UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMPLOYEE 1,
EMPLOYEE 2, and
EMPLOYEE 3,

Plaintiffs,

v.

BON SECOURS CHARITY HEALTH SYSTEM MEDICAL GROUP, P.C., and WESTCHESTER MEDICAL CENTER HEALTH NETWORK,

Defendants.

Case No. 22-CV-2929(CS)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs Employee 1, Employee 2, and Employee 3, by their undersigned attorney, respectfully submit this memorandum of law in opposition to Defendants' motion to dismiss served September 30, 2022.

This is an action for religious discrimination in violation of Title VII of the Civil Rights Act of 1964 on the grounds that Defendants failed to reasonably accommodate Plaintiffs' sincerely held religious objections to a mandatory COVID-19 vaccination policy, wrongly denied their requested religious exemptions, and as a result illegally terminated their employment.

Importantly, by this action, Plaintiffs are not challenging the legal validity of the underlying New York State Department of Health emergency regulation imposing the COVID-19 vaccination requirement ("State Mandate") or Defendants' policy implementing the mandate. Rather, Plaintiffs are asserting their individual right to a reasonable accommodation to the policy, which is guaranteed by federal law. Specifically, Plaintiffs are asserting the right to be exempted from the COVID-19 vaccination requirement, which conflicts with their sincerely held religious beliefs, and to be allowed to continue their regular employment while following the same health and safety protocols – testing, masking, social distancing, and sanitizing – that were in place before the vaccination policy was announced. To date, this issue has not been the subject of any controlling case law.

STANDARD OF REVIEW

The "plausibility" standard of review applicable to the present motion is well established. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009) (following *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)); *Clarke v. White Plains Hosp.*, 13-CV-5359(CS), 2015 WL 13022510, at *2 (S.D.N.Y. Apr. 22, 2015). In the interest of brevity, this language

will not be repeated here, except to underscore that Plaintiffs' well-pleaded factual allegations are deemed true. *Id.*

STATEMENT OF FACTS

Plaintiffs' Second Amended Complaint provides a detailed chronology of the events in this case. For purposes of the present motion, the essential facts are as follows:

On August 13, 2021, all employees were notified that WMCHealth was implementing a mandatory COVID-19 vaccination policy. SAC ¶¶ 27, 58, 87. Initially, Defendants permitted employees to apply for religious exemptions, which Plaintiffs each applied for. *Id.* ¶¶ 28-29, 59-60, 88-89. While their exemption applications were pending, Plaintiffs were required to wear N95 masks at all times in the workplace and submit to regular COVID-19 testing. *Id.* ¶¶ 33, 42, 71, 100.

On August 26, 2021, the New York State Department of Health adopted an emergency rule ("State Mandate") requiring covered healthcare entities to require their covered personnel to have the COVID-19 vaccination beginning September 27, 2021. *Id.* ¶ 108. The State Mandate provided for medical exemptions to the vaccination policy but did not include a provision for religious exemptions. *Id.* ¶¶ 109, 114.

Defendants denied Employee 1's religious exemption, without explanation, on October 11, 2021. *Id.* ¶ 35. They neither questioned the sincerity of her religious objections to the COVID-19 vaccines nor stated it would cause an undue hardship to grant her an exemption. *Id.* ¶¶ 38-39. Employee 1's employment subsequently was terminated on October 28, 2021, for failing to submit proof of COVID-19 vaccination. *Id.* ¶ 47.

Defendants denied Employee 2's religious exemption, without explanation, on October 11, 2021. *Id.* ¶ 64. They neither questioned the sincerity of her religious objections to the COVID-19 vaccines nor stated it would cause an undue hardship to grant her an

exemption. *Id.* ¶¶ 67-68. Employee 2's employment subsequently was terminated on October 28, 2021, for failing to submit proof of COVID-19 vaccination. *Id.* ¶ 76.

Defendants denied Employee 3's religious exemption, without explanation, on October 11, 2021. *Id.* ¶ 93. They neither questioned the sincerity of her religious objections to the COVID-19 vaccines nor stated it would cause an undue hardship to grant her an exemption. *Id.* ¶¶ 96-97. Employee 3's employment subsequently was terminated effective November 1, 2021, for failing to submit proof of COVID-19 vaccination. *Id.* ¶ 106.

It should be noted that Defendants denied Plaintiffs' religious exemptions and terminated their employment while the NDNY temporary restraining order was in effect enjoining the State, *inter alia*, "from enforcing any requirement that employers deny religious exemptions from COVID-19 vaccination or that they revoke any exemptions employers already granted before the vaccine mandate issued," *see Dr. A. v. Hochul*, 21-CV-1009(DNH), 2021 WL 4189533, at *1 (N.D.N.Y. Sept. 14, 2021), which TRO was converted to a preliminary injunction on October 12, 2021, *see Dr. A. v. Hochul*, 567 F. Supp.3d 362 (N.D.N.Y. 2021). The preliminary injunction was not vacated on appeal until November 4, 2021, s*ee We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. Nov. 4, 2021) (per curiam) ("*We the Patriots I*"). Accordingly, there is no reason to believe that Defendants denied Plaintiffs' exemptions because of an alleged conflict with the State Mandate, which is a post-hoc justification offered for the first time in defense of this lawsuit.

<u>LEGAL FRAMEWORK</u>

Title VII declares it unlawful, *inter alia*, "for an employer . . . to discharge any individual . . . because of such individual's . . . religion . . . ." 42 U.S.C. § 2000e-2(a)(1). Title VII further defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably

accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

Significantly, the U.S. Supreme Court has emphasized: "Title VII does not demand mere neutrality with regard to religious practices – that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual . . . because of such individual's' 'religious observance and practice.' . . . **Title VII requires otherwise neutral policies to give way to the need for an accommodation**." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015) (emphasis added).

To make out a prima facie case of discriminatory failure to accommodate, a plaintiff must show (1) she held a bona fide religious belief conflicting with an employment requirement; (2) she informed her employer of this belief; and (3) she was disciplined for failing to comply with the conflicting employment requirement. *See Baker v. Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006) (citation omitted).

Once a prima facie case is established by the employee, the employer must offer her a reasonable accommodation, unless doing so would cause the employer to suffer an undue hardship. *Id.* (citation omitted); *see also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) ("The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.") (quoting 42 U.S.C. § 2000e(j)).[1]

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[1] Defendants' argument that Plaintiffs' Title VII claims fail because they have not alleged that "Defendants intended to discriminate against them because of their religious beliefs" (Def. Memo. at 18) is mistaken. A Title VII reasonable accommodation claim does not require proof of discriminatory intent, but only that "the employer's desire to avoid the prospective accommodation is a motivating factor in his decision." *EEOC v. Abercrombie & Fitch*, 575 U.S. at 773-774. Here, Plaintiffs were terminated precisely, and only, because Defendants refused to grant their requested religious exemptions. Quite obviously, this

In the case at bar, Plaintiffs have plausibly alleged each of the elements of their prima facie case. Notably, Defendants do not dispute Plaintiffs' bona fide religious objections to the COVID-19 vaccine. Ordinarily this should be sufficient at the 12(b)(6) stage.

Nevertheless, ignoring what actually happened in this case – that is, Defendants denied the requested religious exemptions *without explanation* while a federal court TRO was in effect requiring the State Mandate to provide for religious exemptions – Defendants argue that granting the requested exemptions "would have imposed an undue hardship on Defendants as a matter of law. Specifically, the accommodations would have: (1) required Defendants to violate the State Mandate and subject themselves to penalty by the DOH; and (b) placed the health and safety of immunocompromised Bon Secours patients and employees at risk." (Def. Memo. at 7.) For the reasons that follow, Defendants' arguments lack merit and their motion to dismiss should be denied.

<u>ARGUMENT</u>

1. Granting Plaintiffs a religious exemption to the COVID-19 vaccination policy would not have violated the State Mandate.

On its face, the State Mandate does not speak to this issue. Despite Defendants' repeated use of absolutist language – "unequivocally barred" (at 10), "clear directives" (at 1), "does not permit" (at 5), "incontrovertibly foreclosed" (at 10) – the mandate neither provides for religious exemptions nor prohibits religious exemptions. As the Second Circuit noted in *We the Patriots I*, "Section 2.61 [the State Mandate] is silent . . . on the employment-related actions that employers may take in response to employees who refuse to be vaccinated for religious reasons." 17 F.4th at 292. While the Second Circuit held in

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satisifes the necessary causality requirement. Defendants cite no cases where a reasonable accommodation claim was denied on the grounds that the plaintiff failed to prove discriminatory intent by the employer in denying the accommodation; this is not the law.

We the Patriots I – at the preliminary injunction stage – that Title VII does not preempt the mandate, 17 F.4th at 291-293, the reverse does not follow that the mandate vitiates Title VII. *Cf. EEOC v. Abercrombie & Fitch, supra*, at 775 ("Title VII requires otherwise neutral policies to give way to the need for an accommodation.")

Significantly, there is no language in the mandate that purports to override the rights and protections otherwise afforded employees under anti-discrimination laws, including Title VII. On the contrary, federal and state anti-discrimination laws remain fully applicable under the State Mandate. This was made crystal clear by the "Dear Administrator Letter" issued by the New York State Department of Health on November 15, 2021, which stated, in relevant part:

> Facilities should have a process in place to consider reasonable accommodation requests from covered personnel based on sincerely held religious beliefs consistent with applicable Federal and State laws, including Equal Employment Opportunity (EEO) laws such as Title VII of the Civil Rights Act and the NYS Human Rights Law, and their applicable guidance.

SAC ¶¶120-124.

Amazingly, although alleged in the Second Amended Complaint, the "Dear Administrator Letter" is not addressed by Defendants anywhere in their motion. How do they explain away this *express directive* from the DOH that covered healthcare entities "consider reasonable accommodation requests from covered personnel based on sincerely held religious beliefs consistent with applicable Federal and State laws"? Notably, the Letter was issued only three days after the Second Circuit's "clarifying" opinion in *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 368 (2d Cir. Nov. 12, 2021) (per curiam) ("*We the Patriots II*"), which suggested – in dicta – that religious "exemptions" are not allowed under the State Mandate. *Id.* at 370. The obvious import of the Letter is that the DOH does *not* subscribe to the Second Circuit's restrictive interpretation of the State Mandate. The Letter demonstrates that, despite the lack of an express religious exemption provision in

the regulation, the DOH does *not* consider the mandate to be inconsistent with laws that require reasonable accommodations for sincerely held religious beliefs.

Nor is there any reason to believe that the DOH would penalize healthcare institutions for granting religious exemptions in appropriate cases (of which the case at bar is one). *See* SAC ¶¶ 126-130. Indeed, such exemptions have been granted by healthcare employers in New York. *Id.* Consequently, it would not have violated the State Mandate for Defendants to grant Plaintiffs a religious exemption to the COVID-19 vaccination policy, and therefore it would not have caused an undue hardship as a matter of law.

2. Granting Plaintiffs a religious exemption to the COVID-19 vaccination policy would not have caused an undue hardship.

In addition to arguing that granting the requested exemptions would have violated state law (it does not), Defendants argue, in purely conclusory fashion, that granting the exemptions "would have put the health of these two fragile patient populations [cardiac and cancer patients] (and any immunocompromised staff members) **at significant risk**." (Def. Memo. at 16 (emphasis added).) This is pure speculation and fear-mongering, unsupported by any allegations in the Second Amended Complaint. To the extent there is a legitimate dispute of fact on this issue, it cannot be resolved on a motion to dismiss, but must await discovery, summary judgment, and trial.

Notably, the State Mandate authorizes medical exemptions without *any* workplace limitations. SAC ¶¶ 109-112; *see We the Patriots I*, 17 F.4th at n.33 ("healthcare entities may permit a medically exempt employee to continue normal job responsibilities provided they comply with requirements for personal protective equipment"). As Plaintiffs allege (¶ 113), there is no reason to believe that an employee granted a *religious* exemption would pose an undue risk of spreading COVID-19, whereas an employee granted a *medical* exemption would not. As Plaintiffs also allege (¶¶ 43-45, 72-74, 99-103), there is no reason

to believe that an employee who follows the same health and safety protocols that were in place before the mandatory vaccination policy, but who is not vaccinated, whether for medical or religious reasons, poses an undue risk of spreading COVID-19.

The EEOC has published extensive guidance relating to COVID-19 (which the "Dear Administrator Letter" instructed healthcare facilities to consider). In "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated July 12, 2022) (available at www.eeoc.gov), the EEOC has explained:

> An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business. For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

Id. § K.2 (Vaccinations – Overview). These are precisely the reasonable accommodations at issue here – testing, masking, social distancing, and sanitizing – that Plaintiffs could have followed in lieu of the COVID-19 vaccine. As the EEOC recognizes, an employee who follows these protocols does *not* pose an undue risk of spreading COVID-19.

This issue ultimately comes down to the effectiveness of the COVID-19 vaccines in *preventing transmission of the illness from one person to another*. The evidence will show that even in the fall of 2021, it was recognized that the vaccines do not prevent transmission but, rather, were justified by the public health authorities on the grounds that they reduced the risk of severe illness, hospitalization, and death. For example, on August 5, 2021, during a televised interview with CNN's Wolf Blitzer, CDC Director Dr. Rochelle Walensky stated that the COVID-19 vaccines "continue to work well for Delta, with regard to severe illness and death – they prevent it. But what they can't do anymore is prevent transmission." Consequently, it is pure speculation – and also blatantly ignores the

allowance for medical exemptions – for Defendants to argue that "even a small number of unvaccinated individuals in a hospital or medical setting have the ability to infect vulnerable individuals." (Def. Memo. at 18.) Again, this is an issue that cannot be decided as a matter of law based on the allegations in the Second Amended Complaint.

3. The Second Circuit's decisions in *We the Patriots* do not foreclose Plaintiffs' Title VII claims as a matter of law.

The plaintiffs in *We the Patriots* were seeking to invalidate the State Mandate on various constitutional and statutory grounds. Significantly, unlike the case at bar, they were not seeking to vindicate an individual right to a reasonable accommodation to the COVID-19 vaccine. On the contrary, as relevant here, they argued that the mandate was *preempted* by Title VII. The applicable test was whether "[the] local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." 17 F.4th at 291 (quoting *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010)). Under this test, the Second Circuit, at the preliminary injunction stage, rejected the plaintiffs' position. *Id.* at 291-293.

In *We the Patriots*, the plaintiffs "contrue[d] Section 2.61 to prohibit healthcare employers from making reasonable accommodations as otherwise required by Title VII." *Id.* at 291. As discussed above, this assumption was erroneous – as demonstrated by the "Dear Administrator Letter" and actual practice in New York State – but had been adopted by the district court below and continued by the Second Circuit on appeal. From this starting point, the Second Circuit noted that the mandate "on its face, does not bar an employer from providing an employee with a reasonable accommodation that removes the individual from the scope of the Rule." *Id.* at 292. Accordingly, "[b]ecause Section 2.61's text does not foreclose all opportunity for Plaintiffs to secure a reasonable accommodation

under Title VII, the Rule does not conflict with federal law." *Id.* That was the actual, limited holding of the case – no irreconcilable conflict, therefore, no preemption.

The legal and procedural posture of *We the Patriots* was completely different from the case at bar. For one, it was a preemption case, with a very different test than an individual claim under Title VII. Furthermore, "[t]raditionally, there has been a presumption against preemption with respect to areas where states have historically exercised their police powers," *Town of Clarkstown*, 612 F.3d at 104, which obviously informed the Second Circuit's analysis in *We the Patriots*. Secondly, the case was decided at the preliminary injunction stage, and the Second Circuit expressly acknowledged that "[w]e caution further that our opinion addressed only the likelihood of success on the merits of Plaintiffs' claims; **it did not provide our court's definitive determination of the merits of those claims**." *We the Patriots II*, 17 F.4th at 371 (emphasis added). Certainly, the decision did not address the merits of an individual religious accommodation claim.

For both these reasons, therefore, the language in the *We the Patriots* decisions suggesting that Title VII, as a matter of law, does not require covered entities to provide religious exemptions to the COVID-19 vaccine in individual cases is dicta. Such language also conflicts with the EEOC's guidance on this issue (discussed above), which is entitled to "great deference." *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 309 (2d Cir. 1996). Lastly, as previously noted, the DOH has expressly endorsed that federal and state reasonable accommodation statutes *apply to the State Mandate*. Consequently, the Second Circuit's decisions in *We the Patriots* do not foreclose Plaintiffs' claims in this case. *But see Marte v. Montefiore Med. Ctr.*, 22-CV-3491(CM), 2022 WL 7059182, at *4 (S.D.N.Y. Oct. 12,

2022) (agreeing with hospital that "Plaintiff's requested accommodation [exemption] would qualify as an undue hardship because it required Defendant to violate the law").[2]

The other case relied upon by Defendants, *Lowe v. Mills*, 21-CV-242(JDL), 2022 WL 3542187 (D. Me. Aug. 18, 2022), is inapposite. First, it did not involve the New York State mandate, but a Maine statute. Second, the plaintiffs acknowledged in their complaint that "the Governor has threatened to revoke the licenses of all health care employers who fail to mandate that all employees receive the COVID-19 vaccine." *Id.* at *7. No such allegations are included in Plaintiffs' Second Amended Complaint, which on the contrary alleges the "Dear Administrator Letter" expressly directing healthcare entities to consider requests for religious accommodations under federal and state laws.

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss should be denied in its entirety and this case should be allowed to proceed on the merits.

Respectfully submitted,

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[2] The *Marte* decision is distinguishable on the grounds that the plaintiff failed to allege a prima facie case for a Title VII violation. 2022 WL 7059182, at * 3-4. Accordingly, the district court's alternative discussion of *We the Patriots* is dicta. Furthermore, there is no indication in the opinion that the "Dear Administrator Letter" was before the court.