UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar, Plaintiff, v. Essentia Health, Innovis Health, LLC, dba Essentia Health West, HealthPartners, Inc., and HealthPartners Administrators, Inc., Defendants.	Court File No. 0:16-cv-00100-DWF-LIB **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND COMPLAINT**

Plaintiff Brittany R. Tovar ("Tovar") respectfully submits the following Memorandum in support of her motion to amend her complaint. This motion comes at a procedurally early point in the case, before the start of discovery. In this case, Tovar alleges that the Defendants maintained, planned, and administered a health care insurance plan that discriminated against her because it failed to provide medically necessary health care for her transgender son.

The proposed First Amended Complaint adds some additional facts. Some of these facts were discovered based on the file Tovar obtained from the Equal Employment Opportunity Commission. Others clarify Tovar's employment status and monetary damages.

Additionally, Tovar moves this court to add HealthPartners Administrators, Inc. ("HPAI") as a defendant in the caption. HPAI is already a defendant in the case. In previous

proceedings, the honorable Richard H. Kyle ordered HPAI be added to the case. (Order 2, June 23, 2016, ECF No. 32.) Adding HPAI to the caption will reduce confusion and more accurately reflect the current state of the litigation.

The amended complaint also adds Tovar's son, Reid Olson ("Olson"), as a plaintiff in this lawsuit. Adding Olson is consistent with efforts for judicial efficiency and his claims are not barred by *res judicata*.

Prior to filing this motion, Tovar sent copies of the proposed amended complaint to Essentia Health and Innovis Health, LLC (collectively "Essentia") and to HealthPartners, Inc., and HealthPartners Administrators, Inc., (collectively "HealthPartners"). (LR 7.1(a) Meet and Confer Statement.)

In subsequent correspondence, HealthPartners indicated that it did not intend to oppose this motion. Essentia does oppose this motion. (*Id.*) Essentia may clarify in its own filings if there are portions of the complaint that it does not object to amending, but its objections are likely limited to the addition of Olson's claim against Essentia under Section 1557 of the Affordable Care Act. But Olson's claims are brought within the statute of limitations, joining these claims with Tovar's promotes judicial efficiency, and Olson's claims are not barred by *res judicata*. For these reasons, the Court should grant Plaintiff's motion to amend her complaint.

FACTS

A. Factual Allegations

Tovar worked for Essentia from September 24, 2010, until July 29, 2016. (First Am. Compl. and Demand for Jury Trial ("Am. Compl.") ¶ 16.) Tovar's employment benefits

included health insurance through the Essentia Health Employee Medical Plan ("the Plan"). (Compl. ¶ 22.) The Plan covered Tovar and Olson at all relevant times. (Am. Compl. ¶¶ 18, 73.) HealthPartners, Inc. was the third-party administrator for the Plan. (Compl. ¶ 24.) It also designed and marketed the plan to Essentia. (Am. Compl. ¶ 28.) The Plan contained a discriminatory exclusion barring insurance coverage for "[s]ervices and/or surgery for gender reassignment." (Complaint ¶ 25.)

Gender reassignment is a treatment for gender dysphoria. (Compl. ¶¶ 29, 30.) The Diagnostic and Statistical Manual, fifth edition ("DSM-5") recognized Gender Dysphoria as arising when an individual's gender identity differs from the gender assigned at birth. (Compl. ¶ 27.) In current usage, such individuals may be referred to as "transgender," while individuals whose gender identity aligns with the gender they were assigned at birth may be referred to as cisgender. (Compl. ¶ 28.) Gender reassignment services are treatments only prescribed to transgender individuals. (Compl. ¶¶ 27-30.)

Olson was diagnosed with gender dysphoria in November 2014. (Compl. ¶ 27.) His doctor recommended he begin taking Lupron. (Compl. ¶ 35.) Transgender individuals can use Lupron to suspend menstruation. (Compl. ¶ 37.) Cisgender individuals can use Lupron to treat painful menstruation. (Compl. ¶ 36.) The Plan covers Lupron, but not when prescribed to transgender individuals. (Compl. 38–39.) Upon receiving Olson's request for Lupron coverage, HealthPartners, Inc. had multiple interactions with Tovar and doctors concerning the status of the Lupron claim. (Am. Compl. ¶¶ 48–56.) On some occasions, HealthPartners, Inc. indicated it had approved Lupron. (Am. Compl. ¶¶ 51, 54.) On other occasions, HealthPartners, Inc. indicated it had denied Lupron. (Am. Compl. ¶¶ 50, 52, 55.)

Tovar consistently requested written confirmation of the decision. (Am. Compl. ¶¶ 50, 52, 53, 55), which HealthPartners, Inc. did not provide until weeks later. (Am. Compl. ¶ 56.)

HealthPartners, Inc. also denied claims for general treatment of gender dysphoria, testosterone treatment, and gender reassignment surgery. (Compl. ¶¶ 33, 38, 43, 46.) HealthPartners, Inc. denied treatment, despite acknowledging that treatment was medically necessary. (Compl. ¶ 33.) The Plan covered all the denied services for cisgender individuals. (Compl. ¶¶ 39, 43, 47.)

B. Procedural History

On or about May 1, 2015, Tovar filed a charge of sex discrimination against Essentia with the Equal Employment Opportunities Commission ("EEOC") under Title VII. (Compl. ¶ 18.) The EEOC determined that there was probable cause to believe that Essentia discriminated against Tovar based on sex when it denied her son's medical benefits. (Compl. ¶ 19.) The EEOC issued a right to sue, and Tovar filed three claims in this lawsuit. (Compl. ¶¶ 20, 49-64.) Counts I and II alleged that Essentia violated Title VII and the MHRA. Count III alleged that HealthPartners violated Section 1557 of the Affordable Care Act.

Both Defendants filed motions to dismiss in lieu of Answers, and discovery has not begun. (ECF 10, ECF 12.) The District Court dismissed Tovar's claims against Essentia, reasoning that she did not have standing because Essentia's alleged discrimination was against Olson, not her. (Memorandum Opinion and Order, May 11, 2016, ECF 22.) It also dismissed her claim against HealthPartners, Inc. (*Id.*) It reasoned that her injuries were not traceable to HealthPartners. It held that HPAI was the proper defendant for Tovar's claims,

but that even if Tovar had brought a claim against HPAI, she would lack standing for that claim as well. (*Id.* at 6-7.)

The language of the Count III dismissal left some question as to whether this was a final appealable judgment. So, Tovar filed a motion requesting an Amended Order, clarifying Count III and dismissing with Prejudice. (ECF 24.) At the request of both HealthPartners, Inc. and Tovar, who were seeking to promote efficiency, the district court amended its order to add HPAI as a Defendant on Count III. (Order, June 23, 2016, ECF 32.) The district court then dismissed all claims in the amended complaint with prejudice. (*Id.*)

Tovar appealed the ruling, and the Eighth Circuit heard the case. The Eighth Circuit affirmed in part and reversed in part. (Order on Appeal ("Appeal"), May 24, 2017.) It affirmed the dismissal of claims against Essentia, agreeing with the District Court that Tovar did not have standing. (*Id.* at 9.) It reversed the dismissal of Tovar's claim against HealthPartners, Inc., and HPAI. (*Id.*)

Tovar now seeks to amend her complaint to add facts, add HPAI to the caption, and join her son Olson as a plaintiff in the lawsuit.

ARGUMENTS

A. Legal Standard

Plaintiff requests leave to file the proposed First Amended Complaint. Federal Rule of Civil Procedure 15(a) requires the Court to freely grant leave to amend where justice so requires. Fed. R. Civ. P. 15(a)(2). Under the liberal amendment policy of Rule 15(a), denial of leave to amend is appropriate only when there is an undue delay, bad faith on the part of the moving party, the amendment is futile, or unfair prejudice to the nonmoving party. *Roberson*

v. Hayti Police Dept. 241 F.3d 992, 995 (8th Cir. 2001) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). "The burden of proof of prejudice is on the party opposing the amendment." *Sanders v. Clemco Indus.*, 823 F.2d 214, 217 (8th Cir. 1987).

B. Olson's Claims Are Brought Within The Statute Of Limitations

Olson's claims against Essentia and HealthPartners are timely. Since the statute of limitations does not bar the claims, it is unnecessary to analyze whether they relate back to the original claims under Fed. R. Civ. P. 15(c).

Federal law provides a default statute of limitations where not otherwise specified. "[A] civil action arising under an Act of Congress enacted after the date of enactment of this section [on Dec. 1, 1990] may not be commenced later than 4 years after the cause of action accrues. 28 U.S.C. sec. 1658. Section 1557 of the Affordable Care Act does not contain its own statute of limitations. 42 U.S.C. § 18116. Therefore, the statute of limitations for claims brought under Section 1557 of the Affordable Care Act is four years. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 374 (2004).

C. Olson's Claims Meet the Standard for Permissive Joinder of Plaintiffs.

The Federal Rules of Civil Procedure allow additional plaintiffs to join a case when the claims arise from the same "transaction or occurrence." Fed. R. Civ. P. 20(a)(1). While courts should decide these claims on a case-by-case basis, *Kampschroer v. Anoka County*, 57 F.Supp.3d 1124, 1145 (D. Minn 2014), the rule is construed liberally so parties can obtain complete relief from a single proceeding. *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977); *see also Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332–1333 (8th Cir. 1974) (stating the purpose of Rule 20 is to promote trial convenience

since single trials lessen delay and inconvenience). Under the Federal Rules of Civil Procedure, it is appropriate to permit Tovar to join Olson as a plaintiff.

Tovar and Olson both alleged claims stemming from the same transaction and occurrence. In fact, Plaintiffs both allege harm as a result of the exact same actions. The Defendants worked together to deny Olson medically necessary care because he is a transgender individual. (Am. Compl. ¶ 34.) Through this single action, HealthPartners discriminated against Tovar and Olson, (Am. Compl. ¶ 76), and Essentia discriminated against Olson (Am. Compl. ¶ 80.) This single instance of discrimination is the basis for all of the Plaintiffs' claims.

Because the statute of limitations does not bar Olson's claims, it would be possible for him to file a separate lawsuit. This would be inefficient, requiring different judges and juries to evaluate claims that are based on the same conduct. Requiring two separate lawsuits would burden the Court and reduce efficiency. It is in the interest of judicial economy to litigate the claims as a single case. This will reduce the fiscal burden and undue delay for all parties and free up judicial resources.

Joinder is also proper because the additional claims do not unfairly burden the defendants. The test for allowing an amendment is whether defendants are "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely." *In re Vitamins Antitrust Litigation*, 217 F.R.D. 34, 36 (D.D.C. 2003) (internal citations omitted.) Here the defendants have not lost an opportunity to present facts or evidence. It is still early in this case. The parties have not

even started the discovery process yet. Adding a party, at this point, is functionally the same as adding a party shortly after filing a complaint.

Olson's claims may somewhat burden the defendants, but this is true of all claims and complaints. Litigating two separate trials would burden the defendants more than adding Olson's claims. The District Court of the District of Columbia held that "Defendants will not be unfairly disadvantaged by the addition of new plaintiffs, who could file a separate action against Defendants in their own names . . . as Defendants will have ample opportunity to litigate any issues arising from [this] amendment" *Hartford Ins. Co. v. Socialist People's Libyan Arab Jamahirya*, 422 F.Supp.2d 203, 206 (D.D.C. 2006). Here too, HealthPartners and Essentia have not lost any opportunity to litigate Olson's claims. Therefore, there is no unfair prejudice in allowing Tovar to amend her complaint.

D. Olson Is Not Barred By *Res Judicata* From Bringing His Claims

Defendant Essentia may argue that Olson is barred by *res judicata* from bringing his claims against it, but his claims are not precluded. To rely on *res judicata*, a party must show (1) a prior final determination on the merits; (2) similar parties or those in privity with them; **and** (3) a second action based on the same claims as were or could have been raised in the first action. *Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 165 (5th Cir. 2015).

It is accurate that Tovar was bringing claims for the same wrongs that affected Olson. Essentia may claim that Olson is in privity with Tovar because she is his guardian or fiduciary. *See, e.g.*, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 (1974) ("[N]onparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties.").

However, Tovar brought her own claims, not Olson's claims. The Eighth Circuit, in its decision, specifically pointed out that Tovar was not bringing these claims on behalf of her son. (Appeal, 6) ("Tovar's son is not a plaintiff in this lawsuit, nor has she brought a claim on his behalf.") Since Tovar was not bringing a claim on behalf of Olson, she did not represent his interests as a beneficiary. Case law indicates that a parent child relationship is not sufficient to create preclusion. *See Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 863 (5th Cir. 1985) (citing *Moore's Federal Practice*, "[C]lose family relationships are not sufficient by themselves to establish privity with the original suit's party, or to bind a nonparty to that suit by the judgment entered therein."). The fact that Tovar is Olson's mother is not enough to create claim preclusion, and Tovar did not bring a claim on his behalf. Therefore, Olson's claims are not precluded.

CONCLUSION

Olson is a proper plaintiff in this case. He can bring his claims in a separate lawsuit. So, it is in the best interest of all parties, including the Court, to resolve this matter with a single case. Therefore, the Court should add Olson as a party. Additionally, it is proper to add HPAI to the caption of the lawsuit, as it is already a lawfully joined defendant. The Court should grant the Plaintiff's motion to amend the complaint.

Respectfully submitted,

Date: October 5, 2017

GENDER JUSTICE

s/ *Christy L. Hall*

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I, Christy L. Hall, representing Plaintiff Brittany Tovar, hereby certify that Plaintiff's Memorandum in Support of Motion to Amend Complaint complies with Local Rule 7.1(f).

I further certify that, in preparation of this memorandum, I used Microsoft Word Office 365, 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 2433 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.

Date: October 5, 2017

GENDER JUSTICE

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