UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar, Plaintiff, vs. Essentia Health, et al, Defendants.	)	File No. 16-cv-100 (DWF/LIB) Duluth, Minnesota November 7, 2017 1:41 p.m. DIGITAL AUDIO RECORDING TRANSCRIPT

BEFORE THE HONORABLE LEO I. BRISBOIS
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTIONS HEARING)

APPEARANCES

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: This is the matter of Brittany Tovar versus Essentia Health, et al. The court file is 16-cv-100. Counsel, please note your appearance and representation for the record.

MS. HALL: Your Honor, I'm Christy Hall on behalf of the Plaintiff Brittany Tovar. I also represent Mr. Reid Olson.

MS. LYSTAD: Your Honor, I'm Vanessa Lystad. I represent the Essentia Defendants, Essentia Health and Innovis Health, LLC.

THE COURT: All right.

MR. WILK: Good morning, Your Honor. David Wilk for HealthPartners.

MS. SMITH: Your Honor, Lisa Smith, and I belong with Ms. Lystad also representing Essentia Health and Innovis Health, LLC.

THE COURT: All right. Before the Court this afternoon is Docket Number 52, Plaintiff's Motion to Amend Complaint. Mr. Wilk, HealthPartners is essentially taking no position in the motion. The meet and confer statement also suggests you do not oppose the motion so I don't expect I'm going to be hearing anything from you today, am I?

MR. WILK: Just to tell you we don't oppose the motion, Judge.

THE COURT: Okay. Glad we got that cleared up. Thanks.

MR. WILK: Thank you.

THE COURT: All right. Ms. Lystad, you or Ms. Smith can argue. Who is going to argue?

MS. LYSTAD: I'm going to argue, Your Honor.

THE COURT: All right.

Ms. Hall, it's your motion. Use the podium, please. You can move it however you want.

MS. HALL: May it please the Court, my name is Christy Hall and I'm a staff attorney at Gender Justice which is a nonprofit legal advocacy organization and we represent Ms. Tovar and her son, Mr. Olson, both of whom are present today with us in the courtroom. And this case is one of the first in the country to address the anti-discrimination provision of the Affordable Care Act, also known as Section 1557.

Ms. Tovar was an employee of Essentia. As part of her benefits package Essentia provided a self-insured health care plan and that plan was administered then by HealthPartners. And in 2014 and 2015, the years that are covered in the complaint, the plan had an exclusion that excluded coverage for transgender health care from the plan.

Tovar's son, Mr. Olson, is transgender. He was a teenager at the time and he needed health care that was excluded from coverage under that plan. In some cases he didn't end up receiving that care because it was excluded and in other cases Tovar paid out of pocket for the care and which HealthPartners and Essentia, I think Essentia, subsequently reimbursed.

And of course, you know, procedurally we have been up to the Eighth Circuit on the Defendants' Motions to Dismiss and are back in the District Court. This case has already set some precedent on the question of whether there are any circumstances under which a third party administrator could be liable for Section 1557.

THE COURT: You went up to the circuit as a group but you only came back as a partial group.

MS. HALL: Correct.

THE COURT: Essentia is not a party to this case.

MS. HALL: That's right. As of this moment, prior to consideration of this Motion to Amend, Essentia is not a party.

And, you know, we are before the Court on Tovar's Motion to Amend her complaint, you know, prior to what we assume will be another round of motions to dismiss.

So, um -- but I just want to break up the three things that this proposed amendment actually does. So one

of those things is that it adds HealthPartners Administrators, Inc., as a Defendant. And I don't believe anybody objects to that.

THE COURT: Is that really a new party or is that just a change in name of an existing party?

MS. HALL: It's essentially a change in the caption and then, you know, some language throughout the complaint is corrected then to reflect that also. But Judge Kyle already made that decision as part of the Motions to Dismiss.

THE COURT: Okay. So that's just correcting the -- describing the HealthPartners entity correctly.

MS. HALL: Exactly, Your Honor, yep.

THE COURT: And that, you're saying, is not in dispute?

MS. HALL: I do not believe it's in dispute.

THE COURT: Okay. And Mr. Wilk has said as much. Are the additional facts that are referenced then all related to changing that descriptor, the describer?

MS. HALL: No, there are several categories of additional facts that are added and I want to go over those to sort of -- so we can flush out --

THE COURT: How do we know which ones relate to HealthPartners as you correctly describe, or as will be correctly described, and which relate to a claim against a

non-party, meaning Essentia?

MS. HALL: My feeling, and certainly Essentia will correct me if I'm inaccurate about this, is that the additional facts in the complaint primarily relate to HealthPartners. Now, I mean there's some substance to these so they discuss interactions between HealthPartners and Essentia. But for the most part what they do is, A, clarify that HealthPartners had a greater role in coming up with the plan in the first place.

THE COURT: So if I understand correctly, then to the extent that Essentia's bound in those factual -- it's context for the existing claim against HealthPartners.

MS. HALL: Correct.

THE COURT: Okay.

MS. HALL: Correct. Also there's been some update to the Court to demonstrate, for example, you know, that Ms. Tovar is not alleging that she has any unreimbursed medical expenses. So I imagine that the, you know, the Defendants are pleased. I mean, it's a helpful fact for them, presumably. But it also then clarifies that she is no longer an employee of Essentia.

Again, you know, I don't feel like this is a fact that relates to the claims against Essentia, at least in a negative way for Essentia. So, you know, hopefully Essentia will clarify, but I do not believe that any of the fact

changes through the body of the complaint affect in a negative way Tovar's claim against Essentia.

THE COURT: Okay. So if I'm understanding this correctly then, allowing all of the amendments, factual amendments, serve two purposes. One, to correctly identify the HealthPartners entity and then change when needed to provide context for the HealthPartners entities involved in this process; and where needed, to provide context for the HealthPartners entities involved in this process. And where it interacted with Essentia, that's laid out and clear. But it still goes to the claim against HealthPartners.

If the new claim against Essentia is permitted by Mr. Olson, it's going to rely on the same theory and the same facts. There's no separate independent factual amendments that go to that part of it.

MS. HALL: That's correct, Your Honor.

THE COURT: Okay. So I got it.

MS. HALL: Um-hum.

THE COURT: Okay. So for the sake of procedural devil's advocate, if I grant in part and deny in part, I need focus only on who is going to be a party, not on which facts come in or don't. Because they are all for purposes of the existing claims and provide the foundation for the potential new claim.

MS. HALL: I agree with that, Your Honor.

THE COURT: Okay.

MS. HALL: So I think, you know, I think the issue that's really in dispute here is whether Mr. Olson can join the case at this point.

THE COURT: And HealthPartners doesn't dispute that, at least as it relates to them?

MS. HALL: That's correct. So Mr. Olson is alleging in this amended complaint then an Affordable Care Act claim against the HealthPartners entities, which HealthPartners does not object to that. You know, presumably they intend to bring a Motion to Dismiss all of these claims; and then an Affordable Care Act claim by Mr. Olson against Essentia, which would then bring Essentia back into the case.

THE COURT: Well, and that necessarily requires two separate and distinct analyses, doesn't it? I mean, one motion is amending a case against a current party on existing theory to add another Plaintiff to that existing claim against an existing party. The other is basically shall we bring in a whole new lawsuit to an existing lawsuit.

MS. HALL: Correct, Your Honor.

THE COURT: Yeah. And those are looked at through -- although some would view that there are some distinct distinctions between how we analyze those two motions given

the procedural posture and where we're at and all that kind of stuff.

MS. HALL: Yes, I think that's fair, yes.

THE COURT: Okay. Well, since there's no objection to the HealthPartners amendments, why don't we focus the rest of our time on the new claim, the new case.

MS. HALL: Certainly, Your Honor. So, you know, essentially it's that. It's can Mr. Olson bring a claim against Essentia, the Essentia entities, now at this point after Ms. Tovar's claim against Essentia -- Title VII claims, not Affordable Care Act claims -- have already been dismissed. And our position is that Mr. Olson would be entitled to bring an entirely separate lawsuit. And it would -- it's more efficient to join these together since they are a common set --

THE COURT: Under the ACA?

MS. HALL: Correct, correct. And the reasons why he would be able to bring an entirely separate lawsuit are, first of all, because the statute of limitations has not run. It follows that the federal rule regarding statute of limitations, so it's four years. I don't believe that's ever been litigated but that's certainly our position and I don't think there is any opposition to that in the briefing.

And then, you know, the question then becomes was Mr. Olson required in some procedural way to have brought

these claims as part of his mother's lawsuit. Is there some sort of res judicata effect. Is there a claim preclusion, and, you know, then you look at the elements of claim preclusion. So I think that's where the key core of disagreement is.

THE COURT: It's maybe not precisely res judicata. It's failure to join. It's more or less a splitting of a cause of action theory, kind of.

MS. HALL: I certainly -- my position, you know, our position is --

THE COURT: I mean, usually this classic straight-up res judicata is the claim was actually litigated, both parties were a party to the suit.

MS. HALL: Yes.

THE COURT: And we don't have that really here. What we have is whether or not there's been a splitting of a cause of action and whether that should be brought in two separate lawsuits or not.

MS. HALL: Yes.

THE COURT: Okay.

MS. HALL: And so I think the -- I think the issue here related to res judicata -- I mean, I think that it all sort of falls under the umbrella of res judicata but I'm certainly not an expert in this.

THE COURT: Well, it falls under an umbrella of

claim preclusion.

MS. HALL: Yes.

THE COURT: There's a number of different ways and theories to get to that.

MS. HALL: Yes.

THE COURT: But res judicata, per se, on its face really isn't what we're talking about.

MS. HALL: Correct. I mean, except to the extent that there's an argument that he was required to bring a previous claim because he's in privity with his mother. That there is some privity between the two parties. So, I mean, that's -- that's where we see the issue. That's where we see the potential barrier, even though we do not agree that it actually exists in this case.

You know, if it were in fact the case that Ms. Tovar had brought a lawsuit as a representative of Mr. Olson or that she were trying to do so now, we do believe that the claim would be barred.

THE COURT: Is Mr. Olson of majority age?

MS. HALL: He is now, Your Honor, yes.

THE COURT: Was he of majority age at the time that the suit was first filed?

MS. HALL: No he was not, Your Honor.

THE COURT: Okay.

MS. HALL: And so, you know, we have to look at

case law about what constitutes privity. I mean, there's lots of case law about what constitutes privity in terms of, you know, like a representative of a class, you know, as a fiduciary, as a guardian, meaning that in the sense of somebody who is representing the other party's interests.

But the Eighth Circuit in its decision was quite clear that Ms. Tovar was representing her own interests, not her son's, when she brought her Title VII claim. And in fact the entire reason why Tovar's Title VII claims failed was because of the standing issue because the Eighth Circuit -- and, you know, obviously we disagree with this but this is settled in this case -- the Eighth Circuit did not believe that she had standing. That her interests were the type of interests designed to be addressed by the statute.

So, you know, I think if we think about -- and in its brief Essentia talks about that there are the exact same interests here at play. But they are separable. So for example, Ms. Tovar, some of the injuries that she suffered were her child not getting the care that he needed and her having to watch him suffer. Having to pay out of pocket for claims that were later reimbursed but she had to pay out of pocket.

You know, potentially being forced to change jobs in order to get insurance that covered her son's medically

necessary care now that, you know, was not required. The plan was changed prior to her leaving. But those are the kinds of interests that Tovar has in this lawsuit.

And Olson's interests are different than that. You know, he has an interest in receiving medically necessary care that his doctors wanted him to have and that he wanted to have. He has an interest in not experiencing discrimination personally on the basis of his own gender identity. You know, in a way the Eighth Circuit, when it addressed this issue, when it addressed whether Tovar could bring a Title VII claim, points out that the discrimination is directed at Mr. Olson and that's been Essentia's position from the beginning of the lawsuit. That Mr. Olson is actually the person whose interests were harmed, not Ms. Tovar. And we disagree with that and obviously Tovar still has a live claim here against HealthPartners.

But that's the -- you know, from the beginning, it's been clear that these are different people with different interests, even though the facts are the same. And the case law on privity --

THE COURT: Your -- your Motion to Amend, though, is not under Title VII. It's under the ACA.

MS. HALL: That is correct. That is correct. Which --

THE COURT: Does that mean that the Eighth Circuit

hasn't spoken to that issue then?

MS. HALL: I believe that's accurate. They have spoken to the issue of whether a third-party administrator can be held liable.

THE COURT: Under Title VII?

MS. HALL: Under the Affordable Care Act.

THE COURT: I'm sorry. But we're talking about Essentia, though?

MS. HALL: Yes, yes.

THE COURT: But they said under Title VII Essentia could not be?

MS. HALL: Correct.

THE COURT: Your theory here is not under Title VII. It's under ACA?

MS. HALL: Yes. Which I believe, you know, points out the distinction between the claim that was brought and lost before and the claim that's brought now.

THE COURT: But the Eighth Circuit has said that Ms. Tovar can proceed under an ACA claim against HealthPartners.

MS. HALL: That's correct. So Ms. Tovar can bring her claim against HealthPartners for the harm that HealthPartners potentially caused.

THE COURT: Was there an ACA claim against Essentia in the case that went up to the circuit?

MS. HALL: There was not.

THE COURT: Okay.

MS. HALL: And our position is that that -- you know, the reason why we are not amending to include that is because there is privity there. You know, even though we're talking about a different claim, we are talking about the same issues. You know, there was a -- we do believe that she would have been required to bring that Affordable Care Act claim on her own behalf and since she didn't, it's gone.

THE COURT: And there is no Title VII claim against HealthPartners because she wasn't an employee of HealthPartners?

MS. HALL: Correct. And so if you look at the case law regarding privity or actually, you know, if you take a look at *Moore's Federal Practice*, it talks about privity between family members and it notes that a generally recognized rule here is that a family relationship is not sufficient to establish privity.

It goes on to say, and I'm looking here at 18, 131. *Moore's Federal Practice*, Section 131.40. It points out that husband and wife, parent and child, these are generally not sufficient for purposes of preclusion. So they do, however, bring up another example and that's a case of they give the example of loss of consortium claims that are brought by both spouses.

So that's semi-analogous to what -- I mean, it's certainly obviously different, but the fact that it's about the same set of facts and that it's a family relationship and, you know, both people bringing similar claims.

THE COURT: Well, that's because in a loss of consortium claim the uninjured spouse's claim is only derivative of the injured spouse. If there's no right to recovery by the injured spouse, then there's no right to recovery by the uninjured spouse.

MS. HALL: Yes.

THE COURT: So that's why there is privity.

MS. HALL: Yes. And what they say here in *Moore's Federal Practice*, just to point out, is that even in that circumstance where there is some -- you know, we're talking about the same claim, the same injury, a single injury, it notes that there's issue preclusion but not claim preclusion. They say normally this distinction doesn't matter because the issue is whether there was a loss of consortium, so the issue preclusion precludes the other claim just because there's nothing other than that issue.

But here, you know, I completely agree that there's issue preclusion. That issue preclusion applies to Mr. Olson, but not the claim preclusion. He could bring this claim in a totally separate lawsuit or he could bring it here where it's efficient to join the parties together.

And I do want to address briefly some of the remaining arguments that Essentia made in its brief about futility. I do not believe that any of these issues demonstrate that the amendment would be futile. I mean, it would be difficult to say that Olson's Affordable Care Act claim would necessarily fail in part because this has just not been litigated very often. So I think it's fairly -- you know, I guess one way to describe it to be that it's fairly optimistic of Essentia to assume that it would fail.

You know, they do discuss ERISA, whether ERISA was correctly filed. That's not required for an Affordable Care Act claim. That's a totally separate cause of action. We even discussed this as part of the Motions to Dismiss related to HealthPartners because HealthPartners was the Affordable Care Act claim and ERISA simply is not a bar to bringing an Affordable Care Act claim.

Next they talk about the lack of economic harm to Mr. Olson. And of course this is true. You know, Mr. Olson was a minor at the time. He was not paying for his own health care. His mom was paying for his health care. All of the economic loss that they experienced was reimbursed. But he did, nevertheless, suffer harm, right? He did not receive certain kinds of treatment that he was seeking. The Lupron, for example, that's mentioned in the complaint.

He also experienced the emotional distress of, you

know, being told that the care that he needed that was necessary was not available or was not covered by his mother's health care plan because of his gender identity.

And under futility, Essentia next addresses the fact that the regulations for the Affordable Care Act have been stayed. And I certainly have an opinion on whether, you know, that would apply here. You know, maybe at some point this Court will be asked to consider whether this case should be stayed as well because those regulations are stayed. I disagree with that and if the Court were inclined to do that, I would ask to be heard on that topic.

But a question of whether the regulations have been stayed or this case should be stayed shouldn't prevent the amendment from going forward. You know, if the amendment is denied because it could be stayed, then, you know, somewhere down the road it's not stayed any longer and the statute of limitations is expired. So I don't know that is a reasonable argument for disallowing the amendment.

And unless Your Honor has further questions, I -- I will conclude.

THE COURT: Thank you.

MS. HALL: Thank you, Your Honor.

THE COURT: Ms. Lystad.

MS. LYSTAD: May it please the Court. As noted, my name is Vanessa Lystad and I represent the Essentia

Defendants.

Your Honor, almost two years ago Plaintiff Tovar commenced a case against the Essentia Defendants and HealthPartners. Essentia has been dismissed on a 12(b)(6) motion when Plaintiff Tovar initially brought employment discrimination claims against Essentia. Essentia was dismissed by the District Court. That case went on appeal to the Eighth Circuit and the Eighth Circuit affirmed that dismissal.

And now Plaintiff Tovar post-dismissal, post-judgment in favor of Essentia and post-appeal, seeks to amend the complaint to add her son as a Plaintiff and to add the Affordable Care Act claim against Essentia. We would ask that this Court deny the motion for two reasons.

One, there's been undue delay in bringing this motion post-judgment, post-appeal, as well. Primarily because all of the facts set forth in the Amended Complaint were known to Plaintiff Tovar at the time that she initially -- initially commenced her action against Essentia. And also besides undue delay, there is futility in bringing forth this new claim against Essentia by Reid Olson. It is barred by res judicata. There is a failure to exhaust the administrative remedies under ERISA because this is a benefits issue.

There's also the lack of economic damages, as we

have set forth, and that's actually been admitted by counsel that there are absolutely no economic damages in the Amended Complaint. And then there's also an inability to show any violation at all of Section 1557 by Essentia.

So to briefly outline what the courts in this circuit have set forth, that Motions to Amend post-dismissal, post-judgment, are disfavored. Even though Rule 15 may set forth that free -- that Motions to Amend may freely be granted, there are different considerations post-dismissal and that's because of the interest of finality of judgments.

THE COURT: Isn't most of those cases, though, involving existing parties? I mean, it's like you went up with claims A through C; didn't do so well. And now you want to -- the same party wants to add claims D through G. You know, that's sort of waiting to see how things turn out, kind of. That's the argument there. But that makes sense when you're talking about an existing claim of trying to, you know, resurrect a greater panoply of claims following, you know, interrogatory denials.

MS. LYSTAD: Um-hum.

THE COURT: Or dismissals. Here we're talking about a claim by a different party against Essentia on a different theory than was dismissed by the Eighth Circuit arising out of the same operative facts. And the question

is if more -- one of the questions is are there some efficiencies to be gained by joining that new case with this case or letting it play out as a separate case.

MS. LYSTAD: Yes, Your Honor. Well, first I would point out with efficiency, that seems to be lacking in this case due to the fact that these facts were initially known to Plaintiff Tovar at the District Court level when --

THE COURT: But the claim belongs to putative Plaintiff Olson.

MS. LYSTAD: Correct, yes.

THE COURT: And are you arguing that there's a statute of limitations?

MS. LYSTAD: No statute of limitations.

THE COURT: Okay. So long as the claim is brought by putative Plaintiff Olson for purposes of argument here, within the statute of limitations, that, you know, and if it doesn't necessarily -- since the claim is being brought by someone else other than the initial Plaintiff, the initial Plaintiff's decision not to seek to join at the outset of the case doesn't affect whether that claim is subject to latches or not, does it?

MS. LYSTAD: Well, maybe for terms of the statute of limitations issue, that would still exist. That's a separate issue. But here we're looking at the fact that Plaintiff Tovar potentially could have brought this case in

her representative capacity, even if he was a minor at the time.

And also I'd point out that we have one case cited in our brief, the *James v. Watt* case, it was actually from the First Circuit, but it also dealt with Plaintiffs, I believe they were individual Indians bringing a claim, a land issue. And the Court determined that the individual Plaintiffs couldn't actually bring a case because it should have been brought in the tribe's name. Post-dismissal these individual Plaintiffs attempted to bring in the tribe as an additional Plaintiff.

THE COURT: Well, without -- I mean, that's a whole other complex area of the law that probably is not the best analogy. I mean, you're talking about issues of tribal sovereignty and, you know, tribal land claims do not involve fee simple land claims. So to say that that's analogous to this claim is a bit far afield.

MS. LYSTAD: Well, certainly the facts -- and we're not claiming that the facts of that case are similar to this case. But in terms of procedural history, it actually has quite a bit of analogies you can see because --

THE COURT: Well, sure, but *Watt*, that outcome there may have more to do with the sovereign nature of tribal government and tribal lands as opposed to fee lands, you know, being -- I'm not too persuaded by that case as

being something I should be looking to here.

MS. LYSTAD: Well, and also that's true, Your Honor, that it did deal with a land issue and that may have been more appropriate for in that analysis of who owns the land. However, it came down to the fact that who holds the cause of action. And at the beginning of this case it had been brought forth to Plaintiff Tovar's attention through the Motions to Dismiss, through actually even pre- motions, that the proper Plaintiff in this case should have been Reid Olson in the first place. This is not something that had been post-dismissal first raised.

THE COURT: Yeah. And that sounds more like because of the parental obligation over a minor that that's a privity argument.

MS. LYSTAD: Absolutely.

THE COURT: Okay.

MS. LYSTAD: And we would argue -- and we could argue from that respect as well that we would have a res judicata issue because those are claims that could have been brought. So when you looking to that case, even though --

THE COURT: Well, then it's not res judicata because the claims are litigated and lost. It's because the ACA claim was not brought and was not subject to the Eighth Circuit proceeding. What you're arguing is that it's claim preclusion because you're severing your causes of action.

MS. LYSTAD: Correct.

THE COURT: Yep.

MS. LYSTAD: And it could have been brought, the ACA action could have been brought potentially in the initial action. Clearly Plaintiff Tovar had one claim against HealthPartners that was under the Affordable Care Act and they had separate claims against Essentia for these employment discrimination claims. And it seems based on the facts that we know from the initial lawsuit that was commenced almost two years ago, that there was a strategy, a litigation strategy that they wanted to have separate employment discrimination claims and then a separate ACA claim. But now post-dismissal, since the employment discrimination claims have failed, they now want to try to bring in Essentia to have this claim against them, as well.

However, this could have been brought initially. And like I believe has even been mentioned, that there's no actual new facts against Essentia that weren't known at the time of this case actually starting. And that gets into this claim preclusion that we have a claim that could have been brought initially, certainly in a representative capacity by Plaintiff Tovar as the mother.

And we also have the privity is also there between Plaintiff Tovar and Reid Olson because their interests are tightly aligned here. It's not simply one Plaintiff

alleging a separate injury from the other. The only reason that we have this claim in the first place is denial of benefits to one party and she is bringing it for that reason.

Because we have these closely aligned issues, there -- there's -- it's so intertwined that we can only find that privity based on that -- that relationship of the claim itself. So it's not simply the family relationship. It's the claim.

And that is one reason, Your Honor, we would argue that there is this futility in actually granting this Motion to Amend as to Essentia alone. But also besides that, undue delay is a valid reason to deny a Motion to Amend and, again, it's -- it's because of this post-dismissal, post-judgment, post-appeal, trying a second bite at the apple to create or to just change the theory of the case. And we've cited the *Humphreys* case citing that post-dismissal change of a legal theory when there's already been a decision on the merits is certainly within this Court's discretion to deny a new Motion to Amend.

As well as that --

THE COURT: If I were to deny on that basis, that's a denial directed to the current Plaintiff. That doesn't preclude Mr. Olson from starting his own lawsuit; and then you'd have to bring whatever *Iqbal-Twombly* motions

against the particular allegations in that claim as they relate to him. Whatever I do with this case on the basis of that argument you just made would not be -- it would be nothing more than a denial here without prejudice of the Motion to Amend.

MS. LYSTAD: Right. And then -- and then as you mentioned, we'd just need to come back and do the Motions to Dismiss. And if anything, we have multiple grounds right now for this Court to deny the Motion to Amend to, again, this is a matter of judicial efficiency to do that knowing that we have these alternative arguments based on futility of the amendment itself, including this res judicata which would bar the actual claim.

And besides that, we have the claim -- the ACA claim itself is somewhat tenuous given the legal nature of the regulations. As this Court may know, the *Franciscan Alliance* case issued a nationwide injunction for Section 1557 regulations. And after that point, as the case recently held that there was a stay of the proceedings so that the department could actually re-evaluate those regulations because it indicated it was looking to change and amend those regulations. And those deal at the heart of this case as their allegations have centered around those regulations.

Now with those regulations being highly

questioned, that is something that we've set forth that is an additional reason for this Court to deny the motion.

THE COURT: Those change in regulations would be prospective only. They couldn't reach backwards to relieve violations or alleged violations while they were in effect.

MS. LYSTAD: That may be. But also interestingly those regulations indicated they went into effect July 18, 2016; and Essentia removed the exclusion from its plan January 1st, 2016. And so actually the regulations go farther and say that plans need to be in compliance January 1st, 2017. So Essentia was one full year in compliance before they would have been set to go into effect.

THE COURT: So Essentia was aware then because of the comment period?

MS. LYSTAD: Correct, yes. So the comment period I believe started September of 2015. January 1st, 2016, they took out the exclusion. And then these rules were not actually issued until May of 2016. So they were -- they were quite a bit forward thinking on that.

THE COURT: Well, is it -- I mean, when a statute proscribes certain behavior, is it of no effect unless and until the agency to which the further discretionary authority has been provided actually promulgates regulations? I mean, I don't know that you cited a case to that effect, but that sounds to be your argument.

MS. LYSTAD: Are you --

THE COURT: Well, the ACA.

MS. LYSTAD: It has been in effect since 2010, yes.

THE COURT: And the Section that's at issue prohibited discrimination and that's been in effect.

The ACA also delegated certain rule-making authority to the appropriate agency. But my question is, and I don't know that I -- maybe you did. Maybe I missed it. Is there a case out there that says as a matter of administrative law and statutory enactments that a statute that proscribes certain conducts and is effective on date A really doesn't take effect until the agency makes regulations under that statute two years later on date B?

MS. LYSTAD: Right.

THE COURT: So there's a two-year gap of no effectiveness?

MS. LYSTAD: No, no, and I don't think we would argue that, Your Honor. And certainly the ACA has been in effect.

THE COURT: So the regulations, when they came into effect and when they didn't, kind of are irrelevant as to whether there was a violation of the section at issue then.

MS. LYSTAD: The interesting thing about the

Franciscan Alliance case from 2016 was that it really went into what based on sex within Title IX, which is the reference in the ACA, what that really meant.

THE COURT: Okay.

MS. LYSTAD: And it looked into the fact that the courts actually hadn't decided that based on sex meant based on gender identity.

THE COURT: As opposed to just gender.

MS. LYSTAD: Biological differences, yes. And so the analysis that the *Franciscan Alliance* case goes into really dates back to the ACA itself. So even if setting aside these regulations if we would say yes, we agree that they don't really have a retroactive effect, looking at that alone, you know, when this case was started, we can look at that analysis as well to say that it wasn't contemplated by the ACA.

So for these reasons, we would find that there --

THE COURT: That decision, though, is not binding on this Court, though, is it?

MS. LYSTAD: No, no, Your Honor. I believe it's a Northern District of Texas, I believe.

THE COURT: So until the Eighth Circuit or the Supreme Court speaks to it, that's really not a futility argument. That's a there's-some-persuasive-authority-out-there-you-might-want-

to-consider argument.

MS. LYSTAD: Right, Your Honor, yes. But simply because those ones have -- relate very closely to the issues in this case. And that court is also the one that issued the nationwide injunction. Has certainly created an effect nationwide.

THE COURT: Well, but if you haven't moved to stay this case pursuant to that injunction.

MS. LYSTAD: We have not, Your Honor, we have not.

THE COURT: If you thought you had a basis for it, I assume you would have done that already.

MS. LYSTAD: Right, Your Honor. So -- yes, at issue -- but at issue today we clearly have this Motion to Amend and we would request that this Court deny it for the various reasons that we've set forth.

THE COURT: Um-hum.

MS. LYSTAD: Thank you.

THE COURT: Anything else?

MS. LYSTAD: Anything else? If the Court has any other questions?

THE COURT: No.

MS. LYSTAD: Okay. Thank you very much.

THE COURT: Ms. Hall, any response? Reply briefly.

MS. HALL: Just one note, Your Honor. You are

correct to point out that the *Franciscan Alliance* case would be perhaps persuasive authority, perhaps not. But not binding. And in fact, the District of Minnesota has clearly indicated in the *Rumble* matter -- that I believe a different order from the *Rumble* case was cited by the Defendants in this brief -- that the Affordable Care Act does indeed protect people on the basis of gender identity. So we do have a ruling contrary to the *Franciscan Alliance* ruling right here from this District.

Thank you, Your Honor.

THE COURT: Okay. All right. With regard to the additional facts and the caption change and corresponding changes within the complaint reflect the Defendant is HealthPartners Administrators, Inc., those are obviously going to be granted. There's no opposition to that. It will be briefly assessed in the order but we're not going to spend a great deal of time on that.

The real issue here is whether the amendment to allow the new Plaintiff and the new ACA claim against what is ostensibly a new Defendant in this existing case is going to be forward or not.

So the whole motion is under advisement. You know the part that we're going to be wrestling with the most. We'll address the whole motion in our order now which we will get out just as soon as our workload -- current

workload permits.

We're adjourned. Thank you.

(Court adjourned at 2:22 p.m.)

* * *

I, Carla R. Bebault, certify that the foregoing is a correct transcript from the digital audio recording of proceedings in the above-entitled matter, transcribed to the best of my skill and ability.

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