IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

PETER CERRETA	:	
Plaintiff,	:	CIVIL ACTION No.
v.	:	3:21-cv-00982-HES-JBT
JOHNSON & JOHNSON, *et al.*	:	
Defendants.	:	

DEFENDANTS JOHNSON & JOHNSON AND JOHNSON & JOHNSON VISION CARE, INC.'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Johnson & Johnson and Johnson & Johnson Vision Care, Inc. respectfully move this Court for an Order dismissing Plaintiff's First Amended Complaint for Permanent Injunction ("Amended Complaint") [Dkt. 6] for failure to state a claim upon which relief can be granted.

In support of this Motion, Defendants attach a Memorandum setting forth the reasons why the Motion should be granted and, as Exhibits hereto, (A) August 16, 2021 Corporate Vaccine Requirement Announcement (B) September 9, 2021 Accommodation Letter. Each attached document is properly considered in

connection with this Motion because the documents are incorporated by reference into Plaintiff's Amended Complaint.

DATED: October 14, 2021

Respectfully submitted,

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PETER CERRETA Plaintiff, v. JOHNSON & JOHNSON, *et al.* Defendants.	CIVIL ACTION No. 3:21-cv-00982-HES-JBT

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants Johnson & Johnson and Johnson & Johnson Vision Care, Inc. (collectively "J&J"), by and through their attorneys, Blank Rome LLP, respectfully submit this Memorandum in support of their Motion to Dismiss Plaintiff's Amended Complaint under Fed. R. Civ. P. 12(b)(6).

I. INTRODUCTION

Plaintiff Peter Cerreta's Amended Complaint alleges that J&J's employee vaccination requirements designed to protect against the spread of COVID-19 virus within the J&J employee community and those with whom employees come in contact violates (1) his constitutional rights under the First Amendment's Establishment Clause and Free Exercise Clause and (2) the Religious Freedom Restoration Act ("RFRA"). The Amended Complaint fails to state a claim. The

First Amendment protects religious freedom, among other fundamental rights, from infringement by ***state action***. "***The First Amendment does not apply to private parties***." *Bell v. J.B. Hunt Transp., Inc.*, 427 Fed. Appx. 705, 708 (11th Cir. 2011) (emphasis added). RFRA similarly authorizes only "appropriate relief ***against a government***" by a "person who religious exercise has been burdened" by ***government action***. 42 U.S.C. § 2000bb-1(c) (emphasis added). *See also*, *e.g.*, *Walden v. CDC*, No. 08-2278, 2010 U.S. Dist. LEXIS 157623, at *32 (N.D. Ga. Mar. 18, 2010) ("Private employers are not subject to liability under the free exercise clause or the RFRA."). This is an insurmountable barrier to Plaintiff's claims. J&J is a private employer, and not a state actor, and Plaintiff does not (and cannot) allege that J&J's corporate vaccination requirement is government action subject to the First Amendment or RFRA.

Even if Plaintiff could allege state action (which he cannot), his claims would still fail because he concedes that he has not been harmed by – and is not at imminent risk of any harm from – J&J's vaccination requirement. To the contrary, ***Plaintiff admits that J&J granted his request for a religious exemption from the vaccination requirement***. His claims therefore rest entirely on his own speculation. He alleges that his current exemption expires in December 2021 and that he ***may*** be harmed "***if*** [he] loses his job" at that time, but he does not (and cannot) allege that J&J has ever informed him that his exemption cannot be

extended or that he will be terminated if he still is not vaccinated in December 2021. It is axiomatic that Plaintiff cannot seek – and this Court cannot grant – relief for an imagined injury that is not threatened and simply does not currently exist.

Finally, even if Plaintiff could articulate any threatened harm, his claims would nonetheless fail because he cannot short-circuit the well-established process for raising religious discrimination claims against a private employer under Title VII of the Civil Rights Act ("Title VII"). There is no authority from this or any other court even suggesting that a corporate employee may circumvent Title VII by alleging a First Amendment or RFRA violation based on the actions of a private employer.

For each of these reasons, this Court should grant J&J's Motion and dismiss Plaintiff's Amended Complaint with prejudice for failure to state a claim.

II. STATEMENT OF THE CASE

A. The COVID-19 Pandemic

The significant and continuing impact of the COVID-19 virus on the United States is well-documented. COVID-19 has caused the death of over 700,000 Americans, making it the deadliest pandemic in American history. Johnson & Johnson developed one of the three vaccines that the U.S. Food and Drug Administration has authorized for use to combat COVID-19. *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, No. 21-22492, 2021 U.S. Dist. LEXIS 148279 at *6-7 (S.D.

Fla. Aug. 8, 2021). All three vaccines have proven to be effective in preventing severe disease, hospitalization, and death. *Harris v. Univ. of Mass., Lowell*, No. 21-11244, 2021 WL 3848012, at *3 (D. Mass. Aug. 27, 2021). While the United States has "come a long way since the darker days of 2020," the virus continues to present daily challenges throughout the country as the Delta variant has proven and, unfortunately, "[n]ew COVID-19 cases often originate in unvaccinated individuals." *Klaassen v. Trustees of Ind. Univ.*, No. 21-238, 2021 U.S. Dist. LEXIS 133300, at *9 (N.D. Ind. July 18, 2021).

B. The Facts Alleged in the Amended Complaint

Plaintiff's Amended Complaint alleges the following facts, which J&J accepts as true solely for purposes of this Motion to Dismiss:

1. J&J's Corporate Vaccine Requirement

J&J is one of many corporations that has adopted policies requiring all U.S.-based employees to be vaccinated against the COVID-19 virus. *See generally Rivkees*, 2021 U.S. Dist. LEXIS 148279, at *45 n.39; *Beckerich v. St. Elizabeth Med. Ctr.*, No. 21-105, 2021 U.S. Dist. LEXIS 183757, at *2-3 (E.D. Ky. Sept. 24, 2021). On August 16, 2021, J&J announced that all of its employees and contractors within the United States must be fully vaccinated against COVID-19 by October 4, 2021. (Am. Compl. ¶¶ 10-11.) The announcement also confirmed that employees and

contractors could request a religious or medical exemption from the vaccine requirement. *See* Ex. A (Aug. 16, 2021 Announcement).[1]

2. Plaintiff's Religious Accommodation Request

Consistent with the policy expressed in the August 16 announcement, Plaintiff requested an exemption from the vaccine requirement based on his religious beliefs. (Am. Compl. ¶¶ 14-16.) On August 31, 2021, J&J asked Plaintiff to provide additional documentation to support his exemption request. (*Id.* ¶ 15.) Based on Plaintiff's representations and the information that he submitted, J&J informed Plaintiff in writing on September 9, 2021 that his accommodation request had been granted. (*Id.* ¶ 17.)

The company's September 9 "Vaccine Accommodation" letter stated that J&J had "approved a reasonable accommodation" exempting Plaintiff "from providing proof of vaccination against the COVID-19 virus." *See* Ex. B (Sept. 9, 2021 Letter). The letter also informed Plaintiff that the accommodation granted on September 9 would "expire[] on 12/8/2021." *Id.* The letter ***did not*** state or suggest

[1] Plaintiff references the August 16, 2021 announcement of J&J's vaccine requirement in his Amended Complaint but did not attach a copy of the announcement to his pleading. *See* Am. Compl. ¶¶ 10-12. The Eleventh Circuit has held that where, as here, "the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleading for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment." *Brooks v. Blue Cross & Blue Shield, Inc.*, 116 F.3d 1364, 1369 (11th Cir.1997). Even in the absence of the announcement as part of the pleadings, the claim fails.

that Plaintiff's religious accommodation could not be extended beyond December 8 based on the exemption request and then existing circumstances. *Id.*

To date, Plaintiff remains employed by J&J and has not been threatened with any adverse employment action as a result of his vaccination status or his religious accommodation. (Am. Compl. ¶ 19.)

III. STANDARD OF REVIEW

Dismissal is required under Fed. R. Civ. P. 12(b)(6) where, as here, a complaint's factual allegations fail to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In resolving a Rule 12(b)(6) motion, this Court must accept the well-pleaded facts alleged in the complaint and draw all reasonable inferences in Plaintiff's favor, but "conclusory allegations and unwarranted deductions of fact are not admitted as true." *Berry v. Coleman*, 172 Fed. Appx. 929, 932 (11th Cir. 2006) (quotation omitted). To survive a motion to dismiss, a complaint must allege specific facts that assert a tenable claim beyond being merely possible or conceivable, and the allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555-56 (2007). "Allegations that are no more than labels and conclusions, a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement are not well-pled facts that must be accepted as

true and will not be sufficient to withstand a motion to dismiss." *Jones v. Citimortgage, Inc.*, 666 Fed. Appx. 766, 772 (11th Cir. 2016 (quotations omitted).

IV. LEGAL ARGUMENT

A. Plaintiff Cannot State Any First Amendment or RFRA Claim Against J&J.

Plaintiff's claims fail for the threshold reason that J&J is a private entity that has engaged in private action and the protections of the First Amendment and RFRA apply only to state action. Because Plaintiff does not allege that J&J's corporate vaccine requirement is a state action, Plaintiff cannot state any claim against J&J under the Establishment Clause, the Free Exercise Clause, or RFRA.

By its plain language, the First Amendment prohibits "Congress" from enacting laws "respecting the establishment of religion" or "prohibiting the free exercise" of religion. *See* U.S. Const. amend. I. As the Supreme Court has emphasized repeatedly, the First Amendment "does not restrict private conduct." *Harris v. Quinn*, 573 U.S. 616, 629 n.4 (2014). *See also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) ("[A] private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor."); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) ("Although Title VII and the National Labor Relations Act govern action by private parties making personnel decisions, it is fundamental that the First Amendment prohibits [only] governmental infringement on the right of free speech."). Accordingly, "[t]he First

Amendment does not apply to private parties . . . unless those parties have engaged in 'state action.'" *Bell*, 427 Fed. Appx. at 708. *See also*, *e.g.*, *Price v. Lockheed Martin Corp.*, 261 Fed. Appx. 761, 764 (5th Cir. 2008) (affirming summary judgment for employer against First Amendment claim arising out of employee's termination: "Lockheed, as a private employer and not a state actor, was not subject to constitutional restrictions.").

Plaintiff does not allege that J&J is a state actor or that it has engaged in state action. Nor can Plaintiff plausibly make any such allegation. The Amended Complaint is unequivocal in alleging that J&J implemented its vaccine requirement as a corporate action applicable only to the company's employees and contractors. *See* Am. Compl. ¶¶ 10-13. The Amended Complaint is equally unequivocal that J&J considered, and granted, his religious accommodation request based on corporate policy administered through the company's internal employee relations processes. *See id.* ¶¶ 14-17. There is no suggestion anywhere in the Amended Complaint that any government entity played any role in J&J's adoption, implementation, and administration of its corporate vaccine requirement.

Because Plaintiff has not alleged (and cannot plausibly allege) that J&J has engaged in state action, his "constitutional claims cannot stand, and thus have zero likelihood of success on the merits." *Beckerich*, 2021 U.S. Dist. LEXIS 183757, at *7

(denying preliminary injunction against employer COVID-19 vaccination requirement); *Harsman v. Cincinnati Children's Hosp. Med. Ctr*., No. 1:21-CV-597, 2021 WL 4504245, at *3 (S.D. Ohio Sept. 30, 2021) (denying temporary restraining order against employers' COVID-19 vaccination requirements). Plaintiff's Establishment Clause and Free Exercise Clause claims must therefore be dismissed. *See*, *e.g.*, *Cushe v. Jenkins*, No. 19-219, 2019 U.S. Dist. LEXIS 122485, at *10 (M.D. Fla. July 12, 2019) (dismissing as "frivolous" First Amendment claims against private actor because private actions are "not subject to First Amendment constraints").

Plaintiff's RFRA claim fails for the same reason. Paralleling the First Amendment, RFRA provides that the "***[g]overnment*** shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a) (emphasis added). The statute authorizes as a remedy only "appropriate relief ***against a government***." *Id*. § 2000bb-1(c) (emphasis added). The term "government" is defined in the statute as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id*. § 2000bb-2(1). Accordingly, Plaintiff may only state a RFRA claim if he alleges that his free exercise of religion has been substantially burdened by a ***government*** rule or policy. *See*, *e.g.*, *McGathey v. Osinga*, No. 17-56, 2017 WL 2445827, at *4 (M.D. Fla. June 6, 2017).

The case law is emphatic in rejecting similar claims under RFRA against private entities. The federal courts have held squarely that RFRA applies only to governmental bodies and that it does not permit claims against private employers. *See, e.g.*, *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010) ("The text of the statute makes quite clear that Congress intended RFRA to apply only to suits in which the government is a party."); *Rweyemamu v. Cote*, 520 F.3d 198, 201 n.2 (2d Cir. 2008) ("[W]e think the text of RFRA is plain. Thus, we do not understand how it can apply to a suit between private parties, regardless of whether the government is capable of enforcing the statute at issue."); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834 (9th Cir. 1999) ("RFRA does not expressly include private employers within its reach. When Congress has intended to regulate private employers, in statutes such as Title VII and the Americans with Disabilities Act (ADA), it has done so explicitly."). The rule is clear: "RFRA is not applicable in cases where the government is not a party." *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015).

There is no allegation in the Amended Complaint that J&J is government actor or that its corporate vaccine requirement is a government action subject to RFRA. Moreover, there is no plausible basis to make such an allegation. As a result, this Court should dismiss Plaintiff's RFRA claim. *See, e.g.*, *Billard v. Charlotte*

Catholic High Sch., No. 17-11, 2021 U.S. Dist. LEXIS 167418, at *49 (W.D.N.C. Sept. 3, 2021) ("RFRA does not apply to suits between purely private parties."); *Van Stry v. McCrea*, No. 19-104, 2020 U.S. Dist. LEXIS 62338, at *19 (E.D. Tex. Apr. 7, 2020) ("Because this case is a dispute between private parties, RFRA is inapplicable here.").[2]

B. Plaintiff Has Not Alleged Any Actual or Threatened Harm.

Even if Plaintiff could state a claim against J&J under the First Amendment or RFRA, his claims must still be dismissed because the Amended Complaint does not allege any actual or threatened harm by J&J.

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. U.S. Const. art. III, § 2, cl. 1. *See also*, *e.g.*, *Flanigan's Enters. v. City of Sandy Springs*, 868 F.3d 1248, 1255 (11th Cir. 2017)). "At a minimum, this requirement means that a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* (quotation omitted). Furthermore, "[t]he ripeness doctrine protects federal courts from engaging in speculation or

[2] Plaintiff's First Amendment and RFRA challenges to J&J's vaccination policy also suffer from the fatal flaw that the policy he purportedly attacks ***favors*** religion because it provides for a religious exemption, which was granted to Plaintiff. *See*, *e.g.*, *Klaassen*, 2021 U.S. Dist. LEXIS 133300, at *107-08 (exemption provisions in mandatory vaccine policy to accommodate religious belief do not burden but rather benefit religion).

wasting their resources through the review of potential or abstract disputes." *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997).

The Amended Complaint fails to even approach this standard because it presents only an abstract dispute based entirely on Plaintiff's speculation as to how J&J may act in the future. Plaintiff has not alleged (and cannot allege) that he has suffered or faces any concrete harm. There is no allegation that Plaintiff will be terminated when his initial accommodation expires and there is no suggestion that J&J will not extend Plaintiff's existing accommodation if circumstances warrant. Indeed, the *only* action by J&J towards Plaintiff alleged in the Amended Complaint is the decision to ***grant*** his request for a religious accommodation. *See* Am. Compl. ¶ 17. That decision certainly cannot be the basis for a religious discrimination claim.

Plaintiff's claims are purely anticipatory. His key allegations found in Paragraphs 18 and 19 of the Amended Complaint are speculative. Paragraph 18 states as follows: "***If*** Cerreta loses his job . . . ." In other words, no adverse action has been taken or even threatened. Paragraph 19 then states: "Cerreta has not been terminated but yet is under continuous threat of termination if he does not violate his religious and convictions on conscience [sic]." This allegation is not based on any action by J&J but rather represents Plaintiff's personal belief about a future possibility. Plaintiff's subjective and hypothetical concerns do not translate

into and do not arguably constitute any actual or threatened harm. To state a claim, Plaintiff must allege facts sufficient to support a claim that J&J has discriminated against him (or threatened to discriminate against him) based on his asserted religious beliefs and that he has suffered (or will suffer) specific harm from any alleged discrimination. To date, J&J has accommodated his religious belief and taken no adverse action.

C. Plaintiff Cannot Use the First Amendment or RFRA to Circumvent Title VII's Administrative Exhaustion Requirement.

This Court should dismiss the Amended Complaint for the additional reason that it is nothing more than a clear attempt by Plaintiff to circumvent the well-established process for presenting religious discrimination claims against private employers under Title VII.

Unlike the First Amendment and RFA, Title VII applies to private employers and prohibits employment discrimination based on an employee's firmly held religious beliefs. *See* 42 U.S.C. § 2000e–2(a)(1). However, prior to commencing a Title VII action in court, a complainant must first file a timely charge with the Equal Employment Opportunity Commission ("EEOC") following the occurrence of an "alleged unlawful employment practice." *Id.* § 2000e–5(e)(1). The EEOC then makes its determination and, if it chooses not to bring a civil action against the employer itself, issues the complainant a "right-to-sue" notice at any time after the expiration of 180 days from the charge's filing

date, notifying the complainant that they have 90 days to commence a civil action. *Id.* § 2000e–5(f)(1). *See also* 29 CFR § 1601.28.

Plaintiff opted to bypass the very statute designed to address his particular grievances by raising constitutional claims against a private actor in this current suit. This Court should not countenance this end run around the administrative process created by Congress and regularly utilized by employees who believe they have been subject to discrimination. While Plaintiff likely recognizes that he would be unable to even establish a *prima facie* case of religious discrimination under Title VII, as he has not suffered an adverse employment action, that does not justify his efforts to evade the EEOC process or to accelerate the legal process in contradiction of a federal statute.

V. CONCLUSION

For the foregoing reason, this Court should grant J&J's Motion and dismiss Plaintiff's Amended Complaint in its entirety with prejudice.

DATED: October 14, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2021, I caused the foregoing document to be electronically filed via the Court's CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF.

Dated: October 14, 2021

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