NO. 16-3186

In the United States Court of Appeals for the Eighth Circuit

Brittany R. Tovar,

Plaintiff - Appellant,

vs.

Essentia Health; Innovis Health, LLC, doing business as Essentia Health West; HealthPartners, Inc.; and HealthPartners Administrators, Inc.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
THE HONORABLE RICHARD H. KYLE PRESIDING

BRIEF OF APPELLEES ESSENTIA HEALTH AND INNOVIS HEALTH, LLC DOING BUSINESS AS ESSENTIA HEALTH WEST

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SUMMARY OF THE CASE

Brittany R. Tovar ("Tovar") brings this appeal following a judgment of dismissal entered in favor of Essentia Health, Innovis Health, LLC dba Essentia Health West (collectively referred to as "Essentia"), and HealthPartners, Inc. With respect to Essentia, Tovar claimed that Essentia, as her employer, violated both Title VII of the Civil Rights Act of 1964 ("Title VII") and the Minnesota Human Rights Act's ("MHRA") ban on sex discrimination by maintaining an exclusion in its employer-provided health insurance plan for "[s]ervices and/or surgery for gender reassignment." Essentia moved to dismiss the claims, asserting Tovar lacked standing to bring her claims under Title VII or the MHRA because (1) it was her son, a beneficiary of the plan, who allegedly was denied benefits related to gender reassignment and (2) Tovar herself suffered no discriminatory action or denial of benefits based on her sex or gender identity. The district court granted Essentia's motion, finding Tovar, as the employee, had not been discriminated against by Essentia based on her sex or gender identity in order to seek protection under Title VII or the MHRA. Tovar appeals the judgment of dismissal.

Essentia agrees with Tovar that because of the many legal issues in this case, oral argument is appropriate. Essentia similarly requests this Court grant each side 30 minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

The parent corporation for Appellee Innovis Health, LLC, doing business as Essentia Health West, is Essentia Health. Appellee Essentia Health has no parent corporation. There are no publicly held companies that own ten percent (10%) or more of its stock.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court properly dismissed Tovar's action against Essentia Health and Innovis Health, LLC on the grounds that she is not an "aggrieved" party under Title VII or the Minnesota Human Rights Act because she did not suffer any discrimination or denial of benefits on the basis of her sex or gender identity.

Most Apposite Cases:

Thompson v. North American Stainless, LP, 562 U.S. 170 (2011)

Krueger v. Zeman Construction Company, 781 N.W.2d 858 (Minn. 2010)

Most Apposite Statutes:

42 U.S.C. § 2000e-5

Minn. Stat. § 363A.28

II. Whether Tovar's Title VII and Minnesota Human Rights Act claims fail because she did not suffer any discrimination or any other separate, distinct, or direct injury based on the alleged denial of benefits to her son.

Most Apposite Cases:

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)

Micek v. City of Chicago, 1999 WL 966970 (N.D. Ill. Oct. 4, 1999)

STATEMENT OF THE CASE

Tovar is a current employee of Essentia, and she has been employed by Essentia as a nurse practitioner since 2010. (J.A. at 5.) At Essentia, Tovar receives health insurance benefits through the Essentia Health Employee Medical Plan ("the Plan"). (Id.) According to Tovar's complaint, the Plan corresponds to an insurance policy offered to employees by HealthPartners, Inc., who also serves as the third-party administrator for the Plan. (Id.) This Plan, as alleged by Tovar, contained an exclusion for insurance coverage related to "[s]ervices and/or surgery for gender reassignment." (Id.)

Tovar has a teenage son, who has been a beneficiary of the Plan since October 1, 2014. (Id.) In November 2014, Tovar's son was diagnosed with gender dysphoria, a condition arising when an individual's gender identity differs from the gender assigned at birth. (Id.) Such an individual may be referred to as "transgender," while an individual whose gender identity aligns with the gender assigned at birth may be referred to as "cisgender." (Id.)

Tovar alleged in her complaint that her son was denied insurance coverage for health care to treat his gender dysphoria due to this exclusion. (Id. at 6.) Tovar specifically pointed to three instances in which her son sought coverage. First, her son was prescribed a drug known as Lupron, which treats symptoms associated with dysmenorrhea, or painful menstruation, and also temporarily suspends

menstruation. (Id. at 7.) Essentia allegedly refused to cover Lupron for Tovar's son because of the Plan's exclusion, but Tovar did not ultimately purchase the prescription and, therefore, suffered no out-of-pocket costs. (Id.)

Second, providers also prescribed her son Androderm, a form of testosterone, to treat his gender dysphoria. (Id. at 8.) According to Tovar, the prescription for Androderm was initially rejected due to the exclusion in the Plan. (Id.) However, Essentia later agreed to provide coverage for Androderm as an exception to the Plan. (Id.)

Third, Tovar inquired with HealthPartners' Member Services in December 2015 regarding pre-authorization for gender reassignment surgery for her son. (Id.) Tovar allegedly was told the surgery would not be authorized due to the exclusion, but there are no allegations that her son actually sought or was denied pre-authorization for the surgery or received the surgery. (Id.) Notably, effective January 1, 2016, Essentia Health removed the exclusion from its Plan. (Id. at 15, n.2; 30.)

In her complaint, Tovar alleged she and her family suffered "financial and emotional harm" as a result of the claimed denials. (Id. at 9.) With respect to her son, Tovar alleges that he was "angry, hurt, and concerned about burdening his family financially" and was "worried about the impact of the coverage dispute on his mother's employment." (Id. at 7.) Tovar herself also allegedly "suffered

worry, anger, disappointment, and sleepless nights" due to the claimed denials. (Id.)

On January 15, 2016, Tovar, on her own behalf, brought suit against Essentia and HealthPartners, Inc. in the United States District Court for the District of Minnesota. With respect to Essentia, Tovar alleged its exclusion in the former Plan violated Title VII and the MHRA's ban on sex discrimination. (Id. at 9-10.) On March 3, 2016, Essentia filed a motion to dismiss both claims pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that Tovar lacked the necessary statutory standing in order to bring her Title VII and MHRA claims and, therefore, failed to state a claim upon which relief could be granted. On May 11, 2016, the district court granted Essentia's motion to dismiss, finding Tovar was not an "aggrieved" party able to bring a Title VII or MHRA claim because she, as the employee, suffered no discrimination based on her sex or gender identity. (Add. at 11.) The district court accordingly dismissed both claims against Essentia with prejudice. (Id. at 16.)

SUMMARY OF THE ARGUMENT

The district court properly dismissed Tovar's Title VII and MHRA claims against Essentia pursuant to Fed.R.Civ.P. 12(b)(6) because Tovar lacks essential statutory standing to bring suit under either statute. To have standing under Title VII and the MHRA, the party asserting the claims must be "aggrieved" and fall

within the zone of interests sought to be protected by these employment laws. Tovar's suit fails on its face to satisfy this threshold requirement to bring a Title VII or MHRA claim against Essentia.

Although Essentia is her employer, Tovar suffered no injury related to her employment based on her sex or gender identity in order to seek protection under Title VII or the MHRA. The only actions by Essentia at issue in this case pertain to the alleged denial of health care benefits to Tovar's son, a non-employee and non-party to this action. Tovar herself suffered no discrimination or direct employment injury based on this denial; any injury allegedly suffered by Tovar derives only from alleged benefits denials as applied to her son.

The mere fact that Tovar has a transgender son does not confer standing to Tovar. Both Title VII and the MHRA require the party asserting the claims to have a direct injury related to the party's own employment based on the party's protected status. Tovar herself sought no service and was denied no benefits under the Plan, nor has she identified any adverse action she suffered in her employment. Because Tovar did not suffer a discriminatory action by Essentia based on her sex or gender identity, the district court properly dismissed Tovar's action against Essentia.

ARGUMENT

A. Standard of review

This Court reviews the dismissal of a complaint for failure to state a claim *de novo*, affirming the dismissal if the complaint fails to state a claim upon which relief can be granted. Ash v. Anderson Merchandisers, LLC, 799 F.3d 957, 960 (8th Cir. 2015). For a pleading to properly state a claim, it must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Id. The complaint must also contain facts sufficient to state a claim that is "plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Id.

B. Tovar lacks statutory standing to assert Essentia violated Title VII or the MHRA because she is not an "aggrieved" party within the zone of interests protected by these employment laws.

Tovar and the amici curiae have advanced multiple policy arguments in this case, including the sweeping proposition that Title VII must extend in all respects—including dependent benefits—to transgender individuals. In support of this argument, both Tovar and amici assert that exclusions in an employer's health insurance policy related to gender reassignment are a *per se* violation of Title VII

or the MHRA, which must be addressed by this Court.[1] To the contrary, this Court need not delve into this murky and emerging area of the law on this record. A threshold issue limits this Court's ability to address this issue.

The threshold issue is whether Tovar has standing to raise the broad issue of transgender coverage under the employment provisions of Title VII or the MHRA sufficient to seek redress from the Court, when she is not transgender and does not allege that she was discriminated against in her employment based on her protected status. Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 109 (2001) (stating that "to reach the merits of any challenge to statutes and regulations . . . would require a threshold examination of whether [the plaintiff] has standing to challenge such statutes and regulations"). Thus, this Court need not reach the policy arguments advanced by Tovar and amici. The sole issue for the Court is whether Tovar herself has stated a claim against Essentia upon which relief can be granted under Title VII and the MHRA. Leyse v. Bank of Am. Nat'l Ass'n, 804 F.3d 316, 320 (3d Cir. 2015) (holding the issue of whether a plaintiff has statutory standing is

[1] Though both Tovar and the amici—along with the EEOC—assume Title VII extends to transgender individuals, that conclusion is far from certain and has yet to be addressed definitively by the courts. Such an interpretation of Congressional intent seems questionable, particularly given that the Employment Non-Discrimination Act ("ENDA"), which would expressly prohibit employment discrimination based on sexual orientation and gender identity, has been introduced unsuccessfully in nearly every Congress since 1994. See *Employment Non-Discrimination Act (ENDA)*, www.civilrights.org/lgbt/enda/ (last visited Nov. 1, 2016).

not jurisdictional, but asks whether the plaintiff has stated a claim against the defendant upon which relief can be granted). The district court properly concluded that Tovar lacked standing and had failed to establish that Essentia's actions discriminated against her and caused her direct injuries.

Statutory standing, also referred to as prudential standing, encompasses three broad principles: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Lexmark Int'l, Inc. v. Static Control Components, Inc., -- U.S. --, 134 S. Ct. 1377, 1386 (2014). "Whether a plaintiff comes within the 'zone of interests' is an issue that requires [the Court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claims." Id. at 1387. This Court does "not ask whether [in its own] judgment Congress *should* have authorized [the plaintiff's] suit, but whether Congress in fact did so." Id. (emphasis in original).

Title VII provides, in relevant part, that employers may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In passing Title VII, Congress sought to "protect[] *all employees of*

and applicants for employment with a covered employer . . . against discrimination based on . . . sex." Gen. Tel. Co. of Nw., Inc. v. EEOC, 446 U.S. 318, 323 (1980) (emphasis added). The MHRA was modeled after Title VII and similarly prohibits an employer from discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment because of sex or sexual orientation. Minn. Stat. § 363A.08, subd. 2; see Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978) (providing that because the MHRA was modeled after Title VII, federal interpretations of the federal law assist in construing the MHRA).

Title VII and the MHRA are congruent not only in the prohibitions against employment discrimination based on certain protected classes, but also in that these laws only permit an "aggrieved" party to bring suit. 42 U.S.C. § 2000e-5 (allowing "persons aggrieved" to bring charges); Minn. Stat. § 363A.28 (allowing a person "aggrieved" by a violation of the MHRA to bring a civil action or charge); see Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 175 (2011); Krueger v. Zeman Const. Co., 781 N.W.2d 858, 862 (Minn. 2010). In fact, Tovar agrees that a party bringing suit under Title VII and the MHRA must be "aggrieved" to assert violations of these Acts. (Appellant's Br. at 40.) It is this language that the district court referred to and analyzed in determining whether Tovar is able assert her claims against Essentia. (Add. at 10-11.)

With respect to the MHRA, the Minnesota Supreme Court has recognized the term "aggrieved" is not specifically defined within the Act. Krueger, 781 N.W.2d at 862. Nonetheless, the court has expressly held that a person is "aggrieved" and has standing to bring suit under the MHRA only if "she has suffered the denial or infringement of a legal right." Id. Thus, the MHRA requires the individual bringing suit to allege a direct action against herself "to seek redress for an unfair discriminatory practice." Id. (citing Minn. Stat. § 363A.33, subd. 1).

The United States Supreme Court has also addressed the definition of an "aggrieved" party for purposes of Title VII in Thompson v. North American Stainless, LP. In Thompson, an employee filed a Title VII retaliation claim against his employer, alleging he was terminated in retaliation for his fiancée filing a claim of sex discrimination against the same employer. 562 U.S. at 172. In first determining who is an "aggrieved" party able to bring suit under Title VII, the Court held, consistent with statutory standing principles, a plaintiff is "aggrieved" if he has "an interest arguably sought to be protected by the statute." Id. at 178 (citations and quotation marks omitted). On the other hand, "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII" are not "aggrieved" for purposes of the statute. Id. After determining these parameters, the Court held the plaintiff-employee was "aggrieved" because of the termination of his employment and,

thus, fell within the zone of interests protected by the retaliatory provisions of Title VII. Id. As noted by the Court,

> Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful actions . . . . Thompson is not an accidental victim of the retaliation . . . . To the contrary, *injuring him* was the employer's intended means of *harming Regalado* [his fiancée]. *Hurting him* was the unlawful act by which the employer *punished her*.

Id. (emphasis added). In short, the Court determined that Thompson (an employee of NAS) had standing to sue because he suffered a direct employment action (his termination) in retaliation for his fiancée (also an employee of NAS) engaging in a protected activity under Title VII. In other words, the anti-retaliation provisions of Title VII prohibited an employer from "discriminating against *any* of his employees" in employment for engaging in protected activity. Id. at 174 (emphasis added). NAS's action of terminating Thompson resulted in a harm to him in his employment sufficient to confer standing on Thompson, as well as served to retaliate against his fiancée based on her protected activity.

Factually, Tovar's action is distinguishable from Thompson in several respects. Here, Tovar alleges violation of the provisions of Title VII and the MHRA related to the terms, conditions, or privileges of employment. (J.A. at 2.) These substantive anti-discrimination provisions are narrower than the statutory anti-retaliation provisions, specifically prohibiting only "discriminatory practices that would deprive any individual of employment opportunities or otherwise

adversely affect *his* status as an *employee*." Thompson, 562 U.S. at 174 (emphasis added).

In stark contrast to Thompson, Tovar's complaint is completely devoid of any adverse employment action by Essentia against her. She has not alleged Essentia terminated her, reassigned her to a lesser position, created a hostile work environment, denied her health care benefits, or provided her lesser benefits than similarly situated employees because of any protected class. (J.A. at 1-13.) Tovar alleges that her son was denied benefits under a uniform exclusion—since removed—in Essentia's former Plan. Notably, Tovar does not allege that the exclusion was discriminatorily applied to her, that she was discriminated against in her employment based on sex or gender identity, or that she was otherwise adversely affected in her employment.

Tovar alleges no direct harm to her and, therefore, if anything, is simply an accidental victim of the allegedly discriminatory actions. As such, Tovar is distinguishable from the plaintiff in Thompson, who was directly impacted by the employer's action, yet analogous to the plaintiffs in Jackson v. Deen, 959 F. Supp. 2d 1346, 1354 (S.D. Ga. 2013) and Cochran v. Five Points Temporaries, LLC, 907 F. Supp. 2d 1260, 1269 (N.D. Ala. 2012). The plaintiff in Jackson alleged her employer had engaged in racial discrimination, but she alleged no racially offensive comments were either directed toward her or made with the intent to

harass her. 959 F. Supp. 2d at 1354. While the plaintiff alleged she suffered an injury in that she was deprived of her right to work in an environment free from racial harassment, the court did not find her interests were protected by Title VII, which "seeks to prevent individuals from being discriminated against by their employers with respect to the terms and conditions of *their employment*" and "does not operate to provide individuals unaffected by unlawful racial discrimination with a cause of action to remedy racial discrimination directed toward third parties." Id. (emphasis added). The plaintiff in Cochran similarly attempted to argue she was injured by her employer's alleged racially discriminatory conduct toward other African-American employees, but the court rejected her Title VII claim, finding she was an "accidental victim" because she did not allege her employer "took any discriminatory action against its African-American employees with the intent to affect *her*." 907 F. Supp. 2d at 1268 (emphasis in original). As a mere "bystander to whom no discriminatory or harassing conduct was actually directed," she did not fall within the zone of interests protected by Title VII. Id.

Although the claim at issue in this case is sex discrimination based on a denial of heath care benefits, Tovar's claims under Title VII and the MHRA fare no better than the plaintiff's claims in Jackson and Cochran. Similar to the plaintiffs in these cases, Tovar alleges Essentia engaged in discriminatory actions through its exclusion in its former Plan, but she does not allege *any* discriminatory

actions directed to *her*. Any allegations in her complaint relate to her son, a non-employee and non-party to this action. Tovar is simply "a bystander to whom no discriminatory . . . conduct was actually directed" and, therefore, does not fall within the zone of interests protected by Title VII or the MHRA to bring these claims. Id.

C. Tovar's argument that mere association with her son places her within the zone of interests protected by Title VII or the MHRA must fail.

Tovar relies heavily on associational discrimination caselaw to argue, in essence, that her association with her son, whom she contends is a member of a protected class, is all that is required for her to state a claim that the exclusion in Essentia's former Plan for gender reassignment services violates Title VII and the MHRA. Tovar's reliance on this caselaw is futile, given that she failed to plead any associational discrimination claim in her complaint. More importantly, any such claim fails substantively because Tovar fails to allege an independent injury in her employment based on such association sufficient to confer standing. To accept Tovar's position would be a substantial leap from existing jurisprudence. No court in this nation has taken the broad position advanced by Tovar that mere association with a member of a protected class, absent a distinct adverse employment action to the plaintiff, is sufficient to confer standing under Title VII or the MHRA, including the caselaw Tovar cites in support of this proposition.

1. Tovar failed to plead an associational discrimination claim in her complaint.

The MHRA contains express provisions prohibiting retaliation against employees for certain associations. See Minn. Stat. § 363A.15 (prohibiting an employer from reprisals against any individual because that individual associates with a person of a different sexual orientation). Title VII, by contrast, does not contain any express provisions prohibiting discrimination against an individual for associating with other individuals, and it does not appear that the Eighth Circuit has examined the contours of an associational discrimination claim under Title VII. Courts recognizing that "discriminatory employment practices based on an individual's association with people of a particular [protected class] are prohibited under Title VII" acknowledge the analysis is two-fold. LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 772 (D. Neb. 1999). The focus is on "whether the *employee* has been discriminated against and whether that discrimination was *because of the employee's* [protected class]" being different than the individual with whom she associates. Id. at 772-73 (emphasis added); see Floyd v. Amite Cnty. Sch. Dist., 581 F.3d 244, 249 (5th Cir. 2009); Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999); Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1998); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986).

As indicated, Tovar cannot at the appellate level argue her claim constitutes an "associational discrimination" claim when she failed entirely to plead such a claim in her complaint. Federal Rule of Civil Procedure 8(a) requires that pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief," which places the opposing party on "fair notice of the nature and basis or grounds for a claim." N. States Power Co. v. Fed. Transit Admin., 358 F.3d 1050, 1056 (8th Cir. 2004). Tovar's complaint does not contain the minimal requirements to meet this threshold, given that there is no mention that *she* is associated with her son; that *she* was discriminated against because of her relationship to her son; or that the discrimination was based on *her* own sex or gender identity being different than that of her son. The complaint simply alleges the former Plan was discriminatory based on sex. (J.A. at 9-10.)

Tovar's complaint also failed entirely to reference the portions of the MHRA specifically referring to associational claims. Instead, it solely relies on the provisions of the MHRA and Title VII prohibiting discriminatory terms, conditions, or privileges of employment as applied to employees. (J.A. at 2.) Tovar's failure to properly plead an associational claim in her complaint bars her attempt to manufacture this claim in her appeal. N. States Power Co., 358 F.3d at 1057.

2. Tovar, as the employee, did not suffer a discriminatory or adverse employment action to assert an associational discrimination claim.

Even if this Court broadly construes Tovar's complaint to assert an associational discrimination claim, her complaint nonetheless fails to state a claim upon which relief can be granted. No facts within her complaint establish the basic element recognized by other courts in the Title VII context that she was discriminated against or suffered any adverse employment action in order to bring an associational discrimination claim. LaRocca, 45 F. Supp. 2d at 772-73. Tovar effectively acknowledges this essential element to state a claim by referencing—in her words—"reciprocal characteristic" cases, such as Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

In Newport News, male employees brought a Title VII claim against their employer for not providing the same health benefits to their pregnant spouses as pregnant female employees. The employer in Newport News attempted to argue Title VII's prohibitions did not extend to discrimination against pregnant spouses. The United States Supreme Court reversed, concluding that the sex of the spouse was (by existing law) always the opposite of the sex of the employee and "discrimination against female spouses in the provision of fringe benefits [was] *also discrimination against male employees*." 462 U.S. at 684 (emphasis added). Therefore, the employer's plan was unlawful because the protection it afforded to

the married male employees was less comprehensive than the protection it afforded to married female employees. Id. at 676.

Although Newport News was decided before the recent legalization of same-sex marriage, the holding of Newport News is still valid today. Newport News stands for the proposition that an employer's discrimination targeted toward an employee's relative for a gender-related characteristic may violate Title VII if the characteristic is inextricably connected with the employee to be based on the employee's own sex and there is an actual action affecting the employee in his or her employment. Id. at 684; see Tetro, 173 F.3d at 994 (holding "[a] white employee who is *discharged* because his child is biracial is discriminated against on the basis of *his* race [under Title VII], even though the root animus for the discrimination is a prejudice against the biracial child" (emphasis added)); Parr, 791 F.2d at 892 (holding "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race") (emphasis in original)); see also Chiara v. Town of New Castle, 126 A.D.3d 111, 122 (N.Y. Sup. Ct. 2015) (relying on Tetro and Parr in holding an employee sufficiently stated a claim under New York state law that he was terminated based on "his membership in a protected class by virtue of the defendant's alleged discriminatory conduct stemming from his marriage to a Jewish person").

Tovar's claim, by contrast, does not state a valid claim because the denial of benefits at issue neither resulted in any discriminatory act by Essentia directed to *her* (such as having less comprehensive coverage than other employees) nor was the denial inextricably connected to *her* sex or gender identity. (J.A. at 9-10.) Instead, Tovar asserts the exclusion for gender reassignment services in Essentia's former Plan was *per se* discriminatory based on sex without alleging any discriminatory action against herself, except that she is the parent of her son, who was allegedly denied benefits. Tovar's status as a parent of a transgender individual allegedly denied benefits, however, is not gender-based discrimination in employment sufficient to confer standing on Tovar to assert that the exclusion violates Title VII or the MHRA. See Nicol v. Imagematrix, Inc., 773 F. Supp. 802, 806 (E.D. Va. 1991) (stating "a discharged employee who is also a parent could not state a *prima facie* Title VII claim under the [Pregnancy Discrimination] Act based on his or her daughter's pregnancy, because the status of a parent is not gender-based" since "[p]arents are both male and female"). In fact, Tovar does not contest that the Plan would have applied exactly the same to any employee, regardless of the employee's sex, sexual orientation, or gender identity. Tovar's argument that she need only have a close familial relationship with her son to have standing under Title VII or the MHRA is simply insufficient.

Tovar attempts to justify her claim by creating that construct of "non-reciprocal" associational discrimination. Not only has this construct not been recognized by any court, Tovar cites no authority supporting that such a construct modifies her burden to establish that *she* suffered a direct employment action because of a protected category to state a claim for relief. See, e.g., Chiara, 126 A.D.3d at 119-20 (requiring the plaintiff to show that he was actively discharged and that the discharge occurred under circumstances giving rise to an inference of discrimination). In the self-described "non-reciprocal" caselaw cited by Tovar, each of the employee plaintiffs actually suffered an adverse employment action. See, e.g., Boyd v. Illinois State Police, 2001 WL 301150, at *6 (N.D. Ill. Mar. 28, 2001) (plaintiff employees in Title VII race discrimination case suffered a direct employment injury in alleging "less favorable terms than would have occurred had the group not been 'majority minority'"); Allen v. Am. Home Foods, Inc., 644 F. Supp. 1553, 1557 (N.D. Ind. 1986) (male employees suffered their own injury in losing their jobs allegedly based on the sex of their female co-workers); Flagg v. AliMed, Inc., 992 N.E.2d 354, 361 (Mass. 2013) (plaintiff employee stated a claim for associational discrimination under Massachusetts state law when his employer terminated the employee for his wife's disability). While the plaintiffs in these cases alleged their employer's actions were based on hostility toward the individuals with whom they associated, the employer nonetheless took action

against the employee, effectively treating the employees as part of the protected class, as well. See, e.g., Boyd, 2001 WL 301150, at *6 (holding that although some plaintiffs were white, the majority of plaintiffs were minority and, therefore, the employer perceived all of the plaintiffs in the classification as minority in providing less favorable terms); Allen, 644 F. Supp. at 1557 (holding five male employees out of fifty-one plaintiffs had standing to sue for sex discrimination under Title VII because the male employees suffered the same injury as the female employees); Flagg, 992 N.E.2d at 361 (stating an employee's employer allegedly terminated the employee for his wife's disability, "treating the employee as if he were handicapped himself"); see also Perez v. Greater New Bedford Vocational Technical Sch. Dist., 988 F. Supp. 2d 105, 111 (D. Mass. 2013) (holding an employee did not state an associational discrimination claim under Massachusetts state law because there were no allegations she was regarded as disabled due to her association with others).

Here, by contrast, Tovar neither asserts that Essentia discriminated against her directly based on her sex or gender identity nor that Essentia perceived her as transgender based on her association with her son and discriminated against her. All actions relate entirely to her son. She must allege she herself suffered an adverse employment action, and her construct of "non-reciprocal associational discrimination" is simply a distinction without a difference.

The examples cited by Tovar on brief illustrate the requirement that the employee suffer discrimination or an adverse employment action. In her examples, the employee *him or herself* suffered an adverse employment action (i.e., the denial of housing). (See Appellant's Br. at 48.) Tovar, however, cites to no adverse employment action that she suffered herself in this matter. Because no discriminatory or adverse employment action was directed at her as required by all previous caselaw, she fails to state a claim upon which relief can be granted.

3. Tovar's alleged injuries in her complaint are not separate, distinct, or direct injuries from her son's claimed injuries to assert an associational discrimination claim.

Tovar's reliance on caselaw recognizing associational discrimination claims under the Americans with Disabilities Act ("ADA") is unavailing. Unlike Title VII, the ADA expressly recognizes an associational claim. 42 U.S.C. § 12112(b)(4). Moreover, in order to state a valid associational claim, courts have required plaintiffs bringing ADA associational discrimination claims to allege some "specific, direct, and separate injury" as a result of the association. EEOC v. Grp. Health Plan, 212 F. Supp. 2d 1094, 1100 (E.D. Mo. 2002); Glass v. Hillsboro Sch. Dist. 1J, 142 F. Supp. 2d 1286, 1288 (D. Ore. 2001); Niemeier v. Tri-State Fire Protection Dist., 2000 WL 1222207, at *3 (N.D. Ill. Aug. 24, 2000); Micek v. City of Chicago, 1999 WL 966970, at *3 (N.D. Ill. Oct. 4, 1999). Courts have further specifically analyzed employee claims of injuries resulting from an

employer's denial of health care benefits to a family member, and have held that economic harm or other derivative harms are not separate and distinct in order to maintain an associational discrimination claim. Grp. Health Plan, 212 F. Supp. 2d at 1100; Niemeier, 2000 WL 1222207, at *3; Micek, 1999 WL 966970, at *3.

This precise issue arose in Micek v. City of Chicago, 1999 WL 966970 (N.D. Ill. Oct. 4, 1999), a case involving an employee bringing an ADA claim against his employer for its exclusion of hearing aids from its policies, which affected his wife and son. The plaintiff alleged he suffered "an economic loss as a result of denial of coverage to his family members," but the court held this injury did not rise to a "specific, separate, and direct injury as a result of his association with the disabled individual." Micek, 1999 WL 966970, at *3. His alleged economic harm was "an indirect injury as a result of a City coverage policy that neither singled him out nor provided him with different options than those provided to other City employees." Id. Because the plaintiff was denied no benefit, he suffered no cognizable separate injury sufficient to gain standing to sue. Id. at *4; see also Grp. Health Plan, 212 F. Supp. at 1100 (holding an employee "did not allege a separate and distinct injury [to] bring a suit based on his wife's denial of coverage").

The court in Niemeier v. Tri-State Protection District, 2000 WL 1222207 (N.D. Ill. Aug. 24, 2000), also rejected an employee's ADA associational

discrimination claim for want of a separate and distinct injury. In Niemeier, an employee's wife was denied coverage for infertility treatments and he asserted he incurred out-of-pocket expenses and suffered an injury to "his opportunity to reproduce and raise a family with his wife." 2000 WL 1222207, at *4. The employee, however, was not given a different plan or fewer benefits because he was known to have a wife with a disability; therefore, his harm "result[ed] from his wife's disability and [was] not a separate and distinct injury caused by [his employer's] actions" sufficient to assert an ADA associational discrimination claim. Id.

Equally here, Tovar does not assert any direct injury separate and distinct from the alleged denial of health care benefits to her son. Although Tovar alleges in her complaint that she suffered vague "economic harm and emotional distress" (J.A. at 9), her claimed injuries stream directly from the alleged denial to her son and are not linked to specifically separate and distinct action against her in her employment. See Niemeier, 2000 WL 1222207, at *4; Micek, 1999 WL 966970, at *3. Quite simply, Tovar asserts no direct harm against her based on her association, nor does she assert that she was given less favorable benefits or provided a different plan than any other employee because of her association with her son.

On brief only, but notably absent from her complaint, are allegations by Tovar of societal harm in Essentia's former Plan. Tovar broadly alleges on brief that limiting transgender dependent benefits creates a "drag on the economy" and harms individuals and the broader community. (Appellant's Br. at 47.) However, Tovar fails to assert that these broad, generalized concerns about the impact of Essentia's former Plan exclusion directly and uniquely affect her in a manner sufficient to confer standing. Such a broad reading of standing by Tovar and amici is a troubling and significant leap from existing jurisprudence, as noted in prior caselaw. "If unease on observing wrongs [allegedly] perpetrated against others were enough to support litigation, all doctrines of standing and justiciability would be out the window." Cochran, 907 F. Supp. 2d at 1270 (quoting Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1180 (7th Cir. 1998)).

Additionally, Tovar alleges on brief that Essentia's former Plan "created barriers for Tovar and limited her employment opportunities, since she was forced under the circumstances to *consider* seeking new employment in order to obtain nondiscriminatory healthcare benefits." (Appellant's Br. at 47 (emphasis added)). Despite the fact that this alleged injury was not pled, it nonetheless does not constitute a direct action against her because she was not forced to quit and, in fact, continues to work for Essentia. (J.A. at 5.) Her argument further does not support a separate and distinct injury because there is no direct action by Essentia due to

the alleged denial of benefits or any association with her son that treated her differently with respect to her employment. Indeed, if such a vague and amorphous claimed injury were sufficient to state a claim, it would open the floodgates to litigation, allowing Title VII discrimination claims from individuals *considering* employment with Essentia (or employers with similar plans). This concept of standing would logically extend to those who have never actually applied for employment with an employer at all, based on a wholly speculative injury, unrelated to the individual's protected class status. Title VII was not intended to reach these bounds and, indeed, such a broad reading of standing would be absurd.

Stated simply, Tovar has suffered no separate, distinct, and direct injury to sustain an associational discrimination claim. The fact that Tovar does not have standing to allege Essentia's former Plan violated Title VII or the MHRA does not mean transgender individuals have no recourse to challenge transgender exclusions. Rather, Tovar has simply failed to establish that she has sufficient standing to raise the issue on these facts since she has suffered no direct injury or adverse employment action. See Thompson, 562 U.S. at 174.

Although she baldly asserted to the district court that the exclusion in Essentia's former health Plan was "absolutely . . . used against [her]" in violation of Title VII and the MHRA, the district court was correct in concluding that

Tovar's allegations are simply unsupported by the facts. (J.A. at 215.) Tovar did not suffer any direct injury in her employment based on her sex or gender identity due to the alleged denial of health care benefits to her son only. The district court properly determined Tovar has not been "aggrieved" under Title VII or the MHRA to assert violations of these laws and that Tovar's policy arguments are better addressed to the legislature. This Court should conclude similarly and affirm the district court's ruling.

CONCLUSION

For the foregoing reasons, Essentia Health and Innovis Health, LLC respectfully request this Court affirm the district court's May 11, 2016 order, dismissing Brittany R. Tovar's Title VII and Minnesota Human Rights Act claims.

Respectfully submitted,

Dated: November 4, 2016

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CERTIFICATE OF COMPLIANCE

This brief is 29 pages in length and complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because it contains 6,702 words, excluding the parts of this brief exempted by Fed. R. App. P. (32)(a).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14 pt. Times New Roman font.

The digital version of this brief filed herewith has been scanned for viruses and to the best of my knowledge is virus free.

Dated: November 4, 2016

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CERTIFICATE OF SERVICE FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on November 4, 2016, I electronically filed the foregoing Brief of Appellees Essentia Health and Innovis Health, LLC doing business as Essentia Health West with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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