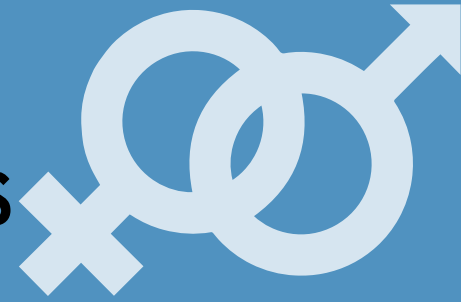


WISCONSIN FEDERAL COURT REQUIRES HEALTH COVERAGE OF MEDICALLY NECESSARY GENDER REALIGNMENT PROCEDURES



You likely saw news coverage in September of a case that drew national attention regarding the interplay between health benefits and gender realignment procedures. The case—*Boyden v. Conlin*—specifically addressed whether excluding medically necessary surgical and hormonal gender realignment treatments from health plans was discriminatory under Title VII of the Civil Rights Act and the Affordable Care Act (ACA).

Ultimately, the court concluded that it was, effectively barring exclusion of those coverages. Some background information and the context of the case may be helpful in looking at what it bodes for the future.

Gender Realignment and Insurance Coverage

According to a 2016 study, the latest for which data appears to be available, approximately .6% of the U.S. population identifies as transgender. In Wisconsin, that number is about .43%. People who are transgender identify as the opposite gender as their birth—otherwise known as natal—sex. A smaller subset of the transgender population suffers from gender dysphoria, a widely recognized psychiatric condition resulting from the misalignment of physical sex and gender identification. Its symptoms include severe anxiety, depression, self-harm, and suicidal ideation. Organizations such as the American Medical Association (AMA), the American Psychiatric Association (APA), and the American Counseling Association have recognized that surgical/hormonal gender reassignment treatment is often medically necessary to treat gender dysphoria.

From a health insurance standpoint, many insurers categorically exclude surgical and hormonal gender realignment treatments—even when deemed medically necessary by an insured’s treating provider.

Boyden

Boyden involved two University of Wisconsin – Madison employees (collectively referred to as “Plaintiffs”). Both Plaintiffs’ natal sex was male, but each identified as female. Both were clinically diagnosed with gender dysphoria, and both of their doctors deemed gender realignment surgery medically necessary to treat the dysphoria. This brings us to an important point: Boyden only applies to medically necessary gender realignment surgeries, as determined by a treating physician. In other words, it does not require insurers to cover realignment surgeries for cosmetic reasons. Purely cosmetic surgeries—for gender realignment or otherwise—can continue to be categorically excluded.

Plaintiffs, as UW-Madison employees, were covered by the State’s health plan. Each year, the State determines which benefits it will offer. This decision is ultimately made by the Government Insurance Board (GIB), which is a board within the Employee Trust Fund (ETF) executive department. Typically, the ETF makes coverage recommendations to the GIB, which it then accepts or rejects. ETF then implements the benefit decisions of the GIB.

In 1994, the GIB voted to exclude surgical and hormonal gender realignment procedures. In June 2016, ETF concluded that the exclusion violated the anti-discrimination provisions of the ACA and recommended to GIB that they remove the exclusion. In July 2016, GIB voted to remove the exclusion. However, in August 2016, GIB was contacted by the Wisconsin DOJ and asked to reconsider removing the exclusion.

Thereafter, GIB caught wind of a pending Texas federal court case in which the court ordered an injunction against enforcing the ACA anti-discrimination regulations. On December 30, 2016, GIB held an emergency meeting and voted to reinstate the exclusion. On February 1, 2017, the reinstated exclusion became effective.

The Plaintiffs claimed that categorically excluding medically necessary gender realignment surgical and hormonal treatment was (1) sex-based discrimination in violation of Title VII of the Civil Rights Act of 1964; (2) sex-based discrimination in violation of the ACA; and (3) sex-based discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The court agreed with Plaintiffs on all three counts (please note, however, that Fourteenth Amendment claims are unique to state actors).

With respect to the Title VII and ACA claims, the court first noted that the discrimination standard was the same—indicating that a violation of one is a violation of the other. It then categorically rejected the Defendants’ arguments that the exclusion was not based on sex, but rather the type of procedure, i.e. cosmetic. According to the court, the exclusion “denie[d] coverage for medically necessary surgical procedures based on the patient’s natal sex” and was therefore a “straightforward case of sex discrimination.” The court concluded:

In other words, the Exclusion entrenches the belief that transgender individuals must preserve the genitalia and other physical attributes of their natal sex over not just personal preference, but specific medical and psychological recommendations to the contrary. In this way, defendants’ assertion that the Exclusion does not restrict transgender individuals from living their gender identity is entirely disingenuous, at least for some portion of that population who will suffer from profound and debilitating gender dysphoria without the necessary medical transition.

Impact

Long term, this seems like a battle that may be destined for the Supreme Court—through the Boyden case or otherwise. In the interim, Boyden has already been appealed to the Seventh Circuit Court of Appeals. It is important that the Boyden court found that Wisconsin’s exclusions violated both the ACA and Title VII—to be legal, an appeals court would have to find it violated neither. The Seventh Circuit has recent precedent supporting the Boyden decision, on top of the change in GIB policy possibly rendering the issue moot, thus it would be surprising if Boyden is overruled by the Seventh Circuit. If the issue makes its way to the Supreme Court, through the Boyden case or another, given the Court’s current composition, it would not be surprising if it ruled differently.