

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar,

Court File No. 16-cv-00100 (RHK/LIB)

Plaintiff,

v.

Essentia Health,
Innovis Health, LLC,
dba Essentia Health West, and
HealthPartners, Inc.,

Defendants.

**MEMORANDUM
IN OPPOSITION TO
DEFENDANT ESSENTIA'S
MOTION TO DISMISS**

INTRODUCTION

Plaintiff Brittany R. Tovar (“Tovar”) opposes the Motion to Dismiss filed by Essentia Health and Innovis Health, LLC, dba Essentia Health West (collectively, “Essentia”). Tovar alleges that the health care plan offered by Essentia and administered by co-defendant HealthPartners violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and the Minnesota Human Rights Act (Minn. Stat. § 363A.08, subd. 2(3)).

Essentia here presents the Court with the question of whether Tovar has statutory standing to sue under either law. Essentia bases its assertions on the false premise that Tovar never sought services excluded by Essentia’s health care plan or was denied care. It further alleges that she is merely acting on behalf of a third party – her dependent, minor child – and has suffered no injury of her own and therefore cannot be considered to have standing under Title VII or the MHRA.

Essentia is incorrect. Tovar is an employee of Essentia and as such is entitled to the benefits provided to her as a privilege of her employment. She was prevented from fully utilizing these benefits, and the basis on which Essentia denied her access was sex. Denials on the basis of sex are unlawfully discriminatory under both the federal and state laws in question. Furthermore, as a direct result of Essentia's discrimination, Tovar suffered multiple harms of a very personal and particular nature. Accordingly, Tovar has successfully stated a claim against Essentia upon which relief can be granted, and Essentia's Motion challenging the same should be denied by this Court.

FACTUAL BACKGROUND

Plaintiff Brittany Tovar has been employed by Defendant Essentia¹ since September 24, 2010. (Complaint at ¶ 21.) Tovar's employee benefits at Essentia include health insurance provided through the Essentia Health Employee Medical Plan ("the Plan"). (*Id.* at ¶ 22.) Essentia specifically selected the Plan at issue, which was designed and offered by HealthPartners as Policy No. G008HPC-03. (*Id.* at ¶ 23.) HealthPartners serves as the third party administrator [or "TPA"] of the Plan.² (*Id.* at ¶ 24.) The Plan contains a categorical

¹ Plaintiff's Complaint names as her employer Defendants Essentia Health and Innovis Health, LLC, dba Essentia Health West. (Complaint at ¶ 6.) The Complaint refers to these defendants collectively as "Essentia." (*Id.*) Essentia does likewise. (Essentia Memo at 1.) Plaintiff expects that discovery will reveal whether, as HealthPartners asserts, "Innovis Health, LLC, is Plaintiff's actual employer" (HealthPartners Memo at 2 n.2).

² HealthPartners asserts that "[c]ontrary to Plaintiff's Complaint, HealthPartners Administrators, Inc., (rather than HealthPartners, Inc.) is the entity that serves as a third-party administrator for the Essentia Health health plan at issue in this case." (HealthPartners Memo at 2 n.1.) If discovery reveals that HealthPartners Administrators, Inc., should be added as a defendant or substituted for HealthPartners, Inc., Plaintiff will seek to amend her Complaint accordingly.

exclusion barring any insurance coverage for “[s]ervices and/or surgery for gender reassignment,” regardless of medical necessity. (*Id.* at ¶ 25.)

Tovar’s beneficiaries include her teenage son, who has been a beneficiary of the Plan since October 1, 2014. (*Id.* at ¶ 26.) In November 2014, Tovar’s son was diagnosed with gender dysphoria, a condition recognized in the Diagnostic and Statistical Manual, fifth edition [“DSM-5”], as arising when individuals’ gender identity differs from the gender they were assigned at birth.³ (*Id.* at ¶ 27.) Such individuals may be referred to as “transgender,” while individuals whose gender identity is aligned with the sex or gender they were assigned at birth may be referred to as “cisgender.” (*Id.* at ¶ 28.) The DSM-5 includes among symptoms of gender dysphoria “clinically significant distress or impairment in social, occupational, or other important areas of functioning.” (*Id.* at ¶ 29.) These and other symptoms have been shown to be relieved by, *inter alia*, medical treatments such as mental health counseling, hormone therapy, and gender reassignment surgery. (*Id.* at ¶ 30.)

Because of the Plan’s categorical exclusion of “[s]ervices and/or surgery for gender reassignment,” Tovar’s son has been denied insurance coverage for health care that his providers have deemed medically necessary. (*Id.* at ¶ 31.) Beginning in March 2015, Tovar used the pre-authorization and appeal processes outlined under the Plan to seek clarification regarding the enforcement of the exclusion, repeatedly emphasizing to Defendants the serious repercussions if her son were denied medically necessary care. (*Id.* at ¶ 32.)

³ Because our society links individuals’ sex (as determined by their chromosomes, hormones, genitals, or other biological features) to particular gender roles, and vice versa, it is also accurate to say that gender dysphoria arises when individuals’ gender identity differs from their sex assigned at birth.

In a letter dated April 9, 2015, HealthPartners reaffirmed its intent to enforce the categorical exclusion. (*Id.* at ¶ 33.) The representative stated in the letter that HealthPartners was “not questioning whether these services are medically necessary or appropriate” but was nonetheless enforcing the Plan’s categorical exclusion. (*Id.*) When HealthPartners denied coverage, Tovar was forced to pay out of pocket for services or medications. (*Id.* at ¶ 34.) When this was not possible, Tovar’s son was forced to go without necessary care. (*Id.*)

One of the treatments denied Tovar by HealthPartners and Essentia was her son’s prescription for the drug Lupron, which was medically indicated for the window of time in which it was appropriate to suspend menstruation, prior to any use of testosterone supplements. (*Id.* at ¶¶ 35-38, 42-44.) The cost of Lupron was approximately \$9,000. (*Id.* at ¶ 40.) Because this otherwise covered drug (*id.* at ¶ 39) was being prescribed for Tovar’s son as a “[s]ervice[] . . . for gender reassignment,” coverage was categorically excluded under the Plan. (*Id.* at ¶ 38.) Tovar could not afford the high out-of-pocket cost of this drug, and her son had to forego its benefits. (*Id.* at ¶ 40.)

Providers also prescribed Androderm, a form of testosterone, to treat Tovar’s son for gender dysphoria. (*Id.* at ¶ 42.) As with the Lupron, Androderm was initially denied under the Plan, even though it would have been covered unquestionably for use by cisgender males. (*Id.* at ¶ 43.) Tovar was forced to pay out of pocket for this drug. (*Id.* at ¶ 44.) Essentia later approved Androderm for Tovar as a one-time exception but kept the categorical exclusion in the Plan. (*Id.* at ¶ 45.)

In December 2015, when Tovar contacted HealthPartners Member Services regarding pre-authorization for gender reassignment surgery for her son, she was told that

the surgery would not be authorized, due to the Plan's continuing exclusion of "[s]ervices and/or surgery for gender reassignment." (*Id.* at ¶ 46.) Had the surgery been recommended by a medical provider for a purpose other than gender reassignment necessitated by gender dysphoria – for instance, a mastectomy for a woman with breast cancer – it would have been covered by the Plan. (*Id.* at ¶ 47.)

Tovar's worry for her son, anger, disappointment, and sleeplessness made it difficult for her to focus on her job and caused a sharp increase in migraines. (*Id.* at ¶ 41.) She frequently found herself in tears at work and was ultimately compelled to reduce her work hours because of the stress. (*Id.*)

Tovar filed this action against Essentia and HealthPartners, alleging that Essentia violated Title VII and the Minnesota Human Rights Act ["MHRA"] and that HealthPartners violated the ACA. (*Id.* at ¶¶ 6-7.) Tovar alleges that Defendants' violations have caused her economic harm and emotional distress, and she seeks declaratory and injunctive relief as well as damages. (*Id.* at pp. 12-13.)

As her final factual allegation, Plaintiff alleges that, as of January 15, 2016 (the date on which the Complaint was filed), "[she] and her family continue to suffer financial and emotional harm due to the Plan's discriminatory exclusion of coverage for medical care needed by [her] son." (*Id.* at ¶ 48.) Essentia asserts in a footnote that "[t]his exclusion was eliminated from the Plan as of January 1, 2016." (Essentia Memo at 2 n.2.) However, this

fact is not in the record before the Court, nor is it relevant to the Court's analysis of Defendants' arguments.⁴

ARGUMENT

I. STANDARD OF REVIEW FOR MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.

Courts evaluate a motion to dismiss by first accepting all of the plaintiff's factual allegations, but not bare legal conclusions, as true. *Ashcroft v. Iqbal*, 56 U.S. 662, 680 (2009). A complaint must include enough facts to state a plausible claim for relief. *Id.* at 678. The complaint must be viewed as a whole to examine its plausibility, rather than determining whether any individual allegation, standing alone, meets that standard. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Plausibility requires more than a slight possibility of success on the merits, but it is not a probability standard. *Id.* (citing *Bell Atl. Corp. v. Twombly*, 440 U.S. 544, 556 (2007)). A plaintiff does not need to plead specific facts showing exactly how the defendant's behavior was illegal. *Id.* (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). Instead, the facts must "allow the court to draw the reasonable inference that the plaintiff is entitled to relief." *Id.* (quoting *Iqbal*, 556 U.S. at 678) (internal quotations omitted).

As Essentia notes, "[i]f the plaintiff lacks statutory standing, the complaint essentially fails to state a claim upon which relief can be granted." (*Id.*; *Leyse v. Bank of Am. Nat'l Ass'n*,

⁴ For clarity, Plaintiff notes that she expects discovery to demonstrate the basis of her belief that the exclusion was still in place as of the date she filed her Complaint, January 15, 2016. However, the analysis below demonstrates that Plaintiff's claims are not in any way reliant on the Plan being in place after January 1, 2016. Plaintiff's Complaint raises merits and damages issues against both Essentia and HealthPartners even assuming that Essentia's assertion is correct, and the discriminatory exclusion was removed as of January 1, 2016. At issue are Defendants' actions prior to January 2016.

804 F.3d 316, 320 (3d Cir. 2015).) The statute at issue must “accord[] this injured plaintiff the right to sue the defendant to redress [her] injury.” (*Id.*; *Miller v. Redwood Toxicology Laboratory, Inc.*, 688 F.3d 928, 934 (8th Cir. 2012).)

II. PLAINTIFF HAS STATUTORY STANDING TO BRING THIS CLAIM.

Essentia does not address Tovar’s Article III standing in its brief. To the extent Essentia might assume an absence of Article III standing, Tovar, in the interests of efficiency, directs the Court to Section B.1 of its Memorandum in Opposition to HealthPartners’ Motion to Dismiss. There, Tovar addresses in full the Article III requirements, specifically that she has “suffered or [is] imminently threatened with a concrete and particularized ‘injury in fact’ that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386, 188 L. Ed. 2d 392, 402 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

“Constitutional standing must be distinguished from statutory standing. . . . The latter concerns whether the person whose standing is challenged is a proper plaintiff under the terms of the statute in question.” *Buetow v. A.L.S. Enters., Inc.*, 564 F. Supp. 2d 1038, 1044, 2008 U.S. Dist. LEXIS 36518, *16 (D. Minn. 2008). With regard to statutory standing, Essentia argues that Tovar lacks “statutory standing” under either Title VII or the MHRA because she is not transgender and her son is not an employee of Essentia. Essentia argues that this scheme guarantees that Tovar’s claim must be barred by Fed. R. Civ. P. 12(b)(6) as it “essentially fails to state a claim against Essentia upon which relief can be granted.” (Essentia’s Memorandum in Support of its Motion to Dismiss (“Essentia Memo”) at 4.)

Essentia's argument is flawed and directly contrary to both Congress's purpose in enacting Title VII and Minnesota's in passing the MHRA.

A. Plaintiff Has Suffered A Separate And Direct Injury And Is An "Aggrieved Party."

The Supreme Court has perhaps most clearly laid out the concept of statutory standing in terms of "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.*, 134 S. Ct. 1377, 1386, 188 L. Ed. 2d 392, 403; quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (internal quotations omitted).

1. Plaintiff Suffered A Separate And Direct Injury.

Essentia claims that Tovar alleged no injury and was not injured "because the denial of coverage was solely to her child and not herself." (Essentia Memo at 7.) In making this assertion, Essentia ignores, however, both the financial and emotional harms stated in Tovar's complaint.

Plaintiff has a "separate and direct injury" because the discriminatory plan at issue resulted in her son not obtaining necessary medical care. Any parent would agree: it is hard to imagine a more personal injury. As noted in the Complaint, this violation of the ACA caused her a number of personal harms, both financial (paying for, or attempting to pay for, her son's care out-of-pocket) and psychological (feeling worry, anger, disappointment, and sleeplessness).

The injury suffered by Tovar in the present case is not “‘abstract’ or ‘conjectural’ or ‘hypothetical,’” *Allen v. Wright*, 468 U.S. 737, 751 (1984), citing *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974). Being so personally harmed, she can be counted on to, “as best [she] can, frame the relevant questions with specificity, contest the issues with the necessary adverseness, and pursue the litigation vigorously.”

In her Complaint, Tovar alleges that she experienced economic damages and emotional distress. (Compl. at ¶64.) She was unable to focus on her work and her migraines increased. (*Id.* at ¶41.) She cried in between providing care to her patients. (*Id.*) She was unable to work as many hours as she had previously because of her distress. (*Id.*)

2. *Plaintiff Is An “Aggrieved Party” Because She Falls Within The Zone of Interests.*

Essentia correctly notes that “a party is ‘aggrieved’ if she falls within the zones of interests protected by Title VII, which ‘is to protect employees from their employer’s unlawful actions’ against them.” (Essentia Memo at 5, citing *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011). Essentia also cites *Krueger v. Zeman Const. Co.*, 781 N.W.2d 858, 862 (Minn. 2010), to define an “aggrieved” party as one who “‘has suffered the denial or infringement of a legal right.’” (*Id.*)

The MHRA states that “[a]ny person aggrieved by a violation of this chapter may bring a civil action as provided in section 363A.33, subdivision 1” Minn. Stat. § 363A.28, Subd. 1. Section 363A.08 of the MHRA makes clear that it is unlawful for “an employer, because of . . . sex [or] sexual orientation . . . , discriminate[s] against a person with respect to . . . privileges of employment.” Minn. Stat. § 363A.08, subd. 2(3).

Tovar is and has at all relevant times been an employee of Essentia. The health care plan provided by Essentia contains a categorical exclusion of “service[s] and surgery for purposes of gender reassignment.” This exclusion discriminates against transgender individuals as the MHRA defines “sexual orientation.” This unlawful practice absolutely was used against Tovar, triggering the protections of both the MHRA and Title VII.

In *Thompson*, an employee sued his employer, claiming unlawful reprisal under Title VII when he was terminated after his fiancée, also an employee, filed a sex discrimination charge. The Sixth Circuit, *en banc*, affirmed the district court’s grant of summary judgment to the employer on the ground that Title VII “does not permit third party retaliation claims.” *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804 (6th Cir. 2009). However, the Supreme Court reversed the Sixth Circuit on appeal, finding that the plaintiff was “a person aggrieved” because he fell within the “zone of interests” meriting Title VII protection. *Thompson*, 562 U.S. at 178.

The Court noted that Title VII “unquestionably” allows that “a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved” 42 U.S.C. § 2000e-5(f)(1); *Thompson*, 562 U.S. at 175. Tovar agrees with the Court that it would be unreasonable for such language to encompass literally every person “claiming to be aggrieved,” as such an interpretation could include those in no way associated with a particular respondent. However, she also agrees with the Court in *Thompson* that the statutory language cannot be narrowed so as to refer “only to the employee who engaged in the protected activity.” 562 U.S. at 177. Indeed, the Court noted that it knew of “no other context in which the words carry this artificially narrow meaning, and if that is

what Congress intended it would more naturally have said ‘person claiming to have been discriminated against’ rather than ‘person claiming to be aggrieved.’” *Id.*

The *Thompson* Court helpfully explained that the Administrative Procedure Act’s language authorizing challenges to federal agencies by those “adversely affected or aggrieved”, 5 U.S.C. § 702, has been used by the Court to “establish[] a regime under which a plaintiff may not sue unless he falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” *Id.* at 177 (internal quotations omitted), quoting *Lujan v. Nat’l Wildlife Federation*, 497 U.S. 871, 833 (1990). Such individuals include “any plaintiff with an interest ‘arguably [sought] to be protected by the statute.’” *Id.* at 178, quoting *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 495 (1998). The “zone of interests” only excludes those “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” *Id.*, quoting *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399-400 (1987). The interests on which Tovar acts in the present case clear the Court’s bar.

B. Title VII Cases Support Finding That Essentia’s Discrimination Against Tovar And Her Son Satisfies The Requirements To Establish Standing.

Essentia argues that the court must dismiss Tovar’s claim because she herself is not transgender. It argues that this prevents her from bringing either a Title VII or an MHRA claim in this case, but the argument ultimately depends solely on the text of Title VII and does not therefore apply to the MHRA. Even under Title VII, this argument depends on a strained reading of Title VII that would permit an employer to discriminate as long as the

employees who are harmed because of the discriminatory conduct do not themselves share the protected status at issue. The Court should reject this strained reading.

Under Title VII, it is an unlawful employment practice for an employer to “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) (emphasis added). Essentia’s argument is that the words “such individual” only permit an employee to bring a claim when her employer injures her because of *her* sex.

Essentia points to *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). In *Newport News*, the Supreme Court struck down a benefit plan that covered female employees’ pregnancies, but failed to provide equivalent coverage for the pregnancies of female spouses of male employees. *Id.* at 672-73. Among the Court’s arguments, it pointed out that the discrimination at issue could be characterized as discrimination against male employees because of their sex, as they were the employees receiving less valuable benefits.⁵ *Id.* at 675-76.

In *Thompson*, the Court declined to expand Title VII standing to the “outer boundaries of Article III[.]” reasoning that it would be “absurd” to allow a shareholder to sue a company because his stock value dropped as a consequence of a race-based termination of a company employee. 562 U.S. at 177. Tovar’s circumstances require no such

⁵ The Supreme Court assumed in *Newport News* that the only employees with female spouses would be male. At the time (1983), this was of course a valid assumption. It is no longer so today. Essentia’s interpretation of *Newport News* would mean that the benefits plan at issue in that case would be legal today under Title VII as both male and female employees could have female spouses that lacked coverage for pregnancy.

expansion. There are far more harmful “absurdities” than noted above that would be enabled by an exceedingly restrictive interpretation of statutory standing in the present case.

In this case, Tovar’s rights as an employee were infringed upon directly, and even if she were not an aggrieved person herself or had not suffered a separate and direct injury, courts have in the past recognized standing in cases where the dependent was the actual target of the discriminatory conduct. For example, the Sixth Circuit held in 1999 that a white employee discharged because his child was biracial had stated a claim of race discrimination upon which relief could be granted under Title VII, “even though the root animus for the discrimination was prejudice against the biracial child.” *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994, (6th Cir. 1999). Quoting the Eleventh Circuit, the *Tetro* court pointed out,

Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in battle with semantics.

Id. (internal quotations omitted); quoting *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (quoting, in turn, *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970)).

Essentia’s argument that because Tovar herself is not the target of the exclusion and her son is not an employee of Essentia, she should be denied standing to pursue redress for the harms done her and her family by this discriminatory health care plan should be rejected by this Court as contrary to public policy and congressional intent under Title VII. Tovar is an employee of Essentia, and she is entitled to the full enjoyment of the privileges of her

employment, including access to and use of her health care benefits equal to that of other employees. To dismiss Tovar's claim here would be similar to allowing discrimination against an African-American child with Caucasian parents even though a racially discriminatory health care plan would be clearly unlawful.

Essentia makes the same argument for MHRA, but fails to cite case law in support of its argument. This argument is not available for the MHRA because of the text of the statute. The MHRA makes it an unlawful employment practice "for an employer, because of . . . sex . . . [to] discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. §363A.08, subd. 2. This statutory language notably fails to suggest a required connection between the discrimination and the employee's own protected status. It is a straightforward application of the statutory language here to argue that it is unlawful for an employer to provide a health care plan that discriminates because of sex or gender identity⁶ to its employee as a term, condition, or privilege of employment.

⁶ The MHRA defines sexual orientation, which is a protected status under the statute, to include gender identity. Minn. Stat. §363A.03, subd. 44.

CONCLUSION

For all of the reasons stated above, this Court should deny Essentia's motion to dismiss this lawsuit.

Dated: March 24, 2016

Respectfully submitted,

GENDER JUSTICE

By: /s/Jill Gaulding

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**LR 7.1(F) CERTIFICATE OF
COMPLIANCE REGARDING
MEMORANDUM
IN OPPOSITION TO DEFENDANT
ESSENTIA'S
MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

Defendants.

I, Jill R. Gaulding, certify that Plaintiff's Memorandum in Opposition to Defendant Essentia's Motion to Dismiss Plaintiff's Complaint complies with Local Rule 7.1(f).

I further certify that, in preparation of this memorandum, I used Microsoft Word, Version 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I further certify that the above-referenced memorandum contains 4,091 words, in compliance with Local Rule 7.1(f)(1)(C).

I further certify that this memorandum complies with the type size requirements of Local Rule 7.1(h), because it is (a) typewritten in size 13 font, (b) double spaced (except for headings, footnotes, and quotations that exceed two lines), and (c) submitted on 8½" by 11" paper with at least 1" margins on all four sides.

Dated: March 24, 2016

Respectfully submitted,

GENDER JUSTICE

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