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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

NEELIE PANOZZO, *et al.*, Plaintiffs, v. RIVERSIDE HEALTHCARE, *et al.*, Defendants.	Case No.: 2:21-cv-02292-CSB-EIL **Plaintiffs' Reply in Support of their Motion for a Temporary Restraining Order**

INTRODUCTION

Plaintiffs—fifty-plus nurses, EMTs, and other healthcare workers—believe their work to be a calling from God to love and serve their patients. They also feel God has called them to love and protect unborn babies, and therefore object to the COVID-19 vaccines that are currently available. They look to this Court to prevent them from an impossible choice, not between their job and the vaccine, but between two equally sincere religious commitments.

I. Plaintiffs have established irreparable harm.

Defendants fundamentally misunderstand, or mischaracterize, Plaintiffs' theory of irreparable harm. Plaintiffs do not suggest that it is an "impossible choice" between "your job and your jab." Rather, they argue that they believe their job is itself a religious commitment, a calling, a vocation, also entitled to this Court's respect and protection. Though Defendants' label this "creative," BIO 7, n.7, that's hardly so—the idea of a job as living out a religiously motivated calling is not novel. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 177 (2012) (At Hosanna-Tabor, "'Called' teachers are regarded as having been called to their vocation by God . . . ."). Though "vocation" is sometimes used specifically as a calling to life as a priest or nun, in both Catholic and Protestant circles its meaning at a universal level is a calling of any person to a

particular profession or career. *See* Mark R. Talbot, "The Importance of Vocation," C.S. Lewis Institute (2018).[1] As demonstrated in the twenty-plus affidavits submitted with the motion, these Plaintiffs see their jobs at Riverside as much more than jobs, but as fulfilling "a divine call to a place of service to others in accordance with the divine plan." *Id*. (quoting definition 1 of the Merriam-Webster Unabridged Dictionary for vocation). Moreover, what is important under Title VII is not whether Plaintiffs' beliefs about their vocations are logical or commonplace, but that they are sincere. *Bushouse v. Local Union 2209, UAW*, 164 F. Supp. 2d 1066, 1078 (N.D. Ind. 2001); *EEOC v. Allendale Nursing Ctr*., 996 F. Supp. 712, 714-15(W.D. Mich. 1998). *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). Plaintiffs are certainly sincere in their beliefs about both vocation and vaccination, and Riverside has never suggested otherwise.

Riverside argues that Plaintiffs' citations to various First Amendment and RFRA cases are inapposite because Riverside is not a state actor. BIO 9. But this misses the point of the citations. They are there not to establish a particular holding but a general legal principle: harm to religious belief is not the sort of harm that is compensable monetarily. *Anderson v. Larry*, No. 21-cv-944, 2021 U.S. Dist. LEXIS 196116, at *36 (N.D. Ill. Oct. 12, 2021) (under RLUIPA statute, "Restricting a prisoner's right to freely exercise his religion unquestionably results in irreparable harm that is not compensable by monetary damages."). That is true whether the harm is perpetrated by an employer or a government.

II. Riverside's invitation to apply for another job is not a reasonable accommodation.

Defendants try to pull a slight of hand by saying "Riverside Offered Them The Opportunity For Reassignment To A Non-Patient-Facing Role, Which They Rejected." BIO 11. But the "opportunity to apply for non-patient facing roles," *id*., is not the same as transfer to non-patient-

[1] https://www.cslewisinstitute.org/The_Importance_of_Vocation_page1.

facing roles. The state trial court specifically authorized Riverside to transfer Plaintiffs into non-patient-facing roles in order to accommodate their religious practices, *see* Ex. A, Pls' Mot. (ECF 9-2), as permitted by *Rojas v. Martell*, 2020 IL App (2d) 190215, ¶ 54, 161 N.E.3d 336, 351 and the EEOC.[2] Indeed, "a transfer . . . is a paradigm of reasonable accommodation." *Rodriguez v. City of Chi*., 156 F.3d 771, 775 (7th Cir. 1998). Yet even with the state court's blessing, Riverside did not transfer anyone. Instead, it simply referred them to its job board of open positions.

But an opportunity to apply and compete for a new job on the open market is not the same thing as a transfer. *See Smith v. Midland Brake, Inc*., 180 F.3d 1154, 1164 (10th Cir. 1999) (*citing Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998)) (interpreting "reasonable accommodation" under the ADA). Indeed, the EEOC has said as much: an invitation to apply on the open market "is not necessarily an accommodation; after all, an applicant may be turned down, and the need to apply seems a gratuitous insult to someone who" already has a job. *EEOC v. Walmart Stores E.*, 992 F.3d 656, 659 (7th Cir. 2021) (summarizing the position of the EEOC).

The Defendants' reliance on *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993), is inapposite because Defendants have not met the burden set forth in *Wright*. First, the employee in *Wright* had not so much an opportunity to apply as a guarantee of a job; he was sure to receive at least two of the four open positions. *Id*. Obviously no such guarantee is made to any plaintiff; indeed, there is no indication there are sufficient positions to go around for all fifty-plus employees. Second, *Wright* warned against reassignments that require a loss of skills or "a reduction in pay or some other loss of benefits." *Id*. Again, Riverside has given no indication that Plaintiffs even could, little less would, receive positions of equal rate and rank. The declaration of Rebecca Hinrich on which Riverside relies provide no information about the positions other than to say that Riverside

[2] U.S. Equal Opportunity Employment Comm'n, Technical Assistance, Oct. 28, 2021.

provided the "opportunity for these employees to remain unvaccinated but apply for available non-patient facing positions." (Decl. Hinrich ¶ 38). Riverside cannot meet the standard provided for in *Wright* because they failed to present evidence to show Plaintiffs would receive the proffered positions and that they are equivalent in skill and seniority, pay and benefits. There is no evidence in Defendants' declaration that it has fifty-plus open non-patient-facing positions, little less of similar pay and seniority. Riverside's website currently only lists 17 open positions in clerical/office, and makes no guarantee all of those are non-patient-facing.[3] This is a legal ploy, a throwaway line in a denial letter, not a real effort at genuine accommodation.

III. Defendants have not established an undue burden from providing exemptions.

Defendants essentially assert carte blanche from courts because they are the medical professionals. BIO 12–13. They provide no rebuttal to any of Plaintiffs' points: that Defendants granted flu vaccine exemptions[4], that they grant COVID-19 vaccine exemptions to pregnant employees against CDC guidance, that there are available alternatives that Riverside is already using effectively, and that they are outliers in their industry. Our unrefuted claims carry the day.

IV. A few loose ends.

Defendants assert that "a significant portion of Riverside's patient facing staff are not vaccinated against COVID-19 and therefore are at increased risk of spreading infection to other staff and to Riverside's patient population." BIO 1. Not only are fifty employees out of three thousand not "a significant portion" of Riverside's workforce, but what we know of Omicron and vaccines indicates that vaccination does little if anything to stop the spread of infection, but instead

[3] https://www.riversidehealthcare.org/careers/.

[4] Defendants, in support of the need for patient-facing employees to obtain the COVID-19 vaccine, assert "Influenza and other dangerous viruses that strict mitigation measures largely abated last winter have also returned in force." BIO 1. Yet they fail to explain why Riverside has given influenza vaccine exemptions to patient-facing religious objectors…

minimizes the severity of the illness for those who get it. Stephanie Nolen, "Most of the World's Vaccines Likely Won't Prevent Infection From Omicron," N.Y. Times (Dec. 19, 2021).[5]

In a footnote, Defendants complain that a second TRO is an improper procedural vehicle. BIO 5, n. 3. First, Defendants misread Federal Rule of Civil Procedure 65(b)(2), which limits TROs to fourteen days only in those instances when they are issued without notice to the other party. *Surgipath Med. Indus. v. O'Neill*, No. 09 C 02453, 2009 U.S. Dist. LEXIS 144394, at *20 (N.D. Ill. June 19, 2009). Second, Defendants ignore that the original state court TRO was in place until January 11, and that when Defendants moved this case to federal court, they had agreed not to terminate Plaintiffs' employment pending briefing, a court hearing, and this Court's decision on Plaintiffs' motion for preliminary injunction. Yet, Riverside subsequently sent communications to Plaintiffs indicating that they would be terminated on January 3, 2022, even though their counsel was unavailable the first week in January for a hearing on the preliminary injunction because of holiday travel plans. Third, courts may issue multiple TROs in the same case. *See, e.g., Clearone Communs., Inc. v. Chiang*, 670 F. Supp. 2d 1248, 1254 (D. Utah 2009). In all events, Plaintiffs only seek a TRO to preserve the status quo until this Court can consider a preliminary injunction.

Finally, the U.S. Supreme Court has scheduled argument on the federal Centers for Medicaid & Medicare Services vaccine mandate on January 7, 2022. Order, No. 21A241 (Dec. 22, 2021). This Court could issue a temporary restraining order lasting only until the Supreme Court rules and this Court can schedule a hearing on a preliminary injunction, which would create clarity on whether Title VII or the Illinois Health Care Rights of Conscience Act is the governing law.

CONCLUSION

This Court should preserve the status quo with a preliminary injunction.

[5] https://www.nytimes.com/2021/12/19/health/omicron-vaccines-efficacy.html.

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Respectfully Submitted,

NEELIE PANOZZO, ET AL.

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