FILED
United States Court of Appeals
Tenth Circuit

May 2, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL S. FREEMAN, II,

Plaintiff - Appellant,

v.

RAYTHEON TECHNOLOGIES CORPORATION; U.S. DEPARTMENT OF DEFENSE; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; LLOYD J. AUSTIN, III; XAVIER BECERRA,

Defendants - Appellees.

No. 23-1133
(D.C. No. 1:22-CV-01161-CNS-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Plaintiff Michael S. Freeman, II, proceeding *pro se*, appeals from a district court order dismissing his Third Amended Complaint against Raytheon Technologies Corporation ("Raytheon"), the United States Department of Defense ("DOD") and its

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Secretary Lloyd J. Austin, III, the Equal Employment Opportunity Commission ("EEOC"), and the United States Department of Health and Human Services ("HHS") and its Secretary Xavier Becerra. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

BACKGROUND[2]

I.

In February 2021, almost a year into the COVID-19 pandemic, Collins Aerospace hired Mr. Freeman as a schedule analyst manager. Collins Aerospace is a subsidiary of defendant Raytheon, a frequent DOD contractor. Later that year, the President issued an executive order instructing all federal agencies to insert a clause into new government contracts requiring the contracting company to comply with COVID-19 guidance issued by the federal government. Around that time, Collins Aerospace implemented a policy promulgated by Raytheon requiring all employees to be vaccinated against COVID-19 or apply for an exemption ("Covid Policy").

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[1] Appellant's *Petition for Initial En Banc Review* was transmitted to all non-recused judges of the court who are in regular active service. No judge requested that the court be polled on the Appellant's request for initial en banc review. As a result, Appellant's petition is denied. The Honorable Timothy M. Tymkovich did not participate in the court's consideration of Appellant's petition.

[2] The following facts are taken from the well-pleaded allegations in Mr. Freeman's complaint. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1105 (10th Cir. 2017) ("In ruling on a motion to dismiss for failure to state a claim, all well-pleaded *facts*, as distinguished from conclusory allegations, must be taken as true, and the court must liberally construe the pleadings and make all reasonable inferences in favor of the non-moving party." (Internal quotation marks and brackets omitted)).

Under the Covid Policy, exempt employees did not have to be vaccinated but were subject to other requirements. Unvaccinated employees had to work primarily from home, test weekly for the virus, provide a negative test within 72 hours of working onsite, and wear a mask while working onsite. Vaccinated employees were not subject to these requirements.

In December 2021, pursuant to a preliminary injunction issued by a federal court, DOD instructed its contracting officers *not* to enforce any COVID-19 clauses that had been inserted into government contracts. Collins Aerospace, however, retained the Covid Policy.

Mr. Freeman has Beta Thalassemia, a genetic blood disorder that causes anemia like symptoms and increases his risk profile with respect to the COVID-19 vaccine. Because of this condition, he opted against the vaccine and requested and received an exemption. He refused to comply with the Covid Policy requirements for unvaccinated employees, however, because he believed the policy was ineffectual and discriminatory towards unvaccinated employees. Mr. Freeman made this complaint to the Collins Aerospace Human Resources department to no avail. And in January 2022, Collins Aerospace fired him for his refusal to comply with the Covid Policy. Mr. Freeman subsequently filed a complaint with the EEOC complaining of discrimination but withdrew the complaint before the EEOC completed its investigation.

II.

A.

In May 2022 Mr. Freeman filed this action against Raytheon, DOD, HHS, and the EEOC as well as the secretaries of both DOD and HHS in their official capacities. He did not name Collins Aerospace as a defendant. Shortly after the complaint was filed, the district court ordered Mr. Freeman to amend his complaint to comply with Federal Rule of Civil Procedure 8. Mr. Freeman proceeded to amend his complaint several times.

Before this court is the district court's order dismissing Mr. Freeman's Third Amended Complaint with prejudice.[3] The complaint asserted thirteen claims for relief stemming from Mr. Freeman's termination from Collins Aerospace. Several claims were abandoned in the district court and are not at issue on appeal. The claims that Mr. Freeman argues were erroneously dismissed can be categorized into three groups: (1) employment discrimination claims brought under Title VII and 42 U.S.C. § 1981 (claims 1 and 2); (2) constitutional claims for violations of the First, Fourth, and Fifth Amendments (claims 5-7); and (3) claims under the Nuremberg Code and various federal regulations (claims 9, 11, and 13).[4]

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[3]Throughout this order, we refer to the Third Amended Complaint as simply the complaint.

[4] It is not clear which claims are asserted against which defendants. But given the more fundamental deficiencies in Mr. Freeman's complaint, this lack of specificity does not affect our analysis.

All defendants filed motions to dismiss. Raytheon, in addition to seeking dismissal under Rule 8, argued the employment discrimination claims failed under Rule 12(b)(6) because Raytheon was never Mr. Freeman's employer and could not be held liable for the actions of its subsidiary, Collins Aerospace. The federal defendants sought dismissal of all claims under Rule 12(b)(1), arguing lack of jurisdiction under the theory of sovereign immunity and further argued the constitutional claims failed for lack of governmental action.

On March 23, 2023, the district court, adopting the recommendation of a magistrate judge, dismissed Mr. Freeman's complaint. Although Mr. Freeman had brought his employment claims under Title VII and 42 U.S.C. § 1981, which do not cover disability and genetic information discrimination, the court treated Mr. Freeman's employment discrimination claims as if they had been asserted under the appropriate federal statutes.[5] The court concluded, however, that Mr. Freeman failed to state a claim against Raytheon because his employer was Collins Aerospace, and Mr. Freeman had failed to allege facts that would justify piercing the corporate veil. The court held the employment discrimination claims against DOD were barred by sovereign immunity for the same reason—because DOD was not Mr. Freeman's employer.

[5] In the "Claims For Relief" section of the complaint, Mr. Freeman alleges violations of Title VII and § 1981. Scattered throughout the complaint, however, are references to the Americans With Disabilities Act and the Genetic Information Nondiscrimination Act. The complaint did not reference the Rehabilitation Act.

The claims against the EEOC were based on the agency's retroactive ratification of COVID-19 policies that Mr. Freeman views as ineffectual and discriminatory. And the claims against HHS were based on that agency's issuance of allegedly flawed guidance that led to the promulgation of the discriminatory policies responsible for Mr. Freeman's termination. The district court dismissed Mr. Freeman's claims against those agencies for lack of jurisdiction, holding Mr. Freeman had failed to cite any caselaw that would support a waiver of sovereign immunity under the theories of liability set forth in the complaint.

The district court dismissed Mr. Freeman's First, Fourth, and Fifth Amendment claims for failure to allege government action under *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995), explaining that the federal government cannot be held liable for the conduct of a private actor. The court reiterated that Mr. Freeman was not a government employee and noted that, by his own admission, the COVID-19 contractual provision that had been inserted into government contracts was not operable at the time of his termination. Finally, the court dismissed Mr. Freeman's claims under the Nuremberg Code and various federal regulations on the grounds the provisions did not provide for a private right of action. The district court entered final judgment on March 24, 2023.

B.

On April 5, 2023, Mr. Freeman filed a motion to set aside or vacate the judgment under Rule 60(a) and (b), which the court construed as also seeking reconsideration under Rule 59(e). In that motion, Mr. Freeman requested leave to

file a fourth amended complaint and sought recusal of the magistrate judge and district court judge under 28 U.S.C. § 455.

On April 21, Mr. Freeman filed a notice of appeal challenging the district court's March 23 order dismissing his complaint and entering final judgment.

On June 28, the district court issued an order denying Mr. Freeman's post-judgment motion in its entirety. Mr. Freeman did not amend his notice of appeal or file a separate notice of appeal as to the June 28 order.

DISCUSSION

I.

A. Standard of Review

The district court concluded it lacked jurisdiction over much of Mr. Freeman's complaint based on sovereign immunity because the federal defendants were not his employer and because many of his claims cite provisions that do not provide a private right of action. We review those conclusions de novo. *See Radil v. Sanborn Western Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004) ("We review the district court's dismissal for lack of subject matter jurisdiction de novo."). Mr. Freeman "bears the burden of establishing [subject matter] jurisdiction as a threshold matter." *Id.* To the extent the defendants attack the factual basis for subject matter jurisdiction, including whether they were Mr. Freeman's employer, "the court does not presume the truthfulness of factual allegations in the complaint." *Id.*

We also review de novo dismissals for failure to state a claim under Rule 12(b)(6). *Brokers' Choice*, 861 F.3d at 1104. To survive a motion to dismiss

under Rule 12(b)(6), "a complaint must contain enough allegations of fact, taken as true, to state a claim to relief that is plausible on its face." *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (internal quotation marks omitted). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Jordan-Arapahoe, LLP v. Bd. of Cnty. Comm'rs*, 633 F.3d 1022, 1025 (10th Cir. 2011) (brackets and internal quotation marks omitted). In reviewing a dismissal under Rule 12(b)(6), "we accept the well-pleaded facts alleged as true and view them in the light most favorable to the plaintiff." *Clinton v. Sec. Benefit Life Ins. Co.*, 63 F.4th 1264, 1275 (10th Cir. 2023). But we need not accept "threadbare recitals of the elements of a cause of action that are supported by mere conclusory statements." *Id.* (brackets and internal quotation marks omitted). "An allegation is conclusory where it states an inference without stating the underlying facts or is devoid of any factual enhancement." *Id.* (internal quotation marks omitted).

As a pro se litigant, Mr. Freeman is entitled to a liberal construction of his pleadings. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). But he must still comply with the same rules as other litigants, and we do not act as his "attorney in constructing arguments and searching the record." *Id.*

B. Dismissal of Discrimination Claims Against Raytheon

To survive Raytheon's motion to dismiss, Mr. Freeman needed to allege sufficient facts to allow an inference that Raytheon was his employer or otherwise

responsible for the actions of Collins Aerospace. *See Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1069 (10th Cir. 1998) (explaining that a prima facie case under Title VII requires an employee/employer relationship); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1361 (10th Cir. 1993) ("Whether Defendant was Plaintiffs' employer depends upon whether Defendant is liable for the acts of its subsidiary."). We agree with the district court's conclusion that the complaint fails in this regard. We expand on its reasoning, however, to address Mr. Freeman's arguments under the single-employer theory.

The district court dismissed the claims against Raytheon because it concluded the complaint failed to allege facts that would justify piercing the corporate veil. *See* R. vol. 3 at 194 (holding the complaint "fail[ed] to show that Defendant Raytheon used Collins Aerospace to perpetuate a fraud or wrong that would permit Plaintiff to pierce the corporate veil"). We agree with the district court's analysis as far as it went. Piercing the corporate veil requires facts from which to infer Collins Aerospace "was used to defeat public convenience, or to justify or protect wrong, fraud or crime." *Boughton v. Cotter Corp.*, 65 F.3d 823, 836 (10th Cir. 1995) (internal quotation marks omitted). The complaint does not allege such facts. Nor does it allege facts relevant to whether Collins Aerospace was Raytheon's alter ego or indeed facts relevant to any theory that would justify piercing the corporate veil. *See Boughton*, 65 F.3d at 836 (listing factors relevant to piercing-the-corporate-veil analysis). The district court was therefore correct in rejecting the veil-piercing theory of liability.

But Mr. Freeman's theory against Raytheon is slightly different. His argument focuses on the single-employer theory of liability, which does not depend on a showing of fraud. The single-employer theory allows a "plaintiff who is the employee of one entity to hold another entity liable by arguing that the two entities effectively constitute a single employer." *Knitter v. Corvias Mil. Living, LLC*, 758 F.3d 1214, 1226 (10th Cir. 2014) (internal quotation marks and ellipsis omitted).

In general, "[t]he doctrine of limited liability creates a strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances." *Frank*, 3 F.3d at 1362. One of those circumstances is where the plaintiff's immediate employer and its parent corporation are integrated to an extent they should be considered a single employer for purposes of federal discrimination law. *See Lockard*, 162 F.3d at 1069-70 (explaining the single-employer test). To succeed under this theory, Mr. Freeman would have to show "sufficient indicia of an interrelationship" between Collins Aerospace and Raytheon to justify his belief that Raytheon was jointly responsible for the acts of his immediate employer. *Id.* at 1070. Put another way, Raytheon must have exercised a degree of control over Collins Aerospace "exceed[ing] that normally exercised by a parent corporation." *Id.* at 1071 n.2. In considering this question, courts look to the following factors: "interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control." *Id.* at 1069.

The complaint does not allege facts to indicate interrelated operations or common management between Raytheon and Collins Aerospace. *See Frank*, 3 F.3d at 1362-63 (providing the following examples of facts suggesting interrelated operations: the parent keeping its subsidiary's books, issuing its paychecks, paying its bills, and sharing its employees, headquarters, and office space). The complaint does include allegations of common ownership, but that, "standing alone, can never be sufficient to establish parent liability." *Lockard*, 162 F.3d at 1071 (internal quotation marks omitted).

Most importantly, the complaint is devoid of facts relevant to the most critical factor—centralized control of labor relations. *See Bristol v. Bd. of Cnty. Comm'rs*, 312 F.3d 1213, 1220 (10th Cir. 2002) (observing that courts generally consider control of labor relations "to be the most important" factor); *see also Lockard*, 162 F.3d at 1070 ("The key factor of this four-part test is . . . whether the putative employer has centralized control of labor relations."). Centralized control of labor relations means the "parent must control the *day-to-day employment decisions of* the subsidiary." *Lockard*, 162 F.3d at 1070 (internal quotation marks omitted). Several factors inform whether a parent controls a subsidiary's labor relations, including whether the "parent kept [the] subsidiary's books, issued its paychecks, and paid its bills;" whether the "parent and subsidiary had common employees, shared services, equipment, employees and office space;" and whether the "parent controlled [the] subsidiary's payroll and benefit program." *Id.* (citing *Frank*, 3 F.3d at 1363).

The complaint does not allege facts showing that Raytheon exercised day-to-day control over Collins Aerospace. Instead, the allegations focus exclusively on a single policy related to the COVID-19 pandemic. We accept as true that Raytheon promulgated the Covid Policy. But that is not enough to infer it exercised day-to-day control over Collins Aerospace. We have specifically cautioned that "[a] parent's broad general policy statements regarding employment matters are not enough to" show centralized control of labor relations. *Frank*, 3 F.3d at 1363. "The critical question is, what entity made the final decisions regarding employment matters *related to the person claiming discrimination*?" *Id.* (internal quotation marks and brackets omitted) (emphasis added).

In this case, that entity was Collins Aerospace. As Mr. Freeman alleges in his complaint, he was hired by Collins Aerospace. When he determined that the Covid Policy was discriminatory against unvaccinated employees, he took his complaints to the human resources department at Collins Aerospace. And when he refused to comply with the Covid Policy, his employment was terminated by Collins Aerospace. Raytheon may have promulgated the policy and provided the digital platform for employees to record their vaccination status, but there is no allegation from which to infer it had any right to fire Mr. Freeman or any other employee of Collins Aerospace. *See Bristol*, 312 F.3d at 1219 (explaining that "[m]ost important to control over the terms and conditions of an employment relationship is the right to terminate it"). To the contrary, what can be inferred from the complaint is that Raytheon was no longer obligated to enforce any vaccine mandate that may have

been added to its defense contracts. Because Mr. Freeman has not alleged facts leading to the plausible inference that Raytheon and Collins Aerospace constituted a single employer, his employment discrimination claims against Raytheon fail.

C. Dismissal of Claims Against the Federal Government

Mr. Freeman's claims against DOD are brought under the joint-employer theory of liability. He argues DOD and Raytheon were joint employers because Raytheon operated as a defense contractor. The district court dismissed this claim outright, and it was right to do so. Sovereign immunity does not bar employment discrimination claims against the federal government where the federal government is the employer. *See Lindstrom v. United States*, 510 F.3d 1191, 1195 (10th Cir. 2007) (citing Title VII waiver of sovereign immunity set forth at 42 U.S.C. § 2000e-16(d)). But here the federal government did not employ Mr. Freeman, and this would be so even if Raytheon and Collins Aerospace could be considered a single employer, a theory we just rejected.

Under the joint-employer theory, two separate entities may be considered joint employers "if they share or co-determine those matters governing the essential terms and conditions of employment." *Knitter*, 758 F.3d at 1226 (internal quotation marks omitted); *see id.* at 1226-27 (explaining differences between the single-employer and joint-employer tests). DOD might be considered a joint employer under this test if it exercised "significant control over [Mr. Freeman]." *Id.* at 1226. In determining whether an entity exercised significant control, courts consider many factors, including "the ability to promulgate work rules and assignments, and set conditions

of employment, including compensation, benefits and hours; day-to-day supervision of employees, including employee discipline; and control of employee records, including payroll, insurance, taxes and the like." *Id.* (internal quotation marks and ellipsis omitted). Most importantly, however, as with the single-employer test, we ask whether DOD had the right to terminate the employment relationship. *See id.* at 1228 (emphasizing preeminence of the right to terminate). There is nothing in the complaint to indicate DOD had the right to fire Mr. Freeman or anyone else working at Raytheon or Collins Aerospace. Moreover, aside from the allegations about the unenforced contractual provision inserted into some defense contracts, the complaint includes no facts relevant to the significant-control analysis. In short there is nothing from which to draw a reasonable inference that DOD was Mr. Freeman's employer. The employment discrimination claims against the federal government were properly dismissed.

D. Dismissal of the Constitutional Claims

Mr. Freeman claims that being forced to abide by the discriminatory Covid Policy under threat of termination violated his rights under the First, Fourth, and Fifth Amendments. These claims fail because Mr. Freeman has not alleged facts from which to infer Collins Aerospace was a government actor. *See Gallaher*, 49 F.3d at 1446-47 (explaining the "essential dichotomy" between governmental action, which is subject to constitutional scrutiny, and "private conduct, which however discriminatory or wrongful," is not). Several principles underlie the constitutional distinction between government action and private conduct, including

the desire to avoid holding the government responsible for conduct beyond its control. *See id.* at 1447. That is precisely what Mr. Freeman seeks to do here in claiming the Covid Policy was implemented and enforced at the behest of the federal government. Not so. Even if the government initially required that contracting employees be vaccinated, it did not promulgate the specific policy at issue, and in any event, it had expressly withdrawn its own vaccination mandate by the time Mr. Freeman was fired. Collins Aerospace opted to retain its Covid Policy, but Mr. Freeman cannot hold the government liable for the decision of a private employer to enforce its own employment policies.

As the federal defendants correctly argue, "the fact that a private entity contracts with the government or receives governmental funds or other kinds of governmental assistance does not automatically transform the conduct of that entity into state action." *Gallagher*, 49 F.3d at 1448. Mr. Freeman claims Raytheon, and by extension Collins Aerospace, had a financial incentive to comply with the government's COVID-19 policies. That is not enough to transform those entities into government actors. *See Gilmore v. Salt Lake Cmty. Action Program*, 710 F.2d 632, 636 (10th Cir. 1983) (recognizing that "governmental funding and regulation of an ostensibly private organization, in the absence of other factors, is insufficient to establish governmental action."); *see also Hurst v. McDonough*, No. 21-2068, 2022 WL 1090913, at *4 (10th Cir. Apr. 12, 2022) (holding the Department of Veterans Affairs was not a joint employer of federal contractor employee for purposes of

Title VII) (unpublished) (cited for its persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A))

Finally, even if Collins Aerospace could be considered a government actor, that does not automatically convert its termination of Mr. Freeman into government action. *See Gilmore*, 710 F.2d at 638 (recognizing "that not all actions by state actors are state action"). Government action requires, at a minimum, "a showing that the deprivation was in some sense attributable to a governmental decision." *Id.* Here the government affirmatively stated it would not enforce its vaccination mandate against government contractors. And there are no allegations indicating a government agent participated in any way in the decision to fire Mr. Freeman. Because the complaint fails to allege that Collins Aerospace was a government actor and that its termination of Mr. Freeman constituted governmental action, the district court was correct in dismissing the constitutional claims.

E. Dismissal of Claims Under the Ninth Amendment, the Nuremberg Code, and 16 C.F.R. 1028.116

Mr. Freeman argues the defendants' conduct violated rights stemming from a combination of the Ninth Amendment and the Nuremberg Code and federal regulations governing informed consent. But he has cited no authority supporting this novel theory of liability. To the contrary, courts have held the Ninth Amendment does not create a private right of action. *See, e.g., Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986) (holding "the ninth amendment has never been recognized as independently securing any constitutional right"). And Mr. Freeman

has not identified any statute creating a private right of action for violations of the Nuremberg Code or 16 C.F.R. § 1028.116, which sets forth regulations governing informed consent in human research. *See generally McKenzie v. U.S. Citizenship & Immigr. Servs.*, 761 F.3d 1149, 1157 (10th Cir. 2014) (explaining the Supreme Court "will rarely recognize an implied private cause of action arising from a mere regulation"). The district court did not err in dismissing these claims.[6]

F. Challenges to the District Court's June 28, 2023, Order

We lack jurisdiction to address Mr. Freeman's arguments concerning the district court's order denying his post-judgment motion because he did not file a separate, or amend his existing, notice of appeal to challenge that order. *See* Fed. R. App. P. 4(a)(4)(B)(ii); *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1159-60 (10th Cir. 2023).

CONCLUSION

The judgment of the district court is AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

[6] For the same reason, the district court was correct in dismissing Mr. Freeman's Thirteenth Claim for Relief, which cites various federal regulations implementing the Ethics in Government Act. *See* 5 C.F.R. § 2635.101, *et seq*. These regulations do not create a private right of action. *Id.*, § 2635.106(c).

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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May 02, 2024

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RE: 23-1133, Freeman v. Raytheon Technologies Corporation, et al
Dist/Ag docket: 1:22-CV-01161-CNS-NRN

Dear Counsel and Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

CMW/klp

FILED
United States Court of Appeals
Tenth Circuit

June 10, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL S. FREEMAN, II,

Plaintiff - Appellant,

v.

RAYTHEON TECHNOLOGIES CORPORATION, et al.,

Defendants - Appellees.

No. 23-1133
(D.C. No. 1:22-CV-01161-CNS-NRN)
(D. Colo.)

ORDER

Before **BACHARACH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-01161-CNS-NRN

MICHAEL S. FREEMAN II,

Plaintiff,

v.

RAYTHEON TECHNOLOGIES CORPORATION,
U.S. DEPARTMENT OF DEFENSE,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES,

Defendants.

REPORT AND RECOMMENDATION ON DEFENDANT RAYTHEON TECHNOLOGIES CORPORATION'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT (DKT. #42); THE FEDERAL DEFENDANTS' MOTION TO DISMISS (Dkt. #43); and PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT AGAINST RAYTHEON TECHNOLOGIES CORPORATION (Dkt. #47)

N. REID NEUREITER
United States Magistrate Judge

This case is before the Court pursuant to an Order (Dkt. #48) issued by Judge Charlotte N. Sweeney referring three motions:

- Defendant Raytheon Technologies Corporation's ("Raytheon") Motion to Dismiss Plaintiff's Third Amended Complaint. (Dkt. #42.) Plaintiff Michael S. Freeman, proceeding pro se, [1] filed a response (Dkt. #46), and Raytheon filed a reply. (Dkt. #51.)

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[1] Because Mr. Freeman proceeds pro se, the Court "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). However, a pro se litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in

- Defendants U.S. Department of Defense ("DoD"), Secretary of Defense Lloyd J. Austin III, Equal Employment Opportunity Commission ("EEOC"), U.S. Department of Health & Human Services ("HHS"), and Secretary of the Department of Health & Human Services Xavier Becerra's (collectively, the "Federal Defendants") Motion to Dismiss (Dkt. #43), to which Plaintiff responded (Dkt. #50), and the Federal Defendants replied. (Dkt. #58.)[2]

- Plaintiff's Motion for Summary Judgment Against Raytheon Technologies Corporation (Dkt. #47), which the Court stayed briefing on pending a ruling on the motions to dismiss. (*See* Dkt. #55.)

The Court has taken judicial notice of the docket and considered the applicable Federal Rules of Civil Procedure and case law. Now, being fully informed and for the reasons discussed below, the Court makes the following recommendations.

BACKGROUND[3]

Plaintiff's 79-page, 230 paragraph-long Third Amended Complaint can be abridged as follows. Plaintiff was hired as a schedule analysis manager at Collins Aerospace, a Raytheon subsidiary, in February 2021. (Dkt. #38 ¶ 4, 9.) He suffers from beta thalassemia, genetic blood disorder that causes anemia-like symptoms. (*Id.* ¶ 1.)

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ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983); *see also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). A plaintiff's pro se status does not entitle him to an application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

[2] The Court also considered Plaintiff's surreply (Dkt. #59) and his Opposed Motion to Update the Court on a Recent Development (Dkt. #61) and the Federal Defendants' response thereto. (Dkt. #62.)

[3] The following allegations are taken from Plaintiff's Third Amended Complaint (Dkt. #38) and all non-conclusory allegations are presumed true for the purposes of the motions to dismiss. All citations to docketed materials are to the page number in the CM/ECF header, which sometimes differs from a document's internal pagination.

This lawsuit centers on Raytheon's (or, more accurately, Collins Aerospace's) COVID-19 policies, adopted in September 2021, which Plaintiff describes as follows:

> Raytheon's Vaccine Policy is that all employees must either complete a COVID-19 vaccine regiment or get approved for a Reasonable Accommodation in lieu of vaccination. If approved for a Reasonable Accommodation, the only Reasonable Accommodation option provided for unvaccinated employees is to be switched to primarily work from home (unless you were absolutely essential to be onsite), complete a weekly COVID-19 test, and test negative for COVID-19 a maximum of 72 hours prior to entering a Raytheon facility, and wear a facemask at all times while onsite—vaccinated employees were not required to make such an agreement. Declaration of vaccination status prior to implementation of the aforementioned policy was required under threat of termination of employment.

(*Id.* ¶ 10.)

On October 1, 2021, the DoD issued a memorandum directing its contracting agents to insert a COVID safety protocol provision in new defense contracts. (*Id.* ¶¶ 36, 39.) Federal district courts enjoined this requirement, and on December 9, 2021, the DoD issued another memorandum instructing contracting officers not to enforce the COVID provision in contracts and not to include the provision in new contracts. (*Id.* ¶¶ 42–43.)

Plaintiff sought from Raytheon an accommodation for beta thalassemia, and also questioned the safety and efficacy of the existing vaccines. (*Id.* ¶ 37.) His accommodation request was approved, but he was subjected to the above testing, masking, and work from home requirements that only applied to non-vaccinated employees. (*Id.* ¶ 44.) On January 20, 2022, Plaintiff informed his supervisor at Collins Aerospace and a human resources representative that he would not comply with the policy as applied and his employment was terminated on January 28, 2022. (*Id.* ¶¶ 46–47.)

Plaintiff filed an EEOC complaint against Raytheon and the DoD in March 2022. (*Id.* ¶ 48.) On March 14, 2022, the EEOC published a question-and-answer guidance document on its website (the "March 14 Guidance") stating that testing administered by employers would not violate the ADA if the employers followed current guidance from the Center for Disease Control and Prevention ("CDC"). (*Id.* ¶¶ 51, 199.) In October 2021, the CDC had published recommendations "that employers frequently test unvaccinated asymptomatic employees for COVID-19, among other recommendations." (*Id.* ¶ 40.) In response to the March 14 Guidance, on April 4, 2022, Plaintiff filed an EEOC complaint against the EEOC and HHS.[4] (*Id.* ¶ 54.)

Plaintiff generally alleges that the Federal Defendants are liable for condoning the discriminatory and retaliatory practices of Raytheon, a major defense contractor. (*Id.* ¶ 14.) Specifically, Plaintiff alleges that he had a "proxy employer-employee relationship" with the DoD (*Id.* ¶ 62.) He also claims that the EEOC "went out of their [sic] way to retroactively enact a policy authorizing this form of baseless discrimination . . . ." (*Id.* ¶ 69.) As for the HHS, he alleges that it "is so marred with deeply flawed-analyses, regulatory capture by large pharmaceutical interests, and massive conflicts of interest that their organization cannot and should not be granted the latitude necessary to implement such an unscientific policy that accomplishes nothing in terms of protecting public health or the Plaintiff." (*Id.*)

Plaintiff asserts thirteen claims for relief:

[4] The CDC is a division of the HHS.

- Claim One: a claim under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, for "disability and genetic discrimination" against all Defendants;
- Claim Two: a Title VII claim for "retaliation for engaging in protected activity" against all Defendants;
- Claim Three: a 42 U.S.C. § 1981 claim for "discriminatory treatment because of disability and genetic condition" against all Defendants;
- Claim Four: a 42 U.S.C. § 1981 retaliation claim against all Defendants;
- Claim Five: a First Amendment claim against the Federal Defendants;
- Claim Six: a Fourth Amendment claim against the Federal Defendants;
- Claim Seven: a Fifth Amendment claim against the Federal Defendants;
- Claim Eight: an Eighth Amendment claim against the Federal Defendants;
- Claim Nine: a Ninth Amendment claim against the Federal Defendants;
- Claim Ten: a Fourteenth Amendment claim against the Federal Defendants;
- Claim Eleven: a claim against the Federal Defendants for violating "the principles of informed consent established in the Nuremberg Code and 16 CFR § 1028.116";
- Claim Twelve: a claim for injunctive relief against the Federal Defendants for violating 5 U.S.C. § 706(2)(A)–(B); and
- Claim Thirteen: a claim against the Federal Defendants for violating "clearly established statutory or constitutional rights."

Defendants move for dismissal of all claims. The Court will address the motions in turn.

ANALYSIS

I. Raytheon's Motion to Dismiss (Dkt. #42)

Raytheon argues that the four claims asserted against it (Claims One, Two, Three, and Four)[5] are subject to dismissal under Rules 8 and 12 of the Federal Rules of Civil Procedure. The Court agrees.

a. Rule 8

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See also* Fed. R. Civ. P. 8(d)(1) ("Each allegation must be simple, concise, and direct."). The twin purposes of a complaint are to give the opposing parties fair notice of the basis for the claims against them so that they may respond and to allow the Court to conclude that the allegations, if proven, show that the plaintiff is entitled to relief. *See Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Ass'n of Kan.*, 891 F.2d 1473, 1480 (10th Cir. 1989). The requirements of Rule 8 are designed to meet these purposes. *See TV Commc'ns Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1062, 1069 (D. Colo. 1991), *aff'd*, 964 F.2d 1022 (10th Cir. 1992). Taken together, Rules 8(a) and (d)(1) underscore the emphasis placed on clarity and brevity by the federal pleading rules. Therefore, prolix, vague, or unintelligible pleadings violate Rule 8. Claims must be presented clearly and concisely in a manageable format that allows a court and a defendant to know what claims are being asserted, and enables a defendant to respond to the claims. *New Home Appliance Ctr., Inc., v. Thompson*, 250 F.2d 881, 883 (10th

[5] Plaintiff confirms in his response that he does not assert the remaining claims against Raytheon. (*See* Dkt. #46 at 12.)

Cir. 1957). For the purposes of Rule 8(a), "[i]t is sufficient, and indeed all that is permissible, if the complaint concisely states facts upon which relief can be granted upon any legally sustainable basis." *Id.*

"To survive a motion to dismiss, a complaint must contain 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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Id.* (citing *Twombly*, 550 U.S. at 556). "The burden is on the plaintiff to frame a complaint with enough factual matter (taken as true) to suggest that he or she is entitled to relief." *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). The degree of specificity necessary to establish plausibility and fair notice, as required under Rule 8(a)(2), depends on the type of case. *See id.* at 1248 ("A simple negligence action based on an automobile accident may require little more than the allegation that the defendant negligently struck the plaintiff with his car while crossing a particular highway on a specified date and time.").

Although allowance may be made for some deficiencies in a pro se pleading, such as failure to cite appropriate legal authority or confusion of legal theories, "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005); *see also Whitney*, 113 F.3d at 1175 (the court will not "construct a legal theory on a plaintiff's behalf"). A decision to dismiss a complaint pursuant to Rule 8 is within the trial court's sound discretion. *See Atkins v. Nw. Airlines,*

Inc., 967 F.2d 1197, 1203 (8th Cir. 1992); *Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cir. 1969).

b. Rule 12(b)(6)

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all well-pled allegations in the Third Amended Complaint as true and view those allegations in the light most favorable to the nonmoving party. *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1149 (10th Cir. 2001) (quoting *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999)). As noted above, a claim is subject to dismissal if it fails to state a claim for relief that is "plausible on its face." *Ashcroft*, 556 U.S. at 678. To make such an assessment, the Court first discards those averments in the Third Amended Complaint that are merely legal conclusions or "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 678–79. The Court takes the remaining, well-pled factual contentions, treats them as true, and ascertains whether those facts (coupled, of course, with the law establishing the requisite elements of the claim) support a claim that is "plausible" or whether the claim being asserted is merely "conceivable" or "possible" under the facts alleged. *Id.* What is required to reach the level of "plausibility" varies from context to context, but generally, allegations that are "so general that they encompass a wide swath of conduct, much of it innocent," will not be sufficient. *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012).

c. Discussion

In this case, (then-Magistrate, now District) Judge Nina Y. Wang has already advised Plaintiff that "rambling, disjointed factual allegations and vague, seemingly

unrelated assertions of constitutional violations" do not satisfy Rule 8's requirement of a short and plain statement. (*See* Dkt. #13 at 6 (quoting *Gibson v. City of Cripple Creek*, 48 F.3d 1231 (10th Cir. 1995)). Plaintiff's Third Amended Complaint, like those that preceded it, is unnecessarily long and peppered with irrelevant material. It also fails to cure the deficiency specifically noted by Judge Wang that, "[w]ith respect to Raytheon, although Plaintiff generally invokes principles of disability discrimination, genetic discrimination, and/or retaliation in the context of three federal statutes, he does not identify any specific claims raised under any statute or the theories upon which those claims rely." (*Id.* at 4.) Plaintiff attempts to excuse his inability to follow the instructions of the Court and the Federal Rules of Civil Procedure by citing his pro se status, but, as Judge Wang informed Plaintiff, his pro se status "does not excuse him from complying with the procedural rules that govern all civil actions filed in this District—namely, the Federal Rules of Civil Procedure and the Local Rules of Practice for the District of Colorado." (*Id.* at 2 (citing *Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 n.2 (10th Cir. 2008)).) Plaintiff's Third Amended Complaint can and should be dismissed on these grounds alone.

However, the Court also finds that Plaintiff fails to state a claim against Raytheon under Rule 12(b)(6). Plaintiff's Title VII claims (Claims One and Two) are based on his "disability" and "genetic condition." (Dkt. #38 ¶¶ 73, 85.) But Title VII creates a cause of action for discrimination based on an individual's "race, color, religion, sex, or national origin." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 457 (1975). The Third Amended Complaint does not allege discrimination against Plaintiff because of his membership in one of these protected groups, and Title VII does not support claims for

disability discrimination. *See* 42 U.S.C. § 2000e-2; *Omogbehin v. Cino*, 485 F. App'x 606, 609 (3d Cir. 2012) ("Title VII does not prohibit disability discrimination and related retaliation."); *Snay v. United States Postal Serv.*, 31 F.Supp.2d 92, 100 (N.D.N.Y. 1998) ("Title VII does not cover disability discrimination.").

Plaintiff concedes the point but asks that the Court construe his claims as actually being brought under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101, and the Genetic Information Nondiscrimination Act of 2008 ("GINA"), pointing out that he cites these statutes (almost 50 pages later) in the "Relief Requested from the Court" section of his Third Amended Complaint. But this just highlights the manifest shortcomings of the pleading and why it violates Rule 8. *See Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007) (stating that a plaintiff fulfills his Rule 8 obligations by explaining what each defendant did to him, when the defendant did it, how the defendant's action harmed him, and what specific legal right he believes the defendant violated). And it is "not the district court's job to stitch together cognizable claims for relief from the wholly deficient pleading." *Mann v. Boatright*, 477 F.3d 1140, 1148 (10th Cir. 2007); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Plaintiff's Title VII claims should be dismissed.

Plaintiff encounters similar problems with his § 1981 claims (Claims Three and Four). Section 1981 gives "all persons . . . the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens*." 42 U.S.C. § 1981(a) (emphasis added). This section, then, prohibits racial

discrimination, not disability discrimination. *See Davies v. Polyscience, Inc.,* 126 F. Supp. 2d 391, 393 (E.D. Pa. 2001) ("[Section] 1981 liability does not extend to discrimination based on disability."). Therefore, Plaintiff's § 1981 claims should likewise be dismissed.

Finally, even if the Court were to construe Plaintiff's employment discrimination claims against Raytheon as being asserted under the ADA and GINA, they still fail because, according to Plaintiff's Third Amended Complaint itself, Collins Aerospace, not Raytheon, was Plaintiff's employer. Plaintiff states that "Raytheon is the parent company of Collins Aerospace, the company subsidiary that Plaintiff worked for." (Doc. 38 ¶ 4.) He further alleges that "he was hired by the Collins Aerospace in February of 2021 as a Schedule Analyst Manager." (*Id.* ¶ 9.) He states he complained about the COVID policy "via email to Collins Aerospace Human Resources," (*id.* ¶ 11), and that he informed his supervisor and a human resource representative that he would not follow it on January 20, 2022. (*Id.* ¶ 46.) Then, according to Plaintiff's response, his employment with Collins Aerospace was subsequently terminated. (*See* Dkt. #46 at 8 (stating that "the termination was executed by Collins Aerospace employees").) In short, Plaintiff fails to adequately allege that Raytheon was his employer or that Raytheon terminated him. Plaintiff should have named Collins Aerospace as a defendant for any employment discrimination claim.

III. The Federal Defendants' Motion to Dismiss (Dkt. #43)

The Federal Defendants argue that Plaintiff's claims should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) and for failing to state a claim under Rule 12(b)(6). Again, the Court concurs.

The Court first notes that Plaintiff has abandoned his Eighth and Fourteenth Amendment claims. (*See* Dkt. #50 at 26, 27.) Accordingly, these claims should be dismissed.

In his response brief, Plaintiff further requests that his claim for injunctive relief contained in Claim Twelve be dismissed as to the EEOC. (*See id.* at 12, 37.) And in his surreply (Dkt. #59 at 13–14), he confirms that he no longer seeks injunctive relief against either the EEOC or the HHS (via the CDC) at this time.[6] The Court agrees that the APA claim is moot because the EEOC no longer takes the approach, outlined in its March 14, 2022 Guidance, that ""[t]esting administered by employers consistent with current CDC guidance will meet the ADA's 'business necessity' standard." (*See* Dkt. #38 ¶ 199.) Similarly, on August 11, 2022, the CDC issued new guidance that no longer recommends that employers distinguish between vaccinated and unvaccinated employees and no longer recommends screening for asymptomatic individuals in most community settings. (*See* Dkt. # 58 at 11–13 n.6.) Claim Twelve should be dismissed.

Plaintiff also concedes that his Title VII claims and § 1981 claims cannot be maintained as pled, but again requests that the Court construe his Third Amended Complaint to assert discrimination claims under the "ADA, GINA, and applicable Constitutional and retaliatory laws." (*Id.* at 14–15.) Regardless of Plaintiff's pro se status, the Federal Defendants are not obligated to anticipate what claims Plaintiff

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[6] Plaintiff states that dismissal is warranted on the APA claim but that he wants "Leave to Amend alongside dismissal." (Dkt.# 59 at 14.) This makes little conceptual sense—the Court cannot keep this matter open indefinitely in case the Federal Defendants decide to institute some repugnant policies in the future, and, in any event, Plaintiff has not sought leave to amend. The Court must assume that Plaintiff requests that dismissal of Claim Twelve be without prejudice.

should have made or meant to make. Nor can the Court manufacture claims for Plaintiff that are not contained in his pleading. Plaintiff has had several opportunities to state his case in a clear and concise manner. He has chosen not to do so. And, as is discussed below, these claims are barred by sovereign immunity in any event.

That said, the Court will now address the Federal Defendants' jurisdictional and substantive arguments.

a. Jurisdictional Defects

The Federal Defendants first argue that Claims One, Two, Three, Four, Eleven, and Thirteen are barred by sovereign immunity.

Sovereign immunity shields the United States and its agencies from suit and deprives federal courts of jurisdiction to consider such claims. *San Juan Cnty., Utah v. United States*, 754 F.3d 787, 792 (10th Cir. 2014). This is so unless "Congress unequivocally expresses its intention to waive the government's sovereign immunity in the statutory text." *Governor of Kan. v. Kempthorne*, 516 F.3d 833, 841 (10th Cir. 2008) (internal quotation marks omitted).

"[A] motion to dismiss based on sovereign immunity is treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1)" *Neiberger v. Hawkins*, 150 F. Supp. 2d 1118, 1120 (D.Colo.2001). Because "federal courts are courts of limited jurisdiction," the Court must have a statutory basis to exercise its jurisdiction. *Montoya*, 296 F.3d at 955 (10th Cir. 2002). Statutes conferring subject matter jurisdiction on federal courts are to be strictly construed. *F & S Constr. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). "The burden of establishing subject matter

jurisdiction is on the party asserting jurisdiction." *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

A motion to dismiss pursuant to Rule 12(b)(1) may take two forms: facial attack or factual attack. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). When reviewing a facial attack on a complaint, the Court accepts the allegations of the complaint as true. *Id.* By contrast, when reviewing a factual attack on a complaint, the Court "may not presume the truthfulness of the complaint's factual allegations." *Id.* at 1003. With a factual attack, the moving party challenges the facts upon which subject matter jurisdiction depends. *Id.* The Court therefore must make its own findings of fact. *Id.* In order to make its findings regarding disputed jurisdictional facts, the Court "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing." *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987)). The Court's reliance on "evidence outside the pleadings" to make findings concerning purely jurisdictional facts does not convert a motion to dismiss pursuant to Rule12(b)(1) into a motion for summary judgment pursuant to Rule 56. *Id.*

Turning to the claims at issue, while Congress has waived sovereign immunity in Title VII suits where the federal government is the employer, *see Lindstrom v. United States*, 510 F.3d 1191, 1195 (10th Cir. 2007), Plaintiff alleges that he was employed by Collins Aerospace, not a federal agency. (*See, e.g.*, Dkt. #38 ¶ 9 ("Mr. Freeman was hired by the Collins Aerospace in February of 2021 as a Schedule Analysis Manager.").) He has not shown that Congress has waived sovereign immunity under Title VII for suits

by private employees against private employers, even if those employers happen to government contractors.

Plaintiff again argues that he meant to bring these claims under the ADA and GINA. This is unavailing, not only because the ADA does not apply to federal employers, *see Brown v. Austin,* 13 F.4th 1079, 1084 n.3 (10th Cir. 2021),[7] but also because Claims One and Two are based on *employment* discrimination, and Plaintiff was not employed by the federal government.

Plaintiff argues at length, in the Third Amended Complaint and his response, that the DoD was a joint employer with Raytheon. Putting aside that Plaintiff himself alleges that he was employed by Collins Aerospace, not Raytheon, his "joint employer" argument is untenable. "Under the joint employer test, two entities are considered joint employers if they share or co-determine those matters governing the essential terms and conditions of employment." *Knitter v. Corvias Mil. Living, LLC,* 758 F.3d 1214, 1226 (10th Cir. 2014) (quotations omitted). "Both entities are employers if they both exercise significant control over the same employees." *Id.* (quotations omitted). "Most important to control over the terms and conditions of an employment relationship is the right to terminate it under certain circumstances . . . ." *Id.* (quotations omitted). Additional factors courts consider for determining control under the joint employer test include the ability to "promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; . . . day-to-day supervision of employees, including employee discipline; and . . . control of employee records, including payroll,

[7] Plaintiff points out that the Rehabilitation Act permits such suits against federal agencies. However, unlike the ADA and GINA, the Third Amended Complaint does not even mention the Rehabilitation Act in passing, much less premise a claim on it.

insurance, taxes and the like." *Id.* (quoting *Butterbaugh v. Chertoff*, 479 F. Supp. 2d 485, 491 (W.D. Pa. 2007)).

Plaintiff lists various reasons why he thinks the DoD should be considered a joint employer, including his own experience as a federal contractor with a "highly specialized skillset" and the importance of Raytheon's work to the DoD. (*See* Dkt. #38 ¶ 65.) But he does not allege that the DoD had the right to terminate him, or that it supervised, disciplined, or otherwise set any of the conditions of his employment. Instead, it was Collins Aerospace who hired Plaintiff, who promulgated and enforced the complained-of COVID policies, and who fired him when he refused to comply. Moreover, Plaintiff's position that the DoD's "vaccine or test policy," which was instituted and then suspended *after* Raytheon's COVID requirements were put in place, "alters the relationship of Plaintiff (and all federal Contractors) into a proxy employer-employee relationship with Defendant DoD" (Dkt. #38 ¶ 62) is absurd on its face. Claims One and Two should be dismissed.

Congress has also not waived immunity to suits brought under § 1981. *See Brown v. Fed. Bur. of Prisons*, No. 11-cv-3191-WYD-BNB, 2012 WL 6774822, at *9 (D. Colo. Dec. 7, 2012) ("Sovereign immunity bars suits against the United States, its agencies, and officers acting in their official capacities that are brought pursuant to civil rights statutes"), *report and recommendation adopted*, 2013 WL 66503 (D. Colo. Jan. 4, 2013); *Affiliated Prof'l Home Health Care Agency v. Shalala,* 164 F.3d 282, 286 (5th Cir.1999) ("This Court has long recognized that suits against the United States brought under the civil rights statutes are barred by sovereign immunity."); *Beal v. Blount*, 461 F.2d 1133, 1137 (5th Cir. 1972) (declaring a suit brought in part under §§ 1981–1988

was the sort "barred by the doctrine of sovereign immunity"). Therefore, even if he could state a § 1981 claim (and he cannot), Plaintiff lacks jurisdiction to assert civil rights claims for damages against the Federal Defendants.

Claim Eleven is brought under the "Nuremberg Code banning coercion of persons to participate in medical experiments" and 16 C.F.R. § 1028.116, which, he alleges, bans "coercion of persons to participate in a medical experiment." (Dkt. # 38 ¶¶ 185–86.) Claim Thirteen is brough pursuant to 5 C.F.R. § 2635.101(b), which details ethics rules for executive branch personnel. (*Id.* ¶ 221.) As the Federal Defendants demonstrate, there is no private right of action for violations of these regulations. *See* Dkt. 43 at 19–20 (citing *Reed v. Tyson Foods, Inc.*, No. 21-cv-1155, 2022 WL 2134410, at *12–*13 (W.D. Tenn. June 14, 2022) (dismissing a challenge to a COVID vaccine mandate by a private employer under the Nuremberg Code, finding "no private right of action"); *Robertson ex rel. Robertson v. McGee*, No. 01-cv-60, 2002 WL 535045, at *3 (N.D. Okla. Jan. 28, 2002) ("no private right of action" under Nuremberg Code, citing cases); *cf. Crosby v. Austin*, No. 8:21-cv-2730, 2022 WL 603784, at *1 (M.D. Fla. March 1, 20 2022) (no right of action under an analogous "informed consent" statute, 21 U.S.C. § 360bbb-3); *Norris v. Stanley*, No. 1:21-cv-756, 2022 WL 247507, at *5 (W.D. Mich. Jan. 21, 2022) (same)); *see also* 5 C.F.R. § 2635.106(c) ("A violation of this part of supplemental agency regulations, as such, does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person."); *Scherer v. United States*, 241 F. Supp. 2d 1270, 1285 (D. Kan. 2003) (dismissing a claim based upon the ethics standards because the plaintiff had "no right of action"). Logically, if there is no right of

private action, there is no implication that Congress intended any waiver of sovereign immunity.

Similarly, to the extent Plaintiff intends to assert a claim against the EEOC the way it handled or processed his discrimination claim (*see* Dkt. #38 ¶¶ 69, 77, 87, 96, 106, 130, 142, 155, 168, 179, 190 (complaining that the EEOC "retroactively authorized these unlawful discriminatory practices")), such a claim must fail. In *Scheerer v. Rose State College*, 950 F.2d 661, 663 (10th Cir. 1991), the Tenth Circuit recognized that courts have uniformly rejected the notion that a plaintiff has a cause of action against the EEOC for challenges to the processing of an administrative claim.

Accordingly, Claims One through Four, Eleven, and Thirteen should be dismissed under Rule 12(b)(1) for lack of jurisdiction.

b. Constitutional Violations

Plaintiff cannot maintain any of the remaining constitutional claims against the Federal Defendants.

Plaintiff's First, Fourth, and Fifth Amendment claims (Claims Five, Six, and Seven) fail for lack of state action. The COVID policies at the heart of Plaintiff's Third Amended Complaint were implemented by his employer, Collins Aerospace. Private parties are not liable for constitutional violations unless they are "jointly engaged with the state officials in the conduct allegedly violating the federal right." *Janny v. Gamez*, 8 F.4th 883, 919 (10th Cir. 2021); *see also Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp. 3d 157, 175 (D.D.C. 2017) ("It is axiomatic that to elicit First Amendment protection, the infringement upon speech or petition rights must have arisen from state action of some kind.") (quotations omitted)); *Gallagher v. Neil Young Freedom Concert*,

49 F.3d 1442, 1446 (10th Cir. 1995) ("only unreasonable searches and seizures conducted by the government and its agents are prohibited" by the Fourth Amendment); *Behagen v. Amateur Basketball Ass'n of U.S.*, 884 F.2d 524, 530 (10th Cir. 1989) ("It is axiomatic that the fifth amendment applies to and restricts only the Federal Government and not private persons." (quotations omitted)). The constitutional distinction between governmental action and private conduct "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Gallagher*, 49 F.3d at 1447 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). While Plaintiff maintains that "[g]overnment policies and actions have exerted a strong influence on the policies of Raytheon to such a degree to warrant their status as Defendants in this suit" (Dkt. #50 at 15), he admits that the government's COVID protocols were not even being enforced at the time of his termination. (*See* Dkt. #38 ¶¶ 42, 76.) Plaintiff cannot state constitutional claims against the Federal Defendants based on Plaintiff's conditions of employment with Collins Aerospace, a private actor.

Finally, because "[t]he Ninth Amendment is not an independent source of individual rights." *Holmes v. Town of Silver City*, 826 F. App'x 678, 681–82 (10th Cir. 2020), Claim Nine fails as a matter of law.

III. Plaintiff's Motion for Summary Judgment (Dkt. #47)

As the Court has found Plaintiff has failed to state a claim against Raytheon, Plaintiff's motion for summary judgment against the company should be denied.

RECOMMENDATION

Accordingly, it is hereby **RECOMMENDED** that:

- Defendant Raytheon Technologies Corporation's Motion to Dismiss Plaintiff's Third Amended Complaint (Dkt. #42) be **GRANTED**;

- The Federal Defendants' Motion to Dismiss (Dkt. #43) be **GRANTED**; and
- Plaintiff's Motion for Summary Judgment Against Raytheon Technologies Corporation (Dkt. #47) be **DENIED**.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, *Thomas v. Arn*, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated: February 10, 2023
Denver, Colorado

N. Reid Neureiter
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Charlotte N. Sweeney

Civil Action No. 1:22-cv-01161-CNS-NRN

MICHAEL S. FREEMAN, II,

Plaintiff,

v.

RAYTHEON TECHNOLOGIES CORPORATION,
U.S. DEPARTMENT OF DEFENSE,
EQUAL EMPLOYMENT AND OPPORTUNITY COMMISSION, and
U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES,

Defendants.

ORDER

Before the Court is Plaintiff's Objection[1] (ECF No. 69) to United States Magistrate Judge Neureiter's Report and Recommendation (ECF No. 66), which recommends granting Defendant Raytheon Technologies Corporation's Motion to Dismiss (ECF No. 42), granting the Federal Defendants' Motion to Dismiss (ECF No. 43), and denying Plaintiff's Motion for Summary Judgment Against Raytheon Technologies Corporation (ECF No. 47). For the following reasons, the Court AFFIRMS and ADOPTS the Recommendation.

[1] Plaintiff spends a considerable amount of his briefing conducting ad hominem attacks against Defendants and Magistrate Judge Neureiter. The Court does not appreciate such commentary or accusations that the magistrate judge is perpetuating falsehoods about his arguments (*see, e.g.*, ECF No. 69 at 9). The Court has read all the pleadings as well as the Recommendation and can clearly see that the magistrate judge performed a thorough analysis of Plaintiff's claims and such analysis comports with the precedent within the Tenth Circuit.

I. SUMMARY OF ORDER FOR PRO SE PLAINTIFF MICHAEL S. FREEMAN II

You started this lawsuit on May 9, 2022, raising claims against Raytheon Technologies Corporation, the U.S. Department of Defense, the Equal Employment and Opportunity Commission, and the U.S. Department of Health & Human Services about your termination from Collins Aerospace for refusing to comply with their COVID-19 protocols for unvaccinated employees. You did not list Collins Aerospace as a defendant in this case. The Defendants, whom you named in your lawsuit, filed two motions to dismiss your Third Amended Complaint due to sovereign immunity because you are attempting to sue federal agencies, and failure to state a claim because Raytheon was not your employer who terminated you. Magistrate Judge Neureiter recommended that the Court grant the two motions to dismiss and deny your motion for summary judgment against Raytheon. This Court is generally adopting the magistrate judge's recommendation and will explain why it is granting the two motions to dismiss further below and denying your motion for summary judgment. The Order will discuss the legal authority that supports this conclusion. This Order results in the dismissal of all your claims and your lawsuit.

II. BACKGROUND

This civil action arises from Plaintiff's termination from his job as a schedule analyst manager for Collins Aerospace (ECF No. 38 at 10). Collins Aerospace is a subsidiary of Raytheon, which is a U.S. Department of Defense (DoD) federal contractor (*id.*). Plaintiff alleges that he has a genetic blood disorder, beta thalassemia, that causes anemia-like symptoms (*id.* at 7). Plaintiff did not name Collins Aerospace as a defendant in this case. Plaintiff alleges that the Defendants discriminated and retaliated against him because of his COVID-19 vaccination status, genetic condition, request for accommodation, and complaint of discrimination (*id.*). According to

Plaintiff, Raytheon promulgated a vaccine policy where employees must either (1) receive the complete regiment of COVID-19 vaccinations or (2) if approved for a reasonable accommodation, may work from home but must regularly conduct COVID-19 tests, test negative for COVID-19 seventy-two hours before entering a work facility, and wear a facemask while onsite (*id.* at 11).

Plaintiff alleges that he requested and received an accommodation from his employer, Collins Aerospace, sometime in January 2022 (*id.* at 19-20). Plaintiff alleges that he was terminated by Collins Aerospace on January 28, 2022, after he refused to comply with the policy for unvaccinated employees (*id.*). Plaintiff alleges that he filed a complaint with the Equal Employment Opportunity Commission (EEOC) against Raytheon in March 2022 (*id.* at 20). Plaintiff alleges that he received a Notice of Right to Sue Letter from the EEOC on April 11, 2022 (*id.* at 22).

Plaintiff raises thirteen claims for relief alleging violations of: (1) Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e, for disability and genetic discrimination against all Defendants; (2) Title VII against all Defendants for retaliation; (3) 42 U.S.C. § 1981 for discriminatory treatment based on a disability and genetic condition against all Defendants; (4) 42 U.S.C. § 1981 for retaliation against all Defendants; (5) the First Amendment against Defendants DoD, EEOC, U.S. Department of Health & Human Services (HHS), Becerra, and Austin (the Federal Defendants); (6) the Fourth Amendment against the Federal Defendants; (7) the Fifth Amendment against the Federal Defendants; (8) the Eighth Amendment against the Federal Defendants; (9) the Ninth Amendment against the Federal Defendants; (10) the Fourteenth Amendment against the Federal Defendants; (11) the Nuremberg Code and 16 C.F.R. § 1028.116 (general requirements for informed consent) against the Federal Defendants; (12) the

Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A)-(B) and requesting for injunctive relief against the Federal Defendants; and (13) 5 C.F.R. § 2635.101 (basic obligation of public service) against the Federal Defendants (*id.* at 34-81).

Magistrate Judge Neureiter recommended dismissing Plaintiff's Third Amended Complaint because (1) the pleadings did not comply with Federal Rule of Civil Procedure 8(a)(2); (2) Plaintiff failed to state a claim against Defendant Raytheon under Federal Rule of Civil Procedure 12(b)(6); (3) Plaintiff abandoned his Eighth and Fourteenth Amendment claims; (4) claims one through four, eleven, and thirteen should be dismissed under Rule 12(b)(1) for lack of jurisdiction due to sovereign immunity; and (5) claims five, six, and seven must be dismissed for failure to allege state action (ECF No. 66 at 19-20). Additionally, Magistrate Judge Neureiter recommended denying Plaintiff's motion for summary judgment (*id.*).

III. STANDARD OF REVIEW

Because Plaintiff is proceeding pro se, this Court construes his filings liberally; however, this Court does not assume the role of advocate for him. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine *de novo* any part of the magistrate judge's [recommendation] that has been properly objected to." An objection to a recommendation is properly made if it is both timely and specific. *United States v. 2121 East 30th St.*, 73 F.3d 1057, 1059–60 (10th Cir. 1996). An objection is sufficiently specific if it "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id.* at 1059. In conducting its review, "[t]he district judge may accept, reject, or modify the [recommendation]; receive further

evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

Rule 12(b)(1) governs dismissal challenges for lack of subject matter jurisdiction and assumes two forms: factual or facial. In the first, the moving party may "facially attack the complaint's allegations as to the existence of subject matter jurisdiction." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004). When reviewing a facial attack, courts must accept a complaint's allegations in the complaint as true. *Ratheal v. United States*, No. 20-4099, 2021 WL 3619902, at *3 (10th Cir. Aug. 16, 2021) (citation omitted). In the second, a party may "go beyond" the complaint's allegations by presenting evidence challenging the factual basis "upon which subject matter jurisdiction rests." *Nudell*, 363 F.3d at 1074 (citation omitted). When reviewing a factual attack, courts cannot "presume the truthfulness of the complaint's factual allegations," and may consider documents outside the complaint without converting the motion to dismiss into a motion for summary judgment. *Ratheal*, 2021 WL 3619902, at *3. In this instance, the plaintiff bears the burden of establishing subject matter jurisdiction as the party asserting it exists. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Under Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true and interpreted in the light most favorable to the non-moving party, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Additionally, the complaint must sufficiently allege facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed; however, a complaint may be dismissed because it asserts a legal theory not cognizable as a matter of law. *Forest Guardians v. Forsgren*,

478 F.3d 1149, 1160 (10th Cir. 2007); *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1217 (D. Colo. 2004). A claim is not plausible on its face "if [the allegations] are so general that they encompass a wide swath of conduct, much of it innocent," and the plaintiff has failed to "nudge[the] claims across the line from conceivable to plausible." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). The standard, however, remains a liberal pleading standard, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (internal quotations and citation omitted).

IV. ANALYSIS

The Court has reviewed the Third Amended Complaint, Defendants' two motions to dismiss, Plaintiff's Objection, and the relevant legal authority. After conducting a de novo review, the Court agrees with Magistrate Judge Neureiter's analysis that Plaintiff's Third Amended Complaint should be dismissed under Rule 12(b)(1) and (b)(6) and that Plaintiff's motion for summary judgment should be denied. Plaintiff filed a timely Objection and was permitted by the Court to file a reply (ECF No. 69, 74).[2]

A. Objections Not Raised and Conceded Claims (Claims Eight, Ten, Twelve, Three, and Four)

The Court notes that Plaintiff abandoned his eighth (Eighth Amendment) and tenth (Fourteenth Amendment) claims in his response to the Federal Defendant's motion to dismiss

[2] Plaintiff alleges that the Federal Defendants present new arguments in the response to Plaintiff's objection (ECF No. 70). The Court finds that the Federal Defendants' responses are in line with the arguments Plaintiff raised in his Objection and Magistrate Judge Neureiter's analysis in the Recommendation. Furthermore, the Court does not find that the Federal Defendants' arguments are misleading, despite Plaintiff's protests (*see* ECF No. 74 at 5-8).

(ECF No. 50 at 26-27). Plaintiff also does not argue that the magistrate judge erred in determining that Plaintiff abandoned these claims. Accordingly, these claims are dismissed.

Plaintiff did not object to the Recommendation's dismissal of his twelfth claim (APA and injunctive relief). In his objection, Plaintiff states:

> The Court states that the Plaintiff's request for the Administrative Procedures Act (APA) Claims against Defendant EEOC and Defendant HHS "makes little conceptual sense". Plaintiff's objective with his request for Leave to Amend is to preserve the applicability of the chain of events in the event that the federal government pursues these abusive and unscientific policies once again.

(ECF No. 69 at 5). The Court finds that this is not a specific objection to the magistrate judge's analysis. A party's failure to file such written objections may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). When this occurs, the Court is "accorded considerable discretion" and "may review a [magistrate judge's] report under any standard it deems appropriate." *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) (citing *Thomas*, 474 U.S. at 150). After reviewing all the relevant pleadings, the Court concludes that Magistrate Judge Neureiter's analysis was thorough and comprehensive, the Recommendation is well-reasoned on this issue, and the Court finds no clear error. Plaintiff's twelfth claim is also dismissed.

Finally, Plaintiff concedes in his Objection that he has admitted that 42 U.S.C. § 1981 was "cited in error" (ECF No. 69 at 8). Accordingly, Plaintiff's third and fourth claims are dismissed.

B. Remaining Claims Against Defendant Raytheon (Claims One and Two)

Plaintiff's allegations against Defendant Raytheon follow as such: (1) Collins Aerospace is a subsidiary of Raytheon; (2) Raytheon is the parent corporation and a government contractor with the DoD; (3) Raytheon allegedly implemented a COVID-19 policy where employees must

either be vaccinated, work from home if unvaccinated, or (if unvaccinated and must work in person) test negative and wear a mask and therefore discriminated and retaliated against Plaintiff in violation of Title VII; (4) Collins Aerospace implemented this policy; and (5) "Defendants EEOC and DoD had knowledge of Raytheon's discriminatory and retaliatory practices yet failed to take any action to address them" (ECF No. 38 at 9-11). Plaintiff alleges that he was discriminated against after requesting an accommodation (after not getting vaccinated against COVID-19) because vaccinated employees are not required to test negative for COVID-19 and wear a mask before being on the premises of Collins Aerospace (*id.* at 11). The magistrate judge largely recommended dismissing these claims under Rule 8 because it could not discern cognizable claims. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Plaintiff states in his Objection that the Court fails to understand his argument that "it was Defendant Raytheon that 'promulgated' this policy—Collins Aerospace was merely executing a policy that Defendant Raytheon made them execute (ultimately to satisfy the government)" (ECF No. 69 at 8). The magistrate judge noted in the Recommendation:

> Finally, even if the Court were to construe Plaintiff's employment discrimination claims against Raytheon as being asserted under the ADA and GINA, they still fail because, according to Plaintiff's Third Amended Complaint itself, Collins Aerospace, not Raytheon, was Plaintiff's employer.

(ECF No. 66 at 11). "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *Cyprus Amax Mins. Co. v. TCI Pac. Commc'ns, LLC*, 28 F.4th 996, 1007 (10th Cir. 2022) (citing *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)). "A presumption of corporate separateness exists that

is overcome only by clear evidence that the parent in fact controls the subsidiary." *F.D.I.C. v. First Interstate Bank of Denver, N.A.*, 937 F. Supp. 1461, 1466 (D. Colo. 1996).

Plaintiff's Third Amended Complaint fails to show that Defendant Raytheon used Collins Aerospace to perpetuate a fraud or wrong that would permit Plaintiff to pierce the corporate veil. *See Boughton v. Cotter Corp.*, 65 F.3d 823, 835 (10th Cir. 1995). Despite Plaintiff's protests that the magistrate judge did not understand his claims, the facts of Plaintiff's Third Amended Complaint are clear: he was hired by Collins Aerospace, Collins Aerospace promulgated and enforced a COVID-19 policy, and Collins Aerospace terminated Plaintiff after he refused to comply with the policy regarding masking and testing for non-vaccinated employees (ECF No. 38 at 10-11). Accordingly. Plaintiff's claims against Defendant Raytheon are dismissed for failure to state a claim under Rule 12(b)(6).

C. Remaining Claims Against the Federal Defendants (Claims One, Two, Three, Four, Five, Six, Seven, Nine, Eleven, and Thirteen)

The next deficiency in Plaintiff's Third Amended Complaint is that he cannot show that the DoD, EEOC, or HHS are responsible for the actions taken by Collins Aerospace. Plaintiff was not employed by the federal government but rather by Collins Aerospace. Plaintiff alleges that Defendant DoD was in a "joint-employer-employee relationship" with Raytheon and Collins Aerospace (ECF No. 38 at 25). Plaintiff's basis for his allegations against Defendant EEOC pertains to the processing of his initial discrimination claim and updating the EEOC guidance and policies (*id.* at 11-12, 20-21). Plaintiff's only basis for his allegations against Defendant HHS is the alleged guidance it issued regarding the COVID-19 pandemic (*id.* at 15-22).

First, Plaintiff argued in his first two claims that he was discriminated and retaliated against, in violation of Title VII, and that the EEOC and DoD knew of these practices (ECF No.

38 at 11). Plaintiff later argued that he meant to allege violations of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) (*see* ECF No. 69 at 7). The Court will not analyze claims that were not raised in the Third Amended Complaint.[3] While the Court must construe pro se filings liberally, the claims in the Third Amended Complaint must put the parties and the Court on notice of what is being alleged. *See Twombly*, 550 U.S. at 555. The Court notes that Plaintiff does not object to the magistrate judge's recommendation regarding sovereign immunity; rather, Plaintiff objects to sub-issues pertaining to sovereign immunity (*see* ECF No. 69 at 6). Accordingly, the Court will review Plaintiff's remaining claims and objections.

1. Sovereign Immunity-DoD (Claims One, Two, and Thirteen)

Plaintiff objects to the magistrate judge's analysis that the DoD was not a joint employer, and that sovereign immunity bars his claims against the agency. Sovereign immunity bars Plaintiff's claims against the DoD unless he can show that the DoD was his employer. *Knitter v. Corvias Mil. Living, LLC*, 758 F.3d 1214, 1225 (10th Cir. 2014) ("To make out a prima facie case

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[3] The Court notes that then-Magistrate Judge Wang instructed Plaintiff in her sua sponte Order, dated May 19, 2022, that Plaintiff needed to file a Second Amended Complaint that would remedy the deficiencies identified. He did not. In particular then-Magistrate Judge Wang noted:

> With respect to Raytheon, although Plaintiff generally invokes principles of disability discrimination, genetic discrimination, and/or retaliation in the context of three federal statutes, he does not identify any specific claims raised under any statute or the theories upon which those claims rely. *See* [*id.* at ¶ 21]. "A complaint falls short of Rule 8's notice requirement when it fails to list or clearly articulate any causes of action." *Polovino v. Int'l Bhd. of Elec. Workers, AFL-CIO*, No. 15-cv-023-JHP-PJC, 2015 WL 4716543, at *4 (N.D. Okla. Aug. 7, 2015); *Swint v. Mueller*, No. 21-cv-382 MV-JFR, 2021 WL 2822601, at *1 (D.N.M. July 7, 2021) (complaint failed to comply with Rule 8 where it "[did] not include discernable claims" and instead simply stated "Title VII – Discrimination"). "Claims must be presented clearly and concisely in a manageable format that allows the Court and Defendants to know what claims are being asserted and to be able to respond to those claims." *Moore v. Cosarrubias*, No. 18-cv-00259-GPG, 2018 WL 11145813, at *2 (D. Colo. Mar. 9, 2018). To meet the requirements of Rule 8, Plaintiff must provide more than "a bare averment that he wants relief and is entitled to seek it." *Noor v. Hickenlooper*, No. 13-cv-00692-REB-CBS, 2013 WL 1232201, at *1 (D. Colo. Mar. 26, 2013). Plaintiff's attribution of various violations of federal statutes and constitutional provisions to the Department of Defense, the EEOC, and the Department of Health and Human Services also does not pass Rule 8 muster.

(ECF No. 13 at 4).

of either wage discrimination or retaliatory termination under Title VII, a plaintiff must first prove the defendant was her employer."). Magistrate Judge Neureiter correctly noted that the DoD had not set any conditions of Plaintiff's employment and, based on Plaintiff's allegations in the Third Amended Complaint, the only entity that hired Plaintiff, promulgated and enforced the COVID-19 policy, and terminated Plaintiff's employment was Collins Aerospace.

"Under the joint employer test, two entities are considered joint employers if they share or co-determine those matters governing the essential terms and conditions of employment." *Knitter*, 758 F.3d at 1226 (internal quotations and citation omitted). The most important factor to examine is the "control over the terms and conditions of an employment relationship" and the "right to terminate it under certain circumstances." *Id.* (quotations omitted). Plaintiff has not alleged that DoD had the ability to terminate him and accordingly cannot establish a joint-employer relationship. Therefore, Plaintiff's objection is overruled. Because Plaintiff does not raise any further objections regarding sovereign immunity and Defendant DoD, the Court dismisses claims one, two, and thirteen against Defendant DoD.

2. Sovereign Immunity-EEOC (Claims One, Two, and Thirteen)

Plaintiff next objects regarding his claims against the EEOC and states that "Plaintiff has made it clear throughout multiple filings that his claims stem from policies of Defendant EEOC and not the manner in which the claim was processed" (ECF No. 69 at 9). Despite his claims regarding the EEOC denying his claim in his Third Amended Complaint, the Court will only examine sovereign immunity and the EEOC's promulgation of policies during the COVID-19 pandemic. Regardless, Plaintiff still cannot overcome the ruling that sovereign immunity bars his claims against Defendant EEOC. Waiver of sovereign immunity is narrowly construed. *West v.*

Gibson, 527 U.S. 212, 222 (1999). Plaintiff does not argue that he can overcome sovereign immunity as to the EEOC's promulgation of policies or cite any caselaw that supports his position. Accordingly, the Court overrules his objection and dismisses claims one, two, and thirteen against Defendant EEOC.

3. Sovereign Immunity-HHS (Claims One, Two, and Thirteen)

Plaintiff does not raise any objections to the magistrate judge's conclusion that sovereign immunity bars his claims against Defendant HHS. Accordingly, the Court dismisses claims one, two, and thirteen against Defendant HHS.

4. Remaining Constitutional Claims (Claims Five, Six, Seven, and Nine)

Regarding claims five, six, and seven (violations of the First, Fourth, and Fifth Amendments, respectively), Plaintiff does not contest the magistrate judge's determination that his pleadings fail for lack of state action (ECF No. 69 at 9). The magistrate judge determined that the COVID-19 policy was implemented by Collins Aerospace and not a state actor. Plaintiff contends that his previous filings show that Defendant Raytheon "jointly engaged with the state officials in the conduct allegedly violating the federal right." Plaintiff still does not overcome his burden to show that "the alleged deprivation of constitutional rights was caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (internal quotations and citation omitted). Plaintiff failed to allege that Defendant Raytheon was responsible as a corporate parent of Collins Aerospace. Plaintiff also fails to show how the federal agencies were responsible for the actions taken by Collins Aerospace. Thus, the links in his theory are broken and he cannot show that the federal

government has violated the First, Fourth, or Fifth Amendments for conduct taken by a private actor, namely Collins Aerospace.[4]

Regarding the Ninth Amendment, Plaintiff does not contest the caselaw cited or legal conclusion that the magistrate judge reached, that is, the Ninth Amendment is not an independent source of individual rights. Plaintiff only alleged in his Third Amended Complaint that the Federal Defendants' actions failed to "adhere to the U.S. Constitution" and that the "unlawful employment practices were done with malice or with reckless indifference to Mr. Freeman's Constitutional rights" (ECF No. 38 at 60). The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. However, the Ninth Amendment has "never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim." *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986); *see also Holmes v. Town of Silver City*, 826 F. App'x 678, 681 (10th Cir. 2020). Plaintiff now argues in his Objection that he wishes to "combine" his Ninth Amendment claim with his claim of a violation of the Nuremberg Code to create a cause of action. However, as this Court previously noted, this claim was not present in the Third Amended Complaint, and, thus, the Court did not analyze it. Regardless, Plaintiff's Nuremberg Code claim also fails as a matter of law, and therefore, combining this issue with the Ninth Amendment would be fruitless. Accordingly, claims five, six, seven, and nine are dismissed.

[4] Plaintiff also concedes in his Third Amended Complaint that the federal COVID-19 protocols were not being enforced at the time of his termination (ECF No. 38 at 19, 35 ("Defendant DoD mandated that all contractors follow these unlawful discriminatory practices such as this. This mandate was eventually overturned by an injunction from federal courts, and enforcement remains suspended while they appeal the injunction.")).

5. Nuremberg Code and 16 CFR § 1028.116 (Claim Eleven)

"The United States Military Tribunal established the Nuremberg Code as a standard against which to judge German scientists who experimented with human subjects." *United States v. Stanley*, 483 U.S. 669, 687 (1987) (Brennan, J., concurring). Nothing, however, under 16 C.F.R. § 1028.116 establishes a private right of action for a party. *See Kriley v. Nw. Mem'l Healthcare*, No. 22-1606, 2023 WL 371643, at *2 (7th Cir. Jan. 24, 2023) ("Nothing suggests that [plaintiff] has even an arguable right to sue the defendants under these regulations."). Thus, the magistrate judge did not err in concluding that because there was no private right of action under either the Nuremberg Code or 16 C.F.R. § 1028.116, there was no waiver of sovereign immunity and Plaintiff could not raise this claim. Accordingly, Plaintiff's eleventh claim is dismissed.

D. Plaintiff's Motion for Summary Judgment

Because none of Plaintiff's claims survive Defendants' motions to dismiss, the magistrate judge correctly recommended that Plaintiff's motion for summary judgment should be denied (ECF No. 66 at 19). Accordingly, the Court denies Plaintiff's motion for summary judgment against Defendant Raytheon (ECF No. 47).

V. CONCLUSION

Accordingly, the Recommendation of Magistrate Judge Neureiter is AFFIRMED and ADOPTED (ECF No. 66). Plaintiff's objection is OVERRULED, Defendants' motions to dismiss are GRANTED (ECF Nos. 42, 43), and Plaintiff's motion for summary judgment is DENIED (ECF No. 47).

It is FURTHER ORDERED that Plaintiff's Third Amended Complaint is DISMISSED (ECF No. 38).

It is FURTHER ORDERED that the Clerk of the Court is directed to terminate this case.

DATED this 24th day of March 2023.

BY THE COURT:

Charlotte N. Sweeney
United States District Judge

SEPTEMBER 09, 2021

Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and section 301 of title 3, United States Code, and in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce, it is hereby ordered as follows:

Section 1. Policy. This order promotes economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument as described in section 5(a) of this order. These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government. Accordingly, ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.

Sec. 2. Providing for Adequate COVID-19 Safety Protocols for Federal Contractors and Subcontractors. (a) Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments (as described in section 5(a) of this order) include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting. This clause shall apply to any

workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).

(b) By September 24, 2021, the Safer Federal Workforce Task Force (Task Force) shall, as part of its issuance of Task Force Guidance, provide definitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions to Task Force Guidance that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).

(c) Prior to the Task Force publishing new Guidance related to COVID-19 for contractor or subcontractor workplace locations, including the Guidance developed pursuant to subsection (b) of this section, the Director shall, as an exercise of the delegation of my authority under the Federal Property and Administrative Services Act, *see* 3 U.S.C. 301, determine whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. Upon an affirmative determination by the Director, the Director's approval of the Guidance, and subsequent issuance of such Guidance by the Task Force, contractors and subcontractors working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order), shall adhere to the requirements of the newly published Guidance, in accordance with the clause described in subsection (a) of this section. The Director shall publish such determination in the *Federal Register*.

(d) Nothing in this order shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective safety protocols than those established under this order or with any more protective Federal law, regulation, or agency instructions for contractor or subcontractor employees working at a Federal building or a federally controlled workplace.

(e) For purposes of this order, the term "contract or contract-like instrument" shall have the meaning set forth in the Department of Labor's proposed rule, "Increasing the Minimum Wage for Federal Contractors," 86 Fed. Reg. 38816, 38887 (July 22, 2021). If the Department of Labor issues a final rule relating to that proposed rule, that term shall have the meaning set forth in that final rule.

simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation;

(iv) employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the Federal Acquisition Regulation; or

(v) subcontracts solely for the provision of products.

Sec. 6. Effective Date. (a) Except as provided in subsection (b) of this section, this order is effective immediately and shall apply to new contracts; new contract-like instruments; new solicitations for contracts or contract-like instruments; extensions or renewals of existing contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments, as described in section 5(a) of this order, where the relevant contract or contract-like instrument will be entered into, the relevant contract or contract-like instrument will be extended or renewed, or the relevant option will be exercised, on or after:

(i) October 15, 2021, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 3(a) of this order; or

(ii) for contracts and contract-like instruments that are not subject to the Federal Acquisition Regulation and where an agency action is taken pursuant to section 3(b) of this order, October 15, 2021, consistent with the effective date for such action.

(b) As an exception to subsection (a) of this section, where agencies have issued a solicitation before the effective date for the relevant action taken pursuant to section 3 of this order and entered into a new contract or contract-like instrument resulting from such solicitation within 30 days of such effective date, such agencies are strongly encouraged to ensure that the safety protocols specified in section 2 of this order are applied in the new contract or contract-like instrument. But if that contract or contract-like instrument term is subsequently extended or renewed, or an option is subsequently exercised under that contract or contract-like instrument, the safety protocols specified in section 2 of this order shall apply to that extension, renewal, or option.

(c) For all existing contracts and contract-like instruments, solicitations issued between the date of this order and the effective dates set forth in this section, and contracts and contract-like instruments entered into between the date of this order and the effective dates set forth in this section, agencies are strongly encouraged, to the extent permitted by law, to ensure that the safety protocols required under those contracts and contract-like

instruments are consistent with the requirements specified in section 2 of this order.

Sec. 7. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,

September 9, 2021.