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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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|-----------------------------|---|--------------------|
| Brittany R. Tovar, |) | |
| |) | File No. 16-CV-100 |
| Plaintiff, |) | (RHK/LIB) |
| |) | |
| vs. |) | Duluth, Minnesota |
| |) | April 14, 2016 |
| Essentia Health, |) | 8:30 a.m. |
| HealthPartners, Inc., and |) | |
| Innovis Health, LLC, doing |) | |
| business as Essentia Health |) | |
| West, |) | |
| |) | |
| Defendants. |) | |

BEFORE THE HONORABLE RICHARD H. KYLE
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING)

APPEARANCES

| | |
|----------------------------------|--|
| For the Plaintiff: | GENDER JUSTICE JILL R. GAULDING, ESQ. CHRISTY L. HALL, ESQ. Minnesota Women's Building 550 Rice Street, Suite 105 Saint Paul, Minnesota 55103 |
| For Defendant HealthPartners: | LARSON KING, LLP DAVID M. WILK, ESQ. 30 East Seventh Street Suite 2800 St. Paul, Minnesota 55101-4922 |
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Court Reporter: CARLA R. BEBAULT, RMR, CRR, FCRR
316 North Robert Street
Suite 146 U.S. Courthouse
Saint Paul, Minnesota 55101

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 how do we want to approach these arguments? We've got
2 briefs and several briefs. I've got one hour set aside for
3 this and no more than an hour, so I don't know whether you
4 have given any kind of -- any thought to how you want to do
5 this before I tell you how we're going to do it.

6 MS. GAULDING: Your Honor, that's the way we'd
7 like to do it.

8 THE COURT: Well, here is a suggestion. That
9 would be we'll start with Essentia for 15 minutes,
10 HealthPartners for 15 minutes, and then Brittany Tovar for
11 20 minutes; and then Essentia and Health have five-minute
12 replies. That totals one hour. If anybody thinks that's --
13 not if anybody thinks it should be more than an hour but in
14 a different order, I would be happy to listen to it. No
15 response.

16 MS. EDISON-SMITH: Mr. Wilk and I had discussed
17 having HealthPartners go first.

18 THE COURT: I don't care who goes first.

19 MS. EDISON-SMITH: We don't have any strong
20 preference.

21 THE COURT: If you've got that set to go first,
22 why don't we.

23 MR. WILK: Judge, I'm happy to start. Happy to
24 start.

25 THE COURT: Okay.

1 MR. WILK: So I'll do that, for 15 minutes.

2 THE COURT: 15 minutes, correct.

3 MR. WILK: Excellent.

4 THE COURT: And when 15 minutes is up, I'll tell
5 you and you will -- we'll cut you off in mid-sentence.

6 MR. WILK: I'm sure you won't be shy about it if I
7 go over. I'll take off my watch here and keep a close eye
8 on it as best I can.

9 THE COURT: Okay.

10 MR. WILK: May it please the Court, counsel. Your
11 Honor, David Wilk for HealthPartners again.

12 HealthPartners shares the Plaintiff's desire to
13 expand health coverage for transgender persons and for all
14 persons, but your Honor has been asked to address a much
15 different question today. Questions having to do with the
16 legal viability of the lawsuit. Not as a matter of public
17 policy but as a matter of law. The standing cases that
18 we've cited for your Honor and the plausibility cases and
19 the reach and the application of Section 1557. And that's
20 what this motion is directed at, your Honor.

21 There's no question that the Plaintiff was not
22 denied. The Plaintiff herself was not denied anything; was
23 not discriminated against herself. What she's challenging
24 is the plan and her view that the plan is discriminatory.
25 She hasn't sued the plan. She has sued HealthPartners which

1 is just the TPA under the plan which provides administrative
2 services under the plan, which isn't a plan sponsor, isn't a
3 plan administrator, and has fiduciary duties under ERISA to
4 follow the plan.

5 And so right away, your Honor, we see issues about
6 standing. And the first issue then, of course, that I want
7 to raise, your Honor, has to do with Article III standing.
8 The Court has extraordinary power and that power is limited.
9 Is limited under the Constitution to deciding cases and
10 controversies. And there's a whole body of law around how
11 the Court, this Court, the Eighth Circuit, the Supreme
12 Court, assures itself that it is presiding over an active,
13 live case or controversy, and one of those requirements is
14 standing.

15 And we cited for your Honor the *McClain* case out
16 of the Eighth Circuit, the case that Judge Magnuson I
17 believe had and went to the Eighth Circuit. And it has this
18 three-part test which is following, of course, the Supreme
19 Court's three-part test. The Plaintiff herself needs to be
20 injured. The Plaintiff's injury needs to be traceable to
21 the Defendant, in this case HealthPartners. And the injury
22 needs to be redressable by HealthPartners.

23 And I just want to look at two of those because I
24 know your Honor has looked at this and I know your Honor has
25 wrestled with standing before, not least in the *Reid* case in

1 2013. And in that case you had before you HealthPartners
2 but HealthPartners was an insurer there, your Honor. That's
3 a key distinction. HealthPartners is not an insurer.
4 Everybody agrees in this case HealthPartners is serving as a
5 third-party administrator and that Essentia is self-insured.
6 And we know that in our bones from Exhibit A, page 23, the
7 Summary Plan Description. It says, and no one disputes,
8 that Essentia is self-insured for this exercise today, for
9 this coverage today.

10 So in *Reid* your Honor looked at standing. We need
11 to look at traceability of injury. What is the Plaintiff
12 claiming harmed her? The Plaintiff is claiming, and she
13 says it at page 26 of her brief, the benefits she received
14 through her son were lacking because of the discrimination.
15 That's page 26. Exactly what we're trying to get at there,
16 but what it seems to me that she's claiming that her injury
17 is injury she experienced through another to benefits that
18 were lacking. Benefits from where? From the plan that is
19 not a party here today. The plan that's not a party. The
20 plan that HealthPartners is obligated to simply apply.

21 So the injury, your Honor, is not traceable to
22 HealthPartners. It's traceable to the plan. The plan that
23 they haven't sued for whatever reason. So we seem to have a
24 Plaintiff who doesn't herself have an injury under the law
25 suing the parties that didn't cause whatever injuries she

1 believes her son has.

2 No injury, not traceable, not redressable by
3 HealthPartners, your Honor. We know there's no existing
4 denial of coverage going on. Everybody agrees -- in
5 addition to agreeing that the plan is a problem, according
6 to the Plaintiff, in addition to agreeing that
7 HealthPartners never pays anything, everybody also agrees
8 that under the current plan that the Plaintiff receives
9 through Essentia there is no exclusion. So there's nothing
10 to be redressed today under the current plan. And if she
11 believes she was denied benefits in the past that either
12 were or should have been provided under the plan, her remedy
13 lies against the plan.

14 Your Honor, this is not a case where the plan
15 clearly provides coverage and for some reason HealthPartners
16 said no and said no for discriminatory reasons. Quite the
17 opposite, your Honor. Everyone agrees that the plan doesn't
18 provide or that the plan contained the exclusion and because
19 she's challenging the exclusion, she shouldn't be suing
20 HealthPartners. So that's the standing issue, your Honor.

21 So then we switch over and once we address
22 standing, we need to look at plausibility under 1557. What
23 is the claim under 1557, assuming we have a Plaintiff who
24 has standing, assuming we have an active case for
25 controversy.

1 Well, 1557 is part of the Affordable Care Act and
2 what it says is that there's not going to be certain kinds
3 of discrimination under certain kinds of health programs or
4 activities. And we believe what the Court needs to look at
5 then is what is the health plan or health program or
6 activity that the Plaintiff is challenging. And what is the
7 health program or activity that HealthPartners was
8 providing, even assuming that 1557 applies at all to
9 HealthPartners. What are those two different health
10 programs or activities.

11 Because the program or activity that the Plaintiff
12 is challenging is the exclusion contained in the plan. The
13 health program or activity that HealthPartners provided is
14 simply the handling of claims under that plan.

15 And the way this shakes out, I think, your Honor,
16 under the *Rumble* case that Judge Nelson decided, under other
17 cases, is that what the Court looks to is where did the
18 discrimination occur allegedly? And if the discrimination
19 occurred allegedly in the plan, then the remedy lies against
20 the plan. If the plan covered something and HealthPartners
21 said no, and said no wrongly under the plan, and said no for
22 reasons that are discriminatory, there may be a claim
23 against HealthPartners in that instance.

24 But here HealthPartners accurately conveyed the
25 existence of the exclusion. It couldn't do anything else

1 under ERISA other than provide accurate information about
2 the existence of the exclusion. Imagine what would have
3 happened if HealthPartners would have said something that
4 contradicts the summary plan description.

5 This is really no different from if Ms. Tovar went
6 the next step and went down to a pharmacy and tried to get a
7 prescription for Lupron filled, and the pharmacy would have
8 said exactly what HealthPartners said: Hey, this isn't
9 covered under your plan. What arrangements would you like
10 to make? That's not a claim against the pharmacy for
11 accurately conveying that information.

12 And that's totally different from the CVS case
13 where CVS was accused of its own discrimination. If the
14 plan covered something and the TPA gave that a green light
15 and the pharmacy said no anyway, and did so for
16 discriminatory reasons, that may be a claim under 1557.
17 That's nothing like what we have here, your Honor.

18 And then the final point. If we get through a
19 plausible claim under 1557, we need to look procedurally
20 whether it's been preserved properly. And that's the whole
21 line of cases that we've cited including the *Grandson* case
22 from the University of Minnesota up here in Duluth, the
23 athletics department. There's a whole body of law about how
24 this all works under Title IX. And Title IX is imported by
25 reference in 1557, and 1557 says the enforcement mechanisms

1 shall apply.

2 Well, what are those enforcement mechanisms?
3 Enforcement mechanisms are notice of the alleged
4 discrimination and an opportunity to rectify alleged
5 discrimination. What notice is provided here? The
6 allegation is Lupron was prescribed and denied consistent
7 with the plan. Never -- there's no allegation that was ever
8 appealed, brought to anybody's attention at HealthPartners
9 or anyplace else. Same thing with Androderm. Same thing
10 with the surgery. It was never appealed.

11 The closest thing we have is paragraph 32. In
12 March of 2015 there's a generalized allegation -- and I want
13 to be sure I've got it accurate here, your Honor -- that
14 Ms. Tovar wrote a letter requesting clarification. She
15 requested clarification regarding the exclusion and she
16 received that clarification. The exclusion is in the
17 policy. She received that in April. There's never any
18 other allegation that she came and appealed anything,
19 brought anything specific to anybody's attention.

20 But even if she did, the issue then becomes what
21 about the opportunity to rectify? Because now we're in
22 March and April of 2015, according to paragraphs 32 and 33.
23 What's the opportunity to rectify, at least as it relates to
24 HealthPartners? HealthPartners can't do anything right now.
25 It has signed on to administer -- to play its role in this

1 policy to comply with the policy under ERISA. But the very
2 next time Essentia offers a plan to Ms. Tovar, it doesn't
3 contain an exclusion. So the very next time anybody could
4 rectify this it was rectified. Ms. Tovar's current coverage
5 through Essentia, another self-insured plan, doesn't contain
6 the exclusion.

7 So it's standing, your Honor; and it's 1557
8 plausibility, plus the procedural elements that go with all
9 Title IX cases.

10 Your Honor, I appreciate your attention. I don't
11 have anything else unless the Court has something?

12 THE COURT: No. Fine.

13 MR. WILK: Thank you, Judge. Thank you.

14 MS. EDISON-SMITH: Your Honor, Lisa Edison-Smith
15 for the employer in this case, Essentia Health. I'll just
16 use that abbreviation for all the parties named.

17 Ms. Tovar, as Mr. Wilk noted, was an employee of
18 Essentia Health and brings this claim for an exclusion of
19 benefits available to her son based on the group health
20 policy provided by Essentia to all of its employees.

21 Ms. Tovar, as Mr. Wilk noted, does not claim that
22 she sought or was denied health benefits of any kind under
23 the plan. In fact, Ms. Tovar makes no allegations that she
24 was denied benefits or provided lesser benefits of any kind.
25 And the claims in this matter that relate to my clients are

1 the claims under Title VII of the Civil Rights Act and the
2 employment provisions of the Minnesota Human Rights Act.

3 Ms. Tovar's son is not a party to this case. He
4 is not an employee of Essentia Health and thus, what we have
5 is the anomaly of we have an employment law case in which
6 the employee does not claim that she was denied a benefit;
7 and the party -- or the individual, excuse me, that claims
8 the denial of a benefit is neither an employee of Essentia
9 Health nor a party to this case. For these reasons, our
10 brief focuses on the issue of statutory standing under both
11 Title VII and under the Minnesota Human Rights Act.

12 We do note and concur with the briefing of our
13 codefendant HealthPartners on the issue largely of Article
14 III standing on the issue of injury; and also Mr. Wilk has
15 ably briefed the issues of mootness and the issues of
16 ripeness and the issues of failure to exhaust administrative
17 remedy, so I'm not going to address those in my argument.

18 But as I've noted, this is an employment law case
19 and that's what really is the issue before the Court. Was
20 Ms. Tovar, as an employee of Essentia Health, discriminated
21 in her employment based on the exclusion that related
22 strictly to a dependent under Essentia's plan, and
23 sufficiently to be considered an aggrieved person for
24 purposes of standing under either Title VII or the Minnesota
25 Human Rights Act? And we believe that the case law

1 resoundingly answers that question no.

2 Essentia Health is very sensitive to the issues of
3 the LGBT community and, as Mr. Wilk indicated, at the first
4 opportunity after this issue was raised with the January
5 1st, 2016 plan, the exclusion in question has been removed
6 and so those benefits -- there is no longer any exclusion
7 that would prohibit the coverage of benefits to Ms. Tovar's
8 son and similarly-situated persons.

9 And the -- in this case an aggrieved party under
10 Title VII for purposes of statutory standing is a person who
11 falls within the zone of interest intended to be protected
12 by Title VII. And the Courts have noted that the purpose of
13 Title VII is to protect employees from discrimination in
14 their employment. Both my client and the Plaintiffs cite
15 the *Thompson versus North American Stainless* case in support
16 of their positions. *Thompson*, however, was careful to note
17 that, again, the extent of statutory standing under Title
18 VII is not coterminous or it doesn't reach the outer
19 boundaries of Article III standing. It's lesser than that.
20 In fact, the Court noted that for -- if statutory standing
21 under Title VII reached the outer boundaries of Article III,
22 it could result in absurd results such as a shareholder
23 being able to sue a corporation based on the termination of
24 an employee based on race because his stock price went down.
25 That's an absurd result.

1 And so the *Thompson* court necessarily noted that
2 that's not the measure of statutory standing. And the
3 statutory standing under Title VII is specifically limited
4 to the zone of interest that Congress intended to protect,
5 which is to protect employees in their employment.

6 *Thompson*, I expect the Plaintiffs, and Plaintiffs
7 have argued supports their position, to the extent that it
8 was brought by an employee who -- of North American Steel
9 who he did not himself engage in the protected activity.
10 The allegations in *Thompson* are fairly simple. *Thompson's*
11 fiancee was also employed by North American Steel. She
12 filed a claim of discrimination. *Thompson* alleged that he
13 was terminated as a result of his fiancee's protected
14 activity in filing a claim of discrimination. And on its
15 face that could potentially make an argument for third-party
16 standing because *Thompson* himself did not engage in the
17 protected activity.

18 However, the *Thompson* case is readily
19 distinguishable from the case at bar because it's a
20 retaliation case. The Court was very -- expressly made the
21 distinction that this is a retaliation case. Other
22 distinctions with regard to *Thompson* are that *Thompson* was
23 an employee. He did suffer an adverse action in employment
24 in that he lost his job. And the protected activity that
25 was at bar was a discrimination claim against the employer.

1 And that was precisely the type of activity that's within
2 the zone of interest that's intended to be protected by
3 Title VII.

4 In this case we simply don't have that. We have a
5 situation where Ms. Tovar claims in her complaint that
6 she -- that there was a denial of benefits not to her but to
7 her son. And the complaint itself outlines the emotional
8 damage to her son; and it also claims that Ms. Tovar herself
9 suffered a financial loss because she was required to pay
10 out-of-pocket amounts; and also claims that she suffered
11 emotional distress, I believe an increase in migraine
12 headaches and similar symptomatic issues related to her
13 being distraught over the relationship with her son.

14 However, none of those -- none of the cases cited
15 by Plaintiff relates to a situation in which the employee,
16 him or herself, did not suffer a -- some sort of separate
17 and distinct injury related to his or her employment. In
18 the *Thompson* case the employee was terminated.

19 A case that I believe is -- that we've cited on
20 brief that is on point in this is the *Niemeier versus*
21 *Tri-State Fire Protection* case heard by the Northern
22 District of Illinois. In that case Mr. Niemeier's wife was
23 denied infertility treatments under his employer's group
24 health plan. He sued under Title VII and the Pregnancy
25 Discrimination Act seeking a remedy himself as an injured

1 party, and the Court concluded that he lacked standing to do
2 that. Even though Mr. Niemeier had asserted that he had
3 suffered injury individually in that he had been forced, as
4 Ms. Tovar claims, to pay additional out-of-pocket costs and
5 that he had been denied the right to procreate, the Court
6 rejected that and said that Mr. Niemeier had failed to show
7 a separate and distinct injury and that the expense and
8 damage that he claimed was intertwined with his wife's claim
9 and it was not unique to himself.

10 And in this case we believe that's also the case.
11 The -- that the -- the damage claimed by Ms. Tovar and the
12 injury that she claims is really no different -- it's not
13 related specifically to her employment. It's no different
14 than any parent would experience under any policy of
15 insurance if there were a denial of benefit to a dependent
16 as in this case.

17 The Minnesota Human Rights Act is also cited.
18 It's Count 2, I believe, of Plaintiff's complaint. And
19 standing under the Minnesota Human Rights Act has been
20 construed by the Minnesota Supreme Court we believe even
21 more narrowly than standing under Title VII, statutory
22 standing under Title VII. Under the *Krueger versus Zeman*
23 *Construction Company* case, Ms. Krueger was -- owned and
24 operated a company called Diamond Dust Contracting and she
25 sued for unlawful business discrimination based on sex

1 against the Defendant Zeman Construction Company because she
2 alleged that she herself was subjected to sexual harassment
3 and demeaning conduct and all sorts of prohibited conduct
4 based on sex under the Minnesota Human Rights Act.

5 Now, she sued in an individual capacity and she
6 also sued on the basis of the company standing. And the
7 court ruled that she did not have standing and was not an
8 aggrieved party under the Minnesota Human Rights Act because
9 although she had been subjected to this conduct, she was not
10 a party to the contract and she was, therefore, not
11 aggrieved in the legal sense and under the Minnesota Human
12 Rights Act.

13 And the courts particularly noted that although
14 the Minnesota Human Rights Act prohibits sex discrimination,
15 it prohibits it in particular context. It noted that
16 there's a separate provision in the employment context, in
17 the real property context, in the public accommodation
18 context, in the public services context, and for business
19 discrimination. And the standing has to be interpreted with
20 regard to that context. We believe the same thing applies
21 in this case with regard to Ms. Tovar's claim.

22 Your Honor, simply put, none of the cases cited
23 stands for the proposition of derivative standing as in this
24 case, or third-party standing, and the cases expressly state
25 that Title VII simply does not provide derivative standing.

1 It does not provide third-party standing. Plaintiff cites
2 *Tetro versus Elliott Popham Pontiac* for the concept that
3 there's affiliational or derivative standing. In that case
4 the Plaintiff was terminated so he actually suffered an
5 injury and he argued that it was based on animus towards his
6 biracial child. The Court specifically ruled that that did
7 state a claim under Title VII and provide standing, but it
8 based its claim not on the race of the biracial child but on
9 the race of the employee. And the employee clearly suffered
10 an injury in employment. He was terminated and he suffered
11 an injury based on his sex.

12 In this case, injury and employment simply doesn't
13 exist and there is nothing to suggest that Ms. Tovar was
14 discriminated based on her sex, her sexual orientation, or
15 gender identity in this case.

16 If you don't have any questions, your Honor.
17 Thank you, sir.

18 THE COURT: Thank you.

19 MS. GAULDING: Good morning, your Honor. I'm Jill
20 Gaulding here with Brittany Tovar.

21 THE COURT: Good morning.

22 MS. GAULDING: May it please the Court:

23 One thing I want to note to begin with is there's
24 nothing about the arguments being brought by either
25 Defendant today that goes directly to the question of

1 whether the policy that's at issue here, this policy that
2 excludes coverage for gender confirmation surgery, is legal
3 or not illegal. In fact, the comments made by both counsel
4 for Essentia and counsel for HealthPartners are essentially
5 acknowledging that there is a problem with that policy.
6 They emphasize that they have fixed the problem. They have
7 changed it in the 2016 plan going forward.

8 So that's not what we're addressing today. We're
9 addressing the question of whether it was acceptable for the
10 employer to have an illegal policy during the time period
11 that they had it prior to 2016, and whether it was
12 acceptable for HealthPartners as the TPA to assist Essentia
13 in enforcing that policy.

14 So it's really raising two questions here
15 overarchingly. One is, is there a Title VII issue here that
16 needs to be addressed and is there a 1557 issue here to be
17 addressed. And those questions come out in technical terms
18 as questions about Article III standing and statutory
19 standing, but they boil down to that basic question.

20 And if we consider an equally illegal policy, it
21 might simplify matters because we don't have to talk about
22 the complexities of what it means to be transgender and why
23 that policy would be illegal. We can consider a policy that
24 an employer would have that would say, for example, we don't
25 provide medical coverage for Mormons. You can come up with

1 something that that's blatantly discriminatory.

2 And what Essentia is arguing is that the only
3 person who could challenge a policy like that would be an
4 employee who was themselves a Mormon. They wouldn't be able
5 to challenge it if they couldn't work for that employer
6 because their child happened to be Mormon or their child, if
7 we changed to a racial category, if their child was black.
8 And HealthPartners is saying it would be perfectly
9 acceptable for them to have the policy in front of them
10 written down on paper saying this employer does not provide
11 coverage for someone who is Mormon, or someone who is black,
12 or someone who is intersex, or someone who is transgender.
13 We can carry out that policy. And that's not the way Title
14 VII operates.

15 The way Title VII operates, it's designed to
16 assure that the workplace is free of discrimination. And
17 what the policy at issue here would do is it would prevent
18 people like Ms. Tovar from working for certain employers.
19 That was the issue that was just brought up in the *Tetro*
20 case where the person already worked there and was fired.

21 But if you have blatantly discriminatory policies
22 like these, you're not able to freely choose your
23 employment. And that's the underlying policy of Title VII.
24 And we see that, therefore, in the associational
25 discrimination cases. You don't have to necessarily have

1 the characteristic yourself. And that's what the *Thompson*
2 case is pointing to. You look at the underlying policy of
3 Title VII to say that when you're -- let me step away from
4 that for a minute. I apologize, your Honor.

5 What *Thompson* is saying, look to the purpose of
6 the law. Don't look to the specific statutory language that
7 might imply that the statute is narrower. So narrow that
8 you couldn't hold an employer liable for firing an employee
9 because of his wife's challenge to a discriminatory policy.

10 I apologize, your Honor. My -- it's been a long
11 week and my brain is a little bit jumbled.

12 I think the most helpful way to explain why
13 Brittany Tovar has challenged both of these Defendants is to
14 look at that staffing agency analysis, and we have that
15 reference throughout our briefs. This is a situation in
16 which we have an employer who has what is going to be shown
17 to be a blatantly discriminatory and illegal policy, and we
18 have HealthPartners as a TPA acting in the role of a
19 staffing agency.

20 And I want to point out to the Court that the
21 reference that counsel for HealthPartners has made to the
22 *Williams* case is actually a misreading or an overly brief
23 reference to what the *Williams* court was actually saying.
24 There are three different ways that a staffing agency can be
25 liable under Title VII. Two of them involve this question

1 of control that they are talking about.

2 But the first one, being liable simply as an
3 employment agency itself, is not a question of control.
4 It's the rule that says we can't have an employer that says,
5 for example, Don't hire any African Americans. And then a
6 staffing agency that goes out and says, Okay, we won't hire
7 any African Americans. That staffing agency cannot control
8 what the employer has chosen to do. The only thing that
9 they can control is to say we will or we won't help you
10 carry that out.

11 That's the policy under Title VII that says we
12 will hold staffing agencies liable if there's a blatantly
13 discriminatory policy like don't hire any African Americans
14 and they carry it out. There doesn't need to be an
15 allegation that the staffing agency could have controlled
16 the employer's choice to have that policy. And if we
17 translate that into the content of a blatantly illegal
18 benefits policy, that's exactly what HealthPartners is doing
19 up here.

20 So the analogy carries over both for Essentia as
21 an employer and for HealthPartners as the TPA. It's a Title
22 VII issue for HealthPartners because the policy itself hurts
23 employees. It hurts the ability of people to freely choose
24 their employment based on whether the employer has a
25 discriminatory policy. And in the 1557 context, the TPA is

1 acting exactly like a staffing agency that's helping the
2 employer choose to hire only African Americans or choose to
3 hire only men or choose to hire only women.

4 There's no relevance to the ERISA argument that
5 HealthPartners is making because ERISA is about the benefits
6 that are already being offered. When ERISA is compared to
7 another federal statute like Title VII, and Title VII is
8 operational, Title VII bars sex discrimination, say, the
9 ERISA issue just falls away. There's never any conflict
10 between ERISA and a federal statute. And that's what the
11 *Shaw* case says.

12 So all of the references that counsel for
13 HealthPartners has made to the difference between a self-
14 funded plan and a fully-funded plan, those are all ERISA
15 concepts that simply don't apply here. The question is does
16 1557 bar this behavior and the answer to that question is
17 yes. TPAs are being held liable under this statute and they
18 can be held liable exactly in the same way that a staffing
19 agency would be held liable under Title VII for carrying out
20 a discriminatory policy.

21 And the ultimate goal, of course, is the same as
22 with that Title VII policy which is to say on a systemic
23 level if you tell staffing agencies that they can carry out
24 discriminatory plans, ultimately you do a better job
25 insuring that the marketplace isn't suffering from that sort

1 of discrimination.

2 It's also equivalent in that sense to a customer
3 prefers rule. I mean, it used to be argued actually that a
4 business could say it's not our own discriminatory bias
5 that's causing us, for example, not to hire black workers.
6 It's the fact that our customer doesn't want to work with
7 black workers. So what can we do about that?

8 And the answer to that question under Title VII
9 policy is one by one by one, each employer is going to be
10 told you can't carry out that customer preference because
11 systemically then nobody will be carrying out that
12 preference and will get to the correct outcome from a Title
13 VII policy perspective. And that's the same rule here.
14 It's true that only HealthPartners is being challenged for
15 its behavior in supporting Essentia's illegal plan here.
16 But if we hold all TPAs responsible for not carrying out
17 illegal plans, then those employers will not be in a
18 position to themselves have that illegal policy.

19 If we go back, your Honor, to the specifics of the
20 HealthPartners' argument, under Article III standing they've
21 said that we don't here meet any of the three requirements.
22 There's no personal injury. There's no harm that's
23 traceable to HealthPartners and there's no ability to
24 redress the issue. The personal injury question under
25 Article III is clearly met here. She suffered emotional

1 distress. She suffered an injury to her pocketbook. That
2 argument really goes back to the more specific arguments
3 that exist under the statutory standing argument that
4 Essentia is making. Article III standing, this is not a
5 third-party injury. She was clearly directly personally
6 injured, as we argue in our brief.

7 The latter two factors, I would point out, if
8 HealthPartners was correct in saying there's no Article III
9 standing here, then, just as we have been arguing with
10 respect to the staffing agency, there would be no Article
11 III standing to challenge a staffing agency that was saying
12 we won't hire any women or we won't hire any blacks or we
13 won't hire any Mormons. By their argument, that would also
14 mean that you couldn't sue a staffing agency for carrying
15 out those policies because they would say, Well, it's not
16 traceable to us and it's not redressable by us. And clearly
17 that's not the rule so it wouldn't be the rule here as well.

18 In terms of their 12(b)(6) or 1557 arguments,
19 again, the argument that HealthPartners is making about
20 ERISA exhaustion is simply not relevant. This is a direct
21 challenge to their behavior in carrying out HealthPartners'
22 illegal policy.

23 With regard to the 1557 claim being plausible,
24 they have alleged that they haven't had notification. But
25 this is their plan. And, your Honor, at the 12(b)(6) stage

1 we're not in a position to argue that with as much detail as
2 we ultimately would like to be able to do, but the
3 Plaintiff's complaint does allege that they designed this
4 plan and then offered it and that's why the plan has that
5 very complicated name. Essentia didn't come to them and say
6 let's call this plan "complicated plan name". It's
7 HealthPartners that has a collection of plans that they are
8 offering.

9 So the notification argument is itself really
10 implausible. They didn't need to be notified of the terms
11 of the plan that they themselves had designed and they
12 themselves were carrying out.

13 Again, under the 1557 argument, an ERISA claim,
14 they suggest that Plaintiff's claim can't possibly be able
15 to go forward because it would put TPAs in an impossible
16 situation. They wouldn't be able to both comply with ERISA
17 and be able to comply with 1557. But there's a very easy
18 answer to that question, your Honor, which is what is found
19 under the *Shaw* case which says ERISA is simply not an issue
20 if there's another federal statute that applies and bars
21 some form of discrimination.

22 So to be more concrete, a TPA like HealthPartners
23 doesn't have to worry about not carrying out the terms of a
24 discriminatory plan. What the *Shaw* case says is their
25 option is either to help HealthPartners -- or rather help

1 Essentia have a discriminatory plan and carry out its terms,
2 in which case they are going to be held liable just like a
3 staffing agency not hiring blacks, or they can choose not to
4 have that contractual relationship. And that's what the
5 statute is essentially asking them to do.

6 In terms of whether Plaintiff has damages under
7 1557, again, she has a right to injunctive relief. That
8 alone gives her a right to move forward here. It's true
9 that HealthPartners is no longer carrying out an illegal
10 plan because Essentia has decided not to have an illegal
11 plan anymore going forward. But that doesn't mean that
12 Ms. Tovar doesn't have the right to have it clearly stated
13 on the record going forward that they are not allowed to
14 reinstate that plan. They could change their mind for the
15 year 2017. They could change their mind halfway through
16 2016 and reinstate that policy; and, according to them, she
17 would then have no recourse. That's the reason why that
18 Plaintiffs in discrimination cases are allowed to seek
19 injunctive and declaratory relief to say that was illegal.
20 You're not allowed to do that again.

21 And, of course, that has a benefit systemically
22 because other employers then also know. But it has a
23 specific benefit to Ms. Tovar in working for Essentia that
24 she would know that Essentia would not be able to put that
25 policy into place, and under 1557 HealthPartners would not

1 be able to carry it out.

2 I'm pausing, your Honor, to see whether I've gone
3 over all the arguments here, see if there are any that we
4 haven't touched upon yet. I believe that touches upon all
5 the arguments that counsel has made. If I could reserve
6 time to assert any additional points after counsel has
7 responded.

8 THE COURT: You may be able to respond to what
9 they say now, but not to go back to where you are.

10 MS. GAULDING: Right. If there are new arguments
11 made. Thank you, your Honor.

12 THE COURT: Counsel.

13 MR. WILK: Your Honor, David Wilk again for
14 HealthPartners.

15 THE COURT: Counsel.

16 MR. WILK: The suggestion that this policy
17 prohibits care to transgender people, of course it does. It
18 was an exclusion for a particular kind of care. That
19 exclusion is no longer present. The exclusion never applied
20 to Plaintiff ever. And to suggest that the standing
21 argument that HealthPartners is advancing somehow would
22 preclude people from pursuing a staffing agency that
23 wouldn't hire African Americans is simply wrong.

24 What it may say is that the unsatisfied
25 applicant's mother who has emotional distress because their

1 child didn't get hired, and who put the child up and paid
2 some expenses for the child in the meantime, can't sue the
3 agency. That mother certainly would not have standing to
4 sue a staffing agency, just like Ms. Tovar doesn't have
5 standing to sue HealthPartners here.

6 But the staffing agency cases involve two
7 decisions. A decision by the ultimate employer and a
8 decision by the staffing agency. And here what
9 HealthPartners is doing is saying to Ms. Tovar this is how
10 your plan works. We don't have a choice but to tell you
11 this now in 2015. Now that you've asked us for what you
12 call clarification on the exclusion, we're telling you there
13 is an exclusion and Essentia hasn't removed it.

14 And the very next time -- this is the Title IX
15 cases, your Honor -- the very next time, because we have to
16 have an opportunity to rectify the situation, the very next
17 time this plan is issued, there is no exclusion. That's the
18 1557 issue that the Plaintiff hasn't addressed. That's the
19 Title IX issue that's embedded within 1557.

20 And then the argument, Well, I could get
21 injunctive relief as to other plaintiffs. You have a
22 Plaintiff who doesn't have standing for the current case,
23 much like standing about a future case or a hypothetical
24 case, your Honor. And I think this can boil down to just
25 looking at the wherefore clause in this complaint. The

1 argument is I'm out of pocket because Lupron was not
2 provided under the plan. That would never have been paid
3 for by HealthPartners under that plan ever. And I've
4 emotional distress because Lupron wasn't paid for. That's
5 not flowing from anything HealthPartners did. That's
6 flowing from her view that she should have had Lupron. And
7 then she says injunctive relief. We all agree that the
8 child is getting the care today without exclusion.

9 Your Honor, unless the Court has some specific --

10 THE COURT: No.

11 MR. WILK: Thank you.

12 THE COURT: Counsel.

13 MS. EDISON-SMITH: Your Honor, Lisa Edison-Smith
14 again for Essentia Health. And I just want to respond
15 briefly to a couple of points brought up by Ms. Gaulding.

16 Ms. Gaulding seemed to suggest in her argument
17 that -- that Defendant Essentia is suggesting that it would
18 be okay for them not to hire or to allow an individual to
19 work for Essentia because the individual has a child who is
20 Mormon or a child who is black. That's a completely
21 different situation. There is no allegation that Ms. Tovar
22 has had any adverse action in her own employment because of
23 the gender identity or sexual orientation of her son. In
24 fact, that's exactly the *Tetro* case. The *Tetro* case says
25 the employee had a biracial child and the employee suffered

1 termination based on his own race because it was different
2 from that of his child.

3 So in that case there was undisputedly an adverse
4 action against the employee in his employment that's
5 redressable under Title VII because of his race. That
6 simply does not exist in this case. There's no allegation
7 that that exists.

8 Again, the *Thompson* case, as we previously argued
9 and have argued on brief, specifically ties back to
10 employment and provides that the Plaintiff was an employee
11 of North American Stainless. That the protected activity is
12 within the zone of interest because it involved a claim of
13 employment discrimination in the employment relationship.
14 Those facts just don't exist here either.

15 Every case that we've cited that ties the injury
16 back to the employment relationship and when the injury is
17 strictly to a dependent such as in the *Niemeier* case that
18 we've cited or the *Group Health* case that we've cited, when
19 it's strictly to a dependent and there's no separate injury
20 to the employee in the employment relationships, Title VII
21 standing does not exist. And there is no derivative
22 standing. Courts have made that clear.

23 The question is not -- Ms. Gaulding has raised a
24 number of issues, but the question is not whether
25 hypothetically someone could bring a claim based on

1 discrimination. I think, you know, the -- it's a major leap
2 to go from you, Ms. Tovar, were discriminated against in
3 your employment, to what Ms. Gaulding seemed to be
4 suggesting that you -- that a wholly third party who never
5 even applied for or worked for Essentia might have a claim
6 because they might be deterred from working for Essentia
7 because it had an exclusion and it affected a dependent in a
8 group health plan. That's just not the type of injury that
9 is sufficient to establish statutory standing.

10 On those facts, because it's facially deficient,
11 we would ask that the Plaintiff's claim be dismissed, your
12 Honor. Thank you.

13 THE COURT: Thank you, Counsel.

14 I'll give you about one minute.

15 MS. GAULDING: Your Honor, I just want to say that
16 we agree very much actually with the argument just made.
17 This is an employment law issue ultimately because terms,
18 conditions, and privileges of employment are what Title VII
19 addresses. It would go to salary, obviously, but the
20 benefits that you get as part of your compensation are
21 equally addressed by Title VII. And from what counsel for
22 Essentia is saying, they acknowledge that it would be
23 illegal, for example, we're going to pay employees less if
24 they have a child who is black, for example, clearly
25 illegal.

1 And that's exactly what's happening here.
2 Essentia is saying we're going to give you benefits that are
3 not as beneficial; that we're going to give you lesser
4 benefit. It's exactly like having a lesser salary because
5 your child is in a protected class. And that's illegal
6 under Title VII and it's illegal for HealthPartners under
7 1557 to help them carry out that policy.

8 Thank you.

9 THE COURT: Thank you. Interesting case. I'll
10 take the motions under advisement and try to get out an
11 order as soon as I can. I quit early on predicting when I'm
12 going to get them out. It always comes back to haunt me.

13 It would help me in the process to get a
14 transcript of the argument which I have just heard this
15 morning, but to do that I have to have the parties agree to
16 order it. And how long do you estimate, 50 pages? Her
17 rates are very reasonable. You can divide it by three. I
18 make that request. I guess I could order it, but I would
19 rather have you agree to it. You will get a copy of it,
20 too. But it does help me to be able to go back. I make
21 notes but I try to read my notes a week from now and I can't
22 read them very well. So I'll take it under advisement.

23 Is there anything left? Is there some trial date
24 on this case? What's the -- whatever discovery there was,
25 it's all done? No.

1 MR. WILK: Just a 12(b)(6) in response to the
2 complaint, your Honor. So we're at the front end of it.

3 THE COURT: Everything is ahead of us if this
4 motion gets denied?

5 MR. WILK: Yes, sir.

6 THE COURT: Okay. Well, again, thank you for
7 coming in and I will turn my attention to it.

8 For those in the back of the audience, I hope you
9 found it interesting and not too confusing.

10 So we are in recess then on this one.

11 (Court adjourned at 9:21 a.m.)

12 * * *

13

14 I, Carla R. Bebault, certify that the foregoing is
15 a correct transcript from the record of proceedings in the
16 above-entitled matter.

17

18

19 Certified by: s/Carla R. Bebault
20 Carla Bebault, RMR, CRR, FCRR

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