

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SEAN ALLEN SIMONSON,

Plaintiff,

vs.

OSWEGO COUNTY, A MUNICIPAL
CORPORATION OF THE STATE OF NEW
YORK; and OSWEGO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

**NOTICE OF MOTION TO
DISMISS**

**Civil Case No.: 4:17-cv-1309
(MAD/DEP)**

PLEASE TAKE NOTICE, that upon the Affidavit of Carol Alnutt Supporting Motion to Dismiss dated December 22, 2017; the Affidavit of Charles C. Spagnoli Supporting Motion to Dismiss dated December 22, 2017; and the Defendants' Memorandum of Law in Support of Motion to Dismiss dated December 22, 2017, Defendants Oswego County ("County") and Oswego County Department of Social Services ("Department") will move this Court at the James T. Foley Courthouse, 445 Broadway, Albany, New York on February 6, 2018 at 10:00 a.m., for an Order pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure dismissing Plaintiff's Complaint as moot and presenting no justiciable actual case or controversy such that the Court lacks subject-matter jurisdiction, and in the alternative dismissing (1) Plaintiff's claims under Title VII, the Equal Protection Clause, the New York Human Rights Law, and the New York Civil Rights Law for failure to state a claim upon which relief may be granted; (2) Plaintiff's claims against the Department for failure to state a claim upon which relief may be granted, because the Department does not have legal existence or susceptibility to suit independent of the County; and (3) Plaintiff's claim(s) for punitive damages as contrary to the law and public policy.

PLEASE TAKE FURTHER NOTICE THAT Defendants intend to serve and file reply papers supporting this motion.

Dated: December 22, 2017
East Syracuse, New York

Respectfully submitted,

The Law Firm of Frank W. Miller

s/Charles C. Spagnoli, Esq.

Bar Roll No.: 507694

Attorneys for Defendants

Office and Post Office Address:

6575 Kirkville Road

East Syracuse, New York 13057

Telephone: 315-234-9900

Facsimile: 315-234-9908

cspagnoli@fwmlawfirm.com

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SEAN ALLEN SIMONSON,

Plaintiff,

vs.

OSWEGO COUNTY, A MUNICIPAL
CORPORATION OF THE STATE OF NEW
YORK; and OSWEGO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

**AFFIDAVIT OF CHARLES C.
SPAGNOLI, ESQ.
SUPPORTING MOTION TO
DISMISS**

**Civil Case No.: 4:17-cv-1309
(MAD/DEP)**

STATE OF NEW YORK)
) ss.:
COUNTY OF ONONDAGA)

CHARLES C. SPAGNOLI, being duly sworn, deposes and says:

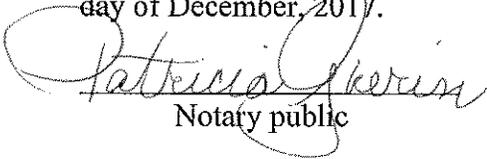
1. I am an attorney duly licensed to practice in the State of New York, and counsel with the Law Firm of Frank W. Miller, attorneys for Defendants Oswego County (“County”) and Oswego County Department of Social Services (“Department”) in the above-captioned matter. I make this affidavit of my own personal knowledge and am fully competent to testify as to all matters herein.

2. Defendants move to dismiss Plaintiff’s Complaint, and each and every claim in the Complaint, because it is moot and presents no justiciable actual case or controversy such that the Court lacks subject-matter jurisdiction, and in the alternative because (1) Plaintiff’s claims under Title VII, the Equal Protection Clause, the New York Human Rights Law, and the New York Civil Rights Law fail to state a claim upon which relief may be granted; (2) Plaintiff’s claims against the Department fail as a matter of law because the Department does not have legal existence or

susceptibility to suit independent of the County; and (3) Plaintiff's claim(s) for punitive damages are contrary to the law and public policy.


CHARLES C. SPAGNOLI

Sworn to before me this 22nd
day of December, 2017.


Notary public

PATRICIA GUERIN
Notary Public, State of New York
Qual. in Onondaga Co. No. 01GJ6065911
Commission Expires October 29, 20 21

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SEAN ALLEN SIMONSON,

Plaintiff,

vs.

OSWEGO COUNTY, A MUNICIPAL
CORPORATION OF THE STATE OF NEW
YORK; and OSWEGO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

**AFFIDAVIT OF CAROL
ALNUTT SUPPORTING
MOTION TO DISMISS**

**Civil Case No.: 4:17-cv-1309
(MAD/DEP)**

STATE OF NEW YORK)
) ss.:
COUNTY OF OSWEGO)

CAROL ALNUTT, being duly sworn, deposes and says:

1. I am the Director of Human Resources for Oswego County and have held that position at all times relevant hereto. I make this affidavit of my own personal knowledge and am fully competent to testify as to all matters herein.

2. The health insurance plan offered to employees of Oswego County and its Department of Social Services (the "Plan") formerly contained an express exclusion of coverage for sex reassignment procedures and medications. The exclusion was part of the Plan at least as early as the most recent restatement of the Plan in 2004. A copy of the relevant portions of the Plan is presented herewith as Motion Exhibit 1.

3. The Plan was amended prior to November 30, 2017 to eliminate the exclusion, and a notice was sent out on November 28, 2017 to each Plan participant, including retirees, enclosing the

amendment documents. Copies of a notice in the form sent to each Plan participant with the accompanying Plan amendments are presented herewith as Motion Exhibit 2.

4. As the Plan amendment documents in Motion Exhibit 2 show, the Plan was expressly amended to eliminate the exclusion for sex reassignment procedures and medications not only prospectively, but also *retroactively* to December 15, 2014.

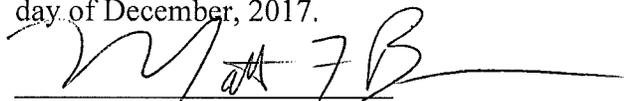
5. A notice was sent to Plaintiff Sean Simonson on December 20, 2017 specifically highlighting the retroactive nature of the elimination of the exclusion and his ability to obtain reimbursement of any out-of-pocket expenses incurred since December 15, 2014 as a result of the exclusion (i.e., any amounts that would have been covered by the Plan, not including copays or deductibles, but for the exclusion). A copy of the December 20, 2017 notice is presented herewith as Motion Exhibit 3.

6. It is the County's understanding and intent that the Plan will reimburse Plaintiff as outlined in paragraph 5, above.



CAROL ALNUTT

Sworn to before me this 22nd
day of December, 2017.



Notary public

MATTHEW F. BACON

Notary Public, State of New York

No. 04BA6169787

Qualified in Oswego County

My Commission Expires June 25, 2019

**Master Plan Document and Summary Plan Description
for**

**COUNTY OF OSWEGO
HEALTH BENEFIT PLAN**

**A Self-Funded Group Health Benefit Plan
For Employees And Their Dependents**

Plan Restatement- September 1,2004

SECTION V - PLAN EXCLUSIONS

All benefit determinations are based on Plan limitations and exclusions in effect at the time expenses are Incurred. All claims are subject to review to decide whether services are covered according to Plan limitations and exclusions. You must comply with requests for additional medical documentation, as deemed necessary by the Claims Administrator, to evaluate a claim for benefits. Failure to submit requested information or to provide a signed authorization for release of required information could result in denial of benefits. The Claims Administrator confidentially maintains all medical documents. Treatment decisions are independent from payment decisions. The patient's Physician is responsible for deciding whether treatment should be given despite whether the charges are totally or partially included in, or excluded from, coverage under the Plan.

In addition to limitations and exclusions shown elsewhere in this SPD, charges for the following expenses will not be paid by the Plan, unless the Plan specifically shows an expense is covered as an exception to the an applicable exclusion. Also, see **Section IX - Definitions**.

1. **Plan Coverage not in Effect.** Services or Supplies Incurred while an individual is not eligible and enrolled in the Plan or Incurred before the Plan became effective or after the Plan is cancelled. Services or Supplies that are not covered according to Plan limitations and exclusions in effect at the time expenses were Incurred.
2. **Unreasonable Charges.** Charges that are more than any fees found to be Usual, Customary, and Reasonable Charges according to Plan provisions. See **Section X - Definitions** under Usual, Customary and Reasonable Charges.
3. **Not Physician Approved/Not under Care of Physician.** Services or Supplies that are not recommended or approved by an Attending Physician operating within the authorization of his/her license to prescribe such Services or Supplies or Services or Supplies that are Incurred while not under the care of the Physician.
4. **Medical Necessity/Unnecessary Care.** Services or Supplies that are not Medically Necessary, not essential or unnecessary, according to Plan provisions, for the treatment of the Illness or Injury including, but not limited to, preventive care or well care such as routine physicals, screening exams, premarital exams, school exams, camp or sport exams, and related services; test unrelated to symptoms or treatment of Illness or Injury; inoculations, immunizations, vaccinations, or other preventive shots; precautionary services, standby services even if ordered by the doctor or due to Hospital regulations. Exception: Preventive mammography, pap tests and PSA tests specifically included in the Plan; Expenses connected with voluntary sterilization specifically included in the Plan (but not the reversal of).
5. **Blood Donations.** Services or Supplies for autologous or direct blood donations and storage when done as precautionary measures in case the need for blood arises. Exception: Autologous or direct donation preceding Surgery that could require blood transfusion as specifically included in the Plan.
6. **Investigational or Experimental /Acupuncture/Alternative Care.** Services or Supplies related to care considered Investigational, according to Plan provisions, at the time expenses are Incurred. See **Section X - Definitions** under *Investigational or Experimental*. Transplants will be considered Investigational, except those that are specifically covered by and meet the coverage criteria of the Federal Health Care Financing Administration in effect at the time expenses are Incurred. This exclusion includes all services related to the Investigational transplants, including chemotherapy or other Services or Supplies that are integral to the transplant care and would not otherwise have been given. Services or Supplies connected with care such as acupuncture, holistic medicine, biofeedback, hypnotherapy, environmental ecology, and other alternate type or Investigational care is not covered. Exception: Coverage for breast reconstruction and symmetry procedures following covered mastectomies as specifically included in the Plan based on Federal law.

24. **Infertility/Reproduction/In-vitro/Artificial Insemination.** Services or Supplies relating to artificial insemination, in vitro fertilization procedures or other artificial conception procedures; treatment of infertility or reproduction unless to treat correctable medical conditions otherwise covered by the Plan (Documented evidence must be presented and the Claims Administrator must approve it for Plan coverage).
25. **Gender Identity Disorders.** Services or Supplies connected to sex change Surgery, transsexualism, gender dysphoria, sexual reassignment or change, or to any treatment of gender identity disorders including medications, implants, hormone therapy, Surgery, medical or psychiatric treatment.
26. **Cosmetic Surgery.** Services or Supplies connected with Cosmetic Procedures. Exception: Plan covers reconstructive Surgery when it is incidental to or following Surgery resulting from trauma, infection, or other diseases of the involved part; or reconstructive Surgery rendered before the Dependent Child's 16th birthday to correct a functional defect that is due to congenital disease or anomaly of the Child.
27. **Transportation/Travel.** Services or Supplies related to transportation or travel by any means other than an ambulance even if ordered, recommended, or prescribed by a Physician. Services or Supplies related to non-Emergency ambulance services. Ambulance transportation when a person could have been safely transported by other means unless ordered by a Physician, a police officer or firefighter. Ambulance transportation that is not to the nearest local Hospital or Inpatient facility that can treat the patient's condition. Ambulance Emergency transportation from a Hospital unless the Covered Person is being transferred between two Inpatient facilities (due to Medical Necessity) and cannot be safely transported by any other means.
28. **Free Care/Obligation to Pay.** Services or Supplies received for which no charges would have been made without coverage under the Plan or for which there is no legal obligation for payment by the Enrollee or Covered Person. Exception: Plan covers to the extent federal and state law requires the Plan to allow benefits that would have been otherwise payable.
29. **Care by Relative/Household Member.** Services provided by Immediate Relatives or Household Members.
30. **Facility Employees.** Separate charges for services by members of the staff employed by a Hospital, Skilled Nursing Facility or by any Inpatient facility where care is received.
31. **Condition Due to Military Service.** Services or Supplies for which benefits are, or can be, provided by any government for any condition arising from the past or present military service in the armed forces of any government or international authority.
32. **Illegal Services/Payments.** Services or Supplies to the extent expense or the payment for such Expenses is illegal according to Federal or state laws.
33. **Work-Related/Occupational Conditions.** Services or Supplies received for a condition that arises out of or in the course of any employment for wages or profit; or that are in connection with any condition that is covered under a worker's compensation, occupational disease law, or similar legislation. Payment will not be made even if you or your Dependent does not claim the entitled benefits.
34. **Government Programs.** Services or Supplies that are provided by or paid by governmental (domestic or foreign) program (other than Medicaid) under which you or your Dependents are or could be covered. Exception: Plan covers to the extent that such programs require the Plan to allow benefits that would have been otherwise payable; Medicare specifically included in **Section VI - Medicare Integration with Plan Benefits.** Note: Plan will estimate the amounts payable by Medicare, if the person eligible for Medicare fails to enroll in Medicare at the time Medicare becomes the primary plan according to Medicare Secondary Payer Rules in effect at the time expenses are incurred. These estimated amounts could reduce available benefits.



OSWEGO COUNTY HUMAN RESOURCES DEPARTMENT

Carol N. Alnutt
Director of Human Resources

COUNTY BUILDING
46 EAST BRIDGE STREET
OSWEGO, NEW YORK 13126
(315) 349-8209 • Fax: (315) 349-8254
www.oswegocounty.com

November 28, 2017

«Name_First» «I». «Name_Last»
«Address_Street_1»
«Address_Street_2»
«Address_City», «Address_State» «Address_Zip_Code»

RE: Health Insurance Plan Amendments
POMCO's Acquisition by UMR, a United Healthcare Company

To All Oswego County Employees and Retirees:

Earlier this year, POMCO announced its acquisition by UMR, a United Healthcare Company. The coverage and claims processing under the County's self-insured group health benefit plan for employees/retirees and eligible dependents will not be affected by this change. You will receive additional information including new member enrollment cards in early 2018. Meanwhile, please feel free to call the Human Resources Department (315-349-8285) or POMCO/UMR (800-501-9536) with any questions or concerns you may have.

Enclosed is a new amendment for your information. This amendment reflects a change made to the health plan in the event you need to access these benefits. The Oswego County Summary Plan Description and amendments can be accessed at any time at **MyPOMCO.com** and by clicking on My Resources Center and Forms and Communications. This website also allows you to view your claims, search for physicians or hospitals, and download a mobile app for MyPOMCO.com. If you have any difficulty accessing the website, please contact the Human Resources Department or POMCO for assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Carol N. Alnutt".

Carol N. Alnutt
Director of Human Resources

Enclosure

AMENDMENT NUMBER 2016-002
COUNTY OF OSWEGO HEALTH BENEFIT PLAN

BY THIS AGREEMENT, the County of Oswego Health Benefit Plan, (herein called the "Plan") is hereby amended effective 12/15/2014.

Nature of Amendment: To amend the Plan to add coverage for transgender treatment.

Provisions Affected:

1. Section MEDICAL SERVICES AND SUPPLIES, add subsection Transgender Treatment to read:

Transgender Healthcare

Transition-related services to treat gender dysphoria or gender identity disorders include:

- *Medically Necessary gender-reassignment and reconstructive services. This includes, but is not limited to chest surgeries (such as mammoplasty, subcutaneous mastectomy, nipple grafts, chest reconstruction); genital surgeries (such as orchiectomy, penectomy, vaginoplasty, scrotoplasty, implantation of erectile and/or testicular prostheses); and other surgeries (such as facial reconstruction surgery, thyroid cartilage reduction, voice surgery).*
- *Mental health care, including all eligible family members, related to all stages of the transition.*
- *Medically Necessary prescription drugs and hormone therapies, including but not limited to puberty suppression; continuous hormone therapy (testosterone, estrogen and androgen suppression); and laboratory testing to monitor the safety of such hormone therapies.*

2. Section PLAN EXCLUSIONS, the following exclusion only is amended to read as follows and exclusion "Sex Changes" is deleted:

- (9) **Counseling/Analysis/Support Groups.** Services or supplies primarily directed at raising the level of consciousness, social enhancement, counseling limited to everyday problems of living such as marriage counseling, family counseling, pastoral counseling; sex therapy or support groups. Exception: Coverage for limited family counseling included in the Substance Abuse Disorder and Mental Disorder treatment, Hospice Care, and diabetic counseling.

* * * *

IN WITNESS WHEREOF this agreement has been executed on behalf of County of Oswego Health Benefit Plan.

 (Signature)

Director of Human Resources (Title)

11-16-17 (Date)

AMENDMENT NUMBER 2016-002
COUNTY OF OSWEGO RETIREES HEALTH BENEFIT PLAN

BY THIS AGREEMENT, the County of Oswego Health Benefit Plan, (herein called the "Plan") is hereby amended effective 12/15/2014.

Nature of Amendment: To amend the Plan to add coverage for transgender treatment.

Provisions Affected:

1. Section MEDICAL SERVICES AND SUPPLIES, add subsection Transgender Treatment to read:

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* * * *

IN WITNESS WHEREOF this agreement has been executed on behalf of County of Oswego Health Benefit Plan.

 (Signature)

Director of Human Resources (Title)

11-16-17 (Date)



**OSWEGO COUNTY
HUMAN RESOURCES DEPARTMENT**

Carol N. Alnutt
Director of Human Resources

COUNTY BUILDING
46 EAST BRIDGE STREET
OSWEGO, NEW YORK 13126
(315) 349-8209 • Fax: (315) 349-8254
www.oswegocounty.com

December 20, 2017

Sean Allen Simonson
19 West Mohawk Street
Oswego, NY 13126

Dear Sean:

This is to advise you that the County of Oswego Health Plan has been amended to include coverage for transgender treatment. Enclosed for your information are Amendments for both the active and retiree health plans regarding affected provisions. These were also sent to you on November 28, 2017. The Oswego County Summary Plan Description and amendments can be accessed at any time at MYPOMCO.com, My Resources Center, and Forms and Communications.

If you have received medical services for care provided for in this amendment and personally paid for that care, please submit all claims for review by POMCO/UMR, the County's third-party administrator for the County's health benefit plan. Please submit your claims, by February 17, 2017, directly to: Daniel Knapp, Account Administrator, POMCO Group/UMR, 2425 James Street, Syracuse, NY 13206. If you have questions regarding your claims, please feel free to contact Dan at 800.934.2459 or 315.432.9171 X4007.

Each claim will be reviewed to determine coverage and any potential reimbursement to you pursuant to the health benefit plan.

If you have any questions, please feel free to contact this office at 315.349.8209.

Sincerely,

A handwritten signature in black ink, appearing to read "Carol N. Alnutt".

Carol N. Alnutt
Director of Human Resources

Enclosures: Amendment Number 2016-002 – County of Oswego Health Benefit Plan
Amendment Number 2016-002 – County of Oswego Retirees Health Benefit Plan

C: Dan Knapp, POMCO Group/UMR

AMENDMENT NUMBER 2016-002
COUNTY OF OSWEGO HEALTH BENEFIT PLAN

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- *Mental health care, including all eligible family members, related to all stages of the transition.*
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- (9) **Counseling/Analysis/Support Groups.** Services or supplies primarily directed at raising the level of consciousness, social enhancement, counseling limited to everyday problems of living such as marriage counseling, family counseling, pastoral counseling; sex therapy or support groups. Exception: Coverage for limited family counseling included in the Substance Abuse Disorder and Mental Disorder treatment, Hospice Care, and diabetic counseling.

* * * *

IN WITNESS WHEREOF this agreement has been executed on behalf of County of Oswego Health Benefit Plan.

 (Signature)

Director of Human Resources (Title)

11-16-17 (Date)

AMENDMENT NUMBER 2016-002
COUNTY OF OSWEGO RETIREES HEALTH BENEFIT PLAN

BY THIS AGREEMENT, the County of Oswego Health Benefit Plan, (herein called the "Plan") is hereby amended effective 12/15/2014.

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* * * *

IN WITNESS WHEREOF this agreement has been executed on behalf of County of Oswego Health Benefit Plan.

 (Signature)
 Director of Human Resources (Title)
 11-16-17 (Date)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SEAN ALLEN SIMONSON,

Plaintiff,

vs.

OSWEGO COUNTY, A MUNICIPAL
CORPORATION OF THE STATE OF NEW
YORK; and OSWEGO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

**DEFENDANTS'
MEMORANDUM OF LAW
SUPPORTING MOTION TO
DISMISS**

**Civil Case No.: 4:17-cv-1309
(MAD/DEP)**

INTRODUCTION

Defendants Oswego County (“County”) and Oswego County Department of Social Services (“Department”) maintained a self-funded health insurance plan for their employees and for retired former employees which excluded coverage for sex reassignment surgeries and medications. Prior to the filing of the instant lawsuit, the County agreed to revise the plan to eliminate the restriction, retroactively such that Plaintiff Sean Simonsons’ losses, if any, would be reimbursed. This litigation is thus moot and subject to dismissal as not involving an actual case or controversy. Several of Plaintiff’s claims also independently fail on the merits and are subject to dismissal.

PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a retired employee of the County who worked within the Department.
(Complaint ¶ 3.) The County and the Department maintained a self-funded health insurance plan

for their employees and retired employees (the “Plan”). (Id. ¶¶ 3, 26, 27) The Plan formerly expressly excluded coverage for sex reassignment surgeries or medications. (Id. ¶ 4.)

Plaintiff claims that in March, 2015, March, 2017, and April, 2017, he was denied coverage for sex reassignment surgeries and medications. (Complaint ¶¶ 43, 52.) On October 30, 2015, he filed a charge of discrimination with the Equal Employment Opportunity Commission (but not the New York State Division of Human Rights). (Id. ¶ 15.) On June 14, 2017, he served a notice of claim on the County. (Id. ¶ 18.) On June 21, 2017, the County served a demand for examination upon Plaintiff pursuant to New York General Municipal Law § 50-h. (CCS Aff. ¶ 3; Motion Exhibits 2, 3.) Plaintiff, however, refused to appear for the examination. (CCS Aff. ¶ 4; Motion Exhibit 4.)

On November 16, 2017, the County entered into an “Assurance of Discontinuance” with the New York State Attorney General agreeing to eliminate the exclusion and provide coverage on the same basis as medically necessary surgeries and medications. (Id. ¶ 32.) The Plan was amended to make the coverage retroactive to December 15, 2014. (Alnutt Aff. ¶ 4.) Notices were sent to all Plan participants on November 28, 2017 advising them of the change in coverage and enclosing copies of the actual Plan amendment documents showing the change was retroactive to December 15, 2014. (Alnutt Aff. ¶ 3 and Motion Exhibit 2.) On November 30, 2017, Plaintiff Sean Simonson nevertheless filed his Complaint.

Under the retroactive provisions of the amended plan, Plaintiff will be reimbursed for any out-of-pocket payments he made that would have been covered by the plan but for the exclusion. (Alnutt Aff. ¶¶ 5-6 and Motion Exhibit 3.) Further, of course, the amendment of the Plan before this litigation commenced renders moot the equitable relief sought. The action as a whole is thus moot and presents no actual case or controversy, such that the Court lacks subject-matter

jurisdiction to entertain it. Plaintiff's individual causes of action are also deficient in that each fails to state a claim as a matter of law. Defendants now move to dismiss the Complaint and each claim of the Complaint.

ARGUMENT

POINT I

THE COURT LACKS SUBJECT-MATTER JURISDICTION BECAUSE THERE IS NO ACTUAL CASE OR CONTROVERSY

Because the Plan was retroactively amended prior to the initiation of this lawsuit, such that Plaintiff is to be reimbursed for his alleged losses and the changes to the Plan language sought by Plaintiff have already been made, his Complaint does not present an actual case or controversy and is without the subject-matter jurisdiction of this Court.

Article III, Section 2 of the Constitution limits the jurisdiction of the federal courts to actual cases and controversies. Thus, "federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402 (1971). Where a litigant has been put in a position, before or even after the commencement of litigation, such that his or her rights are not being infringed and are not reasonably likely to be infringed in the future, there is no case or controversy, and the court is without subject-matter jurisdiction under the Constitution to proceed.

In *De Funis v. Odegaard*, 416 U.S. 312 (1974), a prospective law student denied admission to Washington Law School filed suit claiming race discrimination. The state trial court granted injunctive relief requiring the law school to admit him, and he began attending the law school. By the time the case reached the United States Supreme Court for argument on

appeal, he was in his final quarter at the law school, and the school averred that it had no intention of rescinding his admission. *Id.* at 315-316. This raised the question of mootness.

The Supreme Court noted that the voluntary cessation of illegal practices will not render a case moot unless it can be said with “reasonable assurance” that the wrongdoer will not return to its illegal practices once the case is dismissed. *Id.* at 318 (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894 (1953)). However, in the case before it, the Court observed that the question of mootness was not due to the law school’s abandonment of its discriminatory admissions practices, but because the individual in question was in his final quarter, with the school’s assurance that he would be permitted to finish. *De Funis, supra* at 318. Thus, because the student would “complete his law school studies at the end of the term for which he has now registered regardless of any decision [the Supreme Court] might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.” *Id.* at 319-320.

De Funis provides not one, but two lines of analysis under which this matter is moot such that it does not fall within the Court’s constitutionally-confined jurisdiction. The first is suggested by the similarity of the relevant facts between the two cases. Here, as in *De Funis*, Plaintiff claims there was in place a discriminatory policy which infringed his rights and caused him injuries; here, as in *De Funis*, the reality is that Plaintiff’s alleged losses have been or will be restored, and the discriminatory policy will have no further impact on him (because it has been discontinued, and indeed discontinued retroactively). The greatest disparity between *De Funis* and the present case in terms of the mootness analysis is that in *De Funis* the change in the plaintiff’s fortunes came about only after he commenced litigation, and as a direct result of that

litigation; whereas here, the change eliminating Plaintiff's claimed injuries occurred prior to and independent of his filing of the Complaint. It is respectfully submitted that this distinction makes the present case even more susceptible of being deemed moot than *De Funis* was.

The second approach suggesting that this matter is moot and beyond the Court's jurisdiction derives from *W.T. Grant*, a case discussed in *De Funis*. There it was suggested that the discontinuance of an illegal practice may not render a case moot absent a reasonable assurance that the illegal practice will not be resumed. Here, the discontinuance was brought about as part of an investigation by the New York State Attorney General's Office, and made binding in a negotiated "Assurance of Discontinuance" between the County and the Attorney General's Office. Under the circumstances, there certainly exists "reasonable assurance" that the provision of the Plan excluding coverage of sex reassignment procedures and medications will not be reinstated in the future. As such, the litigation is moot under *W.T. Grant* and its progeny.

This is not a case of a violation that is recurring yet brief in lifetime, such that it can occur but end before appellate review, time and again. The Plan exclusion, once eliminated, could not return to existence unless the County deliberately amended the Plan again, in violation of the Assurance of Discontinuance agreement with the Attorney General's Office. It is not, in short, the sort of thing that may be expected to come up again and again in the normal course of operations. Nor, once such an exclusion was reinstated, would it by its nature exist only for a short time. The complained-of exclusion of coverage is thus not a condition "capable of repetition, yet evading review" allowing departure from strict application of the mootness test. *Cf. Fox v. Board of Trustees of State University of New York*, 764 F.Supp. 747, 752-753 (N.D.N.Y. 1991).

Therefore, it is respectfully submitted that the Court lacks subject-matter jurisdiction over this case, and it should be dismissed.

POINT II

PLAINTIFF'S TITLE VII CLAIM FAILS AS A MATTER OF LAW BECAUSE THE ALLEGED DISCRIMINATION AGAINST TRANSGENDER INDIVIDUALS, AND DENIAL OF COVERAGE IN KEEPING WITH THE PLAN'S TERMS, ARE NOT COGNIZABLE UNDER TITLE VII

Title VII of the Civil Rights Act of 1963 prohibits discrimination on the basis of certain stated protected characteristics, including, as relevant here, “sex.” The prohibition of sex discrimination does not extend to prohibition of discrimination against transgender individuals (at least until Congress legislates to the contrary), and Title VII therefore does not furnish a cause of action for discrimination on the basis of transgender status. *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *see also Mario v. P&C Food Markets*, 313 F.3d 758, 767 (2d Cir. 2002) (“[i]t is not clear that Mario, as a transsexual, is a member of a protected class” for purposes of Title VII claim). As such, Plaintiff’s Title VII claim should be dismissed.

Although Plaintiff alleges he was discriminated against based on failure to conform to gender stereotypes (Complaint ¶ 5), this is a wholly conclusory claim that is not supported by any fact alleged in the Complaint. His claim that discrimination was due to nonconformity with gender stereotypes is expressly and exclusively predicated on the Plan provision excluding coverage for sex reassignment procedures and medications. (See *id.*) The Plan exclusion, however, is entirely neutral in its phrasing, and states only that the procedures and medications are not covered; nothing in its text suggests an intent to discriminate based on gender

nonconformity. (See *id.* ¶ 30.) In other words, Plaintiff has alleged only that he was denied benefits according to the Plan's plain language, without any accompanying facts to support a claim that *he* was being discriminated against because *he* did not behave in conformity with gender stereotypes. Therefore, Plaintiff has not set forth any specific facts supporting his claim of discrimination based on gender nonconformity.

Further, a Title VII employment discrimination claim, to survive, must involve a materially adverse employment action. *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997). A mere denial of benefits does not qualify absent evidence that the employee was entitled to the particular benefit in question as a term of his or her employment. See *Mario*, *supra* at 767 (noting "it is not clear that the denial of benefits, without more, constitutes an adverse employment action"); *Blair v. Long Island Child & Family Development Services*, 2017 U.S. Dist. LEXIS 14177, *31-32 (E.D.N.Y. 2017) (Title VII claim based on denial of benefit failed absent proof that employee was entitled to the benefit in question). Here, Plaintiff's own allegations establish that coverage of sex reassignment procedures and medications was not offered to anyone as a term of employment; it was not part of the Plan. In other words, if the Plan had provided a particular benefit and it was denied individually to Plaintiff because of his sex, a Title VII claim might be available to him; but because the Plan – which was the package of benefits offered to Plaintiff as the health insurance option accompanying his employment (and subsequently as a retiree) – did not include coverage for sex reassignment procedures and medications, the denial of coverage upon request by Plaintiff did not constitute a discriminatory deprivation of a benefit *of his (former) employment*. As such, it was not an adverse employment

action cognizable under Title VII. For this independent reason, it is respectfully submitted that Plaintiff's Title VII claim should be dismissed.¹

POINT III

PLAINTIFF'S SECTION 1983/EQUAL PROTECTION CLAIM FAILS AS A MATTER OF LAW BECAUSE THE EXCLUSION WOULD SURVIVE RATIONAL BASIS REVIEW

Transgender status is not a protected characteristic under federal law, and thus equal protection analysis of claims of disparate treatment based on transgender status are subject to rational basis review. *Lopez v. City of New York*, 2009 U.S. Dist. LEXIS 7645, *39 (S.D.N.Y. 2009). Here, the Plan (before its amendment) excluded coverage not only for sex reassignment surgery, but for procedures deemed to be cosmetic and not medically required. Gender dysphoria has only relatively recently been recognized as a diagnosable mental health condition, and until recently there remained disagreement among medical authorities as to whether sex reassignment procedures and medications are medically necessary. *See Mario, supra* at 765-766 (noting in 2002 that defendant had met its burden of showing that sex reassignment procedures are not uniformly medically necessary). The exclusion of coverage for such procedures and medications was adopted, at the latest, when the Plan was restated in 2004. (Alnut Aff. ¶ 2 and Motion Exhibit 1.) Because the exclusion of coverage of sex reassignment procedures and medications (like the exclusion for cosmetic procedures) was adopted on the basis that they were not medically necessary, rather than out of discrimination against individuals due to their

¹ Plaintiff's New York Human Rights Law claim is determined under the same principles as govern Title VII claims. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1304 n.4 (2d Cir. 1995). Thus, even if transgender discrimination is generally cognizable under the Human Rights Law, the claim under the Human Rights Law would fail for lack of an adverse employment action.

transgender status, there was a “rational basis” for the exclusion, which therefore survives Equal Protection review.

POINT IV

PLAINTIFF’S CIVIL RIGHTS LAW CLAIM FAILS AS A MATTER OF LAW BECAUSE THE CIVIL RIGHTS LAW DOES NOT COVER DISCRIMINATION AGAINST TRANSGENDER INDIVIDUALS

The New York Civil Rights Law prohibits, as relevant here, discrimination on the basis of sex. For the same reasons as apply to Plaintiff’s Title VII claim, Plaintiff’s claims of discrimination based on his transgender status do not constitute claims of discrimination based on sex for purposes of his Civil Rights Law claim. It is respectfully submitted the claim should be dismissed.

Additionally, Plaintiff did not serve a notice of claim as required by County Law § 52 and General Municipal Law § 50-e until June 14, 2017. (Complaint ¶ 18.) General Municipal Law § 50-e(1)(a) requires a notice of claim to be served within ninety days after a cause of action accrues. Although Section 50-e itself only requires notices of claim for tort claims, County Law § 52 requires a notice of claim to be served consistent with the procedural requirements of Section 50-e for any “claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act of the county, its officers, agents, servants, or employees.” The County Law § 52 notice-of-claim requirement applies to claims under the New York Civil Rights Law.

LeBarron v. Warren County Sheriff’s Office, 2015 U.S. Dist. LEXIS 62549, *38-39 (N.D.N.Y.

2015).² The requirement is a condition precedent to suit, and thus a facet of subject-matter jurisdiction. “Federal courts do not have jurisdiction to hear state law claims brought by plaintiffs who have failed to comply with the notice of claim requirement.” *Dingle v. City of New York*, 728 F.Supp.2d 332, 348-349 (S.D.N.Y. 2010).

Thus, Plaintiff is barred from asserting claims under the Civil Rights Law that accrued prior to March 16, 2017, ninety days before June 14, 2017. Specifically to Plaintiff’s allegations, he cannot pursue such claims with respect to the alleged denials of March 15, 2015; June 11, 2015; and June 29, 2015, as described in Complaint ¶¶ 44, 45, and 46.

POINT V

PLAINTIFF’S CLAIMS AGAINST THE DEPARTMENT SHOULD BE DISMISSED BECAUSE THE DEPARTMENT HAS NO SEPARATE EXISTENCE AND IS NOT CAPABLE OF BEING SUED

“Federal courts must look to state law to determine whether a state government entity may be sued. ‘Under New York law, a department of a municipal entity is merely a subdivision of the municipality and has no separate legal existence.’” *Hunt v. Favro*, 2016 U.S. Dist. LEXIS 18476, *8 (N.D.N.Y. 2016) (quoting *Hoisington v. County of Sullivan*, 55 F.Supp.2d 212, 214 (S.D.N.Y. 1999)). As such, claims against such departments must be dismissed. *Id.* Here, the Department is thus only a subdivision of the County, and all claims against the Department should be dismissed.

² It also applies to claims under the New York Human Rights Law. *Woods v. City of Utica*, 902 F.Supp.2d 273, 285 (N.D.N.Y. 2012); *Mills v. County of Monroe*, 89 A.D.2d 776, 776 (4th Dept. 1982), *aff’d*, 59 N.Y.2d 307 (1983). Thus, to the extent the notice of claim was untimely with respect to Plaintiff’s Civil Rights Law claim, it was also untimely with respect to the Human Rights Law claim.

POINT VI

**PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES SHOULD BE
STRUCK BECAUSE AN AWARD AGAINST DEFENDANTS
WOULD VIOLATE PUBLIC POLICY**

Punitive damages are not available against a municipality. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748 (1981). A county is a municipality for this purpose. *Luessenhop v. Clinton County*, 2007 U.S. Dist. LEXIS 25787, *34-35 (N.D.N.Y. 2007). To the extent Plaintiff seeks punitive damages against Defendants, the request should be dismissed.

CONCLUSION

For all the foregoing reasons, and upon all the above-cited authorities, Defendants respectfully request the Court grant an order dismissing the Complaint, and each claim in the Complaint, with prejudice, and award such other and further relief as the Court deems just.

Dated: December 22, 2017
East Syracuse, New York

Respectfully submitted,

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