

Class Action Alleging Discriminatory Coverage of Fertility Treatment Survives Dismissal

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Murphy v. Health Care Serv. Corp., 2023 WL 6847105 (N.D. Ill. 2023)

A health plan participant filed a class action lawsuit against the plan's insurer under Affordable Care Act (ACA) Section 1557, alleging that the insurance policy discriminated against her and similarly situated participants based on their sexual orientation or gender identity by denying them equal access to fertility treatments. The policy covered such treatments for participants who (1) attested to their inability to conceive after one year of unprotected sexual intercourse, (2) were diagnosed with a condition affecting fertility, or (3) were unable to attain or maintain a viable pregnancy. The participant claimed that because she and her female partner could only conceive a child through fertility treatments such as intrauterine insemination and in vitro fertilization, the policy forced them to pay for such procedures out-of-pocket for a year before the insurer would cover them. In contrast, she argued, heterosexual participants did not have to incur such expenses before qualifying for fertility benefits. The insurer argued that the case should be dismissed because the participant did not allege the intentional discrimination required to state a claim under the ACA.

While acknowledging that intentional discrimination may be hard to prove, the court concluded that the participant had adequately alleged that the policy discriminated against certain participants based only on their sexual orientation. The court explained that "the policy is written such that a significant portion of [the] LGBTQ community—women who are healthy and could attain, maintain, and sustain a pregnancy—cannot meet the definition of infertility without incurring out-of-pocket costs, whereas their straight counterparts can." In a footnote, the court acknowledged, but declined to follow, another court's conclusion that Section 1557 does not prohibit discrimination on the basis of sexual orientation.

EBIA Comment: Plan coverage of fertility treatments has recently been in the news as well as in the courts. In mid-October, the American Society for Reproductive Medicine (ASRM) expanded its definition of "infertility" to include (among other things) "the need for medical intervention, including, but not limited to, the use of donor gametes or donor embryos in order to achieve a successful pregnancy either as an individual or with a partner." The change may expand fertility coverage under certain group health plans as some insurers reportedly defer to the ASRM's definition. 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 Sections XXI.M.1 ("Interaction of Title VII and Section 1557") and XXI.H ("Plan Coverage of Fertility Treatments Under Title VII, as Amended by the PDA"). 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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