UNITED STATES DISTRICT COURT
for the

Northern District of Texas

Fort Worth Division

Case No. 4:21-cv-01098-O

DAVID A. FOLEY
Plaintiff
-v-

JOSEPH R. BIDEN, JR.
In his official capacity as President of the United States only
Defendant

PLAINTIFF'S MOTION IN OPPOSITION TO DEFENDANT'S MOTION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT

Defendant's answer to the Plaintiff's original complaint is due on December 1, his opposition to Plaintiff's motion for leave to amend the complaint[1] is due on December 3.

[1] Plaintiff's proposed amended complaint would include additional parties and new claims. Among the new claims is that Defendant violated the Religious Freedom Restoration Act (RFRA). There is no agreement in the federal courts as to the standing of federal employee plaintiffs in such cases, but the Fifth Circuit's precedent is favorable to Plaintiff. *Compare Harrell v. Donahue*, 638 F.3d 975, 984 (8th Cir. 2011)(holding RFRA claims alleging religious discrimination in federal employment are barred because "Title VII provides the exclusive remedy for [] claims of religious discrimination"); *Francis v. Mineta*, 505 F.3d 266, 272 (3d Cir. 2007) (stating that "[i]t is equally clear that Title VII provides the exclusive remedy for job-related claims of federal religious discrimination, despite [plaintiff's] attempt to rely upon the provisions of RFRA"); and *Holly v. Jewell*, 196 F.Supp.3d 1079, 1085 (N.D. Cal. 2016) (dismissing constitutional claim arising from alleged First Amendment religious discrimination as covered exclusively by Title VII); with *Lister v. Def. Logistics Agency*, No. 2:05-CV-495, 2006 WL 162534, at *3

Defendant argues that this circumstance creates an "exceedingly inefficient" circumstance and he requests an extension of 30 days to respond to the original complaint.

Defendant's motion should be denied because **I.)** Defendant created the scenario which he seeks to avoid, **II.)** the original complaint raises genuine and important issues, **III.)** delay in answering the complaint would prejudice Plaintiff.

I. Defendant created the scenario which he seeks to avoid

Ordinary defendants are provided 21 days to respond to complaints. The United States Government and its officials are allowed 60 days. Defendant seeks 90. His request should be denied.

Defendant seeks intervention to allow him to escape from a dilemma that he created. There are three ways in which Defendant could step out of this trap that do not involve the intervention of this Honorable Court.

First, Respondent could withdraw his opposition to Plaintiff's motion for leave to amend the complaint. Instead, Defendant intends to oppose the amendment on the grounds that it would be "futile"; i.e. by arguing against the merits of the proposed complaint. By pursuing these substantive arguments through motion, Defendant simply (and unnecessarily) prolongs the litigation. Defendant may be privileged to choose to contest the viability of the amended complaint, but that choice necessitates further litigation of the unamended complaint. Defendant, not Plaintiff, has chosen to litigate the merits of two complaints at the same time.

(S.D. Ohio Jan. 20, 2006) (denying defendants' motion to dismiss as to RFRA claim and finding that "Title VII does not preclude Plaintiff from pursuing claims under the Fifth Amendment to the United States Constitution and RFRA" because "[a]lthough the claims arise from the same factual circumstance as the Title VII claim, the claims are distinct from Plaintiff's claim for employment discrimination and therefore are not precluded by Title VII"); and *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013) (allowing employee's RFRA claim to proceed against agency that enforced building security regulations and denied her permission to enter building while wearing a kirpan).

Second, it is within Defendant's power to file his motion in opposition to the amendment *prior* to the deadline for responding to the complaint. By local rules, Defendant has 21 days instead of 14 to file his opposition to Plaintiff's motion. While he is allowed to wait 21 days, he does not have to. A speedy response could have – and still might – lead to the resolution of the amendment issue prior to the further briefing on the original. Defendant may choose to wait the full 21 days to respond, but that choice means that he must first respond to the original complaint.

Third, Defendant could avoid the inefficiency from which he seeks relief if he simply stepped away from his unreasonable position that employees who defy his Order are not entitled to use the leave they have accrued prior to their discharge. Plaintiff would agree to the 30-day extension if time were not so critical. But time is critical. Defendant's deadline has passed. Unless stopped, Defendant can initiate Plaintiff's termination proceedings on the day of his choosing.

Defendant has averred that employees like Plaintiff threaten the safety of their coworkers by way of possible exposure to Covid-19, a communicable disease. If Plaintiff poses such a risk, the regulations are clear: prior to being fired and banished, he is entitled to use his accrued sick leave (and annual leave in lieu of sick leave). Under § 630.401, "an agency must grant sick leave to an employee when he or she…[w]ould, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease." Invoking that provision, Plaintiff requested to use 615 hours of leave. Had that the request been approved, Plaintiff would have maintained his pay, benefits, and position until March 14, 2022.

However, in a bizarre shifting of burdens, Defendant's agent at the National Labor Relations Board denied the request on the grounds that Plaintiff had not provided documentation sufficient to prove that he posed a threat. Defendant cannot have it both ways. Either Plaintiff poses a threat of communicable disease transmission, in which case he would be entitled to sick leave, or he does not pose such a threat and cannot be fired on those grounds.

It is within the power of Defendant, whose Safer Federal Workforce Task Force sets Covid policy for the federal workforce, to direct federal agencies to faithfully and rationally adhere to federal regulations. Instead, Defendant chooses to apply maximum pressure to the livelihoods of his employees and thus creates the time pressure which has led to the circumstance from which he now seeks relief.

Thus, where Defendant chooses to oppose the motion to amend, chooses to wait the full 21 days to respond, and chooses to leave the near-term threat of discharge looming over Plaintiff's head, he has no equitable grounds to seek relief from this Honorable Court.

II. The original complaint raises important concerns

A. Developments in the courts and in the news validate the concerns of the original complaint.

The original complaint raised important concerns that have since been validated through findings of fact and rulings of law in cases that have addressed parallel issues as well as the development of facts as they related to the Order. Three examples of such validation can be seen in the following.

1. Workarounds to coerce citizens

Citing statements by the Defendant and his agents regarding Defendant's "patience" and intentions, the original complaint alleges that the Order was issued in order to coerce employees in their roles as *citizens* rather than employees to take an unwanted, experimental medical

treatment.[2] Relying on the same statement about Defendant's patience, as well his agent's endorsement (via retweet) of the concept of using workplace mandates as "workarounds" to compel injection, the Fifth Circuit Court of Appeals was troubled by "concerns over separation of powers principles [which] cast doubt over the [OSHA] Mandate's assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation." *BST Holdings v. OSHA*, No. 21-60845, slip op at page 7, footnotes 11-13, and pages 17-18 (5th Cir. Nov. 12, 2021)(emphasis supplied). Litigation of the original complaint will establish that the same concerns hold true for the Order.

2. Arbitrary nature of the mandates

The original complaint attacked the Order as arbitrary in a number of ways, including that it applies to teleworkers (like Plaintiff) and those who have acquired natural immunity after contracting the virus (like Plaintiff).[3] Here again, there is much support to be found in the Fifth Circuit's analogous decision regarding the OSHA Mandate, where the court discussed as follows:

> All else equal, a 28 year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor. Likewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus. The list goes on, but one constant remains—the Mandate fails almost completely to address, or even respond to, much of this reality and common sense.

BST Holdings v. OSHA, No. 21-60845, slip op at page 13, (5th Cir. Nov. 12, 2021). Just as the OSHA Mandate lacks common sense, the Order here lacks common sense. That is to say, it is arbitrary on its face.

[2] See e.g. Document 1 Filed 09/29/21, PageID 5, 6, 21, and 38
[3] See e.g. Document 1 Filed 09/29/21, PageID 5,6, 8, 18, 19, 23, 34, and 35

3. *10% of the federal workforce remains in the balance.*

Reports are now being circulated that roughly 10% of the federal workforce remains unvaccinated.[4] This is no small number. To "decimate" an enemy is to destroy 10% of its forces. The "spoils system" was named after 10% of government officials were removed at the outset of the Jackson administration. Given that those identifying as politically conservative likely represent a minority of the federal workforce to begin with, it is not unlikely that the unvaccinated 10% of the federal workforce represents half or more of its most conservative members.

To Plaintiff's knowledge, Defendant has yet to so much as commit to the availability of accommodations for any workers. Nor can Defendant avoid the issue by claiming that decisions and discretion are left to the agencies themselves. The top-down nature of the mandate and decisions about the same has been apparent since the Order was announced on September 9.

B. Respondent's defenses to the original complaint are not iron-clad

As to most of the claims, Plaintiff has conceded only that it would be prudent to "sidestep the thicket" of issues involving claims against a president, but he does not concede that a president is above the law.

With respect to the Administrative Procedures Act (APA) claims, Plaintiff concedes that the law *currently* holds that statute inapplicable to Defendant. However, there are arguments to be made as to whether case the lead case, *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992), was incorrectly decided. See Kathryn A. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63 (2020) (persuasively arguing that *Franklin* was wrongly decided). If there was ever a

[4] See https://www.reuters.com/world/us/90-us-federal-employees-have-received-least-one-covid-19-dose-officials-2021-11-22/

case which demonstrated the need for readdressing this issue, it is the case at bar which provides a compelling vehicle for overturning that precedent.

III. Delay would unjustly prejudice Plaintiff while Defendant is not prejudiced by adhering to deadlines it has long been aware of.

The FDA recently announced that it intends to provide Freedom of Information Act responses over the course of *55 years*.[5] Defendant's interests would apparently be served by glacially slow information production and slow litigation on the one hand, and hastily implemented mandates on the other. Conversely, Plaintiff's interests lay in being provided with due process with in responding to the mandate and the swift progression of litigation opposing it.

Plaintiff moved to add additional defendants in order to "sidestep the thicket." A side-step is one thing, but to grant Defendant *90 days* to answer the original complaint simply because he chooses to use all time available to argue against the merits of the amended complaint before would turn the procedural sidestep into a long-delaying detour during which Plaintiff's window for justice will close.

For these reasons, Plaintiff respectfully requests that this Honorable Court deny the Defendant's motion.

Respectfully submitted this 23rd day of November,

By: David A Foley

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[5] https://www.reuters.com/legal/government/wait-what-fda-wants-55-years-process-foia-request-over-vaccine-data-2021-11-18/

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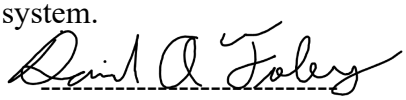
Certification of Service

I certify that I have served the above motion and the draft complaint by virtue of electronic service on all parties via the e-file system.



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