

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

TERRI BRUCE,)	Case No. 17-5080
)	
Plaintiff,)	
)	
vs.)	DEFENDANTS' ANSWER TO
)	PLAINTIFF'S COMPLAINT
STATE OF SOUTH DAKOTA and)	
LAURIE GILL, in her official capacity as)	
Commissioner of the South Dakota Bureau)	
of Human Resources,)	
)	
Defendants.)	

Comes now State of South Dakota and Laurie Gill, in her official capacity as Commissioner of the South Dakota Bureau of Human Resources, by and through their undersigned counsel of record, who, for their Answer and Defenses to Plaintiff's Complaint, deny, admit, state, and allege as follows:

1. Deny each and every allegation, matter, thing, and conclusion contained in the Complaint except those allegations which are hereinafter specifically admitted or otherwise qualified.
2. As to Paragraph 1 of the Complaint, it is admitted that the State of South Dakota provides, or at least makes available, healthcare coverage to its employees through the South Dakota State Employee Health Plain ("SDSEHP" or the "Plan"). As to the second sentence of Paragraph 1, deny that all State employees are covered by the Plan. In further regard to the second sentence, admit that the Plan states that members of the Plan shall be "entitled to Medically Necessary services and supplies, if provided by or under the direction of a physician."

However, immediately after what has just been quoted, the Plan provides that “[t]hese services are subject to: 1) The limitations, exclusions, and other provisions of the Plan” as well as other expressly identified conditions or requirements. Admit that the third sentence of paragraph 1 sets out the Plan’s definition of “Medically Necessary.”

3. As to Paragraph 2 of the Complaint, deny that under the Plan healthcare is provided to “every other employee” and that “the Plan singles out transgender employees for unequal treatment.” The Plan does provide as follows: “The Plan does not pay any benefits for the following services or supplies. Refer to ‘Covered Charges’ for exceptions. (ww) Services or drugs related to gender transformations.” Therefore, admit that under that exclusion such services or drugs are not covered even if they are “medically necessary” as defined under the Plan.

4. As to Paragraph 3 of the Complaint, the Defendants believe that Mr. Bruce is, as they understand the phrase, “a man who is transgender.” Admit that Mr. Bruce has worked for the South Dakota State Historical Society Archaeological Research Center as a permanent employee since 2010. It is also admitted that he was a temporary employee before 2010 but the records reviewed do not show if Mr. Bruce’s temporary employment dates back to 2005.

5. As to Paragraph 4 of the Complaint, deny that the exclusion is discriminatory as alleged in said paragraph and throughout the Complaint. Also deny that the Plan “blocked” the Plaintiff from receiving chest reconstruction surgery. Admit that chest reconstruction surgery was prescribed by his physician which according to that physician “follows the WPATH Standards of Care.” Deny that the Plan administrator, but admit that a medical director with Health Management Partners, wrote, in part, what is set out in the last sentence of Paragraph 4. But deny that the Medical Director agreed that the surgery was medically necessary in that, as shown

in exhibit C to the Complaint, the Medical Director also wrote: “This determination does not address the medical necessity of service.”

6. As to Paragraph 5 of the Complaint, deny that the exclusion is discriminatory as alleged in said paragraph and throughout the Complaint. The Defendants lack knowledge or information sufficient to form a belief about the truthfulness of the remainder of the allegations in Paragraph 5.

7. As to Paragraph 6 of the Complaint, admit that the Plan does cover medically necessary chest reconstruction surgery and certain supplies related thereto if provided by or under the direction of a physician subject to “the limitations, exclusions, and other provisions of the Plan” and other conditions of the Plan such as payment of the deductible, etc. Admit that the Plan does not cover reconstruction surgery if it is “related to gender transformations.”

8. As to Paragraph 7 of the Complaint, deny that the exclusion is discriminatory as alleged in said paragraph and throughout the Complaint. Also, deny the remaining allegations in Paragraph 7.

9. As to Paragraph 8 of the Complaint, whether there is a legitimate medical justification for the exclusion is the subject of an existing dispute in the medical field and, therefore, the first sentence of this paragraph, including the allegation that the Plan is discriminatory as alleged in the Complaint, is denied. The Defendants lack knowledge or information sufficient to form a belief about the truthfulness of the allegations in the second sentence of the paragraph. Finally, the Defendants lack knowledge or information sufficient to form a belief about the truthfulness of the allegation in the third sentence of the paragraph that “every major medical organization recognizes that such exclusions have no basis in medical

science and that transition-related care is effective, safe, and medically necessary for treatment of gender dysphoria.”

10. As to Paragraph 9 of the Complaint, deny that the exclusion is discriminatory as alleged in said paragraph and throughout the Complaint. The remaining allegations in the paragraph are denied.

11. As to Paragraph 10 of the Complaint, admit that Mr. Bruce seeks declaratory and injunctive relief under the Complaint. The remaining allegations in the paragraph are denied.

12. As to Paragraphs 11, 12, and 13 of the Complaint, admit, without admitting to any merit or basis for this action, that the Plaintiff’s claims are based on and, therefore, this action arises under 42 U.S.C. § 2000e *et seq*, the Constitution of the United States, and 42 U.S.C. § 1983; admit that this Court has jurisdiction over this action under the constitutional and statutory provisions cited in Paragraph 12; and that under their terms and conditions 28 U.S.C. §§ 2201 and 2202 authorize declaratory relief.

13. Paragraphs 14, 15 and 16 are admitted.

14. As to Paragraphs 17 and 18 of the Complaint, it is admitted that venue of this suit belongs in the Judicial District of South Dakota. However, the Defendants reserve the right under 28 U.S.C. §§ 1404 and 1406 to move for a change of venue to the Central Division of the Judicial District of South Dakota.

15. Paragraphs 19, 20, 21, 22 and 23 of the Complaint are admitted.

16. The Defendants lack knowledge or information sufficient to form a belief about the truthfulness of the allegations contained in Paragraphs 24 and 25 of the Complaint.

17. As to Paragraph 26 of the Complaint, the Defendants are unable to admit or agree with the description of gender dysphoria in the manner stated in that paragraph. Defendants will admit that gender dysphoria, as stated at page 451 of DSM-V, “refers to the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.”

18. As to Paragraph 27 of the Complaint, admit that the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and International Classification of Diseases (IC-10) conclude that gender dysphoria can be a serious medical condition. Admit that DMS-V (302.85) sets forth criteria for diagnosing gender dysphoria.

19. As to Paragraph 28 of the Complaint, admit that the World Professional Association for Transgender Health (“WPATH”) has established and published standards of care for treating gender dysphoria and that those standards are thought by many in the medical field to be the standard of care for treating people with gender dysphoria. The Defendants lack sufficient knowledge or information to form a belief as to whether “the leading medical organizations” recognize these standards of care, but admit that they are recognized by the American Medical Association, the American Psychological Association, and the Defendants also believe, by the American Academy of Pediatrics.

20. As to Paragraph 29 of the Complaint, WPATH uses a three-step approach in treating gender dysphoria and the allegations of this paragraph appear to set out the rudiments of that approach and to that extent the allegations are admitted.

21. As to Paragraph 30 of the Complaint, the Defendants lack knowledge or information sufficient to form a belief about the truthfulness of the allegations in that paragraph.

22. As to Paragraph 31 of the Complaint, the Defendants lack knowledge or information sufficient to form a belief about the truthfulness of the allegations in the first sentence of the paragraph. Deny the second sentence since whether the subject exclusion has or does not have a basis in medical science is in dispute within the medical field.

23. As to Paragraph 32 of the Complaint, it is admitted that the American Medical Association passed Resolution 122 and that the Plaintiff has accurately quoted portions of that Resolution in the entirety of the paragraph. Deny, however, that the Resolution “emphatically asserts” what is quoted in the last sentence of the paragraph.

24. As to Paragraph 33 of the Complaint, it is admitted that Resolution 122 states, among other things, what is contained in this paragraph.

25. As to Paragraph 34 of the Complaint, the Defendants lack knowledge or information sufficient to form a belief about the allegations contained in this paragraph.

26. As to Paragraph 35 of the Complaint, the Defendants lack knowledge or information sufficient to form a belief about the truthfulness of the allegations contained in that paragraph.

27. Paragraphs 36 and 37 of the Complaint are admitted.

28. As to Paragraph 38 of the Complaint, the Defendants deny that Health Management Partners contracted to review claims under SDSEHP. Instead, Health Management Partners contracted to, among other things, review and decide requests for pre-authorization of healthcare services, etc.

29. As to Paragraph 39 of the Complaint, admit that the Plan states that “members shall be entitled to Medically Necessary services and supplies, if provided by or under the

direction of a Physician.” However, immediately after that quoted sentence, the Plan provides that “[t]hese services are subject to: 1) The limitations, exclusions, and other provisions of the Plan”, as well as other expressly identified conditions or requirements. Admit that this paragraph sets out the Plan’s definition of “Medically Necessary.”

30. As to Paragraph 40 of the Complaint, admit that the Plan excludes and does not cover “[s]ervices or drugs related to gender transformations’ regardless of medical necessity.

31. As to Paragraph 41 of the Complaint, Defendants admit that Mr. Bruce has worked for the South Dakota State Historical Society Archaeological Research Center as a permanent employee since 2010. It is also admitted that he was a temporary employee before 2010 but the records reviewed do not show if Mr. Bruce’s temporary employment dates back to 2008.

32. As to Paragraph 42 of the Complaint, the Defendants believe that Mr. Bruce is, as they understand the phrase, “a man who is transgender.” Defendants lack knowledge or information sufficient to form a belief about the truthfulness regarding his identification on insurance forms, or whether his passport was changed. Defendants believe that the allegations in said paragraph regarding the birth certificate are true.

33. The Defendants lack knowledge or information sufficient to form a belief about the truthfulness of the allegations of Paragraph 43 of the Complaint.

34. As to Paragraph 44 of the Complaint, Defendants admit that Mr. Bruce saw Dr. Snyder on May 3, 2016, based on a referral by his primary care physician. Also, the Defendants believe that a mastectomy gynecomastia was scheduled for June 22, 2016. The Defendants lack

knowledge or information sufficient to form a belief regarding whether the mastectomy gynecomastia “was part of his medically necessary treatment for gender dysphoria.”

35. As to Paragraph 45 of the Complaint, admit that on or about May 9, 2016, Health Management Partners wrote, in part, what is set out in Paragraph 45. But deny that HMP agreed that the surgery was medically necessary in that, as shown in Exhibit C to the Complaint, HMP also wrote: “This determination does not address the medical necessity of service.”

36. As to Paragraph 46 of the Complaint, admit that, after Mr. Bruce filed a first-level appeal, the State of South Dakota [Employee Benefit Program] upheld the denial because of the subject exclusion in the State health plan.

37. The Defendants lack knowledge or information sufficient to form a belief about the truthfulness of the allegations in Paragraph 47 of the Complaint.

38. Admit to the truthfulness of the allegations contained in Paragraphs 48 and 49 of the Complaint.

39. As to Paragraph 50 of the Complaint, admit that if an employee becomes a member of the Plan, coverage provided by the Plan is part of the “compensation, terms, conditions or privileges of [the employee’s] employment” as that phrase is used or understood under 42 U.S.C. § 2000e-2(a)(1).

40. At this point in time, the Defendants lack knowledge or information sufficient to form a belief regarding whether the subject exclusion is not based on standards of medical care as alleged in Paragraph 55 of the Complaint. Deny all other allegations contained in Paragraph 55.

41. As to paragraph 57 of the Complaint, the Defendants incorporate by reference their responses to Paragraphs 1 through 56 herein.

42. As to Paragraph 58, without knowing exactly every act that Plaintiff is referring to, the Defendants admit as they understand their conduct or actions that they have acted under color of state law with respect to the subject matter of this suit.

43. Admit to the truthfulness of the allegations contained in Paragraph 59 of the Complaint.

44. As to Paragraph 61 of the Complaint, deny the first sentence of the paragraph. The Defendants lack knowledge or information sufficient to form a belief about what discrimination Plaintiff is alleging by using the phrase under sub-paragraph (a) that “transgender[s], as a class, have historically been subject to discrimination” and, therefore, the Defendants deny the same. As to 61(b), the Defendants do not know what “defining characteristic” Plaintiff is referring to; but the Defendants do not believe that transgenders do not have “an ability to perform or contribute to society.” The Defendants deny all other allegations contained in Paragraph 61.

45. As to Paragraph 62 of the Complaint, the Defendants deny that the subject exclusion is discriminatory and as such it must be narrowly tailored to serve a compelling governmental interest as the Plaintiff seems to be alleging in said paragraph.

46. As to Paragraph 63 of the Complaint, the Defendants deny that the subject exclusion is discriminatory and as such it must be substantially related to an important governmental interest as the Plaintiff seems to be alleging in said paragraph.

47. As to Paragraph 64 of the Complaint, the Defendants deny that the subject exclusion is discriminatory and “is grounded in set stereotypes, discomfort with gender nonconformity and moral disapproval of people who are transgender.”

48. As a separate and affirmative defense, state that the Complaint fails to state a claim upon which relief can be granted.

49. As a further separate and affirmative defense, except where the Eleventh Amendment as been abrogated by Congress, the Defendants have and hereby assert their Eleventh Amendment immunity from the Plaintiff's claims.

50. As a further separate and affirmative defense, allege that Plaintiff failed to mitigate his damages.

WHEREFORE, these answering Defendants respectfully demand judgment as follows:

1. That Plaintiff's Complaint be dismissed with prejudice;
2. For judgment in favor of the Defendants and against the Plaintiff on Plaintiff's Complaint;
3. For the Defendants' attorneys fees, costs and disbursements herein; and
4. For such other and affirmative relief as to the Court seems just in the premises.

Dated this 28th day of November, 2017.

JERRY JOHNSON LAW FIRM

/s/ Jerry D. Johnson

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**TRIAL BY JURY IS DEMANDED ON ANY AND ALL ISSUES
THAT ARE TRIABLE OF RIGHT BY A JURY**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the Defendants' Answer to Plaintiff's Complaint upon the person herein next designated, on the date below shown, via electronic filing with the U.S. District Court, to-wit:

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
jim@southdakotajustice.com

which address is the last address of the addressee known to the subscriber.

Dated this 28th day of November, 2017.

JERRY JOHNSON LAW FIRM

/s/ Jerry D. Johnson

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