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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff,
vs.
ALEX M. AZAR II, et al.,
Defendants.

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA,
Plaintiff,
vs.
ALEX M. AZAR, et al.,
Defendants.

COUNTY OF SANTA CLARA et al,
Plaintiffs,
vs.
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants.

No. C 19-02405 WHA
Related to
No. C 19-02769 WHA
No. C 19-02916 WHA

DECLARATION OF SARAH HENN, MD, MPH, CHIEF HEALTH OFFICER, WHITMAN-WALKER HEALTH, IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Date:	October 30, 2019
Time:	8:00 AM
Dept:	12
Judge:	Hon. William H. Alsup
Trial Date:	None Set
Action Filed:	5/2/2019

I, Sarah Henn, declare:

1. I am Chief Health Officer of Whitman-Walker Clinic, Inc., d/b/a Whitman-Walker Health (Whitman-Walker). I received my medical degree from the University of Virginia; interned at Emory University; was a resident in Internal Medicine at the University of Virginia; and completed an Infectious Disease Fellowship at the University of Maryland. I earned a Masters of Public Health degree at The Johns Hopkins Bloomberg School of Public Health. I maintain active board certifications in Infectious Disease and Internal Medicine. I have been a physician at Whitman-Walker since 2007, and became Chief Health Officer in May 2018. I oversee all healthcare-related services at Whitman-Walker, as well as maintain a panel of patients for whom I provide direct care. In addition, I oversee Whitman-Walker's Research Department, am the primary investigator for multiple HIV and Hepatitis C treatment and prevention trials, and am the Leader of our Clinical Research Site for the AIDS Clinical Trials Group funded by the National Institutes of Health. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment and in support of their opposition to Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment.

2. Whitman-Walker provides a range of services, including medical and community healthcare, transgender care and services, behavioral-health services, dental-health services, legal services, insurance-navigation services, and youth and family support. Whitman-Walker provides primary medical care, HIV and Hepatitis C specialty care, and gender-affirming care to transgender and gender non-binary persons within the diverse community of the greater Washington, DC metropolitan area. In calendar year 2018, our medical, dental, behavioral-health and community-health professionals provided health services to 20,797 patients—including medical care to 11,471 individuals, dental care to 2,354 patients, and walk-in sexually-transmitted-infection testing and treatment to 1,719 persons. In 2018, 3,573 of our patients were individuals living with HIV; 1,837 identified as transgender; and 9,990 identified as gay, lesbian, bisexual or otherwise non-heterosexual.

3. Whitman-Walker's patient population, including patients to whom I provide direct care and whose care I oversee, includes many persons who have experienced refusals of healthcare or

who have been subjected to disapproval, disrespect, or hostility from medical providers and staff in hospitals, medical clinics, doctor's offices, or Emergency Medical Services personnel because of their actual or perceived sexual orientation, gender identity, gender presentation, ethnicity or race, religious affiliation, poverty, substance use history, or for other reasons. My patients and those whose care I oversee tell us that they are apprehensive or fearful of encountering stigma and discrimination in healthcare settings because of their past experiences. Many of our patients have delayed medical visits or postponed recommended screenings or treatment because of such fears. Frequently, persons living with HIV, diagnosed with sexually transmitted infections, struggling with substance use disorders, or whose gender identity is different from the sex that they were assigned at birth, face heightened stigma and discrimination and are particularly apprehensive in medical encounters. Our patients' concerns have been magnified by their belief that the federal government is permitting, if not encouraging, healthcare personnel to discriminate against them because of personal moral or religious beliefs in accordance with the Denial-of-Care Rule.

4. Whitman-Walker's mission and fundamental principles of medical ethics that I adhere to in overseeing and providing care to patients dictate that all patients are deserving of the best and most respectful care available to them. All healthcare professionals are taught that their personal beliefs about a patient's actions, identity or beliefs cannot compromise the care that they provide to that patient in any way. Whitman-Walker and I, in my role as Chief Health Officer for Whitman-Walker, communicate that message to all healthcare staff from the beginning of the recruitment process to the first day of employment, and reinforce the message regularly. The possibility that individual providers or other healthcare staff at Whitman-Walker could invoke the Denial-of-Care Rule to opt out of any aspect of care would fundamentally disrupt our care model and operations, violate basic tenets of medical ethics, and could not be accommodated without lasting damage to the health center, patient morale, and our reputation in the community. It would be very difficult, if not impossible, for Whitman-Walker to accommodate individual healthcare staff who object to, for example, providing treatment for gender dysphoria, counseling pregnant clients with their pregnancy termination options, assisting with harm-reduction care for substance abusers, or providing healthcare services to lesbian, gay, or bisexual patients. Any such effort to accommodate

individual employees at the expense of patients would fundamentally compromise Whitman-Walker's mission and the quality of patient care, and would harm patients, including my own.

5. Good medical care is based on trust as well as frank, and full communication between the patient and their provider. In many, if not most encounters, providers need patients to fully disclose all aspects of their health history, sexual history, substance-use history, lifestyle, and gender identity in order to provide appropriate care for the patients' mental and physical health. Incomplete communication, or miscommunication, can have dangerous consequences. For instance, a patient who conceals or fails to disclose a same-sex sexual history may not be screened for HIV or other relevant infections or cancers; and a patient who fails to fully disclose their gender identity and sex assigned at birth may not undergo medically-indicated tests or screenings (such as tests for cervical or breast cancer for some transgender men, or testicular or prostate cancer for some transgender women). Patients need to be encouraged to fully disclose all information relevant to their healthcare and potential treatment, which can only be achieved when patients are assured that the information they provide will be treated confidentially and with respect, and will not be used against them to deny treatment. The Denial-of-Care Rule endangers the provider-patient relationship, and is likely to harm many patients' health, by discouraging patients from full disclosure, and by encouraging providers to avoid topics that may offend their personal moral or religious beliefs in their encounters with patients.

6. Furthermore, there is every reason to believe that the Denial-of-Care Rule's message that healthcare providers and staff have the legal right to refuse care or opt out of serving patients with particular needs, based on personal beliefs, will result in more discrimination against LGBT patients and patients living with HIV at other clinics, doctors' offices, hospitals, pharmacies, and other healthcare facilities outside Whitman-Walker. Even before the Rule was issued, I and other Whitman Walker healthcare providers, including referral coordinators, behavioral-health providers, and other staff, have learned of many instances of discrimination, from our patients and from communications with outside providers and staff. Examples include the following:

a. Whitman-Walker was recently contacted by a transgender woman suffering from tonsillitis. She wanted treatment but knew of no hospital or facility

other than Whitman-Walker where she could go. The caller reported that in her suburban area, she and other transgender individuals she knows are routinely disrespected and poorly treated when they seek medical care, and asked for advice on where transgender patients can receive good care.

b. A gay man reported that he consulted a cardiologist for a heart issue. The cardiologist reviewed his medications and saw that one was Truvada – an antiretroviral medication that is used for "Pre-Exposure Prophylaxis" or "PrEP" – taken by persons who are not HIV-infected to avoid contracting HIV during sex. The cardiologist was startled and disapproving, and began lecturing the patient about what the cardiologist considered his inappropriate sex life.

c. A transgender man, together with his girlfriend, consulted a fertility clinic about their pregnancy options. Clinic staff told them that they would not help people like them.

d. A transgender patient of Whitman-Walker attempted to fill a prescription at a non-Whitman-Walker pharmacy for a hormone prescribed to assist in their gender transition, and was refused by the pharmacist.

e. Our patients seeking to fill prescriptions for Truvada for PrEP have also been refused by some pharmacies.

f. A gay man who is a long-term HIV survivor went to a local hospital emergency room after an accident that occurred during sex. He was treated with contempt by ER staff and was lectured about his sex life.

g. A transgender individual went to a local hospital emergency room suffering from acute abdominal pain. The individual was subjected to intrusive, hostile questioning by ER personnel, loudly and in public, about their anatomy and gender identity.

h. One of our physicians, while in residency at a hospital in a major Midwestern city, heard other residents refuse to refer to transgender patients by pronouns

conforming to their gender identity, citing their religious beliefs. They continued to refuse even when informed that they were violating hospital policy.

i. A transgender woman was scheduled to receive an ultrasound for cancer. The first radiological technician she encountered refused to perform the ultrasound. When she protested, a second technician performed the procedure, but mocked her openly.

j. Transgender patients have reported to us that they have been in medical or mental-health crisis and called for an ambulance, and that the Emergency Medical Service personnel who have arrived on the scene have intentionally used pronouns inconsistent with their gender identity, even when the patients have asked them to stop and told them that their language was increasing their distress.

k. A gay man who was engaged in sex, while under the influence of drugs, experienced a physical episode and was fearful he was having a heart attack. He called an ambulance, but the Emergency Medical Service personnel who arrived belittled him and his situation and refused to take him to an emergency room.

l. Local hospitals and surgeons have refused to perform gender-transition-related surgeries on Whitman-Walker transgender patients, even when they routinely perform the procedures in question on non-transgender patients, including in situations where the patient's insurance would cover the procedure or when the patient was able to pay for the procedure. This has happened with orchiectomies, breast augmentations, and breast reductions - procedures which are all routinely performed for treatment of cancer or for other reasons, not related to gender identity.

m. A number of primary care physicians in our area have refused to prescribe hormone therapy for transgender patients seeking to transition from the sex

they were assigned at birth to their actual gender identity. Many of these doctors have stated that they are not "comfortable" with such hormone therapy.

n. Our providers have seen situations in which a teenager who is transgender or gender-nonconforming has presented at a local hospital with symptoms for which hospitalization was indicated, but their hospitalization was delayed and even denied because hospital personnel took them less seriously than they took other young people with similar presentations who were not transgender.

o. Our transgender patients frequently report instances of being treated with disrespect and hostility by staff in doctors' offices, hospitals, and clinics. Frequently, staff at these facilities will refuse to address patients by their chosen names and gender pronouns, if these are not the same as the patients' legal names and sex assigned at birth, or if patients appear to be transgender. The persistent use of names and pronouns other than what the patients have requested appears intentional and intended to communicate strong disapproval of the patients. I and my staff who frequently consult with transgender patients hear of such experiences from as many as four out of every five transgender patients.

7. Such experiences are not only insulting and demoralizing for the patient, but can jeopardize the patient's health, when a screening or treatment is denied or postponed, or the patient is discouraged from seeking medical care out of fear of repeated discrimination. Many if not most of my and Whitman-Walker's transgender patients express strong distrust of the healthcare system generally, and a demonstrative reluctance to seek care outside Whitman-Walker unless they are in a crisis or in physical or mental stress. This is because they want to avoid discrimination or belittlement. Such incentives to avoid regular check-ups and other medical care can result in disease processes that are more advanced at diagnosis, less responsive to treatment, or even no longer curable in the case of some cancers.

8. These and many other experiences reveal that many medical providers and other staff continue to harbor explicit or implicit biases against LGBT people. Many providers and staff who harbor such feelings or beliefs nonetheless have provided care to LGBT patients, and kept their personal beliefs in check, because of anti-discrimination laws; non-discrimination policies at many hospitals, clinics, and other healthcare facilities; and professional norms. The Denial-of-Care Rule counteracts such non-discrimination policies and norms, and encourages healthcare providers and staff to act on their personal beliefs. The result will likely be a significant increase in discriminatory incidents, denials of care, and the attendant harms to patients' health and well-being.

9. In addition to instances of discrimination against LGBT patients, I and the providers who I supervise have been informed of many examples of discrimination against patients based on other personal biases, especially personal disapproval of persons who use illegal drugs and persons who are not proficient in English—particularly Spanish speakers who are (correctly or incorrectly) thought to be immigrants. For example:

a. Whitman-Walker has a robust and very successful substance-use-disorder treatment program. Many of our patients are on Medically-Assisted Therapy or MAT, for opioid use disorders. A patient of ours was denied an opioid antagonist, Narcan, in a crisis situation because the EMS personnel available expressed disapproval of the patient in question. This was witnessed outside of our own clinic where we had to use our own clinic stock of the medication to reverse the life threatening overdose. The Denial-of-Care Rule encourages healthcare providers to deny patients life-saving medications.

b. Whitman-Walker has a number of patients whose primary language is Spanish and who lack English proficiency. I and the providers I supervise have patients who, in hospital and medical-clinic settings, were refused Spanish-language interpreters, even when such interpreters were available in the facility, because the provider or other staff thought that the patient ought to know English, or because of bias against immigrants. Patients in

these situations have had difficulty understanding their diagnosis and/or treatment plan, greatly increasing risk of a negative result and harm.

10. The Denial-of-Care Rule encourages providers and other healthcare staff to think that any personal belief, whether or not based in a religious faith, is sufficient grounds to deny or opt out of care. Such an understanding could have disastrous impacts on the care that is available to patients, resulting in significant harm to patients' health and well-being, including patients in my care and those whose care I supervise.

11. Whitman-Walker is a certified healthcare provider under the Medicare program and also under the District of Columbia's Medicaid program. As a healthcare provider with Whitman-Walker, I am individually credentialed under Medicare and also under the District of Columbia's Medicaid programs. Both programs are overseen by HHS' Center for Medicare and Medicaid Services (CMS). These funds and related benefits account for the insurance of 70 percent of the patients we serve. This represents a significant portion of my work and the healthcare services that I, and those that I supervise, provide to patients. Without such funding, we could not provide proper treatment to our patients. A large portion of the population that we serve rely heavily on Medicaid and Medicare for their healthcare needs. A loss of Medicare or Medicaid funding, as a possible sanction, under the Denial-of-Care Rule, resulting from enforcement of Whitman-Walker's nondiscrimination mandate which applies to all of our healthcare providers and staff, would result in service reductions, if not closure of our programs in their entirety. As a physician individually credentialed under these programs, I have a reasonable fear not only that Whitman-Walker's continued certification under these vital programs might be endangered, but also that I could individually be sanctioned for enforcing Whitman-Walker's mission with respect to the providers and other staff that I supervise.

12. In addition to overseeing medical care of patients, and working with my own patients, I oversee Whitman-Walker's Research Department, and am personally involved in a number of clinical research projects. Much of this research is funded by HHS or by institutions affiliated with or themselves funded by HHS—for example, the National Institutes of Health and the Centers for Disease Control and Prevention. In 2019, our federally-funded research contracts and grants total

more than $2 million. My understanding is that such research could be at risk under the Denial-of-Care Rule unless Whitman-Walker were to accommodate employees who might wish to opt out of providing care because of their personal moral or religious beliefs. As I previously noted, such accommodation would be impossible for Whitman-Walker: it would thwart our mission, be inconsistent with fundamental professional standards, and could endanger patients. Research also requires the following of strict protocols for patient safety and these would be jeopardized by the rule. Important research could suffer as a result. Our current federally-funded research projects that are of great public importance include a wide range of HIV-related studies, including research as a Clinical Research Site of the AIDS Clinical Trials Group into novel treatments and HIV cure; a longitudinal study over several decades into the health of HIV-positive and HIV-negative gay and bisexual men; a study of less intrusive ways to diagnose anal cancer; the effects of stigma, stress, and drug use on biomarkers in Black men; health-related behavioral coaching of young gay and bisexual men of color; the first longitudinal cohort study of HIV-negative transgender women, to determine causes of HIV acquisition; and the effects of stress on transgender women of color who are HIV-positive and on hormone therapy.

1. I am designated as an Investigator or Principal Investigator on many of the federal research grants and contracts described above. As Whitman-Walker's Chief Medical Officer and as the acting director of our Research Department, my responsibility includes enforcing our nondiscrimination mandate with respect to all of our providers and staff, including those working on federally funded research. I, therefore, have a reasonable fear that the ability to conduct federally funded research would could be severely impeded potentially putting research participants at risk or that I might be subject to sanctions as an Investigator of federal research grants and contracts under the Denial-of-Care Rule.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed on September ___, 2019, in Washington, D.C.

Sarah Henn, MD, MPH