providing accommodations for sincerely held religious beliefs (Plaintiffs' Opp. at 28) is accurate, but misleading in this case, as it glosses over the fact that they have expressly insisted on the one accommodation that is clearly not available to them. None of the cases cited by Plaintiffs are to the contrary.

Although Plaintiffs have abandoned their Count II Supremacy Clause claim (there is no mention of it in their opposition)[4], they continue to argue that Title VII preempts the Vaccine Mandate. Plaintiffs' Opposition at 29-30; Doc. 117, ## 1364-1365. The circularity of this argument is all the more evident from Plaintiffs' Opposition, and it fails for the reasons discussed in Provider Defendants' initial motion.

In sum, the Title VII claims fail as a matter of law because, on the face of the Complaint, Plaintiffs require the Court to accept the underlying contention that exemptions for each Plaintiff from the State's Vaccine Mandate are reasonable accommodations for their sincerely held religious beliefs. Because the exemptions would both expose Provider Defendants' employees and patients to increased health risks and constitute violations of state law, the law is settled that they are not accommodations that Provider Defendants can be required to provide.

IV. COUNT IV - Conspiracy in Violation of 42 U.S.C. § 1985

Provider Defendants note that the same conflation of exemption and accommodation that bedevils Plaintiffs' Title VII claim rears its head again in their opposition to dismissal of Count V. Citing to Paragraph 49 of their Complaint, they claim that State Defendants "engaged in an overt act … by publicly stating to the public [sic] that *religious accommodations and exemptions* were no longer permissible in Maine…" Plaintiffs' Opposition at 34; Doc. 117, # 1369 (emphasis

[4] *In Re Compact Disc Minimum Advertised Price Antitrust Litigation,* 456 F.Supp.2d 131, 152-153 (D. ME 2006); *United States v. Zannino,* 8905F.2d 1, 17 (1st Cir. 1990).

supplied). But in quoting the Maine CDC Division of Disease Surveillance, Paragraph 49 actually says following: "The health care immunizations law has removed the allowance for *philosophical and religious exemptions* and has included influenza as a required immunization." *Id.* Plaintiffs also note the allegation in Paragraph 185 that the denial of Jane Doe 1's request for a "religious exemption and accommodation" is sufficient to allege an agreement between MaineHealth and Governor Mills to refuse requests for religious exemptions. But Paragraph 185 quotes MaineHealth as accurately saying that, based on the well-established law of undue hardship, it could not consider *exemptions,* while saying nothing about the *accommodations* Plaintiffs themselves allege it offered to discuss with Jane Doe 1.

Provider Defendants stand by their argument that Plaintiffs' allegations in support of Count V are legally insufficient, as found by both the First Circuit and this Court. Defendants' Motion at 11. However, even assuming sufficiently alleged facts to indicate an agreement among the alleged conspirators to mandate vaccines for healthcare workers, such an agreement cannot be a conspiracy under 42 USC § 1985 to deprive them of a civil right they do not have under existing law. Because Provider Defendants do not, as a matter of law, run afoul of Title VII by declining to violate the Vaccine Mandate in order to give Plaintiffs exemptions to which they do not have a right, it follows that Provider Defendants cannot be found liable for agreeing to support the adoption of that Mandate.

Finally, Plaintiffs do not respond to Provider Defendants' argument concerning the still-anonymous Jack and Joan Doe plaintiffs. Even if the Court does not order a complete dismissal, they should be dismissed from the case. *See In Re Compact Disc Minimum Advertised Price Antitrust Litigation,* 456 F.Supp.2d at 152-153 ("A party's failure to oppose specific arguments in a motion to dismiss results in waiver of those issues."); *Graham v. United States,* 753 F.Supp. 994, 1000 (D. Me. 1990) and *Collins v. Marina–Martinez,* 894 F.2d 474, 481 n. 9 (1st Cir.1990) ("It is

settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived.").

V. CONCLUSION

To be sure, Plaintiffs' exemption-only position cuts to the chase of their Title VII claim. Whether Plaintiffs chose this all-or-nothing approach for strategic or other reasons, the choice eliminates any issue regarding the accommodation process from their claim and enables the Court to consider the viability of their insistence on an exemption in connection with a motion to dismiss. Plaintiffs were free to request a specific accommodation, to the exclusion of all others, as they have done. However, the consequence of that choice is that the sole accommodation that is acceptable to them is an undue hardship, and thus not available as a matter of law.

For these reasons, Provider Defendants MaineHealth, Genesis, and MaineGeneral Health respectfully request that the Court dismiss all claims against them, with prejudice. Additionally, all claims should be dismissed for lack of standing as to Jack Does 1-250 and 501-1,000, and Joan Does 1-250 and 501-1,000.

Dated: April 12, 2022

/s/ James R. Erwin
James R. Erwin

/s/ Katharine I. Rand
Katharine I. Rand

Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
207-791-1100
jerwin@pierceatwood.com
krand@pierceatwood.com

Counsel for Defendants MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare LLC and MaineGeneral Health

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2022, I electronically filed the foregoing Reply Memorandum in Support of Motion to Dismiss of Defendants MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare LLC, and MaineGeneral Health with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to counsel of record.

Dated: April 12, 2022

/s/ James R Erwin
James R. Erwin

Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
jerwin@pierceatwood.com

Counsel for Defendants MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare LLC and MaineGeneral Health