UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALEXANDER PANGBORN, Plaintiff v. CARE ALTERNATIVES OF MASSACHUSETTS, LLC D/B/A ASCEND HOSPICE; and CARE ONE MANAGEMENT, LLC, Defendants	Civil Action No. 3:20-cv-30005-MGM

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY PENDING SUPREME COURT DECISION IN R.G. & G.R. HARRIS FUNERAL HOMES, INC. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Central to Plaintiff Alexander Pangborn's claims against Care Alternatives of Massachusetts, LLC d/b/a Ascend Hospice ("Ascend Hospice") and Care One Management, LLC ("Care One Management") (collectively, "Defendants") is whether Title VII of the Civil Rights Act of 1964 ("Title VII") and similar federal anti-discrimination statutes prohibit discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This is precisely the issue currently pending before the United States Supreme Court in *R.G. & G.R. Harris v. Equal Emp't Opportunity Comm'n*, 139 S. Ct. 1599 (2019). The Supreme Court's decision in *Harris*, which is expected before the end of June, will have significant, perhaps dispositive, consequences for the majority of the claims asserted against the Defendants in this case. The efficient administration of justice and the balance of harms warrant a stay of this case pending the Supreme Court's decision in *Harris*. This is particularly true during the current international pandemic and national crisis

due to COVID-19. Ascend Hospice is on the front lines providing essential hospice care to at-risk individuals in private homes, skilled nursing facilities and hospitals. Care One Management is also on the front lines providing essential assistance in the protection of the health and safety of the patients of hospitals and the skilled nursing facilities it serves. Both organizations are operating under extreme conditions and their efforts are focused on supporting the best care and quality of life possible for the individuals they serve and maintaining the safety of their own staff.

PROCEDURAL POSTURE

Plaintiff filed his Complaint in this in this action on January 10, 2020. *See* Dkt. 1. The initial deadline for Defendants to respond to the complaint was March 16, 2020. On March 12, 2020, the Parties filed a Joint Stipulation extending the time for Defendants to respond to the Complaint for two weeks, up to and including March 30, 2020, which this Court granted. *See* Dkt. 6, 7. At or about the same time, the World Health Organization declared the COVID-19 outbreak a pandemic. On March 13, 2020, the President of the United States issued a proclamation declaring a National Emergency and urged medical facilities throughout the country to assess their preparedness posture and be prepared to surge capacity and capability. *See* Proclamation No. 9994, 85 F.R. 15337 (Mar. 13, 2020). As a result of the COVID-19 pandemic, the Parties agreed to a further extension for Defendants to respond to the Complaint up to and including April 30, 2020, which extension was also granted by the Court. *See* Dkt. 9, 11.

RELEVANT FACTS

A. The Defendants.

Ascend Hospice provides hospice care to patients and their families throughout the United States. *See* Affidavit of Cristina Lopez in Support of Motion to Stay ("CL Aff.") at ¶ 4. Ascend Hospice serves approximately 850 patients in nursing homes, assisted-living facilities, hospitals

and private homes. CL Aff. at ¶ 5. Ascend Hospice delivers palliative care to patients—attending to their physical, psychosocial and spiritual needs—and serves as a source of strength and support for the families of such patients. *Id.*

Care One Management provides certain management and advisory services to healthcare organizations and facilities, including Ascend Hospice. *See* Affidavit of Sharon Zeigler in Support of Motion to Stay ("SZ Aff.") at ¶ 3. Both Ascend Hospice and Care One Management have their principal places of business in New Jersey. *Id.* at ¶ 4, CL Aff. at ¶3.

In the time since the Complaint was filed and today, New Jersey has undertaken dramatic measures specifically designed to mitigate the impact of COVID-19 and to protect the capacity of New Jersey's healthcare system as reflected in Executive Order No. 103 declaring a "State of Emergency and a Public Health Emergency" and continuing with the most relevant directive Executive Order No 109 issued on March 23, 2020 "Suspending All Elective Procedures to Preserve Essential Equipment and Hospital Capacity." *See* Affidavit of Defendants' Counsel in Support of Defendants' Motion to Stay ("Counsel Aff.") at Exs. 1, 2. In Massachusetts, similar Executive Orders have been issued. *See* Counsel Aff. at Exs. 3, 4.

In view of the necessity of the healthcare community focusing every effort and available resource on combatting the international pandemic and national crisis, Chief Justice Rabner of the New Jersey Supreme Court, on March 24, 2020, issued an Order recognizing that "the COVID-19 pandemic has resulted in a critical need for the uninterrupted services of many doctors, nurses and healthcare professionals" and mandating the suspension of any all depositions and participation in court proceedings for all individuals and entities involved in responding to the COVID-19 public health emergency. *See* Counsel Aff. at Ex. 5.

As a result of the growing number of positive cases of COVID-19 in New Jersey, the skilled nursing centers that Care One Management supports have been specifically called upon by the State of New Jersey to be on the front-lines of New Jersey's response efforts. SZ Aff. at ¶ 5. As just one of numerous examples, on March 24, 2020, CareOne at Hanover in Whippany – was asked, and later directed by the New Jersey Department of Health - to relocate all of its own residents in order to accommodate all senior residents of St. Joseph's Senior Home in Woodbridge, New Jersey (24 of whom had tested positive for COVID-19 and the remaining 70 were presumed to be positive) because they were unable to receive required care as a result of their caretakers also having been exposed to the virus. SZ Aff. at ¶ 6; *see also* Counsel Aff. at Ex.6, Ex.7.[1] The New Jersey Department of Health time has called upon five (5) other skilled nursing centers which Care One Management assists to be dedicated exclusively to treating COVID-19 positive patients. SZ Aff. at ¶ 7. Care One Management is actively in discussions with the Commonwealth of Massachusetts and local officials about providing additional support to combat this international pandemic and national crisis here. SZ Aff. at ¶ 8.

B. <u>The Plan.</u>

Ascend Hospice offers its employees health benefits through the self-funded benefit plans of Care One Management, including the Open Access Aetna Select plan ("Plan"). CL Aff. at ¶ 6. Aetna provides third party administrative services to the Plan. *Id.* at ¶ 7. There are over 4,600 participants in the self-funded health and welfare plans offered by Care One Management across 25 different states. SZ Aff. at ¶ 11. The Plan has over 1350 participants in 18 different states,

[1] The Governor of New Jersey and other politicians have recognized the important role Care One is playing in addressing the crisis. The Commissioner of Health has outlined Care One's participation in multiple news conferences and at his March 24 press conference, Governor Murphy singled out Care One for a "shout out" and thanked them for stepping up into the breech for the State in a time of need.

including Massachusetts. *Id.* at ¶ 12.

The self-funded plans offer different benefits for different disabilities and exclude certain care altogether. *Id.* at ¶ 13. For example, "[a]ny treatment, drug, service or supply related to changing sex or sexual characteristics" are expressly excluded from coverage under the Plan ("Exclusions"). *Id.* at ¶ 14.

C. The Complaint.

Plaintiff is an employee of Ascend Hospice. In the Complaint, Plaintiff alleges he is a transgender male and has been diagnosed with gender dysphoria.[2] Dkt. 1 at ¶¶36-37.[3] Plaintiff alleges that in 2018 he requested coverage under the Plan for phalloplasty surgery to treat his gender dysphoria. *Id.* at ¶¶41-42. He further alleges coverage was denied on or about January 17, 2019, based upon the Exclusions. *Id.* at ¶ 46. The Complaint is, in sum, a challenge of the decision to deny his request for benefits under the Plan document.

Plaintiff has asserted seven separate claims against the Defendants: sex discrimination under Title VII and M.G.L. c. 151B ("Chapter 151B") (Counts I and II); gender identity discrimination under Chapter 151B (Count III); disability discrimination under the Americans with Disabilities Act ("ADA") (Count IV), the Rehabilitation Act (Count V) and Chapter 151B (Count VI); and sex and disability discrimination under Section 1557 of the Affordable Care Act ("ACA") (Count VII). *See* Dkt. 1 at ¶¶57-83. Plaintiff claims that he was denied medical care "because of his birth sex" and that, if he were a man whose birth sex were male rather than

[2] "Gender dysphoria" is a mental condition traditionally described as the distress caused by a discrepancy between one's experienced or expressed gender and assigned gender. *See generally, What Is Gender Dysphoria,* AMERICAN PSYCHIATRIC ASSOCIATION, (last physician review Feb. 2016), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (identifying all of the criteria that must be met for a diagnosis of Gender Dysphoria).

[3] Citations to the Complaint reference *allegations* made by Plaintiff, which Defendants assume are true for purposes of this Motion only.

female, he would not have been denied the surgery. *Id.* at ¶¶51-52. He also claims he was denied benefits because he is a man who does not conform to gender stereotypes and because he is transgender. *Id.* at ¶¶53-54. With respect to his disability discrimination claims, Plaintiff contends that, despite the ADA's express exclusion of gender identity from ADA coverage[4], the Exclusion in the Plan is discriminatory and violates the ADA and similar state and federal disability discrimination laws. *Id.* at ¶¶73, 76, 80, 83. Defendants dispute that Plaintiff's claims fall within the protections of Title VII, the ADA, the Rehabilitation Act or the ACA. If Defendants are correct, Plaintiff's Chapter 151B claims are preempted by the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"), 29 U.S.C. §1001, *et seq.* *See Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 197 (1st Cir. 2015) (state anti-discrimination laws are preempted by ERISA unless such state laws prohibit conduct proscribed by federal law).

D. <u>The United States Supreme Court's Pending Decision.</u>

On October 8, 2019, the Supreme Court heard oral arguments in the *Harris* case. The issue before the Court is whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228. *Harris*, 139 S. Ct. 1599. A decision in the case is expected before the Court recesses at the end of June. That decision will have significant impacts on the viability of Plaintiff's claims in this case. As a result, the Court should stay this case pending the Court's decision.

[4] *See* 42 U.S.C. § 12211.

LEGAL ARGUMENT

A. The Court Has Broad Discretion To Stay These Proceedings.

The Court has broad discretion to stay all proceedings in an action pending the resolution of independent proceedings elsewhere. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) ("the District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n. 6 (1998) ("The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). "It is beyond cavil that, absent a statute or rule to the contrary, federal district courts possess the inherent power to stay pending litigation when the efficacious management of court dockets reasonably requires such intervention." *Marquis v. F.D.I.C*, 965 F.2d 1148, 1154 (1st Cir. 1992) (citing *Landis*, 299 U.S. at 254-55). *See also, Taunton Gardens Co. v. Hills*, 557 F.2d 877, 878-79 (1st Cir. 1977) (a federal district court has "inherent discretionary power to control its own docket," which includes the power to stay proceedings pending the outcome of unrelated cases).

A case may be stayed pending the disposition of an unrelated case even if the unrelated case does not dispose of all the questions involved but would "assist in the determination of the questions of law involved." *Landis*, 299 U.S. at 253 ("True, a decision in the [unrelated case] may not settle every question of fact and law in [the] suits [sought to be stayed], but in all likelihood it will settle many and simplify them all").

Federal courts routinely stay actions, while the Supreme Court considers issues of significance to those actions in unrelated cases. *See, e.g.*, *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 171 (D.D.C. 2008) (noting that the court had ordered a four-month stay while the

Supreme Court heard and decided an "issue of considerable significance" in an unrelated case); *Ashby v. Farmers Group, Inc.*, No. 01-CV-1446-BR, 2006 WL 3169381, *1 (D. Or. Oct. 30, 2006) (granting motion to stay action pending Supreme Court's determination of an unrelated case potentially dispositive of stayed action); *Sierra Club v. Coca-Cola Corp.*, 673 F.Supp. 1555, 1557 (M.D. Fla. 1987) (granting stay pending Supreme Court decision because "nothing in the record suggests that the public interest or the interests of the parties requires immediate disposition of this case"); *Daimler-Benz Aktiengesellschaft v. U.S. Dist. Court for W. Dist. of Okla.*, 805 F.2d 340, 341-42 (10th Cir. 1986) (staying appeal and action below while Supreme Court decided a relevant question of law in an unrelated case); *Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977) (staying further proceedings pending resolution by the Supreme Court of a case upon which the question of liability will "in all likelihood, turn").

The *Ashby* case is illustrative. The defendant in *Ashby* was accused of willfully violating the Fair Credit Reporting Act ("FCRA"). *Ashby*, 2006 WL 3169381, *1. While the litigation was pending, the Supreme Court granted review in two unrelated actions, in which it agreed to decide what constitutes a willful violation of FCRA. *Id.* The defendant in *Ashby* asked the district court to stay that action pending the Supreme Court's determination of the willfulness issue in the unrelated cases, arguing that this issue was "of particular significance" to its defense that it did not willfully violate the FCRA. *Id.* The court "agree[d that] the Supreme Court's opinion as to the proper standard for determining willfulness may be relevant to" the defense asserted by the defendant and granted a stay in October 2006, which was in effect for eight months, until June 2007, when the Supreme Court decided the willfulness issue in the unrelated cases. *Id.*

Stays may not be "cavalierly dispensed: there must be good cause for their issuance; they must be reasonable in duration; and the court must ensure that competing equities are weighed and

balanced." *Marquis*, 965 F.2d at 1155. However, "[e]specially in cases of extraordinary public moment [such as this], the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Landis*, 299 U.S. at 256.

B. The Court Should Exercise Its Discretion And Stay These Proceedings.

The Court should grant a stay in this action pending the Supreme Court's determination of whether Title VII prohibits discrimination against transgender people based on their status as transgender or sex stereotyping in *Harris* because: (1) the *Harris* decision will decide issues of significance to this case and preserve limited judicial resources; and (2) the harm to Defendants, and the public welfare, if the stay is denied, outweighs any harm to Plaintiff resulting from a short stay of this action.

If the Supreme Court in *Harris* determines that Title VII's prohibition against discrimination "because of sex" does not include the discrimination of transgender people based on their status as transgender or sex stereotyping, Plaintiff's claims for sex-based discrimination under Title VII, as well as the ACA, will likely be eliminated. So, too, will Plaintiff's sex and gender identity discrimination claims under Chapter 151B because such claims will be preempted by ERISA. *See Sirva*, 794 F.3d at 197 (state anti-discrimination laws are preempted by ERISA unless such state laws prohibit conduct proscribed by federal law).

The Supreme Court's decision in *Harris* could also prove instructive on the issue of whether gender dysphoria is properly excluded from coverage under the ADA, the Rehabilitation and/or the ACA,[5] an issue on which the First Circuit has not yet opined. However, even if that

[5] Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age and disability under a health plan that receives certain federal funding. Gender identity is not explicitly included as a protected class in Section 1557. *See* 29 U.S.C. §1182. The ADA expressly excludes gender identity from coverage. *See* 42 U.S.C. § 12211.

was not the case, the *Harris* decision will have a significant impact on the claims and defenses in this action and the Court should stay the case pending that decision. *See Landis*, 299 U.S. at 253 (a stay may be warranted even if a decision in the unrelated case does not settle every question of fact and law "but in all likelihood [] will settle many and simplify them all"). To permit the case to move forward during the short time left in the Supreme Court's term would be an inefficient use of limited judicial resources, particularly during this time of national crisis.

Defendants, and the public at large, will be harmed if the case is not stayed. As described above, Defendants have committed their efforts and resources to combatting the international pandemic and national crisis caused by COVID-19 by providing or supporting essential healthcare needs in private homes, nursing homes, assisted-living facilities and hospitals. The Defendants are also actively working with state and local governments to help promote the health and safety of the healthcare community and the public at large. If Defendants are required to shift resources away from these efforts to defending this litigation and claims that may well be resolved by the Supreme Court's decision in *Harris* in the next couple of months, Defendants, and the public welfare, will be harmed. Any harm Plaintiff may suffer by the short delay is neither excessive nor oppressive and the balance of harms tips overwhelmingly in favor of the stay. *See Landis*, 299 U.S. at 256.

WHEREFORE, Care Alternatives of Massachusetts, LLC d/b/a Ascend Hospice and CareOne Management, LLC request that the Court stay this action until thirty (30) days after the United States Supreme Court issues its decision in the *Harris* case.

Respectfully submitted,

CARE ALTERNATIVES OF MASSACHUSETTS, LLC D/B/A ASCEND HOSPICE HOSPICE; AND CARE ONE MANAGEMENT, LLC,

/s/ Cheryl B. Pinarchick

Cheryl B. Pinarchick (BBO# 636208)
Monica P. Snyder (BBO#681573)
Fisher & Phillips LLP
200 State Street, 7th Floor
Boston, MA 02109
617-722-0044
cpinarchick@fisherphillips.com
mpsnyder@fisherphillips.com

Date: April 30, 2020

CERTIFICATE OF SERVICE

I, Cheryl B. Pinarchick, hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic filing (NEF) on April 30, 2020.

/s/ Cheryl B. Pinarchick
Cheryl B. Pinarchick