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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as Chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

Case No. CV-19-00035-TUC-RM (LAB)

STATE DEFENDANTS' OBJECTIONS TO PORTIONS OF THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1), Defendants State of Arizona, Andy Tobin, and Paul Shannon ("State Defendants") respectfully submit these Objections to the portions of the Magistrate Judge's Report and Recommendation ("R&R") (Doc. 46) regarding (1) Plaintiff's failure to exhaust the Health Plan's internal appeals process (p. 3-5); (2) Plaintiff's Equal Protection Clause claim (p. 8-10); and (3) sovereign immunity (p. 10).[1]

I. Plaintiff Failed to Exhaust Administrative Remedies.

The State Defendants object to the R&R's conclusions that (i) the Health Plan's exhaustion provision is ambiguous, and (ii) it is unclear whether the internal appeals process applies to a Title VII or Equal Protection Clause challenge to a Health Plan exclusion. As explained below, the Health Plan's exhaustion requirement is not ambiguous. Also, it is clear the internal appeals process applies to claims brought under Title VII and the Equal Protection Clause where an individual seeks to "recover on this Plan" (i.e., have surgery paid for), such as Toomey seeks to do here. (Doc. 1-2, p. 77).

The R&R correctly points out that (i) the Health Plan contains a detailed review process for individuals to appeal adverse benefit decisions, (ii) this review process includes an Independent Review Organization ("IRO") reviewing whether the Health Plan's "terms are inconsistent with applicable law," (iii) the Health Plan makes clear that "[n]o action at law or in equity can be brought to recover on this Plan until the appeals procedure has been exhausted as described in this Plan," and (iv) "Toomey does not allege that he exhausted that procedure." (Doc. 46, p. 3-5).

The R&R should have applied the cases cited in the State Defendant's Motion to Dismiss (Doc. 24, p. 6-8) and Reply brief (Doc. 40, p. 2-4) requiring parties to exhaust administrative remedies under a health plan before bringing suit. These cases hold that individuals may not recover on a health plan (e.g., have surgery paid for, which is what

[1] The R&R did not address the State Defendants' argument that Toomey failed to exhaust administrative remedies under Title VII because Toomey failed to file a charge of discrimination against the State of Arizona or Arizona Department of Administration. (Doc. 24, p. 16-17; Doc. 40, p. 12). The R&R stated, "[t]he court need not reach this argument in light of the court's finding above that Toomey does not assert a proper Title VII claim." The State Defendants renew their request for dismissal on this basis in the event the District Court does not adopt the R&R on Toomey's Title VII claim (Doc. 46, p. 5-8).

Toomey seeks here) without following the plan's internal appeals procedure. Indeed, as noted in *Diaz v. Un. Agric.*, "many employee claims for plan benefits may implicate statutory requirements imposed by ERISA or COBRA (or perhaps other statutes, for that matter). . . .[A] claimant [does not have] the license to attach a 'statutory violation' sticker to his or her claim and then to use that label as an asserted justification for a total failure to pursue the congressionally mandated internal appeal procedures." 50 F.3d 1478, 1484 (9th Cir. 1995). This exhaustion requirement has been applied to both ERISA and non-ERISA plans, so courts do not become administrators of health plans. *See Harrow v. Prudential*, 279 F.3d 244, 249-50 (3d Cir. 2002) (courts require exhaustion of administrative remedies "to help reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of claims settlement; and to minimize the costs of claims settlement for all concerned"); *Lane v. Sunoco*, 260 F. App'x 64, 65-66 (10th Cir. 2008); *McGraw v. Prudential*, 137 F.3d 1253, 1263 (10th Cir. 1998) ("ERISA contains no explicit exhaustion requirement although we have observed exhaustion of administrative (i.e., company or plan-provided) remedies is an implicit prerequisite to seeing judicial relief"); *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990) ("Nothing in the legislative history suggests that Congress intended federal district courts would function as substitute plan administrators, a role they would inevitably assume if they received and considered evidence not presented to administrators concerning an employee's entitlement to benefits"); *Roche v. Aetna*, 165 F. Supp. 3d 180, 188 (D.N.J. 2016) (in case evaluating non-ERISA plan, plaintiff's argument "does not obviate the requirement to seek administrative review before filing suit"; granting summary judgment because plaintiff did not exhaust administrative remedies before filing suit). These cases support dismissal of Plaintiff's Complaint.

The R&R analyzes Arizona State Court decisions that applied contract law in the context of disputes that did not involve health plan benefits, and then incorrectly concluded this Health Plan's exhaustion provision is ambiguous. (Doc. 46, p. 3-5, citing *ELM Ret. Ctr. v. Callaway*, 226 Ariz. 287, 246 P.3d 938 (App. 2010) (involving a home

purchase); *Chandler Med. Bldg. v. Chandler Dental,* 175 Ariz. 273, 855 P.2d 787 (App. 1993) (involving a partnership dispute); *Leo Eisenberg & Co. v. Payson,* 162 Ariz. 529, 785 P.2d 49 (1989) (involving disputed real estate commission)). But, as set forth above, the analysis for health plan benefits is unique—without the exhaustion requirement, courts will determine benefits claims and function as substitute plan administrators. And here, the exhaustion provision in the Health Plan is clear and unambiguous.

The R&R presented the issue as: "Did the parties intend that the internal appeals process would apply to a Title VII or an Equal Protection Clause challenge to a Plan exclusion? If yes, then the defendants' motion to dismiss should be granted." (Doc. 46, p. 3-4). But here, the language in the Health Plan is clear and unambiguous, and "[n]o attempt need be made to divine drafters' intent when the language of a . . . contract is unambiguous." *Escalanti v. Sup. Ct. of Maricopa,* 165 Ariz. 385, 388, 799 P.2d 5, 8 (Ct. App. 1990); *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 258, 681 P.2d 390, 410 (Ct. App. 1983) ("If the meaning of a contract can be determined from the four corners of the document and cannot reasonably be construed in more than one sense, extraneous documents are irrelevant and the court must give effect to the language of the agreement"). Even so, the plain language in the Health Plan makes clear the parties intended the internal appeals process would apply to a Title VII and Equal Protection Clause challenge to the denial of a claim under the Health Plan.

First, the Health Plan makes clear in Section 12.12: "Limitation. *No action at law or in equity can be brought to recover on this Plan* until the appeals procedure has been exhausted as described in this Plan." (Doc. 1-2, p. 77) (emphasis added). The R&R does not conclude that this language in Section 12.12 is ambiguous or unclear in any way. And in fact, Section 12.12 is clear – an individual may not bring *any* "action at law or in equity. . . to recover on this Plan" (i.e., have a surgery paid for, which is what Toomey is seeking here) before the individual has exhausted the internal appeals procedure.

Instead, the R&R concluded the phrase "applicable law" (discussing what the IRO will review) is not clear. The Health Plan provides the IRO will review, among other things, "[t]he terms of your Plan to ensure that the IRO's decision is not contrary to the

terms of the Plan, *unless the terms are inconsistent with applicable law*." (Doc. 1-2, p. 76) (emphasis added). The R&R determined that "applicable law" is unclear and could possibly be limited to statutes and regulations governing the health insurance industry. But that is not correct. The phrase "applicable law" is not limited in any way—it includes all laws, statutes, constitutional provisions, and regulations that apply to the Health Plan. Thus, "applicable law" clearly conveys the scope of IRO review; the term is broad and, because it is not limited in any way, it must include federal civil rights statutes and the federal constitution. Indeed, in this case, Plaintiff's Complaint is based on the premise that terms in the Health Plan violate laws that are *applicable* to the State's Health Plan (Title VII and the Equal Protection Clause). Thus, "applicable law" is clear and is not limited to statutes and regulations governing the health insurance industry in Arizona.

Moreover, the R&R states the IRO "in the usual case" makes "a medical decision relating to the appropriateness or efficacy of a particular medical treatment. It appears that this is the IRO's primary area of expertise." (Doc. 46, p. 4). But nowhere in the Health Plan does it state the IRO will only look at medical decisions or treatments as the "primary area of expertise." Instead, the plain language of the Health Plan states the IRO will look at whether the terms of the Health Plan are "inconsistent with applicable law."

The R&R further concludes the language in the Health Plan providing for IRO review "is not all encompassing" because it is not clear what factors determine when a claim will not be eligible or accepted for Level 3 review. (Doc. 46, p. 4-5). But this is not correct. Upon close review of Section 12.10 ("Levels of Standard Appeal and Responsibility of Review"), the IRO review process is clear and provides for a broad review under a Level 3 appeal. (Doc. 1-2, p. 75-77). As the R&R points out, when a Level 3 appeal is filed, "[t]he assigned IRO will timely notify you in writing of the request's eligibility and acceptance for External Review." (*Id*. p. 76). The previous paragraph makes clear what factors determine "eligibility and acceptance" for a Level 3 appeal - specifically, (1) a "Level 3 appeal must be filed within 60 days of the Level 2 denial," and (2) the Level 3 appeal must involve "a denial of services in which the denial was upheld during the review of the Level 2 appeal." (Doc. 1-2, p. 75). If these factors

are met, the matter will be eligible and accepted for Level 3 appeal. Thus, disputes that are beyond the scope of IRO review are those that are untimely filed or do not involve a denial of service upheld during the Level 2 appeal. Accordingly, the "eligibility and acceptance" provisions are clear and provide for a broad review at Level 3.

In conclusion, the Health Plan's internal appeals process is clear and unambiguous. The Level 3 appeal is broad and involves reviewing terms that are "inconsistent with applicable law" (which includes claims such as those brought by Plaintiff in this case). Plaintiff concedes he did not follow the internal appeals process. Thus, his Complaint should be dismissed with prejudice for failure to exhaust administrative remedies.

II. Equal Protection Claim.

The R&R concluded that "Toomey has alleged facts that, if true, could justify a heightened level of scrutiny." (Doc. 46, p. 9-10). But the "gender reassignment surgery" exclusion should be analyzed under rational basis review, under which a classification "is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. State of Md.*, 366 U.S. 420, 425-26 (1961). "Where, as here, there are plausible reasons for [the state] action, [the court's] inquiry is at an end." U.*S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (the "task of classifying persons for benefits inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line"). Courts have already recognized that the government's interests in cost containment and reducing health costs are substantial. *See, e.g., IMS Health Inc. v. Sorrell*, 630 F.3d 263, 276 (2d Cir. 2010); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1127 (10th Cir. 2015); *Harris v. Lexington-Fayette Urban County Gov't*, 685 Fed. App'x 470, 473 (6th Cir. 2017). Thus, the Equal Protection Clause claim should be dismissed with prejudice because the exclusion survives rational basis review.

In concluding that heightened scrutiny should apply, the R&R first noted that heightened scrutiny may apply where the plaintiff is a member of a "discrete and insular

minority" or is characterized by an "immutable characteristic determined solely by the accident of birth." (Doc. 46, p. 9) The R&R relies on two cases that do not involve discrimination based on transgender status and do not support heightened review in this case. First, *Graham v. Richardson* involved a distinction based on alienage: "Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. This is so in the area of economics and social welfare. But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." 403 U.S. 365, 371-72 (1971) (internal citations omitted). Second, *Frontiero v. Richardson* involved a distinction between the rights of female vs. male members of the uniformed services to obtain increased quarters allowances and medical benefits. A serviceman could claim his wife as a dependent regardless of whether she was in fact dependent upon him; but a servicewoman could not claim her husband as a dependent unless he was in fact dependent on her. 411 U.S. 677, 678-79 (1973). This was a distinction based on "sex"; the Court noted that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Id.* at 686. These cases do not involve classifications based on transgender status and do not support heightened review here.

Plaintiff claims heightened review is supported under *Karnoski v. Trump*, 2019 WL 2479442 (9th Cir. 2019). But *Karnoski* is distinguishable from this case. In *Karnoski*, the Court was evaluating a federal policy ("2018 Policy") that solely disqualified transgender persons from military service; on the other hand, that same policy did not disqualify non-transgender (cisgender) individuals from military service. Thus, the 2018 Policy in *Karnoski* specifically targeted transgender individuals: "On its face, the 2018 Policy regulates on the basis of transgender persons," as the policy itself disqualified "transgender persons" from military service. *Id.* at *14. Further, the 2018 Policy effectively served as an almost complete exclusion of transgender persons from military service: "Beyond the narrow reliance exception, transgender individuals who wish to

serve openly in their gender identity are altogether barred from service." *Id*. at *12, n.15 (the "policy indisputably bars many transgender persons from military service"). Thus, the Court "conclude[d] that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies" (which was "intermediate scrutiny"). *Id*. at *14-15.

Here, in contrast, the Health Plan does not specifically target transgender persons. Indeed, the gender reassignment surgery exclusion is just one of *many* different exclusions in the Health Plan that apply to various individuals (both transgender and non-transgender) regardless of medical necessity. (Doc. 1-2, p. 29, 58-61). Further, transgender individuals are covered under the Health Plan, and they receive coverage for medically necessary treatments in the vast majority of cases. (*Id*., p. 29-30, 58-61) All persons - transgender and non-transgender (cisgender) - are subject to numerous exclusions for various treatments, procedures, and surgeries within the Health Plan, even if a physician has designated such treatment, procedure, or surgery as "medically necessary." (*Id*.) Further, the Health Plan provides coverage for some gender transition services, including mental health counseling and hormone therapy deemed medically necessary by a clinician. The Health Plan does not eliminate coverage for all gender transition treatment. (*Id*., p. 29-30, 58-61) Accordingly, in contrast with *Karnoski*, the Health Plan here does not specifically target transgender individuals; it does not "regulate on the basis of transgender status" or constitute discrimination or a classification based on transgender status. 2019 WL 2479442, *14. Thus, the level of judicial scrutiny set forth in *Karnoski* is not applicable based on the facts presented here.

Further, the R&R incorrectly states "[t]he defendants do not argue that, as a matter of law, the Plan exclusion would survive a heightened level of scrutiny. Accordingly, the defendants have not shown that Toomey fails to state a proper claim under the Equal Protection Clause." (Doc. 46, p. 9-10) First, as noted above, rational basis review should apply to Toomey's claim. But even if heightened scrutiny applies, the State Defendants argued in the Motion to Dismiss briefing, and have established, that the Health Plan would also survive a heightened level of scrutiny. In particular, the State Defendants' Reply

(Doc. 40, p.10, n.13) made clear the exclusion would survive a heightened level of scrutiny:

> But even if intermediate scrutiny applies, Plaintiff's claim must fail. *U.S. v. Virginia*, 518 U.S. 515 (1996) (To succeed in intermediate scrutiny, "a party seeking to uphold government action . . . must establish an exceedingly persuasive justification for the classification" and "show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives"). This intermediate level of judicial scrutiny recognizes that sex "has never been rejected as an impermissible classification in all instances." *Rostker v. Goldberg*, 453 U.S. 57, 69 n.7 (1981). As explained in Section III, there is a substantial relationship between the exclusion and the State's important interests in cost-containment. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015) ("administrative convenience and economic cost-saving" are "relevant" to intermediate scrutiny analysis).

Even assuming *Karnoski* applies and Toomey's claim is subject to intermediate scrutiny (it is not), the Health Plan survives intermediate scrutiny analysis. Under intermediate scrutiny, a challenged classification "must substantially relate to an important governmental objective." *Seeboth v. Allenby*, 789 F.3d 1099, 1104 (9th Cir. 2015) (internal citations and quotations omitted); *see also U.S. v. Virginia*, 518 U.S. at 533. In this case, Toomey seeks class action certification. (Doc. 28) He is asking the Court to order the State to pay to cover "gender reassignment surgery" under the Health Plan for a class of employees. These are not trivial or minimal costs. As noted above, the State has an important governmental objective in cost containment and reducing health care costs. *See IMS Health*, 630 F.3d at 276 ("we agree with the district court that Vermont does have a substantial interest in both lowering health care costs and protecting public health"); *Bonidy*, 790 F.3d at 1127 ("administrative convenience and economic cost-saving" are "relevant" to intermediate scrutiny analysis); *Harris*, 685 Fed. App'x at 473 ("There, the government's interests—furthering offender accountability and reducing the county's costs of incarceration—were substantial. Again, the same is true here").

Here, the means employed (including many exclusions in the Health Plan, just one of which is the gender reassignment surgery exclusion) is substantially and directly related

to the achievement of these objectives of cost containment and reducing health care costs. The Court can take judicial notice of the fact that a coverage exclusion (for a procedure/surgery) in an employer-sponsored health plan means this procedure/surgery is not paid for under the plan and thus serves as a cost-saving for the employer. *See Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977) ("A court may take judicial notice of facts of 'common knowledge' in ruling on a motion to dismiss"). Thus, even if the Court does not apply rational basis review, the Health Plan exclusion still survives heightened scrutiny and Toomey's Equal Protection claim should be dismissed with prejudice.[2]

III. Sovereign Immunity

The R&R incorrectly concludes that Toomey's suit falls within the *Ex Parte Young* exception because his "proposed remedy is entirely prospective." (Doc. 46, p. 10) But this is incorrect because Toomey is in actuality attempting to seek retrospective relief – specifically, a retroactive award of a benefit (i.e., a surgery) that was previously applied for and denied. Thus, sovereign immunity bars the claim against Tobin and Shannon.

The R&R relies on *Porter v. Jones*, 319 F.3d 483 (9th Cir. 2003), which did not involve a plaintiff's attempt to recover a benefit that was previously applied for and denied. Instead, *Porter* involved an allegation that the Secretary of State violated the First Amendment by threatening to prosecute operators of "vote swapping" websites for brokering exchange of votes for presidential candidates. Thus, *Porter* is inapposite and does not provide guidance for the facts presented in this case.

This case is not a suit against an official for mere prospective relief, nor is the relief sought simply to "prevent future and ongoing illegality." *Id*. at 491. Instead, what

[2] The R&R concludes Toomey "has alleged facts that, if true, could justify a heightened level of scrutiny." (Doc. 46, p. 9). If this language could be interpreted as requiring "strict scrutiny," that level of review is not appropriate here. Strict scrutiny is reserved for state "classifications based on race or national origin and classifications affecting fundamental rights." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (internal citations omitted). If a law "targets a suspect class or burdens the exercise of a fundamental right, we apply strict scrutiny and ask whether the statute is narrowly tailored to serve a compelling governmental interest." *Seeboth*, 789 F.3d at 1104. Because the exclusion is not a classification based on race or national origin and does not affect a fundamental right, it is not subject to strict scrutiny. But in the event the Court applies strict scrutiny (it should not), the exclusion would still survive constitutional scrutiny based on the analysis above.

Toomey actually seeks is a reversal of the Health Plan's August 10, 2018 denial of coverage for his gender reassignment surgery: Toomey seeks an injunction to remove the exclusion and "evaluate whether [Toomey's] surgical care for gender dysphoria is 'medically necessary' in accordance with the Plan's generally applicable standards and procedures." (Doc. 1, p. 22). But Toomey has already alleged the surgery is a "medically necessary hysterectomy prescribed by his physician" and he previously sought coverage for the surgery, which was denied. (*Id*. ¶¶4, 43-45) Thus, in actuality, Toomey is not merely seeking "prospective injunctive relief" under *Ex Parte Young*, and the relief sought is not a mere expenditure of funds ancillary to prospective injunctive relief. *Verizon v. Public. Serv*., 535 U.S. 635, 645 (2002); *Seminole Tribe v. Fla*., 517 U.S. 44, 54 (1996).

The R&R does not address *Edelman v. Jordan*, 415 U.S. 651 (1974) or the other cases cited by the State Defendants in the Motion to Dismiss and Reply briefs. (Doc. 24, p. 14-16; Doc. 40, p. 11-12) In particular, *Edelman* supports dismissal in this case. In *Edelman*, the trial court "ordered the state officials to release and remit AABD benefits wrongfully withheld," but the Supreme Court held the 11th Amendment barred these "retroactive payment of benefits found to have been wrongfully withheld." 415 U.S. at 656, 668, 678 (the relief "will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials"). Here, Toomey is similarly seeking a retroactive award of a benefit (through the expense of public monies) that he claims was previously wrongfully denied. This retrospective relief is not permissible under *Edelman* or *Ex Parte Young*, and thus his claim against Tobin and Shannon should be dismissed.

For all of the reasons set forth above, the State Defendants object to the portions of the R&R regarding Plaintiff's failure to exhaust the Health Plan's internal appeals process, Plaintiff's Equal Protection Clause claim, and sovereign immunity. The District Court should dismiss Plaintiff's entire Complaint – both the Title VII and Equal Protection Clause claims – with prejudice.

RESPECTFULLY SUBMITTED this 8th day of July, 2019.

BURNSBARTON PLC

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants.

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