

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

THE RELIGIOUS SISTERS OF MERCY,)
et al.)

Plaintiffs)

v.)

Case No. 3:16-cv-00386

THOMAS E. PRICE, M.D., Secretary of)
the United States Department of Health)
and Human Services, *et al.*)

Defendants)

CATHOLIC BENEFITS ASSOCIATION,)
et al.,)

Plaintiffs)

v.)

Case No. 3:16-cv-00432

THOMAS E. PRICE, M.D., Secretary of)
the United States Department of Health)
and Human Services; UNITED STATES)
DEPARTMENT OF HEALTH AND)
HUMAN SERVICES; Victoria Lipnic,)
Acting Chair of the United States Equal)
Employment Opportunity Commission;)
and UNITED STATES EQUAL)
EMPLOYMENT OPPORTUNITY)
COMMISSION)

Defendants)

**CBA PLAINTIFFS’ MOTION FOR ADDITIONAL STAY IN RESPONSE TO
DEFENDANTS’ MOTION FOR REMAND AND STAY**

On May 26, Defendants filed a motion for voluntary remand and stay so that Defendant HHS may have “the opportunity to reconsider the regulation [implementing Section 1557 of the Affordable Care Act] at issue in these

consolidated cases.” Dkt. 45 at 1. Defendants incorrectly claim that “a remand and stay would not prejudice” the Catholic Benefits Association Plaintiffs¹ because “this Court’s temporary stay of enforcement ... would continue in force during the remand.” *Id.* at 2. The CBA Plaintiffs’ present motion explains why the Defendants’ proposed remand and stay would prejudice the CBA and its members and proposes an additional stay directed at Defendant EEOC to maintain the status quo while HHS revisits its regulation.

All of the plaintiffs in the *Religious Sisters of Mercy* case (No. 3:16-cv-00386) are medical providers, directly subject to HHS’s transgender services regulation under ACA § 1557. The Court’s existing stay, preserved under Defendants’ proposed remand and stay, adequately protects their religious liberty. But two of plaintiffs in the *Catholic Benefits Association* case (No. 3:16-cv-00432), and most CBA members, are not medical providers; the HHS recognizes that it does not have jurisdiction over such employers. Instead, HHS states that it will ask EEOC to enforce violations of these agencies’ shared gender transition coverage mandate. In light of this threat, the CBA case asks for injunctive relief against both HHS and EEOC. *See* CBA Am. Compl. ¶¶ 67-68, 187-93, 197-99, 203-06, 236.

While the CBA Plaintiffs are grateful that Defendants are seeking leave so the new administration can reconsider HHS’s 1557 Rule, Defendants’ proposal to

¹ The named plaintiffs in the Catholic Benefits Association’s (“CBA”) Amended Verified Complaint include the CBA, the Diocese of Fargo, Catholic Charities of North Dakota, and the Catholic Medical Association (“CMA”). CBA Am. Verified Compl. (“CBA Am. Compl.”), Dkt. 44, ¶¶ 20, 32, 36. Each is a member of the CBA. *Id.* ¶¶ 21, 32, 38. These plaintiffs are referred to herein as the “CBA Plaintiffs.” The CMA and the CBA sue on their own behalf and in a representative capacity on behalf of their respective members. *Id.* ¶¶ 36-42, 49-59.

pause the case in its present state would leave CBA Plaintiffs exposed to irreparable harm. If the Court simply grants Defendants' motion, the CBA Plaintiffs would remain exposed to EEOC enforcement actions and DOJ lawsuits for adhering to their religious beliefs. Further, due to the proposed remand, the CBA Plaintiffs would have to wait indefinitely before this Court is able to hear their motion for injunctive relief. A remand without such a stay clearly prejudices the CBA Plaintiffs. For all the reasons this Court has already stayed enforcement of the HHS gender transition coverage mandate, it should also protect the CBA and its members from the EEOC gender transition coverage mandate while this case is on hold.

ARGUMENT

A. The Court has yet to address the CBA's claims against Defendant EEOC.

This Court has found "thorough and well-reasoned" another district court's judgment that HHS's 1557 Rule is likely illegal, and therefore has stayed HHS from enforcing its gender transition coverage mandate against the plaintiffs in the consolidated cases. Dkt. 36. Before this Court grants Defendant HHS leave to reconsider the 1557 Rule, it should address the CBA's similar requests for relief against Defendant EEOC. This Court's rulings have not yet recognized that there are *two federal agencies* named as defendants in the CBA case.

On January 20, the CBA filed a brief explaining that the Court's December 30 Order, which issued a stay against HHS's gender transition coverage mandate, had overlooked the CBA's claims against EEOC. CBA Mot. for Add'l Stay, Dkt. 15,

No. 3:16-cv-432. The CBA urged the Court to remedy this oversight by issuing a parallel order against EEOC, thus preserving the status quo for all CBA members.

Id. at 2.

The Court's two January 23 orders, however, continued to overlook the CBA's claims against EEOC. One order consolidated the two cases after finding that they "concern essentially the same dispute" over the HHS 1557 Rule. Dkt. 37. The other refined the scope of the December 30 Order but still did not address the CBA's request for a stay against EEOC. Dkt. 36. This Court's orders have thus left CBA members exposed to EEOC enforcement actions under Title VII for failure to provide gender transition coverage in their employee health plans.

- B. The CBA has asked for broader relief because many of its members are not covered entities under the HHS 1557 Rule but almost all of its members are covered employers under the similar EEOC Title VII rule.**

The reason the CBA has asked for broader relief than the *Religious Sisters of Mercy* plaintiffs is because the CBA represents a broader range of Catholic employers. In *Religious Sisters of Mercy*, all plaintiffs are "covered entities," directly regulated by the HHS 1557 Rule because they operate health programs or activities that receive federal financial assistance, primarily Medicare and Medicaid. *See Religious Sisters of Mercy's Memo. in Supp. of Mot. for Prelim. Inj.*, Dkt. 6, at 7-11. But the employers represented in *CBA* are not so limited. Plaintiffs Diocese of Fargo and Catholic Charities North Dakota, for example, are not "covered entities" and, therefore, are not directly subject to the HHS 1557 Rule. But they are directly

subject to Title VII and EEOC’s interpretation of this law. CBA Am. Compl. ¶¶ 20-35.

The CBA is a membership organization whose mission is to help its members—Catholic organizations located in North Dakota and elsewhere—exercise their right to practice their faith in their professions and workplaces, including their right to offer health care services and provide employee health benefits consistent with Catholic values. *Id.* ¶¶ 44-51. In addition to Catholic hospitals, CBA members include about sixty Catholic dioceses and archdioceses, along with Catholic Charities, schools, and other Catholic ministries and businesses. *Id.* ¶¶ 52-63 (describing CBA members). Almost all of these members are subject to Title VII.

C. HHS has threatened to refer complaints against “non covered entities” to EEOC for enforcement under Title VII.

The HHS 1557 Rule itself explains why the CBA also sought relief against EEOC. Although HHS broadly interprets its 1557 to encompass almost every health care provider,² it admits that it is unable to enforce its gender transition coverage mandate on all employers. In such cases, EEOC has agreed to serve as a backup.

The HHS 1557 Rule describes HHS’s process when it learns that an employer’s health plan “excludes coverage for all services related to gender transition.” 81 Fed. Reg. 31,376, 31,432 (May 18, 2016). First, its Office of Civil Rights will determine whether it “has jurisdiction over a claim against an employer”

² HHS believes that its 1557 rule gives it authority to regulate virtually every health care provider in the country—over 275,000 health care entities, 7.6 million workers, and “almost all licensed physicians.” 81 Fed Reg. at 31,445-46, 31,449-50. *See also* CBA’s Memo. in Supp. of Mot. for T.R.O. (“CBA TRO Br.”) at 4, Dkt. 4, No. 3:16-cv-432.

under its 1557 Rule. *Id.* When HHS finds that it “lacks jurisdiction” over a transgender discrimination claim, it will “transfer the matter to EEOC and allow that agency to address the matter” under Title VII. *Id.* EEOC has already confirmed to HHS that it will cooperate in such matters, indicating that “the date a complaint was filed with [HHS] will be deemed the date it was filed with the EEOC.” *Id.*

Just as HHS claims through its 1557 Rule that Title IX bars all gender identity discrimination, so EEOC has asserted that Title VII “forbid[s] any employment discrimination based on gender identity.” EEOC, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,” (“EEOC Statement,”) https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

The enforcement actions and penalties that CBA members face from EEOC are comparable to those that some CBA members face from HHS. Both EEOC and HHS threaten employers that exclude gender transition coverage with onerous, time-consuming, and expensive federal investigations. CBA Am. Compl. ¶ 197. Like HHS, if EEOC confirms that a Catholic employer has followed its religious beliefs by excluding gender transition coverage, EEOC will require the employer to take corrective remedial actions. *Id.* Like HHS, if EEOC is dissatisfied with a Catholic employer’s corrective remedial actions, it may refer the matter to the Department of Justice with a recommendation that that it bring a federal lawsuit against the religious employer. *Id.* ¶ 198.

D. EEOC is actively pursuing Catholic employers for failure to cover gender transitions.

Nor is the CBA's claim against EEOC speculative. EEOC has already applied its aggressive interpretation of Title VII to find that a Catholic hospital violated Title VII because its health plan did not cover phalloplasty (penis construction) for a biologically female employee who wanted to "transition." *See Josef Robinson v. Dignity Health*, No. 3:16-cv-03035 (N.D. Cal. 2016). On May 12, 2016, EEOC issued a determination letter, declaring that Dignity Health had violated Title VII "by excluding 'sex transformation surgery from all health care coverage.'" Less than a month later, Robinson filed a federal lawsuit against the Catholic hospital, attaching EEOC's determination letter as Exhibit A. The lawsuit claims that the Catholic hospital's refusal to cover Robinson's penis construction surgery violated Title VII. In August, EEOC filed an amicus brief on Robinson's behalf, arguing that Robinson "has been denied access to medically necessary treatment for his gender dysphoria, a serious health condition directly related to the fact that he is transgender." Br. of EEOC as Amicus Curiae at 4, *Robinson v. Dignity Health*, 16-cv-03035 YGR (N.D. Cal.) (filed Aug. 22, 2016). EEOC's amicus brief cites as an authority its own assertion that Title VII bars all discrimination based on "gender identity." *Id.* at 6. The risk of enforcement of a Title VII-based transgender services mandate by the EEOC is real.

E. EEOC's Statement and HHS's 1557 Rule share the same legal infirmities.

Defendant EEOC's and Defendant HHS's legislative rules not only pose comparable threats to CBA members, they also share the same legal infirmities.

The CBA's legal arguments against the HHS 1557 Rule and the EEOC Statement, set out in its Amended Verified Complaint and Motion for Temporary Restraining Order, are virtually identical. Both agencies' actions are unlawful under the Administrative Procedure Act and the Religious Freedom Restoration Act.

The *Franciscan Alliance* decision, which this Court found "thorough and well-reasoned," Dkt. 36 at 2, issued a preliminary injunction against the HHS 1557 Rule because it found that HHS's action violates the Administrative Procedure Act and likely violates the Religious Freedom Restoration Act. *Franciscan Alliance, Inc. v. Burwell*, 2016 WL 7638311, *18, *20 (N.D. Tx. Dec. 31, 2016). The Texas court found HHS acted unlawfully by transforming a federal law that bars discrimination "on the basis of sex" into a legislative rule barring discrimination on the basis of "gender identity" and by threatening religious employers with consequences if they fail to "provide insurance coverage for gender transitions" "regardless of their contrary religious beliefs or medical judgment." *Id.* at *1.

As the CBA explains in its motion for a TRO, all of these legal arguments against HHS's 1557 Rule apply with equal force against EEOC's Statement. The HHS 1557 Rule is premised on its claim that Title IX bars discrimination on the basis of "gender identity." The EEOC Statement is premised on its equally flawed interpretation of Title VII. *See* CBA TRO Br. at 5. Both agencies' actions are unlawful under the Administrative Procedure Act, and for the same reasons. *Id.* at 8-10. Both agencies' actions also violate the Religious Freedom Restoration Act

because they substantially burden CBA members' religious exercise and cannot survive strict scrutiny. *Id.* at 12-19.

F. The simplest course forward for the Court to grant the CBA an additional stay before granting the government's request for remand.

Given the current posture of the case, the similarities between Defendant HHS's 1557 Rule and Defendant EEOC's Statement, and Defendant HHS's request for a stay and remand, the CBA proposes that the most efficient and equitable way to preserve the status quo would be for the Court to issue an additional stay, *applicable only in the CBA case*, that prohibits EEOC from infringing on CBA members' rights until such time as the Court rules on the CBA Plaintiffs' pending motion for a temporary restraining order.

CONCLUSION

For the reasons cited above, the CBA requests that the Court issue an additional stay, applicable only in the CBA case, that prohibits EEOC from infringing on CBA members' rights. The CBA proposes that the Court's additional stay read as follows:

The Court HEREBY ORDERS that Defendant EEOC is STAYED from enforcing its position that Title VII bars discrimination on the basis of gender identity against the Catholic Benefits Association and its members and the Catholic Medical Association and its members pending Defendants' requested remand and stay, and until this Court rules on the CBA's pending motion for a temporary restraining order.

DATED: May 30, 2017.

<Signature on following page>

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2017, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

s/ Eric N. Kniffin
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