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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEF ROBINSON,

Plaintiff,

vs.

DIGNITY HEALTH d/b/a CHANDLER REGIONAL MEDICAL CENTER,

Defendant.

No. 16-cv-03035-YGR

DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES

Date: August 23, 2016
Time: 2:00 p.m.
Location: Oakland Courthouse, Courtroom 1, Fourth Floor
Judge: Hon. Yvonne Gonzalez Rogers

Complaint Filed: June 6, 2016
Trial Date: None Set

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NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(6)

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that this motion will be heard on August 23, 2016 at 2:00 p.m. or as soon thereafter as counsel may be heard before the Honorable Yvonne Gonzalez Rogers, United States District Judge for the Northern District of California, in Courtroom 1, Fourth Floor of the United States Courthouse, located at 1301 Clay Street, Oakland, California 94612.

Defendant Dignity Health dba Chandler Regional Medical Center will and hereby does move the Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing the complaint of Plaintiff Josef Robinson on the ground the complaint fails to state a claim.

This motion is based upon this Notice of Motion and attached Memorandum of Points and Authorities; Defendant's Motion to Transfer Pursuant to 28 U.S.C. § 1404(a) or §1406; all pleadings and papers on file in this matter; and all other such evidence or argument as may be submitted to the Court at or prior to the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED

1. Whether plaintiff Josef Robinson's claim for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), fails because Title VII does not prohibit an employer from providing a self-insured health plan to its employees that excludes coverage for sex transformation surgery and related services.

2. Whether Robinson's claim for violation of section 1557 of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18116, fails because the regulation implementing the ACA, which prohibits health care employers from categorically excluding coverage for "all health services related to gender transition," was not in effect at the time Robinson's claim was denied on the ground that his employer's plan does not cover it.

II. INTRODUCTION

Robinson, a transgender employee of Chandler Regional Medical Center ("Chandler"), a Dignity Health hospital in Arizona, alleges Chandler unlawfully discriminated against him on the basis of sex by excluding coverage for "sex transformation" surgery from the self-insured health

plan that it offers to employees. He contends the exclusion violates Title VII, as well as the non-discrimination provision in section 1557 of the ACA. These allegations fail to state a plausible claim.

A coverage exclusion that applies equally to all employees, as here, does not violate Title VII. Robinson is aware of this and, as a result, asks this Court to expand Title VII to cover transgender status as a new protected classification. But a court cannot simply add new protected categories to the statute. That is exclusively a task for Congress, which has repeatedly considered and rejected proposed legislation that would expand the reach of Title VII to encompass transgender status and create new rights that Robinson seeks to impose through this lawsuit. The Court should not impose new prohibitions not in the statute and that Congress has declined to impose.

Robinson's allegations fail to state a claim for sex stereotyping—the only basis on which Title VII may protect transgender individuals from discrimination. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that Title VII's prohibition of discrimination "because of . . . sex" includes discrimination against a person on the basis of a perception that the person's appearance or behavior does not conform to the employer's stereotyped views of how a person of that gender should look or act. Some courts have relied on *Price Waterhouse*'s "sex stereotyping" theory to protect transgender individuals from discrimination based upon their failure to exhibit stereotypical gender characteristics.

That is not this case. Robinson does not and cannot plausibly allege Chandler put the coverage exclusion in its Plan because Robinson or any other transgender individual failed to conform to a stereotype of how he or she should dress or behave in the workplace. He alleges that he is currently working at Chandler, and does not allege he is unable to present himself at work as male or suffers any adverse consequences from doing so. Robinson cannot shoehorn his allegations about health coverage into a claim for sex stereotyping.

Robinson's allegation that the "medical transition from one sex to another" involved in transgender surgery "inherently violates sex stereotypes" (Compl. ¶ 57) does not remotely suffice to plead facts to plausibly support a sex stereotyping case. Indeed, the same contention of

"inherent" stereotyping was recently rejected as a basis to recognize a new protected status under Title VII. *See Christiansen v. Omnicom Group, Inc.*, __ F. Supp. 3d__, 2016 WL 951581, at *14 (S.D.N.Y. March 9, 2016) (rejecting argument that although Title VII does not prohibit discrimination based on sexual orientation, a plaintiff could still maintain a claim based on "the stereotyping inherent in his claim for discrimination based on sexual orientation").

There is no support for treating transgender status as a protected category under Title VII where it does not fit the parameters of sex stereotyping under *Price Waterhouse.* Moreover, even if the Court were to write transgender status into Title VII, the statute still would not reach the health coverage exclusion here. Robinson fails to allege Chandler adopted the policy exclusion *because* it intended to treat transgender persons differently, as required for a Title VII claim. Here, as alleged, Chandler's policy exclusion applies neutrally to all employees.

Finally, Robinson's claim of an ACA violation also fails as a matter of law. The ACA's nondiscrimination requirement, section 1557, on its face prohibits only the same discrimination based on sex that is prohibited by Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. Title IX cases are typically analyzed with reference to Title VII case law, bringing Robinson's allegations back full circle to his failed Title VII claim. While the Office of Civil Rights (OCR) of the Department of Health and Human Services has recently (May 2016) promulgated a new regulation that may prohibit the categorical exclusion of coverage of all gender transition services, the regulation clearly imposes *new* requirements that did not previously exist. If Chandler's Plan is not in compliance with the regulation, then Chandler must undertake to redesign its Plan in order to bring it into compliance with the regulation, such as by amending the exclusionary provision. Under the regulation, issues of plan design—defined to include "covered benefits, benefits limitations or restrictions"—need not be implemented until the first plan year beginning after January 1, 2017.[1] Even if the issue did not involve plan design (which it indisputably does), the regulation does not go into effect until July 18, 2016, long after the Plan denied Robinson's request for coverage based on the exclusion.

Moreover, nothing in the ACA or the regulation prohibits employers from deciding to

[1] 81 Fed. Reg. 31376, 31378 (May 18, 2016).

exclude particular coverage based on nondiscriminatory reasons such as the absence of medical necessity. Robinson alleges a virtual consensus that transgender surgery is medically necessary, but that is incorrect. Indeed, as the Centers for Medicare & Medicaid (CMS) recently reported after a lengthy review of the medical literature, "*there is not enough evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria*."[2] Likewise, Arizona's Medicaid law specifically excludes such coverage. *See* Ariz. Admin. Code § R9-22-205(B)(4)(a).

Robinson's contention that Chandler violated anti-discrimination law by excluding a category of treatment—a contention that lacks any allegation of intent to discriminate and that relates to a time when the exclusion was not prohibited by any law or regulation—is not plausible, or even tenable. The complaint should be dismissed as a matter of law, with prejudice, as the defects in the claims cannot be cured by amendment.

III. ALLEGATIONS OF THE COMPLAINT

Robinson alleges he is a man who is transgender, meaning that "he was assigned the sex of female at birth, but his gender identity is male and he identifies as a man." (Compl. ¶ 22.) Robinson has been employed as a nurse at Chandler since January 2014. (Compl. ¶ 30.) He has health care coverage through Chandler's self-funded Plan, which is administered by United Medical Resources. (Compl. ¶ 31.) The Plan contains an exclusion of coverage for "sex transformation," defined as "[t]reatment, drugs, medicines, services and supplies for, or leading to, sex transformation surgery." (Compl. ¶ 33; Ex. C at 62 no. 73.) Robinson alleges the Plan denied him coverage and/or authorization of medically necessary surgery and hormone therapy based on this exclusion. (Compl. ¶¶ 36-43.) As a result, he has paid out-of-pocket for hormone therapy and one surgery, and has been unable to proceed with another surgery. (*Id.*)

The complaint alleges that Chandler's neutral coverage exclusion violates Title VII and section 1557 of the ACA.

[2] *See* Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-0446N) at 61 (emphasis added), available at https://www.cms.gov/medicare-coverage-database/shared/handlers/highwire.ashx?url=https://www.cms.gov/medicare-coverage-database/details/nca-proposed-decision-memo.aspx@@@NCAId$$$282&session=sff51x55j20xlp55ggugkz45&kq=981133218.

IV. ARGUMENT

A. Legal Standard on Motion to Dismiss Under Rule 12(b)(6).

A complaint that fails to state a claim upon which relief may be granted is subject to dismissal under Federal Rule of Civil Procedure 12(b)(6). A dismissal under Rule 12(b)(6) may be based on the "lack of a cognizable legal theory or [on] the absence of sufficient facts alleged under a cognizable legal theory." *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011), *cert. denied sub nom. Blasquez v. Salazar*, 132 S.Ct. 1762 (2012).

A complaint cannot survive a Rule 12(b)(6) motion unless it "contain[s] sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must allege more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" or "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "Determining whether a complaint will survive a motion to dismiss for failure to state a claim is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Mony Life Ins. Co. v. Marzocchi*, 857 F. Supp. 2d 993, 995 (E.D. Cal. 2012) (quoting *Iqbal*, 556 U.S. at 679). "In making this context-specific evaluation, this court must construe the complaint in the light most favorable to the plaintiff and accept as true the factual allegations of the complaint." *Mony Life Ins.*, 857 F. Supp. 2d at 995). However, "the reviewing court, though crediting factual assertions made in the pleadings, is not required to credit legal conclusions." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

Where the complaint has not alleged "enough facts to state a claim to relief that is plausible on its face," a plaintiff has "not nudged [his] claims across the line from conceivable to plausible, [and the] complaint must be dismissed." *Twombly*, 550 U.S. at 570; *see also Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996-97 (9th Cir. 2014) (to plausibly plead a claim, a complaint must allege facts tending to exclude an alternative explanation); *Windy City Innovations, LLC v. Microsoft Corp.*, __ F. Supp. 3d __, 2016 WL 3361858, at *3 (N.D. Cal. June 17, 2016) ("If the facts alleged do not support a reasonable

inference of liability, stronger than a mere possibility, the claim must be dismissed.").

B. The Complaint Does Not Allege an Actionable Violation of Title VII.

1. Only Congress May Expand Title VII's Protections; Congress Has Repeatedly Rejected Proposed Legislation That Would Expand Title VII to Reach Robinson's Claim.

Robinson attempts to allege a discrimination claim based upon "transgender status." Although transgender people may state claims under Title VII for sex discrimination based upon gender stereotyping, transgender status itself is not a protected classification under Title VII and only Congress may establish such a statutory claim. Here, the history of legislative efforts on this subject makes it very clear that Congress has chosen not to do so.

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). On its face, Title VII does not prohibit discrimination based on an employee's transgender status. While courts may construe the statutory language of Title VII, courts may not create new protections beyond the language of the statute.[3] It is one thing for a court to construe Title VII's prohibition of discrimination "because of sex" to prohibit discrimination based on non-conformance with sex stereotypes. *See infra* Part IV.B.2. It is altogether different—and beyond the province of the courts—to use a Title VII discrimination theory to require employer-sponsored benefit plans to cover sex transformation surgery for members of a group that is not protected *as a group* by Title VII. *See Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007) ("If transsexuals are to receive legal protection apart from their status as male or female, . . . *such protection must come from Congress and not the courts*.") (emphasis added); *Johnston v. Univ. of Pittsburgh of the Commonwealth*

[3] Thus, courts have construed narrowly Title VII's prohibition on discrimination based on medical conditions related to pregnancy, refusing to read "related" to pregnancy to include procedures for contraception or infertility. *See Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (no claim because "[p]regnancy and childbirth which occur after conception, are strikingly different from infertility, which prevents conception"); *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 942 (8th Cir. 2007) (same); *Williams v. MacFrugal's Bargains Close Outs, Inc.*, 67 Cal.App.4th 479, 484 (1998) (hysterectomy not related to pregnancy; the antidiscrimination laws "share one common goal: 'to end discrimination against pregnant workers,' not to stop pregnancy") (citations omitted).

Sys. of Higher Educ., 97 F. Supp. 3d 657, 676-77 (W.D. Pa. 2015) ("It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited [under Title VII]"); *Hinton v. Virginia Union U.*, __ F. Supp. 3d __, 2016 WL 2621967, at *5 (E.D. Va. May 5, 2016) ("Title VII is a creation of Congress and, if Congress is so inclined, it can either amend Title VII to provide a claim for sexual orientation discrimination or leave Title VII as presently written. It is not the province of unelected jurists to effect such an amendment."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation"). Asking a court to read "because of . . . sex" broadly to sweep in other characteristics that arguably relate to sex (such as transgender status or sexual orientation) is asking the court to legislate where Congress has refused to do so. *See Mowery v. Escambia County Util. Auth.*, 2006 WL 327965, at *9 (N.D. Fla. Feb. 10, 2006) (noting that some "commentators emphasize that the distinction between sex and sexual orientation is, at times, logically meaningless. This Court expresses no opinion on the merits of such views, for the distinction between sex and sexual orientation is not meaningless to *Congress*. In fact, Congress has specifically and repeatedly rejected legislation that would have extended Title VII to protect an individual from discrimination based on his or her sexual orientation.") (emphasis in original; citations omitted).

Thus, it is Congress's job to decide whether or not to enact legislation expanding Title VII to cover transgender discrimination. To date, it has not done so. In fact, Congress has repeatedly demonstrated its unwillingness to define the meaning of "because of . . . sex" or to create additional protected categories that might be related to sex, rejecting dozens of legislative proposals in the subject area. *See Oiler v. Winn-Dixie La., Inc.*, 2002 WL 31098541, at *4 (E.D. La. Sept. 16, 2002) ("From 1981 through 2001, 31 proposed bills have been introduced in the United States Senate and the House of Representatives which have attempted to amend Title VII and prohibit employment discrimination on the basis of affectional or sexual orientation. None have passed."). Most notably, 22 different versions of a proposed bill entitled the Employment Non-Discrimination Act (ENDA) have been introduced, at least one in nearly every Congress

since 1994, with the specific purpose of prohibiting employment discrimination on the basis of sexual orientation or gender identity. *See*, e.g., H.R. 2015 (2007), H.R. 3685 (2007), H.R. 3017 (2009), H.R 1397 (2011), S. 811 (2011), H.R. 1755 (2013). Of the 22 proposed ENDA bills, Congress did not enact a single one. And legislation is currently pending before Congress that would explicitly extend the Civil Rights Act of 1964, including Title VII, to cover gender identity (H.R. 3185; S. 1858 (introduced July 23, 2015))—further indication that such protections do not currently exist in the law, and that any future introduction of such protection must come from Congress.

Not only has Congress declined to expand Title VII to reach transgender status, but Congress *has* acted to pass legislation that specifically *excludes* gender identity disorders from coverage under federal disability discrimination laws. *See* 42 U.S.C. § 12211(b) (Americans with Disabilities Act: "Under this chapter, the term 'disability' shall not include--(1) transvestism, transsexualism, . . . gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."); 29 U.S.C. § 705(20)(F)(i) (similar exclusion under the Rehabilitation Act). Congress' enactment of two separate statutes on the specific subject of discrimination on the basis of transgender status—and excluding it as a protected category under both—evidences that Congress is fully aware of the issue of potential discrimination on the basis of transgender status and has the ability to legislate protections for transgender individuals if it chooses to do so. It chose instead to exclude that category, further highlighting the significance of repeated congressional rejection of federal legislation expanding Title VII. In contrast, some states have acted to pass transgender-specific anti-discrimination laws, confirming that legislative action is required to do so.[4]

Consequently, Title VII does not apply to Robinson's claim in the absence of legislative expansion of Title VII to protect transgender people as a group from neutral coverage exclusions.

[4] *See*, *e.g.,* Cal. Gov. Code §§ 12940, 12955; Cal. Civ. Code § 51 (California); Colo. Rev. Stat. Ann. §§ 2-4-401(13.5), 24-34-401(7.5) (Colorado); HRS §§ 489-2, 489-3 (Hawaii); 775 Ill. Comp. Stat. 5/1-103 (Illinois); Iowa Code Ann. § 216.1 *et seq.*; Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (Maine); Minn. Stat. Ann. § 363A.03 (Minnesota); NRS 613.330(1)(a) (Nevada); NJ Stat. Ann. § 10:5-5 (New Jersey); N.M. Stat. Ann § 28-1-2(Q) (New Mexico); ORS § 174.100(6) (Oregon); R.I. Gen Laws § 11-24-2.1 (Rhode Island); Vt. Stat. Ann. tit. 1, § 144 (Vermont); Wash Rev. Code § 49.60.040(26); D.C. Code § 2-1401.02.

2. A Facially Neutral Health Care Coverage Exclusion Is Not Sex Stereotyping Actionable Under Title VII.

Robinson seeks to invoke a sex stereotyping theory by alleging that Title VII's prohibition on discrimination "because of . . . sex" extends to employment actions taken on the basis of gender nonconformity. (Compl. ¶¶ 54-55.) Courts have recognized a sex stereotyping theory under Title VII to protect men and women, including transgender men and women, where an employer discriminates against the employee on the basis that the person's appearance or conduct does not conform to male or female gender stereotypes. However, Robinson has not alleged such a claim.

In *Price Waterhouse v. Hopkins*, the Supreme Court recognized that Title VII's prohibition on discrimination "because of . . . sex" encompasses discrimination based on sex stereotyping. The plaintiff in *Price Waterhouse* was a woman who was denied partnership in an accounting firm. Certain partners reviewing her bid for partnership commented that the plaintiff appeared too masculine, and that she would improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Price Waterhouse*, 490 U.S. at 236. In a plurality opinion, the Court ruled that the employer discriminated against the plaintiff on the ground she did not conform to stereotypes about how women should look and act. The Court held "these remarks about [plaintiff] Hopkins stemmed from an impermissibly cabined view of the proper behavior of women [and] resulted from sex stereotyping," which constituted actionable discrimination based on "sex" under Title VII. *Id.* at 236-37. Thus, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 251.

The Court explained:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch

> 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Id. at 251 (citations omitted). The Ninth Circuit, relying on *Price Waterhouse*, has recognized limited Title VII protections for transgender persons on the basis of sex stereotyping, explaining:

> What matters, for purposes of this part of the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one. Thus, under *Price Waterhouse*, "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.

Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (emphasis in original); *see also Kastl v. Maricopa County Comm. College Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) ("it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women").

Other circuits agree. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) ("We conclude that a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity. . . . The first inquiry is whether [the defendant] acted on the basis of [the employee's] gender non-conformity."); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) ("Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination"); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir.) (affirming jury verdict finding transgender police officer demoted for failure to conform to sex stereotypes), *cert. denied*, 546 U.S. 1003 (2005); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (transgender individual stated a claim for sex discrimination under the Equal Credit Opportunity Act based on sex stereotyping). Thus, a sex stereotyping claim requires allegations that the employer treated the transgender individual differently because "he did not conform to his harasser's vision of how a man should look, speak, and act. . . . Sex stereotyping claims are based on behaviors, mannerisms, and appearances."

Johnston, 97 F. Supp. 3d at 680.[5]

Robinson does not allege any facts to support a claim that Chandler decided to exclude health care coverage for sex transformation surgery because it perceived that transgender individuals do not conform their appearance or behavior to sex stereotypes. And he could not plausibly do so. The stereotyping theory simply has no application to the type of employment action here—a facially neutral exclusion, applicable to all employees, that has nothing to do with an intent by Chandler to treat transgender persons less favorably than others. Robinson does not allege he experiences any stereotyping or other discrimination when he performs his job at Chandler and presents at work as a male person. In the absence of allegations that Chandler interfered with Robinson's ability to present and function as a man in the workplace, sex stereotyping did not occur. *See Johnston*, 97 F. Supp. 3d at 681 (dismissing Title VII claim where employer "permitted [plaintiff] to live in conformance with his male gender identity in all material respects, with the one exception of [the] policy regarding bathroom and locker room usage").

Robinson attempts to fit his health benefits claim into the unaccommodating paradigm of sex stereotyping by alleging that "because medical transition from one sex to another inherently violates sex stereotypes, denying coverage for such health care constitutes impermissible discrimination based on gender nonconformity." (Compl. ¶ 57.) But there is no support for his conclusory assertion of an "inherent" link between transitioning and sex stereotypes.

This very argument has been rejected in the context of an alleged Title VII claim based on sexual orientation. The "prevailing construction of Title VII" is that sexual orientation is not a protected characteristic under Title VII. *See Christiansen*, 2016 WL 951581, at *14. In *Christiansen*, the court recognized that to the extent a sexual orientation discrimination claim

[5] The May 18, 2016 Final Rule, discussed *infra*, defines "[s]ex stereotypes" as "stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include the expectation that individuals will consistently identify with only one gender and that they will act in conformity with the gender-related expressions stereotypically associated with that gender. Sex stereotypes also include gendered expectations related to the appropriate roles of a certain sex." 81 Fed. Reg. at 31468; 45 C.F.R. § 92.4.

could be couched in terms of sex stereotypes—such as a claim that a gay man was discriminated against because of effeminate characteristics—courts have allowed such claims to proceed. *See id.* at *12-*13. But the court also recognized that absent allegations supporting the contention that the employer acted *based on sex stereotypes*, the plaintiff had no Title VII claim. Thus, "the Court must consider whether the Plaintiff has pleaded a claim based on sexual stereotyping, *separate and apart from the stereotyping inherent in his claim for discrimination based on sexual orientation*." *Id.* at *14 (emphasis added). Because the plaintiff did not allege sex stereotyping, the court found he had not stated a claim, and dismissed the case. Robinson's allegation that discrimination against transgender persons based on their transition from one sex to another "inherently violates gender stereotypes" (Compl. ¶ 57) is no more compelling.

There is no other basis to extend Title VII to alleged transgender discrimination. *See Johnston*, 97 F. Supp. 3d at 676 ("Title VII does not provide an avenue for a discrimination claim on the basis of transgender status"); *EEOC v. RG & GR Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 598 (E.D. Mich. 2015) (allowing sex stereotyping claim but noting "[i]f the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the Funeral Home that the EEOC's complaint would fail to state a claim under Title VII"); *Eure v. Sage Corp*., 61 F. Supp. 3d 651, 661 (W.D. Tex. 2014) ("courts have been reluctant to extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because of the plaintiff's status as a transgender man or woman, *without any additional evidence related to gender stereotype non-conformity*"; finding no actionable discrimination where alleged discrimination was based on transgender status, not stereotyping) (emphasis added); *Etsitty*, 502 F.3d at 1221 ("This court agrees with . . . the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII."); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (finding no discrimination where employer did not require transgender plaintiff to conform her appearance to a particular gender stereotype, but instead only required plaintiff to conform to the accepted principles established for gender-

distinct public restrooms), *aff'd*, 98 Fed. Appx. 461 (6th Cir. 2004); *Creed v. Family Express Corp.*, 2007 WL 2265630, at *3 (N.D. Ind. 2007) (dismissing transgender plaintiff's discrimination claims based on transgender status but allowing claims based on stereotyping).[6]

Similarly, no case has endorsed a Title VII discrimination claim based on an exclusion of coverage applicable to all employees for sex transformation surgery. Indeed, in the sole reported decision in which a court was confronted with a Title VII transgender discrimination claim based, as here, on an exclusion of a category of health care coverage, the court noted skeptically "that it is not clear that the denial of benefits, without more, constitutes an adverse employment action. It is also not clear that Mario, as a transsexual, is a member of a protected class [under Title VII]." *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 767 (2d Cir. 2002) (affirming summary judgment on other grounds and not reaching the question of whether allegations regarding the policy exclusion could support a Title VII claim).

Thus, the sex stereotyping cases are based on an employer's perception of the plaintiff in the context of its belief as to how people of a particular gender should look or behave in the workplace. Health coverage that applies equally to all genders does not involve stereotyping of a

[6] The few decisions that appear to recognize a broader theory of sex discrimination against transgender individuals still rely primarily on *Price Waterhouse*. *See, e.g., Fabian v. Hospital of Central Conn.*, __ F. Supp. 3d__, 2016 WL 1089178, at *14 (D. Conn. Mar. 18, 2016) (discussing discrimination claim by a man who presented as a woman as grounded in *Price Waterhouse*); *Finkle v. Howard County, Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (same); *Schroer v. Billington*, 577 F. Supp. 2d 293, 300 (D.D.C. 2008) (transgender plaintiff stated a Title VII sex discrimination claim based on sex stereotyping and also based on gender identity). The EEOC takes an expansive view of transgender as itself a protected classification under Title VII, separate from sexual stereotyping. This traces to its own administrative ruling in *Macy v. Holder*, 2012 WL 1435995 (EEOC April 20, 2012). In *Macy*, however, the employee actually complained of sexual stereotyping. In any event, the EEOC litigation decision does not comport with the vast majority of federal court decisions and is not entitled to deference afforded to regulatory agencies. *See In re Union Pacific*, 479 F.3d at 943 (concluding that EEOC decision interpreting Title VII to require employers to cover prescription contraception for women was "unpersuasive"); *RG & GR Harris Funeral Homes*, 100 F. Supp. 3d at 599 (rejecting EEOC's urging of an expansive interpretation of Title VII's reference to sex that would protect transgender persons from discrimination not based on sex stereotyping because there was no Supreme Court or circuit authority to support that position); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In addition, these cases all involved an employer's specific decision to treat a specific person differently because of the employer's negative reaction to that person. An employer's intentional adverse action targeted at a particular individual because of the employer's animus toward transgender persons is not analogous to the type of facially neutral coverage exclusion here. Robinson's own allegations show that he presents as a man at work without any animus from his employer.

transgender person's gender against some baseline of expected behavior as a man or woman.[7]

3. Robinson's Title VII Claim Fails Because He Does Not and Cannot Plausibly Allege Facts Supporting an Inference of Intentional Discrimination.

Even if Title VII could be stretched to reach employer-sponsored health plans' exclusion of sex transformation surgery, the complaint's allegations are still factually insufficient to state a claim. Title VII discrimination occurs "where an employer has treated a particular person less favorably than others *because of* a protected trait." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (emphasis added; internal quotation marks and alterations omitted). "A disparate-treatment plaintiff must establish that the defendant had a *discriminatory intent or motive* for taking a job-related action."[8] *Id*. (internal quotation marks omitted, emphasis added); *see also Rolling v. Department of Indus. Rels*., 2013 U.S. Dist. LEXIS 102319 (E.D. Cal. July 19, 2013) (granting employer's motion to dismiss plaintiff's Title VII claim where "the allegations of plaintiff's complaint are too vague to support a causal connection that the adverse employment action was 'because of [her protected classification].'"). "[L]iability depends on whether the protected trait . . . *actually motivated* the employer's decision." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (emphasis added). "It is insufficient for a plaintiff alleging discrimination under the disparate treatment theory to show the employer was merely aware of the adverse consequences the policy would have on a protected group." *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985). "To allege a gender stereotyping claim, a plaintiff must show that his harasser was acting to punish his noncompliance with gender stereotypes." *Johnston*, 97 F. Supp. 3d at 680.

A facially neutral benefits policy, like Chandler's Plan exclusion, cannot give rise to a

[7] Federal appellate courts have concluded that an employer's exclusion of insurance coverage for contraceptives and infertility treatment does not violate Title VII because such exclusions are gender-neutral, even if women may be more affected by the exclusion. *See Union Pacific*, 479 F.3d at 943-44 ("[L]ike infertility, contraception is a gender-neutral term. Therefore, Union Pacific's denial of coverage for contraception for both sexes did not discriminate against its female agreement employees in violation of Title VII."); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 343 (2d Cir. 2003) (exclusion of coverage for infertility treatments does fall within Title VII's protection); *Krauel*, 95 F.3d at 679-80.

[8] "A Title VII plaintiff can make a case by proving either disparate treatment or disparate impact." *Mitchell v. Jefferson County Board of Education*, 936 F.2d 539, 546 (11th Cir.1991). Robinson alleges disparate treatment. *See* Compl. ¶¶ 50, 53 (citing 42 U.S.C. § 2000e-2(a)(1), Title VII's disparate treatment provision).

Title VII claim in the absence of allegations supporting a reasonable inference—"stronger than a mere possibility," *Windy City*, 2016 WL 3361858, at *3—that the policy exclusion resulted from an intent to discriminate against transgender individuals *because they are transgender*. *See Wood v. City of San Diego*, 678 F.3d 1075, 1081 (9th Cir. 2012) (affirming dismissal of Title VII disparate treatment claim under Rule 12(b)(6); "Wood does not claim that the City adopted the surviving spouse benefit *because* it would benefit men more often than women. Her only allegation is that . . . the City was *aware* that male employees would disproportionately benefit from the change") (emphasis added). Thus, an employer's awareness that a facially neutral policy may impact one group more than another does not demonstrate intent to discriminate against that group. *See Krauel*, 95 F.3d at 680 (employer's explanation of coverage exclusion for infertility treatments—that "too many women of child-bearing age were employed by [employer] and infertility treatments result in too many multiple births, thereby creating a financial burden on the Plan"—were insufficient to show that intent to discriminate on the basis of sex motivated the exclusion). "If the statements demonstrate anything at all, they may indicate that cost was a factor in [employer's] decision to exclude coverage for infertility treatment." *Id.*

Further, courts have routinely found a transgender plaintiff's ability to carry on at work or school presenting as the gender with which he or she identifies, without adverse comments or actions, defeats any inference of discrimination. For example, in *Johnston,* a transgender plaintiff alleged that his school violated Title IX by enforcing a policy requiring the plaintiff to use the bathroom consistent with his birth gender. The court granted the school's motion to dismiss, reasoning:

> Plaintiff alleges that the University permitted him to live in conformance with his male gender identity in all material respects, with the one exception of the University's policy regarding bathroom and locker room usage. Plaintiff alleges that he presented as a male, and he does not allege that he was ever harassed or discriminated against by the University because he dressed, spoke, or behaved like a man, or because he did not dress, act, or speak like a woman.

Johnston, 97 F. Supp. 3d at 681. "Such an allegation is insufficient to state a claim for discrimination under a sex stereotyping theory." *Id*. at 680.[9]

[9] Transgender persons' access to bathrooms is the subject of several pending cases. However, the federal cases that have definitively and finally addressed bathroom restrictions for transgender

Here, Robinson has not alleged a single fact to plausibly support an inference that Chandler acted with "an intent to punish his noncompliance with gender stereotypes." *Id.* To the contrary, as in *Wood*, his Title VII claim arises out of a facially neutral benefits policy, without any allegation that the policy was adopted *because* of sex stereotyping or any other discriminatory motive (as opposed to a neutral business-judgment motivation based on the debatable medical efficacy of the excluded treatment *vis-a-vis* the plan's limited resources). He alleges that he continues to work at the hospital as a man. (Compl. ¶ 5). Thus, as in *Johnston*, Robinson was "permitted . . . to live in conformance with his male gender identity in all material respects, with the one exception" of the employer's neutral policy. *Johnston*, 97 F. Supp. 3d at 681. As in *Johnston*, Robinson cannot allege that "he was ever harassed or discriminated against . . . because he dressed, spoke, or behaved like a man, or because he did not dress, act, or speak like a woman." *Id*.

Robinson does not and cannot plausibly allege that the Plan exclusion was adopted by Chandler because of an intent to treat transgender individuals less favorably than others. Accordingly, the complaint fails to plead facts to state a plausible claim for relief. *Iqbal*, 556 U.S. at 678.

C. The Complaint Does Not Allege an Actionable Violation of ACA Section 1557 or the Final Rule.

In Count Two of the Complaint, Robinson alleges that the Plan's exclusion of coverage for sex transformation treatment violates section 1557 of the ACA and the Final Rule promulgated by OCR on May 18, 2016. (Compl. ¶¶ 61-66.)[10] This cause of action also fails to state a plausible claim.

On its face, section 1557, 42 U.S.C. § 18116, does not require an employer to provide health coverage for sex transformation treatment. To the contrary, section 1557 incorporates the prohibition of discrimination on the basis of disability under the Rehabilitation Act which, as noted *supra*, expressly carves out transgender status as *not* subject to protection. The prohibition

persons have denied the plaintiffs' discrimination claims. *See Johnston*, 97 F. Supp. 3d at 681; *see also Kastl*, 325 Fed. Appx. at 493; *Etsitty*, 502 F.3d at 1223-25.

[10] OCR issued a Proposed Rule on September 8, 2015, and invited comments. 80 Fed. Reg. 54172 (Sept. 8, 2015).

that Robinson alleges Chandler violated is in fact contained only in the Final Rule, which prohibits the "'categorical coverage exclusion or limitation for all health services related to gender transition . . . .'"[11] (Compl. ¶¶ 64-65 (quoting 45 C.F.R. § 92.207(b)(4)).) However, the Final Rule was not in effect at the time the Plan denied Robinson coverage and the relevant provisions are not effective until January 1, 2017.

1. Section 1557 Does Not Prohibit Discrimination Based Upon Transgender Status.

On its face, section 1557 prohibits discrimination only on certain enumerated grounds, none of them transgender. Sex discrimination is prohibited by section 1557 only to the extent it is prohibited under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* *See* 42 U.S.C. § 18116. Thus, any contention that a particular act discriminates on the basis of sex must be evaluated with reference to the prohibitions on sex discrimination developed under Title IX. Title IX provides, with exceptions not relevant here, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). Title IX does not prohibit discrimination on the basis of transgender status.[12] *See Johnston*, 97 F. Supp. 3d at 674 ("Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute"). Moreover, Title IX cases are typically analyzed under Title VII

[11] To the extent the Final Rule contains express requirements directly at odds with the coverage of the statute, the rule is ultra vires and invalid. *See Northwest Environmental Advocates v. US EPA*, 537 F.3d 1006, 1021-22 (9th Cir. 2008); *see also Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006) ("In reviewing an agency's statutory construction, we must reject those constructions that are contrary to clear congressional intent or that frustrate the policy that Congress sought to implement."). "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936).

[12] Title IX is intended to prevent certain educational programs from affording preferential treatment to one gender. Its plain language contemplates only two genders. *See, e.g.*, 20 U.S.C. § 1681(a)(2) (referring to institutions that change from admitting students of "only one sex" to admitting students "of both sexes"); *id.* § 1681(a)(8) (permitting certain activities as long as, if they are "provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex").

law. *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 1997 (2013). As discussed above, Title VII does not bar Chandler's exclusion; by extension, neither does Title IX or section 1557.[13]

Nor does any contention that section 1557 alone prevented the Plan exclusion prior to the specified future effective dates of the Final Rule make any sense.[14] As discussed below, the Final Rule itself sets forth *future* deadlines for compliance. If section 1557 on its own already imposed the Final Rule's requirements on Chandler, then the Final Rule's compliance period is meaningless.[15]

Likewise, any the notion that existing federal law already prevented plans from excluding coverage for transition services is illogical given that the nation's largest insurer (Medicare) categorically excluded transgender surgery in a National Coverage Determination until May 2014, long after the enactment of section 1557.[16] Today, the coverage still is not required on a national level, and in a recent Proposed Decision Memo (*supra* n.2), CMS declined to require coverage of gender reassignment surgery.[17] Similarly, Medicaid has not required coverage.

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[13] In addition, section 1557 incorporates the provisions of the Rehabilitation Act that prohibit discrimination on the basis of disability. *See* 42 U.S.C. § 18116 (citing 29 U.S.C. § 794). Rather than including discrimination on the basis of transgender status, the Rehabilitation Act expressly *excludes* discrimination against individuals based on "transvestism, transsexualisim, . . . gender identity disorders not resulting from physical impairments." Section 1557 is a single anti-discrimination law applicable to specific protected classifications including sex and disability. It makes no sense for Congress in the ACA to incorporate disability discrimination law that specifically does not extend to transgender status while silently including the same discrimination if it is labeled "sex," rather than disability, discrimination.

[14] Indeed, it was widely reported that the Proposed Rule "*for the first time* includes bans on gender identity discrimination as a form of sexual discrimination, language that advocacy groups have pushed for and immediately hailed as *groundbreaking*." https://www.washingtonpost.com/national/health-science/us-offers-new-health-rules-to-protect-women-transgender-people-others/2015/09/03/ddf90170-5246-11e5-9812-92d5948a40f8_story.html (emphasis added).

[15] *But cf. Rumble v. Fairview Health Servs.*, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015), in which a court found actionable discrimination under the ACA, prior to the Final Rule, on the basis of sex by a hospital's mistreatment of a transgender individual in providing medical care. *Rumble*, however, is another sex stereotyping case that relies upon *Price Waterhouse* and is replete with discussion of how the defendant's alleged misconduct toward the plaintiff, if proven, was sex stereotyping. *See id.* at *2 ("Because the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping. Therefore, Plaintiff's transgender status is necessarily part of his 'sex' or 'gender' identity."); *see also id.* at *7.

[16] This rule was invalidated in 2014, but not on the basis of requirements of section 1557. http://www.hhs.gov/dab/decisions/dabdecisions/dab2576.pdf

[17] Medicare Administrative Contractors (MACs) are permitted to establish Local Coverage

Instead, states have had flexibility to determine their individual benefit packages with respect to transgender-related treatments. 42 C.F.R. § 440.225. Some states have required coverage of such services under Medicaid, while other states—including Arizona—explicitly exclude at least some of these services, typically surgery. Ariz. Admin. Code § R9-22-205(B)(4)(a). These laws may change following implementation of the Final Rule. But they minimally confirm that the law prior to implementation of the Final Rule did not require coverage for transgender health services.

Finally, as noted, proposed legislation *currently* pending in Congress would explicitly extend the Civil Rights Act of 1964, including Title VII, to cover gender identity discrimination in, among other things, health programs funded by the federal government. (H.R. 3185; S. 1858 (introduced July 23, 2015).) This also confirms that existing law, prior to implementation of the Final Rule, does not prohibit discrimination on this basis.

2. The Final Rule Does Not Apply to Robinson's Claims Because the Material Provisions Are Not Effective Until January 1, 2017.

a. The Plan Design Provisions of the Final Rule Are Not Effective Until January 1, 2017.

The Final Rule recognizes that covered entities' plans may not be in a position to comply with the new coverage requirements by the effective date (July 18, 2016) of the regulation (discussed *infra* Part IV.C.2.b). Therefore, OCR expressly provided that such entities would have an additional period of time to make changes to plan design in order to come into compliance. Specifically, in the Preamble to the Final Rule, OCR stated:

> We are sensitive to the difficulties that making changes in the middle of a plan year could pose for some covered entities and are committed to working with covered entities to ensure that they can comply with the final rule without causing excessive disruption for the current plan year. Consequently, *to the extent that provisions of this rule require changes to health insurance or group health plan benefit design* (*including covered benefits, benefits limitations or restrictions*, and cost-sharing mechanisms, such as coinsurance, copayments, and deductibles), such provisions, as they apply to health insurance or group health plan benefit design, *have an applicability date of the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2017*.

Determinations (LCDs). Their LCDs are valid solely in their respective jurisdictions. CMS Pub. 100-08 §13.1.3, Local Coverage Determinations (LCDs), Centers for Medicare and Medicaid Services. Some MACs have issued LCDs covering gender reassignment surgery. *see, e.g.*, Priority Health - https://www.priorityhealth.com/provider/manual/auths/~/media/documents/medical-policies/91612.pdf.

81 Fed. Reg. at 31378 (emphasis added).

The issue of which Robinson complains—the Plan's exclusion of benefits for sex transformation treatment—is inarguably one of "plan design." *See Burns v. Rice*, 39 F. Supp. 2d 1350, 1356 (M.D. Fla. 1998) (referring to "an employer's decisions regarding whether, how much, and to whom to provide benefits" as "'plan design'" decisions), *aff'd*, 210 F.3d 393 (11th Cir.), *cert. denied*, 531 U.S. 814 (2000). The exclusion is one of 90 specific exclusions set forth in the "General Exclusions" section of the Plan and is applicable to all Dignity Health employees in Arizona who are covered by the Plan. The June 22, 2015 denial letter stated that Robinson's requested surgery "is not a covered benefit under the plan. A review was conducted and it was determined that the proposed procedure does not meet the criteria for coverage based on the [exclusion]. Exclusions . . . are not considered benefits under this Plan and will not be considered for payment as determined by the Plan." (Compl. Ex. D; *see also* Ex. E (August 13, 2015 letter stating same).) Likewise, Robinson's fiancee's initial letter to Chandler requested "a fully inclusive equitable benefits plan . . . [that] includes coverage of mental health, hormonal therapies and surgical treatments (not limited to genital surgery)." (Compl. Ex. G.) Robinson alleges that his claims were denied *because* of the Plan's exclusion. *See* Compl. ¶ 36 ("As a result of the Dignity Health Plan's categorical exclusion of coverage related to 'sex transformation surgery,' Robinson has been denied coverage for medically necessary treatment for gender dysphoria . . ."); *see also id.* ¶¶ 37, 39. Thus, he alleges that the Plan's design allegedly caused his harm.

Accepting as true for purposes of this motion the allegations that the Final Rule would prohibit the Plan's exclusion, Chandler must redesign and amend the Plan in order to come into compliance with the Final Rule. However, under the express language of the Final Rule, Chandler has until the first day of the first Plan year beginning after January 1, 2017 to do so. Prior to that date, the plan design requirements in the Final Rule do not apply and there can be no actionable violation of section 1557 on this basis.

b. The Provisions of the Final Rule That Are Unrelated to Plan Design Are Not Effective Until July 18, 2016.

Even if the redesign of plan benefits were somehow not a "plan design" issue, Chandler

still would not be liable for an alleged violation of the ACA. Robinson's claim was denied on June 22, 2015 and August 13, 2015, and the denial was upheld on February 12, 2016. (Compl. ¶¶ 39, 41.) Chandler's last communication with Robinson's fiancée on the subject of plan design was November 16, 2015. (Compl. ¶ 47.) The complaint was filed on June 6, 2016. However, even the provisions of the Final Rule that are not related to plan design do not go into effect until July 18, 2016. 45 C.F.R. § 92.1 (effective date is 60 days after issuance of the Final Rule).

Chandler was not subject to the requirements of the regulation at the time the Plan's exclusion impacted Robinson. Accordingly, as a matter of law, the allegations that Chandler violated section 1557 by maintaining a Plan that excluded and denied the coverage fail to state a claim.

c. The Provisions of the Final Rule Are Not Retroactive.

Section 1557 provides that "[t]he Secretary [of HHS] may promulgate regulations to implement this section," 42 U.S.C. § 18116(c), but provides no authority for the Secretary to apply regulations retroactively. "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown U. Hosp.*, 488 U.S. 204, 208 (1988). There is no indication that OCR intended the Final Rule to apply retroactively. To the contrary, OCR's deliberations over, and requests for comments regarding, a future effective date—60 days *after* issuance of the Final Rule for most aspects of the regulation—strongly indicate that the Final Rule was not intended to apply retroactively. *See Campbell v. Nationstar Mortgage*, 611 Fed. Appx. 288, 297 (6th Cir.) ("Nationstar argues that the regulation's January 10, 2014 effective date reflects an intent not to apply it to conduct occurring prior to that date. We agree. . . . If the CFPB had intended to apply the amended Regulation X to conduct occurring before January 10, 2014, it could have ignored the industry concerns about the time allotted for implementation and made the rule effective immediately."), *cert denied*, 136 S.Ct. 272 (2015), *cited in Consumer Fin. Protection Bureau v. Gordon*, 819 F.3d 1179, 1197 (9th Cir. 2016).

3. Neither Section 1557 Nor the Final Rule Prevents an Employer From Excluding Services That Are Not Medically Necessary.

Nothing in section 1557 or even in the Final Rule prohibits an employer from making decisions as to what medical services its plan will and will not cover if it does so for nondiscriminatory reasons. To the contrary, the Final Rule expressly allows a plan to exclude treatments that are not medically necessary. The Final Rule states that "OCR will not second-guess a covered entity's neutral nondiscriminatory application of evidence-based criteria used to make medical necessity or coverage determinations. Therefore, we refrain from adding any regulatory text that establishes or limits the criteria that covered entities may utilize when determining whether a health service is medically necessary or otherwise meets applicable coverage requirements." 81 Fed. Reg. at 31436. Thus, a plan may lawfully exclude coverage for transgender-related services where the medical necessity of such treatment is not established.

As is shown by Exhibit C to Robinson's complaint, the Plan excludes coverage for services that are not "medically necessary." (Compl. Ex. C at 61, 85.) A service is medically necessary if, among other things, it is "[i]n accordance with Generally Accepted Standards of Medical Practice," meaning "standards that are based on credible scientific evidence published in peer-reviewed medical literature generally recognized by the relevant medical community, relying primarily on controlled clinical trials, or, if not available, observational studies from more than one institution that suggest a causal relationship between the service or treatment and health outcomes." (*Id.*) Robinson alleges a virtual consensus that transitioning surgery is medically necessary (Compl. ¶¶ 25-28), but there is no such consensus and the medical efficacy of sex transformation surgery remains the subject of debate. For example, CMS itself concluded, after thoroughly researching the success rate of such surgeries, that "[t]here were conflicting (inconsistent) study results—of the best designed studies, some reported benefits while others reported harms" from sex transformation surgery. (CMS Proposed Decision Memo, *supra* n.2); *see also id.* ("Our review of the clinical evidence for gender reassignment surgery was inconclusive for the Medicare population at large").

Robinson's claim for violation of section 1557 fails. No cause of action could accrue

prior to the effective date of the Final Rule, which was after the events alleged in the complaint and after the complaint was filed.

V. CONCLUSION

Title VII does not prevent Chandler from excluding coverage for sex transformation treatment, and the ACA's section 1557 does not prevent it either. To the extent the new Final Rule is alleged to bar the Plan's exclusion, it has yet to go into effect and Chandler cannot have violated it as a matter of law. Robinson's complaint fails to allege any actionable claim. The deficiencies cannot be cured by amendment, and the complaint should be dismissed with prejudice.

Dated: July 15, 2016

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