UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REBECCA WEINREB and DAVID M. WEINREB, Plaintiffs, v. XEROX BUSINESS SERVICES, LLC HEALTH AND WELFARE PLAN, CONDUENT HR CONSULTING, LLC, AND CAREMARK PCS HEALTH LLC, Defendants.	)	Case No. 1:16-cv-06823-DAB

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO ALTER OR AMEND THE JUDGMENT

Caremark's reading of Section 1557 would inject a discriminatory enforcement standard into this non-discrimination law by granting different rights and remedies to different people depending upon whether the discrimination they suffered was due to their sex, race, age, or disability. And it would provide an entirely unworkable standard for those seeking relief for multiple and intersecting forms of discrimination. To hold in favor of Caremark, the Court would have to conclude not only that this absurd result was intended by Congress, but also that this purported Congressional intent is so unambiguously evident from the statutory text that the Court can ignore contrary legislative history and the U.S. Department of Health and Human Services' unequivocal rejection of this reading of the law.

But Caremark's interpretation finds no support in either the plain language of Section 1557 or its legislative history. Quite the contrary, it is clear from both the text and legislative history of Section 1557 that Congress intended Section 1557 to adopt a single uniform standard for resolving private causes of action that permits disparate impact claims, regardless of the grounds of

discrimination alleged. HHS quite reasonably interpreted Section 1557 this way, and the Court was required to defer to that interpretation if it found the statutory text even somewhat ambiguous.

Thus, the Court clearly erred in holding that Plaintiffs could not proceed with their disparate impact sex discrimination claim under Section 1557. Because Plaintiffs adequately pled this claim, the Court should grant the instant motion and reopen this case.

ARGUMENT

I. Congress Clearly Intended to Permit Disparate Impact Sex Discrimination Claims Under Section 1557.

Defendant makes no attempt to refute Plaintiffs' arguments that at Step 1 of the *Chevron* analysis, the statutory text and legislative history of Section 1557 make clear that Congress unambiguously intended all enforcement mechanisms in each of the four referenced statutes to be available to all Section 1557 plaintiffs. Moreover, Defendant ignores that at least one other court in this District relied on HHS' determination that Section 1557 authorizes a private right of action for claims of disparate impact sex discrimination in denying a motion for summary judgment. *Cruz v. Zucker*, 195 F. Supp. 3d 554, 580–81 (S.D.N.Y. 2016), *reconsideration granted on other grounds by* 218 F. Supp. 3d 246 (S.D.N.Y. 2016). Instead, Defendant's entire argument rests upon four out-of-circuit district courts decisions, some of which contain little or no independent analysis on this question. (Caremark Mem., Dkt. No. 102, at 3–5). Section 1557 jurisprudence is still in its infancy, and the interpretation that Defendant advances defies the unambiguous intent of Congress.

At *Chevron* Step 1, "the question [is] whether Congress has directly spoken to the precise question at issue. 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. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). To ascertain Congressional intent, the Court should not examine the relevant statutory language in a vacuum;

on the contrary, the Court should "employ[ ] traditional tools of statutory construction," *id.* at 843 n.9, "looking to the statutory scheme as a whole and placing the particular provision within the context of that statute," *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 108 (2d Cir. 2012). If the "plain statutory language is ambiguous or would lead to an absurd result," the Court must consult legislative history. *Id.*; *see also Chevron*, 467 U.S. at 845 (reviewing text and legislative history to ascertain Congressional intent); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency*, 846 F.3d 492, 512 (2d Cir. 2017) (examining "the statutory text, structure, and purpose as reflected in its legislative history" at *Chevron* Step 1).

Defendant takes the extraordinary position that the plain language of Section 1557 so unambiguously adopts different enforcement mechanisms for different claimants that this Court (1) need not employ principles of statutory construction, (2) need not view the statute in the context of the entire ACA, (3) need not consider contrary legislative history, and (3) cannot, under *Chevron* Step 2, consider HHS' flat rejection of this interpretation. But the plain language of Section 1557 does not say what Defendant wants it to. Section 1557 states: "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." It does *not* state that only title IX enforcement mechanisms are available for claims of sex discrimination, or anything of the sort.

Consequently, the Court must view this language in the context of the entirety of the ACA; it must employ principles of statutory construction; and it must look to legislative history to ascertain Congressional intent. *Catskill Mountains*, 846 F.3d at 512; *Louis Vuitton*, 676 F.3d at 108. From this review, it is clear that Congress intended precisely the opposite of what Defendant argues: Congress intended Section 1557 to apply a single uniform standard for all plaintiffs, irrespective of the grounds of discrimination alleged. *See Rumble v. Fairview Health Servs.*, No.

14-CV-2037 SRN/FLN, 2015 WL 1197415, at *11 (D. Minn. Mar. 16, 2015). Because Section 504 of the Rehabilitation Act permits a private right of action for disparate impact claims, so does Section 1557. *See Davis v. Shah*, 821 F.3d 231, 260 (2d Cir. 2016); *see also Alexander v. Choate*, 469 U.S. 287, 299 (1985) (assuming based on review of legislative history that Congress did not intend to limit Section 504 to claims of intentional discrimination).

First, the Court must interpret the statutory text to avoid "patently absurd" results. *United States v. Brown*, 333 U.S. 18, 27 (1948). Defendant's "multiple standards" interpretation would yield the absurd and invidious result that individuals' protections under Section 1557 would vary depending on their particular characteristics, and courts would have no guidance for evaluating a claim of discrimination on the basis of multiple characteristics. *Rumble*, 2015 WL 1197415, at *11-12. Defendant's interpretation of Section 1557 is thus clearly erroneous on its face.

Second, Section 1557 is a civil rights statute embedded within a larger remedial statute, the ACA. Both civil rights statutes and remedial statutes must be broadly construed. *See Phillip v. Univ. of Rochester*, 316 F.3d 291, 296 (2d Cir. 2003) (federal civil rights statutes are to be construed as "broadly as is consistent with the actual language of each clause"); SUTHERLAND'S ON STATUTORY CONSTRUCTION, § 60:1 (7th ed. 2018) (courts should give language in remedial statutes "a generous construction consistent with [their] reformative mission"). Requiring all victims of sex discrimination to prove intentionality when the plain language does not so require flouts these canons of construction. Giving Section 1557 the liberal construction required by these overlapping canons, and viewing it in context of the larger ACA statutory scheme, *Catskill Mountains*, 846 F.3d at 512; *Louis Vuitton*, 676 F.3d at 108, it is clear error for the Court to artificially impose this narrow and burdensome interpretation onto the statutory text.

Third, extensive legislative history reinforces that Congress intended the ACA in general, and Section 1557 in particular, to provide robust protection against sex discrimination in health care and health insurance. (*See* Plaintiffs' Mem., Dkt. No. 101, at 5 (citing multiple contemporaneous remarks from the Congressional record indicating this unambiguous intent)). As with the Rehabilitation Act, "much of the conduct that Congress sought to alter in passing" Section 1557 and the ACA, including insurance practices that unduly burden women, "would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Alexander,* 469 U.S. at 296–97. And as Senator Leahy explained, Section 1557 "ensure[s] that all Americans are able to reap the benefits of health insurance reform *equally without discrimination*." 156 Cong. Rec. S1842 (daily ed. Mar. 23, 2010) (emphasis added). By giving different people different levels of protection based upon their protected class, Defendant's "multiple standards" interpretation embeds discriminatory practices into Section 1557. This is antithetical to the ACA's and Section 1557's express goal of eliminating discrimination in health care.

Curiously, the only other argument Defendant makes to support its "multiple standards" interpretation is by citing to HHS' regulation, which essentially repeats the text of Section 1557. (Caremark Mem., Dkt. No. 102, at 5 (citing 45 C.F.R. § 92.301(a) (2016))).[1] Defendant argues that this regulation "clearly requires" Plaintiffs to state a Title IX claim, (*id.* at 5-6), wholly ignoring that HHS rejects this interpretation (*see* Part II, *infra*). HHS is the controlling authority

[1] "The enforcement mechanisms available for and provided under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, or the Age Discrimination Act of 1975 shall apply for purposes of Section 1557 as implemented by this part." 45 C.F.R. § 92.301(a) (2016).

on the meaning of its own rules. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). Defendant's flawed interpretation of Section 1557 finds no support in HHS' regulation.

Thus, the statutory text and legislative history demonstrate that Congress unambiguously intended all enforcement mechanisms in each of the four referenced statutes to be available to all Section 1557 plaintiffs, and the Court clearly erred in holding otherwise. Accordingly, Plaintiffs may proceed with a disparate impact claim.

II. The Court Clearly Erred by Overlooking HHS' Determination that Section 1557 Permits Disparate Impact Sex Discrimination Claims.

Even if the textual analysis and legislative history do not convince the Court that Congress intended Section 1557 to adopt a uniform standard for all claimants that includes disparate impact sex discrimination, the Court still must adopt this interpretation because HHS has spoken on the issue. *Chevron*, 467 U.S. at 843. The preamble to HHS' Section 1557 final rule states:

> [HHS' Office for Civil Rights] interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation.

Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375-01, 31,440. HHS provided this interpretation in response to comments submitted during the rulemaking process specifically asking HHS to confirm that "all enforcement mechanisms available under the statutes listed in Section 1557 are available to each Section 1557 plaintiff, regardless of the plaintiff's protected class." *Id.*, 81 Fed. Reg. at 31,439.

This is not only a reasonable construction of the statute, but the only permissible construction for all the reasons set forth in Part I, *supra*. Consequently, the Court must defer to HHS' interpretation. *Chevron*, 467 U.S. at 843; *Catskill Mountains*, 846 F.3d at 520 ("At *Chevron*'s second step the court must defer to the agency's interpretation if it is reasonable." (internal quotation marks and alterations omitted)); *Cmty. Health Ctr. v. Wilson-*

Coker, 311 F.3d 132, 138 (2d Cir. 2002) (holding agency interpretations in the preamble to a final rule promulgated through notice-and-comment rulemaking are entitled to deference, "whether *Chevron* or otherwise"). Accordingly, in *Cruz v. Zucker*, Judge Rakoff relied on this precise preamble language in denying a motion for summary judgment against a claim of sex discrimination in health coverage under Section 1557. 195 F. Supp. 3d at 580–81.

The Court clearly erred by overlooking HHS' interpretation of Section 1557.

III. The Second Amended Complaint States a Claim for Disparate Impact Sex Discrimination.

At the motion to dismiss stage, Plaintiffs need not "establish" or "demonstrate" that the plan of benefits and Caremark's administration thereof has the effect of discriminating against women. (*See* Caremark Mem., Dkt. No. 102, at 6–7). Nor must Plaintiffs cite statistical evidence to state its disparate impact claim. *See Jenkins v. New York City Transit Authority*, 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009). At this stage of the litigation, Plaintiffs need only "identify in [their] pleadings a specific . . . practice that is the cause of the disparate impact" to "give the defendant fair notice of what [their] claim is and the grounds upon which it rests." *Id.* at 469–70 (internal quotation marks omitted). As a civil rights claim, Plaintiffs' allegations must be construed with particular liberality. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 88 (2d Cir. 2000), *abrogated on other grounds by Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).

Plaintiffs allege that Caremark's denial of coverage for fentanyl to treat Global Diffuse Adenomyosis discriminates on the basis of sex because it has the effect of denying the only effective treatment for a medical condition directly related to pregnancy and childbirth, and as a result "provides inferior coverage to women than to men." (Second Amended Complaint ("Compl."), Docket No. 67, ¶ 104). Plaintiffs have alleged that the plan treats men and women differently: whereas women do not receive comprehensive coverage under the plan, "upon

information and [b]elief, the Plan does not preclude males from receiving a medication under the Plan which is the only effective medication to treat illness exclusive to men." (Compl. ¶ 104). Plaintiffs adequately state a claim for sex discrimination under Section 1557. *See Tovar v. Essentia Health*, No. CV 16-100 (DWF/LIB), 2018 WL 4516949, at *4 (D. Minn. Sept. 20, 2018). If the Court disagrees, leave to amend is the appropriate remedy. Fed. R. Civ. P. 15(a)(2).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion to Alter or Amend the Judgment dismissing Plaintiffs' Section 1557 claim and reopen this case.

Dated: November 15, 2018

___/s_____

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***Pro hac vice motion forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2018, I electronically filed the foregoing Reply Memorandum in Support of Plaintiffs' Motion to Alter or Amend the Judgment with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record at their e-mail address on file with the Court.

/s/ Michelle Banker

Counsel for Plaintiffs