Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHERYL ENSTAD et al.,

Plaintiffs,

vs.

PEACEHEALTH,

Defendant.

No. 2:17−cv−01496−RSM

DEFENDANT PEACE HEALTH'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(B)(6)

NOTE ON MOTION CALENDAR:

February 9, 2018

Complaint Filed: October 5, 2017
Trial Date: None Set

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION.

Plaintiffs' Opposition confirms that Plaintiffs have not pled, and cannot plead, a claim for discrimination under Section 1557 of the Affordable Care Act ("Section 1557") or the Washington Law Against Discrimination (the "WLAD"). As an initial matter, the chest surgery sought by Plaintiff Pax Enstad ("Pax") was not medically necessary. The medical policies attached to Complaint affirmatively establish that the surgery was not medically necessary because Pax was only 16 years old. This is confirmed by The World Professional Association for Transgender Health Standards of Care ("WPATH Standards"), which are attached to the Opposition. While the standards indicate that the surgery "could" be performed earlier, they also make it clear that *irreversible* surgery should not be performed until the patient has lived as the opposite sex for at least a year and has previously progressed through multiple *reversible* interventions. The Complaint tacitly admits this did not happen, and the Opposition does not argue otherwise or proffer a curative amendment. As each of Plaintiffs' discrimination claims is expressly based upon the purported medical necessity of the chest surgery, this is fatal to the Complaint. (Complaint, ¶¶ 68-69, 79, 91).

Plaintiffs' claims under Section 1557 also fail because the religious exemption in Title IX of the Education Amendments of 1972 ("Title IX") applies to PeaceHealth and Plaintiffs also fail to allege sex discrimination under Title IX. Plaintiffs' argument regarding the religious exemption is contrary to the plain text of Section 1557 (which incorporates *all* of title IX, without limitation) and is contrary to the only authority, *Franciscan Alliance, Inc. v. Burwell,* 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016). Further, the exclusion in the PeaceHealth Plan for sex change surgery applies to all participants. Sex change surgery is excluded for men, women, transgender men, and transgender women. Therefore, the Plan does not discriminate on the basis of sex.

Finally, Plaintiffs' WLAD claims also fail because the religious exemption in the WLAD bars the claims, Cheryl Enstad ("Cheryl") cannot bring a claim under the WLAD based upon a lack of coverage for Pax, and Plaintiffs have failed to establish that Pax is protected by any of the specific provisions of the WLAD or that there is any basis for a judicial extension of the WLAD.

II. THE COURT SHOULD DISMISS PLAINTIFFS' COMPLAINT.

A. Pax's Surgery Was Not Medically Necessary; therefore, Plaintiffs Cannot State A Claim.

The Complaint and Plaintiffs' Opposition establish that the surgery sought by Pax was not medically necessary. Each of Plaintiffs' claims is expressly based upon the purported medical necessity of the surgery. See Motion at 7-8; (Complaint, ¶¶ 68-69, 79, 91). For this reason alone, the Complaint should be dismissed without leave to amend.

Plaintiffs' Complaint alleged that Pax's surgery would have been covered as medically necessary under the Regence "Medical Policy Manual" and Aetna Policy 0615. (Complaint, ¶¶ 44-49; Ex. B and C). The Motion demonstrated that this allegation was false because the Aetna and Regence policies unequivocally require the patient to be at least 18 years of age and meet numerous other requirements. Retreating from the Aetna or Regence policies which are not mentioned in the Opposition, Plaintiffs now purport to rely only upon the WPATH Standards, which they contend provide that "[c]hest surgery in [boys who are transgender] could be carried out earlier." (Opp. at 5:24). But, even this "quote" is misleading. The WPATH Standards actually state that "Chest surgery in FtM patients[1] *could* be carried out earlier [than 18 years of age], preferably after ample time of living in the desired gender role and after one year of testosterone treatment."[2] (Opp. Ex. A, p. 21 (emphasis added)). Nor do Plaintiffs mention that the WPATH Standards provide that *fully reversible* interventions (*i.e.*, certain medications) and *partially* reversible interventions (*i.e.*, hormone therapy) are stages that the patient should progress through prior to irreversible interventions such as surgery. (*Id.*, p. 18.) *"A staged process is recommended to keep options open through the first two stages. Moving from one stage to another should not occur until there has been adequate time for adolescents and their parents to assimilate fully the effects of earlier interventions*." (*Id.* (emphasis added).)

Thus, far from indicating that chest surgery is "medically necessary" for a 16 year old, the

[1] "FtM" is an "[a]djective to describe individuals assigned female at birth who are changing or have changed their body and/or gender role from birth-assigned female to a more masculine body or role." (Opp., Ex A at 21). The WPATH Standards make no mention of "boys who are transgender."

[2] Thus, Plaintiffs' suggestion that there is no "requirement" that a chest surgery patient live in a congruent gender role or receive testosterone treatment is misleading, especially in the context of their argument that the surgery for a minor is supposedly "medically necessary" before reversible treatments are even attempted. (Opp. at 5-6.)

WPATH Standards establish that it is *not* medically necessary, particularly in the case of Pax who has not alleged that he lived as the opposite sex and progressed through the two prior physical interventions (medication and hormones) prior to seeking the surgery at 16 years of age. Under the Plan, "medically necessary" means "[m]edical services and/or supplies which are *absolutely needed and essential* to diagnose or treat an illness or injury . . .." (Complaint, Ex. A at 135 (emphasis added). The WPATH standards simply state that the surgery "could" be performed under 18 years of age. Under no formulation of the English language does that mean it is "absolutely necessary and essential." Even then, the WPATH Standards sensibly provide that the patient should have gone through "reversible" and "partially reversible" interventions before surgery, which Pax does not allege happened.

Plaintiffs' discrimination claims against a Catholic hospital for refusing to cover a sex change surgery for a child that was plainly not medically necessary were improper and incorrect from the inception. The claims should be dismissed without leave to amend.

B. Plaintiffs Fail To Establish That They Can State A Claim For Sex Discrimination Under Section 1557.

1. Section 1557 Incorporates Exemptions for Religious Employers.

Plaintiffs' argument that Congress did not incorporate the statutory exceptions to discrimination under Title IX is contrary to the express terms of Section 1557 and the decision of the court in *Franciscan Alliance.*, 227 F. Supp.3d at 690, which enjoined HHS's regulations implementing Section 1557 nationwide. In Section 1557, Congress provided that "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . be subjected to discrimination . . .." The express reference to "et seq.," in Section 1557 means "and the following"— *i.e.*, the rest of the statute, which includes the exemption for religious organizations.[3] Thus, the religious exemption in Title IX is part of Section 1557. Plaintiffs' argument that there are some exceptions to Title IX that would not make sense does not apply here because a religious exemption to Section 1557 makes perfect sense and such exceptions

[3] *See* 20 U.S.C. § 1681(a)(3) (prohibiting sex discrimination "except that this section shall not apply to an educational institution which is controlled by a religious organization . . .).

are a common feature of many laws.[4]

In the now enjoined Final Rule, HHS bizarrely interpreted Congress' incorporation of *all* other statutory grounds for discrimination — race, color, national origin, age, and disability – to include the relevant statutory exemptions, but HHS refused to acknowledge the incorporation when it came to Title IX. [5] As *Franciscan* held, that refusal "renders the Rule contrary to [Section 1557]." *Franciscan All.*, 227 F. Supp. 3d at 691.[6] As a matter of common sense, if Title IX exempts certain conduct then that conduct is not prohibited under Title IX. Put another way, "a religious organization refusing to act inconsistent with its religious tenets on the basis of sex does not discriminate on the ground prohibited by Title IX." *Franciscan All.*, 227 F. Supp. 3d at 690. Moreover, had Congress intended to incorporate only the ban on sex discrimination, it easily could have limited the incorporation to "20 U.S.C. 1681(a)" or simply referred to "sex." *See Corley v. United States*, 556 U.S. 303, 315 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004))(courts must give effect to all of a statute's provisions "so that no part will be inoperative or superfluous, void or insignificant").

2. Plaintiffs Fail To Allege Sex Discrimination Under Section 1557.

Plaintiffs' Opposition also fails to establish that they have pled an actionable claim for intentional sex discrimination based upon the exclusion of coverage for sex change operations. Plaintiffs cite no case that so holds. The coverage exclusion in the Plan applies to all people – men, women, transgender men, and transgender women – none of whom are covered for sex change operations. As a result, the Plan does not discriminate.

There is no shortage of difficult legal questions posed by issues related to sexual orientation, transgender, fluid gender, non-binary and other gender identities. However, this case deals only

[4] *See* RCW § 48.43.065(2)(a)(no health care provider or facility may be forced to pay for services if they object to doing so by reason of religion). *See Stormans Inc. v. Selecky*, 844 F.Supp.2d 1172, 1176-77 (W.D. Wash. 2012)(applying law to pharmacists).

[5] See 45 C.F.R. 92.101 ("The exceptions applicable to Title VI apply to discrimination on the basis of race, color, or national origin under this part. The exceptions applicable to Section 504 apply to discrimination on the basis of disability under this part. The exceptions applicable to the Age Act apply to discrimination on the basis of age under this part."); see also 81 Fed. Reg. at 31378.

[6] Notably, HHS itself agrees that the *Franciscan Alliance* decision decision binds the agency from any further enforcement of the Final Rule. See https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html#issued-opinion. ("Pursuant to court order [in *Franciscan Alliance*], OCR is enjoined from enforcing the Section 1557 regulation's prohibitions against discrimination on the basis of gender identity and termination of pregnancy on a nationwide basis.")

with the narrow question of whether a self-funded church health plan that excludes coverage for sex change surgery and related services unlawfully discriminates on the basis of sex. Contrary to Plaintiffs' suggestion, the courts have not recognized transgender as the equivalent of a third sex. Indeed, the only federal appellate court to address the precise subject held squarely that a plaintiff's transgender status is not itself protected under Title VII. *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007). Numerous courts cited here and in the Motion recognize that only Congress can add a new protected category. *Id*. at 1222, n.2.

To avoid this result, Plaintiffs cite *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and the sex stereotyping cases which followed it. However, as the Supreme Court noted in *Price Waterhouse*, "[i]n deciding as we do today, we do not traverse new ground." *Id*. at 248. Nor do the sex stereotyping cases establish that the exclusion of coverage for sex change operations constitutes sex discrimination. "In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Id*. 250; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"), *citing Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993). Here, the coverage exclusion applied to everyone. If you asked PeaceHealth why coverage was denied and received a truthful response, none of the reasons would be that Pax was a boy, a girl, or a transgender boy or girl. Coverage was not denied because Pax is any of these. Coverage was denied because sex change surgery is not covered by the Plan for anyone.

Plaintiffs also place great importance on *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) which applied the *Price Waterhouse* in the transgender context.[7] However, *Schwenk*, a case in which a transgender woman was raped by a prison guard because she exhibited feminine

[7] Schwenk's claim was based not on Title VII, but on the Gender Motivated Violence Act, now codified at 34 U.S.C.§ 12361. As the *Schwenk* court noted, the statute's "plain language" made it applicable to transgender persons because the law applied to "all persons within the United States". *Schwenk*, 204 F.3d at 1200, citing subsection (b) of current Section 12361.

characteristics, like *Price Waterhouse,* focuses on the question of whether gender was a "motivating factor" in the attack. Schwenk was raped because she had male anatomy but was effeminate and did not act like a man. Had she acted like a man, she would not have been raped. Thus, *Schwenk* acknowledged that discrimination because a person does not act like the sex he or she was determined to have at birth (gender non-conformity) is sex discrimination. However, unlike *Schwenk* and similar cases cited by Plaintiffs, Pax was not denied coverage for a sex change operation because of how he acted or because he did not conform to the stereotype of how a man or woman should behave. He would have been denied if acted like a man, woman, boy or girl. He was denied coverage because sex change operations were not covered for anyone.

Plaintiffs insistence that *Schwenk* holds that a transgender person's status alone warrants statutory protection under Title VII (and thus Title IX) is belied not only by the *Schwenk* decision itself, but also by subsequent Ninth Circuit authority. *See Kastl v Maricopa Cnty. Comty Coll*, 325 Fed.Appx. 492, 493 (9th Cir. 2009)(affirming dismissal and reaffirming that "after *Hopkins* [*Price Waterhouse*] and *Schwenk,* 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."[8] The Ninth Circuit in *Kastl* said nothing to support the notion that it considers gender identity to be a protected status that is actionable in the absence of sex stereotyping.

Although Plaintiffs criticize PeaceHealth's authorities as "outdated," Plaintiffs do not cite sex discrimination cases that go beyond this basic sex discrimination paradigm. Homosexual and transgender people may, of course, state claims for sex discrimination based upon the same standards that apply to all people, but homosexuality and transgender status are not themselves specially protected categories for discrimination analysis. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) ("[E]mployee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment."); *Etsitty v. Utah Transit Authority*, 502 F.3d at 1222, n.2 ("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.")

[8] Plaintiffs cite only a much earlier district ruling in *Kastl* (Opp. at 12), ignoring that the district court later entered summary judgment following which the Ninth Circuit affirmed.

(emphasis added); *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"); *EEOC v. RG & GR Harris Funeral Homes, Inc.*, 2016 WL 4396083, at *20 & n.15 (E.D. Mich. Aug. 18, 2016) ("Significantly, neither transgender status nor gender identity are protected classes under Title VII. . . . Congress can change that by amending Title VII. It is not this Court's role to create new protected classes under Title VII"), appeal filed Oct. 13, 2016; *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ*., 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015)("It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited [under the statute]"); *Hinton v. Virginia Union U.*, 185 F. Supp. 3d 807, 817 (E.D. Va. 2016) ("Title VII is a creation of Congress and, if Congress is so inclined, it can . . . amend Title VII to provide a claim for sexual orientation discrimination . . .. It is not the province of unelected jurists to effect such an amendment").

Unlike the present case, all of the authorities cited by Plaintiffs are cases in which the plaintiff was disadvantaged or punished because he or she did not conform to gender stereotypes.[9] *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017) ("A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance"); *Glenn v. Brumby*, 663 F.3d 1312, 1320-21 (11th Cir. 2011) (defendant testified that he fired Glenn because defendant found it "unsettling" and "unnatural" that Glenn dressed in women's clothing); *Prescott v. Rady Children's Hosp.*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (defendants "continuously referre[ed]" to deceased with female pronouns "despite knowing he was a transgender boy and that would cause him severe distress"); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001,1007 (D. Nev. 2016)

[9] Plaintiffs also rely upon two cases involving equal protection claims by prisoners who were denied sex transformation surgery. *Denegal v. Farrell*, 2016 WL 3648956 (E.D. Cal. July 8, 2016); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1109 (N.D. Cal. 2015). These Section 1983 cases involving denial of transgender care by the *government* alleged to be cruel and unusual punishment or a violation of the equal protection have no bearing on this case regarding health coverage for transgender surgery. The prisons in these cases completely deprived prisoners of the ability to express their gender identity even to the point of refusing to allow one plaintiff to change her name. Both cases are also replete with evidence of outright hostility and *Denegal* makes clear that the government's conduct would be actionable as a violation of the right to equal protection regardless of membership in any protected class. *See Denegal*, 2016 WL 3648956 at *7 (noting the lack of a rational relationship to a legitimate state purpose).

(defendant refused to update records or change bathroom policy after plaintiff's name change); *Finkle v. Howard County Md.*, 12 F. Supp. 3d 780, 789 (D. Mo. 2014) (transgender plaintiff alleged her job application was denied because she was a "6′3″, 220 pound, broad-shouldered [individual] with C cup breasts, shoulder length blond hair" who wore a skirt to her interview); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305, 308 (D.D.C. 2008) (the "Library's hiring decision was infected by sex stereotypes"); *Fabian v. Hospital of Cent. Conn.*, 172 F. Supp. 3d 509, 513 (D. Conn. 2016) (plaintiff offered job later denied after an in-person interview where she stated that she would present as a female when the position started).[10]

But, sex stereotyping is not sufficient to establish a sex discrimination claim in this case. Nor do Plaintiffs point to any similar case in which a court found that a coverage exclusion applicable to all constituted sex discrimination. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684, n. 25 (1983) (coverage exclusion that affects male and female employees equally is non-discriminatory even if a distinction is made "on the basis of sex"). PeaceHealth's medical plan included a neutral policy excluding coverage for sex change surgery. The Plan does not exclude all services for transgender people. It excludes sex change surgery and related services. As Plaintiffs indicate, Pax has been covered for medical services for his entire life. The exclusion is gender neutral, applying to both sexes and genders equally, and therefore does not discriminate.[11]

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[10] Plaintiffs twice miscite *Cruz v Zucker*, 195 F. Supp. 3d 554, 581 (S.D.N.Y. 2016) as "holding" that a categorical exclusion on treatment for gender dysphoria under a state Medicaid statute is discrimination on the basis of sex under Section 1557. (Opp. At 11, 18). The *Cruz* court specifically declined to find that transition surgery was medically safe for minors like Pax. *Id*. at 573. The *Cruz* court also did not rule that Section 1557 itself was the source of such a prohibition; instead, the court merely denied the defendant state Medicaid agency's motion for summary judgment, finding that the state law at issue "r[a]n afoul of the ACA ***or*** the recent HHS regulation....". 195 F.Supp. 3d at 581. (emphasis added). In ambiguously referring both to the ACA and the regulation – the same Final Rule later ruled in invalid in *Franciscan Alliance* – the court was plainly influenced by the Final Rule. *See id*., at 580-81 discussing Final Rule. For whatever reason, the defendant in *Cruz* neglected even to argue that the Final Rule could not apply retroactively, thereby inviting the court to conflate the Final Rule with the ACA, which plainly says absolutely nothing about gender identity, much less prohibits categorical exclusions from coverage for transgender persons. Plaintiffs also cite irrelevant equal protection cases in which the courts have considered whether transgender is a protected status requiring intermediate scrutiny. *See e.g.*, *Karnoski v. Trump*, No. 17-1297, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017), appeal docketed, No. 17-36009 (9th Cir. Dec. 15, 2017). These are not sex discrimination cases and do not establish that transgender plaintiffs are treated any different than other men and women under federal anti-discrimination statutes.

[11] Plaintiffs do not allege that PeaceHealth ever reacted to Pax in any way, judged the way he should look or behave, or disfavored him because of discomfort with his appearance, his behavior, or even his desire for transition itself. Nor does Cheryl allege any facts that PeaceHealth ever took any action against her in anyway because Pax is transgender. *Compare Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 1503 (2005) (plaintiff terminated in retaliation for reporting sex discrimination).

Plaintiffs cannot allege that Pax's sex or gender made any difference. Pax was not denied anything available to other people because he is gender nonconforming. Rather, he contends that because he is gender nonconforming he is entitled to an extra benefit – sex change surgery – that no one gets. That is not the law.

C. Plaintiffs Fail To Establish That they Can State A Claim Under the WLAD.[12]

1. The Religious Exemption Bars Plaintiffs' WLAD Claims.

The WLAD expressly exempts non-profit religious organizations from the definition of "employer." Plaintiffs admit that PeaceHealth is a non-profit Catholic hospital system; therefore, on the face of the WLAD, Peacehealth is exempt. Plaintiffs, however, contend that the religious exemption should not apply because Cheryl's job is not related to the organization's religious practices. That is not correct. Plaintiffs admit that Cheryl is a hospice social worker. (Opp. at 3:11). As such, Cheryl's job directly relates to PeaceHealth's religious mission. *See* PeaceHealth Statement of Common Values ("SCVs")("PeaceHealth believes that life and death are part of a sacred journey. We provide medical, spiritual and emotional support to those who are dying").[13]

Morever, contrary to the Opposition, the Washington Supreme Court's 4-4-1 decision in *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769 (Wash. 2014) does not require a connection between Cheryl's job and religion. The lead opinion found that the religious exemption was constitutional and appropriately applied in any employment situation. Indeed, the opinion notes the religious exemption is necessary for the very reason presented by this case – that the WLAD includes gender identity and sexual orientation discrimination claims. *Id*. at 785. The dissent by Justice Stephens, with whom three other Justices joined, found the exemption unconstitutional but focused on the absence of a reasonable ground to distinguish between religious non-profits and secular organizations. *Id.* at 804 ("Because WLAD grants immunity from discrimination claims that are unrelated to the employer's religious beliefs, it is not necessary to alleviate a concrete and substantial burden on religious exercise"). Here, Justice Stephens' rationale supports an exemption.

[12] As discussed in Section II.A, above, Plaintiffs's Complaint and Opposition establish that chest surgery was not medically necessary. Therefore, they cannot establish a claim for discrimination under the WLAD. (Motion at 7-8.)

[13] https://www.peacehealth.org/statement-of-common-values. The SCVs further states that "Palliative care, including effective pain management, is critical in the care of the dying. We are committed to providing a full range of palliative care services. Any act done with the explicit intent of ending a patient's life may not be performed in PeaceHealth owned or leased facilities. . . .."

There is a reasonable basis to distinguish between religious and non-religious employers with respect to the provision of benefits such as sex change surgery and the exemption alleviates a concrete and substantial burden. Plaintiffs have alleged that the coverage exclusion is based upon "based on [PeaceHealth's] moral disapproval of . . . gender transition." (Complaint, ¶ 82). Whether true or not, that is precisely the type of allegation as to which a religious employer should be protected because to adjudicate the claim would require litigation over religious beliefs and practices. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (declaring unconstitutional agency practice of examining whether a school is "completely religious" or merely "religiously associated" to determine jurisdiction); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("it is well established, in numerous other contexts, that courts should refrain from trolling through a person's religious beliefs").

The opinion by Justice Wiggins makes this very clear. Justice Wiggins found that the exemption was unconstitutional but only because, where the employee's job qualifications and responsibilities are unrelated to religion, "there is no reasonable ground for distinguishing between a religious organization and a purely secular organization." *Ockletree*, 179 Wn.2d at 806. Justice Wiggins's point was not that constitutionality required a relationship between the responsibilities of the job and religion in every case but rather that there must be a nexus between the employment related action and religion. Here, the nexus is that Plaintiffs' discrimination claim based upon lack of coverage for sex change operations relates directly to PeaceHealth's status as a Catholic hospital. The Complaint itself makes this connection.

Thus, Cheryl's employment discrimination claim fails because it is barred by the religious employer exemption and Pax's claim also fails because it is based upon his purported status as a "beneficiary" of Cheryl's purported employment contract. (Opp. at 22-23; Complaint, ¶ 90.)

2. Cheryl Enstad Lacks Standing.

Cheryl also fails to establish that she can bring an employment discrimination claim based upon the lack of coverage for Pax's chest surgery. The Opposition includes no response at all to the implementing regulations issued by the Washington Human Rights Commission ("WHRC") which make it clear any such claim must be based upon the *employee's* sexual orientation, gender

expression or gender identity. Wash. Admin. Code § 162-32-030[14] ("Employee benefits provided in whole or in part by an employer must be consistent between *all employees* and *equal for all employees*, regardless of *the employee's* sexual orientation or gender expression or gender identity" (emphasis added); *see Sedlacek v. Hillis*, 145 Wn.2d 379 (2001)(WLAD's implementing regulations establish that employment claims related to disability under the WLAD must be brought by the disabled person).[15]

3. Pax Has No Claim Under *Marquis*.

The Opposition also fails to establish that Pax has a claim under *Marquis v. City of Spokane*, 130 Wn.2d 97 (1996) which held that an independent contractor could state a discrimination claim under the WLAD. As an initial matter, the Plan is not an employment contract. (Complaint, Ex. A, p. 8)("NOT A CONTRACT")[16]. Nor does the Complaint contain any factual allegations establishing that the Plan is an employment contract. Therefore, Pax cannot state a claim as a purported third party beneficiary of an employment contract.

Likewise, there is no basis to further extend *Marquis* to support any claim by Pax. Washington courts apply the rule of "ejusdem generis" to interpretation of the WLAD. *See, e.g.*, *Malo v. Alaska Trawl Fisheries, Inc*., 92 Wn.2d 927, 930 (1998). This rule "requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific terms. In short, specific terms modify or restrict the application of general terms where both are used in sequence." *State v. Stockton*, 97 Wn.2d 528, 532 (1982) (citation omitted). In *Marquis*, the Court held that an independent contractor could state a claim under the WLAD because of the close similarity between employees and independent contractors. *Marquis*, 130 Wn.2d at 110 (noting that the common law distinguishes between employees and independent contractors based on the degree

[14] *Id*. at § 162-32-010 ("This chapter interprets and implements the sexual orientation and gender expression and gender identity discrimination protections of [the WLAD] and provides guidance regarding certain specific forms of sexual orientation and gender expression and gender identity discrimination").

[15] Plaintiffs' attempt to distinguish *Sedlacek* fails. Although the case involved a wrongful discharge claim, the Washington Supreme Court interpreted the WLAD and made clear that "the Legislature has not extended the WLAD to include a prohibition against association discrimination," *Id*. at 391.

[16] "This Plan Document and any amendments constitute the terms and provisions of coverage under this Plan. The Plan Document *shall not be deemed to constitute a contract of any type between the Company and any Participant* or to be consideration for, or an inducement or condition of, the employment of any Caregiver" (emphasis added).

of control exercised over their work). Recognizing a new cause of action for a dependent under a health plan is not remotely similar to the extension to independent contractors in *Marquis*.[17] *See Matter v. Washington Dep't of Corr*., No. 13-CV-05213 BJR-KLS, 2014 WL 4449925, at *6 (W.D. Wash. Sept. 10, 2014)("In order to have a WLAD claim, the individual must allege an unfair practice with respect to credit transactions, insurance transactions, employers, labor unions or employment agencies).[18] Plaintiffs neither allege nor explain how Pax's claim is similar to one of the grounds enumerated in the statute, because there is no similarity. *See, e.g., Owa v. Fred Meyer Stores*, No. 2:16-CV-01236-RAJ, 2017 WL 897808, at *3 (W.D. Wash. Mar. 7, 2017) (dismissing WLAD claim because there was no relationship between plaintiff and defendant under RCW 49.60.30).[19]

III. CONCLUSION.

For the foregoing reason, the Court should dismiss the Complaint without leave to amend.

Dated: February 12, 2018

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[17] The vigorous dissent in *Marquis* over even this small expansion of discrimination claims pointed out that, as of 1996, in the 40 years since the enactment of the WLAD, no appellate court had recognized a cause of action based upon the board language of the statute that was not a violation of a right expressly identified in the statute. Perhaps, even more notable, despite *Marquis*, Plaintiffs have not pointed to a single further decision in the last 20 years expanding the WLAD. *See e.g., Galbraith v. TAPCO Credit Union*, 88 Wn.App. 939, 953 (1997), as amended on reconsideration (Dec. 12, 1997)(refusing to permit claim not identified in WLAD).

[18] *Marquis* noted that the WHRC regulations expressly provide that independent contractors are covered by RCW 49.60.030. *Marquis*, 130 Wn.2d at 111. Here, in contrast the regulations expressly limit gender discrimination claims to those based upon the gender of the employee only. *See* Wash. Admin. Code § 162-32-030.

[19] Marquis also expressly recognizes that there is no violation of the WLAD when, as here, every employee is offered the same terms. *Marquis*, 130 Wn.2d at 114 ("We agree that a plaintiff would be unable to show that he or she was offered a contract under terms less favorable than those offered to members of the opposite sex where the same contract is offered to all.")