



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

Emily T. Prince a/k/a

Trina C.,¹

Complainant,

v.

Rob Shriver,

Acting Director,

Office of Personnel Management,

Agency.

Appeal No. 0120162759

Agency No. 2015025

DECISION

On September 2, 2016, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the August 3, 2016 final decision of the Office of Personnel Management (Agency) concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency subjected Complainant to disparate treatment on the basis of sex (gender identity/transgender female) when, for the 2015 plan year, it contracted with CareFirst BlueChoice, Inc. (CareFirst) for a health insurance plan in the Federal Employee Health Benefits (FEHB) Program that contained a general exclusion of coverage for

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

“[s]ervices, drugs, or supplies related to sex transformations . . . ,” resulting in denial of coverage for gender affirming surgery.

BACKGROUND

During the period at issue, Complainant worked as a Trial Attorney for the Department of Transportation’s Federal Railroad Administration. Complainant is a transgender woman who was diagnosed with gender dysphoria. On April 22, 2015, Complainant’s surgeon contacted her FEHB carrier, CareFirst, and requested prior approval for gender affirming surgery. CareFirst was nonresponsive to Complainant’s surgeon. Complainant contacted CareFirst who advised her that gender affirming surgery was not covered by her FEHB plan. CareFirst cited its 2015 FEHB brochure which contained a general exclusion of gender affirming surgery (hereinafter, “the Exclusion”). Specifically, CareFirst’s 2015 FEHB brochure stated: “We do not cover . . . [s]ervices, drugs, or supplies related to sex transformations.”

On June 3, 2015, Complainant initiated contact with an EEO Counselor. The parties were unable to informally resolve the matter. On June 23, 2015, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the basis of sex (gender identity/transgender female) when:

On April 22, 2015, her FEHB insurance plan, CareFirst Blue Choice Blue Cross Blue Shield, excluded coverage for transgender-related medical services.

On August 24, 2015, Complainant appealed the denial to CareFirst. On September 24, 2015, CareFirst denied Complainant’s appeal citing the Exclusion as stated in its 2015 FEHB brochure. At that time, applicable Agency policy, from FEHB Program Carrier Letter No. 2014-17, permitted CareFirst to maintain the Exclusion.²

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ).

² Specifically, in FEHB Program Carrier Letter No. 2014-17, the Agency announced that starting with the 2015 plan year, the Exclusion was permissible, but not mandatory in FEHB plans. Effective with the 2016 plan year, the Agency no longer allowed FEHB plans to contain the Exclusion.

In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant had not proved that the Agency subjected her to discrimination as alleged.

In its final decision, the Agency stated that it had offered a legitimate non-discriminatory reason for its actions. Specifically, the Agency stated that its 1985 standard FEHB brochure language required all carriers to include the Exclusion in their plans based, in part, on the medical community's viewpoint at that time as to the absence of medical necessity for gender affirming surgical procedures. The Agency further maintained that, because Complainant could have chosen a different FEHB plan that offered coverage for gender affirming surgery, Complainant could not claim to have been discriminated against since she chose a FEHB plan that did not offer coverage for gender affirming surgery. Next, the Agency defended its decision allowing FEHB carriers to retain the Exclusion for the 2015 plan year before it forbade FEHB carriers from maintaining the Exclusion starting with the 2016 plan year. The Agency stated that this decision was predicated upon its normal negotiation process with FEHB carriers and there was no basis upon which to conclude that its normal negotiation process was a pretext for discrimination.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency is liable for permitting CareFirst to maintain the Exclusion, which is discriminatory on its face. Complainant argues that the Agency's policy, as described in FEHB Program Carrier Letter No. 2014-17, permitted CareFirst to exclude gender affirming surgery from coverage. According to Complainant, FEHB Program Carrier Letter No. 2014-17 is direct evidence of sex discrimination. Complainant contends the Agency cannot show that the Exclusion was a bona fide occupational qualification that was reasonably related to the Agency's normal business operations. Additionally, Complainant maintains that the Agency failed to proffer a legitimate non-discriminatory reason for the Exclusion. Finally, Complainant argues that the availability of other FEHB plans that covered gender affirming surgery for the 2015 FEHB plan year does not mitigate the direct harm that the Agency's policy inflicted upon her.

The Agency did not submit an opposing brief.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

ANALYSIS

This appeal is straightforward because the Commission addressed the Exclusion in Lawrence v. Office of Pers. Mgmt., EEOC Appeal No. 0120162065 (May 20, 2024), holding that it discriminates based on sex in violation of Title VII.

Specifically, Lawrence held that “a benefits exclusion that specifically targets gender-affirming care for unfavorable treatment plainly discriminates against transgender employees.” Id. While the Exclusion does not use the word “transgender,” the discrimination is still clear because “[b]y excluding medical services because they are related to ‘sex transformations,’ the plan unambiguously targets transgender employees.” Id.; see also, Kadel v. Folwell, 100 F.4th 122, 149 (4th Cir. 2024) (en banc) (“[C]overage exclusions that bar treatments for gender dysphoria bar treatments on the basis of transgender identity by proxy.”).

As Lawrence also noted, “discriminating against a transgender individual includes discriminating based on ‘the fact that the person has transitioned or is in the process of transitioning.’” Id. (quoting Macy v. Dep’t of Justice, EEOC Appeal No. 0120120821 (Apr. 20, 2012)). It follows that “withhold[ing] a benefit because an employee needs it in connection with a gender transition is to discriminate on the basis of transgender status, and therefore sex, in violation of Title VII.” Id.

Finally, Lawrence noted that the Exclusion was an “impermissible, sex-based rule for allocating employment benefits.” Id.

The Exclusion, including its reference to “sex transformations,” is “a policy that cannot be stated [or applied] without referencing sex, and so is inherently based upon a sex-classification.” Id. (internal quotation omitted).

Applying Lawrence, we find that the Agency subjected Complainant to disparate treatment on the basis of sex (gender identity/transgender female) when it contracted with CareFirst for a health insurance plan in the FEHB Program that contained a general exclusion of coverage for “[s]ervices, drugs, or supplies related to sex transformations,” resulting in the denial of coverage for gender affirming surgery in 2015. As we stated in Lawrence, the plans in the FEHB Program are employee benefits, and must allocate benefits in a nondiscriminatory fashion in order to comply with Title VII.

For clarity, we repeat Lawrence’s observation that Title VII does not “necessarily require[] coverage of all gender-affirming care in an employee health benefits plan.” Id. Instead, Title VII “require[s] that coverage decisions for such care be made using standards and criteria that are nondiscriminatory.” Id. The Exclusion is discriminatory and violates Title VII because it “[d]epart[s] from the standards and criteria generally used by the health insurance plan to make coverage decisions and instead target[s] particular types of medical care and services for lesser coverage because of the protected characteristics of the employees receiving it[.]” Id.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency’s final decision finding no sex discrimination, and REMAND the matter for further action consistent with this decision and the ORDER of the Commission below.

ORDER

To the extent that it is has not already done so, the Agency is ORDERED to take the following remedial action:

1. **Within sixty (60) calendar days** of the date this decision is issued, the Agency shall conduct and complete a supplemental investigation to determine whether Complainant is entitled to compensatory damages for this violation of [statute]. In so doing, the Agency shall:

- a) Issue a notice to Complainant of her right to submit evidence based our guidance in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993) and request evidence from Complainant in support of compensatory damages.³ The Notice shall provide Complainant with thirty (30) calendar days to respond (with an option and instructions to request an extension in the case of extenuating circumstances). Complainant has a duty to cooperate with Agency's investigation to determine compensatory damages, including responding to agency requests for documentation or completing agency forms.
- b) Issue a new final agency decision ("Compensatory Damages FAD") based on the findings of the supplemental investigation. The Compensatory Damages FAD shall state the amount (if any) of compensatory damages owed to Complainant and explain how the Agency determined that amount. The Compensatory Damages FAD shall include appeal rights to the Commission.

Within sixty (60) calendar days of the date the Compensatory Damages FAD is issued, the Agency shall pay Complainant the amount of compensatory damages it determined are owed. If there is a dispute over the exact amount of compensatory damages owed, the Agency shall pay the undisputed amount to Complainant. If Complainant disagrees with the agency's award, they may challenge the Agency's decision on the amount of compensatory damages by filing an appeal of the Compensatory Damages FAD with the Commission.

³ To establish entitlement to compensatory damages, the evidence must show a causal relationship between the Agency's discriminatory action and any pecuniary (monetary) or non-pecuniary losses/harm experienced by Complainant. For more information on evidence to determine compensatory damages: EEOC Management Directive 110, Ch. 11 § VII (Aug. 5, 2015), available at https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm (provides the types of compensatory damages available under EEOC statutes and "Objective Evidence" of entitlement); and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) available at <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy under the subsection "Proof of Damages").

Instructions on how to appeal, including the deadline to file, will be included in the appeal rights portion of the Compensatory Damages FAD.

2. **Within one hundred and twenty (120) calendar days of the date this decision is issued**, the Agency shall provide a minimum of four hours of in-person or virtual interactive EEO training to the FEHB administrators regarding their responsibilities under EEO laws, particularly with respect to Title VII and transgender individuals.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)


If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

ATTORNEY'S FEES (H0124)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), they are entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

FOR THE COMMISSION:


Carlton M. Hadden, Director
Office of Federal Operations

December 16, 2024
Date