UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar, Plaintiff, vs. Essentia Health, Innovis Health, LLC dba Essentia Health West, and HealthPartners, Inc., Defendants.	Case No.: 0:16-cv-00100 (RHK/LIB) **REPLY IN SUPPORT OF DEFENDANTS ESSENTIA HEALTH AND INNOVIS HEALTH, LLC DBA ESSENTIA HEALTH WEST'S MOTION TO DISMISS**

INTRODUCTION

To have standing to bring a claim under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Minnesota Human Rights Act ("MHRA"), a plaintiff employee must be "aggrieved" under the statutes. Plaintiff, Brittany R. Tovar, brings this lawsuit against her employer claiming she was discriminated against on the basis of sex under the employment provisions of Title VII and the MHRA, which are aimed at protecting employees from discrimination on the basis of certain, enumerated protected classes. Defendants Essentia Health and Innovis Health, LLC dba Essentia Health West (collectively, "Essentia") have moved this Court to dismiss Plaintiff Brittany R. Tovar's complaint asserting violation of both of these statutes on the grounds that she has not been aggrieved and, therefore, lacks statutory standing under the statutes. In response, Tovar makes cursory allegations that her claims survive dismissal simply because she is an employee of Essentia and the availability of healthcare coverage benefits at issue is related to sex – albeit not her own sex. Tovar's argument is insufficient because her claims do not relate to the availability of benefits based

on her sex or her gender identity. Rather, the entirety of Tovar's allegations relate to availability of benefits not to her, but rather to her minor child based on his transgender status under a since-removed exclusion in Essentia's medical plan for gender reassignment services or surgery. Under these circumstances, Tovar is not an aggrieved employee whose interests were intended to be protected by Title VII or the MHRA. Consequently, this Court should grant Essentia's motion to dismiss Tovar's complaint for failure to state a claim upon which relief can be granted.

LAW AND ARGUMENT

Essentia's motion to dismiss focuses on the lack of Tovar's statutory standing under statutory provisions serving to protect employees from discrimination in an employment context. Although Tovar contends in her opposition to Essentia's motion that she has Article III, or constitutional, standing to assert her claims, the issue as to whether Tovar has statutory standing is narrower, focusing on whether this particular plaintiff is able to seek redress under these particular statutes. See Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 177 (2011) (stating whether a party is "aggrieved must be construed more narrowly than the outer boundaries of Article III"). Neither the allegations in the complaint nor Tovar's opposition to Essentia's motion set forth this requisite standing for her case to proceed in light of the lack of any discriminatory actions by Essentia based on Tovar's own sex or gender identity.

I. Tovar's allegations are insufficient to establish that she is an "aggrieved" party under either Title VII or the MHRA in order to have standing to assert her claims against Essentia.

The parties agree that in order for Tovar to assert a Title VII or MHRA claim against her employer, Essentia, she must be an "aggrieved" party, as defined by those statutes. (Compare Essentia Memo. at 5, with Tovar Memo. at 9.) Thus, under Title VII, Tovar must

have an interest "arguably sought to be protected" by the statutory purpose of "protect[ing] employees from their employers' unlawful actions." Thompson, 562 U.S. at 178. Similarly, Tovar must also "suffer[] the denial or infringement of a legal right" established by the employment provisions of the MHRA, which are also intended to protect employees from discrimination by their employer. Krueger v. Zeman Const. Co., 781 N.W.2d 858, 862 (Minn. 2010); see, e.g., Rutschke v. Nw. Airlines, Inc., 2005 WL 2100985, at *11 (D. Minn. Aug. 30, 2005) (noting an "aggrieved employee" may bring an MHRA claim if he belongs to a protected class and suffers an adverse employment action because he belongs to the class). Though it is true that Tovar is an employee of Essentia, this fact alone does not entitle her to bring a Title VII and MHRA against her employer. Instead, Tovar herself must have suffered some unlawful discriminatory action based on her protected status as an employee of Essentia in order to bring these claims. See Thompson, 562 U.S. at 178.

Tovar has suffered no such action from Essentia. The crux of Tovar's discrimination claim is that Essentia discriminated based on sex and gender identity by including an exclusion in its employer-sponsored employee medical plan for services related to gender reassignment or surgery. Tovar herself, however, is admittedly not a transgender individual and concedes that she was never denied services based on her sex or gender identity. Despite the fact that the exclusion was never applied to Tovar, she vaguely alleges in her opposition to Essentia's motion that this exclusion was "used against [her]," when, in fact, the exclusion only applied to benefits for Tovar's minor child. Although Tovar's minor child is transgender, he is neither an employee of Essentia nor a party to this action. (Compl. at ¶ 31.) Thus, there has been no discrimination against Tovar on the basis of her sex or gender identity for her to invoke standing as an aggrieved person under either Title VII or the

MHRA. See, e.g., Patee v. Pacific Nw. Bell Telephone Co., 803 F.2d 476, 479 (9th Cir. 1986) (holding male employees were not aggrieved persons to assert a Title VII claim against their employer because they did not belong to the class allegedly discriminated against).

Thompson v. North American Stainless, LP, 562 U.S. 170 (2011), involves a matter in the context of retaliation and requires a wholly different analysis based on the scope of activity intended to be protected under the statute. Thompson pertained to a Title VII retaliation claim, not an employment discrimination claim, such as in the present action. 562 U.S. at 172. In Thompson, the Court held that a male employee had standing to sue under Title VII for retaliation based on the filing of a gender discrimination claim by his fiancée, who was employed by the same employer. In Thompson, the Court held the male employee fell within the zone of interests of Title VII because he himself was terminated, and thus a direct victim contemplated by the statute. Thus, although Thompson himself was aggrieved, the employer's action was also intended to retaliate against his fiancée – also an employee – based on her employment discrimination complaint. Id. at 178 (noting that "injuring [the plaintiff] was the employer's intended means of harming [his fiancée]"). This is directly the type of activity intended to be protected by the statute. Id. Consequently, Tovar's citing of Thompson, in which the victim was only selected for termination based on the protected activity of his fiancée, simply does not support Tovar's claim.

Unlike Thompson, there is no evidence that the denial of benefits to Tovar's son was in any way related to any protected category or activity of Tovar; moreover, Tovar's son is not a party to this action. Tovar has not suffered any discriminatory action by Essentia based on sex or gender identity sufficient to be an aggrieved person contemplated in the context of

her Title VII employment discrimination claim. Notwithstanding any financial or emotional harm Tovar claims to have suffered, the complaint solely alleges discrimination in the availability of health coverage benefits based on a former exclusion in Essentia's plan as applied to Tovar's minor child, not Tovar. Id. (excluding "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII"). Tovar simply was not subjected to any discriminatory action in employment by Essentia based on her sex, gender identity, or any protected category. Accordingly, she is not aggrieved and lacks the statutory standing to bring a claim under Title VII. See Jackson v. Deen, 959 F. Supp. 2d 1346, 1355 (S.D. Ga. 2013) (relying on Thompson for the conclusion that a white, female employee did not fall within the zone of interests sought to be protected by Title VII to assert a racial discrimination claim on behalf of African-American staff).

The result is the same under the construction and requirements of the MHRA. Perhaps even more limited than Title VII's requirement that a plaintiff fall within the zone of interests protected by Title VII, a plaintiff must actually suffer the denial of a right conferred by the MHRA to be aggrieved in order to bring a claim under the statute. Krueger, 781 N.W.2d at 862. For employees, the rights conferred by the MHRA include the right to be free from discrimination by their employers for belonging to a protected class. See, e.g., LaMont v. Indep. Sch. Dist. No. 728, 814 N.W.2d 14, 20 (Minn. 2012) (noting "one of the purposes of the MHRA is to rid the workplace of disparate treatment of female employees merely because they are female").

Tovar's complaint is void of any allegations that *she* has suffered the denial of any benefit or right conferred by the MHRA. The allegations in her complaint solely relate to the

availability of health coverage benefits to her minor child based on his sex or gender identity. (Compl. at ¶ 31.) Tovar contends that the lack of availability of benefits to her minor child alone is discriminatory, but there is no allegation of discrimination based on *her* sex or gender. This link is essential in order for Tovar to be an aggrieved party under the MHRA. Krueger, 781 N.W.2d at 862 (stating "a person is 'aggrieved' in the legal sense when she has suffered the denial or infringement of a legal right, and the MHRA allows an aggrieved person to seek 'redress for an unfair discriminatory practice'"). In its absence, she lacks any statutory standing under the MHRA, and her complaint should be accordingly dismissed.

II. Tovar has presented no caselaw in support of her position that she has statutory standing under either Title VII or the MHRA.

Tovar requests this Court extend the boundaries of employment statutes to cover an employer's alleged denial of healthcare coverage benefits to an employee's minor child based on the child's sex or gender identity. Tovar, however, has pointed to no decision from any jurisdiction ruling that either statute extends to these circumstances. No court decision appears to exist, given current interpretations of Title VII and the MHRA limiting employees' ability to bring employment discrimination cases only when the discrimination relates to their own protected class.

Tovar seemingly agrees with this interpretation by citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). In Newport News, the United States Supreme Court struck down a benefit plan providing lesser hospitalization benefits related to pregnancy for spouses of male employees than it provided to female employees. 462 U.S. at 672. However, as Tovar recognizes, the Court held the plan was discriminatory because it provided a less inclusive benefit package for the male *employees* because of *their* sex. Id.

(emphasis added). Newport News does not provide a statutory basis of standing for Tovar under Title VII or the MHRA. Unlike Newport News, Tovar suffered no denial in this instance that related to her own sex or gender identity or status as an employee. In fact, the alleged denial of benefits as applied to Tovar's child based on the previous exclusion in Essentia's plan would have applied to the dependent of any employee, *regardless of* the employee's sex, gender identity, or any other protected class.

Tovar provides a footnote, implying that Newport News is dated because same-sex marriage is legal and a female or male employee may have a female spouse. However, the premise of Newport News is that the male employees suffered discrimination in benefits based on their own sex not because of the sex of their pregnant spouses. Thus, the issue is whether the discrimination occurred in employment and not whether theoretical discrimination exists apart from the employment relationship. These circumstances are not present in this case, and the lack of any action by Essentia based on Tovar's own sex or gender identity establishes she does not have statutory standing under either the Title VII or the MHRA.

Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc., 173 F.3d 988 (6th Cir. 1999), as cited by Tovar, further highlights that an employee is able to assert a Title VII claim only so long as there is alleged discrimination against the employee based on the employee's protected category. In Tetro, a white employee brought a Title VII claim against his employer, alleging he was terminated for his employer's racial animus towards himself for having a biracial daughter. 173 F.3d at 991. In holding the employer stated a claim upon which relief can be granted, the Sixth Circuit Court of Appeals specifically noted "[a] white employee who is discharged because his child is biracial is discriminated against

on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child." Id. at 994 (emphasis added).

Tetro provides no support for Tovar's argument that she has statutory standing in this particular case. Unlike the plaintiff in Tetro, there have been no allegations of discrimination against Tovar based on *her* sex or gender identity. Although Tovar's minor child is transgender and the previous exclusion in Essentia's plan barred coverage for gender reassignment services or surgery, this exclusion did not relate to Tovar's sex or gender identity.

To accept Tovar's interpretation that Title VII or the MHRA extends to the circumstances of this case would not be a simple expansion of the statutes, as suggested by Tovar. Rather, Tovar's interpretation that an employee may bring an employment discrimination claim based solely on the status of a third party who is neither an employee nor party to the action goes far beyond the scope of Thompson or Newport News by shifting the requisite showing from the employee as an aggrieved party to the status of persons outside the employment relationship. Tovar has cited no case for this proposition, and in fact, courts have expressly rejected this contention, stating "Title VII does not contemplate third-party standing." Niemeier v. Tri-State Fire Protection Dist., 2000 WL 1222207, at *4 (N.D. Ill. Aug. 24, 2000).

Tovar concedes, on brief, that the zone of interests protected by Title VII is "to protect employees from their employer's unlawful actions against *them*." (Tovar Memo. at 9, citing Thompson v. North Am. Stainless, LP, 562 U.S. 170, 178 (2011) (emphasis added)). She similarly concedes that the MHRA protects against discrimination "against a person with respect to . . . privileges of employment." (Id., citing Minn. Stat. § 363A.08, subd. 2(3)).

Tovar's complaint fails on its face to state any discrimination or discriminatory act against *her* in her employment based on proscribed conduct under either Title VII or the MHRA. Consequently, this Court should reject Tovar's interpretation as contrary to the purpose of Title VII and the MHRA.

CONCLUSION

For the foregoing reasons and the reasons set forth in their moving brief, Defendants Essentia Health and Innovis Health, LLC dba Essentia Health West respectfully request this Court grant their motion to dismiss Plaintiff Brittany R. Tovar's complaint for failure to state a claim upon which relief can be granted.

Dated this 31st day of March, 2016.

VOGEL LAW FIRM

/s/ Lisa Edison-Smith

BY: Lisa Edison-Smith(#266127)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983

Email: ledison-smith@vogellaw.com

ATTORNEYS FOR DEFENDANTS ESSENTIA HEALTH AND INNOVIS HEALTH, LLC DBA ESSENTIA HEALTH WEST

2509432.7

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar,

Plaintiff(s)

v.

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

Defendant(s)

LR 7.1(f) & LR 72.2(d)
CERTIFICATE OF COMPLIANCE

Case Number: 0:16-cv-00100-RHK/LIB

I, Lisa Edison-Smith, certify that the

■ Memorandum titled: **Reply in Support of Defendants Essentia Health and Innovis Health, LLC dba Essentia Health West's Motion to Dismiss** complies with Local Rule 7.1(f).

or

□ Objection or Response to the Magistrate Judge's Ruling complies with Local Rule 72.2(d).

I further certify that, in preparation of the above document, I:

■ Used the following word processing program and version: **Microsoft Office Word 2007** and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

or

□ Counted the words in the document.

I further certify that the above document contains the following number of words: 2,595

Date: March 31, 2016

s/ *Lisa Edison-Smith*

Lisa Edison-Smith
VOGEL LAW FIRM
218 NP Avenue, P. O. Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983
Email: ledison-smith@vogellaw.com
Bar ID: 266127