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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' RESPONSE TO PLAINTIFF'S OBJECTION TO REPORT AND RECOMMENDATION

Defendants State of Arizona, Andy Tobin, and Paul Shannon ("State Defendants") hereby respond to Plaintiff's Objection to the Magistrate Judge's Report and Recommendation ("R&R") regarding the dismissal of Plaintiff's Title VII claim (Dkt. 49). As set forth below, and also in the State Defendants' Motion to Dismiss and Reply (Doc. 24, 40), this Court should adopt the Magistrate Judge's decision to dismiss Plaintiff's Title VII claim.

1. The "Gender Reassignment Exclusion" Does Not Facially Discriminate Based on Sex.

Plaintiff argues the R&R improperly dismissed his Title VII claim, and *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) and *Schwenk v. Hartford,* 204 F.3d 1187 (9th Cir. 2000) support this claim. But these cases do not support Plaintiff's Title VII claim relating to one benefits exclusion for gender reassignment surgery (among many other exclusions) in the health plan.

First, *Price Waterhouse* does not support expanding Title VII's protections to transgender persons as a group beyond cases that involve sex-stereotyping. *Price Waterhouse* did not involve a transgender person; instead, in *Price Waterhouse*, a female plaintiff alleged her employer failed to promote her to partnership because she was "aggressive." The Supreme Court held Title VII was intended to prohibit disparate treatment based on "sex stereotypes," which is a failure to conform to stereotypical gender norms based on an individual's conduct: "[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender…An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." *Id*. at 250-51. Thus, *Price Waterhouse* does not stand for the proposition "that discrimination against transgender individuals is inherently discrimination based on gender nonconformity under *Price Waterhouse*," as Plaintiff claims. (Doc. 49, p. 9). Further, the *Price Waterhouse* "sex stereotyping" theory is distinct from the facts alleged here. The exclusion in the health plan does not require that Toomey act, dress, talk, or behave a certain way – nor is there any allegation that the

exclusion or medical benefits decision was based on the way Toomey acts, dresses, talks, or behaves. The exclusion is facially neutral, applicable to all employees, regardless of sex. And Toomey's Complaint does not allege he is unable to present himself at work as a male or suffers any adverse consequences from doing so. Thus, the benefits exclusion does not constitute "sex stereotyping" under *Price Waterhouse*.

Schwenk also does not support Plaintiff's Title VII claim. *Schwenk* was a prison sexual assault case involving the 8th Amendment (cruel and unusual punishment) and Gender Motivated Violence Act (GMVA); it was not a Title VII case. 204 F.3d 1187. In *Schwenk*, the Ninth Circuit applied *Price Waterhouse* sex-stereotyping, noting "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one." *Id.* at 1202. Indeed, "Schwenk testified that her appearance and mannerisms were very feminine, and that Mitchell was aware of these characteristics. In fact, Mitchell offered to bring her make-up and other 'girl stuff' from outside the prison in order to enhance the femininity of her appearance. Thus, the evidence offered by Schwenk tends to show that Mitchell's actions were motivated, at least in part, by Schwenk's gender – in this case, *by her assumption of a feminine rather than a typically masculine appearance or demeanor*." *Id.* (emphasis added). Indeed, as acknowledged by Plaintiff in his Objection (Doc. 49, p. 4), the *Schwenk* Court noted that "[d]iscrimination because one fails to *act* in the way expected of a man or woman is forbidden under Title VII." *Id.* (emphasis added). Again, the gender reassignment exclusion does not require Toomey to act, appear, or behave in a certain way, and it is not based on Toomey's demeanor or how he appeared or acted. Thus, *Schwenk* does not support Plaintiff's Title VII claim in this case.[1]

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[1] This application of sex-stereotyping has been addressed in other Ninth Circuit cases. *See Kastl v. Maricopa Cty.,* 325 F.App'x. 492 (9th Cir. 2009) ("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 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"); *Nichols v. Azteca,* 256 F.3d 864 (9th Cir. 2001) (*Price Waterhouse* "applies with equal force to a man who is discriminated against for acting too feminine," and describing *Schwenk* as "comparing the

Several other cases cited by Plaintiff similarly involve allegations of sex-stereotyping that are simply not present here. Therefore, these cases do not support Plaintiff's Title VII claim. *Whitaker v. Kenosha,* 858 F.3d 1034 (7th Cir. 2017) (plaintiff was told he "would have to complete a surgical transition . . . to be permitted access to the boys' restroom" and case "show[ed] sex stereotyping"); *Glenn v. Brumbry,* 663 F.3d 1312, 1318-20 (11th Cir. 2011) (terminated plaintiff dressed "inappropriate," "unsettling," and "unnatural"; gave example of a male "wearing jewelry that was considered too effeminate, carrying a serving tray too gracefully, or taking too active a role in childrearing"); *Prescott v. Rady,* 265 F.Supp.3d 1090, 1099 (S.D. Cal.2017) (in Affordable Care Act (ACA) claim, staff "continuously referr[ed] to him with female pronouns, despite knowing that he was a transgender boy", "refused to treat Kyler as a boy precisely because of his gender non-conformance" and "told him, Honey, I would call you 'he,' but you're such a pretty girl"); *Roberts v. Clark Cty.,* 215 F.Supp.3d 1001, 1015 (D.Nev. 2016) (defendant "banned Roberts from the women's bathroom because he no longer behaved like a woman. This alone shows that the school district discriminated against Roberts based on his gender and sex stereotypes"). In addition, *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018) ("*Harris Funeral Homes*") should not be relied upon in support of Plaintiff's Title VII claim, as this case is now in question and pending before the United States Supreme Court. Nonetheless, in *Harris Funeral Homes*, the individual who decided to terminate the plaintiff "testified that he fired Stephens because 'he was no longer going to represent himself as a man. He wanted to dress as a woman." *Id.* at 569. But in this case, the exclusion applicable to all employees does not punish Plaintiff based on a sex stereotype; does not require Plaintiff act or dress in a certain way or use a certain bathroom; does not punish him for his conduct, dress, appearance, or mannerisms; and there is no

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scope of the [GMVA] with the scope of Title VII, which forbids '[d]iscrimination because one fails to act in the way expected of a man or woman'"). Thus, the Ninth Circuit has not determined that transgender status is "because…of sex" or protected as a group under Title VII.

allegation the exclusion was based on Plaintiff's conduct, dress, appearance, mannerisms, or failure to act like a woman.

Stockman v. Trump also does not support Plaintiff's Title VII discrimination claim. First, *Stockman* is not a Title VII case, nor was there any holding that discrimination solely on the basis of transgender status gives rise to a Title VII claim. Instead, *Stockman* involved an outright ban on transgender individuals from serving in the military. In *Stockman,* the plaintiff asserted four constitutional claims under the First and Fifth Amendments to the U.S. Constitution. 2017 WL 9732572 (C.D. Cal 2017). In its analysis of the constitutional claims, the court cited language from *Schwenk* and said the "Ninth Circuit has strongly suggested that discrimination on the basis of one's transgender status is equivalent to sex-based discrimination." *Id.* at *15. But, as noted above, *Schwenk* did not actually hold that discrimination solely on the basis of transgender status is sex-based discrimination under Title VII (instead, the case recognized a sex-stereotyping theory that is simply not present based on the facts Toomey has alleged here). Thus, *Stockman* is not instructive.

The remaining cases cited by Plaintiff also do not support his Title VII claim. *Norsworthy v. Beard* is not a Title VII case; nor did it hold, as Plaintiff seems to suggest, that discrimination on the basis of transgender status gives rise to a Title VII claim. Instead, *Norsworthy* involved a prisoner who was completely barred from the ability to seek reassignment surgery by the prison where she was incarcerated, and the case also included allegations and evidence of hostility (refusing to allow plaintiff to change her name and deliberate indifference to medical needs) and an 8th Amendment deliberate indifference claim. 87 F.Supp.3d 1104 (N.D. Cal. 2015). Further, Toomey's citation to dicta in a concurring opinion in *Latta v. Otter* also does not support his Title VII claim. *Latta* is a same-sex marriage case (not a Title VII case), in which the court specifically noted that transgender people were not "represented among the plaintiff class." 771 F.3d 456, 495 n.12 (9th Cir. 2014). Further, in *Kastl v. Maricopa Cty.,* the court analyzed whether "Title VII permits an employer to require a biologically female employee believed to possess

stereotypically male traits to provide proof of her genitalia or face consignment to the men's restroom." 2004 WL 2008954, *2 (D. Ariz. 2004). There, the plaintiff was *required* to have reassignment surgery to use the women's restroom and was terminated when she refused to use the men's restroom. *Id.* at *5. Those facts are simply not present here.

Plaintiff also claims courts have recognized that insurance policies that "categorically exclude coverage for transition-related healthcare" discriminate on the basis of sex. (Doc. 49, p. 5-6) First, there is no categorical exclusion for transition-related healthcare in this case, as the health plan here provides some gender transition services (hormone therapy and mental health counseling). (Doc. 1, Exh. A, p. 26-27, 55-58) In addition, Plaintiff's cases are inapposite. *Boyden v. Conlin,* 2018 WL 4473347 (W.D. Wis. 2018) is a Wisconsin case that is not precedent for this Court. *Boyden* was decided under Seventh Circuit precedent and is not binding on this Court under current Ninth Circuit precedent (*supra*, p. 3-4). Also, the exclusion in *Boyden* excluded all services associated with gender reassignment, in sharp contrast with the exclusion here which provides coverage for other gender transition services. *Tovar v. Essentia Health,* 2018 WL 4516949 (D. Minn. 2018) and *Flack v. Wis. Dep't of Health Services,* 328 F.Supp.3d 931 (W.D. Wis. 2018)[2] are also not dispositive, as (1) the federal courts in Minnesota and Wisconsin were *not* evaluating Title VII claims (Tovar asserted an ACA claim, and Flack asserted ACA and equal protection claims), (2) these Minnesota and Wisconsin cases are not binding on this Court under current Ninth Circuit precedent, (3) the plans contained a broad exclusion for transition coverage (not just surgery), and (4) the decisions relied on *Harris Funeral Homes* which is now pending before the U.S. Supreme Court.[3]

Plaintiff claims the plan is discriminatory because a hysterectomy would be covered if it were a medically necessary treatment for other medical conditions, but a hysterectomy

[2] Judge William Conley in Wisconsin issued the decisions in both *Flack* and *Boyden*.

[3] The Magistrate Judge's decision not to analyze the Wisconsin and Minnesota cases addressing insurance exclusions was not error, as these decisions are distinguishable and are out-of-District cases that are not binding on this Court. Thus, this Court is not required to address those decisions.

for the purpose of gender transition is excluded regardless of medical necessity. But this argument completely ignores the fact that the health plan excludes *numerous* surgeries, treatments, and procedures (for *all* persons, including cisgender individuals) *regardless of medical necessity*. (Doc. 1-2, p. 29, 58-61). Thus, for example, even if a physician has designated a certain treatment, procedure, or surgery as "medically necessary" for an individual, the health plan excludes coverage for that service if it is one of the many services listed in Article 10 ("Exclusions and General Limitations") of the health plan. (*Id*.) Thus, it is not as though members receive coverage for all "medically necessary" services, except the one Toomey seeks here. The reality is there are many services excluded under the health plan, even if a medical provider has deemed those services "medically necessary." Thus, the health plan does not discriminate based on sex.

Finally, Plaintiff argues the State Defendants are "impermissibly *insisting* that employees' anatomy match the stereotype associated with their sex assigned at birth" and that "transgender individuals *must* preserve the genitalia and other physical attributes of their natal sex." (Doc. 49, p. 6-7) (emphasis added). But this is not an accurate representation. Plaintiff is not completely prevented from obtaining a gender reassignment surgery. He can still obtain the surgery. It just would not be covered by insurance under the State's healthcare plan.

2. The Magistrate Judge Did Not Mischaracterize *Schwenk* or Misapply *Manhart's* "But-For" Test.

The R&R correctly applied the U.S. Supreme Court's "simple test" under Title VII of "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." *City of Los Angeles, Dep't of Water & Power v. Manhart,* 435 U.S. 702, 711 (1978). Applying *Manhart*, the R&R correctly held, "Toomey claims this denial is discrimination based on sex, but it is not. If it were, the Plan exclusion would not apply if his sex were different, and Toomey has no evidence of that. Accordingly, he does not state a claim for sex discrimination under Title VII. Toomey alleges instead that he is being discriminated against because his sex and his gender identity do not match. That

may be so, but discrimination based only on what Toomey calls his 'transgender status' does not violate Title VII." (Doc. 46, p. 5-6)

The R&R then correctly applied *Schwenk* to the allegations Plaintiff has asserted in this case. (Doc. 46, p. 6-8) The R&R correctly noted that "[i]f Schwenk were female (that is, if the sex assigned to her at birth was female) rather than male and displayed the same feminine appearance and demeanor that Schwenk displayed, then the attack would not have occurred." (Doc. 46, p. 8) This finding is supported because Schwenk, assigned male at birth, presented evidence showing the actions of the guard who attempted to rape her "were motivated, at least in part, by Schwenk's gender – in this case, *by her assumption of a feminine rather than a typically masculine appearance or demeanor*." 204 F.3d at 1202 (emphasis added). Moreover, the *Schwenk* Court explained, "here, for example, the perpetrator's actions stem from the fact that he believed that *the victim was a man who 'failed to act like' one." Id*. (emphasis added) Thus, the assault was motivated by the fact that Schwenk was assigned male at birth, and had assumed a feminine appearance and demeanor and did not "act like" a man. *Id.* Thus, the attack would not have occurred if Schwenk was assigned female at birth. The R&R was correct that *Schwenk* supports dismissal of Toomey's claim, as the gender reassignment surgery exclusion applies neutrally to both males and females.

Plaintiff takes issue with the fact that the R&R focused on *Manhart*, yet the Ninth Circuit in *Schwenk* did not cite *Manhart*, and the R&R did not discuss *Price Waterhouse*. But *Manhart* is a U.S. Supreme Court opinion that set forth the "simple test" for evaluating Title VII sex discrimination claims. *Manhart* is precedent that is properly applied in a Title VII sex discrimination case, as Plaintiff has asserted here. Also, just because the Ninth Circuit in *Schwenk* did not cite *Manhart* does not minimize *Manhart's* precedential value and the "simple test" the Supreme Court adopted under Title VII. Finally, it was not incorrect for the R&R to not address *Price Waterhouse* because, as noted above, (1) *Price Waterhouse* did not involve discrimination against transgender persons, and (2) the benefits

exclusion in the health plan does not constitute "sex stereotyping" under *Price Waterhouse*, as the exclusion does not require Toomey to act, dress, talk, or behave a certain way – nor is there any allegation that the exclusion or medical benefits decision was based on the way Toomey acts, dresses, talks, or behaves.

Further, Plaintiff argues it was not appropriate for the Magistrate Judge to equate "sex" under Title VII with sex assigned at birth. But any discussion in the R&R equating sex with sex assigned at birth is appropriate in this case because (1) as noted in the Motion to Dismiss (Doc. 24, p. 8-9), when Title VII was enacted in 1964, the "ordinary, contemporary, common meaning" of the term sex was biological sex (*Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014)); and (2) Toomey has not alleged any facts supporting a sex-stereotyping theory under *Price Waterhouse*.[4] Nonetheless, Plaintiff argues he was treated in a manner that but for his sex assigned at birth would have been different. But this is not correct because the gender reassignment surgery exclusion is a neutral exclusion that applies to individuals assigned both male and female at birth. Plaintiff further argues his surgery is excluded from coverage as a gender reassignment surgery without regard to medical necessity; but "[b]y contrast, the exclusion would not apply to a man with male sex assigned at birth who was born with a uterus and fallopian tubes as a result of Persistent Mullerian Duct Syndrome ("PMDS")." (Doc. 49, p.9-10) But this reasoning fails to support a Title VII sex discrimination claim here because, by Plaintiff's own logic, the exclusion would not apply to procedures in any case where an individual's external genitalia does not match his/her internal organs or features - regardless of whether the individual was assigned male or female at birth. Thus, the gender reassignment surgery exclusion is gender neutral.

Citing language from *Harris Funeral Homes*, Plaintiff argues that "[d]iscrimination

[4] Plaintiff's citations to dictionary definitions in *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016) (evaluating school board bathroom policy under Title IX and discussing definitions of sex after Title VII was enacted) and *Fabian v. Hosp. Cent. Of Conn.,* 172 F.Supp.3d 509, 526 (D. Conn. 2016) also do not support Plaintiff's claims. First, these dictionary definitions do not include "transgender status" or "gender identity" in the definition of "sex." Also, the definitions are not instructive to the allegations in this case, as there was no action taken because of sex-stereotyping under *Price Waterhouse* (e.g., the exclusion was not based on Toomey's behaviors or social mannerisms/characteristics).

based on transgender status is *always* discrimination that would not occur but for the person's sex assigned at birth because, if the person's sex assigned at birth were different, the person would not be transgender." (Doc. 49, p. 10) But this is incorrect. First, the Ninth Circuit has not held that discrimination based on transgender status is "always" discrimination under Title VII, nor has it held that transgender status as a group is protected under Title VII. And in this case, there is no sex-stereotyping under *Price Waterhouse* and *Schwenk*, as there is no allegation that the gender reassignment exclusion is based on the way Toomey acts, dresses, talks, or behaves. Second, the gender reassignment exclusion does not discriminate based on the person's sex assigned at birth because it applies neutrally to both males and females. The person's sex assigned at birth does not matter – the exclusion applies whether the person was assigned female or male at birth. Thus, the exclusion does not result in "treatment of a person in a manner which but for that person's sex would be different." *Manhart*, 435 U.S. at 711. Finally, as noted above, *Harris Funeral Homes* should not be relied upon because it is now in question and pending before the U.S. Supreme Court.

For all of these reasons, this Court should affirm the portion of the R&R dismissing Plaintiff's Title VII claim.

RESPECTFULLY SUBMITTED this 24th day of July, 2019.

BURNSBARTON PLC

By *s/C. Christine Burns*
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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 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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