

**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
URBANA DIVISION**

NEELIE PANOZZO, *et al.*,

Plaintiffs,

v.

RIVERSIDE HEALTHCARE, *et al.*,

Defendants.

Case No.: 2:21-cv-02292-CSB-EIL

**Plaintiffs' Response to Defendants' Motion to Dismiss Second Amended Complaint**

The trajectory of this case has fluctuated significantly in the relatively short time since Plaintiffs filed it. Initially, six plaintiff nurses employed by Riverside Healthcare filed a complaint in Illinois circuit court against Riverside and its CEO, Philip Kambic, alleging that Defendants' vaccine mandate forced Plaintiffs to choose between compromising their sincerely-held religious beliefs by obtaining the COVID-19 vaccine or losing their job in violation of the Illinois Health Care Right of Conscience Act, 745 ILCS § 70/1, et seq. (the "HCRCA"). Plaintiffs obtained a TRO from the state court and added dozens of other employees of Riverside as Plaintiffs. But then the federal Centers for Medicaid & Medicare Services (CMS) issued a rule requiring vaccination of employees of Medicaid/Medicare-participating employers like Riverside, and Defendants sought to dissolve the TRO based on federal preemption. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,583 (Nov. 5, 2021). Plaintiffs subsequently filed their Second Amended Complaint, adding a count alleging a violation of Title VII of the federal Civil Rights Act of 1964, and Defendants removed the case to this Court.

One day later, the U.S. District Court for the Western District of Louisiana issued a nationwide preliminary injunction against the CMS Rule. *Louisiana v. Becerra*, 3:21-CV-03970, ECF No. 28

(Nov. 30, 2021), eliminating Defendants' federal preemption defense against the HCRCA. On December 14, 2021, Plaintiffs filed a motion for TRO and Preliminary Injunction based on their HCRCA claim. (Dkt. 006). Yet, the next day, the U.S. Court of Appeals for the Fifth Circuit lifted the nationwide injunction on the CMS vaccination mandate, *Louisiana v. Becerra*, No. 21-30734 (5th Cir. Dec. 15, 2021), restoring the federal rule that preempted Plaintiffs' state-law claim. In response, Plaintiffs filed another motion for TRO and Preliminary Injunction based on their Title VII claim. (Dkt. 008). Because the state court's TRO expired, Defendants explained to Plaintiffs that Plaintiffs would be fired on January 3, 2022, unless they complied with the Defendants' vaccine mandate. Plaintiffs asked this Court to rule on their motions for TRO and PI before January 3, 2022.

This Court, in an opinion issued on January 2, 2022, denied Plaintiffs' motions for TRO and PI. (Dkt. 13). It denied Plaintiffs' motion based on the HCRCA claim as moot since at the time of the Court's opinion, the injunction against the CMS vaccination mandate did not apply to Illinois.<sup>1</sup> The Court also denied Plaintiffs' motion based on the Title VII claim on the merits, holding that Defendants would face an undue hardship in accommodating Plaintiffs' COVID-19 vaccine exemption requests; that Plaintiffs' permanent loss of employment is not irreparable harm; and that the balancing of the equities favors Defendants.

Defendants filed their Motion to Dismiss the Second Amended Complaint on January 14, 2022. (Dkt. 15). Defendants' motion provides three bases to dismiss the Second Amended Complaint.

First, Defendants state that the CMS Rule preempts their claims under the HCRCA. Plaintiffs have previously conceded this point. Although it is possible that a court may issue a permanent

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<sup>1</sup> As Defendants point out, subsequent to the Court's order, on January 13, 2022, the U.S. Supreme Court granted the government's request for a stay of the Fifth Circuit's limited injunction, clearing the way for CMS to enforce the CMS Rule nationwide. *See Becerra et al. v. Louisiana et al.*, 595 U.S. — (2022), [https://www.supremecourt.gov/opinions/21pdf/21a240\\_d18e.pdf](https://www.supremecourt.gov/opinions/21pdf/21a240_d18e.pdf).

injunction against the CMS Rule, since the injunctions currently in place do not apply to Illinois and have been stayed by the Supreme Court, Plaintiffs recognize that at this time their HCRCA claim is preempted by the CMS Rule. Because it is possible that the CMS Rule may eventually be permanently enjoined, Plaintiffs' HCRCA claim should be dismissed without prejudice.

Second, Defendants assert that Plaintiffs' Title VII claims against Defendant Kambic should be dismissed because there is no individual liability under Title VII. Plaintiffs named Kambic a defendant, in his official capacity as President of Riverside, when they initially brought their claim seeking injunctive relief to protect Plaintiffs from being fired from their positions based on the HCRCA. As Kambic was president and was responsible for enforcing the vaccine mandate and terminating employees who did not comply, Plaintiffs named him a defendant to ensure any injunction would specifically prevent Kambic from enforcing the mandate against Plaintiffs and/or firing Plaintiffs for failing to comply with the mandate. Because the denial of Plaintiff's motions for preliminary injunctive relief has made Plaintiffs' requests for injunctive relief moot, as Plaintiffs either have been terminated for not complying with the vaccine mandate or have decided to obtain the vaccine against their religious beliefs, Plaintiffs do not oppose the dismissal of Kambic as a Defendant in this lawsuit. The dismissal of Kambic should be done without prejudice because it is possible that Plaintiffs' HCRCA may become available if the CMS Rule is permanently enjoined.

Third, Defendants assert that before a plaintiff files a Title VII claim in court against their employer, they must first file a charge with the U.S. Equal Employment Opportunity Commission ("EEOC") and obtain a Notice of Right to Sue letter. It is important to note that initially Plaintiffs proceeded under the HCRCA, which did not require them to exhaust any administrative remedies, and that Plaintiffs sought immediate relief to prevent their firing. Plaintiffs were later forced to file

a Title VII claim after the CMS Rule was issued, preempting the HCRCA claim, and the injunction against the rule was held not to apply to Illinois. Further, because Plaintiffs were seeking to maintain the status quo and prevent Defendants from firing them, the Court could have granted injunctive relief under the Title VII claim without Plaintiffs having to wait on the EEOC to obtain a Notice of a Right to Sue letter. *See Halczenko v. Ascension Health, Inc.*, No. 1:21-cv-02816-JPH-DML, 2021 U.S. Dist. LEXIS 218975, at \*4 (S.D. Ind. Nov. 12, 2021). As Defendants admit, many of the Plaintiffs have in fact filed claims with the EEOC seeking Right to Sue letters, however, Plaintiffs are still waiting for the EEOC to act to issue such letters. Because once Plaintiffs receive those letters from the EEOC, they would immediately re-file their Title VII claims once again against Riverside before this Court, Plaintiffs suggest in the interest of judicial economy, this Court stay Plaintiffs' Title VII claims against Riverside for 120 days, allowing Plaintiffs time to receive their right to sue letters from the EEOC, rather than require Plaintiffs to completely refile this case against Riverside. Should the Court decline to stay Plaintiffs Title VII claims against Riverside, the Court should dismiss those claims without prejudice to ensure that Plaintiffs will be able to refile those claims when they receive the Notice of the Right to Sue letters from the EEOC.

### **CONCLUSION**

Plaintiffs do not oppose Defendants' motion to dismiss Plaintiffs' HCRCA claim and Defendant Kambic. Those claims should be dismissed without prejudice. With respect to Plaintiffs' Title VII claims, Plaintiffs request that this Court stay those claims for 120 days to allow Plaintiffs to obtain the Notice of the Right to Sue letters from the EEOC, or in the alternative dismiss those claims without prejudice.

Dated: January 28, 2022

Respectfully Submitted,

NEELIE PANOZZO, ET AL.

By: /s/ Jeffrey M. Schwab  
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**CERTIFICATE OF SERVICE**

I, Jeffrey M. Schwab, an attorney, certify that I served the foregoing Plaintiffs' Response to Defendants' Motion to Dismiss the Second Amended Complaint on all parties on January 28, 2022, via the Court's electronic filing system.

/s/ Jeffrey M. Schwab  
Jeffrey M. Schwab