UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REBECCA WEINREB and DAVID WEINREB, Plaintiffs, - v - XEROX BUSINESS SERVICES, LLC HEALTH AND WELFARE PLAN, CONDUENT HR CONSULTING, LLC AND CAREMARK PCS HEALTH LLC, Defendants.	Civil Action No.: 16-cv-06823-DAB

CAREMARK PCS HEALTH, LLC'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND THE JUDGMENT

Defendant, Caremark PCS Health, LLC ("Caremark"), by and through its attorneys, respectfully submits the following Response in Opposition to Plaintiffs' Motion to Alter or Amend the Judgment.

INTRODUCTION

Presenting no new evidence or change in the law, Plaintiffs seek to reargue this Court's dismissal of Plaintiffs' claim against Caremark under Section 1557 of the Affordable Care Act (the "ACA"). This Court should deny Plaintiffs' motion. First, after careful analysis and review, this Court correctly determined that Section 1557 of the ACA expressly incorporates the pleading standards of Title IX in connection with any sex discrimination claim. Thus, Plaintiffs have no claim for disparate impact under Section 1557 because Title IX does not allow those claims. Also, Plaintiffs do not dispute, nor could they, that they have not alleged an intentional discrimination claim as required under Title IX.

Second, even if this Court were to interpret Section 1557 as allowing for sex discrimination claims based on disparate impact, Plaintiffs have not pled such a claim. As this Court already

determined, "[g]iven that Plaintiffs make no allegations regarding how Defendant's Plan impacts a protected group, Plaintiffs' claims under a disparate impact fail as well." (Opinion, Dkt. No. 89, at 36). Thus, this Court should deny Plaintiffs' motion and uphold its prior decision.

ARGUMENT

The decision whether to grant a Rule 59(e) motion is within the sound discretion of the district court. *Wells Fargo Fin. Inc. v. Fernandez*, 2001 WL 345226, *1 (S.D.N.Y. Apr. 9, 2001). The Court "may alter or amend judgment to correct a clear error of law or prevent manifest injustice." *Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 153 (2d Cir. 2008) (internal quotation marks omitted). "Alteration or amendment of a prior decision is warranted only where controlling law has changed, new evidence is available, and/or clear error must be corrected or manifest injustice prevented." *Katz v. Berisford Int'l PLC*, 2000 WL 1760965, at *5 (S.D.N.Y. Nov. 30, 2000) (internal quotation and citation omitted). "The standard for granting a Rule 59(e) motion is strict and reconsideration is generally denied as a Rule 59(e) motion is not a vehicle for reargument or asserting arguments that could and should have been made before judgment issued." *Wells Fargo*, 2001 WL 345226 at *1 (internal quotations and citations omitted).

I. THE COURT DID NOT ERR IN HOLDING THAT PLAINTIFFS HAVE NO DISPARATE IMPACT CLAIM UNDER SECTION 1557 OF THE AFFORDABLE CARE ACT

Plaintiffs have failed to establish that the Court made a clear error in its ruling, or that new evidence is now available that would warrant an alteration in the judgment entered. *Katz*, 2000 WL 1760965, at *5. Plaintiffs simply try to reargue this Court's decision that disparate impact claims are not allowed under Section 1557 of the ACA because Title IX, as expressly incorporated in Section 1557, does not allow them. This Court should deny that request.

As conceded by Plaintiffs, only in the face of ambiguous statutory text is a court permitted to look to the statute's legislative history or agency's interpretation of the statute. *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1981). Citing to agency guidelines and *Rumble v. Fairview Health Services*, 2015 WL 1197415 (D. Minn. Mar. 16, 2015), Plaintiffs previously argued that Section 1557 should employ a uniform standard regardless of protected class that encompasses disparate impact claims. This Court already rejected that argument and Plaintiffs present no new authority or change in the law that would alter this Court's decision.

As this Court correctly noted, "a Plaintiff suing a Defendant for discriminating in the denial of benefits under the ACA must essentially plead a corresponding civil rights statute predicate in order to make out a valid Section 1557 ACA claim." (Opinion, Dkt. No. 89, at 44). Because Title IX does not allow for disparate impact claim (which Plaintiffs do not dispute), Plaintiffs' Section 1557 claim for sex discrimination similarly does not allow such claims. This Court's decision was well-reasoned based on the statutory text of Section 1557.

Indeed, at least four (4) courts, one (1) in 2017 and three (3) in 2018, have reached the same conclusion as this Court. *Condry v. UnitedHealth Grp., Inc.*, No. 17-CV-00183-VC, 2018 WL 3203046 (N.D. Cal. June 27, 2018) (holding that disparate impact claims on the basis of sex are not cognizable under section 1557); *Doe v. Bluecross Blueshield of Tennessee, Inc.*, No. 2017-CV-02793TLPCGC, 2018 WL 3625012 (W.D. Tenn. July 30, 2018); *E.S. by & through R.S. v. Regence BlueShield*, No. C17-01609 RAJ, 2018 WL 4566053 (W.D. Wash. Sept. 24, 2018); *Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725 (N.D. Ill. 2017).

Plaintiffs now argue that this Court's decision was clearly erroneous based on *Davis v. Shah*, 821 F.3d 231, 260. However, *Davis* involved Section 504 of the Rehabilitation Act of 1973, not Title IX. *Davis* has absolutely no discussion regarding gender discrimination, and does not

hold that a private cause of action for disparate impact sex discrimination claims are subject to the pleading requirements of Section 504 of the Rehabilitation Act. *See generally id.*

Further, Plaintiffs' reliance on *Rumble*, is also meritless. While the court, *in dicta*, discusses Congress' intent in the adoption of four (4) civil rights statutes in Section 1557 of the ACA, the court ultimately declines to rule on the intent standard required for a Section 1557 claim at the motion to dismiss stage. *Rumble v. Fairview Health Services*, No. 14-cv-2037, 2015 WL 1197415, at *18 (D. Minn. Mar. 16, 2015). Further, this Court already rejected Plaintiffs' reliance on *Rumble*.

The court in *Briscoe*, *supra*, rejected *Rumble* and its analysis. In *Briscoe*, three women sued claiming that Blue Cross Blue Shield of Illinois violated the ACA by denying them coverage for and access to lactation counseling. The court dismissed the ACA claim holding that the ACA does not allow a disparate impact claim based upon alleged sex discrimination.

> This Court finds § 1557's text plain and unambiguous. Section 1557 begins by identifying the ACA's prohibited grounds for discrimination, based upon specific references to four civil-rights statutes: race (42 U.S.C. § 2000d), sex (20 U.S.C. § 1681), age (42 U.S.C. § 6102), and disability (29 U.S.C. § 794). Section 1557 then provides that the enforcement mechanisms "provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection."
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> If Congress intended for a single standard to apply to all § 1557 discrimination claims, repeating the references to the civil-rights statutes and expressly incorporating their distinct enforcement mechanisms would have been a pointless (and confusing) exercise. *See Gilead*, 102 F. Supp. 3d at 698. Instead, Congress used the civil-rights statutes for two purposes: (1) to define the grounds for discrimination prohibited under the ACA; and (2) to establish the enforcement mechanisms available under the ACA for different discrimination claims. Taken together, the first two sentences of § 1557 unambiguously demonstrate Congress's intent "to import the various different standards and burdens of proof into a Section 1557 claim, depending upon the protected class at issue." *Id.* at 698–99.

> Because this Court finds § 1557 plain and unambiguous, Defendant's citation to OCR's interpretation is unavailing. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *see also York*, slip op. at 33–34.
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> In light of the above, Title IX's enforcement mechanism applies to Plaintiffs' sex discrimination claim, so their claim fails because Title IX does not allow disparate-impact claims. Title IX "implies a private right of action to enforce its prohibition on *intentional* sex discrimination." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). And Title VI of the Civil Rights Act—the model for Title IX—prohibits only intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). Because Title IX must be interpreted and applied the same way as Title VI, *see Cannon v. Univ. of Chi.*, 441 U.S. 677, 696, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), Plaintiffs may not assert Title IX discrimination claims premised upon a disparate-impact theory.

Briscoe v. Health Care Serv. Corp., 281 F. Supp. 3d 725, 738 (N.D. Ill. 2017). The court in *Doe*, *supra*, finding *Briscoe* "particularly instructive," agreed that that "[i]f Congress intended for a single standard to apply to all § 1557 discrimination claims, repeating the references to the civil-rights statutes and expressly incorporating their distinct enforcement mechanisms would have been a pointless (and confusing) exercise." 2018 WL 3625012, at *6.

Finally, Plaintiffs cite to HHS guidelines indicating that disparate impact claims should be allowed under Section 1557 regardless of the protected class. Again, however, this Court need not consider those guidelines where the statutory language is clear. Here, as this Court and the other courts cited above already have determined, the pertinent regulation states "the enforcement mechanisms available for and provided under…Title IX of the Education Amendments of 1972…shall apply for purposes of Section 1557 as implemented by this part." *See* 45 CFR 92.301. This clearly requires that Plaintiffs must establish a predicate claim under the enumerated statutes

in order to state a Section 1557 claim. Since Title IX does not allow for disparate impact claims, Plaintiffs similarly have no disparate impact claim under Section 1557 for sex discrimination.

The Court was correct in its ruling that Section 1557 does not provide for disparate impact claims for sex discrimination and Plaintiffs have failed to prove that the court made a clear error in its ruling.

II. PLAINTIFFS HAVE NOT PLED A VIABLE CLAIM FOR SEX DISCRIMINATION UNDER A DISPARATE IMPACT THEORY

Even if the Court were to rule that Section 1557 allows for sex discrimination claims based on disparate impact, Plaintiffs have not stated such a claim, as already determined by this Court. This Court analyzed and determined that Plaintiffs had not stated a claim under Title VII based on disparate impact. (Opinion, Dkt. No. 86, at 34-36).[1] For a disparate impact claim to survive a Rule 12(b)(6) motion to dismiss, plaintiffs must demonstrate a particular practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(k)(1)(A)(I). Specifically, plaintiffs must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two. *Wright v. Stern*, 450 F. Supp. 2d 335, 367 (S.D.N.Y. 2006).

Plaintiff has failed to meet this burden. Plaintiff has not established that the Plan Guideline, as written and applied, discriminates in any way on the basis of gender. The Plan Guideline in question provides that the Plan will not pay for benefits for fentanyl unless the patient has cancer. This provision is entirely gender neutral as it applies equally to both men and women. Because both men and women suffer from non-cancer pain, and neither sex are able to receive benefits for

[1] This claim was asserted by Mr. Weinreb against Xerox. Mr. Weinreb would have no direct Title VII claim against Caremark because Caremark did not employ him. However, the pleading deficiencies would apply equally to any disparate impact claim by Plaintiffs under Section 1557 of the ACA.

fentanyl for non-cancer pain, both sexes receive the same coverage. Plaintiff has failed to demonstrate that any disparity exists between the treatment of men and women for fentanyl benefits.

As this Court noted, Plaintiffs also cite to no statistical evidence that fentanyl is prescribed more frequently to men than it is to women or that women who seek fentanyl off-label are less likely to receive it than are men who seek it. (Opinion, Dkt. No. 86, at 35). Thus, even considering a disparate impact claim, Plaintiffs still have not stated a viable claim for sex discrimination against Caremark under Section 1557 of the ACA.

Finally, this Court was well-within its discretion to deny leave to amend based on the number of amended pleadings already allowed. As such, this Court should deny Plaintiffs' motion to reconsider.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Motion to Alter or Amend the Judgment.

Dated: October 25, 2018

Respectfully submitted,

/s/ *James Weller*

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