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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 REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(B)(6)

Date: September 27, 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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I. INTRODUCTION

Despite stating in the Opposition that the "vast majority" of courts support Robinson's claims, Robinson's Opposition fails to cite any case in which a court has found that a facially neutral health plan exclusion for transgender surgery violates Title VII. Nor has Robinson cited any case in which a court has found that an employer discriminated against a transgender employee outside of the well-established category of sexual stereotyping, which does not apply here. Indeed, the cases Robinson cites—cases involving transgender prisoners denied medical treatment in violation of their civil rights and the prohibition on cruel and usual punishment, transgender patients injured and denied treatment by doctors at a hospital, and transgender individuals being denied employment because of their non-conforming gender appearance—bear no resemblance to the facts of this case. Here, in stark contrast, the claim concerns insurance coverage under a self-insured health plan for Arizona employees of Chandler that simply includes a longstanding exclusion for transgender surgery.

Robinson's complaint does not merely ask the Court to apply Title VII; it asks the Court to substantially expand employer liability for sex discrimination under Title VII far beyond that accepted by any appellate court. That is the role of Congress, not the courts. Robinson correctly argues that the law regarding discrimination against transgender people has developed significantly in the years following the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and it is now clear that a transgender person may state a claim for discrimination if an employer treats the person differently *because* he or she does not conform to gender stereotypes. But that is not the same as a discrimination claim based solely upon the fact that the person is transgender. The latter claim is not supported by the text of the statute, and it is not connected to the sole basis recognized by the Ninth Circuit and other courts as supporting a Title VII discrimination claim by a transgender person. Such a claim requires the kind of fundamental reordering of legal obligations that is left to Congress.

The case law does not support the existence of a new protected classification for transgender people. Robinson disagrees with those cases; he has a different vision of appropriate public policy that is not expressed in any of the laws he invokes. But he cannot displace a

reasoned application of Title VII that does not permit a court to make up new substantive obligations in the discrimination context without action by Congress. *See Hively v. Ivy Tech Comm. College*, __ F.3d __, 2016 WL 4039703, at *3 (7th Cir. July 28, 2016) ("despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation. Moreover, Congress has not acted to amend Title VII even in the face of an abundance of judicial opinions recognizing an emerging consensus that sexual orientation [discrimination] in the workplace can no longer be tolerated"); *id.* at *11 ("Our task is to interpret Title VII as drafted by Congress . . . ."); *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."). Congress has not acted to expand Title VII to include protections against discrimination for transgender status.

As for his claim that Chandler is in violation of section 1557 of the Affordable Care Act and its related regulation, Robinson has little to say. He does not seriously dispute that the law he accuses Chandler of violating does not actually apply until 2017. While he also contends that the regulation merely clarified an existing prohibition, this is clearly incorrect. For the same reasons the Title VII claim fails, the law prior to the implementation of the Final Rule did not cover action based solely on the fact that a person is transgender, it did not inform an employer that it was required to provide coverage for transgender surgery, and it certainly did not prohibit a health care employer from excluding categories of services in a facially neutral health plan provision. The material change in the law was precisely the reason the Final Rule provides a lengthy period for health plans to comply. Robinson's argument would in effect eliminate that compliance period. There is also no basis for the Court to issue an injunction prohibiting Chandler from violating a law that does not yet apply and with which it has not yet had a chance to comply. In effect, Robinson asks this Court to hold his defective complaint in abeyance until the law changes and then issue an injunction based on assumed facts that do not yet even exist. This request should be rejected and the case dismissed.

II. ARGUMENT

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

1. Creating Transgender Protections in Title VII Requires Legislative Action, Which Congress Has Declined to Take.

Robinson claims Chandler discriminated against him because he is transgender. On its face, Title VII does not apply to discrimination based on transgender status. Many courts have recognized the statute's *limited* application to transgender persons in cases based on alleged sex stereotyping, but Robinson does not make such allegations here. There is no other basis for finding transgender protection to be within the scope of Title VII. To do so would usurp the role of Congress, which has repeatedly had the opportunity to enact legislation to create broad discrimination protections based on transgender status, but has not done so. *See* Motion at 7-8. In fact, a legislative proposal that would accomplish the protections urged by Robinson is currently pending in Congress. (H.R. 3185; S. 1858 (introduced July 23, 2015).) To date, Congress has taken no action.[1]

Chandler's motion cited numerous cases confirming that Title VII cannot be expanded without congressional action. *See* Motion at 6-7. Robinson cannot refute this basic point. Instead, he seeks to distinguish these cases on several inapposite grounds. Robinson notes that some of the cases involve claims of sexual orientation rather than transgender discrimination. This is irrelevant to Chandler's simple point that when Title VII does not protect a particular category, legislative action is required to change that. Courts can, of course, interpret the language of the statute and read it to cover situations that may not have been Congress's precise focus when Title VII was enacted,[2] but they will not do so when that would expand the statute by

[1] In fact, Congress did act to specifically *exclude* transgender status as a basis for a disability discrimination claim. *See* 42 U.S.C. § 12211(b); 29 U.S.C. § 705(20)(F)(i). Contrary to Robinson's assertion (Opp. at 16) that this means transgender is included in Title VII because it is not expressly carved out, it is more reasonably interpreted to mean that Congress recognized that transgender is not a disability that requires accommodation. Congress certainly does not create new legal protections by silence and, as noted, it has considered and rejected categorical protection for transgender persons. "Congress … does not . . . hide elephants in mouseholes" when legislating. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[2] *See, e.g., Price Waterhouse*, 490 U.S. 228 (reading Title VII's prohibition of discrimination

adding protected classifications. Just as Title VII's prohibition of discrimination because of sex does not include sexual orientation, it cannot reasonably be read to include discrimination simply because that person is transgender. *See Oncale*, 523 U.S. at 78 (Title VII's sex discrimination provision "'evinces a congressional intent to strike at the entire spectrum of disparate treatment of *men and women* in employment'") (emphasis added; citation omitted).

Robinson also argues that Congress's failure to enact new legislation to add protection for transgender status is not relevant because later acts of Congress are not probative of the legislative intent behind an earlier statute. But Chandler is not arguing that Title VII should be interpreted based upon later acts of Congress. Chandler's point is simply that expanding the scope of a federal statute requires congressional, not judicial, action. *See, e.g., Gunnison v. Commissioner of Internal Revenue*, 461 F.2d 496, 499 (7th Cir. 1972). Numerous recent cases find that Congress's failure to act is dispositive of the point that Title VII does not include unenumerated categories. *See, e.g., Hively*, 2016 WL 4039703, at *3-*4; *Hinton v. Virginia Union U.*, 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").

Finally, Robinson cites several cases for the proposition that congressional inaction or statutory amendments may not be relied upon to interpret an ambiguous statute. (Opp. at 15-16.) However, the cases he cites involve amendments or inaction with respect to highly technical and specialized areas of law—such as ERISA, copyright, or the Warsaw Convention. In contrast, whether Title VII protects transgender status is a simple and non-technical issue. In this context, where Congress's failure to explicitly extend the reach of the statute is clearly significant, Congress's failure to legislate does speak volumes.

Robinson does not dispute the proposition that only Congress may expand the statute to encompass new protections. He simply insists that congressional action is not necessary because

because of sex to include sex stereotyping); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (reading Title VII's prohibition of discrimination because of sex to include sexual harassment of men as well as women).

Title VII already applies to transgender status. As discussed below, it does not, outside of the sex stereotyping context that is not presented in this case.

2. The Only Potentially Viable Claim of Transgender Discrimination Is Sex Stereotyping, Which Is Not Alleged Here.

Robinson tries to ground his Title VII claim in cases applying *Price Waterhouse* to find that discrimination against transgender people can constitute sex discrimination prohibited by Title VII. However, *Price Waterhouse* does not support expanding Title VII's protections to transgender persons beyond cases of sex stereotyping. Indeed, from the Opposition, the Court would never know that *all* of the Circuit court cases cited by Robinson for the proposition "discrimination against transgender individuals is discrimination because of sex under federal civil rights statutes" are, like *Price Waterhouse*, sex stereotyping cases. (Opp. at 10 (citing *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).)

What Robinson really wants is for this Court to misread *Price Waterhouse* and its progeny as standing for the incorrect proposition that because some discrimination (on a sex stereotyping theory) may be actionable under Title VII, transgender status is itself protected. However, that huge leap is not supported by logic or case authority and the Court should decline Robinson's unstated invitation to materially change existing law. Indeed, as Robinson implicitly admits, no court has found a facially neutral health coverage exclusion to be actionable under Title VII.

Despite the distinction, recognized in the case law, between sex stereotyping and discrimination against transgender status, *see EEOC v. RG & GR Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 598 (E.D. Mich. 2015)[3], Robinson incorrectly claims that the Ninth Circuit

[3] Robinson acknowledges that *Harris* drew a distinction between transgender status and sex stereotyping, but calls that distinction "purely theoretical." (Opp. at 13 n.8.) On August 18, 2016, the same court granted summary judgment on that claim in favor of the employer. The court found that the EEOC had failed to show that the transgender woman's right to wear a skirt to work implicated sex stereotyping. The court repeatedly pointed out that the EEOC was still "proceeding as if gender identity or transgender status is a protected class under Title VII," although the court had already rejected those theories. *Harris*, 2016 WL 4396083, at *2, *19. In other words, the supposed "purely theoretical" distinction between the theories at the time of the motion to dismiss ultimately became dispositive to the ruling on the merits in favor of the employer. Notably, the ACLU appeared as amicus in *Harris*, arguing that Title VII applied

recognizes Title VII's protections as applicable to transgender status generally. *See* Opp. at 10 (asserting that *Schwenk* applies Title VII to "all discrimination that 'is related to the sex of the victim'"). But *Schwenk* is a prison attempted rape case in which the Ninth Circuit expressly *applied* the sex stereotyping theory of *Price Waterhouse*. The plaintiff asserted that the prison guard who attempted to rape her did so because she was a man that appeared feminine and had feminine mannerisms. Based upon these facts, the Ninth Circuit held that she had stated a sex stereotyping claim in that the attempted rape occurred because she was a man who failed to act like a man. As such, *Schwenk* plainly does not stand for the proposition that transgender status is generally protected.

Robinson focuses on the part of *Schwenk* where the Ninth Circuit held that the distinction between "sex" (anatomy) and "gender" (sexual identity) that had been applied in prior cases such as *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977), had been overruled by the logic of *Price Waterhouse*. *Schwenk*, 204 F.3d at 1201. But the statement simply meant that discrimination claims were not limited to claims of discrimination against women because they are women or men because they are men. *See e.g., Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984) (cited in *Schwenk*). Nothing in *Schwenk* remotely establishes that transgender status is a new protected classification. Rather, the Ninth Circuit held precisely that "discrimination because one fails to act *in the way expected* of a man or a woman is forbidden." *Schwenk*, 204 F.3d at 1202 (emphasis added). Here, there is no allegation of discrimination against Robinson because he failed to act like a man or a woman. Chandler's health benefits policy exclusion applicable to all employees has nothing to do with how Chandler perceives Robinson or how he behaves or dresses.

This interpretation of *Schwenk* is not subject to serious debate. The Ninth Circuit itself has described its holding in *Schwenk* in multiple cases. For example, the court explained that "we held [in *Schwenk*]. . . that transgender individuals may state viable sex discrimination claims *on the theory* that the perpetrator was motivated by the victim's real or perceived *non-conformance*

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because of the claim of sexual stereotyping. The ACLU did not, however, argue in support of the EEOC's central claim that transgender status alone was protected under Title VII.

to socially-constructed gender norms. After [*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*." *Kastl v. Maricopa County Comm. College Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) (emphasis added); *see also Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (describing *Schwenk* as "comparing the scope of the Gender Motivated Violence Act with the scope of Title VII, which forbids '[d]iscrimination *because one fails to act in the way expected of a man or woman*'") (emphasis added); *Latta v. Otter*, 771 F.3d 456, 495 n.12 (9th Cir. 2014) (Berzon, J., concurring) (describing *Schwenk* as showing that "transgender people suffer from similar gender stereotyping expectations" as lesbian, gay, and bisexual people).

Consistent with *Schwenk*, Chandler's motion cited numerous cases for the proposition that transgender discrimination *not* based on sex stereotyping is not cognizable under Title VII. (Motion at 12-13.) Robinson wants to ignore these cases because they undermine his incorrect suggestion that the "vast majority" of courts support the unfounded claim that transgender status is a protected classification. And he seeks to sweep the cases away by claiming they depend on now-discredited, pre-*Price Waterhouse* decisions (*Holloway* and *Ulane*). But citations to *Holloway* or *Ulane* do not render these cases obsolete. These cases *acknowledge* the viability of a *Price Waterhouse* stereotyping theory; they merely decline to *extend* transgender discrimination *beyond* sex stereotyping—and thus they accurately reflect current Title VII law. *See Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1221-24 (10th Cir. 2007) (holding that transgender persons are not a protected class; assuming without deciding that a sex stereotyping theory under *Price Waterhouse* is viable); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674-82 (W.D. Pa. 2015) (finding transgender is not a protected status but considering plaintiff's sex stereotyping claim); *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 661 (W.D. Tex. 2014) (declining to find actionable discrimination based on transgender status, but considering plaintiffs' sex stereotyping claim and finding it not supported by the facts alleged); *Creed v. Family Express Corp.*, 2007 WL 2265630, at *3-*4 (N.D. Ind. 2007) (following *Ulane* as to transgender status discrimination but finding that plaintiff had stated a viable claim for

gender stereotyping); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999-1000 (N.D. Ohio 2003) (rejecting transgender status claim that was not based on stereotyping), *aff'd*, 98 Fed. Appx. 461 (6th Cir. 2004).

Thus, the overwhelming prevailing view is that Title VII covers transgender discrimination only where the employer is alleged to have treated the person differently because of perceptions about gender norms. Robinson tries to stretch *Price Waterhouse*'s application, suggesting that all discrimination against transgender individuals, in any form, fits the *Price Waterhouse* mold because transgender status inherently is dissonant with gender stereotypes. This notion has repeatedly been rejected in the sexual orientation context, where plaintiffs have argued that a same-sex relationship inherently violates stereotypes of how men and women should behave. *See, e.g., Hively*, 2016 WL 4039703, at *5-*6 and cases cited therein; *Christiansen v. Omnicom Group, Inc.*, __ F. Supp. 3d __, 2016 WL 951581, at *13-*14 (S.D.N.Y. March 9, 2016). The notion is no more persuasive in the transgender context.

Robinson cites three district court cases in which transgender prospective employees brought claims for violation of Title VII. However, in each of these cases, the plaintiff pled a claim of sex stereotyping. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 305, 308 (D.D.C. 2008) (the "Library's hiring decision was infected by sex stereotypes"; the Library of Congress violated Title VII by refusing to hire Schroer because "her appearance and background did not comport with the decisionmaker's sex stereotypes . . ."); *Finkle v. Howard County, Md.*, 12 F. Supp. 3d 780 (D. Md. 2014) (plaintiff not hired after in-person interview stated a Title VII claim that she was discriminated against "because of her obvious transgender status"); *Fabian v. Hospital of Cent. Conn.*, 2016 WL 1089178, at *2-*3 (D. Conn. March 18, 2016) (plaintiff offered job that was later denied after an in-person interview where she stated that she would present as a female when the position started). Consequently, these cases do not support a discrimination claim where, as here, Robinson does not plausibly allege sex stereotyping. *See* Motion at 13 n.6.[4]

[4] *Rumble v. Fairview Health Servs.*, 2015 WL 1197415 (D. Minn. March 16, 2015), which arose under section 1557, is similar. In *Rumble*, which preceded the Final Rule implementing section 1557, the court was unsure of the specific standard that applied to claims under section 1557, but

Robinson attaches importance to these cases because they raise the issue of whether transgender status is itself a protected classification and the courts find it difficult to draw a line between sex stereotyping claims and claims based upon protected status. That is not surprising because, as a practical matter, this line may become blurry in cases where an employer reacts negatively to a particular transgender person's appearance and mannerisms in the workplace. *See Schroer*, 577 F. Supp. 2d at 306 (noting that the employer's comments could be parsed in multiple ways). But a case like the present is very different. Chandler instituted a facially neutral policy, many years before Robinson worked there, excluding coverage for a category of services when sought to treat a particular condition. And Robinson does not allege anything about how people reacted to him in the workplace, judged the way he should look or behave, or disfavored him because of discomfort with his appearance, his behavior, or even his transition itself.[5] Absent allegations of sex stereotyping, which Robinson disavows (Opp. at 17), no discrimination claim is stated.[6]

3. Robinson Fails to Allege the Discriminatory Intent Required for a Title VII Disparate Treatment Claim.

As Chandler's motion shows, where a plaintiff challenges a facially neutral policy under a Title VII disparate treatment theory, the plaintiff must allege and prove that the employer created

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held that "even if Plaintiff was required to prove that Dr. Steinman intended to harass Rumble because of Rumble's transgender status or *Rumble's failure to conform with gender stereotypes*, Plaintiff plausibly alleges facts demonstrating Dr. Steinman's requisite intent." *Id*. at *18 (emphasis added). Indeed, the court found that the doctor's egregious conduct, which included physically harming Rumble, constituted a denial of medical care. *Id*. at *16.

[5] Robinson plainly errs in asserting that being transgender means a person's behavior is inherently gender-nonconforming. For example, some people identify as transgender but have taken no steps to actually transition or to present as a member of the non-assigned sex. Those persons have the same transgender status as a person who has transitioned, but they are not "inherently" violating any gender stereotypes.

[6] Robinson also cites 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, 1120 (N.D. Cal. 2015). These cases bear no resemblance to the present facts in that they involve *government* action that 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. Moreover, both cases are replete with evidence of outright hostility—for example, indifference to the plaintiffs' medical needs and the government's failure to apply its own rules. In addition, as *Denegal* makes clear, the government's behavior 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).

the policy because it intended to treat the plaintiff differently based on a protected characteristic. (Motion at 14-16.) Where that intent is lacking, the claim fails.

Robinson makes two arguments in response. First, he contends that Chandler's coverage exclusion is facially discriminatory, not neutral. But that assertion is demonstrably false. On its face, the exclusion is neutral as to gender.[7] The benefit plan covers all Chandler employees to the same extent and for the same treatments.[8] The plan denies coverage of procedures to men who are transitioning to become women and women who are transitioning to become men. Men—whether transitioned or not—get coverage for medically necessary treatments that apply to male anatomy; the same is true for women, whether or not transitioned. And if a transgender person seeks coverage for a mastectomy or another procedure for a medical reason that is not related to transition—for instance, to treat cancer—then the procedure will be covered. What is excluded is a range of treatments for a particular condition. In fact, Robinson acknowledges that the policy covers the same treatments if sought for a different reason. (Opp. at 7.) That is not disparate treatment discrimination.

Second, Robinson says that an employer's intent to discriminate is irrelevant to the Title VII inquiry. But he ignores the key fact that Chandler's policy is *facially nondiscriminatory*. The case he cites, *International Union et al. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), answered a very different question: whether the employer's nondiscriminatory motive could save a *facially discriminatory* policy from Title VII liability. Unlike Chandler's policy, which applies to all employees equally, the employer's policy in *Johnson Controls* "explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender." *Id.* at 197. The Court

[7] Robinson asserts that the fact that the policy only excludes services when sought by transgender people makes it facially discriminatory. But that is a disparate impact theory, which the complaint does not allege and which Robinson does not argue in opposition to the motion. The three cases he cites to support his characterization of the policy do not consider whether an adverse impact can turn a facially neutral policy into one that is facially discriminatory. In any event, a disparate impact claim would fail here because there is no protected class for the reasons discussed herein.

[8] Robinson also says that the exclusion is not facially neutral because of the term "sex" in its title. (Opp. at 17.) This makes no sense, as it would apply equally to exclusion of sex therapy or sex addiction treatment, which would not treat transgender people differently or have any special impact on that group. Indeed, such exclusions would surely also be neutral in character.

held that the employer's motivation of safety rather than discrimination "does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Id.* at 199. Where, as here, the employment practice is facially neutral, a plaintiff must allege and prove a discriminatory motive in order to establish disparate treatment under Title VII. *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).[9]

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

Section 1557 of the ACA prohibits certain sex discrimination, to the same extent as Title IX, in the provision of employee benefits to employees of a health care employer. Congress left it up to the agency, OCR, to promulgate regulations fleshing out and refining those prohibitions. OCR did so, but not until May 18, 2016, when it issued the Final Rule with an effective date of July 18, 2016 (after the complaint was filed) for some provisions, and an effective date after January 1, 2017 for other provisions—such as the redesign of the exclusionary clause that Robinson seeks here.[10] Robinson's attempt to hold Chandler liable for violating a law that is even now not yet effective fails for several reasons. Robinson does not seriously refute any of

[9] Robinson tries to find Chandler had a motive to discriminate in "extrinsic evidence that Dignity Health retained the exclusion to enforce some of its corporate officers' religious convictions about the sexual differences of men and women." (Opp. at 18.) Even if extrinsic evidence cited in opposition to Chandler's motion to change venue were relevant to evaluate whether the allegations of a complaint plead a plausible claim under Rule 12(b)(6) (it is not), Robinson's characterization of that evidence is false. The cited email (Exhibit H to the complaint) explains that Robinson' fiancée's complaints about the exclusion were evaluated "through the lens of our values, our internal policy and our ethical & religious directives" applicable to Catholic hospitals, not officers' personal convictions.

[10] To the extent the Final Rule's requirements exceed the scope of OCR's authority to promulgate regulations interpreting section 1557, they are invalid. (Motion at 17 n.11.) In fact, the Final Rule is now being challenged on this very basis (among others) in *Franciscan Alliance, Inc. v. Burwell*, No.16-cv-00108-O (N.D. Tex., filed August 23, 2016).

them.

1. The Exclusion Is Not Precluded by Any Law Applicable Prior to the Effective Date of the Final Rule.

Robinson contends that the Final Rule's express bar of a categorical exclusion of services for transgender treatment actually pre-existed the regulation and arose merely from the ACA's reference to Title IX. Robinson says that the rule's prohibition of categorical exclusions is just "mak[ing] explicit what is already prohibited by the statutory text." (Opp. at 20.) However, he cites no part of the statutory text that contains any such rule, nor is there prior statutory or case law that does so. For the reasons discussed above, nothing in Title IX (or Title VII, which provides guidance for interpreting Title IX) comes close to precluding an employer from excluding coverage for transgender treatment for its employees in a facially neutral plan provision.[11] Robinson's contention that the Final Rule is nothing more than a "clarification" of the ACA is unsupported wishful thinking, at odds with plain text.[12]

Despite the general ban on retroactive effect of regulations (Motion at 21), Robinson attempts to bootstrap the Final Rule's prohibitions back to an earlier time. He cites cases for the proposition that regulations may articulate requirements that already exist in the particular statutes they purport to implement. But the cases involved statutes, unlike section 1557, where the statutory text and prior interpretations already established the requirement at issue. Section 1557 on its face *only* prohibits sex discrimination prohibited by Title IX; nothing in Title IX prohibits facially neutral health benefit exclusions for transgender surgeries. In *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-78 (2005), the Court held that retaliation was

[11] Moreover, although Title IX cases are interpreted consistently with Title VII law, it is worth noting again that the statutory provisions of Title IX itself plainly contemplate only two sexes. *See* Motion at 17 n.12; *see also Texas v. United States*, 2016 WL 4426495, at *14-*15 (N.D. Tex. Aug. 21, 2016) (interpreting Title IX regulation's reference to "sex" as relating to "the biological and anatomical differences between male and female students as determined at their birth"). Further, section 1557 does not even incorporate Title VII, opting instead to incorporate other anti-discrimination laws, one of which (the Rehabilitation Act) expressly forecloses protection of transgender persons.

[12] *Cruz v. Zucker*, 2016 WL 3660763 (S.D.N.Y. July 5, 2016), ruled that a New York state Medicaid law's categorical exclusion of coverage of cosmetic procedures for gender dysphoria violated section 1557, prior to the effective date of the Final Rule. *Cruz*, 2016 WL 3660763, at *7. However, the opinion contains no discussion of a retroactive effect of the Final Rule. It appears that the defendant simply acquiesced in the conclusion that the bar applied before the effective date of the Final Rule.

prohibited by the text and prior interpretations of Title IX itself, and thus rejected the argument that a regulation had created a new prohibition for retaliation. *See also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 645-47 (1999) (concluding that Title IX itself prohibits student-on-student harassment and that subsequent agency guidance was consistent); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 (1982) (discussing text of Title IX). None of these cases supports the proposition that a type of discrimination *not* prohibited by the text of the statute can nonetheless be prohibited by a regulation prior to the effective date of the regulation. While OCR stated that the law "currently provides" protections, it did so in the context of explaining why it would not impose an effective date that was further *in the future* than the date it had settled on. 81 Fed. Reg. 31376, 31430 (May 18, 2016). If the prohibitions pre-existed the regulation, the effective date would be a nullity.

Robinson also attempts to ground a pre-existing prohibition of categorical exclusions in the ACA itself on an assertion that states issued bulletins prior to the effective date of the Final Rule "alerting that the Affordable Care Act (in addition to applicable State laws) prohibited categorical exclusions in health plans." (Opp. at 20 n.15.) But he relies on a statement in the Proposed Rule that does not support his characterization, as it notes that some states have *their own laws* prohibiting certain exclusions for transgender services. 80 Fed. Reg. 54172, 54189-90 (Sept. 8, 2015). Arizona is not one of the listed states.

Robinson concedes that the Final Rule expressly allows plans to exclude services based on lack of medical necessity. As Chandler's citations to various agency materials show, there is no consensus on the issue of medical necessity of transgender surgery.[13] *See O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. 34, 95 (U.S. Tax Ct. 2010) (Holmes, J., concurring) (noting the "academic controversy" over the medical necessity of sex reassignment surgery). It

[13] Robinson alleged a general acceptance in the medical community that transgender surgery is medically necessary. To the extent that is construed as a factual allegation, the court must accept it as true for the purposes of ruling on this motion. However, this Court need not and should not reach any conclusion about the medical necessity of the procedures in ruling on this motion, beyond acknowledging what Robinson alleged. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (accepting plaintiff's allegation of medical necessity for purposes of motion to dismiss, but "express[ing] no opinion on whether [a procedure] is medically necessary for Rosati or whether prison officials have other legitimate reasons for denying her that treatment").

makes no sense, and would be patently unfair, to impose retroactive liability on Chandler for a having a policy that excludes a service the medical necessity of which remains the subject of debate, change, and lack of clarity, even among federal agencies.[14] For instance, as the Motion noted, federal Medicaid law leaves coverage up to individual states, and Arizona has chosen not to require it. (Motion at 4.) This weighs heavily against a conclusion that the prohibition of a categorical exclusion for transgender surgery predated the Final Rule.

2. The Prohibitions of the Final Rule Are Not Yet in Effect and Chandler Cannot Be Punished for Allegedly Violating Them.

Robinson contends that if the coverage exclusion was not already unlawful under the ACA before the regulation was effective, then Chandler was required as of the July 18 effective date to immediately provide the benefits. But he does not dispute that the exclusion is a matter of plan design, nor does he dispute that the Final Rule expressly does not impose liability on an employer for plan design issues until 2017. Instead, he argues that the 2017 deadline does not matter because, as a self-funded plan, Chandler's plan has no "administrative challenges" and it can comply now by exercising its discretion to approve the benefit. (Opp. at 22.) The pages of the plan that he cites (Ex. C at 71-72) merely set forth the plan's voluntary process for a beneficiary to appeal the denial of a benefit; it does not provide discretion for the plan to decide to cover a procedure that the plan explicitly does not cover.

Moreover, self-funded ERISA plans have the same complex plan procedures as insured plans and need to change the same systems in order to alter the plan's coverage and exclusions. Among other things, plan fiduciaries owe duties to the plan itself, not to individual beneficiaries seeking coverage of expensive procedures outside the scope of the plan's coverage. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985). They cannot simply exercise discretion to approve such procedures in individual cases. OCR recognized the time and

[14] *See* CMS Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-0446N) at 61, 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; *see also* http://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=2900-ap69 (OMB notice of proposed rulemaking to remove Department of Veterans Affairs ban on transgender services).

difficulty inherent in making significant changes to plan benefits, which is why it gave *all* covered employers extra time to bring their plans into compliance—whether self-funded or not. 81 Fed. Reg. at 31378. Any retention of discretion to administer the plan does not mean that a plaintiff can circumvent the clear regulatory effective date and hold an employer liable long before that date because it fails to exercise its discretion in his favor. Robinson's argument would render the delayed effective date meaningless.

Robinson argues that he at least is entitled to damages for Chandler's non-coverage beginning July 18, and an injunction for Chandler's assumed future noncompliance with a law that does not yet apply and with which it has not yet had a chance to come into compliance if necessary. These contentions fail as well. Until Chandler is subject to the plan design rules—after the effective date, in 2017—it cannot have committed and is not committing any violation of the regulation by not covering the surgery. The complaint alleges no facts to support Robinson's assumption that Chandler will not amend its plan as appropriate to ensure compliance with the Final Rule's plan design requirements. There is no ripe factual or legal basis alleged to support any relief. *See Cruz*, 2016 WL 3660763, at *2 ("'A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated,' such as the denial of coverage for medically necessary cosmetic surgeries"). In January 2017, if the coverage is not satisfactory to Robinson, he can bring a claim at that time based on current factual allegations and law that is in effect. But there is no basis for essentially holding this lawsuit in abeyance to wait until the law allegedly prohibiting Chandler's past conduct becomes unlawful in the future.

III. CONCLUSION

Robinson's complaint fails to allege a plausible violation of Title VII or section 1557, and should be dismissed with prejudice.

Dated: August 29, 2016

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