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IN THIS ISSUE

This article offers insight into whether a plan participant can assert a claim for disparate impact discrimination based on benefits provided through an insured health plan covered by the Affordable Care Act.

Sixth Circuit Rejects Disparate Impact Discrimination Claim against Health Insurer under the Affordable Care Act



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Disparate impact discrimination claims are particularly problematic for employers and insurers because they are not predicated on any actual intent to discriminate. In fact, a disparate impact claim essentially concedes the employer or insurer was not intending to discriminate against anyone. Instead, the claim arises when “an entity acts for a nondiscriminatory reason, but nevertheless disproportionately harms a protected group.” *Doe v. Blue Cross Blue Shield of Tennessee, Inc.*, 926 F.3d 235, 241 (6th Cir. 2019) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)).

Section 1557 of the Patient Protection and Affordable Care Act (“ACA”) provides that an “individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or section 504 of the Rehabilitation Act of 1973, be excluded from participation in, be denied the benefits of, or be subject to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance.” *See Doe*, 926 F.3d at 238 (quoting 42 U.S.C. § 18116(a)). The Department of Health and Human Services (“HHS”), during the notice-and-comment period for regulations under § 1557, further commented that it “interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation.” *See id.* at 240 (quoting Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,439-40 (May 18, 2016)).

Against this statutory and regulatory backdrop arose the Sixth Circuit’s decision in *Doe*. *Doe* was covered under a health insurance plan administered by Blue Cross Blue Shield of Tennessee (BCBS). *See id.* at 237. The plan required its participants to obtain certain specialty medications from a specialty pharmacy network. *See id.* at 237-38. *Doe* was prescribed HIV medication (Genvoya) to keep his condition under control. *See id.* at 237. If *Doe* received this medication through the specialty pharmacy network, his out-of-pocket expenses were limited to a monthly co-pay of \$120. *See id.* at 238. If *Doe* obtained this medication from his local pharmacy, however, none of the medication costs were covered and his costs would be in the thousands of dollars per batch. *See id.* *Doe* preferred obtaining his medications from his local pharmacy because it would help protect him against harmful drug interactions and he was concerned about his privacy, as well as the weather impact (heat damage) on the medications through mail delivery. *See id.* When *Doe* asked for permission from BCBS to get his medications from his local pharmacy, it declined. *See id.*

Doe filed a complaint, including a request for class certification, against BCBS alleging, among other claims, that it violated § 1557 of the ACA by discriminating against him on the basis of disability. *See id.* Although *Doe* essentially had no evidence of intentional discrimination, he claimed the plan had a disparately adverse impact on disabled individuals. The United States District Court

for the Western District of Tennessee granted BCBS's motion to dismiss and Doe appealed to the Sixth Circuit Court of Appeals. *See id.*

On appeal, the Sixth Circuit focused attention on the threshold question of whether a claim for disparate impact discrimination exists under the ACA. *See id.* Doe conceded not all the discrimination statutes cited in § 1557 of the ACA (42 U.S.C. § 18116(a)) recognize disparate impact claims, but argued he could choose from among the cited statutes and use whatever liability standard he selected (presumably the lightest) to establish his claim. *See id.*

In resolving this question, the Sixth Circuit focused on the statutory language in the ACA's anti-discrimination provision. The Court first focused on the word "ground" in the statute, which according to the Court, focuses on the basis for an insurer's actions. *See id.* According to the Court, "ground" creates a statutory framework focused on the "source of the discrimination," *e.g.*, race, sex, or age. *See id.* The Court found further support for its reading of the ACA's anti-discrimination provision in the statutory text around the word "ground." *See id.* The statutory language further bars any discrimination on any "ground prohibited" in the statutes cited. *See id.* This, according to the Court, clarifies that the ACA is picking up on the types of discrimination prohibited by each respective statute. *See id.* To sustain a claim on a "ground prohibited" by § 504 of the Rehabilitation Act, for example, a

claimant must show a health insurer's differential treatment was "solely by reason of disability." *Id.* Absent this showing, a health insurer's actions would not amount to the kind of discrimination prohibited by the law. *See id.* Stated differently, by citing four different discrimination statutes in the ACA, Congress "incorporated the legal standards that define discrimination under each one." *Id.* at 239.

The Sixth Circuit found still further support for its reading of the ACA from the remedial provisions incorporated into it. *See id.* Specifically, the Court noted that violations of § 1557 of the ACA triggered application of the "enforcement mechanisms provided for and available under" the respective statutes cited. *Id.* The Court explained it made no sense to conclude the first sentence of § 1557 of the ACA created a new single standard for discrimination but, in the very next sentence, incorporated four different and distinct enforcement mechanisms. *See id.* Indeed, the Court perceived no reason for Congress to incorporate four different enforcement mechanisms into the statute, if the intent was to enforce compliance with a single new unified claim. *See id.*

The Court further explained that each of the respective anti-discrimination statutes cited in the ACA were adopted to address the specific type of discrimination targeted. *See id.* The Court explained, for example, some of the statutes cited by Congress in the ACA anti-discrimination provision require exhaustion of administrative remedies (age discrimination) while others do not

(disability and racial discrimination). *See id.* at 239-40. If a plaintiff could treat the various enforcement mechanisms for different types of discrimination as a single claim, it “would make a hash of the underlying enforcement schemes.” *Id.* at 240.

Although Doe pointed to the prior interpretation of the ACA by HHS, recognizing adverse impact claims under § 1557 of the ACA, the Court found this argument unconvincing. *See id.* According to the Court, the statutory text of the ACA was clear, only one interpretation was possible, and HHS was not free to rewrite the statute in the guise of interpretation. *See id.* The Court, accordingly, rejected Doe’s reliance on the HHS interpretation. *See id.*

The Sixth Circuit found the only potential discrimination claim Doe had under the ACA was for a violation of § 504 of the Rehabilitation Act, which was incorporated into the ACA by § 1557. *See id.* at 240-41. The Court, however, rejected Doe’s discrimination claim under this statute on two levels. First, the Court concluded BCBS did not “exclude Doe from participating in the plan or deny him benefits covered by it.” *Id.* at 241. Second, Doe was unable to show any intentional discrimination by BCBS. *See id.* To the contrary, the list of specialty medications was neutral on its face and the common trait linking the medications appeared to be cost, not disability status. *See id.* Indeed, although some of the medications might be used by individuals with disabilities, other medications clearly

were not, including medications “to treat high cholesterol, osteoporosis, or allergic rhinitis.” *Id.*

Alternatively, Doe argued even if BCBS was not intentionally discriminating, the plan caused a disparate impact on him and was actionable under § 504 of the Rehabilitation Act. *See id.* The Sixth Circuit rejected this claim, in part, because the Rehabilitation Act requires discrimination “solely by reason of her or his disability.” *Id.* at 242 (quoting 29 U.S.C. § 794(a)). This language, in the Court’s view, could not reconcile with actions taken for non-discriminatory reasons. *See id.* Stated differently, actions taken for nondiscriminatory reasons were not “solely by reason” of a disability. Two other circuit courts, however, reached a different conclusion as to the availability of disparate impact claims under the Rehabilitation Act and this may result in Doe filing a petition for a writ of *certiorari*. *See, e.g., Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003); *McWright v. Alexander*, 982 F.2d 222, 228-29 (7th Cir. 1992). Notwithstanding those opinions, the Sixth Circuit found no room for interpreting the Rehabilitation Act to include disparate impact claims. *See Doe*, 926 F.3d at 243.

The Sixth Circuit’s interpretation of the ACA to not include disparate impact discrimination claims is definitely welcome. This resolution should offer some solace to employers offering health benefits to employees and the insurers supporting those benefits.

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