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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. 3:16-cv-03035-YGR

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS OR TRANSFER FOR IMPROPER VENUE (28 U.S.C. § 1406(a)); OR TO TRANSFER FOR CONVENIENCE (28 U.S.C. § 1404(a))

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

Plaintiff's lawsuit asserts that a long-standing categorical exclusion of transgender surgery coverage from an Arizona health plan for the Arizona employees of an Arizona hospital, including Plaintiff, violates Title VII. Plaintiff does not dispute that he applied for, and was denied, coverage for the requested transgender surgery in Arizona based upon the provisions of a health plan that applies to Arizona employees only. Indeed, Plaintiff asserts that if he had been employed by Dignity Health in California, the requested surgery would have been covered. Consequently, there is no nexus with California sufficient to support venue in the Northern District, and California does not have an interest in this case. Plaintiff has the burden of establishing that venue is appropriate and he has failed to do so.

In what readily should be seen as a naked attempt to manufacture venue in California, and facing a factual record that provides no basis for a lawsuit in the Northern District, Plaintiff's fiancée began emailing Dignity Health's corporate officers in San Francisco, asserting that the Arizona health plan was discriminatory and requesting changes to that plan. Not realizing that Plaintiff was attempting to forge a basis for a lawsuit in a venue away from his home in Arizona, Dignity Health's officers sought to respond in good faith to Plaintiff's fiancée (not Plaintiff), including by holding a meeting to discuss the claims of discrimination and the suggestion that the exclusion be changed. Plaintiff's Opposition to Chandler's venue motion is almost entirely focused on this meeting**,** which occurred months *after* the Arizona health plan had *denied* two successive requests by Plaintiff that the plan cover his transgender surgery based on the coverage exclusion. That meeting is legally irrelevant to the proper venue for this lawsuit.

The alleged "unlawful employment practice," *i.e.* the purported discrimination with respect to the "terms, conditions or privileges" of Plaintiff's employment, occurred in Arizona where Plaintiff lives and works and where he applied for and was denied (on multiple occasions) coverage for transgender surgery based upon the coverage exclusion. (Compl., ¶¶ 50, 58, 70.) And, as established in Chandler's Motion, Plaintiff's employment records are located in Arizona. It is no accident and no small irony that Plaintiff elected to eschew Title VII's specific venue provisions, which are designed to protect alleged victims of discrimination by allowing them to

sue locally, where they are allegedly wronged, and where they can better afford to prosecute their claims. Indeed, Plaintiff himself understood this, when he began the adjudication of this dispute by filing his complaint with the EEOC in Phoenix, not in California.[1]

In the Opposition, Plaintiff for the first time contends that Dignity Health's decision to "retain," "continue" or not to "lift" the exclusion constituted the unlawful discrimination. However, on such an "inaction" theory, an employee could always shop his way to a forum at the employer's corporate offices. That is not the law. *See Darby v. U.S. Dep't of Energy*, 231 F. Supp. 2d 274, 278 (D.D.C. 2002) ("The Title VII venue statute . . . does not authorize venue based on the location where management control is exercised"); *Robinson v. Potter*, 2005 WL 1151429 at *4 (D.D.C. May 16, 2005) ("the plaintiff's arguments that the principal office is concerned with the unlawful practice and ultimately had control of the actions are insufficient to establish proper venue"). A district court must dismiss an action (or transfer the case if that is in the interests of justice) when the "unlawful employment decision" was neither made nor felt in the district and the employment records are not maintained there. Here, the alleged unlawful employment practice – *i.e.* the categorical exclusion of transgender surgery coverage to the Plaintiff under an Arizona health plan confined to Arizona employees – as well as the Arizona situs of Plaintiff's employment records, all require that this action be dismissed or transferred.[2]

Moreover, even if the Court were to consider Plaintiff's flawed new theory of venue based

[1] Doubtless, the Phoenix office EEOC that investigated Plaintiff's administrative complaint would have filed suit in Arizona had it elected to prosecute this case.

[2] In an effort to inflate the relevance of the November 5, 2015 meeting, Plaintiff speculates that the meeting was convened to discuss the religious and ethical implications of covering gender transition services across all Dignity Health employee benefits plans. However, this is not a case about Dignity Health's religious views on transgender issues. This is instead a case about health coverage under the Arizona Preferred Plan. The reality is that Dignity Health does not have a religion-based company policy regarding coverage of gender transition services, or else the Court would have seen argument on this subject in the concurrent Rule 12(b)(6) motion to dismiss. Plaintiff's insistence that arguments nowhere seen in the defendants' moving papers are somehow being made is another forced attempt to manufacture venue. But the evidence confirms that health benefits coverage and exclusion determinations are, and continue to be, made at the local level. (Sternbach Decl., ¶ 13). In fact, as Plaintiff has noted, Dignity Health employee health benefit plans in California do cover gender transition services. Supplemental Declaration of Eva Palermo, ¶ 2 (more than half of Dignity Health's health plans cover gender dysphoria, including plans in California); (Comp., Exh. G).

on management *inaction*, venue cannot lie in San Francisco because courts apply a "commonsense appraisal" of the events that have operative significance. *See Darby*, 231 F. Supp. 2d at 277; *Lamont v. Haig*, 590 F.2d 1124, 1134 (D.C.Cir.1978); *Donnell v. Nat'l Guard Bureau*, 568 F.Supp. 93, 94 (D.D.C.1983). Here, the events having operative significance to the alleged unlawful discrimination all occurred in Arizona, where Plaintiff lives and works, and where his application for benefits was made and denied. Indeed, contrary to Plaintiff's speculation, the discussion at the corporate office was simply an after-the-fact review of his fiancée's discrimination-related complaint and the company's policies – a review that had no impact whatsoever on the denial of coverage. That denial had already occurred, and was based upon a completely free-standing process conducted in Arizona.

II. ARGUMENT

It is undisputed that, in any action involving a Title VII claim, venue is authorized ***only*** in: (i) the district in which the alleged unlawful employment practice was committed; (ii) the district in which the employment records are maintained and administered; or (iii) the district in which the plaintiff would have worked but for the alleged employment practice. 42 U.S.C. § 2000e-5(f)(3); *Passantino v. Johnson & Johnson Consumer Products*, 212 F.3d 493, 504 (9th Cir. 2000).[3]

Plaintiff has failed to carry his burden of showing sufficient facts to support venue anywhere other than Arizona under any of the three prongs of the Title VII venue statute.[4] *See Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979) ("Plaintiff ha[s] the burden of showing that venue [is] properly laid in the Northern District of California."); *Cheng v. Schlumberger*, 2013 WL 5814272, at *2 (N.D. Cal. Oct. 29, 2013) ("Because [defendant] challenges venue, [plaintiff] bears the burden to establish that venue in this District is

[3] It bears emphasis that the plaintiff here is quite unlike the plaintiff in *Passantino*, who vindicated Title VII's specific venue provisions by filing suit where she lived and was wronged. Here, Plaintiff has forsaken his home venue, which he admits is a proper venue, in order to find what he presumably perceives as a friendlier venue for his claims.

[4] Prong three of the Title VII venue statute is not relevant to the present case because Plaintiff continues to be employed at the Chandler hospital in Arizona.

proper.").

A. The Only Proper Venue for This Case Is the District of Arizona Under Rule 12(b)(3) and Section 1406(a).

1. Venue Is Proper in the District of Arizona Because the Alleged Unlawful Employment Practice Was Committed in Arizona.

In the Opposition, Plaintiff argues that venue is proper under the first prong of the Title VII venue statute based his new theory that the unlawful employment practice occurred at a November 5, 2015 meeting in San Francisco where a corporate-level decision was purportedly made to "retain" an exclusion for transgender surgery. (*See* Opp. at 9:28-10:2 (arguing, "the critical decision to retain the exclusion for 2016 was made at a meeting convened on November 5, 2015 at Dignity Health's headquarters in San Francisco").) But this argument fails because there is no support for Plaintiff's "management inaction" theory of venue and nothing that occurred in San Francisco had an operative effect on the alleged unlawful employment practice, which was complete before San Francisco even entered the picture.

First, Plaintiff cites no authority whatsoever for his management inaction theory of venue. Nor is there any such authority because the point of the venue statute is to locate a lawsuit where the alleged unlawful practice was committed, *i.e.,* where the decisions were made or the impact felt. *See Passantino* 212 F.3d at 504. Here, the undisputed evidence shows that Plaintiff applied for, and was denied, coverage for transgender surgery in Arizona. There is no authority that a purported action to "retain" an existing coverage exclusion or any other policy by a corporate office gives rise to venue in that jurisdiction. *Robinson*, 2005 WL 1151429 at *4 ("If the court were to interpret actions or omissions of [defendant] as decisions determined at [defendant's] headquarters then a plaintiff would always be able establish venue wherever the principal office is located"); *Ifill v. Potter*, 2006 U.S. Dist. LEXIS 83833 at *6, fn. 3 (D.D.C. Nov. 16, 2006) ("[T]he fact that acts or omissions may be construed to be determinations of the [corporate] headquarters is insufficient to establish venue"); *Cook v. UBS Fin. Servs., Inc.*, 2006 WL 760284, at *3-4 (S.D.N.Y. Mar. 21, 2006) (dismissing for improper venue where broad-based personnel policies may have been approved at the company's New York headquarters, but the specific personnel decisions impacting plaintiff occurred in Maryland).

Second, Plaintiff's evidence does not even establish that the Dignity Health employees discussing the exclusion in San Francisco decided to "retain" the exclusion. The evidence shows that they determined that it was not discriminatory and decided to continue to study the issue. (Complaint, Exh. H (referring to additional steps that would be taken to gather additional information about the general issue of "Gender Identity Dysphoria and treatment options").) However, even assuming for purposes of argument that they did decide to "retain" the exclusion, that would still be irrelevant to venue in this case. The alleged unlawful employment practice had already occurred in Arizona where Plaintiff lives, works and was denied coverage for transgender surgery. Nor were the emails by Plaintiff's fiancée part of any "appeal" process with respect to those denials. The activity ginned-up by Plaintiff's fiancée months after his claim had been denied in an apparent effort to ground venue in San Francisco was a nullity as far as the alleged unlawful practice was concerned. Plaintiff's coverage request had been denied twice months before and remained denied with no change or impact at all from employees located in San Francisco.[5]

The exclusion from which Plaintiff's claim arises is contained in the Arizona Health Plan, which is managed and administered by Dignity Health's Health and Welfare Benefits Department, which is based in Arizona (Palermo Decl., ¶ 8). Like all other benefits and coverage exclusions in the Arizona Preferred Plan, it is reviewed on a quarterly basis by the Arizona Benefits Steering Committee (Sterbach Decl., ¶ 13). Plaintiff does not allege that Dignity Health's corporate office even ***knew*** of the exclusion until after it had been applied to Plaintiff and Plaintiff's fiancée had complained.[6] Venue cannot possibly be rooted in the post-decision review by Dignity Health's corporate office of the underlying "alleged unlawful employment practice," a process that produced no change to decisions already made in Arizona. *Robinson*, 2005 U.S. Dist. LEXIS 9491 at *13-14 ("the plaintiff's arguments that the principal office is

[5] Plaintiff does not allege that Melissa Mayo had any authority to represent him in connection with his application for health coverage or his appeal of the Arizona Health Plan's denial.

[6] Plaintiff filed his benefits claim in June 2015, appealed the denial of the claim in July 2015, and paid out-of-pocket for the desired procedure in August 2015 – all before his fiancée first contacted the corporate office in September 2015. (Palermo Decl., ¶¶ 13-14.)

concerned with the unlawful practice and ultimately had control of the actions are insufficient to establish proper venue").

Third, Plaintiff has failed to establish that the corporate office took any action beyond conducting an administrative investigation of a complaint. *See Amirmokri v. Abraham*, 217 F. Supp. 2d 88, 90-91 (D.D.C. 2002) (holding that "records relating to plaintiff's unlawful employment practice complaint and the investigation thereof . . . do not support venue in the district where the complaint and investigation records are maintained"). As Plaintiff quotes from a communication between Darryl Robinson and Plaintiff's fiancée, "[Dignity Health] deliberated whether our existing policies were discriminatory and inconsistent with our organization values as you stated in your letter. We found no evidence of discriminatory practice in the employee benefit plan documents, internal practice or the administration of the plan." (Compl., Ex. H.) This post-hoc review of an alleged unlawful employment practice committed elsewhere does not support venue other than in Arizona.

Finally, Plaintiff is unable to dispute that responsibility for the management and administration of the relevant coverage exclusion belongs to Dignity Health representatives based in Arizona. Plaintiff's unsupported assertion that "Dignity has provided no evidence that any Dignity Health employee in Arizona played any role in deciding whether or not to create or maintain the 'sex transformation' exclusion in the Arizona self-funded plan" is simply wrong. (Opp. at 7:12-15.) The evidence submitted with the hospital's moving papers confirms that the "Arizona Benefits Steering Committee . . . is responsible for reviewing the [Arizona Preferred] Plan's performance on a quarterly basis and making decisions regarding benefits and coverage exclusions in self-funded health plans offered to Dignity Health." (Sterbach Decl., ¶ 13.) Additionally, "Dignity Health's Health and Welfare Benefits Department in Arizona is responsible for the management and administration of all of the employee health plans . . . ." (Palermo Decl., ¶ 8.) Hence there is uncontested evidence that Dignity Health employees in Arizona are ***solely*** responsible for making decisions regarding the maintenance and administration

of the relevant exclusion.[7]

2. Venue Is Proper in the District of Arizona Because the "Master Set" of Plaintiff's Employment Records Is Maintained in Arizona.

Plaintiff also argues that venue is proper in California under the second prong of the Title VII venue statute because employment records relating to the November 5, 2015 meeting – to the extent any such records exist – were created in the Northern District of California. (Opp., at 13:1-5.) Plaintiff has failed to carry his burden with respect to this argument for at least three reasons.

First, "the prong of the Title VII venue statute that concerns employment records speaks of '*the* judicial district' in which employment records are 'maintained and administered.' From the statute's use of the singular, it is clear that Congress intended venue based on this factor to lie only in the one judicial district in which the complete, 'master' set of employment records is 'maintained and administered.'" *Washington v. General Electric Corp*., 686 F. Supp. 361, 363 (D.D.C. 1988) (emp. in original). Here, it is undisputed that the "master set" of Plaintiff's employment records is maintained and administered in Arizona; and if any records relating to Plaintiff were generated as a result of the November 5, 2015 meeting, such records would be maintained in Plaintiff's personnel file. (Sterbach Decl., ¶ 4.)

Second, any "records relating to plaintiff's unlawful employment practice complaint and the investigation thereof are . . . not 'employment records' within the meaning of the [Title VII venue] statute." *Amirmokri*, 217 F. Supp. 2d at 90-91. The Title VII venue provision contemplates that venue is proper in the ***one*** location where employment and personnel-type records are maintained in the ordinary course of the plaintiff's employment – in this case, Arizona. It does not allow for venue based on the location of an administrative investigation into a plaintiff's discrimination complaint – as was the case with the November 5, 2015 meeting upon which Plaintiff's opposition places so much emphasis.

[7] The evidence unequivocally disproves Plaintiff's unsubstantiated contention that "Dignity Health did not treat the 'sex transformation' exclusion as a run-of-the-mill question about employee benefits to be decided locally"; but rather, "the decision was made by corporate-level employees because it implicated Dignity Health's 'values,' 'internal policy,' and 'ethical & religious directives.'" (Opp., at 11:3-7.) Indeed, the fact that Dignity Health's employee benefits plans continue to vary widely with respect to their coverage of transition-related care actually confirms that Dignity Health has not made any corporate-level decision whatsoever.

Thus, under prong two of the Title VII venue provision, venue is proper in the District of Arizona, where Plaintiff's employment records are maintained and administered. (Sterbach Decl., ¶ 4.)

B. Alternatively, Venue Should Be Transferred for Convenience Pursuant to 28 U.S.C. § 1404(a).

Even if the Court does not find that Plaintiff filed this action in an improper venue, the Court should nonetheless transfer this action to the District of Arizona because Arizona is the most convenient venue.

Plaintiff's opposition argues against transferring venue under section 1404(a) because: (i) Plaintiff's choice of venue is entitled to deference, and (ii) "the critical witnesses who need to be deposed are the individuals who participated in the November 5, 2015 meeting." (Opp., at 14:10-12.) These arguments are not supported by the facts and the law.

First, in arguing that Plaintiff's choice of venue is entitled to deference, Plaintiff simply ignores the multiple authorities cited in the hospital's moving papers for the proposition that a plaintiff's choice of forum receives less weight where the chosen forum is not the plaintiff's residence. *Hawkes v. Hewlett-Packard Co.*, 2012 WL 506569, at *4 (N.D. Cal. Feb. 15, 2012) ("Because Hawkes does not reside in California, her choice of forum receives less weight."); *SP Inv. Fund I, LLC v. Lowry*, 2016 WL 590192, at *6 (C.D. Cal. Feb. 11, 2016) ("The deference afforded a plaintiff's choice of forum is substantially reduced . . . when the venue lacks a significant connection to the activities alleged in the complaint."); *McCormack v. Safeway Stores, Inc.*, 2012 WL 5948965, at *4 (N.D. Cal. Nov. 28, 2012). Plaintiff's opposition does not even mention these authorities, much less successfully rebut them. Accordingly, Plaintiff's choice of forum in the Northern District of California is not entitled to the deference normally given to a plaintiff's choice because this is not the forum in which Plaintiff lives or works.

Second, the individuals who participated in the November 5, 2015 meeting are not relevant to the alleged unlawful employment practice. The relevant individuals are the employees responsible for maintaining and administering the benefits policy that contains the exclusion – *i.e.* Dignity Health's Health and Welfare Benefits Department and Benefits Steering Committee, all

of whose members are based in Arizona. (*See* Palermo Decl., ¶ 8; Sterbach Decl., ¶ 13.) These Arizona-based employees are the persons most knowledgeable regarding the Arizona Health Plan and the transgender surgery exclusion that has been in place since at least 1999.

Accordingly, this action should be transferred to Arizona for the convenience of the parties and witnesses, and in the interests of justice. Arizona is where all of the relevant parties and witnesses live and work, it is where Plaintiff's employment records are maintained and administered, it is where the applicable health plan is managed, and it is the sole jurisdiction in which the coverage exclusion at issue applies.

C. Plaintiff's Undefined Request for Venue Discovery Should Be Denied.

For the reasons described above, there is no need for venue discovery in this case. Venue is not proper in the Northern District of California and "there is no basis to conclude that additional discovery will yield facts sufficient to constitute a basis for . . . venue." *Modak v. Alaris Co.*, 2009 U.S. Dist. LEXIS 36477 at *18 (N.D. Cal. April 17, 2009); *see also Kaia Foods, Inc. v. Bellafiore*, 70 F. Supp.3d 1178, 1187 (N.D. Cal. 2009) (denying request for venue discovery because "[plaintiff] has offered nothing in its briefs or at oral argument that leads the Court to believe that venue discovery will change the result on this issue").

Plaintiff's opposition requests "leave to conduct discovery regarding the location and scope of the November 5, 2015 meeting." (Opp., at 14:21-22.) However, neither the location of the November 5, 2015 meeting in the Northern District of California nor what happened is in dispute. Indeed, Plaintiff attached emails regarding that meeting to his Complaint. Nor would discovery reveal any further fact that would be helpful to the Court because Plaintiff's management inaction theory of venue is not supported by any authority and the alleged meeting in San Francisco does not change the fact that the allegedly unlawful employment decision was made in Arizona. It is evident from the face of Plaintiff's complaint, and also evident from his Memorandum in Opposition to Defendant's Motion to Dismiss under Rule 12(b)(6), that the alleged unlawful employment practice consists of the exclusion contained in the Arizona Preferred Plan – which has existed as a written plan policy since at least 1999. (*See* Compl. ¶¶ 58, 70 ("[b]y excluding all healthcare related to 'sex transformation surgery' from the only

available health plan it provides to employees, Dignity Health has unlawfully discriminated against Mr. Robinson.").) Because the alleged practice giving rise to Plaintiff's Title VII claim was in effect – and was, in fact, applied to deny Plaintiff's claim – long before the November 5, 2015 meeting, the "scope" of such meeting is irrelevant to the question of proper venue.

Consequently, Plaintiff's request for venue discovery on the "location and scope" of the November 5, 2015 meeting should be denied.

III. CONCLUSION

For the foregoing reasons, the hospital respectfully requests that this Court enter an order transferring the action to the District of Arizona.

Dated: August 29, 2016

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