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Federal court rules healthcare plan's policy is, on its face, sex discrimination

BY ARTHUR S. LEONARD

A federal district court in Anchorage, Alaska, has ruled that a public employer's health benefits plan violates Title VII of the Civil Rights Act of

1964 because it categorically denies coverage for gender transition surgical procedures. According to a March 6 opinion by Senior District Judge H. Russel Holland, the employer's exclusion is "discriminatory on its face and is direct evidence of sex discrimination."

The ruling does not require all employers to provide coverage for gender reassignment surgery, but it requires that they not discriminate because of an employee's sex in deciding which

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procedures are covered.

Holland's decision has potentially wide application because Title VII applies to all employers of 15 or more, including both private businesses and government agencies at the federal, state and local levels. A trial court ruling does not establish a precedent binding on other courts, but Holland's analysis may provide a persuasive signpost both for courts confronting similar claims and for employers deciding how to respond to workers seeking such coverage.

Lambda Legal filed suit on behalf of Jennifer Fletcher, who works as a legislative librarian for the State of Alaska. Fletcher is enrolled in AlaskaCare, a self-funded employee healthcare plan administered by Aetna Life Insurance. The plan provides for "medically necessary" services "not otherwise excluded."

The state conceded that for "some" transgender individuals, surgical procedures for gender transition may be "medically necessary," but the plan formally excludes the procedures Fletcher sought, even though they are available for medical issues other than gender transition. That disparity was at the heart of Holland's conclusion that the exclusion is discriminatory on its face.

Fletcher was diagnosed with gender dysphoria in 2014 and began the process of social, legal, and medical transition under professional care, starting hormone therapy that year. By 2016, she and her healthcare provider agreed that surgery was necessary, and Fletcher's claim

asserted the treatment was "essential" for her "well-being." Aetna told her, however, that the plan did not cover it in that year and would not in 2017 either. Though the plan has since been modified to allow coverage for some aspects of gender transition, hormones and counseling, the express exclusion of surgery continues.

Fletcher's request for coverage spurred the state to study the cost of eliminating this exclusion, and a consultant advised that the annual increase in claims on the plan would be \$60,000. The state took no further action beyond obtaining this estimate.

Given the lack of coverage, Fletcher obtained her surgery in Thailand, where it was less expensive for her. She then filed a discrimination complaint with the federal Equal Employment Opportunity Commission (EEOC), alleging that the plan's exclusion violates Title VII's ban on employment discrimination because of an individual's sex.

The state's simplistic response was that because the plan excludes coverage for any surgical procedure for purposes of gender transition, whether the employee was identified as male or female at birth, there was no discrimination "because of sex."

The EEOC rejected this argument, and issued a finding that the state's policy violates Title VII. In May of last, the federal agency notified Fletcher that its attempt to resolve the matter through conciliation with the state was unsuccessful and authorized her to file a lawsuit.

Fletcher's sex discrimination complaint alleged that Title VII protections covered "dis-

crimination on the basis of gender nonconformity, gender identity, transgender status, and gender transition" — all of the bases of theories federal courts have employed to evaluate such claims by trans plaintiffs.

After discovery, both sides moved for summary judgment by the court.

As it turned out, Fletcher's itemization of alternative theories in support of her complaint was unnecessary, because Holland concluded the exclusion from coverage was, on its face, discrimination "because of sex." His conclusion was based on the state's concession that all the surgical procedures involved in Fletcher's transition would be covered if they were performed for medical reasons other than gender transition.

So, had Fletcher been identified as female at birth but needed a vaginoplasty procedure for some other reason, she would be covered — and indeed that procedure is employed to deal with medical conditions experienced by some cisgender women. But the procedure was denied an individual identified at birth as male for no reason other than it was aimed at addressing gender transition. To Holland, this was clearly an exclusion specifically based on the sex of the employee.

Under Title VII, any "disparate treatment" between men and women regarding employment is illegal unless it is justified as a "bona fide occupational qualification... reasonably necessary to the normal operation of an employer's business." In the absence of the state making this argument, Fletcher won summary judgment.

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