UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v.

Case No. 17-cv-264

STATE OF WISCONSIN DEPARTMENT OF EMPLOYEE TRUST FUNDS, *et al.*,

Defendants.

MEMORANDUM OF LAW SUPPORTING MOTION OF DEFENDANT DEAN HEALTH PLAN, INC. TO DISMISS THE AMENDED COMPLAINT

Plaintiff Alina Boyden, a teaching assistant at the University of Wisconsin - Madison, has brought this lawsuit alleging discrimination on the basis of her sex and transgender status. Her claims are based on the denial of health insurance coverage for surgery to treat her gender dysphoria. Defendant Dean Health Plan, Inc. ("DHP") is Ms. Boyden's insurer. DHP administers a health plan offered to Ms. Boyden as a benefit of her employment within the University of Wisconsin System. The terms of the plan are set by the Wisconsin Department of Employee Trust Funds ("ETF") and the Group Insurance Board ("GIB"), also defendants in this lawsuit. Those plan terms include an exclusion for health care services related to the treatment of gender dysphoria; it is that exclusion that gives rise to Ms. Boyden's claims.

Though this lawsuit involves a number of different claims and defendants, Ms. Boyden has alleged just one claim against DHP: she asserts that DHP, by administering the University of Wisconsin's health insurance plan according to the terms set by ETF and GIB, has engaged in sex discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1). Pursuant to Federal Rule

of Civil Procedure 12(b)(6), DHP respectfully requests that this Court dismiss that claim. Title VII imposes liability on employers who discriminate against employees; DHP has never been, and is not alleged to be, Ms. Boyden's employer. Instead, Ms. Boyden alleges that DHP is liable as the "agent" of her employer. However, case law does not support her expansive reading of Title VII liability given that, as alleged, DHP exercised no control over the plan exclusion Ms. Boyden challenges as unlawful. Taking all the facts Ms. Boyden alleges as true, DHP is not a proper defendant under Title VII, and accordingly, the Court must dismiss the Title VII claims against DHP.

I. Factual Allegations

The complaint alleges a number of facts unrelated to Ms. Boyden's claim against DHP, including facts related to plaintiff Dr. Andrews's claims and facts related to both plaintiffs' claims against the other defendants in this case. DHP briefly summarizes those factual allegations where necessary for understanding of the lawsuit, but focuses primarily on the allegations specifically relevant to Ms. Boyden's Title VII claim against DHP. As is required for purposes of a Rule 12(b)(6) motion to dismiss, DHP accepts as true (for purposes of this motion only) all of Ms. Boyden's well-pled factual allegations and draws reasonable inferences in her favor. *See Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010).

a. The Parties

Plaintiff Alina Boyden is a graduate student and teaching assistant in the Department of Anthropology in the College of Letters and Science at the University of Wisconsin - Madison. (Am. Compl., ECF No. 27, ¶ 10.) Ms. Boyden is a transgender woman, meaning that she was assigned the male sex at birth, but her gender identity is female and she identifies as a woman. (*Id.* ¶ 29.) This feeling of incongruence between one's gender identity and one's sex assigned at

birth is known as "gender dysphoria," a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and International Classification of Diseases (ICD-10). (*Id.* ¶ 31.) (Plaintiff Dr. Andrews is also a transgender woman employed by the University of Wisconsin System (*Id.* ¶ 11.).)

Defendant DHP is a health insurance administrator that offers insurance plans to Wisconsin state employees through ETF. (*Id.* ¶ 28.) DHP was the health insurance provider for Ms. Boyden at the time relevant to this complaint; DHP is alleged to be an "agent" for Wisconsin state employers, including the University of Wisconsin System, based on its role in administering health insurance coverage for state employees.[1] (*Id.*) DHP is not alleged to have provided health care coverage for plaintiff Dr. Andrews, or to have had any involvement in the discrimination she alleges. (*See id.* ¶¶ 59-81.)

Because the outcome of this motion turns on whether DHP qualifies as an agent of Ms. Boyden's employer, it is helpful to review the State of Wisconsin's system for the provision of health insurance to its employees with reference to the roles of the other defendants named in Ms. Boyden's complaint. As noted above, DHP offers insurance plans to Wisconsin state employees through defendant ETF. ETF is a state agency that oversees the State of Wisconsin Group Health Insurance for state employees and determines the requirements for health insurance plans offered to those employees. (*Id.* ¶ 20.) It also establishes the scope of health insurance coverage for state employees. (*Id.*) ETF's policy is set by another defendant in this lawsuit, GIB. (*Id.* ¶ 21.) GIB oversees the administration of group health insurance plans for

[1] As discussed *infra*, while the Court must accept as true the factual allegation that DHP administers health insurance coverage for state employees for purposes of this motion to dismiss, whether DHP is an "agent" of the University of Wisconsin System such that it is subject to direct Title VII liability is a legal conclusion that need not be accepted as true. *See Alam v. Miller Brewing Co.*, 709 F.3d 662, 666 (7th Cir. 2013) (court "need not accept as true legal conclusions . . . ." (quoting *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009))); *Kolbe & Kolbe Millwork, Co. v. Manson Ins. Agency, Inc.*, 983 F. Supp. 2d 1035, 1041 (W.D. Wis. 2013) (same).

state employees alongside the Secretary of ETF. (*Id.*) Together, ETF and GIB are alleged to "set the terms of Wisconsin state employees' health insurance." (*Id.* ¶ 8.)

In the past, the State of Wisconsin has denied insurance coverage for transition-related care to its employees.[2] (*Id.* ¶ 36.) Specifically, ETF and GIB health plans "exclude coverage of 'procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment.'" (*Id.* ¶ 8.) Before 2016, the exclusion existed in a slightly different form, prohibiting coverage of "[p]rocedures, services, and supplies related to sex transformation surgery and sex hormones related to such treatments." (*Id.* ¶ 8 n.1.)

However, in mid-July of 2016, ETF and GIB amended the state insurance plan policy to provide for coverage for transition-related care beginning in January 2017. (*Id.* ¶ 37.) In August of 2016, the Wisconsin Department of Justice asked GIB to reinstate the exclusion; GIB initially rejected that request. (*Id.* ¶ 38.) However, on December 30, 2016, GIB "took action to reinstate the exclusion of health benefits and services related to gender reassignment as soon as four (4) contingencies were met:" (1) a court ruling enjoining, rescinding, or invalidating rules set by the federal Department of Health and Human Services; (2) compliance with state law, Section 40.03(6)(c); (3) renegotiation of contracts that maintain or reduce state premium costs; and (4) a final opinion of the Wisconsin DOJ that reinstating the exclusion would not constitute a breach of GIB's fiduciary duties. (*Id.* ¶ 39.) On January 30, 2017, GIB found those contingencies had been met and reinstated the exclusion for transition-related care effective February 1, 2017. (*Id.* ¶ 40.)

Ms. Boyden has not alleged that DHP played any role in creating the statewide categorical exclusion for transition-related care under which she was denied coverage, nor has

[2] Transition-related care includes medical steps to affirm a person's gender identity and help an individual transition from living as one gender to another; it may include, for example, hormone therapy, or other medical services to align individuals' bodies with their gender identities. (Am. Compl. ¶ 33.)

she alleged that DHP was involved in the decision to take steps to reinstate the exclusion on December 30, 2016, or to determine that the contingencies for reinstatement had been met on January 30, 2017.

b. Allegations Specific to Ms. Boyden's Insurance Coverage

Ms. Boyden began her gender transition in 2002 and 2003, at which time she was diagnosed with gender identity disorder (now known as gender dysphoria). (*Id.* ¶ 42.) She was prescribed medications to treat the dysphoria, her driver's license identifies her as female, and her colleagues and classmates know her as a woman. (*Id.*) In 2013, Ms. Boyden began graduate school at the University of Wisconsin - Madison. She is currently working on her Ph.D. and has been employed by the University as a teaching assistant for the past three years. (*Id.* ¶ 43.) In that role, she is eligible for health insurance coverage through ETF; as noted above, DHP was her health insurance provider at the times relevant to this complaint.

On or about May 17, 2016, Ms. Boyden requested pre-approval for surgical treatment of gender dysphoria—known as "gender confirmation surgery," or GCS—from DHP. (*Id.* ¶ 46.) DHP denied the request on May 20, 2016. (*Id.* ¶ 48.) Ms. Boyden initiated a grievance on June 6, 2016, requesting reconsideration, and DHP upheld the denial of coverage on July 8, 2016, based on the exclusion for "Procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." (*Id.* ¶¶ 49-50.) Soon thereafter, ETF/GIB made the previously described amendment providing transition-related care coverage as of January 2017. (*Id.* ¶ 51.) Ms. Boyden again requested pre-approval on October 20, 2016, but was denied because the change did not take effect until January 1, 2017. (*Id.* ¶ 52.) Accordingly, she instructed her health care provider to put in a request to DHP for the surgery as soon as possible after January 1, 2017. (*Id.*)

Her provider did so on January 3, 2017, but that request was denied by letter on January 10, 2017. (*Id.* ¶¶ 53-54.) When Ms. Boyden received the letter in the third week of January 2017, she requested a grievance hearing. (*Id.* ¶ 54.) She met in person with DHP representatives on February 15, 2017, and DHP upheld its denial of coverage in a letter dated February 21, 2017, citing GIB's reinstatement of the ban, Dean Health Plan Medical Policy MP9469, and an external review of Ms. Boyden's case conducted by a Board-Certified Plastic Surgeon. (*Id.* ¶¶ 55–56.)

Ms. Boyden has been referred to a surgeon for GCS, but she does not have sufficient funds to pay for the surgery out-of-pocket and thus has not been able to obtain GCS as of the date of the complaint. (*Id.* ¶ 57.) She filed an EEOC complaint against the University of Wisconsin - Madison on December 1, 2015; added GIB as a respondent on March 10, 2016; added DHP as a respondent on October 7, 2016; and requested a right to sue letter from the EEOC on March 31, 2017. (*Id.* ¶¶ 45, 58.) She received Notice of Right to Sue on April 27, 2017. (*Id.* ¶ 58.)

II. Analysis

a. Legal Standard

"Rule 12(b)(6) permits a motion to dismiss a complaint for failure to state a claim upon which relief can be granted." *Kubiak v. City of Chi.*, 810 F.3d 476, 480 (7th Cir. 2016) (citing Fed. R. Civ. P. 12(b)(6)). To survive a motion to dismiss, "a plaintiff's complaint must contain allegations that 'plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level[.]'" *Id.* (quoting *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007)). "If the allegations in a complaint 'however true, could not raise a claim of entitlement to relief,' the court should grant the motion." *Bruguier v. Lac du Flambeau Band of*

Lake Superior Chippewa Indians, Nos. 16-cv-604-jdp, 16-cv-605-jdp, 2017 WL 684230, at *2 (W.D. Wis. Feb. 21, 2017) (quoting *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011)); *see also Enger v. Chi. Carriage Cab Corp.*, 812 F.3d 565, 568 (7th Cir. 2016) ("Dismissal is proper if it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to the relief requested." (quoting *R.J.R. Servs., Inc. v. Aetna Cas. & Sur. Co.*, 895 F.2d 279, 281 (7th Cir. 1989)).)

b. Dismissal is Appropriate Because DHP Is Not Ms. Boyden's Employer Under Title VII

i. Ms. Boyden Has Not Alleged Facts Making it Plausible that DHP is her "Employer" or that DHP Can Be Held Directly Liable as an "Agent"

Ms. Boyden has alleged only a single claim against DHP: her third cause of action, which alleges sex discrimination in violation of Title VII of the Civil Rights Act of 1964. (*See* Am. Compl. ¶¶ 93-102.) Under 42 U.S.C. § 2000e-2(a)(1), it is an unlawful employment practice "for an *employer*—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" *Id.* (emphasis added). Said another way, "[i]t is only the employee's employer who may be held liable under Title VII." *Robinson v. Sappington*, 351 F.3d 317, 332 n.9 (7th Cir. 2003). The question, thus, is whether DHP qualifies as Ms. Boyden's "employer" based on the statute and the facts Ms. Boyden has alleged, such that she may maintain a Title VII claim against DHP directly.

Title VII provides in pertinent part, subject to certain exceptions not implicated here, that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the

current or preceding calendar year, and any agent of such a person… ." 42 U.S.C. § 2000e(b). Ms. Boyden does not allege that she was herself one of DHP's employees;[3] rather, she relies solely on the latter half of the statutory definition, alleging that she is an employee of the University of Wisconsin - Madison and the Board of Regents of the University of Wisconsin System (Am. Compl. ¶ 18), that DHP was her health insurance provider, and that DHP "acts as an agent for Wisconsin state employers, such as the University of Wisconsin System and the University of Wisconsin School of Medicine and Public Health." (Am. Compl. ¶ 28; *see also id.* ¶ 95 ("In establishing the scope of insurance coverage and administering that coverage, ETF, GIB, and DHP are agents of UW-Madison under Title VII.").) Thus, the relevant question for purposes of the present motion to dismiss is whether DHP may be held liable as an agent for its role in administering Ms. Boyden's insurance coverage, the scope of which is determined by defendants ETF and GIB.

The term "agent" is not defined by Title VII, nor is it universally accepted that an agency relationship serves to impose Title VII liability on the agent as well as the employer. (Indeed, many courts that have considered the question—including the Court of Appeals for the Seventh Circuit—have concluded that the inclusion of an employer's "agents" in the statutory definition of "employer" was intended to express traditional *respondeat superior* liability on the part of the *employer* for its *agent's* unlawful actions, rather than to make the agent itself liable. *See, e.g.*, *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995).)

Nevertheless, the Seventh Circuit has recognized that there is some authority for the proposition that "Title VII plaintiffs may maintain a lawsuit directly against an entity acting as

[3] Ms. Boyden does not allege any facts related to DHP that make it plausible that DHP satisfies the traditional common law test to determine whether an employer-employee relationship exists. *See Dittmann v. ACS Human Servs. LLC*, 210 F. Supp. 3d 1047, 1054 (N.D. Ind. 2016) (quoting *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002)).

the agent of an employer[.]" *Alam v. Miller Brewing Co.*, 709 F.3d 662, 668 (7th Cir. 2013). However, in the same sentence, the Seventh Circuit *also* recognized that this is true "*only under certain circumstances.*" *Id.* at 669 (emphasis added). Specifically, the Seventh Circuit stated in *Alam*:

> [T]he cases cited by Alam recognize agency liability where the agent 'exercise[s] control over an important aspect of [the plaintiff's] employment,' where the agent 'significantly affects access of any individual to employment opportunities,' or where 'an employer delegates sufficient control of some traditional rights over employees to a third party.'

Id. at 669 (alterations in original) (citations omitted); *see also Dittmann v. ACS Human Servs., LLC*, 210 F. Supp. 3d 1047, 1053–54 (N.D. Ind. 2016) (applying three categories of cases recognized by *Alam* to analysis of whether named defendant could be held liable as an agent of the employer).

In *Alam*, for instance, the plaintiff sought to hold MillerCoors liable under Title VII as an agent of his former employer, Miller Brewing, based on his allegation that MillerCoors had carried out Miller Brewing's acts of retaliation for a previous lawsuit he had filed against Miller Brewing. *Alam*, 709 F.3d at 668. The Seventh Circuit affirmed the district court's dismissal of the claim against MillerCoors on the basis that the plaintiff had not alleged "that MillerCoors prevented him from accessing 'employment opportunities' or that MillerCoors controlled any aspect of the only employment relationship alleged in the amended complaint, his former employment with Miller Brewing." *Id.* at 669.

As in *Alam* itself, Ms. Boyden has here alleged no facts about DHP that potentially give rise to direct agent liability under Title VII. The first and third situations recognized by the *Alam* Court by their very terms depend upon *control*; that is, DHP must have exercised "control" over an important aspect of Ms. Boyden's employment, or the State must have delegated "sufficient control" of Ms. Boyden's benefits to DHP. *Alam*, 709 F.3d at 669. Neither is true here. On its

face, the complaint makes clear that DHP had *no* control over the health insurance benefits the State afforded Ms. Boyden. Indeed, her allegations, taken as true, would demonstrate that ETF and GIB were wholly responsible for determining the scope of insurance coverage that the State of Wisconsin provided. (*See, e.g.*, Am. Compl. ¶ 8 (alleging that ETF and/or GIB "set the terms of Wisconsin state employees' health insurance"); ¶ 20 (alleging that ETF "determines the requirements for health insurance plans offered to state employees"); ¶ 21 (alleging that GIB "oversees the administration of the group health insurance plans for state employees"); ¶¶ 36-41 (alleging facts regarding the removal and subsequent reinstatement of Wisconsin's ban on coverage for transition-related care).) DHP's role was solely to "administer" the plans that ETF and GIB selected. (*See, e.g.*, Am. Compl. ¶ 28 (alleging that DHP is an agent in "administering health insurance coverage for state employees").) These allegations do not plausibly suggest that DHP exercised any level of control over the health care benefits the State of Wisconsin has chosen to afford Ms. Boyden, or over those the State of Wisconsin has chosen to withhold.[4]

Nor did DHP significantly affect Ms. Boyden's access to employment opportunities. *Alam*, 709 F.3d at 669. The case on which *Alam* relies for that proposition, *Spirt v. Teachers Insurance & Annuity Association*, 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds by* 463 U.S. 1223 (1983), is inapposite. In *Spirt*, the plaintiff, a university professor, sued two insurance companies created for the purpose of providing university employees with insurance

[4] It is worth noting that the cases the *Alam* Court cited in support of direct agent liability based on control are factually inapposite to the present case, as well. *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), involved a lawsuit brought by an employer, Carparts, and its employee against the providers of a medical plan that Carparts offered to its employees. The plan administrators were alleged to have adopted discriminatory amendments capping benefits for AIDS-related illnesses, thereby putting Carparts out of compliance with various anti-discrimination laws. *Id.* at 14-15. In contrast, here, Ms. Boyden has alleged no facts suggesting that DHP played any part in Wisconsin's decision to adopt the challenged exclusion. In *Nealey v. University Health Services*, Inc., 114 F. Supp. 2d 1358 (S.D. Ga. 2000), the alleged agent, CareSouth, was alleged to have been delegated the authority to run day-to-day business operations on behalf of the employer, including setting salaries and implementing policies and procedures. *Id.* at 1366. Ms. Boyden has alleged no such facts here.

services. 691 F.2d at 1057. She alleged that the companies' use of sex-segregated mortality tables, which resulted in women receiving smaller monthly retirement payments than men, violated Title VII. *Id.* at 1058. After finding that the use of sex-segregated mortality tables constituted unequal treatment based on sex, the Second Circuit recognized that for the practice to violate Title VII, "the unequal treatment must be practiced by an 'employer . . . .'" *Id.* at 1063.

Nevertheless, while noting that "Plaintiff clearly is not an employee of [the insurance companies] in any commonly understood sense," the Second Circuit stated that "the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law." *Id.* at 1063 (citations omitted). The court concluded that the insurance companies, "which exist[ed] solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities … that they must be deemed an 'employer' for purposes of Title VII." *Id.* The court held that it was "also relevant that participation in [the benefit programs was] mandatory for tenured faculty members at LIU, and that LIU shares in the administrative responsibilities that result from its faculty members' participation…." *Id.*

Spirt is wholly distinguishable from the present case. As a preliminary matter, *Spirt* implicitly advances the same requirement that the alleged agent must exercise some level of control over the employment relationship in order to be held liable under Title VII, though it does not use the word "control" itself. In *Spirt*, it was the insurance company defendants themselves who made the decision to use the sex-segregated mortality tables alleged to be discriminatory; in the present case, Ms. Boyden's complaint makes clear that it is the State of

Wisconsin, through ETF and GIB, that established the challenged exclusion. (*See, e.g.*, Am. Compl. ¶¶ 20-21, 36-41.) Moreover, the facts that the *Spirt* Court recognized as crucial to its holding are not present in this case. DHP, unlike the insurance company defendants in *Spirt*, does not, and is not alleged to, exist solely for the purpose of enabling the State of Wisconsin to delegate its responsibility to provide health insurance benefits for its employees. *Cf. Spirt*, 691 F.2d at 1063 ("TIAA and CREF, which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities … that they must be deemed an 'employer'…."). Nor is participation in the health care plan DHP offers mandatory for University of Wisconsin employees. *Cf. id.* ("It is also relevant that participation in TIAA-CREF is mandatory…"). Thus, even presuming that *Spirt* remains good law in the Second Circuit (and it is not clear that is the case),[5] *Spirt* does not provide a basis for finding that DHP is the "agent" of the University of Wisconsin System for purposes of Title VII liability.

Thus, though the Seventh Circuit has acknowledged that direct liability under Title VII may theoretically lie against the "agent" of an employer under some circumstances, none of those circumstances are present here. Said another way, DHP is not alleged to have controlled any aspect of the *employment relationship* or to have had any affirmative role in instituting the challenged exclusion for transition-related care. *See Alam*, 709 F.3d at 669. Accordingly, Ms. Boyden's Title VII claim against DHP should be dismissed.

[5] As this Court noted in *Klassy v. Physicians Plus Insurance Co.*, 276 F. Supp. 2d 952 (W.D. Wis. 2003), *aff'd*, 371 F.3d 952 (7th Cir. 2004), "it is questionable whether *Spirt* remains good law in the Second Circuit." 276 F. Supp. 2d at 959. At the very least, the rule has been "sharply limited" in scope to the specific factual situation present in *Spirt* itself. *Yacklon v. E. Irondequoit Cent. Sch. Dist.*, 733 F. Supp. 2d 385, 389 (W.D.N.Y. 2010); *see also Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 377-78 (2d Cir. 2006) (noting that *Spirt* "enunciated a narrow rule based upon a unique factual posture" and that more recent Second Circuit cases are consistent with Supreme Court case law "requir[ing] adherence to common law principles of agency in Title VII cases" in determining whether an employer-employee relationship exists).

ii. This Court Has Already Rejected Ms. Boyden's Theory of Title VII Liability Based Upon an Insurer's Administration of a Health Insurance Plan

This Court has once before confronted the question of whether an insurance company whose only role is to administer an employer's selected health care benefits to the employer's employees is liable under Title VII as that employer's "agent," and has concluded that it is not. That case, *Klassy v. Physicians Plus Insurance Co.*, 276 F. Supp. 2d 952 (W.D. Wis. 2003), *aff'd*, 371 F.3d 952 (7th Cir. 2004), is highly instructive, not only based on its analysis of Title VII agency liability but also because it confirms that *Spirt* does not support Ms. Boyden's position. Accordingly, DHP reviews *Klassy* in some detail here.

In *Klassy*, the plaintiffs were Jehovah's Witnesses who believed that the Bible prohibited them from receiving blood transfusions. 276 F. Supp. 2d at 954. Plaintiff Jim Klassy was employed by the Renschler Corporation and received medical insurance benefits as a result of that employment. *Id.* The benefits were administered exclusively by Physicians Plus. *Id.* When plaintiff Barbra Klassy needed a surgical revision to a hip replacement she had received, she sought authorization for surgery to be performed in accordance with her religious beliefs -- that is, without a blood transfusion. *Id.* at 955. Physicians Plus refused to approve or pay for an out-of-network referral to the surgeon able to perform the surgery without a transfusion, but offered to have one of its own physicians perform the revision if Barbra Klassy agreed to a blood transfusion. *Id.* She did not; ultimately, she hired the surgeon on her own and sued Physicians Plus for violations of state law as well as a violation of Title VII based on religious discrimination.

After analyzing the state law claims and finding them to be preempted by ERISA, the Court turned to the Title VII claim against Physicians Plus. This Court found that "plaintiffs' Title VII claim [was] a non-starter because … Physicians Plus was not plaintiff Barbra Klassy's

employer within the meaning of Title VII." *Id.* at 958. The Court first noted that neither plaintiff was ever employed by defendant Physicians Plus. *Id.* The plaintiffs had argued, however, that the employer-employee relationship under Title VII was "defined broadly enough to authorize a suit by an employee not against her employer, but against her employer's insurance carrier for an allegedly discriminatory benefits decision." *Id.* The Klassys relied on *Spirt* for this argument.

This Court rejected the plaintiffs' argument in its entirety. First, it noted that the continuing viability of *Spirt* appeared doubtful in light of more recent Second Circuit case law. *Id.* at 959. It also held, however, that even if *Spirt* continued to be good law in the Second Circuit, the facts in *Klassy* differed from the facts in *Spirt* in critical ways: Physicians Plus did not exist solely for the purpose of enabling the Renschler Corporation to delegate the responsibility of providing its employees with health benefits, nor were employees required to participate in the Physicians Plus plan, both "features that were critical to the holding in *Spirt*." *Id.* at 959-60; *see* discussion *supra* Section II.b.i.

This Court recognized, and rejected, the expansive implications of the plaintiffs' theory of liability. It noted that "if plaintiffs' theory is correct, for purposes of Title VII, defendant Physicians Plus 'employs' every employee of every company that contracts with Physicians Plus to provide health care coverage for its workers." *Klassy,* 276 F. Supp. 2d at 960. "In the absence of some clear indication in the statute," the Court determined that it could not "infer that Congress intended to impose such potentially wide-ranging liability on insurers." It found persuasive the fact that it was not Physicians Plus that had discriminated against the plaintiffs with respect to their compensation, as prohibited by 42 U.S.C. § 2000e-2(a); rather, the plaintiffs had been "compensated" by the Renschler Corporation. *Id.* (citing *Deal v. State Farm Cnty. Mut. Ins. Co. of Tex.*, 5 F.3d 117, 119 n.3 (5th Cir. 1993), for the proposition that "insurance company

does not provide employee benefits merely because her employer selected insurance company's products"). Finally, the Court explicitly recognized that the definition of "employer" includes agents of employers, but held that to the extent that an "agency" theory was distinguishable from the rejected holding of *Spirt*, the complaint could not support that theory, because a Title VII agent must be an agent with respect to *employment practices*, such as the right to hire and fire, supervise work, set schedules, pay salary, withhold taxes, or provide benefits. *Klassy*, 276 F. Supp. 2d at 960 (citing *Deal*, 5 F.3d at 119; *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 996 (6th Cir. 1997)). Accordingly, this Court held that Physicians Plus was not the Klassys' employer for purposes of Title VII under any mode of analysis and dismissed the Title VII claim.[6]

In all material ways, this case is identical to *Klassy*. Like the plaintiffs in *Klassy*, Ms. Boyden has not alleged that she was ever "employed" by DHP in the ordinary sense of the word; her complaint makes clear that she was at all relevant times employed by the University of Wisconsin - Madison. (Am. Compl. ¶¶ 7, 43.) She relies instead on an agency theory based on DHP's administration of the health insurance plans offered by the State of Wisconsin to its employees and designed by ETF and GIB. But such an expansive view of Title VII liability would, as this Court recognized in *Klassy*, convert insurance companies like DHP into the "employer" of "every employee of every company that contracts with [DHP] to provide health care coverage for its workers." *Klassy*, 276 F. Supp. 2d at 960. Nothing in Title VII supports such a broad reading of the definition of "employer." And, again as in *Klassy*, DHP, like Physicians Plus, lacks the authority to affect the traditional aspects of Ms. Boyden's employment.

[6] Though the Court did not explicitly dismiss the Title VII claim with prejudice, it is notable that the Court granted leave for the Klassys to amend their complaint to assert an ERISA claim to replace their preempted state law claims, but did not grant leave to re-plead the Title VII claim. If the plaintiffs failed to file an amended complaint with an ERISA claim, the Court directed that the clerk of court enter judgment for defendants and close the case. *Klassy*, 276 F. Supp. 2d at 960.

Accordingly, *Klassy* is directly on point and supports DHP's position that the Title VII claims against it must be dismissed.

iii. This Court Should Follow the Holding in *Baker v. Aetna Life Insurance Company*, Which Has Rejected the Theory that a Health Insurance Provider is Liable Under Title VII as an Agent of an Employer

This Court in *Klassy* is not the only court to reject the theory that an insurance provider may be liable under Title VII as the agent of an employer. The District Court for the Northern District of Texas recently confronted a strikingly similar case and employed essentially the same rationale as this Court used in *Klassy* in rejecting the plaintiff's theory. *See Baker v. Aetna Life Ins. Co.*, No. 3:15-CV-3679-D, 2017 WL 131658 (N.D. Tex. Jan. 13, 2017).

In *Baker*, the plaintiff, a transgender woman suffering from gender dysphoria, was an employee of L-3 Communications Integrated Systems, LP and a participant in its health benefits plan, which was administered by Aetna Life Insurance Company. 2017 WL 131658, at *1. She sought breast implant surgery as a means of treating her gender dysphoria but was denied coverage under the health benefits plan, which did not cover breast implants for individuals transitioning to female. *Id.* at *2. Among other claims, she alleged that Aetna and L-3 violated Title VII by discriminating against her on the basis of her sex/gender. *Id.* at *4.

Aetna moved to dismiss, arguing that because it was not Ms. Baker's employer, it could not be held liable under Title VII. *Id.* Ms. Baker, like Ms. Boyden, relied on allegations that Aetna was L-3's agent, asserting that Aetna was liable as her "employer" (that is, the agent of her actual employer) based on a provision of the EEOC Compliance Manual.[7] The district court

[7] Specifically, Ms. Baker relied on Section 2-III.B.2, which states: "An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity. For example, an insurance company that provides discriminatory benefits to the employees of a law firm may be liable under the EEO statutes as the law firm's agent." E.E.O.C., *Compliance Manual* § 2-III.B.2.b, *available at* https://www.eeoc.gov/policy/docs/threshold.html#2-III-B-2-b (last updated Aug. 6, 2009). As the *Baker* court recognized, though, the EEOC manual "does not have the force of law." *Baker*, 2017 WL 131658, at *4 (citing *AT&T Co. v. EEOC*, 270 F.3d 973, 975–76

rejected that theory, noting that the Fifth Circuit "recognizes an agency theory of employer liability only if the alleged agent had authority 'with respect to employment practices.'" *Id.* (citing *Deal*, 5 F.3d at 119). Because Aetna had agency authority only to approve or deny benefit claims, which did not serve to establish employer status under Fifth Circuit precedent, the court concluded that Ms. Baker failed to state a Title VII claim against Aetna on which relief could be granted. *Id.* at *4–5.

Baker is materially indistinguishable from the present case. Ms. Boyden, like Ms. Baker, is a participant in a health insurance benefits plan offered by her employer and administered by the insurance company. As in *Baker*, DHP is not alleged to have anything more than purely administrative authority over the decision to grant or deny particular benefit claims. *See Baker*, 2017 WL 131658, at *4. Accordingly, DHP respectfully requests that this Court follow the holding in *Baker* and recognize that a health care insurer that does nothing more than administer the employer's health plan is not an "employer," or a directly liable "agent," for Title VII purposes.

c. Plaintiff's Title VII Claim Against DHP Should Be Dismissed with Prejudice

Ordinarily, when a complaint fails to state a claim for relief, the plaintiff should be given an opportunity to amend her complaint upon request. *Bogie v. Rosenberg*, 705 F.3d 603, 608 (7th Cir. 2013). "Leave to amend need not be granted, however, if it is clear that any amendment would be futile." *Id.* "[F]utile repleadings include … failing to state a valid theory of liability, *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979), and the inability to survive a motion to dismiss, *Glick v. Koenig*, 766 F.2d 265, 268 (7th Cir. 1985)." *Garcia v. City of Chi.*, 24 F.3d 966, 970 (7th Cir. 1994).

(D.C. Cir. 2001)). And, as discussed above, case law from this circuit militates against the expansive reading of Title VII liability espoused in the EEOC manual.

In this case, Ms. Boyden cannot amend her complaint to state a valid Title VII claim against DHP, because DHP does not qualify as her "employer" as a matter of law. The allegations in the complaint make clear that Ms. Boyden was at all times employed by the University of Wisconsin System, that the scope of her insurance coverage was determined by ETF and GIB, and that DHP's only role in the discrimination that Ms. Boyden alleges was to administer the program, including the exclusion imposed as a matter of ETF and GIB policy. As explained above, based on *Alam* and in light of this Court's holding in *Klassy*, these facts cannot support the imposition of direct Title VII liability against DHP.

More importantly, there are no additional facts Ms. Boyden could allege that could cure this defect. As discussed previously, to support the imposition of Title VII liability against DHP as an "agent," Ms. Boyden would need to allege, at a minimum, that DHP exercised some level of control over the benefits afforded her as a condition of her employment or that DHP affirmatively interfered with her access to those benefits based on her sex. The governing complaint makes clear that is not the case: all of Ms. Boyden's allegations seek to hold ETF and GIB responsible for that conduct. (*See, e.g.*, Am. Compl. ¶¶ 8, 20–21, 36–41.) As a matter of governing Seventh Circuit law, then, DHP cannot be held liable as Ms. Boyden's "employer," either directly or as an agent, for administering the health insurance benefit program offered by the University of Wisconsin System and defined by ETF and GIB. Accordingly, leave to amend in these circumstances would be futile, and Ms. Boyden's Title VII claim against DHP should be dismissed with prejudice.[8]

[8] This outcome is in line with the decision of the *Baker* Court, which dismissed the Title VII claim against the insurer with prejudice. *Baker*, 2017 WL 131658, at *5.

III. Conclusion

Ms. Boyden has alleged sex and transgender status discrimination on the basis of the terms of the insurance coverage she is offered through her employer, the University of Wisconsin System. DHP provides that health insurance, pursuant to terms set by the State of Wisconsin through ETF and GIB. Taking these allegations as true, Seventh Circuit case law simply does not support extending Title VII liability to DHP as an "agent" of Wisconsin state employers like the University of Wisconsin System. Accordingly, DHP respectfully requests, pursuant to Rule 12(b)(6), that Ms. Boyden's Title VII claim against it be dismissed with prejudice.

Dated this 28th day of June, 2017.

s/ Lynn M. Stathas
Lynn M. Stathas
WI State Bar ID No. 1003695
lstathas@reinhartlaw.com
Monica A. Mark
WI State Bar ID No. 1082428
mmark@reinhartlaw.com
Attorneys for Defendant,
Dean Health Plan, Inc.
Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53703

Mailing Address:
P.O. Box 2018
Madison, WI 53701-2018
Telephone: 608-229-2200
Facsimile: 608-229-2100

36247288v4