The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ANDREA SCHMITT, on behalf of herself, and on behalf of all similarly situated individuals, Plaintiff, v. KAISER FOUNDATION HEALTH PLAN OF WASHINGTON; KAISER FOUNDATION HEALTH PLAN OF WASHINGTON OPTIONS, INC.; KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST; and KAISER FOUNDATION HEALTH PLAN, INC., Defendants.	CASE NO. 2:17-cv-1611 DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS NOTED ON MOTION CALENDAR: FRIDAY, FEBRUARY 9, 2018

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Plaintiff's response to Defendant's motion to dismiss is notable for its efforts to re-characterize the issues and the lack of any support for the dramatic change in the law she seeks to have the court endorse.[1] Because Plaintiff's claim rests on the erroneous legal argument that the Patient Protection and Affordable Care Act §1557, codified at 42 U.S.C. §18116 ("ACA §1557"), changed the definition of "disability discrimination" from its long-standing meaning under Section 504 of the Rehabilitation Act ("RA §504") and Title II of the Americans with Disabilities Act ("ADA"), Defendant's motion should be granted. *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015).

Plaintiff ignores the language of ACA §1557 and the Health and Human Services' preamble to the Final Rule ("It is important to note that this final rule, except in the area of sex discrimination, applies pre-existing requirements in Federal civil rights laws"[2]). She asserts that decades of federal disability discrimination jurisprudence has no relevance to disability discrimination claims under ACA §1557, contending that "plan design" or benefits under "contracts of insurance" were never before subject to RA §504 disability discrimination claims (and erroneously claiming anti-discrimination law applies to contracts of insurance "for the very first time," Dkt. 23, p. 6). This is simply not true.

Plaintiff next asserts that this court should reject the majority of cases finding that Congress clearly intended that claims of disability discrimination under ACA §1557 follow the substance and enforcement mechanisms of RA §504. Instead, Plaintiff seeks to have the court follow a single district court case which did not deal with disability discrimination, whose ruling

[1] Plaintiff's counsel has brought similar claims against another insurer in *E.S. v. Regence BlueShield*, W.D. Wash. Case No. 17-1609, in which defendants' motion to dismiss is also currently pending.

[2] 81 Fed. Reg. 31446.

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has been stayed. *Rumble v. Fairview Health Servs.*, 2015 U.S. Dist. LEXIS 31591, at *29 (D. Minn., March 16, 2015), stay order in *Rumble v. Fairview Health Servs.*, 2017 U.S. Dist. LEXIS 13316 (D. Minn. Jan. 30, 2017) (stay order).

Plaintiff then contends that the new standard for disability discrimination that she would have the court adopt is based on a section of the ACA §1557 regulation which applies only to gender transition services (45 CFR 92.207(4)), a form of sex discrimination, and which has also been stayed under a nationwide injunction. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp.3d 660 (N.D. Tex 2016).

Necessary for Plaintiff's argument is equating "hearing loss" as a "disability." This ignores the definition of "disability" under RA §504, which Plaintiff concedes applies (Dkt. 23, p. 15), as well as established law and EEOC guidance on the difference between hearing impairment and hearing disabilities. Finally, after asserting all hearing loss is a "disability" under RA §504, then applying a new standard of discrimination based on a stayed portion of the regulation relating to gender transition services, Plaintiff concludes the so-called "hearing loss exclusion"[3] discriminates against the disabled. This Court should reject the flawed theory.

1. ACA §1557 Adopted the Disability Discrimination Standards of RA §504 Without Change.

There is no support for Plaintiff's contention that RA §504 does not reach disability discrimination claims based on benefit design or under insurance contracts, such that disability discrimination under ACA §1557 should be considered a new standard. Plaintiff argues that ACA §1557's reference to "contracts of insurance" means that anti-discrimination principles were extended for the first time to health plans. This is a misreading of the statute, which

[3] Even this characterization is inaccurate, since the plan covers services for serious hearing loss, such as Cochlear Implants and Bone Anchored Hearing Aids, so the mislabeled "hearing loss" exclusion obviously is not a categorical exclusion for all health services relating to hearing loss as Plaintiff contends. Dkt. 17, p. 6.

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references contracts of insurance merely as an example of a *form of financial assistance* that an entity may receive to subject it to the statute:

> an individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance . . . .

ACA §1557(a). This provides no support for Plaintiff's proposition

Plaintiff's contention also misstates decades of jurisprudence interpreting and applying disability discrimination claims under RA §504.[4] At least eight federal appellate courts have applied RA §504 and the ADA to claims based on "benefit design", including exclusions or limitations in an "insurance contract." None of these cases ruled that RA §504 or the ADA were inapplicable because the disability discrimination claim was based on plan benefit design or a health insurance contract.[5] See *Modderno v. King*, 317 U.S. App. D.C. 255, 82 F.3d 1059, 1061 (D.C. Cir. 1996) and multiple cases cited at Dkt. 17, pp. 17-21.

Plaintiff also points to the ACA §1557 regulation (45 CFR §92.207(b)(2)) which prohibits "marketing practices or benefits designs that discriminate on the basis of race, . . .sex. . . or disability" to support her claim that there should be a new ACA §1557 standard for disability discrimination. This argument is also flawed because that regulation was promulgated under ACA §1557(a) which expressly incorporates RA §504:

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[4] See also ADA's legislative history: "Employers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, . . . a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition. S. Rep. No. 101-116, at 29 (1989).

[5] Plaintiff suggests that Defendant believes ACA 1557 does not extend to benefit design. This is wrong. Disability discrimination claims under ACA 1557 extend to benefit design and the content of insurance contracts in the same way and to the same extent as such claims under RA 504.

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> **an individual shall not, on the ground prohibited under . . . section 794 of title 29 [Rehabilitation Act §504]**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance . . .

ACA §1557(a) (emphasis added). RA §504 contains the identical prohibition on discrimination, e.g. excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. §794 (emphasis added).

Plaintiff's final argument is that the court should ignore the majority of ACA §1557 cases finding that Congress clearly intended that claims under ACA §1557 follow the substance and enforcement mechanisms of RA §504 and the other related federal civil rights statutes depending on protected status. See e.g. *Huffman v. Univ. Med. Ctr. Mgmt. Corp.*, 2017 U.S. Dist. LEXIS 180999, *5-*6 (E.D. La., Oct. 31, 2017)(finding Section 1557 of the ACA has the same meaning and same protections as RA §504 and the ADA, with respect to disability discrimination); *York v. Wellmark, Inc.*, 2017 U.S. Dist. LEXIS 199888, *52-*53 (S.D. Iowa, Sept. 6, 2017) (because Title IX does not allow for disparate impact claims, neither does ACA §1557 for claims of discrimination on the basis of sex); *Briscoe v. Health Care Serv. Corp., No. 16-CV-10294*, 2017 WL 5989727, at *9-10 (N.D. Ill. Dec. 4, 2017); *SEPTA v. Gilead Sciences, Inc.*, 102 F. Supp. 3d 688, 697-670 (E.D. Pa. 2015) (ACA §1557 manifests an intent to import the various standards and burdens of proof of the four referenced civil rights statutes, depending upon the protected class as issue).

Instead, for her contention that ACA §1557 created a new disability discrimination standard, Plaintiff relies on a Nebraska Law Review article (which proposes that the Supreme

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Court decision of *Alexander v. Choate*[6] and its progeny should no longer be considered good law) and a single district court case, *Rumble v. Fairview Health Servs*., 2015 U.S. Dist. LEXIS 31591, at *29 (D. Minn., March 16, 2015). *Rumble* had nothing to do with disability discrimination. It held that instead of adopting the enforcement standards of each of the civil rights statutes expressly referenced in ACA §1557, a single standard applies in all types of discrimination claims—but failed to state articulate the standard. Not only has no other court adopted *Rumble*'s reasoning, but *Rumble* has also been stayed in the wake of a nationwide injunction against enforcement of the HHS regulations prohibiting discrimination on the basis of gender identity as "sex" discrimination. *See Rumble v. Fairview Health Servs.*, 2017 U.S. Dist. LEXIS 13316 (D. Minn. Jan. 30, 2017) (stay order in light of injunction in *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp.3d 660 (N.D. Tex. 2016)). It provides no support for Plaintiff's contention.

This Court should follow the well supported majority view that ACA §1557 adopted the longstanding interpretation of discrimination under RA §504 for claims of disability discrimination. No authority justifies abandoning the jurisprudence under RA §504, when interpreting ACA §1557 disability discrimination claims based on benefit design.

2. Plaintiff's Proposed New Legal Standard is based on Inapplicable HHS Regulations.

Plaintiff's proposed new legal standard for disability discrimination under ACA §1557 is based solely on the federal regulators' statements about gender transition services, a form of sex discrimination, that "an explicit, categorical (or automatic) exclusion of limitation of coverage for all health services related to *gender transition* is unlawful on its face." Dkt. No. 24-1, p.11;

[6] Cited at p. 8, *infra.*

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quoting 81 Fed. Reg. at 31429 (emphasis added). See also 45 C.F.R. §92.207(b)(4), which provides a covered entity shall not "[h]ave or implement a categorical coverage exclusion or limitation for all health services related to *gender transition*[.]"

Plaintiff posits that the words "gender transition" can simply be replaced with "disability" because of the "basic principle" (not articulated anywhere in the statute, regulations or caselaw) that all categorical exclusions of services to treat hearing loss are *per se* discriminatory.

45 C.F.R. §92.207, quoted in full at Dkt. No. 17, p. 15, shows the fallacy of this argument. Paragraph (a) provides a general nondiscrimination requirement, and paragraph (b) lists specific actions that are prohibited. Paragraphs(b)(1)-(2) apply to all protected classes: race, color, national origin, sex, age and disability, while paragraphs (b)(3)-(5) deal specifically with coverage of services provided to transgender people and gender transition. Plaintiff's request to re-write the regulation to insert the term "disability" is baseless.

45 C.F.R. §92.207(b)(4) expressly applies only to gender transition services. The comments to the ACA §1557 implementing regulations discuss at length the regulators' view that ACA §1557 expanded the concept of "sex" discrimination to include gender identity, while expressly stating that there was no change in the test for disability discrimination and the other protected classes. 81 Fed. Reg. 31446, 31464. Moreover, enforcement of 45 C.F.R. §92.207(b)(4) has been stayed by the nationwide injunction entered in *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp.3d 660 (N.D. Tex. 2016)).

Plaintiff, however, goes even further than the regulations for gender transition services. She appears to recognize that her claim would fail even under Plaintiff's proposed "categorical exclusion <u>of all health services</u> related to hearing loss" since the Plan undisputedly does <u>not</u> exclude "all health services" related to hearing loss and expressly covers cochlear implants, used

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to treat profound or severe hearing loss, and bone anchored hearing aids, also for serious hearing loss. (Dkt. 17,pp. 9-10). Therefore, she contends the exclusion is unlawful because it excludes medically necessary hearing aids and related outpatient office visits to an audiologist. Even the gender transition regulation does not go so far. In rejecting comments urging the regulations to require coverage for medically necessary services related to gender transition, the Office of Civil Rights (OCR) responded:

> issuers are not required to cover all medically necessary services. Moreover, we do not affirmatively require covered entities to cover any particular treatment, as long as the basis for exclusion is evidence-based and nondiscriminatory.
>
> Thus, we reject commenters' suggestion that the rule require covered entities to provide coverage for all medically necessary health services related to gender transition regardless of the scope of their coverage for other conditions.

81 Fed. Reg. at 31435.

3. Hearing Loss is Not a Disability under ACA 1557.

Throughout her opposition, Plaintiff asserts "hearing loss" is a "disability," and therefore the Plan's "hearing loss" exclusion violates her new proposed test, a categorical exclusion of medically necessary treatments and services for a disability. This is a central fallacy to Plaintiff's arguments. Even Plaintiff concedes that "disability" under ACA §1557 is defined under RA §504. (Dkt. 23, p. 15). In order to be considered a disability, the hearing impairment must "substantially limit" an individual's hearing or major life activity. 42 U.S.C. §12102(1)-(2). Whether hearing loss is a disability depends on the severity of the hearing loss. *See, e.g.*, *Ayotte c. McPeek*, 2011 U.S. Dist. LEXIS 67913, *19 (D. Colo. 2011) ("Plaintiff's hearing impairment does not rise to the level of a disability under the Rehabilitation Act"); *Santiago Clemente v. Executive Airlines, Inc.*, 213 F.3d 23 (1st Cir. 2000) (rejecting claim that certain level

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of hearing loss constitutes a disability).

Whether Plaintiff personally could be considered "disabled" (a matter not addressed for the purposes of this motion) is not relevant to this issue. Rather, the issue is whether the Plan's "hearing loss" exclusion solely applies to the hearing disabled. On its face it does not, since it applies to those who have a non-disabling hearing impairment. Thus, the Plan's coverage for cochlear implants and BAHA aids demonstrates that hearing loss coverage is provided to those with the more serious or profound hearing loss who are likely to be disabled, while excluding hearing loss services for others who may or may not meet the definition of disability under RA §504.

4. ACA 1557 Only Requires Even-Handed Treatment between the Disabled and Non-Disabled.

The critical inquiry in any claim of unlawful disability discrimination is whether a challenged policy treats disabled persons differently because of their disability. *See United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed.2d 735 (1996); *Alexander v. Choate*, 469 U.S. 287, 299-302, 105 S. Ct. 712, 83 L. Ed.2d 661 (1985). The U.S. Supreme Court in *Alexander* made it clear that RA §504 (and thus ACA 1557) guarantees equal access to, and even-handed treatment under health plans. It does not mandate coverage for every impairment that may afflict the disabled: ("Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. The Act does not, however, guarantee the handicapped equal results"). *Alexander*, 469 U.S. at 303-04 (citations omitted). In *Traynor v. Turnage*, 485 U.S. 535, 548-49, 108 S. Ct. 1372, 99 L. Ed.2d 618 (1988), the Court confirmed that the central purpose of RA §504 "is to assure that handicapped individuals receive 'evenhanded treatment' in relation to

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nonhandicapped individuals."

Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996) is especially instructive. It held that a health plan's exclusion of coverage for infertility treatments was not discrimination based on disability, despite the greater impact it may have on the disabled. The court reasoned that "the Plan's infertility exclusion does not single out a particular group of disabilities," for example infertility due to cancer, while allowing coverage for infertility problems which are not disabilities, such as infertility due to age. *Krauel*, 95 F.3d at 678. Therefore, the court concluded because the exclusion applied equally to all insureds, "in that no one participating in the Plan receives coverage for treatment of infertility problems[,]" the plaintiff's discrimination claim was properly dismissed as a matter of law. *Id.* The exact same analysis applies to the "hearing loss" exclusion at issue here.

The Ninth Circuit expressly adopted the reasoning of *Alexander* and *Krauel* in *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116-18 (9th Cir. 2000) in holding there is no discrimination under the ADA where "disabled individuals are given the same opportunity as everyone else, so insurance distinctions that apply equally to all employees cannot be discriminatory." See also *Doe v. Mutual of Omaha*, 179 F.3d 557 (7th Cir. 1999)(refusing to cover person with AIDS for a broken leg is discriminatory, while offering insurance policies that contain caps for various diseases some of which may also be disabilities with the meaning of the ADA is not.)

The federal regulators endorse precisely the analysis of disability discrimination set forth in *Kraul* and the RA §504 jurisprudence:

> In the proposed rule [which was ultimately adopted], we did not propose to require plans to cover any particular benefit or service, but we provided that a covered entity cannot have coverage that

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> operates in a discriminatory manner. For example, . . . a plan that covers bariatric surgery in adults but excludes such coverage for adults with particular developmental disabilities would not be in compliance with the prohibition on discrimination based on disability.

81 Fed. Reg. at 31429.

Plaintiff confuses the legal standard for disability discrimination (even-handed treatment as between the disabled and non-disabled when applied to a benefit design) with a disparate impact claim in a different context. Consistent with *Alexander* and its progeny, ACA §1557, does not mandate coverage for services just because they could have a disproportionate impact on individuals with a particular disability, as long as the service is excluded for all. S*EPTA v. Gilead Sciences, Inc.*, 102 F. Supp.3d 688 (E.D. Pa. 2015).

The fact that the Plan covers medical/surgical office visits, exams, surgeries and equipment, but not specified services for certain hearing loss, is not a "disability"- based distinction and therefore not "discrimination." Plaintiff, along with all other disabled and non-disabled persons in the Plan, has coverage for the enumerated non-hearing related services. Some persons who avail themselves of the coverage for medical/surgical office visits, exams, surgeries and equipment may well be disabled. Plaintiff makes no allegations that she was denied any of those services because of her alleged disability or that she got few benefits than everyone else under the plan *because of* a disability. Nor do Plaintiff's enumerated non-hearing related covered service examples fit within the example of prohibited discrimination provided by OCR (otherwise covered bariatric surgery for adults excluded for adults with particular developmental disabilities).

Conversely, the exclusion for "hearing loss" does not apply only to the hearing disabled, since not all hearing loss is a disability. And, individuals who would have a substantial

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limitation in hearing (and thus qualify as disabled), *are covered* for hearing loss services related to cochlear implants and BAHA hearing aids. Plaintiff cannot show she was denied the benefits of the Plan or received fewer benefits "because of a disability."

5. Plaintiff's Theory Would Have an Enormous Impact on the Health Insurance Industry that Congress Did Not Intend.

If adopted, Plaintiff's proposed new legal standard for disability discrimination would have a significant and far-reaching impact on the nation's health insurance industry. Even though Essential Health Benefits do NOT require hearing aids to be covered under health plans, every plan would need to immediately amend their health plans and policies to cover hearing aids and related services, and by extension, all other services or equipment that might treat any potentially disabling conditions. The financial impact would be enormous, a result that HHS never envisioned:

> It is important to note that this final rule, except in the area of sex discrimination, applies pre-existing requirements in Federal civil rights laws to various entities, the great majority of which have been covered by these requirements for years. Because Section 1557 restates existing requirements, **we do not anticipate that covered entities will undertake new actions or bear any additional costs in response to the issuance of the regulation with respect to the prohibition of race, color, national origin, age, or disability discrimination . . . .**
>
> For the most part, because this regulation is consistent with existing standards applicable to the covered entities, the new burdens created by its issuance are minimal. . . . **The final rule does not include broad expansions of existing civil rights requirements on covered entities,** and therefore minimizes the imposition of new burdens.

81 Fed. Reg. at 31446, 31464. If Congress had intended such a radical expansion of benefit mandates under the guise of "new" disability discrimination protections, it would have been the subject of vigorous national debate for years. Instead, the regulators, the statute and the caselaw

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are consistent that ACA §1557 simply incorporates RA §504 and exactly mimics its prohibitions.

6. Plaintiff Lacks Standing Because She Suffered No Injury-In-Fact.

Plaintiff does not dispute she purchased hearing aids two months *before* she was enrolled in Kaiser's Plan, and that she has never submitted a claim for coverage of an audiology visit, or anything else relating to her hearing loss. There is accordingly no way to know whether any claim she might have made would be covered. She has failed to allege any concrete or particularized injury. The fact that a new co-plaintiff may now join in this action does not give Plaintiff standing. *See Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir. 1978) (class representatives must allege personal injury); *In re Metro. Sec. Litig.*, 532 F. Supp.2d 1260 (E.D. Wash. 2007) ("each proposed class representative . . . must have standing in his or her own right").

Finally, it was Plaintiff's employer who made the economic decision not to purchase the rider for hearing aid coverage that Kaiser offers. Kaiser does provide coverage for the hearing aids Plaintiff desires, but it does not do so for free. It was Plaintiff's employer's decision not to purchase the hearing aid coverage, which was the cause of Plaintiff's alleged injury. The choice by the employer not to purchase the available coverage cannot be "intentional discrimination" by the insurer.

7. Conclusion.

Plaintiff was not treated differently from others in the Plan "because of" her alleged disability. The Court should decline to adopt a radical, new standard for disability discrimination in the ACA which is untethered to the statute, the regulations, case law or sound public policy. Since the Plan does not discriminate on the basis of a hearing disability, Plaintiff's complaint should be dismissed in its entirety.

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Dated this 9th day of February, 2018.

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CERTIFICATE OF SERVICE

I, Kami Mejia, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to this action. My business address is: 701 Fifth Avenue, Suite 3300, Seattle, Washington 98104.

On this day, I caused the foregoing DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS to be served on the parties listed below in the manner indicated below.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

Executed on this 9th day of February, 2018, at Seattle, Washington.

/s/ Kami R. Mejia
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