

Hearing Aid Exclusion Survives Challenge Under ACA Section 1557

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E.S. v. Regence BlueShield, 2023 WL 2537992 (W.D. Wash. 2023)

A federal trial court has dismissed a proposed class action lawsuit against an insurer for its health plans' exclusion of routine hearing examinations, hearing aids, and other hearing loss treatments. The participants alleged "proxy" discrimination, intentional discrimination, and disparate impact under Affordable Care Act (ACA) Section 1557. (Section 1557 prohibits discrimination in certain health programs or activities on the basis of race, color, national origin, sex, age, or disability.)

Explaining that proxy discrimination arises when a law or policy "treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group," the court dismissed the case. Examining the alleged facts, the court concluded that the exclusion did not predominately affect disabled individuals—rather, it predominately affected individuals with hearing loss who would not be considered disabled under the ADA. Moreover, the court pointed out, the participants failed to show how the needs of hearing disabled individuals differ from the needs of individuals whose hearing is merely impaired. The court also concluded that the participants had not established intentional discrimination since they had not shown "deliberate indifference" or "discriminatory animus." And since all routine hearing examinations and treatments for hearing loss were excluded from coverage, the court could not conclude that there was a disparate impact on the participants, who had access to the same services that were accessible by others.

EBIA Comment: This case serves as a reminder that despite the ongoing litigation over the interpretation of Section 1557's prohibition of discrimination "on the basis of sex" and whether it includes discrimination on the basis of sexual orientation and gender identity, Section 1557 nondiscrimination may be alleged in other contexts, such as this claim for discrimination on the basis of disability. For more information, see EBIA's Health Care Reform manual at Section XXXIV.A ("Section 1557 Nondiscrimination: Grounds Prohibited Under Federal Laws") and EBIA's Group Health Plan Mandates manual at Section XXI.M.1 ("Interaction of Title VII and Section 1557"). See also EBIA's Self-Insured Health Plans manual at Section XIII.D.5 ("Section 1557 Nondiscrimination: Nondiscrimination in Health Programs and Activities").

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