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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 NASEEMA SHAFI, CHIEF EXECUTIVE 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, Naseema Shafi, declare:

1. I am Chief Executive Officer of Whitman-Walker Clinic, Inc., d/b/a Whitman-Walker Health (Whitman-Walker). I received a J.D. degree from the University of Maryland School of Law in 2005. I have served at Whitman-Walker for more than twelve years, first as a Compliance Analyst and Director of Compliance; then Chief Operating Officer, and subsequently Deputy Executive Director. I assumed the CEO position in January 2019. 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 was founded in 1973, and legally incorporated in 1978 to respond to the healthcare needs of the lesbian, gay, bisexual and transgender (LGBT) community. Our team provides a range of services, including medical and community care, transgender care and services, behavioral-health services, dental services, legal services, insurance-navigation services, and youth and family support in Washington, DC. The mission of Whitman-Walker is to offer affirming community-based health and wellness services to all with a special expertise in LGBT and HIV care. We empower all persons to live healthy, love openly, and achieve equality and inclusion. In 2018, Whitman-Walker provided healthcare services to more than 20,700 individuals.

3. Whitman-Walker's patient population is quite diverse and reflects Whitman-Walker's commitment to being a healthcare home for individuals and families that have experienced stigma and discrimination, or have otherwise encountered challenges in obtaining affordable, high-quality healthcare. In calendar year 2018, 58% percent of our healthcare patients and clients who provided their sexual orientation identified as lesbian, gay, bisexual, or otherwise non-heterosexual, and 9% of our patients and clients—more than 1,800 individuals—identified as transgender or gender nonconforming.

4. We at Whitman-Walker also employ dynamic and diverse employees who reflect the diversity of the populations we serve. At the present, we employ 284 medical and behavioral-health providers and support staff, medical-adherence and insurance-navigation professionals, community health-workers, lawyers and paralegals, researchers, administrators, and professionals working in finance, development, human resources, and external affairs. We have employees of

many races, ethnicities, genders, sexual orientations, religious and spiritual traditions, and life experiences. What unites us all is our shared commitment to creating and sustaining a welcoming, inclusive healthcare home for everyone who seeks our care.

5. The Denial-of-Care Rule empowers religiously motivated discriminatory behavior by healthcare providers that would be corrosive of fundamental professional standards, threaten Whitman-Walker's patients' welfare, and place significant strain on our ability to fulfill our critical mission. The Denial-of-Care Rule's message that healthcare providers could be legally entitled to refuse or restrict care, based on their personal religious or moral beliefs, flies in the face of the standards and ethics of every healthcare profession, and would sow confusion and undermine the entire healthcare system. Healthcare is a fundamentally patient-oriented endeavor and the Denial-of-Care Rule's sweeping right to avoid "complicity," with complete disregard for the harm that might result to others, is legally, morally, and medically unsupportable, and is fundamentally corrosive to healthcare providers like Whitman-Walker.

6. As written, provisions in the Rule that empower healthcare personnel to refuse to provide care based on their personal beliefs apply to entities that receive any grant, contract, loan, or loan guarantee under the Public Health Service Act (PHSA); any Health and Human Services-administered grant or contract for biomedical or behavioral research; or funds for any health service program or research activity under any HHS-administered program. Section 88.3(a)(1). "Health service program" is defined so broadly that it seems to cover any health or wellness services or other activities. Section 88.2. As a Federally Qualified Health Center, Whitman-Walker receives grants and other financial support under the PHSA. We receive substantial funding under the Ryan White Care Act, which is administered by HHS. The majority of our third-party revenues for medical and behavioral-health services are reimbursed through Medicaid and Medicare, which are HHS-administered programs. As Dr. Henn, our Chief Health Officer, discusses in her Declaration, Whitman-Walker receives major funding for biomedical and behavioral research from HHS entities.

7. We are particularly concerned that the Denial-of-Care Rule is written so broadly that it would empower healthcare personnel to deny care based on personal objections to LGBT people.

HHS expressly leaves open the possibility that LGBT care might be denied, and that it might interpret the legal right to refuse to assist in "sterilization" procedures to include care for transgender patients.

8. The impact on Whitman-Walker and its patients of a broad, legally unsupported expansion of healthcare providers' refusal rights would be particularly drastic. Providing welcoming, high-quality care to the LGBT community and people living with HIV is at the core of Whitman-Walker's mission. These are communities that are in particular need of affirming, culturally competent care because of the widespread stigma and discrimination they have experienced and continue to experience. By encouraging employees of hospitals, health systems, clinics, nursing homes, and physician offices to express and act on their individual beliefs, rather than focusing on patients' specific healthcare needs, the Rule invites chaos to the overall healthcare system and undercuts Whitman-Walker's operations. Specifically, the Rule would create real harm to the sustainability of Whitman-Walker by consuming precious resources with unnecessary work-arounds and potential litigation; and increasing uncompensated patient care volume. This rule may also raise the specter of misalignment within our work-force if we have staff whose religious beliefs may cause them to wish to deny care themselves. Whitman-Walker's very mission would be at risk of being frustrated in such an environment.

9. Whitman-Walker strives to ensure that all staff understand that one's personal, religious, and moral views are irrelevant to Whitman-Walker's patients' needs and mission. It would be very difficult, if not impossible, for Whitman-Walker to accommodate individual healthcare staff who might object to providing basic aspects of Whitman-Walker's services—for example, providing treatment for gender dysphoria, counseling pregnant clients on their pregnancy termination options, HIV-prevention-related counseling, harm-reduction care for substance users, or healthcare services to lesbian, gay, or bisexual patients—without fundamentally compromising its mission and the quality of patient care.

10. The Denial-of-Care Rule announces a very broad definition of a healthcare worker's alleged right to refuse to "assist in the performance" of care to which they object for personal reasons. HHS' definition is so broad that it seems to encompass providing referrals and information

to patients and any assistance receiving care to which the employee objects, at Whitman-Walker or any place else. This could affect not only our physicians, physician assistants, nurses and nurse practitioners, and therapists, but medical assistants, persons conducting HIV and Sexually Transmitted Infection testing and counseling, front-desk staff, and persons who provide scheduling services and information over the phone. Many of Whitman-Walker's LGBT patients and patients living with HIV have experienced substantial stigma and discrimination and are appropriately concerned with being welcomed or not welcomed in a healthcare setting. If they encounter discrimination at Whitman-Walker from any staff person at any point, Whitman-Walker's reputation as a safe and welcoming place would be undermined. There are multiple "patient touches" in Whitman-Walker's system as in any healthcare system: from the staff person answering the phone or sitting at the front desk to the physician to the pharmacy worker. Because each of these interactions with Whitman-Walker staff can convey respect and affirmation or disrespect and rejection, they have a direct impact on patients' engagement in their own healthcare and can thus, depending on their nature, either promote or undermine patient health.

11. Consistent with its commitment to welcoming and nondiscriminatory healthcare, Whitman-Walker's growing work force is very diverse. Encouraging individual employees to think that their discriminatory beliefs can prevail over their duties to patients—and to their fellow employees—would introduce confusion and discord into Whitman-Walker's staff as well as pose barriers to patient care. We have had situations in which an employee has expressed personal religious or moral discomfort or disagreement with homosexuality or bisexuality; or with healthcare intended to help a transgender person transition from the sex they were assigned at birth to their own gender identity; or with a patient's drug use or sexual behavior. In such situations, we emphasize to the employee that patient needs, and maintaining a respectful and welcoming environment for every patient, are paramount and must prevail over personal beliefs of staff. If individual employees felt legally empowered to refuse to provide care, and Whitman-Walker were limited in how it could respond to such situations, the harm to our mission could be devastating.

12. The harm to Whitman-Walker's operations, finances, and employee morale would be particularly complicated because Whitman-Walker, like many healthcare entities, has a quasi-

unionized workforce. Attempts to accommodate, for instance, one employee's unwillingness to work with LGBT patients or women seeking reproductive healthcare would impose burdens on and increase workloads for other staff, and likely would result in grievances filed by other employees affected by the conscience accommodations. This is especially true where the Denial-of-Care Rule limits Whitman-Walker's options for maintaining policies and procedures for requesting religious or moral-based accommodations in advance to ensure that Whitman-Walker has sufficient staff available to meet patients' needs. Whitman-Walker would incur substantial financial costs and drains on staff time that would substantially challenge its ability to care for a growing patient load. Whitman-Walker, for example, would have to hire additional human resources staff to address the increase in accommodation requests as well as grievances related to hostile work environments resulting from religious-based objections to performing core job responsibilities and increased workloads for other staff.

13. There would also be increased difficulty in determining whether job applicants will be unwilling to perform essential job functions, which seems likely to undermine Whitman-Walker's philosophy of fostering a diverse workforce. Whitman-Walker's current recruiting process is developed to ascertain whether a job applicant would provide healthcare consistent with Whitman-Walker's mission to establish a welcoming, nondiscriminatory environment for all patients and staff, without violating the law. Whitman-Walker emphasizes these principles of inclusion with language that reflects diversity principles in our job descriptions. If an applicant appears to draw lines based on religious or moral principles that are inconsistent with Whitman-Walker's mission, hiring managers will be in a complex position of trying to ascertain whether such applicants could end up causing harm to patients given the Denial-of-Care Rule's prohibition on inquiring about these issues directly. Moreover, adherence to our mission is emphasized in our new employee orientation process, and all employees are currently required to sign a statement committing to our values of inclusiveness, non-judgment, and fully caring for every patient and for fellow staff. Providing care in a non-discriminatory manner, putting aside people's individual religious beliefs, is a core part of Whitman-Walker's job criteria for new applicants. Changing those criteria thwarts Whitman-Walker's mission.

14. The Rule's provisions regarding the accommodation of staff with personal "conscience" objections to any portion of our mission, our services, or our patients, would cause major damage to our operations and patients. My understanding is that the Rule would frustrate the important process that many mission-based organizations like Whitman-Walker have: an assessment of employees' alignment with their mission. The Rule provides that, after hiring, we could ask staff to inform us of their objections, but the objecting staff must consent to our accommodation offers and may unilaterally reject any proffered accommodations. These provisions appear to impose one-sided obligations on the employer that are unworkable for a healthcare center: there does not appear to be any requirement that the objecting employee be reasonable or willing to compromise, and the Rule expressly declares that the employer cannot object to an accommodation that would impose an undue hardship on the employer or that would compromise patient care. Furthermore, the Rule does not provide for any emergency exception to ensure that all patients receive immediate, life-saving care, regardless of staff members' religious beliefs.

15. More specifically, the accommodation provisions are not feasible for Whitman-Walker for a number of reasons. First, requiring us to devote our limited financial resources to hiring additional staff, in order to ensure that patient care does not suffer from accommodating some staff's personal objections, would almost inevitably force us to reduce our existing services. Second, the Rule states that an accommodation cannot "exclude [a] protected [person] from fields of practice on the basis of their protected objections." Section 88.2 (definition of "Discriminate or Discrimination"). Given Whitman-Walker's commitment to providing affirming healthcare to all, a healthcare provider or any other employee with objections to, for instance, LGBT patients, could not be maintained in any patient-facing role, which likely would "exclude" them from a "field of practice." Subjecting any of our patients to the risk of interactions with any Whitman-Walker staff member who expresses opposition or hostility to them or their course of treatment would result in irreversible damage to our reputation and would likely be harmful to the patient's well-being. Third, the rule provides that staff can be asked to specify their objections only once per year "unless supported by a persuasive justification." As a result, Whitman-Walker could be faced with unexpected objections in the intervening twelve months, based on newly emergent patient needs,

otherwise unanticipated situations, or an employee's evolving religious beliefs. The inability to know of objections in advance will interfere with Whitman-Walker's provision of services to its patients, either by forcing Whitman-Walker to divert resources to redundant staffing or by leaving it without an employee willing to deliver appropriate care. Fourth, any healthcare professional or other staff person may be needed to respond to an emergency situation beyond the scope of their regular duties—for instance, responding to a patient who is overdosing, or who is in acute distress or in a crisis situation that may challenge the staff person's personal comfort level. In addition, as I have already noted, efforts to accommodate an individual provider's or other staff person's personal objections to particular patients, procedures or job-related activities will inevitably decrease staff morale, increase conflict between staff members, and likely lead to grievance procedures in our quasi-unionized workplaces.

16. HHS has also defined the "workforce" covered by the Rule to include not only employees, but also contractors, trainers, and even volunteers. This interpretation is even more disruptive of our operations and patient services. For many years, Whitman-Walker has offered walk-in sexually-transmitted-infection testing, treatment and counseling, in a program that is largely staffed by volunteer healthcare professionals. In 2018, that program served more than 1,700 individuals. We also rely extensively on trained volunteers for our HIV testing and counseling services, our peer support counseling services, and our Legal Services Department. Many of the thousands of patients and clients receiving these services every year are in very vulnerable situations, and the possibility that our staff would have limited control over how these volunteers chose to deliver services, and how they might interact with patients and clients, threatens critical components of our mission.

17. Whatever its effect on Whitman-Walker ability to provide affirming, non-discriminatory care to all of our own patients, it is quite likely that the Denial-of-Care Rule will result in a substantial increase in discrimination against LGBT individuals by healthcare providers and institutions outside of Whitman-Walker. Dr. Henn's and Dr. Pumphrey's declarations describe a number of incidents of discrimination that our patients have encountered in other healthcare facilities and offices that our patients have reported to our medical and behavioral health providers.

In addition, the lawyers in our Legal Services Department learn of similar incidents from their clients.

18. Since the mid-1980s, Whitman-Walker has had an in-house Legal Services Department. Our attorneys and legal assistants provide information, counseling, and representation to Whitman-Walker patients, and to others in the community who are LGBT or living with HIV, on a wide range of civil legal matters that relate directly or indirectly to health and wellness – including access to healthcare and discrimination based on HIV, sexual orientation, or gender identity. They also oversee legal clinics, staffed largely by volunteer attorneys, which assist transgender and gender-nonconforming individuals to change their legal names and to correct their birth certificates, driver's licenses, passports, Social Security records, and other identity documents to reflect their new names and actual gender identities. Over the years, Whitman-Walker Legal Services staff and volunteer attorneys have encountered many instances of discrimination by healthcare providers and their staff based on the sexual orientation or gender identity of patients. Recent examples include:

a. As recounted in Dr. Henn's Declaration, Whitman-Walker transgender patients seeking gender transition-related surgery have been rejected at local hospitals, even for procedures that are often performed on non-transgender patients (such as breast surgery), and even though the patients had health insurance or were otherwise able to pay for the procedures.

b. A transgender woman who was about to have surgery at a Washington, DC hospital for an inner ear condition (unrelated in any way to her transgender-related healthcare) was confronted and harassed by hospital staff objecting to her gender identity. She was repeatedly and intentionally referred to as "he" and as "a man" by staff in the radiology department when she went for a pre-surgical scan; by desk staff at the surgery center; and by the nurse preparing her for surgery. Several nurses talked about her with each other and laughed. One staff person refused to talk with the patient when she addressed them. Even the anesthesiologist who she was expected

to entrust with her life in one of her most vulnerable moments before surgery, mocked her and intentionally referred to her as a man. Healthcare providers are supposed to provide comfort to patients when they seek healthcare. Instead, the staff increased her fear just before her surgery because they showed complete disrespect and lack of care for the patient's health and well-being.

c. Another transgender woman went to the office of an ophthalmologist at the same medical center for an eye exam. She arrived on time, filled out the initial paperwork, and then waited for about 45 minutes without being called for her appointment. The patient went to the desk to inquire, and was treated rudely by the staff. The staff then arbitrarily called a security guard to eject her from the office. As the patient spoke to the security guard, one of the clinic staff came to her and said, loudly and offensively, "Sir, your kind needs to go away. We're not serving your kind." She complained to the Office of the Chief Medical Officer and was eventually seen by the ophthalmologist on another day, after considerable effort by her and Whitman-Walker staff.

d. A transgender woman was seen by a medical provider at Whitman-Walker, who examined her and determined she might have broken her ankle. She was sent to the Emergency Room at a Washington, DC hospital. She identified herself to the ER check-in staff as a woman and presented a driver's license that contained a female gender marker. She then waited for a number of hours (she remembers five or six) without being examined. When she inquired about the delay, she was treated rudely and mis-gendered by ER staff. She was finally called from the waiting area, but was taken to the men's dressing room, rather than the area for women patients, to undress and put on a gown for a scan. During the four or more

hours before she received the scan, examination and treatment, she suffered very significant physical pain.

e. Another LGBT patient with end-stage renal disease, was confronted by a staff person at the dialysis clinic the patient attends regularly for care. The employee expressed a strong dislike for LGBT people and objected to being involved in the patient's care at the clinic.

19. The Denial-of-Care Rule will invite an increase in discriminatory experiences for LGBT patients seeking healthcare services, resulting in harm to the patients and community that Whitman-Walker serves.

20. Escalating healthcare discrimination and fear of such discrimination, resulting from the Denial-of-Care Rule, is also likely to result in increased demand for Whitman-Walker's healthcare services, which will present considerable operational and financial challenges. Many of Whitman-Walker's healthcare services lose money due to low third-party reimbursement rates and indirect cost reimbursement rates in contracts and grants which are substantially less than Whitman-Walker's cost of service. Increased demand for Whitman-Walker's healthcare services, driven by increased discrimination and fear of discrimination outside of Whitman-Walker, would exacerbate that pressure. We likely will be called upon to see more patients, and that patient care does not financially cover itself. As a result, Whitman-Walker may not be able to meet the increased demand and sustain the additional financial burdens resulting from an increased load of patients who either fear discrimination elsewhere or who were discriminated against or denied services at other institutions.

21. At the same time, given Whitman-Walker's mission to provide healthcare to marginalized communities, including the LGBT community and people living with HIV, Whitman-Walker needs to increase its education programs and community outreach to help those affected by the Denial-of-Care Rule find the healthcare services that they need and assist them with their trauma resulting from the Rule. Whitman-Walker needs to continue informing the community about its commitment to serving all patients in a non-discriminatory and welcoming manner and notify its patients that the Denial-of-Care Rule will not change Whitman-Walker's commitment to providing

exceptional healthcare services to all members of the community. Whitman-Walker will continue fighting for its patients' rights, including, for example, advocating on behalf of transgender patients who seek treatment for gender dysphoria, but who are rejected due to providers' religious or moral objections to treating such patients. As a result of the Denial-of-Care Rule, Whitman-Walker will also need to devote more resources to working with outside providers and organizations to remind them of the importance of providing healthcare to all patients on non-discriminatory terms.

22. The Denial-of-Care Rule also adversely impacts Whitman-Walker by necessitating a diversion and reallocation of resources in order to provide referrals to patients that it does not have the resources to treat either because Whitman-Walker has reached its capacity for new patients (especially in the behavioral-health departments) or because the patient requires treatment in a specialty that Whitman-Walker does not have. These types of referrals are routine at Whitman-Walker where its focus is on primary care and HIV-specialty care. The Denial-of-Care Rule will make it significantly more difficult and resource-intensive for us to locate, monitor, and provide appropriate referrals. With an increase in referral requests as a result of the Denial-of-Care Rule, Whitman-Walker will need to allocate additional staff time to pre-screen service referrals to ensure that staff are sending patients to LGBT-affirming providers and not to providers who themselves or whose staff would cause additional harm to Whitman-Walker patients.

23. As I previously noted, Whitman-Walker receives various forms of federal funding for health and wellness-related services and for biomedical and behavioral research from HHS and from institutions affiliated with or themselves funded by HHS, including but not limited to funds under the PHSA, direct grants, Medicaid and Medicare programs administered by the Centers for Medicare and Medicaid Services, the FQHC and Ryan White funding administered by the Health Resources and Services Administration; funds under the 340b drug subsidy program, research grants from the Centers for Disease Control and Prevention and the National Institutes of Health, and Medicaid and Medicare reimbursements. The financial risk associated with these funds and related benefits accounts for tens of millions of dollars in revenue for the health center. Whitman-Walker, therefore, has a reasonable fear that it could be sanctioned and lose many millions of dollars of federal funding as a result of our nondiscrimination policies and other practices designed to

ensure the highest quality patient care and compliance with applicable medical guidelines, standards of care, and ethical requirements. If Whitman-Walker were to be sanctioned and lose federal funding as a result of the Rule's enforcement, the impact would include massive service reduction if not closure.

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.

Naseema Shafi
Chief Executive Officer

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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 9, 2019, in Washington, D.C.

Naseema Shafi
Chief Executive Officer