E-FILED
Friday, 14 January, 2022 05:09:40 PM
Clerk, U.S. District Court, ILCD

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

NEELIE PANOZZO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-02292-CSB-EIL**
	)	
RIVERSIDE HEALTHCARE, et al.	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendants, Riverside Healthcare ("Riverside") and Phillip M. Kambic ("Kambic") (collectively, "Defendants"), by and through their attorneys, respectfully submit this Memorandum of Law in Support of their Motion to Dismiss Plaintiffs' Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

I. INTRODUCTION

In a well-reasoned opinion, on January 2, 2022 this Court denied Plaintiffs' expedited Motion for Temporary Restraining Order and Preliminary Injunction (the "TRO Motion"). Defendants now move this Court to dismiss Plaintiffs' claims under the Illinois Health Care Right to Conscience Act ("HCRCA") and Title VII of the Civil Rights Act of 1964 ("Title VII"), pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a legally cognizable claim.

First, Plaintiffs have already admitted that their HCRCA claims against Defendants are preempted by federal law, specifically the November 4, 2021 Interim Final Rule issued by the Centers for Medicare & Medicaid Services (the "CMS Rule"). In recognition of the CMS Rule's preemptive effect, in their amended TRO Motion, Plaintiffs chose to rely exclusively on Title VII and even admitted in their TRO Motion briefing that their HCRCA claims have been preempted

by the CMS Rule. Dismissal of Plaintiffs' HCRCA claims is clearly warranted, if not already a foregone conclusion.

Second, Plaintiffs' Title VII claims against Kambic should be dismissed because it is well-settled that Title VII does not impose individual liability against an individual supervisor, manager, or executive of an employer entity. Rather, any such Title VII claim can only be brought against the employer entity itself, and not against any individual acting on behalf of the employer.

Lastly, Plaintiffs' Title VII claims against Riverside should be dismissed because Plaintiffs fail to plead they have exhausted their administrative remedies with the U.S. Equal Employment Opportunity Commission ("EEOC") by obtaining a Notice of Right-to-Sue letter. As such, Plaintiffs' Title VII claims against Riverside are, at best, premature and should be dismissed without prejudice until such time as Plaintiffs have satisfied their statutory prerequisites under Title VII.

II. FACTUAL ALLEGATIONS

The underlying facts of this case are well-known to the Court, although for purposes of this Motion to Dismiss, only the facts alleged in Plaintiff's Second Amended Complaint ("SAC") should be considered. *See* Dkt. 1-3 (SAC). With respect to the SAC, the core factual allegations relevant to this Motion are summarized below.

Riverside is a not-for-profit healthcare entity that operates a hospital in Kankakee County. SAC, ¶¶ 73, 100. Kambic is the President of Riverside and, according to Plaintiff, "is responsible for day-to-day management of Riverside, including enforcement of policies such as the vaccination mandate." *Id.* at ¶ 74. In August and September 2021, Riverside implemented a policy requiring its healthcare workers to be vaccinated against COVID-19 (the "Policy") in accordance with Governor Pritzker's August 26, 2021 executive order (the "Executive Order"). *Id.* at ¶¶ 85–91.

The Plaintiffs in this action consist of current and former employees of Riverside who have each "requested a vaccine exemption based on sincerely held religious beliefs," but "Riverside denied that request" for each Plaintiff. *Id.* at ¶¶ 2–72. In the SAC, Plaintiffs assert that the Executive Order "included an option for weekly testing if vaccination would require a health care worker to 'violate or forgo a sincerely held religious belief, practice, or observance.'" *Id.* at ¶ 85. According to Plaintiffs, however, Riverside policy is "to deny any religious accommodation request by any employee it deemed to be in a patient-facing position," and consistent with this alleged policy, Riverside allegedly "denied all religious exemption requests for all patient-facing employees, including those of Plaintiffs." *Id.* at ¶¶ 91–92.

As a result of this alleged policy, Plaintiffs allege they are "being discriminated against as a result of their refusal to accept administration of the COVID-19 vaccines." *Id.* at ¶ 101. With respect to their HCRCA claims under state law, Plaintiffs allege that Riverside's Policy "violates the HCRCA's prohibition against discrimination, in that they single out Plaintiffs for disparate treatment based on their conscientious refusal to accept, receive, or obtain administration of a vaccine against COVID-19." *Id.* at ¶ 106. With respect to their Title VII claims, Plaintiffs allege that "Defendants failed to provide Plaintiffs with religious exemptions and reasonable accommodations, thereby discriminating against Plaintiffs because of their religious beliefs." *Id.* at ¶ 115. Plaintiffs do not allege that any of them have fulfilled the administrative prerequisites to filing suit under Title VII, specifically the issuance of a Right-to-Sue letter from the EEOC.

III. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must determine whether

the complaint alleges "sufficient factual matter, accepted as true, to 'state a claim to relief that is ***plausible*** on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (emph. added). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *United States v. Fischer Excavating, Inc.*, 2014 WL 4638600, at *3 (C.D. Ill. Sept. 17, 2014) (quoting *Iqbal*, 556 U.S. at 678).

While the presence of an affirmative defense usually does not invalidate a claim for relief at the motion to dismiss stage since such defenses typically rely on facts not yet before the court, "[a]n exception to this rule occurs where the allegations of the complaint set forth everything necessary to satisfy the affirmative defense." *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005). "[W]hen all relevant facts are presented, a court may dismiss a case based on an affirmative defense prior to discovery." *Fischer Excavating*, 2014 WL 4638600, at *3 (quoting *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012)).

IV. ARGUMENT

A. The CMS Rule Preempts Plaintiffs' HCRCA Claims.

In their TRO Motion, Plaintiffs have already conceded that the CMS Rule preempts their claims under the HCRCA. Dkt. 8 at pp. 1–2 ("[T]he U.S. Court of Appeals for the Fifth Circuit lifted the nationwide injunction on the federal Centers for Medicaid & Medicare Services (CMS) vaccination mandate, . . . thus restoring a federal rule that preempted Plaintiffs' state-law claim.");[1] Dkt. 9 at p. 1 ("Plaintiffs' argument in their first motion for an exemption under the Illinois Health Care Right of Conscience Act is preempted by the CMS Rule."). Indeed, Plaintiffs' recognition

[1] 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 (last accessed January 14, 2022).

that their HCRCA claims are preempted is precisely the reason why they amended their TRO Motion on December 17, 2021, abandoning the HCRCA as the basis for their request for injunctive relief and, instead, choosing to rely solely on Title VII. *Compare* Dkts. 6, 7 *with* Dkts. 8, 9. Even without Plaintiffs' concession, this Court should dismiss all claims under the HCRCA against Defendants because such claims directly conflict with the CMS Rule and thus are preempted by federal law.

1. The CMS Rule requires all covered healthcare entities, including Riverside, to mandate COVID-19 vaccination for their entire staff.

The CMS Rule requires all Medicare and Medicaid-certified hospitals, in addition to 20 other categories of healthcare providers and suppliers ("Covered Entities"), to have all their "staff" receive their first dose of the COVID-19 vaccine by January 27, 2022 and to be fully vaccinated for COVID-19 by February 28, 2022. *See* 86 Fed Reg. 61555, *et seq.* at 61556, 61563 (Nov. 5, 2021); *see also* CMS Guidance for the Interim Final Rule, dated December 28, 2021.[2] Under the CMS Rule, the term "staff" is broadly defined to include all current and newly hired individuals who provide any care, treatment, or other services for a Covered Entity or its patients regardless of clinical responsibility or patient contact, including employees, contractors (i.e. independent physicians), students, trainees, and even volunteers ("Covered Staff"). 86 Fed Reg. at 61570. Covered Staff also includes administrative staff and other non-patient-facing employees of a Covered Entity based on the rationale that "it is necessary to require vaccination for all staff that interact with other staff, patients, [and] residents." *Id.* Consistent with this rationale, only staff

[2] Originally, the CMS Rule required Covered Entities to have all staff receive their first dose of the COVID-19 vaccine by December 5, 2021 and be fully vaccinated by January 4, 2022. *See* 86 Fed Reg. at 61555. Following the Fifth Circuit's decision to vacate the nationwide injunction on the CMS Rule, CMS issued new guidance on December 28, 2021, setting the new compliance deadlines for January 27, 2022 and February 28, 2022, respectively. *See* CMS Guidance for the Interim Final Rule, dated December 28, 2021, available at https://www.cms.gov/files/document/qso-22-07-all.pdf (last accessed, January 14, 2022).

who provide services "100 percent remotely" are exempt from the CMS Rule's vaccination requirements. *Id.*

The CMS Rule requires that all Covered Entities to establish a policy ensuring all Covered Staff have received the first dose of the COVID-19 vaccine by January 27, 2022, and to be fully vaccinated for COVID-19 by February 28, 2022, except for those staff who have been granted religious or disability exemptions pursuant to federal law—i.e. Title VII of the Civil Rights Act of 1964 ("Title VII") or the Americans with Disabilities Act ("ADA")—or "those staff for whom COVID-19 vaccination must be temporarily delayed, as recommended by the CDC, due to clinical precautions and considerations." *Id.* at 61571; CMS Guidance for the Interim Final Rule, dated December 28, 2021. Critically, Covered Entities who fail to comply with the CMS Rule risk subjecting themselves to federal penalties, including civil monetary penalties, denial of payment for new Medicare and Medicaid admissions, and even termination of the noncompliant Covered Entity's Medicare/Medicaid provider agreement. 86 Fed Reg. at 61574. Moreover, unlike the interim rule issued by the U.S. Occupational Safety and Health Administration (the "OSHA Rule"), the CMS Rule does not allow Covered Entities to choose weekly COVID-19 testing in lieu of vaccinations for their Covered Staff. *See id.* at 61614.

2. Plaintiffs' HCRCA Claims Are In Direct And Irreconcilable Conflict With The CMS Rule.

The CMS Rule broadly and unambiguously preempts all state and local laws that conflict with its requirements, including any such laws that prohibit Covered Entities like Riverside from mandating employee COVID-19 vaccinations or provide for broader vaccination exemptions than the exemptions recognized under federal law (i.e. Title VII or the ADA). *Id.* at 61613; *see also*

CMS FAQs[3] at p. 14 ("Under the Supremacy Clause of the U.S. Constitution, this regulation pre-empts any state law to the contrary.") (citing U.S. Const. art. VI § 2).

"Federal law preempts state law under the supremacy clause" if there is "express preemption—where Congress has expressly preempted state action" or if there is "implied conflict preemption—where state action actually conflicts with federal law." *Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 39–40 (2010). Conflict preemption exists when "compliance with both federal and state regulations is a physical impossibility," as well as "instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. *Arizona v. United States*, 567 U.S. 387, 399–400, 132 S. Ct. 2492, 2501, 183 L. Ed. 2d 351 (2012) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963) (internal quotation marks omitted); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Moreover, the conflict preemption inquiry requires courts to consider the relationship between state and federal laws as they are interpreted and applied and not merely as they are written. *Carter,* 237 Ill. 2d at 40 (citing *Jones v. Rath Packing Co.,* 430 U.S. 519, 526 (1977)).

Here, Plaintiffs' HCRCA claims are subject to both express preemption and conflict preemption because the CMS Rule expressly provides that it preempts any state or local laws which conflict with its vaccination requirements. 86 Fed. Reg. at 61613; *see also* CMS FAQs at 14. It is also well-established that a federal regulation has the same preemptive effect as a federal statute. *Time Warner Cable v. Doyle*, 66 F. 3d 867, 875 (7th Cir. 1995) ("[I]n analyzing the preemptive effect of an agency regulation, . . . courts should inquire whether the agency intended to preempt state law[.]"). In the healthcare context, Medicare regulations promulgated by CMS have specifically been found to have express preemptive effect over state law claims. *Uhm v.*

[3] Available at https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf (last accessed January 14, 2022).

Humana Inc., 620 F.3d 1134, 1150-51 (9th Cir. 2010) (holding state consumer fraud claims against Medicare-certified prescription drug provider were be preempted by Medicare regulations promulgated by CMS); *Rudek v. Presence Our Lady Resurrection Medical Ctr.*, 2014 WL 5441845, *5 (N.D. Ill. Oct. 27, 2014) ("[T]he Medicare statute and regulations make clear that [plaintiff's state law claim] is nevertheless within the scope of standards promulgated under the Act and protected by the preemption provision. . . . ***Federal regulations in addition to federal statutes have preemptive effect***.") (emph. added).

In addition to being subject to express preemption, Plaintiffs' HCRCA claims are also irreconcilably in conflict with the CMS Rule and thus preempted on that basis as well. *See Carter*, 237 Ill.2d at 39–40 ("[S]tate law is preempted by [federal law] to the extent that it actually conflicts with state law[.]"). Here, "compliance with both federal and state regulations is a physical impossibility." *Arizona*, 567 U.S. at 399. Under the CMS Rule, the only exceptions to vaccination for Covered Staff are those required by an employer's obligation under the ADA and Title VII to provide reasonable accommodation to employees, which necessarily requires courts and employers to conduct an analysis of "undue hardship." *See* 86 Fed Reg. at 61571. The HCRCA, by contrast, does not recognize any exemptions based on the defense of "undue hardship," thus placing it in direct conflict with the CMS Rule. *See Rojas v. Martell*, 2020 IL App (2d) 190215, ¶ 44, 161 N.E.3d 336, 349. Indeed, Plaintiffs made this very argument earlier in this litigation when they thought their HCRCA claims were still viable (before the CMS Rule), arguing that "Riverside cannot hide behind the language of 'undue hardship' when that standard has already been rejected by Illinois courts" with respect to discrimination claims under the HCRCA. *See* Dkt. 7 at p. 8. In other words, any vaccination policy in compliance with the HCRCA would necessarily

violate the CMS Rule by excluding the "undue hardship" defense recognized under Title VII and expressly required by the CMS Rule.

Accordingly, Plaintiffs' HCRCA claims are in direct and irreconcilable conflict with the CMS Rule. Pursuant to well-established precedent, the Court should dismiss Plaintiffs' HCRCA claims against both Defendants on the basis of federal preemption. *See, e.g.*, *Devooght v. Metro. Life Ins. Co.*, 2016 WL 4370031, at *2 (C.D. Ill. Aug. 15, 2016) (granting Rule 12(b)(6) motion to dismiss because plaintiff's state law claims were preempted by ERISA); *Vill. of Depue, Ill. v. Exxon Mobil Corp.*, 2007 WL 1438581, at *9 (C.D. Ill. May 15, 2007) (dismissing plaintiff's state law claim because it was preempted by the federal Comprehensive Environmental Response, Compensation, and Liability Act).

B. Plaintiffs' Title VII Claims Against Kambic Should Be Dismissed Because There Is No Individual Liability Under Title VII.

It is well-settled that Title VII does not create a cause of action against an individual acting in his or her official capacity on behalf of an employer; rather, Title VII claims can only be asserted against the actual employer entity. *See, e.g., Cruz v. Busing*, 2005 WL 8163260, at *2 (C.D. Ill. Sept. 7, 2005) ("Both Title VII and the ADA define an 'employer' as 'a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person.' The Seventh Circuit has construed the definition of employer to exclude liability by individual employees.") (quoting 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5)(A); citing *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995) (holding that "a supervisor does not, in his individual capacity, fall within Title VII's definition of employer")).

Here, Plaintiffs do not allege that Kambic is their employer. The SAC makes clear that Kambic is named in this action "in his capacity as President of Riverside" and because he was "responsible for day-to-day management of Riverside, including enforcement of policies such as

the vaccination mandate addressed herein." SAC, ¶¶ 1, 74. Since an individual acting on behalf of an employer cannot be personally sued under Title VII, Plaintiffs' Title VII claim against Kambic must be dismissed with prejudice. *See, e.g., Grillot v. Smith Square*, 2007 WL 2700018, at *1 (C.D. Ill. July 31, 2007) ("Granting the Motion [to dismiss] is particularly appropriate in light of the well-settled law establishing that individuals cannot be held personally liable under Title VII."); *Cruz*, 2005 WL 8163260, at *2 ("Title VII and the ADA clearly limit liability to the employing entity and Plaintiff cannot hold individual employees liable under either Title VII or the ADA. Accordingly, the Court recommends granting Defendants' motion to dismiss the individual Defendants."), *report and recommendation adopted sub nom. Palizia Cruz v. Busing*, 2005 WL 8163261 (C.D. Ill. Sept. 26, 2005).

C. Plaintiffs' Title VII Claims Against Riverside Should Be Dismissed Because Plaintiffs Fail to Allege They Exhausted Administrative Remedies Prior to Filing Suit.

It is also well-settled that a Title VII plaintiff must first file a charge with the U.S. Equal Employment Opportunity Commission ("EEOC") and obtain a Notice of Right to Sue letter before bringing a court action against the employer. 42 U.S.C. § 12117(a) (incorporating multiple sections, including 42 U.S.C. § 2000e-5(e)(1) and (f)(1)); *see also Gragg v. Wenzak, Inc*., 2011 WL 1331897, at *4 (C.D. Ill. Apr. 6, 2011) ("Receipt of a Notice of Right to Sue is . . . a statutory prerequisite to bringing a federal employment discrimination suit. The failure to receive a Notice of Right to Sue before filing suit in federal court is a ground for dismissal absent special circumstances justifying equitable modification.") (internal citation and quotation marks omitted) (citing *Worth v. Tyer*, 276 F.3d 249, 259 (7th Cir. 2001)).

The SAC is devoid of any allegation to support that Plaintiffs have exhausted their administrative remedies with the EEOC or obtained the requisite Notice of Right-to-Sue Letter

from the EEOC.[4] Absent such allegations, Plaintiffs fail to state a legally cognizable claim under Title VII against their employer, and their Title VII claims against Riverside should be dismissed as well. *See, e.g., Simpson v. Illinois Dept. of Employment Sec*., 2012 WL 1135517, at *1 (C.D. Ill. Apr. 4, 2012) (dismissing pro se plaintiff's complaint for failure to allege that his discrimination claim was administratively exhausted with the EEOC); *Jenkins v. Common Place, Inc*., 2018 WL 5114123, at *4 (C.D. Ill. Oct. 19, 2018) ("A Title VII plaintiff may not bring claims that were not raised with the EEOC. . . As such, Defendant's Motion to Dismiss the race discrimination component of Count I is GRANTED.").

Accordingly, Defendants submit that Plaintiffs' Title VII claims are premature and request that they be dismissed without prejudice. Any refiling of these claims should be limited to Plaintiffs who have exhausted administrative remedies and received a Right-to-Sue letter.

V. CONCLUSION

Based on the foregoing reasons, Defendants respectfully request the Court to grant their Motion to Dismiss Plaintiffs' Second Amended Complaint, dismiss Plaintiffs' HCRCA claims against both Defendants as well as Plaintiffs' Title VII claims against Defendant Kambic with prejudice, and dismiss Plaintiffs' Title VII claims against Defendant Riverside without prejudice for failure to exhaust administrative remedies.

Dated: January 14, 2022

Respectfully Submitted,

RIVERSIDE HEALTHCARE AND
PHILLIP M. KAMBIC

/s/ Michael R. Phillips
One of their Attorneys

[4] To Defendants' knowledge, only 28 of the Plaintiffs named in this action have filed a Charge of Discrimination with the EEOC.

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CERTIFICATE OF SERVICE

I certify that on January 14, 2022, I filed and served the foregoing document through the Court's electronic filing system, which will serve notice upon all counsel of record.

/s/ Michael R. Phillips
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