ROBERTA L. STEELE, SBN 188198 (CA)
MARCIA L. MITCHELL, SBN 18122 (WA)
PETER F. LAURA, SBN 116426 (CA)
AMI SANGHVI, SBN 4407672 (NY)
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
San Francisco District Office
450 Golden Gate Ave., 5th Floor West
P.O. Box 36025
San Francisco, CA 94102
Telephone No. (415) 522-3077
Fax No. (415) 522-3425
Peter.Laura@eeoc.gov

Attorneys for Plaintiff EEOC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEF ROBINSON,

Plaintiff,

vs.

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

Defendant.

Case No.: 4:16-cv-03035 YGR

AMICUS BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF PLAINTIFF AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Hon. Yvonne Gonzalez Rogers
Hearing Set: 9/27/16 at 2:00 pm
Courtroom 1, 4th Floor

/ / /

/ / /

/ / /

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, REGULATIONS & RULES

OTHER AUTHORITIES

The Equal Employment Opportunity Commission submits the following Brief as Amicus Curiae in support of Plaintiff and in opposition to Defendant's Motion to Dismiss.

I. STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC" or "Commission") is the agency charged by Congress with interpreting and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq*., in private and federal sector cases. *Id.* §§2000e-5(f), 2000e-16(b). In this case, the plaintiff, a transgender man with gender dysphoria, is challenging an exclusion in the defendant's employee health plan for treatment, drugs, and services for or leading to "sex transformation surgery." Plaintiff alleges that this exclusion prevents him and other transgender employees from obtaining medically necessary treatment for gender dysphoria. Because the plan does not exclude medically necessary treatment for the serious medical conditions of non-transgender employees, Plaintiff contends that it violates Title VII's prohibition on sex discrimination.

Defendant has moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6), arguing that neither Plaintiff nor his claim is covered by Title VII. These arguments conflict with case law from the Ninth Circuit and elsewhere holding that discrimination against transgender individuals because of their gender non-conformity is discrimination on the basis of sex. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (§1983); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (Title VII). The arguments also conflict with the Commission's interpretation of the statute, which accords with the holdings of those courts. *See Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (EEOC April 20, 2012). In our view, Defendant's attempts to distinguish this authority are unpersuasive. If accepted by this Court, however, Defendant's arguments — based as they are on a flawed interpretation of Title VII — would deny protection to this vulnerable class of individuals and undermine enforcement of the statute. We therefore offer our views to this Court.

/ / /

/ / /

II. STATEMENT OF THE ISSUES[1]

1. Does Robinson's complaint plausibly allege that discrimination against him because he is a transgender man constitutes discrimination on the basis of sex within the meaning of Title VII?

2. Does the complaint state a plausible Title VII claim that the exclusion in Defendant's employee health plan for "Treatment, drugs, medicines, services and supplies for, or leading to, sex transformation surgery" facially discriminates against transgender employees such as Plaintiff to the extent it denies coverage for medically necessary treatment for gender dysphoria?

III. STATEMENT OF THE CASE

According to the complaint, Josef Robinson has gender dysphoria, a "serious medical condition" where "the sense of one's self — one's gender identity — differs from the sex assigned to [that person] at birth." Complaint ¶¶23-24. Under "widely accepted standards of care," Robinson alleges, "safe," "effective" and "medically necessary" treatment for gender dysphoria is available and may include hormone therapy, sex reassignment surgery, and "other medical services that align individuals' bodies with their gender identities." Compl. ¶¶25-28.

Robinson works as a nurse at the Chandler, Arizona, regional medical center of Dignity Health, the fifth largest health care system in the United States. The self-funded health plan provided to Defendant's employees contains an exclusion for "Treatment, drugs, medicines, services and supplies for, or leading to, sex transformation surgery." Compl. ¶33. In light of this exclusion, to treat his gender dysphoria, Robinson has been paying "out of pocket for medically necessary hormone therapy." *Id.* ¶37. He also paid "out of pocket" for a double mastectomy, after the plan refused to cover this "medically necessary surgery." *Id.* ¶¶39-40. However, he alleges, he cannot afford to pay for any other medically necessary treatment. *Id.* ¶42.

In September 2015, Robinson's fiancée emailed Dignity Health's Chief Executive Officer to explain Robinson's need for additional treatment and to request coverage for the treatment. Compl. ¶44. Despite this direct appeal, Dignity Health nevertheless continues to refuse to cover the

[1] The Commission takes no position on any other issue in this case.

treatment. *Id.* ¶¶45-49.

Accordingly, after receiving an EEOC notice of right to sue, Robinson filed suit alleging, *inter alia*, sex discrimination under Title VII. District court docket number ("R.") 1 (also alleging that the challenged conduct violates §1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. §18116). According to the complaint, "By categorically excluding all medically necessary care related to 'sex transformation surgery,' the [plan] has drawn a classification that discriminates based on transgender status and gender nonconformity." Compl. ¶¶55-56. Under the plan, "non-transgender employees receive coverage for all of their medically necessary healthcare," but, because of the exclusion, "transgender individuals do not." *Id.* ¶57.

Defendant has moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. R.27. Defendant argues that Title VII does not cover discrimination based on transgender status generally, and Plaintiff has alleged no facts suggesting that the employer adopted the exclusion, which Defendant describes as "facially neutral," with a discriminatory motive or to "punish [plaintiff's] noncompliance with gender stereotypes." *Id.*

IV. ARGUMENT

A. Robinson's Allegations that Dignity Health Discriminates on the Basis of Sex By Refusing to Pay for Medically Necessary Treatment for His Gender Dysphoria, Where the Plan Would Cover Medically Necessary Treatment for Other Serious Health Conditions, States a Plausible Claim for Relief under Title VII.

The question before this Court is whether Plaintiff's complaint, alleging that Defendant is refusing to pay for medically necessary treatment, including sex transformation surgery, for Plaintiff's gender dysphoria — where medically necessary treatment would be provided for the serious medical conditions of non-transgender employees — states a plausible claim for relief under Title VII. In moving to dismiss, Defendant argues that it does not.

In resolving a motion to dismiss under Rule 12(b)(6), this Court must "accept all allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Williams v. Cal.*, 764 F.3d 1002, 1007 (9th Cir. 2014) (citation omitted). To withstand such a motion, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

(same). A "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. While "not akin to a 'probability requirement,'" it "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678-79 (quoting *Twombly*, 555 U.S. at 570). On the other hand, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). The "issue is not whether [the plaintiff] will ultimately prevail ... but whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011) (citations omitted).

Plaintiff's complaint easily meets that standard. Plaintiff alleges that because he is transgender, he has been denied access to medically necessary treatment for his gender dysphoria, a serious health condition directly related to the fact that he is transgender. He also alleges that employees who are not transgender receive coverage for all medically necessary healthcare. Taken as true and viewed in the light most favorable to Plaintiff, these allegations state a plausible claim for relief under Title VII. The statute makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. §2000e-2(a)(1). "Health insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment.'" *Newport News Shipbldg. & Dry Dock v. EEOC*, 462 U.S. 669, 682 (1983). Discrimination against an individual like Plaintiff based on the fact that, though assigned the female sex at birth, he fails to act in the way expected of a woman constitutes discrimination on the basis of sex within the meaning of Title VII. *See, e.g.*, *Schwenk*, 204 F.3d at 1202. Finally, disparate treatment in the provision of employee benefits, because of an individual's sex, may violate Title VII. Defendant's motion should therefore be denied.

1. Robinson's complaint plausibly alleges that he is covered by Title VII.

Robinson alleges that Dignity Health discriminates against him because of his transgender status and gender nonconforming conduct — that is, because of sex. Such allegations state a cognizable Title VII claim.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that an employer who bases employment decisions on stereotypical views of how men and women should or should not behave violates Title VII's ban on sex discrimination. The plaintiff there, though highly effective in her job, was perceived by her employer as too masculine. In denying her bid for partnership, several male partners commented that she was "macho" and "overcompensated for being a woman"; she would have a better chance of becoming a partner if she took "a course at charm school" or would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. The Supreme Court concluded that these comments indicated illegal sex discrimination.[2] Writing for the plurality, Justice Brennan explained that "[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 250. "[W]e are beyond the day," the Court stated, "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."'" *Id*. at 251 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (other citation omitted).

Applying that reasoning to cases like this one, courts, as well as the Commission, have concluded that, just as Title VII prohibited discrimination against the plaintiff in *Price Waterhouse* for failing to "conform to socially-constructed gender expectations," a prohibition on sex discrimination may also encompass "discrimination against a transgender individual because of [his or] her gender-nonconformity . . . , whether it's described as being on the basis of sex or gender." *Glenn*, 663 F.3d at 1317. A transgender individual, by definition, fails to act in the way expected of someone of that individual's birth-assigned sex. *Id.* at 1316-22 ("'[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender appropriate

[2] The four-Justice plurality, as well as Justices White and O'Connor, who concurred separately, all agreed with this conclusion. *See Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 (2d Cir. 2004) (adding that Justice O'Connor "characteriz[ed] the 'failure to conform to [gender] stereotypes' as a discriminatory criterion").

appearance and behavior'"); *see also Schwenk*, 204 F.3d at 1201-02 (sex discrimination where assault on transgender plaintiff stemmed from fact that perpetrator believed plaintiff was a man who "failed to act like" one). The Sixth Circuit explained, "discrimination against a plaintiff who is a transsexual — and therefore fails to act and/or identify with his or her gender — is no different from the discrimination against [the plaintiff] in *Price Waterhouse*, who, in sex stereotypical terms, did not act like a woman." *Smith*, 378 F.3d at 574-75; a*ccord Barnes v. City of Cincinnati*, 401 F.3d 729, 733, 736-39 (6th Cir. 2005). The conduct may well violate Title VII.

The Commission agrees. *See Macy*, 2012 WL 1435995 (EEOC April 20, 2012). As *Macy* explains, "gender discrimination occurs any time an employer treats an employee," such as Robinson, "differently for failing to conform to any gender-based expectations or norms." *Id.* at *6. And because a transgender individual does not conform to such expectations and norms, discrimination against a transgender individual because he or she is transgender is, by definition, discrimination "based on ... sex," within the meaning of Title VII. *Id.* at *11.

Under this standard, Plaintiff has plausibly alleged that he is protected against discrimination under Title VII because he fails to conform to socially-constructed gender expectations of how someone who was assigned the female sex at birth ought to act. According to his complaint, because of his gender dysphoria, he is seeking medically necessary treatment, including sex transformation surgery. In other words, he is attempting to conform his body to his gender identity — to change his physical appearance from female to male. In our view, that is the quintessential gender-nonconforming conduct. Thus, to the extent he can show that Dignity Health discriminates against him on that ground, he could establish that he is the victim of discrimination "based on sex."

In moving to dismiss the complaint, Dignity Health takes the position that transgender individuals like Robinson are not covered by Title VII. As support, Defendant makes two main arguments. First, the word "sex" in Title VII should be interpreted narrowly; "transgender status" is not an explicit protected classification, and courts should not "create new protections beyond the language of the statute." Memo at 6-7. Second, Congress has repeatedly rejected bills aimed at amending the statute to prohibit discrimination on the basis of "sexual orientation or gender identity." *Id*. at 7-8. And, Defendant adds, Congress expressly excluded "transsexualism" and

"gender identity disorders not resulting from physical impairments" from coverage in the Americans with Disabilities Act, which, in Defendant's view, "further highlight[s] the significance" of the repeated congressional rejection of other legislation. *Id.* at 8 (citing 42 U.S.C. §12211(b) and 29 U.S.C. §705(20)(F)(i) (Rehabilitation Act of 1973)).

Neither argument has merit. On the first point, the Ninth Circuit has already held that discrimination against a transgender individual based on his gender-nonconforming conduct may constitute discrimination based on sex. *See Schwenk*, 204 F.3d at 1201-02. In making its contrary argument, Defendant never mentions *Schwenk* but rather cites out-of-circuit cases, most of which involve sexual orientation, not gender identity.[3]

In addition, as a remedial statute, Title VII should be construed liberally. *Teamsters v. United States*, 431 U.S. 324, 381 (1977). In accordance with that principle, courts have construed existing classifications broadly to encompass subsets of individuals — what Defendant calls "groups" — within specified classifications. In addition to transgender individuals, for example, the word "sex" has been construed to cover unfeminine women as well as unmanly men (*see Price Waterhouse*, 490 U.S. at 251; *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001)); women with small children (*Back*, 365 F.3d at 122); and "women with childbearing capacity" (*Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 197 (1991)). The same is true for the other classifications. For example, the word "race" has been construed to include association with persons of another race (*McGinest v. GTE Servs. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004)); "national origin" includes an individual's linguistic or cultural characteristics (29 C.F.R. §1606.1); and "religion" includes converts as well as atheists. *Schroer v. Billington*, 577 F.Supp.2d 293, 306

[3] The two exceptions are *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), and *Johnston v. University of Pittsburgh*, 97 F.Supp.3d 657 (W.D. Pa. 2015). Both are out-of-circuit cases involving the use of sex-segregated facilities — not an issue here. In *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756, *9 n.6 (EEOC April 1, 2015), the Commission explained why it "finds the rationale of [*Ettsity*] "unpersuasive." Furthermore, *Etsitty* actually opted not to decide whether that plaintiff was covered under a sex stereotyping theory. 502 F.3d at 1224. As for *Johnston*, the plaintiff there was a student, not an employee; the Fourth Circuit has deemed that case "unpersuasive" when it "confronted a case similar in most material facts" because the *Johnston* court ignored contrary agency interpretation in Title IX regulations. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016). Neither case resembles this one factually, and Defendant makes no attempt to reconcile them with *Schwenk*.

(D.D.C. 2008); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 613-14 (9th Cir. 1988). So while "courts may not create new classifications beyond the language of the statute" (Memo at 6), the existing classifications can be construed so as to provide Title VII protection for "groups," including transgender individuals.

Furthermore, even if, as Defendant suggests, Congress initially intended the word "sex" to mean only birth-assigned "sex," it now clearly extends to gender. *See, e.g., Price Waterhouse*, 490 U.S. at 240 (employers are forbidden "to take gender into account"). "Statutory prohibitions often go beyond the principal evil [the law was passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998). As *Schwenk* and other courts have recognized, the discrimination experienced by the plaintiff in *Price Waterhouse* is "reasonably comparable" to the discrimination experienced by transgender individuals such as Robinson. Title VII should therefore be construed to cover both.

On the second point, the fact that Congress has rejected attempts to enact a federal law explicitly prohibiting discrimination based on gender identity says nothing about what the existing statute prohibits. The Supreme Court has cautioned that "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (citation omitted). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corp. of Eng'rs*, 531 U.S. 159, 169-70 (2001) (citation omitted).[4] As noted above, the Ninth Circuit and other courts began applying *Price Waterhouse* to cases involving transgender plaintiffs as early as 2000. Thus, Congress's failure to pass any of the various bills may show only that legislators are willing to allow the issue of coverage to be resolved in the judicial arena.

As for the exclusions in the disability laws for "transsexualism" and "gender identity

[4] We also note that Defendant is confusing sexual orientation with transgender status. While Defendant refers to legislative proposals dating from 1994 and even 1981 (Memo at 7-8), in fact, bills introduced before 2007 addressed only sexual orientation, not gender identity.

disorders not resulting from physical impairments," whatever those terms mean, it is irrelevant here because this is not an ADA case. In any event, the existence of the ADA exclusions undermines, rather than supports, Defendant's arguments. Having inserted an exclusion in the other statutes, Congress certainly could have added one to Title VII if it had wanted to. Notably, it has not done so.

Taking a different tack, Dignity Health acknowledges that courts including the Ninth Circuit have recognized what Defendant describes as "limited Title VII protections" for transgender individuals under a *Price Waterhouse* sex-stereotyping theory. Memo at 9-10. But, Defendant argues, this theory is inapplicable here because Robinson has alleged no facts indicating that Dignity Health "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." *Id.* at 11. Nor, Defendant notes, has Robinson alleged that Dignity Health has otherwise interfered with his ability to function as a man in the workplace. *Id.* at 10.

In our view, the very fact that Defendant has chosen to exclude coverage for medically necessary surgery for "sex transformation" purposes, but would cover those same surgeries for other purposes, strongly suggests that the opposite is true. Aligning one's body to one's gender identity with drugs and surgery (Compl. ¶26) is the antithesis of sex stereotypical behavior. The fact of the exclusion indicates that in Dignity Health's view, employees should not be attempting to "surgically transform" themselves sexually. If employees nevertheless obtain the treatment, Defendant certainly will not pay for it.

This is analogous to *Glenn*. The plaintiff in *Glenn*, assigned the male sex at birth, was fired shortly after she informed her supervisor that she was transitioning and, as a result, would begin coming to work as a woman. 663 F.3d at 1314. The Eleventh Circuit concluded that the decisionmaker's admission he was uncomfortable with the fact that the plaintiff was dressing like a woman, and the fact he chose to fire her "based on 'the sheer fact of the transition'" provided "ample direct evidence to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity." *Id.* at 1320-21. Similarly, here, this Court can reasonably infer that Defendant is, at the very least, "uncomfortable" with employees' gender non-conformity and the "sheer fact of the transition"; the exclusion is the result of that discomfort. As for whether Robinson

has alleged interference with his "ability" to "function as a man" in the workplace," no such showing is required. *See Newport News Shipbldg.*, 462 U.S. at 675, 684 (holding that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees; rejecting argument that prohibition on sex discrimination is limited to ability or inability to work).

Defendant takes issue with Robinson's allegation that "the 'medical transition from one sex to another' involved in transgender surgery 'inherently violates sex stereotypes.'" Memo at 2, 11 (citing Compl. ¶57). Defendant asserts that this allegation "does not remotely suffice to plead facts to plausibly support a sex stereotyping case" since, in Defendant's view, there is no "inherent link between transitioning and sex stereotypes." *Id.* at 11. Defendant further notes that a district court recently rejected "this very argument" in a case involving sexual orientation. *Id.* at 2-3, 11-12 (citing *Christiansen v. Omnicom Grp.*, 2016 WL 951581, at *14-*15 (S.D.N.Y. March 9, 2016) (reasoning that because controlling Second Circuit precedent draws a rigid line between "sexual orientation and sex-based claims," plaintiff must provide evidence of sex stereotyping "separate and apart" from the stereotyping "inherent" in his sexual orientation claim).

It is curious that Defendant is citing *Christiansen* as an example of how this case should be analyzed. The district court there disagreed with the Second Circuit's requirement — not present in this Circuit — that sexual orientation discrimination be treated as "categorically different from sexual stereotyping." 2016 WL 951581, at *15. The court went on to urge the court of appeals to eliminate the requirement, which the court considered impractical and outdated. *Id.* ("In light of EEOC's recent decision on [sexual orientation] and the demonstrated impracticality of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask — and lest there be any doubt this Court is asking — whether that line should be erased."). Thus, to the extent the court there rejected "this very argument," it was only because the court was bound by adverse circuit precedent.

But more importantly, the two arguments are not the same. Once again, Defendant is confusing sexual orientation and gender identity. *Christiansen* addresses sexual orientation; it has nothing to do with "transitioning." *Cf. Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015) (noting that gender identity and sexual orientation are "distinct").

In fact, there is an "inherent link" between gender identity and gender-nonconformity. *See Macy*, 2012 WL 1435995, at *8 ("consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual"). And in *Glenn*, the court explained: "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. '[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.'" *Id.* at 1316 (citation omitted). The Court continued, "There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Id.*

In any event, "evidence of gender stereotyping is simply one means of proving sex discrimination." *Macy*, 2012 WL 1435995, at *10. In the end, it does not matter "whether an employer discriminates against the employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person." *Id.* at *7. [5] Under any theory, discrimination against a transgender individual because that person is transgender is discrimination because of sex in violation of Title VII.

Accordingly, notwithstanding Defendant's arguments, this Court should not dismiss Robinson's suit for lack of Title VII coverage. The complaint plausibly alleges that the discrimination Robinson has experienced because of his gender identity falls within Title VII's protection against discrimination on the basis of sex.

[5] The court in *Schroer*, 577 F.Supp.2d 293, reached a similar conclusion. There, the prospective employer, the Library of Congress, withdrew a job offer to a transgender woman after she disclosed that, although she had interviewed dressed as a man, she planned to begin work as a woman. After a trial, the court concluded that it did not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived [the plaintiff] to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender nonconforming transsexual." In the court's view, she was "entitled to judgment" based on both "a *Price Waterhouse*-type claim for sex stereotyping" and "the language of the statute itself." *Id.* at 305-06.

2. Plaintiff's complaint plausibly alleges that he is a victim of sex discrimination under Title VII.

Plaintiff further alleges that he is the victim of discrimination because he has been denied access to medically necessary treatment for his gender dysphoria based on his sex — his transgender status and gender nonconformity. Compl. ¶¶54-59. According to Plaintiff, the plan's exclusion for "Treatment, drugs, medicines, services and supplies for, or leading to, sex transformation surgery" discriminates on its face against transgender people because it affects only people who need "sex transformation surgery." All such people are transgender. The plan would cover a mastectomy as treatment for cancer, for example, but not as treatment for gender dysphoria and for sex transformation purposes. This Court should find that these allegations of disparate treatment state a facially plausible claim for sex discrimination under Title VII.

Dignity Health's arguments to the contrary should be rejected. Initially, Defendant argues that the exclusion in the plan is facially neutral because it applies to "all employees." Memo at 11. That makes no sense. By the same rationale, an exclusion for treatment leading to and including prostate surgery would be facially neutral even though only men would need such surgery. The provision targets and is limited to transgender employees since non-transgender employees would not need treatment for gender dysphoria, and would neither need nor want sex transformation surgery.[6]

Defendant also argues that Robinson has not alleged facts suggesting that the employer adopted the provision to "punish" him or with the express intent to discriminate against transgender individuals. Memo at 16. The law is clear, however, that where, as here, a policy is facially discriminatory, no additional evidence of motive or intent is required. *See Frank v. United Airlines*, 216 F.3d 845, 854 (9th Cir. 2000); *see also Johnson Controls*, 499 U.S. at 199 ("absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect").

[6] If Defendant is instead arguing that the exclusion is facially neutral because it applies to both transgender men and transgender women, that argument should likewise be rejected. A policy that, for example, barred the employment of anyone whose spouse was of different race would not be considered facially neutral even though it applied to employees of all races.

Finally, Dignity Health argues that Plaintiff is "incorrect" that there is "virtual consensus" among experts that sex reassignment surgery may be medically necessary to treat gender dysphoria. "Indeed," Defendant notes, a recent report of the Centers for Medicare and Medicaid concluded, "after a lengthy review of the medical literature," that "'*there is not enough evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria*.'" Memo at 4 (citing report) (emphasis added by Defendant). In citing this report (which is only a draft), Defendant fails to acknowledge that, rather than deny all coverage — as Dignity Health's plan does — the Centers decided to continue approving requests for such surgery on an individual claim basis while also encouraging further "robust clinical studies" of the issue. *See* Proposed Decision Memo for Gender Dysphoria & Gender Reassignment Surgery (CAG-00446N), at 1, 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.

Furthermore, a disagreement over whether such surgery is or is not medically necessary does not support Defendant's motion to dismiss. At most, it suggests a potential disputed issue of fact. Down the road, the parties may have to litigate that issue in general and specifically with respect to Robinson. For present purposes, however, the allegations of medical necessity in the complaint — which must be taken as true and viewed in the light most favorable to Plaintiff — easily satisfy the facial plausibility standard from *Iqbal*, 556 U.S. at 278, and *Twombly*, 550 U.S. at 570. Defendant's motion should therefore be denied.

/ / /

/ / /

/ / /

V. CONCLUSION

Plaintiff's complaint adequately alleges that he was denied coverage for medically necessary treatment based on his sex, in violation of Title VII. This Court should therefore hold that the complaint is sufficient to withstand Defendant's motion.

Respectfully submitted,

DATED: August 22, 2016

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By: */s/ Peter F. Laura*
PETER F. LAURA
Senior Trial Attorney

San Francisco District Office
Phillip Burton Federal Building
450 Golden Gate Ave., Suite 5000
San Francisco, CA 94102
415-522-3077

P. DAVID LOPEZ
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

BARBARA L. SLOAN
Attorney

Office of General Counsel
131 M Street N.E., 5th Floor
Washington, D.C. 20507
(202) 663-4721
FAX: (202) 663-7090

CERTIFICATE OF SERVICE

I certify that on August 22, 2016, I electronically submitted the foregoing Brief of the Equal Employment Opportunity Commission As Amicus Curiae, along with the EEOC's Motion for Leave to File, with the Clerk of Courts using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

DATED: August 22, 2016

/s/ Peter F. Laura

PETER F. LAURA
Senior Trial Attorney
San Francisco District Office
Equal Employment Opportunity Commission