

## Transgender Employees Can Sue Their Employer for Healthcare Coverage Even After Obamacare Is Repealed

Transgender people are hardworking, valuable employees. Such as the military analyst who transitioned to female at the Department of Defense with full support of her captain.<sup>1</sup> Most transgender employees keep their medical diagnosis private, officially called "gender dysphoria," for fear of being discriminated against at work. But that runs counter to their physician's advice, as part of their treatment plan, to transition to their authentic self in all aspects of life: with family, friends, and co-workers, and at home, school, work, church, and community.

Some employers proudly do not discriminate and provide transgender healthcare benefits: The Cities of Cincinnati, Columbus, and Dayton,<sup>2</sup> Abercrombie & Fitch Co., American Electric Power Co., Cardinal Health, Convergys Co., Eaton Corp., Federal Reserve Bank of Cleveland, Fifth Third Bank, Frost Brown Todd LLC, Huntington Bank, Key Bank, Macy's, Nationwide, Owens Corning, Procter & Gamble Co., Squire Patton Boggs, and Thompson Hine LLP.<sup>3</sup> It is good for business.

In 2001, San Francisco lead the nation when it offered transgender healthcare for all employees of the city, school district, City College, and Superior Court. There was a concern that so many transgender people would seek employment with the city, the cost of healthcare to the City or raise premium co-pays for the employees would increase. It did not.<sup>4</sup> In 2012, benefits were extended to transgender residents.<sup>5</sup>

Access to affordable healthcare is as important to an employee diagnosed with gender dysphoria, as an employee diagnosed with cancer. Each employee must decide which treatment to pursue: medication, surgery, both? The difference is policies cover a wide range of medically necessary cancer treatments; but most policies exclude coverage for medically necessary transgender healthcare benefits.

A robust transgender healthcare plan should cover counseling, hormone replacement therapy, non-surgical procedures (speech therapy, labs), surgical procedures (including hair removal, voice surgery, facial feminization, liposuction, and chondrolaryngoplasty (also called tracheal shave)), and hormone blockers for pre-pubescent children.<sup>6</sup> The healthcare plan should cover both out-of-network providers since many providers who specialize in transgender issues are out-of-network. Not all employees will need the entire range of treatment. Medical treatment is based on the individual patient's needs and physician's recommendations. Most

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<sup>1</sup> Read her story here: <http://wapo.st/2mFeQP9> or hear her interview here:

<http://www.npr.org/2017/03/05/518606180/life-as-a-transgender-intelligence-analyst>

<sup>2</sup> <http://www.hrc.org/resources/mei-2016-see-your-citys-score>

<sup>3</sup> These employers received 100% ratings from the Human Rights Campaign.

[http://assets.hrc.org/files/assets/resources/CEI-2017-FinalReport.pdf?\\_ga=1.174123490.1929841373.148458862](http://assets.hrc.org/files/assets/resources/CEI-2017-FinalReport.pdf?_ga=1.174123490.1929841373.148458862)

<sup>4</sup> <http://www.hrc.org/resources/are-transgender-inclusive-health-insurance-benefits-expensive>

<sup>5</sup> <http://www.sfchronicle.com/bayarea/article/SF-health-officer-proposes-new-benefits-for-10990522.php>

<sup>6</sup> <http://www.benefitspro.com/2016/12/12/the-state-of-transgender-health-care?t=Consumer-Driven&page=2&slreturn=1489324506>

medical providers follow the World Professional Association for Transgender Health's Standards of Care (WPATH SOC), which are useful for anticipating what treatments might be needed.<sup>7</sup>

When an employee learns her transgender healthcare is excluded, she should request the exclusion be removed. Guides exist<sup>8</sup> to educate employees how to approach their employer. My client, Rachel Dovel, tried this approach for over a year. When this approach failed, she sued both her employer and the health insurance company. We brought a Title VII sex discrimination claim against the employer and a violation of the ACA against the insurance company.<sup>9</sup> *Dovel v. The Public Library of Cincinnati and Hamilton County and Community Insurance Company d/b/a/ Anthem Blue Cross and Blue Shield*, SDOH Case No. 1:16-cv-955.<sup>10</sup>

### **Title VII Sex Discrimination Claim Against the Employer**

Ms. Dovel's healthcare providers determined that she required sex reassignment surgery to effectively treat her gender dysphoria. The surgery was both medically necessary and consistent with well-established standards of care for the treatment of gender dysphoria. Ms. Dovel scheduled her surgery, but Anthem denied her coverage. We claimed it was sex discrimination for the Library's policy to cover the same surgical procedures for employees with cancer that Ms. Dovel was requesting. We argued this was discrimination in the "compensation, terms, conditions, or privileges of employment" because of her birth sex, and was discrimination on the basis of sex stereotyping. By categorically excluding all medically necessary transgender care, the Library discriminated on the basis of sex.

In January 2016, the EEOC settled a case against Deluxe Financial Services which created a hostile work environment for a transgender employee and denied healthcare coverage for her surgery. The EEOC said Title VII prohibits sex discrimination, including that based on transgender status and gender stereotyping. The case settled for \$115,000 and removal of transgender exclusions in its healthcare plans, among other reforms.<sup>11</sup> In June 2016, the ACLU brought a similar Title VII claim against a healthcare company that refused to provide coverage for its transgender employee. *Robinson v. Dignity Health, d/b/a Chandler Regional Medical Center*, NDCA Case No. 3:16-cv-03035 is pending.

These cases are consistent with federal case law that has held gender stereotyping violates Title VII,<sup>12</sup> including *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) and *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

### **ACA Prohibits Discrimination**

At the time Dovel's ACA claim was filed against Anthem, Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116, prohibited discrimination on the basis of sex. The implementing regulations prohibited "categorical coverage exclusion[s] or limitation[s]

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<sup>7</sup> [http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1351](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351)

<sup>8</sup> <http://transgenderlawcenter.org/wp-content/uploads/2014/01/Health-Insurance-Exclusions-Guide-2-WEB.pdf>

<sup>9</sup> Co-Counsel included Scott Knox, a respected LGBTQ advocate in Cincinnati and the National Center for Lesbian Rights in San Francisco.

<sup>10</sup> The complaint is here: <http://www.gbfirm.com/transgender-woman-sues-the-public-library-and-anthem-to-stop-discrimination/> The case is pending at the time of this writing.

<sup>11</sup> <https://www.eeoc.gov/eeoc/newsroom/release/1-21-16.cfm>

<sup>12</sup> [https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm)

for all health services related to gender transition.” 45 C.F.R. § 92.207(b)(4) & (5). The regulations required employers to remove transgender exclusions from healthcare insurance policies in 2017. However, they were enjoined on December 31, 2017. *Franciscan Alliance Inc. et al. v. Burwell et al.*, NDTX Case No: 7:16-cv-00108. Any day now, Congress will repeal the ACA. Nonetheless, the Title VII and equal protection claims remain viable against employers who do not remove the transgender healthcare exclusions.

Transgender employees should not be forced to forgo necessary medical treatment, or pay out of their own pockets. Ms. Dovel had to wait more than a year and pay nearly \$25,000 for her surgery. If employers do not voluntarily remove transgender exclusions from their healthcare plans because it is good business, then they will need to defend a Title VII claim.