IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

AIR FORCE OFFICER, Plaintiff, v. **LLOYD J. AUSTIN, III**, in his official capacity as Secretary of Defense, et al., Defendants.	Case No. 5:22-cv-00009-TES

REPLY IN SUPPORT OF MOTION TO STAY

Plaintiff's opposition to Defendant's motion to stay concedes that granting a stay would not cause any prejudice for the only plaintiff in this lawsuit, Air Force Officer, because a preliminary injunction in her favor would remain in effect throughout the appeal. In these circumstances, Plaintiff cannot show that a stay while the 11th Circuit considers the appeal of her preliminary injunction is unwarranted.

I. Nonparties Are Not Prejudiced by a Stay.

Instead of identifying any prejudice to the Plaintiff, her opposition to Defendants' motion to stay proceedings relies exclusively on purported prejudice to individuals who are not part of this lawsuit. *See* Pls. Resp. to Defs.' Mot to Stay, ECF No. 77. Plaintiff points to supposed prejudice to putative class members like Air Force MSgt Vincent White. *See id.* (citing Jessica Chasmar, *Air Force Sergeant faces court-martial over vaccine refusal in apparent 'discrimination' of Christians: lawyer*, Fox News (Apr.20, 2022),

https://www.foxnews.com/politics/air-force-court-martial-covid-19-vaccine-targeted-discrimination-christians). But Plaintiffs never explain how granting a stay in this case would have any impact on MSgt White whatsoever. Indeed, as the article cited by Plaintiff explains, MSgt White is represented by counsel who can seek federal court review when he and his client think it would be appropriate. MSgt White is not alone—members of the military, including the Air Force, have filed dozens of lawsuits around the country challenging the COVID-19 mandate. Those individuals would not be impacted at all by a stay in this case.

Faced with similar claims that a stay would prejudice non-parties, the Northern District of Georgia recently granted a request to stay proceedings pending appeal despite allegations of ongoing civil rights violations, because an appellate decision was "likely to have a substantial or controlling effect on the claims and issues." Order, *U.S. v. Georgia*, 1:16-cv-3088, ECF No. 40 (N.D. Ga. Aug. 11, 2017) (citing *Miccosukee Tribe of Indians v. S. Cla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009)).

II. Proposed Plaintiffs Are Not Parties, and Have Not Exhausted Their Administrative Remedies

In any event, the circumstances confronting non-parties proposed Plaintiffs does not warrant denial of a stay. The Court has not granted leave to amend, so the proposed Plaintiffs are not yet part of this lawsuit. Since those three individuals are not yet parties in this case, none of Plaintiffs' authority is on point. *See e.g.*, *Kent v. Vilsak*, No. 3:21-CV-

540-NJR, 2021 WL 6139523, at *1 (S.D. Ill. Nov. 10, 2021) (a request to stay denied when a stay could prejudice a party in the lawsuit).

Should the Court stay this case pending appeal of the Preliminary Injunction, these three individuals will have a choice: they can wait for the conclusion of appellate proceedings (which will provide much-needed clarity to the important issues in this case), [1] or they remain free to file their own individual lawsuits in appropriate forums.

Notably, two of the proposed Plaintiffs have no connection to this forum. Air Force Special Agent currently works remotely and lives in California. Proposed SAC, ¶ 80, ECF No. 63-2. Air Force Engineer "currently lives in Virginia." *Id.*, ¶ 88. These two individuals live outside of Georgia, they work outside of Georgia, and their claims are based on events that occurred outside of Georgia. Thus, denying a stay to await resolution of claims from these proposed Plaintiffs makes little sense since they would not be properly joined in this district in any event.

Plaintiff also argues in her opposition to a stay that these proposed Plaintiffs have exhausted their remedies. Pls.' Resp. at 6, ECF No. 77. While that argument is irrelevant to the question of whether the Court should grant a stay, Plaintiff is wrong. Parties who have not exhausted their administrative remedies do not have justiciable claims. The importance of administrative exhaustion in the military context is paramount. *See Hodges*

[1] Plaintiffs suggest that an appeal could take years. But the data shows that a civil appeal to the 11th Circuit is resolved on average 10.7 months after filing a notice of appeal. https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2019.pdf

v. Callaway, 499 F.2d 417, 420 (5th Cir. 1974). Strict adherence to the exhaustion requirement in the special military context (1) avoids separation of powers problems, (2) minimizes the risk of harm to military readiness resulting from premature or unnecessary judicial intrusion into military matters, (3) preserves the primary purpose of the comprehensive remedial scheme that Congress has provided for service members, and (4) permits the military to apply its expertise to sensitive military issues in the first instance.

In this Circuit, a plaintiff is required to exhaust "*all* available military remedies," *Winck*, 327 F.3d at 1303 n.4 (emphasis added), which means everything up to and including "petitioning to the [relevant Board for Correction of Military Records ("BCMR")] requesting the relief sought in th[e] action and receiving the adverse determination," *Rucker v. Sec'y of the Army*, 702 F.2d 966, 970 (11th Cir. 1983).[2] *See also, e.g.*, *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986) (holding claim premature for "fail[ing] to exhaust available service-connected remedies by appealing to the [BCMR]."); *Hodges*, 499 F.2d at 420 (describing the "two types of administrative bodies

[2] Under 10 U.S.C. § 1552, Congress has established a Board for Correction of Military Records in each military department. Each BCMR is a board composed of at least three high-ranking civilian employees. The Secretary of each military department, acting through the appropriate BCMR, possesses plenary authority to afford relief to service members injured by adverse personnel actions, including but not limited to reversing involuntary separations, removing adverse information from personnel files, and awarding back pay and allowances. The Secretary of each military department, acting through the BCMR, may "correct any military record . . . when . . . necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a).

[that] provide review of discharge decisions" that must be exhausted); *Mindes v. Seaman*, 453 F.2d at 198 (plaintiff had "travers[ed] all available intraservice procedural reviews—ending with a denial of relief by the civilian [BCMR] [before he] filed a complaint" in civilian federal district court); *Layman v. Harvey*, 2007 WL 430678, at *6-10 (M.D. Fla. 2007) (dismissing claim against military for failing to exhaust "remedies to the ABCMR").

Several courts have recently denied relief to service members who failed to exhaust their separation remedies before pursuing their RFRA and First Amendment claims. *See Church v. Biden*, --- F. Supp. 3d ----, 2021 WL 5179215, at *10-11 (Nov. 8, 2021, D.D.C.); *Roberts v. Roth*, No. 21-cv-1797-ABJ, 2022 WL 834148, at *4-5 (March 21, 2022).

III. Alleged Delays in Proceedings Are Irrelevant to Whether to Grant a Stay.

Plaintiff's opposition spends much time arguing that a stay would prejudice other parties yet to be added to this lawsuit, and that Defendants have delayed proceedings in this case intended to add those parties. But these arguments are irrelevant to whether to stay the case pending appeal. The question at hand is whether waiting for appellate guidance would efficiently advance the case without prejudice to the current plaintiff. Alleged delays in adding other parties is beside the point, particularly where those parties are free to file their own lawsuits in an appropriate forum.

In any event, contrary to Plaintiff's assertions, Defendants have not delayed this case, but in nearly every instance, have worked to file briefs before the deadline under applicable rules. For example, the Court held a status conference on January 21, 2022,

ECF No. 27, and just 10 days later, Defendants provided their response in opposition to the motion, which attached parts of the administrative record, ECF No. 38. Even the notice of appeal of the preliminary injunction—which Plaintiff emphasizes in her opposition—was filed 4 days before the deadline. Defendants then moved to stay this case two days later and, indeed, have filed this reply before any applicable deadline.

Instead, Plaintiff's own steps have contributed to delay in this case. For example, while Plaintiff first moved for a preliminary injunction on January 16, 2022, *see* Pls.' Mot. for TRO and Prelim. Inj., ECF No. 2, that motion was not clear about whether she sought an individual or nationwide injunction. In her reply (for the first time), she suggested that she sought relief for every person in the Air Force whose religious accommodation request was denied. Reply ISO Mot. for TRO and Prelim. Inj., ECF No. 40, at 10. In fact, the scope of requested relief was only settled "[d]uring oral argument, [when] Plaintiff confirmed that what she really wanted was a nationwide preliminary injunction." Order, at 9, ECF No. 51. The Court denied her request for a nationwide injunction. *Id.* at 10.

A week later, Plaintiff filed a motion for class certification. Mot. for Class Cert., ECF No. 57. But right before filing a motion for class certification, Plaintiff filed an Amended Complaint without first seeking leave of court or other parties. First Am. Compl., ECF No. 56. As the Court recently explained, "Federal Rule of Civil Procedure 15 provides two ways a plaintiff can amend a complaint before trial" one of which is "amending as a matter of course." Order, *Gotel v. Carter a.k.a. Jay-Z*, 5:21-cv-00388-TES

(April 4, 2022, M.D. Ga.) (Self, J.). A party can amend as a matter of course "once within 21 days after serving the complaint" or "21 days after a plaintiff's adversary serves a responsive pleading or 21 days after that adversary serves a motion under Rule 12(b), (e), or (f), whichever is earlier." *Id.* Since the timing of Plaintiff's amended complaint did not fall within either of those two buckets, the only other way that Plaintiff could submit an amended complaint was "with the opposing party's written consent or the court's leave." *Id.* (citing Fed. R. Civ. P. 15(a)(2). Here, Plaintiff had neither (indeed, Plaintiff never even sought Defendants' written consent before filing her First Amended Complaint), so her First Amended Complaint was procedurally improper.

On March 10—before any response to the Amended Complaint was due—Defendants filed a motion to strike, highlighting those facial procedural deficiencies, among other issues. *See* Mot. to Strike, ECF No. 60. Plaintiff then waited three weeks—until the last day permitted under the local rules to respond to Defendant's motion to strike—to oppose the motion to strike and to seek leave to file a second amended complaint. ECF Nos. 63 and 67.

Accordingly, to the extent Plaintiff opposes a stay on the ground that she seeks to expand the scope of this lawsuit to add other parties, any delays related to doing so are primarily of her own doing. And a stay pending appellate resolution of her preliminary injunction would still provide important guidance for any further proceedings.

IV. A Stay Would "Simplify the Issues."

At the end of her reply, Plaintiff suggests that her case should not be stayed because the Eleventh Circuit's decision on RFRA and First Amendment issues will not provide clarity on her Administrative Procedure Act ("APA") claim. She notes that in the dozens of other pending lawsuits challenging the military vaccine mandate, no other plaintiff (to her knowledge) has raised similar APA claims. But the purpose of a stay would be to obtain guidance and potentially simplify the main issues in the case. Awaiting final resolution of a single, narrow, and less significant statutory APA claim will not materially advance proceedings while an appeal is pending on the core issues in this case.

CONCLUSION

For the foregoing reasons, and those set forth in Defendants' opening motion, the Court should stay proceedings in this action pending appeal of the preliminary injunction entered for Plaintiff in this case.

Dated: April 25, 2022

Respectfully submitted,

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