

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JANE DOES 1-6, et al.,

Plaintiffs,

v.

JANET T. MILLS, Governor of the State of
Maine, et al.,

Defendants.

Civil Action No. 1:21-cv-00242-JDL

**DEFENDANT NORTHERN LIGHT EASTERN MAINE
MEDICAL CENTER'S REPLY TO PLAINTIFFS' CONSOLIDATED RESPONSE IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

Defendant Northern Light Eastern Maine Medical Center (hereinafter "EMHS"), hereby submits its reply to Plaintiffs Jane Does 3 and 4, John Doe 3, Jack Does 251-500 and Joan Does 251-500 (collectively, "Plaintiffs")¹ Consolidated Response in Opposition to Defendants' Motion to Dismiss, ECF No. 117 (March 22, 2022) (the "Opposition" or "Opp'n").² In their Opposition to EMHS's Motion to Dismiss, ECF No. 108 (February 14, 2022) (the "Motion" or "Mot."), Plaintiffs repeat and continue to rely on the same conclusory allegations in their Verified Complaint, ECF No. 1 (August 25, 2021) (the "Complaint" or "Compl."), fail to distinguish and

¹ Notably, Plaintiffs do not address EMHS's argument that Jack Does 251-500 and Joan Does 251-500 should be dismissed from this case for lack of standing as the Complaint fails to plead adequate facts to identify who these individuals are and if they have suffered or been threatened with an actual or threatened injury. Plaintiffs' silence is telling and is a waiver of their claims. *See In Re Compact Disc Minimum Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131, 152-153 (1st Cir. 1990) ("A party's failure to oppose specific arguments in a motion to dismiss results in waiver of those issues"). Accordingly, EMHS directs the Court to its argument in the Motion at pages 16-17 and urges it to dismiss Jack Does 251-500 and Joan Does 251-500 from this case.

² Consistent with its past practice in this case, EMHS does not address the arguments that Plaintiffs make against the State Defendants; however, EMHS believes that applicable law supports the constitutionality of the Statute and Final Rule (each as defined in the Motion). *See Does 1-6 v. Mills*, No. 1:21-cv-00242-JDL, 2021 WL 4783626, at *5-16 (D. Me. Sept. 2, 2021), *aff'd* 16 F.4th 20, 29-35 (1st Cir. 2021).

even address cases that support EMHS's arguments that the Motion should be granted, and raise a red herring by calling into question the applicability of the First Circuit's holdings in its earlier decision in this case. For the reasons set forth in the Motion and expanded upon below, Plaintiffs' claims against EMHS should be dismissed for failure to state a claim upon which relief can be granted.

ARGUMENT

I. Title VII (Count IV)

In response to EMHS's Title VII arguments on the merits,³ Plaintiffs try to distinguish the First Circuit's earlier decision in this case on the basis that the decision involved a preliminary injunction, not a motion to dismiss.⁴ *See Mills*, 16 F.4th at 36 (concluding that providing Plaintiffs with an exemption to the Rule⁵ would constitute an undue hardship to Provider Defendants). Plaintiffs' attempt to undercut the impact of the First Circuit's decision is unavailing for the following reasons.

In *Mills*, the First Circuit assessed *the likelihood of success on the merits of Plaintiffs' Title VII claim* and concluded that "hospitals [including EMHS] need not provide the exemption the appellants request because doing so would cause them to suffer undue hardship." *Id.* Plaintiffs do not dispute in the Opposition, and instead underscore, that the *only* accommodation

³ Plaintiffs' response to Provider Defendants' argument that Plaintiffs' Title VII claim should also be dismissed for failure to exhaust administrative remedies falls flat. If employee-plaintiffs in discrimination cases are able to shrug off the exhaustion requirement by filing a complaint or charge with an administrative agency and obtaining a right-to-sue letter at some point *after* filing a complaint, then the important exhaustion hurdle to filing cases in court will be substantially diluted. Here, contrary to the case law cited by Plaintiffs, having filed the Complaint on August 25, 2021, Plaintiffs did not exhaust administrative remedies "shortly after filing of the complaint." *See* Opp'n at 21. Further, Plaintiffs have not amended or sought to amend their Complaint – the alternate remedy to dismissal they point to – at any time since this litigation commenced. *See id.* In any event, a court has the authority to determine that failure to exhaust administrative remedies prohibits assertion of a discrimination claim in federal court. *See Mills*, 2021 WL 4783626, at *15. EMHS encourages the Court to find failure to exhaust Plaintiffs' administrative remedies as an additional basis for dismissal of their Title VII claim.

⁴ EMHS does not dispute that a motion to dismiss and a motion for a preliminary injunction involve different legal standards and only seeks application of the proper standard for the Motion. *See* Mot. at 6-7.

⁵ Definitions which are not otherwise defined in this reply shall have the meanings ascribed to them in the Motion.

to the Rule that they seek is an exemption from its COVID-19 vaccine requirement. *See* Opp’n at 25. This is the same accommodation Plaintiffs sought when this case went before the First Circuit on appeal from a denial of their motion for a preliminary injunction. *See Mills*, 16 F.4th at 28, 29-36. Now, in the Motion, EMHS is asking the Court to dismiss Plaintiffs’ Title VII claim because the factual allegations in the Complaint fail to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, the First Circuit’s assessment of the likelihood of success of Plaintiffs’ Title VII claim applies here regardless of the procedural posture (preliminary injunction versus a motion to dismiss) that placed the substantive legal question before the court. According to Plaintiffs, “the issues presented are ‘purely legal . . .’”, and therefore citing to the First Circuit’s undue hardship analysis and conclusion is proper to establish that Plaintiffs’ Title VII cause of action does not present a claim for plausible relief.⁶ Pls.’ Obj. to Media Intervenors’ Mot. to Unseal Pls.’ Identities at 5, 18, ECF No. 110 (Feb. 28, 2022).

Even if the First Circuit’s *Mills* decision had no bearing on this case (which it does), the Court should dismiss Plaintiffs’ Title VII claim because Plaintiffs fail to rebut (let alone address) the various cases cited by EMHS that also support its position that Plaintiffs’ requested accommodation – an exemption to the Rule – imposes an undue hardship on Provider Defendants. *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133-35 (1st Cir. 2004) (plaintiff-employee’s violation of Costco’s dress code constituted an undue hardship (i.e., more than a de minimis cost on the employer)); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d

⁶ Notably, based on the way the Plaintiffs’ Opposition is structured when compared to their Complaint and other filings in this case, it appears that Plaintiffs have conceded that there is no standalone Supremacy Clause claim (Count II) and have abandoned that claim. *Compare* Opp’n, with Compl. On that basis, Count II should be dismissed. *See In Re Compact Disc Minimum Advertised Price Antitrust Litig.*, 456 F.Supp.2d at 152-153.

826, 830 (9th Cir. 1999) (“[C]ourts agree that an employer is not liable under Title VII when accommodating an employee’s religious beliefs would require the employer to violate federal or state law.”); *see also Kluge v. Brownsburg Cmty. Sch. Corp.*, No. 1:19-cv-2462-JMS-DLP, 2021 WL 2915023, at *22 (S.D. Ind. July 12, 2021) (“Title VII does not require employers to provide accommodations that would place them on the razor’s edge of liability”) (internal quotations and citations omitted). As explained in the Motion, EMHS and the other Provider Defendants simply cannot provide Plaintiffs the exemptions they seek because to do so would require Provider Defendants to violate the Rule and risk incurring substantial monetary and other enforcement penalties, including loss of their license to operate during a pandemic. *See* Mot. at 10-11. Accordingly, Plaintiffs’ Title VII claim should be dismissed because it does not state a claim for relief. *See Iqbal*, 556 U.S. at 678.

Next, Plaintiffs argue that State Defendants’ and Provider Defendants’ positions are at odds and that Provider Defendants could provide Plaintiffs accommodations because “the Department published guidance explaining that the Rule does not prohibit employers from providing accommodations under Title VII.” Opp’n at 28 (quoting State Defs.’ Mot. to Dismiss at 18-19, ECF No. 109 (Feb. 14, 2022)). This argument is inaccurate. In the quoted language, State Defendants simply acknowledge that there *could be* an accommodation provided to healthcare workers other than an exemption to the Rule. Yet, here, it is abundantly clear that the *only* accommodation Plaintiffs seek is an exemption from the Rule, which Provider Defendants cannot provide as it would require them to violate applicable law and potentially incur substantial penalties. *See* Mot. at 10-11; State Defs.’ Mot. to Dismiss at 18 n.12, 18-19. Thus, there is no inconsistency in State Defendants’ and Provider Defendants’ positions regarding possible accommodations permitted under the Rule.

Finally, although Plaintiffs argue in the Opposition that facts regarding undue hardship are at issue (*see* Opp'n at 29), in their Objections to Media Intervenors' Motion to Unseal Plaintiffs' Identities, Plaintiffs clearly state that "the issues presented are 'purely legal . . .'" Pls.' Obj. to Media Intervenors' Mot. to Unseal Pls.' Identities at 5, 18 ("There is little else at issue in this case but whether federal law applies in Maine and whether consideration of a religious exemption for conscientious objectors is available under federal law"). Plaintiffs cannot have it both ways and their admission that this case presents purely legal questions should control. At bottom, there is no fact that would be revealed in discovery that would change the Title VII analysis. The parties' positions have been consistent since the outset of this case last summer – Plaintiffs seek an exemption to the Rule's COVID-19 vaccination requirement and Provider Defendants are forbidden from providing that exemption to Plaintiffs under applicable law. As summarized above, granting Plaintiffs' exemption request would impose an undue burden on Provider Defendants. Thus, Plaintiffs' Title VII claim should be dismissed for failure to state a claim.

II. Conspiracy (Count V)

In the Opposition, Plaintiffs repeat and rely on the conclusory allegations asserted in the Complaint to support their conspiracy claim against EMHS. This is insufficient to meet the *Iqbal* standard. *See Iqbal*, 556 U.S. at 678; *Mills*, 16 F.4th at 37. Tellingly, Plaintiffs ignore EMHS's argument that Plaintiffs' central allegation linking EMHS to the alleged conspiracy – a statement by an EMHS representative in a press release expressing support for the Statute and Rule made *after* the Statute and Rule were enacted – undercuts their claim. *See* Opp'n at 30-35; Mot. at 14-15. Instead of pointing to actual facts of a conspiracy, Plaintiffs take aim at EMHS's citation to an important observation by the First Circuit that "[Plaintiffs have] not allege[d] that

the hospitals had any role in the amendment of the statute or issuance of the regulation, only that they supported the regulations after the fact” because that case involved a preliminary injunction, not a motion to dismiss. *See Mills*, 16 F.4th at 37. As noted above, the procedural posture of the case that presented the First Circuit with legal questions relevant to the Motion is of no moment. Plaintiffs’ failure to squarely address EMHS’s aforementioned arguments speaks volumes. Accordingly, Plaintiffs’ conspiracy claim should be dismissed for failure to state a claim. *See Mills*, 16 F.4th at 29-35; Mot. at 14-15.

CONCLUSION

For the reasons set forth in the Motion and above, Counts II, IV and V of Plaintiffs’ Complaint fail to state a claim upon which relief can be granted to any Plaintiff and should be dismissed against EMHS. In addition to their failure on the merits, the same Counts as asserted by Jack Does 251-500 and Joan Does 251-500 should be dismissed for lack of standing.

Dated at Augusta, Maine, this 12th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2022, I electronically filed the foregoing Defendant Northern Light Eastern Maine Medical Center's Reply to Plaintiffs' Consolidated Response in Opposition to Defendants' Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Ryan P. Dumais
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