

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

SKYLER MUSGROVE,)	
)	
Plaintiff,)	
)	CIVIL ACTION NO.
vs.)	3:18-CV-00080
)	
THE BOARD OF REGENTS OF THE)	FEBRUARY 6, 2019
UNIVERSITY SYSTEM OF GEORGIA,)	
et al.,)	MOTION HEARING
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CLAY D. LAND,
UNITED STATES DISTRICT JUDGE

Proceedings recorded by stenography; transcript produced by computer.

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1 (Proceedings on February 6, 2019, commencing at
2 10:01 a.m., as follows:)

3 THE COURT: Please be seated. Good morning.

4 All right. Mr. Clerk, let's call our next case.

5 THE CLERK: Your Honor, this case is Skyler Musgrove
6 versus the Board of Regents of the University System of
7 Georgia, et al. For the plaintiff, Mr. Kevin Barry, Mr. Noah
8 Lewis. For the defense, Ms. Shelley Seinberg, Mr. Bryan Webb,
9 and Mr. James Washburn.

10 THE COURT: All right. Let's go ahead and identify
11 each person who is seated out here.

12 As counsel, you are Mr. Kevin Barry?

13 MR. BARRY: That's correct, Your Honor.

14 THE COURT: And you are Noah Lewis?

15 MR. LEWIS: Correct.

16 THE COURT: Ms. Seinberg, who do you represent? Blue
17 Cross or Board of Regents?

18 MS. SEINBERG: Board of Regents.

19 THE COURT: And Mr. Webb?

20 MR. WEBB: Board of Regents, Your Honor.

21 THE COURT: And, Mr. Washburn, you must represent
22 Blue Cross.

23 MR. WASHBURN: I do, Your Honor. Thank you.

24 THE COURT: Okay.

25 All right. The purpose of this hearing is I have

1 pending the defendant Blue Cross' motion to dismiss all of the
2 plaintiff's claims against it and the motion by the Board of
3 Regents and the Board of Regents defendants to dismiss certain
4 of the plaintiff's claims. And after reviewing the briefs in
5 this case, I found it -- that it may be helpful to have this
6 hearing on those motions so I can drill down a little deeper on
7 some of the issues that were touched upon in the briefs but
8 which I'd like to have some additional explanation and
9 argument.

10 First of all, just preliminarily, who's going to take
11 the lead for the Board of Regents, Ms. Seinberg or Mr. Webb?

12 MS. SEINBERG: I am, Your Honor.

13 THE COURT: Okay. And you may remain at your table
14 as long as you speak up so that the court reporter can hear
15 you.

16 Does the Board of Regents presently offer coverage
17 for the medical condition of gender dysphoria if it's
18 determined that treatments for that condition are medically
19 necessary? Is that presently offered to university employees?

20 MS. SEINBERG: Is it better if I sit or stand?

21 THE COURT: It's whatever -- if you want to pull it
22 -- you can do whatever is most comfortable as long as we can
23 hear you. Probably going to be better to sit there. If you
24 want to stand, then probably you should go to the lectern.

25 MS. SEINBERG: Okay. In the plan, the Blue Cross

1 plan, that is at issue --

2 THE COURT: No, I'm not talking about -- I just want
3 to get a little bit of background that may or may not be
4 relevant to this particular -- these particular motions.

5 Generally, is that coverage available today?

6 MS. SEINBERG: Not under the Blue Cross plan.

7 THE COURT: But there are plans that are offered to
8 employees who are university employees where that coverage can
9 be obtained?

10 MS. SEINBERG: My understanding is there is also a
11 Kaiser plan that does not have a similar exclusion at present.

12 THE COURT: And was that coverage available at the
13 time that the plaintiff was hired?

14 MS. SEINBERG: The contentions in the complaint are
15 that --

16 THE COURT: I'm not asking you this for this motion
17 to dismiss purposes. I'm just asking you, is the Board of
18 Regents' or the university's position that that coverage was
19 available to the plaintiff had the plaintiff chosen the
20 coverage?

21 MS. SEINBERG: I do not believe it was available when
22 he was hired. I believe Kaiser changed their plan terms at
23 some point later.

24 THE COURT: All right. But the coverage presently is
25 available to current employees, not through Blue Cross but

1 through another plan.

2 MS. SEINBERG: That's my understanding, Your Honor.

3 THE COURT: Okay. So, Mr. Barry, or Mr. Lewis, is
4 the purpose of this lawsuit, then, for the plaintiff to recover
5 the cost of the procedure that was not covered by insurance?
6 Or are you seeking to have some additional injunctive relief,
7 given that apparently the Board of Regents does now offer to
8 its employees insurance that would cover conditions similar to
9 the plaintiff?

10 MR. LEWIS: We are seeking both damages and
11 injunctive relief. Most -- the vast majority of employees
12 choose the three self-funded Blue Cross plans and only a tiny
13 minority choose the Kaiser HMO. The Kaiser HMO does not meet
14 the needs of Mr. Musgrove, who does require additional
15 treatments for gender dysphoria going forward. The -- first of
16 all, it's an HMO so it has a very limited network, and this is
17 highly specialized care.

18 THE COURT: So is it the plaintiff's position that
19 every plan that is offered to University of Georgia employees,
20 or any employees, must include coverage for medically necessary
21 treatments related to gender dysphoria and their failure to do
22 so violates Title VII, the Fourteenth Amendment, and the
23 American With Disabilities Act?

24 MR. LEWIS: The University System of Georgia offers a
25 fringe benefit package to --

1 THE COURT: I'm going to let you explain. But is the
2 answer to that question yes, that's your position?

3 MR. LEWIS: Yes.

4 THE COURT: All right.

5 MR. LEWIS: I would clarify that it must not exclude
6 transgender-related healthcare from its plans. It offers a
7 menu of options to give its employees the best access to
8 healthcare, and it gives every employee four choices of
9 healthcare plans. But under the current system, transgender
10 individuals realistically only have access to one plan. So
11 it's disparate treatment because of that.

12 THE COURT: So the claim here is — to narrow it
13 down, the claim here is that the defendants provided a policy
14 exclusion in their health insurance plans that apply solely to
15 persons based upon their sex or gender and that violates their
16 constitutional and statutory rights.

17 MR. LEWIS: It is a sex- and disability-based
18 exclusion. It's a diagnosis-based exclusion. It's framed as a
19 treatment exclusion. It excludes sex reassignment surgeries,
20 but only people diagnosed with gender dysphoria need those
21 surgeries. So it is a targeted disability diagnosis-based
22 exclusion.

23 THE COURT: But you are not making any contention
24 that the university or the Board of Regents discriminated
25 against the plaintiff based upon the plaintiff's transgender

1 status. You are focused on -- and that this is one indication
2 of that discriminatory animus. Your claim is that this
3 exclusion -- separate from any other conduct by the university,
4 this exclusion is what is discriminatory.

5 MR. LEWIS: Yes. It is an exclusion that excludes
6 certain medically necessary care simply because it changes sex
7 characteristics and simply because it is for the treatment of
8 gender dysphoria.

9 THE COURT: Okay.

10 MR. LEWIS: And I would also just clarify that it's
11 not simply about the denial of healthcare; it is also about the
12 hostile work environment that having such a targeted exclusion
13 creates. It's a stigmatizing exclusion that goes beyond. Even
14 if Skyler did not further need healthcare, he would still be
15 harmed by such an exclusion.

16 THE COURT: You are asserting a Title VII hostile
17 work environment claim?

18 MR. LEWIS: Yes. That's part of it.

19 THE COURT: And is there any -- are there any
20 allegations of any hostility other than as it relates to the
21 healthcare plan exclusion? Your claim I'm talking about. I
22 mean, have you alleged -- I didn't see it if you did, but maybe
23 you did. Have you alleged in your complaint other facts that
24 support a hostile work environment claim other than the
25 exclusion in the Blue Cross healthcare plan?

1 MR. LEWIS: He was essentially given the runaround
2 with HR. He was denied the ability to speak with the board.
3 So the conduct around the exclusion also gives rise to the
4 stigma and the hostile work environment.

5 THE COURT: Okay. And it's your contention that the
6 exclusion in the healthcare plan violates the American
7 Disabilities Act, but it also violates his equal protection
8 rights under the Fourteenth Amendment and under Title VII.

9 MR. LEWIS: Correct.

10 THE COURT: Okay. Are you familiar with the line of
11 cases that were decided by the Supreme Court prior to the —
12 prior to the adoption of the Pregnancy Discrimination Act which
13 addressed healthcare plans that excluded pregnancy coverage for
14 women? And the claim was that because that coverage related
15 solely to a female medical condition, an employer's attempt to
16 exclude coverage for that medical condition that was related
17 solely to one gender, the claim was that that violated Title
18 VII because it was discrimination based on gender and sex and
19 that it violated the Equal Protection Clause of the Fourteenth
20 Amendment because it treated women differently with regard to
21 certain medically necessary treatment plans.

22 Are you familiar with the line of cases before
23 Congress adopted the Pregnancy Discrimination Act —
24 anti-discrimination act — which made all of that against the
25 law?

1 MR. LEWIS: Uh-huh.

2 THE COURT: Are you familiar with those cases?

3 MR. LEWIS: Somewhat.

4 THE COURT: What do you understand those cases held
5 in that context?

6 MR. LEWIS: Well, I think the main thing was that
7 they went against Congress's intention, which is why Congress
8 immediately came back and said, No, we really did intend that a
9 sex-based exclusion in an employer health plan does violate
10 Title VII.

11 THE COURT: But didn't the Supreme Court in the
12 *Geduldig v. Aiello* case find that those type of healthcare plan
13 exclusions specifically did not violate the Equal Protection
14 Clause of the Fourteenth Amendment and that those pregnancy
15 exclusions in *General Electric v. Gilbert* did not violate Title
16 VII? Isn't that what the Supreme Court clearly held in both of
17 those cases? Just — are you familiar with those cases?

18 MR. LEWIS: Not enough to fully respond.

19 THE COURT: Okay.

20 MR. LEWIS: But I can say that —

21 THE COURT: Do you understand generally that that was
22 the holding of the Supreme Court line of precedent? And the
23 Supreme Court said if Congress believes that pregnancy-related
24 coverage should be covered in healthcare plans, then they can
25 easily say so. And that's what Congress did. That the courts

1 didn't strike it down, but Congress enacted the Pregnancy
2 Discrimination Act, or the anti-discrimination act, and
3 specifically said that an employer cannot exclude that kind of
4 coverage. Do you generally understand that to be the law, or
5 not? You may not have looked at it in anticipation for today;
6 and if not, we'll save that for another day. But what is your
7 general understanding?

8 MR. LEWIS: Well, I would just say that it's
9 different in this instance where --

10 THE COURT: Okay. Well, assuming that's what the
11 state of the law is -- or was -- how is excluding coverage in a
12 healthcare plan that says that there's no coverage in this plan
13 for pregnancy-related medically necessary treatments, there's
14 no coverage for that -- and that applies obviously solely to
15 females who are conceiving and having children. Assuming that
16 that is not in violation of the Fourteenth Amendment Equal
17 Protection Clause and assuming that that is not in violation of
18 Title VII, how is an exclusion in a policy that says that we
19 are not going to provide coverage under this policy for
20 treatments related to gender dysphoria, how would that be --
21 how would that be gender discrimination under Title VII and the
22 Fourteenth Amendment when straight-up gender discrimination
23 based on pregnancy is not? How would you --

24 MR. BARRY: So, Your Honor --

25 THE COURT: How would you distinguish the two? Then

1 we'll get to the motions to dismiss, but I'm just -- defendants
2 haven't raised this issue yet. Maybe they are going to raise
3 it at summary judgment or whatever. But I'm just -- how would
4 you distinguish those pre antipregnancy -- antidiscrimination
5 act cases from this?

6 MR. BARRY: I need to look at those. I know the
7 titles from looking at Erwin Chemerinsky's treatise on
8 constitutional law. Your Honor is looking in the right place,
9 I would say, for after the motion to dismiss stage, though I
10 appreciate the questions now, I guess. And I don't know the
11 facts of the cases.

12 I guess the analysis I would apply -- for instance,
13 in the equal protection context we're talking about pregnancy;
14 it only affects women -- the Court must have been applying
15 heightened scrutiny to a quasi-suspect class. I mean, the
16 Court is going to look behind. It's going to look closely.
17 And, I guess, there it found, based on a record, there was no
18 animus, there was no irrational prejudice.

19 We would argue that that's why we need discovery in
20 this case. We think there is. In the *Cleburne* case, which is
21 cited by the defendants and we cited in ours, that was a
22 disability case. And the plaintiff won that case because there
23 the record was clear. There was a -- the locality there had
24 this zoning ordinance that required people with intellectual
25 disabilities, group home for people with intellectual

1 disabilities, to jump through hoops to get a special permit.
2 Other multiple-occupancy dwellings did not require that special
3 permit. Why did we impose that extra requirement on people
4 with disabilities? This was an equal protection case. The
5 Court ruled for the plaintiff. The Court had before it a
6 record where there was fears, unwarranted fears, of --

7 THE COURT: Well, I think if you can establish --
8 under the pre pregnancy act cases, if you can establish that
9 the exclusion was a pretext for gender discrimination, then you
10 can establish an equal protection claim. And you are correct,
11 I think, in those cases that the issue was that they had a
12 justifiable reason for the exclusions and that there was no
13 evidence that it was a pretext for discriminating against
14 females.

15 So is your allegation in this case that the exclusion
16 in the Blue Cross policy is a pretext -- is a pretext for
17 actual animus against persons who have gender dysphoria? Is
18 that part of the factual allegations in your complaint, that
19 the university just is uncomfortable or doesn't like people
20 with gender dysphoria, and we have got an animus against them
21 because we don't think this coincides with our views on the
22 issue, and therefore, we're going to -- not admit that; we're
23 going to do the correct thing as a public institution, where we
24 certainly can't say that there's any -- that that's the way we
25 feel, but we're going to enact some policies that demonstrate

1 that, and one of those is having an insurance policy that
2 doesn't provide these people with coverage? Is that part of
3 your allegation here? I mean, you think that it's more than
4 just a policy -- an insurance policy decision based on cost?
5 You think that it's motivated by their discriminatory animus as
6 it relates to persons with gender dysphoria? That's your
7 allegation in the complaint?

8 MR. LEWIS: Absolutely.

9 THE COURT: All right.

10 MR. LEWIS: And the difference with the pregnancy
11 cases, pregnancy coverage is perhaps a different class of
12 healthcare. But in this instance the plan covers medically
13 necessary surgery, the plan covers medically necessary
14 prescription drugs, except if your diagnosis is gender
15 dysphoria or if you are changing your sex characteristics.

16 THE COURT: So did the pregnancy act -- so did the
17 pregnancy cases. In the pregnancy cases, they covered every --
18 I mean, they covered all kinds of medical treatments, drugs,
19 pharmaceuticals. A guy has a colon problem, you know, they are
20 going to pay for that. If a guy has a prostate problem, they
21 are going to cover that. But they said If a woman gets
22 pregnant, we're not covering that. And even if -- it's
23 obviously medically necessary, they're just saying, We're
24 excluding it, flat out. And the Court said that the
25 Constitution doesn't require an employer to have it, and Title

1 VII doesn't require an employer to have it. And Congress said,
2 Well, wait a minute. We think as a matter of public policy
3 they ought to have it. And so they amended -- in effect
4 amended Title VII with the anti-discrimination, the Pregnancy
5 anti Discrimination Act.

6 But we'll get to that, I assume, if we get to summary
7 judgment. Because, I mean, that's really the line of cases, I
8 think, that this case falls right into. And there's a matter
9 of whether it can be distinguished. And I understand you've
10 got arguments that it can. But this is -- this doesn't, it
11 seems to me, fall into the line of cases where -- I mean, I
12 understand the *Glenn v. Brumby* is relevant, obviously. And it
13 is obviously held in the Eleventh Circuit that you can't
14 discriminate against someone based upon them having gender
15 dysphoria. I think that's what it holds.

16 But this is a different case than somebody being --
17 than those line of cases where somebody is fired for that
18 reason or paid a different amount of money for that reason.
19 This seems to me to fall in that line of cases where you
20 exclude a certain class of people in health plans. That's
21 exactly what this case is, which I think that's what the
22 pregnancy cases were. But we'll get to that later.

23 MR. WASHBURN: Your Honor?

24 THE COURT: Yes, sir.

25 MR. WASHBURN: On behalf of Blue Cross, we are not --

1 THE COURT: You did move for summary judgment on the
2 Title VII claim, but you didn't make the argument that I have
3 been suggesting or posing questions to plaintiff's counsel
4 about, did you?

5 MR. WASHBURN: That is correct. We did not.

6 THE COURT: Did you — perhaps it's because you
7 evaluated that argument and found that it was bogus.

8 MR. WASHBURN: No, Your Honor. It's because the
9 allegation of pretext was absent from the complaint as Your
10 Honor just alluded to.

11 THE COURT: If there was an absence of pretext from
12 the complaint, then that would be even more reason for you to
13 have raised that as a basis for dismissing the Title VII claim.
14 Because I think to get beyond the pre pregnancy Discrimination
15 Act cases, there has to be some evidence of pretext. And if
16 they didn't allege it, then why didn't you dismiss on that
17 basis if you thought those cases were controlling?

18 MR. WASHBURN: And, Your Honor, perhaps we should
19 have.

20 THE COURT: Okay.

21 MR. WASHBURN: The point that I —

22 THE COURT: The point is, you didn't raise it so I
23 don't need to decide it today.

24 MR. WASHBURN: Well, Your Honor, I would say that to
25 the extent that the plaintiff is making an allegation that,

1 yes, there was pretext but we did not allege it in our
2 complaint, then we have a *Twombly-Iqbal* issue.

3 THE COURT: But you haven't moved for dismissal on
4 that basis. And I'm assuming that after today the plaintiffs
5 are going to go back and review their complaint and review the
6 pre pregnancy Act cases; and if they determine they should
7 allege pretext, then they will seek to amend their complaint to
8 do so. I would assume that's what they would do.

9 Mr. Lewis?

10 MR. LEWIS: Absolutely.

11 THE COURT: Okay. So that will be something, if
12 necessary, I guess we'll address it at summary judgment. But
13 it just struck me when I first saw the complaint, having had
14 some familiarity with those cases, that that's what this falls
15 within, and it may boil down to whether there is sufficient
16 evidence of pretext.

17 Okay. Let's get to the motions to dismiss. First of
18 all, I would like to take up the motions by Blue Cross.

19 Ms. Seinberg, I'm assuming you don't want to weigh in
20 on that issue at the moment. You'll wait later on until
21 summary judgment?

22 MS. SEINBERG: Yes, please, Your Honor.

23 THE COURT: Okay.

24 First of all, Mr. Washburn, you seek dismissal based
25 on lack of standing. And I just want to narrow down on a

1 couple -- I have read the brief, so I don't need you to recite
2 that to me, but...

3 I know that you dispute this, but you agree that the
4 plaintiff in support of their disability claim, particularly
5 their Title I disability claim and in support of their Title
6 VII claim, they allege that based upon the agency relationship
7 between Blue Cross and the Board of Regents, they allege that
8 Blue Cross is an employer for purposes of those claims. You
9 agree that they allege that.

10 MR. WASHBURN: I agree that they have -- that's how
11 they have responded to the motion to dismiss.

12 THE COURT: Well, do they allege -- do they allege in
13 the complaint -- I mean, in order for --

14 MR. WASHBURN: I'm sorry. I shouldn't make that
15 distinction. I think that certainly plaintiff's position that
16 Blue Cross is the Board of Regents' agent with respect to Title
17 VII and Title I of the ADA --

18 THE COURT: But they have got -- for Title VII and
19 for the ADA, it's got to be more than the agency. It has to be
20 an agency relationship that amounts to you, in effect, being
21 their employer. Because Title VII only applies to employers;
22 correct?

23 MR. WASHBURN: That's correct, Your Honor.

24 THE COURT: Okay.

25 MR. WASHBURN: And we pointed the Court -- and I know

1 the Court is familiar -- to *Mason v. Stallings*.

2 THE COURT: Yeah. I'm going to get to that in a
3 minute. I'm on standing right now.

4 MR. WASHBURN: All right.

5 THE COURT: If they have sufficiently alleged -- for
6 purposes of a motion to dismiss -- that Blue Cross is or was
7 the plaintiff's employer, then certainly they have alleged
8 enough to have standing to assert a claim under Title VII and
9 under the ADA; correct?

10 MR. WASHBURN: Your Honor, I --

11 THE COURT: I mean, if they ultimately prevail and
12 show that Blue Cross is the employer, they have sufficiently
13 alleged, have they not, that under *Glenn v. Brumby* that there
14 was a decision made that was discriminatory based upon gender
15 and -- gender or sex?

16 MR. WASHBURN: If I could address --

17 THE COURT: I'm talking about standing. I'm not
18 talking about the substance of your claim to dismiss. I'm
19 talking about standing.

20 MR. WASHBURN: All right. Then --

21 THE COURT: If they --

22 MR. WASHBURN: The way I look at the issue, Your
23 Honor, there are three different issues that have been raised.

24 THE COURT: On standing.

25 MR. WASHBURN: That your question addresses.

1 First, let me deal with the two that are not standing
2 and just say I'm not going to talk about those right now.

3 One --

4 THE COURT: Well, let's not even mention those. If
5 they don't relate to standing, let's not even mention them.

6 MR. WASHBURN: All right.

7 THE COURT: Let's just focus on the standing.

8 MR. WASHBURN: Your Honor, the question is whether
9 the alleged harm is traceable to Blue Cross and whether it's
10 redress-able by Blue Cross. And both of those questions are
11 confirmed in the negative by the very documents that the
12 plaintiff has attached to his complaint. The benefits book
13 makes clear that the Board of Regents, not Blue Cross, has the
14 authority.

15 THE COURT: But doesn't that assume that the Board of
16 Regents and Blue Cross are two distinct separate entities? And
17 I understand that you believe that they are; but if they, in
18 effect, are also treated as a dual employer, then doesn't that
19 change the standing analysis? In other words, I understand
20 that if they are not the plaintiff's employer, then your
21 position is, We had nothing to do with making the decision as
22 to what would be covered or not. We just applied what the
23 language of the plan was and we gave them options to pick this
24 plan and they picked it. But if they are successful in showing
25 that you, in effect, for Title VII purposes or for the ADA

1 purposes, that you are an employer, then in that context aren't
2 you in the same boat with the Board of Regents as far as
3 liability related to employment decisions? Now, the Court
4 would ultimately have to determine that your involvement was
5 such that you would be deemed to be an employer, but they
6 allege that at this stage.

7 MR. WASHBURN: They make the statement of complaint
8 which is belied by the documents that they have attached. I
9 certainly understand Your Honor's logic.

10 THE COURT: Let me --

11 MR. WASHBURN: What I'm saying is their allegations
12 are insufficient to get there.

13 THE COURT: Let me just try to get right to the
14 bottom of it. So you think that even if it were determined
15 that Blue Cross was the plaintiff's employer, you still think
16 there would be no standing here for this -- for the employee to
17 assert a Title VII and an ADA against her employer.

18 MR. WASHBURN: In a world where those were the
19 allegations and the facts of the case, I suspect that standing
20 would exist.

21 THE COURT: Okay.

22 MR. WASHBURN: But --

23 THE COURT: For the plaintiff, are you alleging that
24 Blue Cross was, for purposes of the ADA and for purposes of
25 Title VII, involved in such an agency relationship with the

1 Board of Regents that under those two statutes they would be
2 deemed an employer for purposes of those claims?

3 MR. LEWIS: Yes.

4 THE COURT: That's what you are alleging.

5 MR. LEWIS: Uh-huh.

6 THE COURT: And your position is, if they want to
7 contest that, then we can do some discovery; and if they
8 prevail that the relationship was not such that they are an
9 employer, then they could win on those claims. I mean, you are
10 going to ultimately -- on your Title VII and your ADA Title I,
11 ADA claim against Blue Cross -- to prevail on those claims you
12 are going to ultimately have to establish that that agency
13 relationship is such that they are considered an employer under
14 those statutes. You agree with that; correct?

15 MR. LEWIS: Yes.

16 THE COURT: And your contention at this stage is that
17 you have sufficiently alleged it, so you need to be able to go
18 to go to the next step in the process, which is discovery.

19 MR. LEWIS: Yeah.

20 THE COURT: Okay.

21 With regard to the disability act claims,
22 Mr. Washburn -- well, let me ask: Who's going to handle those
23 on behalf of the plaintiff? Mr. Barry or Mr. Lewis? I'll just
24 address it to either of you and whoever is...

25 MR. LEWIS: Thank you, Your Honor.

1 THE COURT: Do you agree at this point that there is
2 no ADA Title III claim related to public accommodation because
3 a health benefit plan is not a public accommodation as that
4 statute has been interpreted?

5 MR. LEWIS: No, Your Honor.

6 THE COURT: You think that a public — that a health
7 benefit plan administered by a state agency is a public
8 accommodation.

9 MR. LEWIS: Blue Cross is a place of public
10 accommodation that sells administrative services, only
11 contracts to employers.

12 THE COURT: Okay. So it's not — the key here is not
13 that they are doing it for a public agency; it's your position
14 that any time Blue Cross offers an insurance plan to employees
15 of any company, they are subject — those plans are subject to
16 Title III of the ADA as a public accommodation.

17 MR. LEWIS: Yes. Title —

18 THE COURT: Did you cite cases in your brief that
19 have so held in the appellate court — in any circuit court
20 cases?

21 MR. BARRY: Yes. Certainly the First Circuit, Your
22 Honor. And I've got — if I may approach, we have two
23 additional cases out of the First Circuit, district court-level
24 cases. It's *Fletcher v. Tufts* and *Boots v. Northwestern Mutual*
25 *Life Insurance*. Those cases —

1 THE COURT: And those are both in the context of a
2 private healthcare plan or public?

3 MR. BARRY: Correct. Employer-sponsored healthcare.

4 THE COURT: And they found that Title III applies?

5 MR. BARRY: That's correct. So *Fletcher* — District
6 of Massachusetts held that the plaintiff was an employee —

7 THE COURT REPORTER: Wait. Wait. Wait. You need to
8 slow down.

9 MR. BARRY: Oh. I'm sorry.

10 THE COURT REPORTER: "The plaintiff was an
11 employee" —

12 MR. BARRY: The plaintiff was an employee of Tufts
13 University. The Court held they could sue the Metropolitan
14 Life Insurance Company.

15 THE COURT: What is the facts of the appellate court,
16 the circuit court case? Not the district court case.

17 MR. BARRY: Circuit court case. That was the
18 *Carparts* decision that we cite. And they're — you know, Your
19 Honor, I need to look through my notes again. The First
20 Circuit was articulating a three-prong test by which the —
21 that decision dealt with both Title I and Title III. It held
22 that —

23 THE COURT: What does it say about Title III?

24 MR. BARRY: I would need to review my notes, Your
25 Honor. I apologize.

1 THE COURT: Do you recall that it specifically said
2 you can have a Title III claim based on the health insurance
3 plan being a public accommodation?

4 MR. BARRY: Title -- yes.

5 THE COURT: Title III?

6 MR. BARRY: The First Circuit has said as much.

7 THE COURT: And are there other circuits that have
8 said otherwise?

9 MR. BARRY: There is. And we note this our brief.
10 The Second Circuit has said that Title III definitely applies
11 to private insurers who are offering insurance. There is some
12 dicta in a footnote of that decision that suggests this
13 distinction that Blue Cross Blue Shield is drawing between --
14 so Second Circuit, in essence, says, Yes, Title III applies to
15 insurers. As to whether it applies to employer-sponsored
16 insurance, there's some dicta in there that suggests maybe the
17 court would not go the same way as the first Circuit.

18 I believe -- and Blue Cross Blue Shield can correct
19 me on this -- I believe the Seventh Circuit also says as much.
20 In other words, the Second and the Seventh Circuit has said,
21 Yes, it applies to insurance plans; Title III applies to the
22 content of insurance plans. As to employer-sponsored insurance
23 plans, I don't believe the Seventh Circuit has gone with the
24 First. It's really the first --

25 THE COURT: Mr. Washburn, did you cite any cases that

1 hold that employer-sponsored health benefit plans are not
2 public accommodations for purposes of Title III of the ADA?

3 MR. WASHBURN: We did, Your Honor.

4 THE COURT: You did?

5 MR. WASHBURN: In fact, there's no case that —

6 THE COURT: You did cite a case for that proposition?

7 MR. WASHBURN: We cited several cases, Your Honor,
8 for the proposition that employer-sponsored health benefits
9 plans are not public accommodations for purposes of Title III.

10 THE COURT: And are those circuit court opinions?

11 MR. WASHBURN: Judge Posner in the Seventh Circuit in
12 the *Morgan* case that we cited, Your Honor.

13 THE COURT: Specifically said —

14 MR. WASHBURN: Held that Title III was not available
15 because it was an employer-sponsored health benefits plan and
16 not a public accommodation. And therefore —

17 THE COURT: Mr. Barry, is that consistent with your
18 recollection of the Seventh Circuit case?

19 MR. BARRY: My recollection is — and I analyzed this
20 in kind of two stages. But, one, does Title III apply to the
21 contents of an insurance plan; and if it does — Seventh
22 Circuit held that it does — does it apply to
23 employer-sponsored? I believe that's a correct statement where
24 Seventh Circuit went in the other way, said it doesn't apply.
25 I think —

1 THE COURT: So you think Judge Posner was wrong?

2 MR. BARRY: Yes.

3 THE COURT: Okay.

4 MR. WASHBURN: Your Honor, if I could also say -- the
5 First Circuit case does not go as far as the plaintiff says it
6 does, the *Carparts* case. *Carparts* does stand for the
7 proposition that the public accommodation law extends beyond
8 physical spaces. *Carparts* does say that. It does not say that
9 the substance of an insurance policy or a health benefits plan
10 is a public accommodation under Title III.

11 THE COURT: Okay.

12 MR. WASHBURN: What it does is, it says, At this
13 stage we don't know, and we're going to remand it back for
14 further evaluation by the district court.

15 THE COURT: Are you aware of any circuit court that
16 has held that an employee-sponsored -- an employer-sponsored
17 health benefit plan is a public accommodation for purposes of
18 Title III of the ADA?

19 MR. WASHBURN: I am not familiar with any case.

20 THE COURT: And you have read the case that -- you
21 are not familiar with any case like that?

22 MR. WASHBURN: I'm not familiar with any case that's
23 held that. Now, Mr. Barry just referred to two cases that he
24 did not cite in his --

25 THE COURT: No. I'm talking about circuit court

1 cases.

2 MR. WASHBURN: All right. With respect to circuit
3 courts, that's correct. There are three circuits, four
4 circuits, arguably a fifth. But three circuits -- the Third,
5 the Sixth, and the Ninth -- that have held that the public
6 accommodation statute, Title III, extends only to public -- to
7 physical spaces. Okay? When it refers to an "insurance
8 office," it's referring to the physical space of an insurance
9 office. It's not referring to the substance of any policy.

10 The Seventh Circuit --

11 THE COURT: Just tell me what Posner said.

12 MR. WASHBURN: Well, he also issued an earlier
13 opinion --

14 THE COURT: I'm interested in whether or not you
15 believe the cases that plaintiff has cited in their brief --
16 circuit court cases -- do any of those cases, in your
17 interpretation of them, stand for the proposition that an
18 employer-sponsored health benefit plan is a public
19 accommodation for purposes of Title III of the ADA?

20 MR. WASHBURN: None of the cases cited in the brief,
21 whether district court or circuit court, stand for the
22 proposition that an employer-sponsored health benefit plan is a
23 public accommodation under Title III.

24 THE COURT: Do you agree with that, Mr. Barry, that
25 precise point?

1 MR. BARRY: The — I'm sorry. I missed the last
2 sentence.

3 THE COURT: He says none of the cases that you cited
4 in your brief stand for the proposition or hold that a
5 employer-sponsored health benefit plan is a public
6 accommodation for purposes of Title III of the ADA. Do you
7 agree with that?

8 MR. BARRY: I need to look at our brief. I do know,
9 and I think that — but what I would agree with Blue Cross Blue
10 Shield, that *Carparts* did suggest — I think that's probably
11 accurate — suggested that it can extend —

12 THE COURT: All right. Well, I can go back and read
13 the cases. I just wanted to see what your — whether you agree
14 with him on that point.

15 MR. BARRY: And I apologize, Your Honor. What I can
16 say is these two cases, which we did not cite in our brief —
17 this is a vexing issue — I think they will help, Your Honor.
18 And I think that the two district court judges go through this
19 kind of analysis. They invoke *Carparts*.

20 THE COURT: So you would have me side with two
21 individual district judges over Judge Posner, who, at least by
22 reputation, has been thought to be a scholarly court of appeals
23 judge from — I think he's now taken senior status — but for
24 many years? You want me to — that's what you ask me to do?

25 MR. BARRY: Yes. The one thing I had asked is, the

1 remedial statute, Title III, does not include damages. When
2 Congress drafted that statute, they made that very deliberate.
3 Title III is broad. It's supposed to be very, very broad,
4 unlike Title I. And that is broad, broader than --

5 THE COURT: All right. Let me ask you about your
6 Rehabilitation Act claim. How do you get beyond the cases that
7 suggest that in order for that claim to apply the defendant has
8 to have received some type of federal financial assistance?
9 How do you distinguish those cases?

10 MR. BARRY: So --

11 THE COURT: You don't contend that -- you don't
12 allege that Blue Cross received federal financial assistance
13 for purposes -- as that term is -- phrase is understood, under
14 the Rehabilitation Act, do you?

15 MR. BARRY: Yes, we do.

16 THE COURT: Oh, you do?

17 MR. BARRY: So, I mean --

18 THE COURT: Do you acknowledge that if they don't,
19 that there's no Rehabilitation Act claim? Is that where the
20 dispute is?

21 MR. BARRY: If they are not receiving federal
22 financial assistance, that's correct. That's one of the
23 elements of a *prima facie* case.

24 THE COURT: So the dispute here is you think you
25 sufficiently allege that Blue Cross receives federal financial

1 assistance for purposes of the Rehabilitation Act claim?

2 MR. BARRY: That's correct.

3 THE COURT: What facts do you allege other than just
4 the conclusory legal conclusion? What facts do you allege?
5 Are you saying that the financial assistance they receive are
6 the premiums or fees that they get from the Board of Regents
7 for this particular policy?

8 MR. BARRY: Well, what we suggest in our opposition
9 brief, that Blue Cross Blue Shield receives federal funds via
10 premium tax credit and cost-sharing reductions under the
11 Affordable Care Act, that we think this is sufficient for
12 purposes of stating a claim. If it's not, Your Honor, they
13 receive Medicare. And we have got decisions. The decision out
14 of Northern District of Alabama. We don't believe we cited
15 this in our brief. This is *Austin v. Blue Cross Blue Shield of*
16 *Alabama* where the Northern District of Alabama denied Blue
17 Cross's motion to dismiss or, in the alternative, summary
18 judgment on this precise issue.

19 THE COURT: Well, you are citing all these cases for
20 the first time here at the hearing. I'm going to give
21 everybody until Friday to file a supplemental brief that just
22 cites any additional — I don't want a whole lot of argument in
23 it — that just says here are the additional cases that we
24 cited at oral argument that are not in our original brief, and
25 this is the proposition that we — that they stand for. So

1 include that one.

2 MR. BARRY: I understand.

3 THE COURT: Mr. Washburn, what about that -- their
4 argument that basically everybody now gets some kind of federal
5 financial assistance, and y'all get Medicare and -- I don't
6 know if you do or don't -- but get Medicare and you get some
7 kind of premium relief under the Affordable Care Act?

8 MR. WASHBURN: Certainly Blue Cross participates in
9 the exchange program. And it may or may not receive premium
10 tax credits from the federal government with respect to that
11 program. However, courts have been clear that the federal
12 assistance -- in order to trigger Section 504, the federal
13 assistance has to be tied to a program for which Section 504 is
14 alleged to apply. In other words, there's got to be some
15 connection between the federal assistance and the application
16 of 504.

17 And I would refer the Court -- I suspect the Court
18 has already read the *Dana* case from the Middle District of
19 Pennsylvania, which goes through that issue at length and cites
20 to the *Grove City v. Bell* case from 1984 involving Title IX,
21 which applied to the Supreme Court case, which also made that
22 clear limitation that if you do receive federal assistance,
23 Section 504 applies to the program for which you receive
24 assistance.

25 THE COURT: Okay.

1 MR. WASBURN: But it does not apply -- once -- and,
2 in fact, it says there are certain corporations -- and the
3 Chrysler Corporation when it was bailed out in the '80's is an
4 example cited by that court -- that if -- for the entire
5 corporation, private corporation, to be subject to 504, the
6 entire corporation has to receive some federal assistance.
7 Putting aside whether federal tax credits are in fact federal
8 assistance under Section 504 or under the CFR section that
9 we've referred to in our brief, which defines what federal
10 assistance is, we argue that the tax credits are not federal
11 assistance for that purpose. But even if it did, Section 504
12 could only potentially apply to the program for which Blue
13 Cross receives financial federal assistance. There's no
14 allegation that Blue Cross receives federal assistance with
15 respect to its administration of the Board of Regents health
16 benefits plan. And in the absence of that, Section 504 cannot
17 apply.

18 THE COURT: I think you covered that in your brief
19 adequately.

20 With regard to the plaintiff's Title I ADA claim
21 where you have got to show that the plaintiff was an employee
22 of Blue Cross, what are the allegations in your complaint that
23 if taken as true -- which the Court has to do at this stage of
24 the proceedings -- would support the reasonable conclusion that
25 plaintiff was in fact an employee of Blue Cross for purposes of

1 this Title I ADA claim?

2 Mr. Lewis?

3 MR. LEWIS: In Paragraph 78 of the complaint, we
4 allege that they offered a healthcare policy that excludes
5 treatment for gender dysphoria. So that's the template plan,
6 the template administrative-services-only contract that they
7 provide to the Board of Regents which defines the benefits that
8 will be covered. This exclusion originated with Blue Cross.
9 The same language appears throughout the state in different
10 health plans that are administered by Blue Cross. So the Board
11 of Regents is not an expert in healthcare. They hired Blue
12 Cross.

13 THE COURT: But just because someone is an agent of
14 an employee's employer doesn't make them that employee's
15 employer. I mean, if, for example, you had a company that sold
16 some product to the Board of Regents that could only be used by
17 women for whatever reason, anatomically or whatever -- the
18 product is designed in a way so that it could only be used by
19 women or it could only be used by men -- that person that's
20 providing that product doesn't become -- and say the employee
21 sues the Board of Regents claiming you are providing these,
22 whatever this product is, in a discriminatory manner because it
23 can only be used by men or it can only be used by women, that
24 relationship between that product provider and the Board of
25 Regents does not make that product provider an employer of the

1 employee.

2 The agency relationship has to be connected to the
3 agent acting in an employer capacity. Like, the classic cases
4 would be if you delegated the responsibility of hiring and
5 firing employees or the responsibility of managing employees'
6 duties. If you were, in effect, acting in an employer
7 capacity, then that could make them an employer.

8 But what is it — what is it about this agency
9 relationship that you contend was a delegation from the Board
10 of Regents to Blue Cross of employer responsibility? Just the
11 fact that providing the management of the health insurance
12 plan, that's enough by itself?

13 MR. LEWIS: The board is relying on Blue Cross for
14 its expertise in the field of health insurance. They — fringe
15 benefits are covered under Title VII. And Blue Cross's control
16 over these fringe benefits is so extensive that it counts as an
17 employer relationship.

18 THE COURT: But doesn't there have to — doesn't the
19 agency relationship have to be such that there's some control
20 over the employees?

21 MR. BARRY: There is. They are — it would be clear
22 that if Blue Cross in its role as a claims administrator was
23 administering the plan in a discriminatory manner, the board
24 would be responsible but also Blue Cross would be directly
25 responsible for discrimination. Here the discrimination just

1 happened a step earlier so that they are not the ones who are
2 denying each claim individually saying the transgender related
3 healthcare is not medically necessary or something like that.
4 They have at the outset convinced the board to exclude all of
5 these claims. And that's where they exercise such control over
6 this policy.

7 THE COURT: So they hold a gun to their head and told
8 these sophisticated people at the Board of Regents that you
9 have got to get a policy that excludes gender dysphoria?

10 MR. LEWIS: They are —

11 THE COURT: Or do they say, Here, this is the
12 standard policy but it's your determination?

13 MR. LEWIS: By merely offering the exclusion and
14 singling this out signals that this is an acceptable legal —
15 that that is in accordance with standard medical practice,
16 which it's not. The board is not knowledgeable about the
17 current medical standards for gender dysphoria. That's
18 precisely what they rely on from Blue Cross to know what should
19 be covered and what should not be in a plan. So the mere fact
20 that they offered it signaled that it was okay. And that's why
21 Blue Cross is responsible.

22 THE COURT: Well, whether they are responsible may be
23 a different question than whether they are legally responsible.
24 Your contention is that for purposes of your ADA claim, your
25 Title I ADA claim, that that makes them an employer of the

1 plaintiff. Your position is that Skyler, your client, was
2 employed by the Board of Regents and Blue Cross.

3 MR. LEWIS: That they were exercising an employment
4 function in determining the contours of the fringe benefits
5 plan, which is an employer function.

6 THE COURT: And they were exercising that function
7 vis-a-vis the Board of Regents?

8 MR. LEWIS: Uh-huh. Yes.

9 THE COURT: But the Board of Regents is the one that
10 ultimately decided whether to offer the plan to its employees.

11 MR. LEWIS: In reliance on the expertise of Blue
12 Cross.

13 The broader issue is that Title VII and the ADA are
14 these broad remedial statutes. And if Blue Cross —

15 THE COURT: So you are suggesting that the Board of
16 Regents' legal department, they didn't even look at the plan.
17 They just, Okay, give us what you got and we'll take it.

18 MR. LEWIS: That's an issue that's ripe for
19 discovery.

20 THE COURT: Okay.

21 What about it, Mr. Washburn? He says that for
22 purposes of the ADA claim that Blue Cross is a employer of the
23 plan.

24 MR. WASHBURN: We disagree with that assertion, Your
25 Honor. First of all, the Eleventh Circuit has ruled —

1 THE COURT: I mean, under that argument, y'all would
2 be an employer — you would — you would be an employer of
3 every employee who is a member of any employer-sponsored plan
4 that you act as administrator on. You would not just be a plan
5 administrator with a contractual relationship with the
6 employer, but you become the employer —

7 MR. WASHBURN: Yes.

8 THE COURT: — of all of the employees.

9 Okay. Well, you cited any cases that support that
10 broad notion?

11 MR. BARRY: Your Honor, the *Carparts* decision does
12 sketch out that Title I theory and actually separates this idea
13 of control and that basically is Blue Cross Blue Shield
14 exercising all sorts of control. That's kind of the tier one.
15 The tier two analysis that *Carparts* first flushes out is
16 there's also this agency relationship. It distinguishes
17 between an agency relationship, which is as my cocounsel has
18 described, versus this control kind of relationship where they
19 are the, capital E, employer. What we're suggesting here is
20 they are an agent.

21 THE COURT: It stretches those two tiers out for a
22 Title I claim?

23 MR. BARRY: Correct. Correct. That's why I was
24 getting confused before, because it also gets into the Title
25 III analysis. It takes on both.

1 THE COURT: Yes, sir, Mr. Washburn.

2 MR. WASHBURN: *Carparts* does not for the — *Carparts*
3 stands for the proposition that if an insurance company —

4 THE COURT: All right. Well, we'll figure out
5 your — I'll figure out *Carparts*.

6 MR. WASHBURN: Well, Your Honor, the point is, who
7 has control over the level of benefits provided by employees.
8 The documents attached to Mr. Musgrove's complaint establish
9 conclusively that the Board of Regents has control over the
10 level of benefits offered to employees. We cited that in our
11 brief. That is clear and cannot be disputed by some —

12 THE COURT: Well, their claim is that the Board of
13 Regents just signed off; they told Blue Cross to come in and
14 give us a policy and we'll just sign off on whatever.

15 MR. WASHBURN: Even if that were true — which I
16 seriously doubt — but even if that were true, the Board of
17 Regents signed up for having control over the level of
18 benefits. The Board of Regents — it states very clearly in
19 the benefits booklet that the Board of Regents retains control
20 over which benefits it will offer and which benefits it will
21 not.

22 THE COURT: Okay. What about — you argue that,
23 Mr. Washburn, that the ADA claim is not viable. But they have
24 not stated an ADA claim because there is this specific
25 transgender exclusion under the ADA that says that — and I

1 know I'm not being precise, but just to summarize it -- for
2 transgender-related conditions there's an exclusion that says
3 that those shall not be disability under the ADA.

4 MR. WASHBURN: That's correct, Your Honor.

5 THE COURT: But it also says that they shall be
6 excluded from being a disability to the extent that they do not
7 result from physical impairments. Now, I'm not sure exactly
8 what that means, but it seems that one interpretation of that
9 could be, in this context, that if there's some physical reason
10 for the condition of gender dysphoria, such as hormone
11 imbalance or some other kind of physical reason for the
12 condition, then that exclusion would not apply.

13 Have you alleged in your complaint that the gender
14 dysphoria condition that your client has is not simply a,
15 quote, psychological condition but there are physical reasons
16 for the condition?

17 MR. BARRY: Yes, Your Honor. We have explicitly.

18 THE COURT: And I'm assuming that you would say
19 having alleged that, that gets you around this exclusion under
20 the ADA?

21 MR. BARRY: It absolutely does. And federal courts
22 have so held.

23 THE COURT: What's your response to that about the
24 exclusion not applying because it carves out an exception to
25 the exclusion if you are transgender -- is "transgender" still

1 an appropriate -- all of this is always changing. So I just
2 don't want to say anything that offends anybody, although I'm
3 sure I will at some point, and you just have to forgive me for
4 that and blame it on age or whatever. But "transgender" is
5 still an appropriate term to use in this area?

6 MR. LEWIS: Yes, Your Honor.

7 THE COURT: Okay. For these transgender-related
8 conditions, that exception or that exemption of disability, why
9 does this physical exception to that not apply here?

10 MR. WASHBURN: Your Honor, the argument --

11 THE COURT: Do you understand what I'm --

12 MR. WASHBURN: I certainly understand the argument
13 advanced by the plaintiff and understand the rulings of the --

14 THE COURT: I'm asking you to respond to it. Is this
15 one of your weaker arguments?

16 MR. WASHBURN: Your Honor, we think that we're not an
17 employer under Title VII or Title I.

18 THE COURT: No. No. No. I understand. That's your
19 strongest argument on the ADA claim.

20 MR. WASHBURN: Right. Your Honor, The *Parker* case,
21 the *Parker v. Strawser Construction* case, addresses this
22 precise point.

23 THE COURT: Which precise point?

24 MR. WASHBURN: Of whether the exclusion -- whether
25 you can make an allegation based on the DSM-5 for gender

1 dysphoria and whether that is somehow distinct from the gender
2 identity disorders that are excluded under the ADA and that,
3 therefore —

4 THE COURT: That case says no, says those are
5 included under the exclusion?

6 MR. WASHBURN: They are. But the legislative
7 intent —

8 THE COURT: Is that a district court case?

9 MR. WASHBURN: It was from the Southern District of
10 Ohio. As far as I know — plaintiffs can correct me if I'm
11 wrong — only district court cases —

12 THE COURT: I mean, I guess your position would be
13 this is exactly what Congress was trying to get at when it
14 enacted this exclusion, that at least at this stage — maybe
15 Congress is behind the times on this. But at least when they
16 enacted the Disability Act, they did not intend for these types
17 of claims to be disability for purposes of the ADA. That's
18 your position?

19 MR. WASHBURN: That is the position.

20 THE COURT: Why did they — how does that case —
21 what does that case explain "physical impairments" to mean?
22 Why did they add that to it?

23 MR. WASHBURN: And, Your Honor, we addressed that in
24 our brief, and I can go back through it. But there are certain
25 physical impairments that are — that predated the ADA that

1 might lead to gender identity disorders. And the --

2 THE COURT: You think that "physical impairments"
3 means physical impairments that could result from gender
4 dysphoria, or does it mean -- the other way around?

5 MR. WASHBURN: The reverse.

6 THE COURT: Physical impairments that could cause --

7 MR. WASHBURN: -- some gender identity disorder. And
8 that --

9 THE COURT: If someone was -- can someone have -- be
10 diagnosed with gender dysphoria related to having been born
11 with anatomical deformities as it relates to the sex organs? I
12 mean, can -- if someone is born with that type of deformity,
13 physical deformity --

14 MR. BARRY: So the question is can you have gender
15 dysphoria as a result of a, I believe --

16 THE COURT: Physical impairment?

17 MR. BARRY: Disorder of sex development.

18 THE COURT: Yes.

19 MR. BARRY: Disorder of sex development.

20 THE COURT: Not hormonal but --

21 MR. BARRY: Correct. One can have that. So Blue
22 Cross Blue Shield --

23 THE COURT: Well, isn't that -- would that be what
24 this is getting at?

25 MR. BARRY: Well, Your Honor, so we've looked

1 extensively at the legislative history. You will all have it
2 now as well, a portion of it that I included in the appendix.
3 The house of representatives version -- the ADA started with
4 the Senate. The House of representatives version of the ADA
5 first included this what I'm going to call the "safe harbor
6 language." That language in that House of Representatives,
7 there is absolutely nothing in there about why it was added.
8 There's no other legislative history.

9 THE COURT: Well, that's why I'm not sold on
10 legislative history. It's not usually a big -- I mean, that's
11 the last resort as far as what this means, because you just --
12 it's unreliable.

13 MR. BARRY: Here is the argument we'd make, Your
14 Honor. All we are left with is the plain language -- and that,
15 we can rely on -- the plain language of the "safe harbor" and
16 the definition of "physical impairment."

17 So stated at Paragraph 82 on our complaint, the EEOC
18 has defined "physical impairment" extremely broadly. I think
19 you were referencing it before. Any physiological condition
20 affecting one or more body systems, including the neurologic --
21 quote/end quote, quote, including the neurological and the
22 endocrine systems.

23 THE COURT: Okay. What do you allege that Skyler's
24 physical impairment was that resulted in her, in part, in
25 her --

1 MR. BARRY: His.

2 THE COURT: -- in his --

3 MR. BARRY: Thank you.

4 THE COURT: -- gender dysphoria?

5 MR. BARRY: An atypical interaction of sex hormones
6 in the brain.

7 THE COURT: Okay.

8 MR. BARRY: That's neurological. That's endocrine.
9 We got it.

10 THE COURT: That's the allegation.

11 MR. BARRY: That's correct,

12 THE COURT: Okay.

13 MR. BARRY: While Blue Cross Blue Shield, I would
14 say, is certainly right that the safe harbor would include GIDs
15 that result from disorders of sex development, they are wrong
16 to suggest that a safe harbor stops there. In plain language
17 it does not.

18 THE COURT: Okay. With regard to Blue Cross's --
19 Ms. Seinberg, are you still awake?

20 MS. SEINBERG: Yes, Your Honor.

21 THE COURT: Okay. I'm going to get to you in a
22 minute.

23 With regard to Blue Cross's motion to dismiss the
24 Title VII claim -- I mean, your primary argument here is you
25 are not an employer.

1 MR. WASHBURN: Certainly we're not an employer.

2 We've also —

3 THE COURT: Do you believe the standard for employer
4 under Title VII is similar or the same as the standard for
5 employer under the ADA?

6 MR. WASHBURN: It is the same, Your Honor. Many
7 courts have held that they are equivalent. And I don't think
8 the plaintiff disagrees with that. And the Court in the
9 Eleventh Circuit in *Cramer*, the *Cramer* case that we cited in
10 our brief, establishes that insurer or a health benefits
11 administrator is not an employer for purposes of Title VII or
12 Title I.

13 THE COURT: I understand that. But if they convince
14 me that you are an employer for Title VII purposes, then you
15 have got a problem at least at the motion to dismiss stage
16 because of *Glenn v. Brumby*. Do you agree with that?

17 MR. WASHBURN: Well, *Glenn v. Brumby* certainly
18 addresses certain employment actions taken with respect to
19 gender nonconformity. And in *Glenn v. Brumby* the facts are, as
20 I'm sure the Court is aware —

21 THE COURT: Okay. So you would make the additional
22 argument that even if you are an employer, what y'all did with
23 regard to the offering of an insurance plan, or offering it to
24 Blue Cross, there is no factual allegation that your conduct —
25 or is your intention that it was superseded by their conduct in

1 adopting the plan?

2 MR. WASHBURN: Your Honor, the argument we --

3 THE COURT: What is your argument under Title VII
4 other than not an employer?

5 MR. WASHBURN: That the Eleventh Circuit has made
6 clear that Title VII does not protect transgender persons as a
7 class, that --

8 THE COURT: How have they made that clear?

9 MR. WASHBURN: They have. The *Evans* case that we
10 cited in our brief, Judge Rosenbaum and Judge Pryor go --

11 THE COURT: That's the sexual orientation case.

12 MR. WASHBURN: Your Honor, that was actually another
13 termination based on a transition, if I recall that correctly,
14 from South Georgia.

15 THE COURT: Are you talking about the Rosenbaum
16 dissent case or another case?

17 MR. WASHBURN: I am talking about the case where
18 Judge Rosenbaum concurs in part and dissents in parts and Judge
19 Pryor concurs.

20 THE COURT: Right. There's another judge that writes
21 the opinion. Judge Pryor concurs and goes into this long
22 discussion of what he thinks "sexual orientation" means. And
23 then Judge Rosenbaum writes a long dissent --

24 MR. WASHBURN: Correct.

25 THE COURT: -- in which, as she explains, that she

1 thinks the determination is, completely contrary --

2 MR. WASHBURN: That's correct.

3 THE COURT: -- I guess, to *Glenn v. Brumby*.

4 MR. WASHBURN: Sorry?

5 THE COURT: Is her contention that it -- No, there
6 was another case.

7 MR. WASHBURN: This is *Evans*. This is the *Evans*
8 case.

9 THE COURT: I know that. But what was the case
10 Rosenbaum was relying on?

11 MR. WASHBURN: That's the *Evans* case, Your Honor.

12 THE COURT: Okay. She's relying on *Evans*.

13 MR. WASHBURN: Yes, because both Judge Rosenbaum and
14 Judge Pryor, though they disagree on virtually everything,
15 agree that the Eleventh Circuit does not protect transgender
16 people as a class, that the gender nonconformity argument under
17 Title VII --

18 THE COURT: So the *Evans* case was a transgender
19 case --

20 MR. WASHBURN: It was.

21 THE COURT: -- and not a sexual orientation case.

22 MR. WASHBURN: That's my --

23 THE COURT: Or you read the two as being the same?

24 MR. WASHBURN: I don't assert that they are the same.

25 THE COURT: What is your position, Mr. Lewis?

1 MR. LEWIS: The Eleventh Circuit --

2 THE COURT: What's the case that Rosenbaum wrote the
3 dissent in and that Pryor wrote the concurring opinion in, the
4 recent 2017 case?

5 MR. WEBB: Your Honor, I'll speak to that. That was
6 the *Evans* case.

7 THE COURT: That was the *Evans* case.

8 MR. WEBB: That was the *Evans* case. *Evans* dealt with
9 an individual who was an employee and who alleged two separate
10 things. One was she was discriminated against or terminated,
11 constructively discharged, based upon her sexual orientation.

12 THE COURT: That's what I thought.

13 MR. WEBB: And also the Court allowed her then to
14 amend her case after it went to the Eleventh Circuit, and she
15 amended to show gender stereotyping.

16 THE COURT: But her claim was that she was
17 discriminated against because she was a lesbian.

18 MR. WEBB: Yes, Your Honor.

19 THE COURT: And the -- Judge Pryor, along with the
20 other visiting judge, held that Title VII -- under Title VII
21 sexual orientation is not a protected class and is not covered
22 by discrimination being prohibited based on sex.

23 MR. WEBB: Yes, Your Honor. And they held that based
24 upon precedent.

25 THE COURT: But the Eleventh Circuit has clearly held

1 in *Glenn v. Brumby* that being transgender is protected.

2 MR. WEBB: I believe that what — I believe that what
3 *Brumby* holds is that you cannot discriminate against somebody
4 based upon a gender stereotyping. It follows the line of *Price*
5 *Waterhouse* and some of those other cases.

6 Now, if you look at how *Glenn v. Brumby* is then
7 decided in other cases within, you know, our circuit, generally
8 what you are seeing is that an individual has something happen
9 to them, and they are alleging that the reason why that happens
10 to them is because of the animus toward some behavior that they
11 are engaging in that goes against the gender stereotype. I
12 think — I don't want to be definitive here, but I think the
13 question about whether or not transgenders' status in the
14 Eleventh Circuit is protected, I don't know whether or not
15 there's been a definitive ruling on that.

16 THE COURT: Well, I thought the case — I thought the
17 *Brumby* case was that the employee was anatomically born a
18 certain sex. The employee determined that their brain sex was
19 otherwise. The employee wished to live consistent with the
20 employee's brain sex and was undertaking treatments consistent
21 with that. And Mr. Brumby said, I'm not going to have any of
22 that. That just is beyond my understanding of what's normal.
23 And it's too disruptive. I can't figure out which bathroom the
24 person is going to go to, all those kind of things.

25 And the Eleventh Circuit in *Brumby* said that is

1 discrimination -- impermissible, unlawful discrimination --
2 based on sex and gender.

3 MR. WEBB: Yes, Your Honor.

4 THE COURT: Isn't that what they said?

5 MR. WEBB: I believe that's what the holding was.

6 THE COURT: So if in this case the university went to
7 the plaintiff and said to the plaintiff, We understand that you
8 are suffering from gender dysphoria. We don't think that's,
9 quote, normal. We don't want to pay extra insurance premiums
10 for something we consider to be abnormal -- I'm not saying it's
11 normal or abnormal; I'm just -- this is the hypothetical -- and
12 therefore, we're not going to cover it, that would clearly be
13 contrary, would it not, to *Glenn v. Brumby*?

14 MR. WEBB: Well, Your Honor, we have not made a
15 motion to dismiss under Title VII.

16 THE COURT: Oh, well, you are trying to bail out
17 Mr. Washburn here. Sometimes that's a problem.

18 What do you think, Mr. Washburn? This is your
19 motion.

20 MR. WASHBURN: It is.

21 THE COURT: That hypothetical that I have just
22 described -- which was not what happened here necessarily --
23 but that would be pretty close to *Glenn v. Brumby*, wouldn't it?

24 MR. WASHBURN: I think that would be close to *Glenn*
25 *v. Brumby*. The distinction that I think the Court is searching

1 for is -- and that the Eleventh Circuit had laid out -- is that
2 there can be claims brought for what *Glenn v. Brumby* calls and
3 I think *Price Waterhouse* calls "gender nonconformity," where
4 the employer perceives that the employee is not conforming to
5 the gender stereotype that the employer expects and, therefore,
6 takes negative action toward that employee. *Glenn v. Brumby*
7 clearly held that that type of conduct is actionable. But what
8 the Court has not done and what the Court in *Evans* -- what both
9 Judge Pryor and Judge Rosenbaum acknowledge in *Evans* is that
10 that's distinct from a class-based claim where if --

11 THE COURT: Well, that's not what Rosenbaum says.
12 Rosenbaum says the two are the same.

13 MR. WASHBURN: Rosenbaum says -- however acknowledges
14 that the Eleventh Circuit does not protect transgender people
15 as a class. And that's the argument that we're advancing.
16 This is the prototypical class-based claim that the university
17 system is treating -- the allegation is they are treating
18 transgender people differently as a whole from others and,
19 therefore --

20 THE COURT: It's Blue Cross's position that
21 discrimination against persons based on their transgender
22 status should be treated the same as discrimination against
23 persons based on their sexual orientation status for purposes
24 of Title VII and the Fourteenth Amendment.

25 MR. WASHBURN: And that -- that's correct. And that

1 status-based claims are not permissible.

2 THE COURT: Okay. And I think Judge Rosenbaum agrees
3 with you.

4 MR. WASHBURN: That's correct.

5 THE COURT: But I think what she says is both are
6 unconstitutional and in violation of Title VII. And, of
7 course, she was a dissent, so she didn't carry the day. But I
8 think she agrees with you.

9 MR. WASHBURN: She agrees with —

10 THE COURT: But I think Pryor disagrees with you.
11 Because he tries to make this distinction — anyway...

12 MR. WASHBURN: And, Judge, Your Honor, I believe
13 where they agree —

14 THE COURT: Well, let me ask Mr. Lewis if he can
15 explain Judge Pryor's concurring opinion in *Evans*.

16 MR. LEWIS: He said that all persons, whether
17 transgender or not, are protected from discrimination on the
18 basis of gender stereotype; and because those protections apply
19 to everyone, a transgender individual cannot be excluded.
20 Logically, any discrimination based on transgender status is
21 inherently sex or gender discrimination. They cannot be
22 separated.

23 So here the plan excludes sex reassignment surgery,
24 something that only transgender people need. It's dictating
25 the very sex characteristics that the employee has. Labeling

1 it as transgender status does not remove Mr. Musgrove from the
2 protections of Title VII based on sex.

3 THE COURT: It's your belief, even under the Eleventh
4 Circuit precedent, that if the University of Georgia fired
5 somebody because they were transgender that that person would
6 have a Title VII claim.

7 MR. LEWIS: Yes, because there's no way they could
8 have made that decision without having sex on the brain.

9 THE COURT: Right. But under the current state of
10 Eleventh Circuit law, if the University of Georgia fired
11 someone for being gay, that person would not have a Title VII
12 claim.

13 MR. LEWIS: If it was strictly based on sexual
14 orientation, correct.

15 THE COURT: That's true. I mean that a person fired
16 for being gay in the Eleventh Circuit does not have a Title VII
17 claim currently.

18 MR. LEWIS: Unless they allege a gender stereotyping
19 claim separately, yes.

20 THE COURT: And explain to me how under Eleventh
21 Circuit precedent someone who is fired because they are gay has
22 no Title VII claim and someone who is fired because they are
23 transgender has a claim. Explain that to me. We're
24 interpreting the same statute. Title VII says that you shall
25 have no — that you cannot discriminate on the basis of sex.

1 The Eleventh Circuit has said if someone is fired because they
2 are gay, that is not a violation of Title VII. The Eleventh
3 Circuit, you believe, has held that if someone is fired because
4 they are transgender, they do have a claim.

5 MR. LEWIS: Yes.

6 THE COURT: Tell me how you reconcile those two.

7 MR. LEWIS: *Glenn v. Brumby* indicated that it was
8 impossible to fire someone for being transgender without
9 invoking gender stereotypes.

10 THE COURT: How is it not impossible to fire somebody
11 for being gay without invoking gender stereotypes? You think
12 the Eleventh Circuit blew it --

13 MR. LEWIS: Yes.

14 THE COURT: -- on the question of whether or not
15 Title VII applies to persons who are gay.

16 MR. LEWIS: Absolutely. And other circuits have
17 found that they are protected.

18 THE COURT: And those two seem to be irreconcilable,
19 but that's what -- see, I say "seem to be." But that's what
20 Judge Pryor was trying to reconcile in his concurrence, I
21 think.

22 Okay. Ms. Seinberg?

23 MS. SEINBERG: Yes, Your Honor.

24 THE COURT: You are seeking Eleventh Amendment
25 immunity with regard to the ADA claim. Do you acknowledge that

1 Congress generally expressed an intent to abrogate Eleventh
2 Amendment immunity with regard to claims under the ADA against
3 the states?

4 MS. SEINBERG: Yes.

5 THE COURT: Okay. So you are not making any
6 contention here that while Congress may have intended to
7 abrogate Eleventh Amendment immunity generally, they did not
8 intend to abrogate Eleventh Amendment immunity with regard to
9 this type of claim. You are not making that argument, are you?

10 MS. SEINBERG: No. This is only --

11 THE COURT: Okay. Your argument is that on the
12 second prong of abrogation that they did not -- there's no
13 constitutional authority for them to have abrogated Eleventh
14 Amendment immunity for this type of claim.

15 MS. SEINBERG: Right. In the public employment
16 context and in this context which is an exclusion in an
17 employer-provided health plan.

18 THE COURT: And your position is that for them to
19 have had constitutional authority to abrogate Eleventh
20 Amendment immunity in this context, then the allegations would
21 need to support a claim that the plaintiff's Fourteenth
22 Amendment equal protection rights have been violated?

23 MS. SEINBERG: Under the actual violation theory
24 articulated in *U.S. v. Georgia*, then, yes, the plaintiff would
25 have to allege conduct that violated the ADA and simultaneously

1 violated the Fourteenth Amendment.

2 THE COURT: And is it your argument that what would
3 have to violate the Fourteenth Amendment is the classification
4 of this disability and not a classification based on gender?

5 MS. SEINBERG: Correct.

6 THE COURT: In other words --

7 MS. SEINBERG: We think that --

8 THE COURT: This does not directly implicate *Glenn v.*
9 *Brumby*, because here you are looking at a decision that
10 classifies some things as disabilities and some things as not.

11 MS. SEINBERG: That's correct. We think the sex and
12 transgender status claims would be irrelevant to this analysis
13 because the ADA only concerns disability discrimination. So --

14 THE COURT: So the question here would be whether or
15 not there was a rational basis for excluding the disability of
16 gender dysphoria compared to other disabilities?

17 MS. SEINBERG: Whether there was a rational basis for
18 the exclusion, correct.

19 THE COURT: So whether there would be a rational
20 basis for being able to sue the state under the ADA for some
21 disabilities but not being able to sue the state for the
22 disability of gender dysphoria.

23 MS. SEINBERG: I'm not sure I completely understand
24 the question. But --

25 THE COURT: I'm trying to -- for there to be a

1 Fourteenth Amendment violation, there needs to have been a
2 classification of separating people based upon certain reasons.
3 Correct? I mean, that's what the Fourteenth Amendment is all
4 about. You have got to treat similarly situated people
5 similarly. I mean, generally that's the principle; correct?

6 MS. SEINBERG: Correct.

7 THE COURT: And so you, first of all, look at what
8 the classification is, how you are treating persons
9 differently. And here the state is clearly subject to suit
10 under the ADA for some disabilities.

11 MS. SEINBERG: That's right.

12 THE COURT: And there's not Eleventh Amendment
13 immunity for all disabilities.

14 MS. SEINBERG: That's right.

15 THE COURT: You are subject to sue — employees who
16 have disabilities can sue you under the ADA under certain
17 context.

18 MS. SEINBERG: That's right.

19 THE COURT: Here you are saying that they would not
20 be able to make a claim based upon a disability of gender
21 dysphoria?

22 MS. SEINBERG: No, Your Honor. What we're
23 alleging —

24 THE COURT: What are you saying?

25 MS. SEINBERG: — is that we're immune from monetary

1 damages under the ADA in this context. We're not --

2 THE COURT: Why?

3 MS. SEINBERG: -- saying there's no remedy here.
4 There's still a claim for prospective injunctive relief, and
5 there's still a claim under the rehab act which follows it.

6 THE COURT: Why are you not subject to monetary
7 damages under the ADA?

8 MS. SEINBERG: In order for Congress to properly
9 abrogate sovereign immunity, they have to act pursuant to a
10 valid grant of Congressional authority. They can do that in
11 two ways. One is under the congruent proportionality test. If
12 they are acting -- enacting prophylactic legislation, they have
13 to establish certain factors which I think we are all familiar
14 with.

15 The other theory of abrogation, which is the one
16 we're discussing, is the actual violation theory which is they
17 can abrogate sovereign immunity if the conduct that they are
18 targeting also actually violates the Fourteenth Amendment.

19 So the inquiry is whether the rights at issue here,
20 the claim at issue here, also independently violates the
21 Fourteenth Amendment or the Equal Protection Clause. The
22 inquiry would be conducted in the abstract not based on
23 evidence. And it's not determined by what the actual
24 motivations really were. The inquiry is whether a
25 disability-based distinction or exclusion in a health plan

1 could violate the Equal Protection Clause. We maintain that it
2 cannot.

3 THE COURT: Don't you look at the specific one that's
4 being claimed?

5 MS. SEINBERG: Even looking at this specific one
6 that's being claimed —

7 THE COURT: Well, isn't that the inquiry?

8 MS. SEINBERG: Yes. Even looking at the specific one
9 that's being claimed, which is an exclusion for — I think it's
10 termed "sex change surgery" in the plan — the inquiry is
11 whether there's any conceivable rational basis for that
12 exclusion. Again, that inquiry is done in the abstract. We
13 have articulated a conceivable rational basis for an exclusion,
14 which is cost. It's the plaintiff's burden to negate every
15 conceivable rational basis that can be hypothesized.

16 THE COURT: Okay. So you focus not on the, quote,
17 disability, but on what you are not covering. You are not
18 focused on gender dysphoria as the disability that makes the
19 gender change procedure medically necessary. You are focused
20 on whether simply prohibiting that type of surgery violates the
21 Fourteenth Amendment.

22 MS. SEINBERG: Right. And, in a way, looking at
23 whether particular healthcare exclusions in a plan can amount
24 to constitutional proportions. We're not contending that those
25 rights, to the extent there's a right to challenge a healthcare

1 exclusion, cannot be vindicated through the ADA or the rehab
2 act. In fact, we think that that's the proper way to vindicate
3 a claim based on an exclusion. But that doesn't mean that
4 those exclusions rise to constitutional proportions. To find
5 that they do would have far-reaching consequences. There are
6 many exclusions in that plan. If they were found to be
7 protected by the Constitution and subject to constitutional
8 challenges —

9 THE COURT: But don't you have to look at — in the
10 analysis, the actual violation analysis, don't you have to look
11 at each specific exclusion? You don't look at just generally
12 whether it's reasonable for the employer to have adopted those
13 exclusions. You have to look at the one that's being claimed
14 to support the Equal Protection Claim specifically; correct?

15 MS. SEINBERG: Right. And we addressed this specific
16 exclusion in our brief.

17 THE COURT: All right. So the question is whether
18 they have alleged sufficient facts in their complaint which, if
19 taken as true, would lead to the plausible conclusion that
20 there was no rational basis for excluding this procedure.

21 MS. SEINBERG: That's correct.

22 THE COURT: You don't get into whether it's gender
23 discrimination, sex discrimination. It's just whether
24 excluding this procedure, whether there's a rational basis for
25 it.

1 MS. SEINBERG: Whether there's any conceivable
2 rational basis. Yes, Your Honor.

3 THE COURT: And so if the Board of Regents' rational
4 reason is cost, it doesn't matter whether they were -- whether
5 the exclusion disproportionately affects people based on their
6 gender.

7 MS. SEINBERG: I do not think that would change the
8 analysis because the analysis is whether the plaintiff can meet
9 his burden to negate every conceivable rational basis.

10 THE COURT: What if the plan permitted breast
11 reconstruction surgery for someone that had a mastectomy
12 because of breast cancer, but it excludes breast reduction for
13 someone suffering from gender dysphoria? Would that just go to
14 whether there was a rational basis for the exclusion?

15 MS. SEINBERG: I think in the disability context,
16 which is subject to rational basis review because there's no
17 suspect class here and no fundamental right implicated, yes,
18 the inquiry would again be whether there's any conceivable
19 rational basis for the exclusion or for the decisions that were
20 made in the context of the exclusion.

21 THE COURT: You wouldn't even get into whether or not
22 the exclusion in some way was motivated by some type of sexual
23 stereotype.

24 MS. SEINBERG: At this stage of the analysis and the
25 abrogation analysis, which is done in the abstract and not

1 based on evidence, that wouldn't be relevant. That may be
2 relevant evidentiary-wise in an ADA claim post discovery, but
3 at this stage of the analysis, evidence and motivations are
4 entirely irrelevant.

5 THE COURT: Mr. Lewis, what facts have you --

6 I guess, Ms. Seinerberg, it's your position that the
7 plaintiff -- if it has -- how can this be decided at motion to
8 dismiss as opposed to summary judgment if I'm going to have to
9 consider your reason for making the exclusion?

10 MS. SEINBERG: Well, the Supreme Court and the
11 Eleventh Circuit both make clear that this is not about what
12 the actual reasons were.

13 THE COURT: So does the plaintiff have to guess at
14 what your reason is and then counter it with facts in its
15 complaint, or does it just have to show that out of the entire
16 universe of reasons for having this exclusion there is no
17 rational one?

18 MS. SEINBERG: My understanding of the analysis is
19 that in the abstract the plaintiff would need to show that
20 there could be no rational basis for this exclusion.

21 THE COURT: So they have got the burden in their
22 complaint of alleging facts that would support the conclusion
23 that there's no rational reason out there?

24 MS. SEINBERG: Yes. To some extent --

25 THE COURT: So they would -- okay.

1 MS. SEINBERG: But in the cases that we cited in our
2 brief, the Court conducts its own independent inquiry into
3 whether there are any conceivable -- not actual but
4 conceivable -- rational bases for a decision.

5 THE COURT: It's not like the *McDonnell Douglas* in
6 the employment situation where you have got to articulate your
7 reason and then they can show that it's pretextual.

8 MS. SEINBERG: Correct.

9 THE COURT: Here at the complaint stage the Court has
10 to look at the situation and say, Is there any rational reason
11 for them to have made this exclusion --

12 MS. SEINBERG: I think it's --

13 THE COURT: -- other than the facts alleged. And if
14 there is some rational reason, even if there's nothing in the
15 complaint or the record showing what that reason is, if the
16 Court says there's a reason, that's enough to dismiss their
17 complaint, to find Eleventh Amendment immunity for the damages
18 claims.

19 MS. SEINBERG: It's enough to say that there is no
20 independent equal protection violation here, meaning that --

21 THE COURT: Which would result in there being no
22 abrogation.

23 MS. SEINBERG: No abrogation.

24 THE COURT: Which means that they would not have a
25 damages remedy for the ADA claim.

1 MS. SEINBERG: That's correct.

2 The other part of our briefs though is that *Garrett*,
3 a Supreme Court case, also found that there has been no
4 abrogation of Eleventh Amendment immunity under Title I of the
5 ADA under the congruence and proportionality test. All of the
6 district courts in this circuit that we could find also
7 uniformly held that *Garrett* applies to Title II for the same
8 reasons. So when looking at the ADA as prophylactic
9 legislation, it's routinely found that immunity was not
10 properly abrogated for monetary damages.

11 THE COURT: All right, Mr. Lewis. What is the basis
12 of your argument that no rational reason exists for excluding
13 breast reduction surgery?

14 MR. BARRY: Your Honor, I can answer the question.
15 And then I would like to drop back to address a few of the
16 points that they raised.

17 THE COURT: Does the policy exclude all breast
18 reduction surgeries or just breast reduction surgeries for
19 people suffering from gender dysphoria?

20 MR. LEWIS: It's the latter.

21 MR. BARRY: The latter, your Honor.

22 THE COURT: Okay. So if you have got a male or a
23 female that's suffering from some kind of physical condition
24 that requires a breast reduction, as long as they don't have
25 gender dysphoria, they can get the operation?

1 MR. LEWIS: Correct.

2 MR. BARRY: So, Your Honor, the example here that the
3 Board of Regents argues this idea that health insurance policy
4 exclusions cannot ever amount to constitutional violations,
5 that's breathtakingly broad and incorrect. So irrational
6 prejudice, which we assert here, based on disability can
7 invalidate any state action including a health insurance
8 exclusion. *Cleburne* tells us that.

9 But in addition -- and I would take issue with the
10 Board of Regents here -- we have also alleged discrimination
11 based on sex, based on transgender status. In other words,
12 heightened scrutiny applies. Heightened scrutiny. Imagine a
13 defendant who's motivated by racial animus who excludes
14 coverage for sickle cell anemia. Imagine a defendant who's
15 hostile to Jewish people who excludes coverage for Tay-Saches.
16 The Board of Regents' argument carried to its logical exclusion
17 says that that black plaintiff and that Jewish plaintiff
18 ultimately lose their case. And as I read the supplemental
19 brief, they are not even entitled to bring a damages claim.

20 THE COURT: Well, they, quote, lose their case. They
21 would still have a claim under Title VII if it were determined
22 that they were discriminated against based upon their race or
23 their ethnicity, I think. Now, they may not have a claim
24 for -- may or may not have a claim for monetary damages under
25 the ADA.

1 MR. BARRY: The other points I wanted to raise, Your
2 Honor, and very briefly, the Board of Regents appears to be
3 conflating alleging an equal protection violation and proving
4 one. That's a crucial distinction here. The *Klingler* case
5 that they cite proves that out. There the Court said, We have,
6 quote, more than sufficient evidence before us. That case was
7 not a motion to dismiss case, the *Klingler* case they cite. All
8 we have to do is allege an actual violation.

9 And my last point is, we have done so. We have done
10 so under -- alleging disability discrimination under Equal
11 Protection Clause as well as these other sex based.

12 THE COURT: But you agree that the Court has to look
13 at your factual allegations -- not just your conclusions but
14 your factual allegations -- that allege that the plaintiff in
15 the case was denied a breast reduction surgery that was
16 medically necessary to treat the plaintiff's gender dysphoria,
17 and the Court has got to look at that factual allegation in
18 determining whether there is any rational basis for excluding
19 that procedure from coverage. And if there is a rational
20 basis -- I don't have to determine what their basis was, but I
21 have got to determine whether there was any rational basis for
22 doing that. And if there was, then there's not a Fourteenth
23 Amendment violation for purposes of abrogation of Eleventh
24 Amendment immunity.

25 MR. BARRY: I disagree, Your Honor.

1 THE COURT: You don't agree that's the analysis?

2 MR. BARRY: That's what you do at summary judgment.

3 Remember *Cleburne*. We've got to have some evidence. We've got
4 to be able to conduct discovery to see if a rational prejudice
5 is at work. We do that at summary judgment.

6 THE COURT: So you disagree that under -- I mean, the
7 reason we're doing rational basis analysis is because this is
8 not a suspect class or a semisuspect class.

9 MR. BARRY: We allege it is, Your Honor.

10 THE COURT: Okay.

11 MR. BARRY: Gender dysphoria implicates a sex-based
12 discrimination.

13 THE COURT: But that's not -- that's not the analysis
14 for abrogation --

15 MR. BARRY: I think it is, Your Honor.

16 THE COURT: -- under the ADA.

17 MR. BARRY: *U.S. v. Georgia* --

18 THE COURT: Don't you look at the nature of what's
19 excluded?

20 MR. BARRY: You look at *United States v. Georgia*.
21 That was an inmate who alleged this damages claim, and the
22 Court said, you know, he's alleging an Eighth Amendment claim.
23 The Court didn't -- that's an Eighth Amendment claim, cruel and
24 unusual punishment. The Court didn't say that it has to be
25 pegged to disability rational basis under -- I mean, that was

1 an Eighth Amendment claim. Here we allege, sure --

2 THE COURT: Well, sure, that's different. The reason
3 it's tied to rational basis is because that's what the
4 Fourteenth Amendment requires in a case involving a nonsuspect
5 class.

6 MR. BARRY: But what we're arguing, Your Honor, is
7 under disability discrimination, applying rational basis, we
8 win, at least at this stage because we --

9 THE COURT: So your contention is that even if they
10 could have had a rational basis, even if they could have had
11 that, such as cost, if in fact they chose this exclusion based
12 upon gender --

13 MR. BARRY: Correct.

14 THE COURT: -- then that's a violation. That's a
15 violation of equal protection.

16 MR. BARRY: Correct. And if they chose this -- they
17 had a legitimate reason for cost -- but they also don't like
18 people with gender dysphoria, that's irrational prejudice under
19 *Cleburne*. So they lose there, too.

20 THE COURT: Okay. So if they have got mixed motives
21 that could make -- even if one is rational and one is not, the
22 fact that it is infected with an irrational basis makes the
23 entire decision irrational.

24 MR. BARRY: That's *Cleburne*.

25 THE COURT: Ms. Seinberg, do you disagree with that?

1 Is it your position that the Court just has to look at this
2 exclusion hypothetically and say, Is there some rational reason
3 that the state could have done this, and therefore, if there
4 is, there's no Fourteenth Amendment violation for purposes of
5 abrogation?

6 MS. SEINBERG: I do think in the abrogation analysis
7 that we're traveling under motivations are entirely irrelevant.
8 So it is just a conceptual analysis about whether --

9 THE COURT: Those are kind of squishy lawyer words.
10 I'm interested in kind of nailing this down.

11 Do you think it's my job to simply determine whether
12 an employer could exclude this type of procedure for a rational
13 reason; and if they could, it doesn't really matter why, in
14 this case, you decided to exclude it? Is that your argument?

15 MS. SEINBERG: Yes.

16 THE COURT: Okay. So even if there was gender
17 stereotype animus in excluding this procedure, even if the
18 president of the University told Blue Cross, We don't want
19 these procedures because of my animus toward gender
20 stereotypes -- which I'm not suggesting he has those. I'm just
21 doing this hypothetically. If that happened, yet I could
22 conclude in the abstract that they -- a rational employer could
23 do this based on cost, then you think that there would still be
24 no Fourteenth Amendment --

25 MS. SEINBERG: No. I would like to clarify

1 something. We're not making any argument -- we haven't made
2 any argument about whether a race-based or gender-based
3 distinction in a health insurance policy could amount to a
4 constitutional violation.

5 THE COURT: That's what they are claiming you did.
6 That's what they are claiming you did.

7 MS. SEINBERG: But in the ADA abrogation analysis,
8 we're only talking about disability-based distinctions.

9 THE COURT: Well, that's what I'm asking you. I'm
10 asking you with regard to the ADA claim, if they alleged in
11 their complaint that the president of the university directed
12 Blue Cross to have this exclusion because of his animus against
13 transgender persons and they put this exclusion in there for
14 that reason, in analyzing whether there is Eleventh Amendment
15 immunity and abrogation of that immunity and whether this
16 exclusion violates the Fourteenth Amendment Equal Protection
17 Clause, do I just disregard that motivation -- which would
18 demonstrate discriminatory animus based upon gender
19 stereotype -- do I just disregard that and think to myself, is
20 there some reasonable, rational reason out there that they
21 could have had this exclusion, notwithstanding the fact that
22 it's alleged that they did it based upon this discriminatory
23 animus? Is it your argument that's what I do is just determine
24 in the abstract?

25 MS. SEINBERG: I think if there was evidence of that,

1 it would speak to the gender claims --

2 THE COURT: Okay.

3 MS. SEINBERG: -- but not ADA.

4 THE COURT: I know you are hesitant -- you are very
5 careful. And I appreciate that. That's what a good lawyer
6 should be.

7 But answer my question directly for the disability
8 claim. Is it your position that with regard to the disability
9 claim there would be no abrogation for the disability claim
10 because I have got to just look at whether there's a rational
11 basis in the abstract?

12 MS. SEINBERG: Yes.

13 THE COURT: Okay. I mean, I know that's hard to
14 reach that conclusion because it seems a little harsh.

15 MS. SEINBERG: Well, I think --

16 THE COURT: But that's the way I understand your
17 argument. And I'm not saying I have rejected it. But as I
18 understand it, all of these allegations about gender stereotype
19 animus are irrelevant on the ADA claim analysis with regard to
20 abrogation, that if there is some theoretical rational basis,
21 it's your position that the exclusion is okay. Otherwise, you
22 would have constitutional litigation with regard to --

23 MS. SEINBERG: Everything.

24 THE COURT: -- exclusions.

25 MS. SEINBERG: That's correct.

1 THE COURT: What about it, Mr. —

2 MS. SEINBERG: Your Honor.

3 THE COURT: Yes. Do you want to add something to
4 that particular point?

5 MS. SEINBERG: Just to point out that Equal
6 Protection Clause claims based on gender would not be relevant
7 to this analysis. So that type of evidence —

8 THE COURT: That's what I understand your argument to
9 be, that deciding this — that determining that the university
10 or the Board of Regents has not ab — well, in determining for
11 this claim there's no abrogation of Eleventh Amendment
12 immunity, all that is deciding is that there's no damage claim
13 under the ADA against the state or the university or the Board
14 of Regents. It has no bearing on whether there is a
15 gender-based Title VII or Fourteenth Amendment claim.

16 MS. SEINBERG: That's correct. That's our position.

17 THE COURT: Okay.

18 Mr. Lewis, your position is that you can't — the
19 Court is not supposed to just do this theoretical analysis
20 separate and apart from your factual allegations with regard to
21 motivation, that she's just wrong when she says I cannot
22 consider motivation.

23 MR. LEWIS: Yes. And I would underscore that, even
24 setting aside the gender-based motivation, the disability
25 distinction here is sufficient because people with gender

1 dysphoria are reviled. And that is a suspect class. It has
2 been found to be so. It's a little hard to distinguish the sex
3 and disability claims because they overlap. I mean, the word
4 "gender" is right in the diagnosis. But it is an animus-based
5 exclusion. We're also talking about *Romer v. Evans*, that
6 animus is not a rational basis. So yes, we need to get the
7 facts here. And —

8 MR. BARRY: The only other comment I'd make, Your
9 Honor, as to my alleging versus proving one, this conflating of
10 alleging an equal protection violation versus proving one, they
11 are forcing us in a position of never — of people with
12 disabilities never being able to get over this hurdle because a
13 judge could always hypothesize a reason at this stage. We do
14 not have to at this particular stage. The *Klingler* decision is
15 clear on that.

16 THE COURT: Well, what they are actually saying is
17 that you could not assert a disability claim against the
18 state —

19 MR. BARRY: For damages.

20 THE COURT: — for damages.

21 MR. BARRY: Yeah.

22 THE COURT: It would not preclude a disability claim
23 against a private employer, I suppose, because this is all
24 about Eleventh Amendment immunity —

25 MR. BARRY: Correct.

1 THE COURT: -- where the state can be sued for
2 damages.

3 MR. BARRY: And my other point with that was they had
4 in their partial motion to dismiss, Your Honor -- and I'll be
5 quick -- they didn't contest that we alleged an equal
6 protection violation. Our assertion -- and *U.S. v. Georgia* has
7 some language in there involving the defendant in that case --
8 they didn't contest that we asserted -- that we alleged an
9 equal protection violation. We have. We still have. And that
10 alone I think is sufficient.

11 THE COURT: But your equal protection violation is
12 based upon gender.

13 MR. BARRY: No. It's based on -- we marched through
14 -- it's based on disability --

15 THE COURT: Okay.

16 MR. BARRY: -- it's based on sex -- two separate
17 theories -- and it's based on transgender status. It's based
18 on all three, the latter two of which require heightened
19 scrutiny. That was our three. What Board of Regents has done
20 is to cherry-pick just the first. I understand why they are
21 advocating that, but just the first.

22 THE COURT: So you have a separate Fourteenth
23 Amendment claim based on disability discrimination?

24 MR. BARRY: Yes. We have --

25 THE COURT: Of course, that -- of course, under 19 --

1 and you are pursuing that up through 1983 which -- you can't
2 get damages on that.

3 MR. BARRY: No. We have to state the actual
4 violation under equal protection and we get the damages under
5 the ADA. And we have stated three separate equal protection
6 violations.

7 THE COURT: But I'm saying if you have got a
8 separate ADA Fourteenth Amendment claim, separate from -- if
9 you have got a separate disability discrimination claim under
10 the Fourteenth Amendment brought through 1983 -- do you have
11 that claim?

12 MR. BARRY: Yes, we have three.

13 THE COURT: Even if you prevail on that, you don't
14 get damages under 1983 against the state.

15 MR. BARRY: Correct.

16 THE COURT: Okay.

17 MR. BARRY: But what *U.S. v. Georgia* says is, but the
18 fact that we have alleged it, we get past -- we get to abrogate
19 their immunity under the ADA. That's what *U.S. v. Georgia*
20 says. We allege this other constitutional violation -- here
21 we've alleged three -- that allows us to abrogate immunity in
22 this case.

23 Your Honor, I can just note for your own purposes --
24 and I will include this in a supplemental --

25 THE COURT REPORTER: Whoa. Whoa. Whoa.

1 MR. BARRY: Sorry. Samuel Bagenstos, in his
2 disability rights law treatise, he talks about the upshot of
3 *U.S. v. Georgia*. When a plaintiff alleges —

4 THE COURT: Listen, I'm sure there are all kind of
5 Law Review articles on this subject where professors are
6 describing both sides of this issue.

7 MR. BARRY: Yeah.

8 THE COURT: But —

9 MR. BARRY: He was deputy assistant of the Civil
10 Rights Division Department of Justice and litigated *Garrett*
11 before the Supreme Court. That's the only reason I mentioned
12 him. I do —

13 THE COURT: What's the citation to his —

14 MR. BARRY: The citation is page 454, Samuel
15 Bagenstos, *Disability Rights Law, Case and Materials, Second*
16 *Edition*. I offer it only because I found it helpful with this
17 exact same issue. This is a difficult issue.

18 THE COURT: Okay.

19 MR. BARRY: Thank you.

20 THE COURT: Where are you from?

21 MR. BARRY: Quinnipiac. Quinnipiac University School
22 of Law in Connecticut.

23 THE COURT: So you are a law professor?

24 MR. BARRY: Yes.

25 THE COURT: Okay. So that's why all these law

1 questions are going to you. And -- well, I didn't know I had
2 been quizzing a law professor. No wonder you are so difficult
3 to tie down.

4 MR. BARRY: You've been doing a very good job, Your
5 Honor.

6 And, Mr. Lewis, you are a private practitioner, or
7 you work for some group?

8 MR. LEWIS: I work for a nonprofit called Transcend
9 Legal.

10 THE COURT: So y'all go all over the country
11 litigating these issues?

12 MR. LEWIS: We focus exclusively on transgender
13 health insurance coverage.

14 THE COURT: So do you have any circuit court of
15 appeals opinions on these issues yet? I guess that would have
16 been in your brief if you did. Everything you have got is in
17 your brief?

18 MR. LEWIS: Yeah. The *Tovar* case did go up to the
19 Eighth Circuit, but it's mostly district courts right now that
20 has found this to be discrimination.

21 THE COURT: Where is your home?

22 MR. LEWIS: New York City.

23 THE COURT: Okay.

24 Ms. Seinberg, let me ask you this: If the policy in
25 question does in fact allow for breast reduction surgery -- I

1 mean, the exclusion we're talking about here, the only thing
2 he's been denied so far is the claim for breast reduction
3 surgery; correct?

4 Is that correct? Is that the exclusion that — is
5 that what has been denied? Breast reduction surgery is the
6 treatment that the plaintiff was denied?

7 MR. LEWIS: Yes. And future care. Also hormones and
8 future surgeries.

9 THE COURT: Okay. So the policy excludes breast
10 reduction surgery for the condition of gender dysphoria even if
11 it's determined that it's medically necessary. If the policy
12 covers breast reduction surgery for other medically necessary
13 reasons, then how can cost be a rational basis for not covering
14 it for what would undoubtedly be a very small slice of the
15 employees?

16 MS. SEINBERG: The exclusion is for a sex change
17 surgery and drugs for a sex change surgery, I believe is how
18 it's worded. So it's not tailored to any one surgery in
19 particular. I would imagine that involves many different types
20 of procedures and prescriptions and drugs.

21 THE COURT: So I have to look at the total exclusion,
22 not just what this plaintiff did not get because of the
23 exclusion?

24 MS. SEINBERG: I believe the claim is challenging the
25 exclusion itself.

1 THE COURT: But in determining whether there's a
2 rational basis, am I to determine whether I think there's a
3 rational reason for having an exclusion that does not allow for
4 reimbursement for breast reduction surgery, or am I to look at
5 it hypothetically, the entire exclusion, and say is there a
6 reasonable basis, a rational basis, for them to have this
7 entire exclusion?

8 MS. SEINBERG: I think the inquiry is the entire
9 exclusion and whether there's a rational basis for it.

10 THE COURT: Okay. It would be hard to argue that
11 there's a rational basis for letting somebody that's overweight
12 and that needs breast reduction to help their back problem and
13 yet not allow somebody with this condition to have breast
14 reduction surgery. Wouldn't it be hard to argue that there's a
15 rational basis for that?

16 MS. SEINBERG: It's hard for me to speculate.

17 THE COURT: That's what you are asking me to do. You
18 are asking me to speculate as to -- you say the law lets me do
19 it, but then you are saying I have got to determine whether
20 there's not only -- I mean, that's the problem -- not the
21 problem, but the difficulty here is, according to your
22 interpretation of the law -- which may be correct; the Court is
23 not determining whether or not you had -- the university had --
24 or the Board of Regents had a rational basis. But the Court is
25 supposed to determine whether out there in the universe of

1 rationality is there some reasonable basis to exclude this.

2 MS. SEINBERG: I think the inquiry is whether there's
3 a rational basis for this exclusion. And there are many
4 exclusions. And they are all arguably there because of cost or
5 other considerations being just one of them. There's constant
6 decisions being made in the insurance sector, weighing risks
7 and clarifying risks and administering risks.

8 THE COURT: Are you with the state law department?

9 MS. SEINBERG: Yes, Your Honor.

10 THE COURT: Okay. Is it — do y'all consistently
11 take the position that there can be no disability — no claims
12 under the ADA against state agencies or the state directly for
13 damages based upon exclusions in healthcare plans because
14 exclusions — there are always a rational basis for any
15 exclusion?

16 MS. SEINBERG: This is a novel issue. This has not
17 been addressed before, to my knowledge, in our office.

18 THE COURT: If I adopted your argument here, that
19 would be the effect of that, wouldn't it? It would be there
20 would be no disability claims against the state for money
21 damages based on exclusions.

22 MS. SEINBERG: Well, there is a rehab act claim here,
23 so that will proceed regardless of this. The point we're
24 making is that healthcare exclusions can't amount to
25 constitutional proportions. The fact that the ADA permits some

1 disability-based distinctions in healthcare plans shows that
2 those types of distinctions are not always unlawful and
3 certainly couldn't be found to be always unconstitutional.
4 Insurers are permitted under the ADA to administer/classify
5 risks as long as it's in accordance with state law. This shows
6 that the ADA doesn't require equal coverage for every type of
7 disability. It also shows that to the extent there's a right
8 to be vindicated here, it's through the ADA and through the
9 rehab act not through the Constitution. It would be illogical
10 to find that exclusions could be found to be unconstitutional
11 when the ADA has deemed some of them to be lawful. I think the
12 inquiry is — or would be broadly applied to healthcare
13 exclusions and plans, which does have far-reaching
14 implications. And I think the consequences of that illustrate
15 that while —

16 THE COURT: Doesn't that — doesn't the fact that —
17 your contention is that the ADA specifically — is your
18 argument that the ADA specifically excludes transgender-related
19 conditions from being covered under the ADA, that that is —
20 supports your position that there should be Eleventh Amendment
21 immunity?

22 MS. SEINBERG: No. That doesn't relate to our
23 position. We're not advocating that at all. This is just
24 about —

25 THE COURT: Well, what is your argument with regard

1 to the state -- to the -- with regard to a state-compliant
2 plan? Is that not your argument either? You mentioned just
3 then that there was something about the ADA that would be
4 inconsistent with the Court finding.

5 MS. SEINBERG: Not inconsistent with, just -- the ADA
6 has a specific provision that applies to all the titles of the
7 ADA that says insurers shall not be prohibited from
8 administering risks, classifying risks, as long as it's in
9 accordance with state law. To me that evidence is the fact
10 that healthcare exclusions were not originally protected by the
11 Constitution.

12 Congress took it a step further in enacting the ADA
13 to govern exclusions such as this. Much like your case you
14 reference where the laws existing at the time didn't cover
15 pregnancy discrimination, so a law was enacted to address it.
16 The ADA was enacted and then in part addresses healthcare
17 exclusions. My point in directing our attention to that is to
18 show that that protection would not have been borne out of the
19 Constitution, but was borne out of the law.

20 THE COURT: Okay. And I understand you have not
21 moved to dismiss the Title VII claim.

22 MS. SEINBERG: That's correct.

23 THE COURT: Is it the state's position that there is
24 no Title VII claim under these circumstances?

25 MS. SEINBERG: We have not taken a position on that.

1 Our thoughts were that we would need to develop a record and
2 evidence to adequately assess all these claims on the merits.

3 THE COURT: So at this point the Board of Regents has
4 taken no position as to whether the plaintiff has a Title VII
5 claim based on gender discrimination?

6 MS. SEINBERG: We did not move to dismiss that claim.

7 THE COURT: No. I know that. I mean, you have
8 answered the complaint. You know what they are claiming. You
9 filed an answer. Is it the position of the Board of Regents
10 that the plaintiff has a gender- or sex-discrimination claim
11 under Title VII? I mean, I'm assuming if you don't know and it
12 depends on their discovery, then your position would be, if
13 they can establish discrimination based on gender stereotype,
14 then they may have a claim.

15 MS. SEINBERG: That's my reading.

16 THE COURT: And it's your position that based upon
17 the evidence you are aware of there's no such evidence to
18 support that? Or you don't know?

19 MS. SEINBERG: We have not been through discovery
20 yet. I don't know. We have --

21 THE COURT: You know what you did. You sold the
22 policy. I mean you offered a policy to the state employees.
23 And you don't know at this stage of the proceedings whether
24 offering that policy with that exclusion violates Title VII?

25 MS. SEINBERG: After having done a lot of research,

1 this area of the law appears very complex and developing and
2 unsettled. I didn't think that at this point, in this
3 preliminary stage, that a motion to dismiss -- or this was ripe
4 for a motion to dismiss. Many of the inquiries depend on
5 evidence which would need to come out in discovery.

6 THE COURT: And is it also the position of the Board
7 of Regents that you don't know yet whether or not they have a
8 claim that this exclusion in this policy violates the
9 Fourteenth Amendment Equal Protection Clause?

10 MS. SEINBERG: Our position is that in the disability
11 context this would not state an equal protection violation. We
12 did not originally address this in our motion.

13 THE COURT: I guess what I'm trying to find out --
14 and I don't really want to get into -- I do not want to get
15 into tactics or, you know, strategy or things that may be based
16 upon decisions unrelated to the law. But is it fair for me to
17 assume that it is the position of the state and the Board of
18 Regents that by not moving for a motion to dismiss the
19 plaintiff's Title VII claim and equal protection claim that the
20 state is acknowledging that they have stated a claim for both
21 of those upon which relief may be granted? Otherwise you would
22 have moved to dismiss them under 12(b)(6).

23 MS. SEINBERG: We did not move to dismiss those
24 claims because we thought they had been adequately pled --

25 THE COURT: Okay.

1 MS. SEINBERG: -- but defend on evidence.

2 THE COURT: So if they end up proving what they have
3 alleged, the state acknowledges that they have got a claim?

4 MS. SEINBERG: We're not contesting their claims at
5 this point as a matter of law.

6 THE COURT: Okay. All right. Well, I have covered
7 what I intended to cover. I mean, it just seems like in light
8 of all that -- there's been no discussion of resolving this
9 case before I make these decisions?

10 MR. LEWIS: We made a settlement demand.

11 THE COURT: Okay. Y'all just considering it?

12 MS. SEINBERG: We are still conferring with our
13 clients and considering it.

14 THE COURT: Okay.

15 MR. LEWIS: Your Honor.

16 THE COURT: So everybody would prefer for me to go
17 ahead and decide those motions before y'all determine that that
18 can't be resolved otherwise?

19 MR. WEBB: Your Honor, I don't.

20 THE COURT: I mean, I usually get defendants in here
21 saying, We didn't move to dismiss the plaintiff's claims in
22 that regard, but we've investigated the matter and we don't
23 think that there's anything to those claims. And we just don't
24 think motion to dismiss is the appropriate stage to get rid of
25 them, but we fully intend and think we will be filing a motion

1 for summary judgment with regard to those claims.

2 When I don't hear that from defense counsel, it
3 suggests to me that perhaps the defense thinks that plaintiffs
4 have meritorious claims and there could be common ground to
5 having them resolved, or the defense has not moved -- is not
6 taking the position openly for some other reason, which I don't
7 really care about. But it seems to me that -- well, if y'all
8 want to settle it, you can settle it. Otherwise, I'm going to
9 decide the motions in due course.

10 Yes, sir?

11 MR. WASHBURN: Your Honor, first, obviously Blue
12 Cross has moved to dismiss all the claims.

13 THE COURT: Right.

14 MR. WASHBURN: Second, point of housekeeping --

15 THE COURT: Yes, sir.

16 MR. WASHBURN: We have argued that they had sued the
17 wrong Blue Cross entity. I wanted to clarify that the two Blue
18 Cross entities have now merged effective January 1; and so
19 therefore, we withdraw the argument that they have sued the
20 wrong entity because there's now only one entity.

21 THE COURT: So is the current defendant the proper
22 defendant?

23 MR. WASHBURN: It is. Blue Cross Blue Shield of
24 Georgia, Inc., was merged into Blue Cross Blue Shield
25 Healthcare Plan, which is the defendant.

1 THE COURT: So did you file a motion to dismiss in
2 that regard?

3 MR. WASHBURN: We did.

4 THE COURT: We'll terminate it.

5 MR. WASHBURN: Well, it's an argument within the
6 motion to dismiss that we advanced.

7 THE COURT: Okay.

8 MR. WASHBURN: And we're simply withdrawing that
9 argument.

10 THE COURT: Very good.

11 All right. I have covered what I intended to cover.
12 But if anybody has any last minute comments that they think I
13 blew right past and they would like to emphasize, then I'll
14 give each side five minutes to do that. If you think we've
15 covered everything adequately, then that's good, too.

16 From the plaintiffs?

17 MR. LEWIS: One point is if the rational basis were
18 cost, then what they should have done was cap the benefits.
19 But there's no basis to totally exclude them.

20 THE COURT: Okay.

21 MR. BARRY: Your Honor, a point on -- and a minor
22 one. But on the ADA 504 exclusion, Blue Cross Blue Shield had
23 discussed this *Parker* case. You were particularly interested
24 in this physical impairment safe harbor. You'll note in the
25 *Parker* case -- I believe it's in a footnote but also some in

1 the text -- the plaintiff did not raise that -- the plaintiff
2 did not allege that gender dysphoria results from a physical
3 impairment. Did not rule on it at all. It does seem that this
4 is the most straightaway determination a court can make to
5 allow gender dysphoria claims under the ADA and 504. The
6 *Parker court* did not address it. Another case, that I will
7 include in the supplemental briefing, *Edmo*, out of the district
8 of Idaho, did. In a couple of sentences allowed a claim to
9 proceed because gender dysphoria is alleged to have resulted
10 from a physical impairment, an atypical interaction.

11 THE COURT: All right.

12 Anything from Blue Cross?

13 MR. WASHBURN: No, Your Honor. I think we have said
14 what we needed to say. Thank you.

15 THE COURT: Board of Regents?

16 MS. SEINBERG: Nothing further, Your Honor. Thank
17 you.

18 THE COURT: Okay.

19 Just a reminder: If anybody wants to file a short
20 supplemental brief -- that I think really should be restricted
21 to any authorities that may have been cited here today that
22 were not in your original briefs -- with just a short
23 description of what proposition they support, do so by this
24 Friday.

25 Thank you for coming. We're adjourned.

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(Proceedings concluded at 12:14 p.m.)

CERTIFICATE OF REPORTER

I, Betsy J. Peterson, Official Court Reporter of the United States District Court, in and for the Middle District of the State of Georgia, Columbus Division, a Registered Professional Reporter, do hereby CERTIFY that the foregoing proceedings were reported by me in stenographic shorthand and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete, and true record of said proceedings.

This 8th day of March, 2019.

s/Betsy J. Peterson
Betsy J. Peterson, CRR, RPR, CCR
Federal Official Court Reporter