

**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

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO STAY PENDING
SUPREME COURT DECISION IN R.G. & G.R. HARRIS FUNERAL HOMES, INC. v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

INTRODUCTION

The plaintiff Alexander Pangborn, a transgender man, is a nurse and one of the defendants’ employees “on the front lines providing essential hospice care to at-risk individuals in private homes” in the midst of the COVID-19 crisis. Defs.’ Mem. 2, ECF No. 12-1. He filed this case because the defendants denied him coverage for critical medical care. Specifically, the defendants choose to maintain in their self-funded health benefits plan a categorical exclusion of all medical treatment for gender dysphoria, treatment that the plaintiff’s doctors have determined is medically necessary for him.¹ *See* Compl. ¶ 43, ECF No. 1 (“Although the Plan generally covers medically necessary treatments, it has a categorical exclusion of coverage for ‘[a]ny treatment, drug, service or supply related to changing sex or sexual characteristics.’”). This *per*

¹ Gender dysphoria is the medical diagnosis for the experience that results from a transgender person having a gender identity that is different from their assigned birth sex. The criteria for a diagnosis of gender dysphoria are set forth in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) (302.85).

se exclusion contravenes the medical consensus that gender dysphoria is a legitimate and serious diagnosis that requires well-established treatment, a consensus recognized by authoritative medical organizations² and numerous federal courts.³

The complaint asserts federal and state claims for discrimination on the basis of sex, gender identity, and disability: Count I (Discrimination on the Basis of Sex - Title VII), Count II (Discrimination on the Basis of Sex - Mass. Gen. Laws ch. 151B, § 4), Count III (Discrimination on the Basis of Gender Identity - Mass. Gen. Laws ch. 151B, § 4), Count IV (Discrimination on

² See, e.g., American Medical Association, Issue Brief: Health Insurance Coverage for Gender-Affirming Care of Transgender Patients (2019), <https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf> (“Every major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people and has called for health insurance coverage for treatment of gender dysphoria.”); American Psychiatric Association, Position Statement on Access to Care for Transgender and Gender Diverse Individuals (July 2018), <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Access-to-Care-for-Transgender-and-Gender-Diverse-Individuals.pdf> (advocating for the “removal of barriers to care and supports both public and private health insurance coverage for gender transition treatment” because “transgender and gender diverse individuals can benefit greatly from medical and surgical gender-affirming treatments”); American Psychological Association, Resolution: Transgender, Gender Identity, and Gender Expression Non-Discrimination, 64 *American Psychologist* 372, (August 2008), <https://www.apa.org/about/policy/transgender.pdf> (“APA supports the provision of adequate and necessary mental and medical health care treatment for transgender and gender variant individuals.”).

³ Recent decisions include: *Fletcher v. State of Alaska*, No. 18-cv-0007-HRH, 2020 LEXIS 45208, at *2 & nn. 11, 12 (D. Alaska Mar. 6, 2020) (“There is no dispute that gender transition-related surgery can be, and was in the case of plaintiff, medically necessary surgery.”); *Toomey v. Arizona*, No. 19-cv-00035-TUC-RM (LAB), 2019 U.S. Dist. LEXIS 219781, at *17-18 (D. Az. Dec. 20, 2019) (recognizing “medically necessary hysterectomies for the purpose of gender reassignment”); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769-71 (9th Cir. 2019) (“The weight of opinion in the medical and mental health communities agrees that GCS [gender confirming surgery] is safe, effective, and medically necessary in appropriate circumstances.”), reh’g en banc denied, 949 F.3d 489 (9th Cir. 2019); *Flack v. Wis. Dep’t of Health Servs.*, 395 F. Supp. 3d 1001, 1018 (W.D. Wis. 2019) (“[A]ny attempt by defendants or their experts to contend that gender-confirming care—including surgery—is inappropriate, unsafe, and ineffective is unreasonable, in the face of the existing medical consensus.”).

the Basis of Disability - Americans with Disabilities Act), Count V (Discrimination on the Basis of Disability - Rehabilitation Act), Count VI (Discrimination on the Basis of Handicap - Mass. Gen. Laws ch. 151B, § 4), and Count VII (Discrimination on the Basis of Sex and Disability - Affordable Care Act § 1557).

The defendants have moved to stay the proceedings pending the Supreme Court's decision in *G.R. & R.G. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission* ("*Harris Funeral Homes*"), no. 18-107, *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019). The Court should deny the defendants' motion to stay the proceedings in this case for the three reasons stated in the Argument, *infra*.

FACTS RELEVANT TO DEFENDANTS' MOTION TO STAY

The Complaint in this action was filed on January 10, 2020. Compl., ECF No. 1 The defendants waived service and their response was due on March 16, 2020. Waivers of Serv., ECF Nos. 4-5. On March 10 or 11, the defendants' counsel requested that the plaintiff agree to stay the case until the Supreme Court decides *Harris Funeral Homes*. Klein Aff. ¶ 2. The plaintiff's counsel indicated that they did not believe a stay was warranted, but offered the defendants additional time to file a response. Klein Aff. ¶ 2. Defense counsel indicated that she would consult with her clients about "what they want to do," presumably with respect to filing a motion for a stay, and asked for two additional weeks until March 30, 2020, which was assented to. Klein Aff. ¶¶ 3-4.

The defendants did not file a motion to stay the proceedings in this case at that time. Instead, they contacted the plaintiff's counsel by telephone on March 27, 2020 to request an additional thirty days to respond to the Complaint in light of the pressures of the COVID-19 crisis. Klein Aff. ¶ 5. The defendants' counsel did not raise any issue in the March 27 telephone

conversation about requesting a stay of the proceedings and the defendants' filing reflects that it sought the additional time "to fully investigate Plaintiff's claims." Joint Mot. to Extend Time ¶ 5, ECF No. 9.

On April 30, 2020, the defendants filed a motion with the Court to stay the proceedings in this action. Defs.' Mot. to Stay, ECF No. 12.

ARGUMENT

I. STANDARD OF REVIEW.

Although this court "possess[es] the inherent power to stay proceedings for prudential reasons," *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004), "stays cannot 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 v. Fed. Deposit Ins. Corp.*, 965 F.2d 1148, 1155 (1st Cir. 1992).

The defendants do not argue, and the precedent does not support, that the pendency of *Harris Funeral Homes* requires a stay of briefing in this Court. The equities weigh in favor of proceeding with briefing in this matter.⁴

II. THE COURT SHOULD DENY THE STAY BECAUSE (1) THE TIMING AND SCOPE OF THE DECISION IN *HARRIS FUNERAL HOMES* IS UNCERTAIN, (2) *HARRIS FUNERAL HOMES* IS IRRELEVANT TO SIGNIFICANT CLAIMS, AND (3) DEFENDANTS HAVE NOT ESTABLISHED HOW THEIR PERSONNEL'S INVOLVEMENT WITH THE COVID-19 CRISIS PRECLUDES THE FILING OF PLEADINGS BY OUTSIDE COUNSEL.

There are three reasons weighing in favor of proceeding with briefing. First, the defendants overstate the potential impact that the Supreme Court's decision in *Harris Funeral*

⁴ Given the request for a stay based on *Harris Funeral Homes*, the plaintiff assumes that the defendants plan to file a motion to dismiss rather than an answer.

Homes may have on the court’s disposition of the plaintiff’s claims. The plaintiff’s complaint includes claims of disability discrimination based on his gender dysphoria,⁵ an issue not currently before the Supreme Court. The defendants do not argue that the disability discrimination claims raised in the plaintiff’s complaint will be resolved by the Supreme Court in *Harris Funeral Homes*.

Second, the timing and the breadth of the Supreme Court’s decision in *Harris Funeral Homes* are uncertain. A decision by the Supreme Court in any case may be extremely narrow, applying only to the specific facts of that case, or it may be broader.⁶ Therefore, the decision in *Harris Funeral Homes* *may* or *may not*, “have significant, perhaps dispositive, consequences for the majority of the claims asserted against the Defendants in this case.” Defs.’ Mem. 1, ECF No. 12-1. It is not reasonable to delay the case based on that speculation when there is a sensible and

⁵ The defendants incorrectly assert that the Americans with Disabilities Act does not protect against discrimination on the basis of gender dysphoria because the Act contains an “express exclusion of gender identity from ADA coverage,” citing 42 U.S.C. § 12211. Defs.’ Mem. 6, ECF No. 12-1. The referenced statute states that the definition of disability does not include “gender identity disorders not resulting from physical impairments.” 42 U.S.C. § 12211(b)(1). The plaintiff’s complaint alleges that research shows that gender dysphoria “has a physiological and biological etiology” and that the plaintiff’s gender dysphoria “results from physical or physiological ‘impairments’ as that term is used in the Americans with Disabilities Act.” Compl. ¶¶ 28, 70, ECF No. 1. A court in this district (Stearns, D.J.) recently ruled that “the continuing re-evaluation of [gender dysphoria] underway in the relevant sectors of the medical community is sufficient, for [the purpose of deciding a motion to dismiss], to raise a dispute of fact as to whether [gender dysphoria] falls outside the ADA’s exclusion of gender identity-based disorders as they were understood by Congress twenty-eight years ago.” *Doe v. Mass. Dep’t of Corr.*, No. 17-cv-12255-RGS, 2018 U.S. Dist. LEXIS 99925, at *18 (D. Mass. June 14, 2018) (“[T]o the extent that the statute may be read as excluding an entire category of people from its protections because of their gender status, such a reading is best avoided.”).

⁶ *E.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018) (avoiding broader question of whether there should be a religious exemption to the application of a sexual orientation nondiscrimination law and ruling on narrow grounds applicable only to the facts of that case).

orderly way to proceed with briefing pending *Harris Funeral Homes*. The defendants may address any implications of *Harris Funeral Homes* in either their reply or through focused supplemental briefing.⁷

Third, the plaintiff, himself a healthcare worker, is sympathetic to the profound and unprecedented impact that the COVID-19 crisis is having on the entire healthcare world, including the defendants' business operations. At the same time, the defendants have not presented any explanation of how outside counsel's preparation and filing of an answer or other pleading would divert resources from "providing or supporting essential healthcare needs in private homes, nursing homes, assisted-living facilities and hospitals" or from "working with state and local governments to help promote health and safety of the healthcare community and the public at large." Defs.' Mem. 10, ECF No. 12-1. A stay of a case in which the plaintiff himself is being denied healthcare should be based on more particularized facts.

The defendants rely on an order of the New Jersey Supreme Court, now expired, which suspends depositions and other court appearances by doctors, nurses, and other healthcare professionals as support for why this Court should issue a stay.⁸ Responding to the plaintiff's

⁷ The plaintiff brings to this Court's attention that the defendants asked the plaintiff to assent to a stay of proceedings on March 10, pointing, at that time, to the pending *Harris Funeral Homes* case before the Supreme Court. The plaintiff declined to assent to the defendants' request at that time. The defendants then sought an extension of time for filing their motion to dismiss, to which the plaintiff did not object. Nearly two months have passed since the defendants first asked the plaintiff to assent to a stay and the plaintiff has since agreed to an additional extension. The defendants have unfairly deprived the plaintiff of the opportunity for timely judicial resolution of the defendants' original stay request. Had the defendants filed their stay motion when originally proposed, the parties would already have an order and either the case would have already been stayed or briefing would be well underway. The timing for filing the current motion is a factor this Court should weigh against the defendants' position.

⁸ The defendants mischaracterize the order as "mandating the suspension of any [and] all depositions and participation in court proceedings for all individuals and entities involved in responding to the COVID-19 public health emergency." Defs.' Mem. 3, ECF No. 12-1. The

complaint does not require any depositions or court appearances by healthcare professionals.

CONCLUSION

For the foregoing reasons, the plaintiff Alexander Pangborn respectfully requests that the Court deny the Defendants' Motion to Stay Pending Supreme Court Decision in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*.

Respectfully submitted,

Alexander Pangborn

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order, which expired on April 26, 2020, suspends “all depositions of and all required appearances for” certain involved professionals, but does not suspend all “court proceedings.” Counsel Aff. Ex. 5, ECF No. 12-4. Moreover, the order refers to “doctors, nurses, and healthcare professionals,” not “entities.” *Id.*

CERTIFICATE OF SERVICE

I certify that the within document was electronically filed with the clerk of the court on May 6, 2020, and that it is available for viewing and downloading from the Court's ECF system. Service by electronic means has been effectuated on all counsel of record.

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