Case No. 16-3186

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brittany R. Tovar,

Plaintiff-Appellant,

v.

Essentia Health; Innovis Health, LLC, dba 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

REPLY BRIEF OF APPELLANT

GENDER JUSTICE

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INTRODUCTION

Plaintiff-Appellant Brittany Tovar was an employee of Essentia,[1] and participated in the self-insured health care plan offered to all employees. HealthPartners[2] was the third-party administrator (TPA) for the plan. The plan contained a categorical coverage exclusion for all health services related to gender transition, and Essentia and HealthPartners denied Tovar's son, who is transgender, coverage for medically necessary care under the terms of this plan.

Tovar submits this Reply Brief in response to the arguments raised by Defendants HealthPartners and Essentia.

LEGAL ARGUMENT

I. HEALTHPARTNERS' ARGUMENTS AGAINST REVERSAL ARE UNAVAILING

A. TPAs Are Liable For Administering Discriminatory Plans.

1. The regulations clearly establish liability for TPAs.

HealthPartners and Tovar agree that the Office for Civil Rights regulations must be given *Chevron* deference. (Brief of Appellees HealthPartners, Inc. and

[1] Tovar's Complaint names as her employer Essentia Health and Innovis Health, LLC, dba Essentia Health West. (J.A.2.) This brief refers to these defendants collectively as "Essentia." (*Id.*)

[2] For ease of reference throughout the brief, Tovar refers to HealthPartners, Inc., and HealthPartners Administrators, Inc., collectively as "HealthPartners." When necessary to refer to these entities separately, Tovar will refer to HealthPartners Administrators, Inc., as "HPAI" and will use the full name for the parent company HealthPartners, Inc.

HealthPartners Administrators, Inc., hereinafter HealthPartners' Brief, at 43-44.) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).)

The parties' disagreement, then, is about what the OCR's regulations say. But the regulations themselves are perfectly clear:

> (b) Discriminatory actions prohibited. A covered entity shall not, in providing *or administering* health-related insurance or other health-related coverage:
>
> (4) Have or *implement a categorical coverage exclusion* or limitation for all health services related to gender transition …

45 CFR § 92.207 (emphasis added). Tovar alleges in her Complaint that HealthPartners, in administering health-related insurance, implemented a categorical coverage exclusion for all health services related to gender transition. (J.A.1, ¶7.) Section 92.207 of the regulations makes clear that this is barred under Section 1557.

In a "Background" section discussing the regulations, published in the Federal Register, OCR explains how the regulations apply to a third party administrator of an employer's self-insured health care plan. Unequivocally, OCR "[is] not excluding third party administrator services from the final rule …" 81 FR 31432.

OCR goes on to note:

> Third party administrator services are undeniably a health program or activity, as they involve the administration of health services. … [T]here is no principled basis on which to exclude the law's application to the third party administrator services or to treat them differently from other entities and services covered by the rule. . . . Moreover, the fact that third party administrators are governed by other Federal laws such as ERISA is not a reason to exempt them from Section 1557. ERISA itself explicitly preserves the independent operation of civil rights laws.

Id.; *see also Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983)(explaining that ERISA does not preempt civil rights laws).

HealthPartners argues that a TPA can never be liable for a discriminatory benefit design. (HealthPartners' Brief at 44.) OCR's commentary on the regulations says otherwise: "Thus, if a plan has a discriminatory benefit design under Section 1557, a third-party administrator could be held responsible for plan features over which it has no control." 81 FR 31432.

HealthPartners argues that Tovar quoted this sentence out of context in her original brief, and it quotes the surrounding paragraphs. (HealthPartners' Brief at 41-43.) But, as Tovar noted in her original brief, the phrase is part of a passage concerned with OCR's discretion to pursue charges and the best use of agency resources, not the reach of the law. *See* 81 FR 31432. In the passage HealthPartners quotes, OCR is acknowledging that if a TPA administers, but did not design, a plan with discriminatory benefits, the law holds it responsible for a plan feature that it did not control. *Id.* In response to commenters' concerns about this, OCR says that it is "adjusting the way in which it will process claims." *Id.* This passage relates to OCR's discretion to use limited agency resources to focus its investigations on cases where liability findings will have the greatest impact. It explains OCR's focus on benefit design, as plan designers will tend to have a broader reach than plan implementers.

Even if OCR meant to deny liability when a TPA only administers, but does not design, a discriminatory plan, that does not rule out liability for all TPAs. OCR

notes that "third party administrators are *generally* not responsible for the benefit design of the self-insured plans they administer." *Id.* (emphasis added). In other words, OCR will at a minimum investigate to see whether the TPA is actually responsible for the benefit design, and if it is, it will exercise its discretion to enforce Section 1557 against the TPA.

This Court does not need to decide which of these two interpretations of the regulations and accompanying commentary is correct, because under either, Tovar's claim against HealthPartners should proceed. As Tovar alleged in her Complaint, "[t]he Plan corresponds to an insurance policy offered to employers by HealthPartners and known as Policy No. G008HPC-03." (J.A.5 ¶ 23.) Tovar has alleged that HealthPartners actually designed the Plan at issue because it corresponds to a plan it issues to employers as an insurer, and under any interpretation of the OCR's commentary this is illegal.

2. TPA liability is a straightforward extension of existing civil rights law.

HealthPartners repeatedly argues that the entity responsible for the discriminatory exclusion in the plan is Essentia, not HealthPartners. (*See, e.g.*, HealthPartners' Brief at 30.) It argues that it was forced by ERISA and by its contract with Essentia to follow the plan once it was put in place. This type of argument has been made without success in the context of other civil rights laws. Essentially, HealthPartners' position is that it should be able to contract around civil rights law.

Once the discriminatory contract is in place, HealthPartners argues that it can't be held responsible for following the discriminatory terms. The Court should reject this argument.

This is a common scenario that arises under Title VII. Staffing firms contract with employers to provide and sometimes supervise employees. Courts and the Equal Employment Opportunity Commission (EEOC) have long held that staffing firms can be held liable, for acting as an employer's agent and for acting as an agency that discriminates, such as failing to refer employees on the basis of a protected status. *See Williams v. Grimes Aero. Co.*, 988 F. Supp. 925, 934 (D.S.C. 1997) (explaining that employment agencies "may be liable as agencies, as employers, and as agents of employers."); *see also* EEOC Enforcement Guidance from Dec. 3, 1997 (available at https://www.eeoc.gov/policy/docs/conting.html) (last visited Nov. 21, 2016).

The EEOC Enforcement Guidance clarifies that a staffing agency can be liable for discrimination even when it is not a joint employer with the client-employer:

> The staffing firm is liable for its discriminatory assignment decisions. Liability can be found on any of the following bases: 1) as an employer of the workers assigned to clients (for discriminatory job assignments); 2) as a third party interferer (for discriminatory interference in the workers' employment opportunities with the firm's client); and/or 3) *as an employment agency (for discriminatory job referrals).*
>
> The fact that a staffing firm's discriminatory assignment practice is based on its client's requirement is no defense. Thus, a staffing firm is liable if it honors a client's discriminatory assignment request or if it knows that its client has rejected workers in a protected class for discriminatory reasons and for that reason refuses to assign individuals in that protected class to that client. Furthermore, the staffing firm is liable if it

> administers on behalf of its client a test or other selection requirement that has an adverse impact on a protected class and is not job-related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k).
>
> https://www.eeoc.gov/policy/docs/conting.html (last visited Nov. 21, 2016)

(emphasis added) (footnote omitted).

The district court cited *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 934 (D.S.C. 1997) (Add.7), discussing the need to show control by both entities in order to show liability of both in a Title VII context. But *Williams* shows only one of the ways in which a staffing agency may be liable, while acknowledging that other ways exist as well. *Williams*, 988 F. Supp. at 934.

Just as an employer may be held liable for carrying out the discriminatory preferences of a customer, a staffing agency may be held liable for carrying out the discriminatory preferences of its employer-customer. The fact that both parties agree in advance to carry out a discriminatory scheme and one drafts a contract to memorialize this agreement doesn't shield either party from anti-discrimination law. The context of employer-provided insurance contracted to a third-party administrator is no different. The fact that HealthPartners' role was to implement and administer the discriminatory plan is no defense, even if it is true that HealthPartners did not design the discriminatory Plan terms (a fact that Tovar disputes).[3] HealthPartners

[3]As Tovar alleged in her Complaint, "[t]he Plan corresponds to an insurance policy offered to employers by HealthPartners and known as Policy No. G008HPC-03." (J.A.5 ¶ 23.)

repeatedly argues that once the Plan was in place it had no choice but to follow it. HealthPartners ignores its own action in agreeing to administer a facially discriminatory plan in the first place.

B. The Court Has Subject Matter Jurisdiction Over Tovar's Section 1557 Claims.

1. Tovar has a claim against HealthPartners as well as HPAI.

In Tovar's Complaint, she alleged a Section 1557 claim against HealthPartners. (J.A.11.) As a result of the motion to dismiss and subsequent district court proceedings, her Complaint was amended to include a Section 1557 claim against HPAI as well. (Add.18.) The allegations in her Complaint are sufficient for the Court to conclude that Tovar states a claim upon which relief may be granted. She alleges that HealthPartners (and consequently, HPAI)[4] is the third-party administrator for her health care plan, and that the Plan corresponds to a known plan that HealthPartners provides as insurance to employers who are not self-insured. (J.A.5 ¶¶ 23-24.) The remainder of the Complaint addresses the discriminatory exclusion in her Plan that HealthPartners and Essentia used to deny Tovar's claims on behalf of her son. (J.A.5-9 ¶¶ 25-48.)

Count III of Tovar's Complaint alleges that HealthPartners discriminated against Tovar by serving as the third party administrator for the Plan and for

[4] Tovar's Complaint was amended by the district court via its Order of June 23, 2016. (Add.18.) The best way to interpret this amendment is that every allegation against HealthPartners is alleged against both HealthPartners and HPAI.

enforcing the Plan's discriminatory exclusion. (J.A.11.) Section A above addresses Tovar's legal arguments about third-party administrator liability for facially discriminatory plans under Section 1557.

HealthPartners argues that Tovar should not have discovery into which of the two entities (HealthPartners, Inc. or HPAI) took any of the alleged actions in Count III of the Complaint. (HealthPartners' Brief at 12.) The reason Tovar needs discovery is that the district court made a fact finding: that HPAI, and not HealthPartners, is the third-party administrator in this case. (J.A.4) ("a separate entity, [HPAI] is actually the third-party administrator ("TPA") of Essentia's self-insured Plan.") But there was no evidentiary hearing to support this finding, and neither Tovar's allegations in the Complaint nor the Plan document embraced by the Complaint resolve this question.

In its brief, HealthPartners simply states that the Plan document embraced by the Complaint "plainly shows that HPAI, not HealthPartners, is the third-party administrator." (HealthPartners' Brief at 11.) But the Summary Plan Description is not clear enough or definitive enough to permit the Court to make that fact finding in the absence of discovery.

The little evidence available in the Plan document actually points the other way. HPAI is identified in the plan documents as the "plan manager," but several points in the Plan documents refer separately to HealthPartners, a short-hand defined in the document as referring to HPAI's parent company, HealthPartners, Inc. (J.A.81-82.) In fact, the sections in the Plan documents most suggestive of redress, the complaint and

appeal sections, refer the plan participant to generic web sites and phone numbers for HealthPartners. (J.A.84.) And at a minimum, the fact finding ignores that Tovar's Complaint specifically alleges that HealthPartners, Inc., the insurance company, not HPAI, sells a corresponding plan as insurance to employers indicating that it is the source of the discriminatory benefit design. (J.A.5 ¶ 23.)

2. Tovar has Article III standing to sue HealthPartners.

HealthPartners argues that Tovar did not have standing to sue under Section 1557 because it says that she was not injured by HealthPartners, that if she was injured her injuries are not traceable to HealthPartners, and that HealthPartners can't redress Tovar's injuries.

Tovar is injured here. As argued in Part II, *infra*, it is Tovar's health care plan that was discriminatory. While it was her son that was denied health care, the plan that should have covered his care belonged to Tovar.

HealthPartners argues in its brief that Tovar "confuses the standing question by raising a parent-subsidiary argument for the first time on appeal." (HealthPartners' Brief at 16.) But it is HealthPartners that confuses the point of this discussion in Tovar's initial brief. (Brief of Appellant, hereinafter Tovar's Brief, at 29-31.) Tovar's brief discusses the legal standard for integrated enterprises to demonstrate that the fact questions regarding which of the two entities (HealthPartners, Inc. or HPAI) is responsible for acting as third-party administrator here are complicated. The Court does not need to decide this question now, but the complexity of the legal argument

shows that, as Tovar argues in Section B.1. above, the district court's fact-finding based on a page in the Summary Plan Description must be reconsidered.

This argument has no bearing on whether Tovar's injuries are traceable to HealthPartners. Tovar's injuries are traceable to HealthPartners because by agreeing to act as third-party administrator and enforcing the discriminatory Plan, HealthPartners made the discrimination possible.

HealthPartners is also responsible for redressing Tovar's injuries. HealthPartners argues that since Essentia was the entity responsible for paying claims to begin with, that it is the only entity that can redress her damages. But this is just not the case. Both entities discriminated against her, and each entity is responsible for its part in the discrimination. Looking again to the EEOC guidance on staffing agencies under Title VII, "[w]here the combined discriminatory actions of a staffing firm and its client result in harm to the worker, the two respondents are jointly and severally liable for back pay, front pay, and compensatory damages." EEOC Enforcement Guidance from Dec. 3, 1997 (available at https://www.eeoc.gov/policy/docs/conting.html) (last visited Nov. 21, 2016). Tovar has compensable injuries for the 2015 Plan at issue in this case and there is no basis to exclude HealthPartners from responsibility for these injuries.

Tovar's injury was direct and personalized, manifested in measurable damages, and was, in fact, caused by an "act of the defendant" HealthPartners, at a minimum by the agreement to administer and the administration of a health care plan that was

discriminatory on its face and as applied to Tovar. Therefore, Tovar has standing to bring this claim.

3. Tovar's Section 1557 claim is not moot.

HealthPartners also argues that Tovar's claim is moot, as the plan was allegedly changed in January 2016. How the plan reads currently is immaterial to her claim because the exclusion was in effect during the relevant period (2015) from which her concrete damages arise. She alleges an inability to purchase drugs that were medically necessary for her son, that she had to pay for some treatment out of her own pocket, and that this injury to her son's health and the discrimination caused her emotional distress. (J.A.6-9, ¶¶ 33-48).

While HealthPartners claims that "there is no danger of recurrence" of the exclusion in the 2015 Plan at issue here, Tovar disagrees. The Plan was allegedly changed in 2016, and HealthPartners gives no reason why it could not be changed back, absent a ruling from a court otherwise.

C. Tovar's Complaint States A Claim Upon Which Relief May Be Granted.

1. Tovar has alleged a plausible Section 1557 claim.

HealthPartners' brief includes a hodge podge of arguments about whether Tovar has alleged a plausible Section 1557 claim. None are persuasive. This section addresses each argument in turn.

Initially, HealthPartners argues that the standard for its liability is "deliberate indifference," a standard that requires actual notice. (HealthPartners' Brief at 25-26.) HealthPartners takes this argument out of context from Title IX law and it is not applicable here. This argument is addressed further in section II.C.2, *infra*.

HealthPartners argues that it is only liable for its own misconduct. (HealthPartners' Brief at 26.) Tovar agrees that HealthPartners is liable for its own misconduct, but throughout its various briefs, HealthPartners ignores the fact that at a minimum, it took the action of agreeing to administer a plan that on its face was discriminatory. That is an action for which HealthPartners should be held liable. Tovar has also alleged in her Complaint that HealthPartners is responsible for the discriminatory benefit design of the Plan. (J.A.5 ¶ 23.)

HealthPartners argues that TPAs should not be held liable for implementing a discriminatory plan, pointing to ERISA and its contract with Essentia. (HealthPartners' Brief at 27-31.) But even if Tovar had not alleged that HealthPartners was responsible for the Plan's benefit design, the regulations for Section 1557 specify that TPAs are liable, and this is a straightforward application of existing civil rights law principles, as argued above in Section I.A.

HealthPartners argues that it should not be liable under Title VII. (HealthPartners' Brief at 31-36.) To clarify, HealthPartners is correct that Tovar did not allege a Title VII claim against it, and any suggestion otherwise in her initial brief

is in error. Tovar relies on Title VII to illustrate principles from other civil rights laws, as discussed in Section I.A.2 above.

HealthPartners compares this case with other Section 1557 cases, arguing that it did not treat Tovar differently from any other Essentia employee. But the plan discriminates because of sex in its express terms, and it was on this basis that Tovar's medical claims for her son's care were denied. As the OCR explained:

> OCR proposed to apply basic nondiscrimination principles in evaluating whether a covered entity's denial of a claim for coverage for transition-related care is the product of discrimination. We noted that based on these principles, an explicit, categorical (or automatic) exclusion or limitation of coverage for all health services related to gender transition is unlawful on its face under paragraph (b)(4); in singling out the entire category of gender transition services, such an exclusion or limitation systematically denies services and treatments for transgender individuals and is prohibited discrimination on the basis of sex.
>
> 81 FR 31429 (citations omitted).

2. There is no separate "notification" requirement.

HealthPartners makes two arguments about notice. First, it argues that Tovar must have provided it notice of the discrimination. Then it argues that it did not have notice from the government that its federal funding was contingent on the absence of sex discrimination in the plans it administered. Tovar addresses each of these arguments in turn.

HealthPartners' argument about deliberate indifference and actual notice under Title IX law is misplaced. First of all, no court has held that this standard (deliberate

indifference and actual notice) is applicable to Section 1557, and this Court need not do so now, as this standard only applies to Title IX in a wildly different context.

Cases like *Gebser* address the question of when a school can be held responsible for sexual harassment committed by a school employee, a student, or a third party. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). In *Gebser*, a teacher sexually harassed a student off school grounds, and the Supreme Court held that the school was not responsible unless it had actual notice of the harassment. *Id.*

This is not a case like *Gebser*. Under Title IX, a different standard applies when a school's educational programs expressly discriminate based on sex. No notice is required because the school itself is responsible for the discrimination:

> A school also engages in sex-based discrimination if its employees, in the context of carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students (such as teaching, counseling, supervising, and advising students) deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex. Under the Title IX regulations, the school is responsible for discrimination in these cases, whether or not it knew or should have known about it, because the discrimination occurred as part of the school's undertaking to provide nondiscriminatory aid, benefits, and services to students. The revised guidance distinguishes these cases from employee harassment that, although taking place in a school's program, occurs outside of the context of the employee's provision of aid, benefits, and services to students. In these latter cases, the school's responsibilities are not triggered until the school knew or should have known about the harassment.

U.S. Dept. of Ed. OCR Title IX Revised Sexual Harassment Guidance, (available at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html) (last visited Nov. 21, 2016).

The scenario here, where the health insurance plan administered by HealthPartners is discriminatory on its face, does not fit the situation in *Gebser*. HealthPartners' argument that Tovar needed to provide it notice is bizarre in light of the fact that the discrimination is in the express terms of the Plan it agreed to administer.

HealthPartners next argues that because Section 1557 was legislated by Congress under its spending power, the government must provide notice that by accepting federal funding, it became exposed to liability. (HealthPartners' Brief at 25-26.) But "Section 1557 has been in effect since its passage as part of the ACA in March 2010, and covered entities have been subject to its requirements since that time." 81 FR 31430.

In 2012, over two years prior to the 2015 Plan at issue in this case, the Office of Civil Rights explicitly stated that the ACA's Section 1557's prohibition of sex discrimination "extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." Letter from Leon Rodriguez, Dir. of Office for Civil Rights, Dep't of Health & Human Services, to Maya Rupert, Fed. Pol'y Dir., Nat'l Center for Lesbian Rights (Jul. 12, 2012) (OCR Transaction No. 12-000800). As discussed in the letter, this was a clear application of existing civil rights law to the framework of Section 1557. Tovar cites this existing civil rights law at length in her initial brief. (Tovar's Brief at 32-34.)

OCR has enforced this interpretation of the law for years. *See* Voluntary Resolution Agreement (OCR Transaction No. 12-147291) (available at http://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/vra.pdf) (last visited Nov. 21, 2016). It is an obvious conclusion that health care plans that explicitly target and exclude care for transgender persons violate the law.

3. The regulations demonstrate that both HealthPartners and HPAI may be liable under Section 1557.

As discussed in Section I.A.1, *supra*, OCR's final regulations for Section 1557 clearly hold TPAs responsible for administering plans that implement a categorical coverage exclusion for all health services related to gender transition. *See* 45 CFR § 92.207. While the regulation includes an effective date subsequent to the Rule's publication, the "Background" section also notes that "Section 1557 has been in effect since its passage as part of the ACA in March 2010, and covered entities have been subject to its requirements since that time." 81 FR 31430.

II. ESSENTIA'S ARGUMENTS AGAINST REVERSAL ARE UNAVAILING

Whether couched as arguments about Tovar's "statutory standing" or about the limits of associational discrimination claims, Essentia's arguments fail to persuade. Addressing each of the arguments in turn:

A. Tovar Has Statutory Standing Under Title VII And Under The MHRA.

Essentia begins its argument for dismissal by suggesting that this Court "need not delve into [a] murky…area of the law" – namely, the question whether Title VII and MHRA protections include protection on the basis of transgender status. (Brief of Appellees Essentia Health and Innovis Health, LLC dba Essentia Health West, hereinafter Essentia's Brief, at 6-7.)

But there is nothing murky about Title VII's protections. This Court has already indicated in *Hunter v. United Parcel Service, Inc.*, 697 F.3d 697 (8th Cir. 2012), that Title VII extends to transgender rights, and in doing so, it ruled consistently with other circuits. As Tovar noted (Tovar's Brief at 32-34), many courts now hold that Title VII's bar on discrimination "because of sex" must extend to discrimination against trans individuals, either under a *per se* analysis or under a gender-stereotyping analysis like that mandated by *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). Both the Second and the Eleventh Circuits have recently reaffirmed this interpretation of Title VII. *See Fowlkes v. Ironworkers Local 40,* 790 F.3d 378 (2d Cir. 2015); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 884 (11th Cir. 2016).

Nor is the MHRA at all murky regarding protections for transgender individuals. Quite the opposite: the protections are written expressly into the state statute. *See* Minn. Stat. § 363A.03, subd. 44.

Furthermore, Tovar's specific allegations against Essentia – that categorical exclusions for transition-related health care violate Title VII and the MHRA because they discriminate on the basis of transgender status – are well-founded. (*See* Tovar's Brief at 34-35 (noting plausibility of this argument under Title VII); *id.* at 36-38 (noting same regarding the argument under MHRA); *cf. OutFront Minnesota v. Piper*, Court File No. 62-CV-15-7501 (Minn. Dist. Ct., 2d Jud. Dist. November 14, 2016) (Leary, J.) (finding state law barring Medicaid coverage for gender confirmation surgery violates the equal protection clause of the Minnesota Constitution).)

Moving past its concern about supposedly murky areas of the law (which are not in fact murky), Essentia turns to its first threshold argument: that Tovar lacks statutory standing under *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), to bring these Title VII and MHRA claims. (Essentia's Brief at 8.) Essentia characterizes statutory standing as encompassing three principles: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances[,]…and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law involved." (*Id.* (citing *Lexmark* at 1386).)

As Tovar noted in her opening brief, statutory standing is not a jurisdictional question and need not be addressed separately from Essentia's Rule 12(b)(6) arguments. (*See* Tovar's Brief at 38-39; *see also infra* Part II.C, addressing the Rule 12(b)(6) arguments, which encompass the *Lexmark* principles.)

But Tovar's points with regard to the three principles in *Lexmark* bear reiteration here. First, Tovar's claims do not violate the "prohibition on…raising another person's legal rights" rather than her own. Tovar is seeking to enforce her own rights as an employee. She alleges that her terms, conditions, and privileges of employment are adversely affected by Essentia's categorical exclusion. In this, she is no different than any employee who argues that he or she is paid less on a discriminatory ground – this is a canonical Title VII or MHRA claim. The value of Tovar's employee benefits is lessened if her beneficiaries receive inferior coverage, and if the value of Tovar's employee benefits is lessened, her overall compensation is lessened. As noted, the Supreme Court long ago recognized that an employee may bring such a claim. *See Newport News Shipbldg. & Dry Dock v. EEOC*, 462 U.S. 669, 682 (1983) (permitting employee to bring a claim challenging discriminatory limitations placed on health care benefits for the employee's beneficiaries, because this affects the employee's compensation).

The second *Lexmark* point follows: Tovar is not seeking "adjudication of generalized grievances"; rather, she seeks adjudication of a very specific and individual grievance. Just like the plaintiff in *Newport News*, she is aggrieved by a lowering of her overall compensation, stemming from discrimination in her benefits. *Cf.* 42 U.S.C. § 2000e-5 (allowing "persons aggrieved" to bring charges); Minn. Stat. § 363A.28 (same).

The third *Lexmark* point follows as well. Tovar's Complaint "fall[s] within the zone of interests protected by the law involved" because that zone of interests, per *Newport News*, includes not reducing employees' compensation via discrimination in their benefits.

Contrary to Essentia's argument (Essentia's Brief at 10-13), nothing about the Supreme Court's decision in *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011), changes these conclusions. The plaintiff in *Thompson* alleged that he was fired in retaliation for his fiancée filing a discrimination claim against the same employer. *Id.* at 172. Essentia notes that this "adversely affect[ed] *his* status as an *employee*." (Essentia's Brief at 12.) It argues, "[i]n stark contrast to *Thompson*, Tovar's complaint is completely devoid of any adverse action by Essentia against her" – and in particular, "[s]he has not alleged Essentia… provided her lesser benefits than similarly situated employees because of any protected class." (*Id.*) But this is patently untrue. Indeed, this is exactly what Tovar *is* alleging: as in *Newport News*, she is alleging Essentia provided her with lesser benefits than similarly situated employees (those whose beneficiaries are not transgender) because of a protected class. Just as in *Thompson*, Tovar alleges that Essentia's discriminatory benefits plan "adversely affected her status as an employee" – specifically, by providing her with inferior benefits, which reduced her compensation. And having reduced compensation is just as actionable as being fired. *See Newport News* at 682.

The two other cases cited by Essentia – *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) – are distinguishable because they concern racial harassment. In those cases, the court did not recognize what might be labeled a "bystander's right" not to be exposed to racial harassment of others in the workplace. 959 F.Supp. 2d at 1354; 907 F. Supp. 2d at 1268. It may be correct to refer to the plaintiffs in *Jackson* and *Cochran* as mere "accidental" (bystander) victims and to reject their claims on that ground. But that is not the situation here. Tovar is not a bystander, observing the effect of discrimination on others; rather, like the plaintiffs in *Thompson* and *Newport News*, she suffered an adverse action herself.

B. Tovar's Association With Her Transgender Son Places Her Within The Zone Of Interests Because Her Terms, Conditions, And Privileges Of Employment Were Worse Than Those Of A Similarly-Situated Employee Who Does Not Have A Transgender Beneficiary.

1. Tovar adequately pled her claim.

Essentia argues that Tovar's Complaint failed to put it on "fair notice of the nature and basis or grounds" for her claim, as required by Federal Rule of Civil Procedure 8(a). (Essentia's Brief at 16.) Specifically, it argues that 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." (*Id.*)

This argument is not persuasive. Tovar's Complaint alleges the basis of her claim against Essentia clearly and in detail (*see* J.A.1-13), and it is difficult to imagine how adding the truism that "[Tovar] is associated with her son" could possibly have put Essentia on any fairer notice than the Complaint already provided. Essentia does not cite any case law in support of this unlikely pleading doctrine.

Essentia also argues that it did not receive fair notice of Tovar's MHRA claim because the Complaint "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." (Essentia's Brief at 16.) This argument misses the mark because Tovar indeed intended to "rely on the provisions of the MHRA and Title VII prohibiting discriminatory terms, conditions, or privileges of employment" – this is the basis of her employment law claims, which Essentia had fair notice of. It was not necessary for Tovar to also reference a separate part of the statute, Minn. Stat. § 363A.15, which describes subtypes of "reprisals," since she is not bringing an MHRA reprisal claim (nor a retaliation claim under Title VII).

2. Tovar suffered an adverse employment action as an employee, arising out of actionable associational discrimination.

In the next section of its brief, Essentia argues that "Tovar, as the employee, did not suffer a discriminatory or adverse employment action to assert an associational discrimination claim." (Essentia Brief at 17; *see also id.* at 19, 21, 22.) To a

large degree, this section merely repeats the argument made in the preceding section of its brief (*see* Essentia's Brief at 6-14) – that Tovar suffered no adverse action. But repeating the argument does not make it stronger. As explained above, Tovar is not raising another person's legal rights – she is raising her own; she is not a bystander, observing the effect of discrimination on others; rather, like the plaintiffs in *Thompson* and *Newport News*, she suffered an adverse action herself.

Essentia does attempt in this section to address the import of the case law recognizing associational discrimination claims under Title VII. (Essentia's Brief at 17-22.) First, like Tovar, it acknowledges the body of cases finding associational discrimination actionable when it involves a "reciprocal characteristic" – where, that is, it is possible to know the protected identity characteristic of the employee, based on the identity of the associated person who triggers the discriminatory action. *See, e.g, Parr v. Woodman of World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where 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."); *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999) ('A white employee who is discharged because his child is biracial is discriminated against on the basis of his race.").

Tovar, of course, is not asserting that her case falls into that "reciprocal characteristic" category, since there is nothing about her son's gender identity that indicates her own. She relies instead on the large body of associational discrimination

cases that *cannot* be understood as involving a reciprocal characteristic. (*See* Tovar's brief at 43-50 (discussing a number of such non-reciprocal cases).)

Essentia's only argument in response is a non sequitur: it argues, "[i]n the self-described 'non-reciprocal' caselaw cited by Tovar, each of the employee plaintiffs *actually suffered an adverse employment action*." (Essentia's Brief at 20 (emphasis added).) This argument does nothing to challenge the existence of this body of law which supports Tovar's claim; instead, it merely repeats once again the false assertion that Tovar has not alleged any adverse employment action against her, as an employee.

Tovar urges this Court to recognize her associational discrimination claim, following cases like *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011); *Boyd v. Ill. State Police*, 2001 U.S. Dist. LEXIS 3792 (N.D. Ill. March 28, 2001); *Chiara v. Town of New Castle*, 2 N.Y.S. 3d 132 (App. Div. 2d Dep't 2015); *Flagg v. AliMed, Inc.*, 992 N.E.2d 354 (Mass. 2013); *Berry v. Frank's Auto Body Carstar*, Inc., 817 F. Supp. 2d 1037, 1047-50 (S.D. Oh. 2011); *Manon v. 878 Educ., LLC*, 2015 U.S. Dist. LEXIS 27016 (S.D.N.Y. 2015); *Huynh v. Bracamontes*, 2016 U.S. Dist. LEXIS 90443 (N.D. Cal. July 12, 2016); and *Allen v. Am. Home Foods, Inc.*, 644 F. Supp. 1553 (N.D. Ind. 1986), *modified* 658 F. Supp. 451 (N.D. Ill. 1987).

Recognizing Tovar's claim in line with cases like these and with venerable cases like *Newport News Shipbldg. & Dry Dock v. EEOC*, 462 U.S. 669 (1983), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), is consistent with the purpose of the statute. It will not create unbounded rights, because courts can recognize appropriate boundaries

under the "zone of interests" test. (Tovar's Brief at 47-50.) Claims like Tovar's, which turn on discrimination in employee benefits, fall well within the zone of interests, since diminutions in employee benefits are by definition an adverse action against an employee and the associated person who triggers the adverse action is by definition closely related to the employee (typically a spouse or child). (*Id.*)

3. Tovar suffered separate, distinct, and direct injuries when her employment benefits were reduced because her beneficiary is transgender.

In its final argument, Essentia repeats the unfounded assertion that Tovar has suffered no "separate, distinct, or direct" injury. (Essentia's Brief at 22.) This is simply the *Lexmark* argument in different guise. To assert that Tovar had no separate, distinct, or direct injury is the same as asserting that she is attempting to "raise another person's legal rights." But she is not. Tovar is seeking to enforce her own rights as an employee, consistent with the rights recognized in *Newport News Shipbldg. & Dry Dock v. EEOC*, 462 U.S. 669, 682 (1983).

Essentia argues that *Micek v. City of Chi.*, No. 98 C 6757, 1999 U.S. Dist. LEXIS 16263 (N.D. Ill. Sep. 30, 1999), supports the view that Tovar has suffered no injury and therefore cannot bring a Title VII claim. (Essentia's Brief at 23.) But this misunderstands the holding in *Micek*. The court in that case rejected the claim brought by an employee to challenge the exclusion of hearing aids from his employer's health care policies. *Id.* at *1. While the court discussed the standing of the non-deaf employee, who was concerned about the denial of coverage to his family members,

the case did not ultimately turn on standing or on any evaluation of associational discrimination. Instead, the central holding related to the underlying allegation of discrimination. *Id.* at *20-26. The court found that the Americans with Disabilities Act (ADA) had no bearing on whether employers were required to include coverage for hearing aids in their plan: in short, refusing to cover hearing aids was not considered discriminatory. *Id.* Given this, it would not matter whether the employee sued on his own behalf (had he been deaf); his claim would still have failed. *Id.* Here, by contrast, Tovar's underlying allegation of discrimination is highly plausible. (*See* Tovar's Brief at 34-35 (noting plausibility of challenge to categorical exclusions for transition-related health care under Title VII); *id.* at 36-38 (noting same regarding the argument under MHRA).)

Essentia's reliance on *Niemeier v. Tri - State Fire Prot. Dist.*, No. 99 C 7391, 2000 U.S. Dist. LEXIS 12621 (N.D. Ill. Aug. 24, 2000), is similarly misplaced. In *Niemeier*, an employee challenged the exclusion of infertility treatments from his employer's health care plan. Id. at *1-3. Rightly or wrongly, the court determined that excluding infertility treatments did not constitute discrimination under the ADA or Title VII. *Id.* at *4-20. Again, by contrast, Tovar's challenge to categorical exclusions for transition-related health care is highly plausible, which makes the holding in *Niemeier* inapposite.

Finally, Essentia argues that Tovar could not have a separate, distinct, and direct injury because, though she may have considered seeking new employment in order to obtain nondiscriminatory healthcare benefits, "she was not forced to quit."

(Essentia's Brief at 25.) Once again, this misunderstands the nature of injuries under the civil rights laws. These laws do not require that employees be fired or be forced to quit or even that they suffer an actual loss in benefits or compensation, in order to have a compensable injury. Employees suffer actionable harm, and qualify as "aggrieved persons," any time an employer adopts a discriminatory plan with the potential to impact their terms, conditions, and privileges of employment. *See Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1188 (7th Cir. 1971). As an employee with a transgender beneficiary, Tovar suffered actionable harm, and qualified as an aggrieved person, as soon as Essentia adopted its discriminatory plan.

CONCLUSION

For the reasons set forth herein, Plaintiff-Appellant Tovar respectfully requests that the Court reverse the District Court's Order granting Appellees' Motions to Dismiss.

CERTIFICATE OF COMPLIANCE

I hereby certify compliance with the type-volume limitation, the typeface requirements, and the type style requirements of Fed. R. App. P. 32(a) and with the technical requirements of 8th Cir. R. 28A(h):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,664 words, excluding portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) (table of contents, table of authorities, statement with respect to oral argument and certificates of counsel).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been produced using a proportionally spaced typeface using 14-point Garamond font, using Microsoft Word, 2010 Version.

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Dated: November 21, 2016

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I hereby certify that on October 4, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal 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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