

**MONTANA DEPARTMENT OF LABOR & INDUSTRY
EMPLOYMENT RELATIONS DIVISION
HUMAN RIGHTS BUREAU**

Eleanor Maloney,

Charging Party,

vs.

Yellowstone County; Scott Twito;
Yellowstone County Board of
Commissioners,

Respondents.

Final Investigative Report

HRB Case Nos.019002; 019003;
019004
EEOC Case No. 32D-2019-00002C

Recommendation: Based on my investigation, I find **reasonable cause** to believe unlawful discrimination occurred as alleged in Charging Party's complaint.

I. ISSUE PRESENTED

Did Yellowstone County, Scott Twito, and Yellowstone County Board of Commissioners (collectively, the County) discriminate against Eleanor Maloney in the areas of employment, governmental services, and insurance because of her sex (female, transgender), in violation of the Montana Human Rights Act (Title 49, Chapter 2, MCA), the Governmental Code of Fair Practices (Title 49, Chapter 3, MCA), and the Civil Rights Act of 1964, as amended, by denying her health insurance benefits to cover medically necessary treatments and surgical procedures?

II. SUMMARY OF THE INVESTIGATION

This report constitutes a summary of the investigation conducted in this case. Content of this report is limited to witnesses, documents and other evidence relevant to the analysis of the issue presented. The case file may contain additional evidence not included in this report.

A. Charging Party's Position Statement:

Eleanor Maloney (Maloney) worked for Yellowstone County (County) as a Senior Deputy County Attorney from February 13, 2017 through June 18, 2018. Maloney is a transgender female. She was diagnosed with Gender Dysphoria (GD) in approximately September 2017.

Maloney received healthcare coverage through the County's self-funded insurance plan, Yellowstone County Group Health Benefit Plan (plan).¹ On April 11, 2018, Maloney sought pre-approval for a doctor's consultation for transition-related (sex/gender reassignment) surgical procedures. However, Maloney's request was denied based on the plan's exclusion for "services or supplies related to sexual reassignment and reversal of such procedures." After her request for coverage was denied, Maloney contacted Chief Deputy County Attorney, Scott Pederson (Pederson), as well as the County's Human Resources (HR) Department to file a grievance.

On April 12, 2018, Maloney sent a letter seeking pre-approval for the following transition-related healthcare services: laser hair removal, hormone replacement therapy, facial feminization surgery, gender confirmation surgery, and other medically indicated treatments and/or surgeries. On May 11, 2018, Maloney received a letter denying her request, due to the transition-related exclusion in the County's plan. On May 16, 2018, Maloney appealed this denial through the benefits administrator and HR.

In May 2016, Maloney met with the Yellowstone County Commissioners (Commissioners) and requested the transition-related healthcare exclusion be removed from the County's plan. On May 24, 2018, Maloney submitted a letter of resignation to HR indicating her last day of employment would be June 18, 2018, identifying the transition-related healthcare exclusion as the sole reason for her resignation. She also filed a grievance with County Attorney, Scott Twito (Twito), on May 29, 2018, and a second grievance through HR on May 31, 2018, asserting the transition-related healthcare exclusion constitutes unlawful discrimination.

From December 2017 through May 2018, Maloney treated her GD through counseling sessions with Kael Fry, MS, MFT (Fry). However, in June 2018, Fry contacted Maloney and informed her the County's benefits administrator was seeking return of payments it had made since Maloney's sessions were related to GD. Maloney also received a denial of payment for her therapy services rendered on April 20, 2018, again, because it was barred by the transition-related healthcare exclusion in the plan.

Maloney asserts the County discriminated against her based on sex, by denying her insurance benefits because she is transgender.

B. Respondent's Position Statement:

The County denies it discriminated against Maloney f/k/a [REDACTED]. Initially, the County asserts that in June 2018, the County asked the Montana Human Rights Bureau whether the exclusionary language in its policy was discriminatory under the Montana Human Rights Act. Noting the Bureau is charged with enforcing non-discrimination laws, the County asserts that the Bureau would not have responded to its inquiry by stating it had "not analyzed this issue" and that it was unaware of clear guidance "if such exclusion was discriminatory." The County asserts there is no federal or state law designating transgender as a protected class, therefore, Maloney has no viable claim of discrimination.

¹ The County's healthcare plan is administered by a third-party administrator, Employee Benefit Management Services (EBMS).

Further, the County argues Maloney previously filed a discrimination complaint against the County with the Montana Human Rights Bureau (Bureau) and the Equal Employment Opportunity Commission (EEOC) regarding the transition-related exclusion in the plan. Then, on June 27, 2018, Maloney withdrew her complaint, which was approved by both the Bureau and the EEOC. The County argues that Maloney's previous complaint could have been acted on absent Maloney's request to withdraw and yet the Bureau and the EEOC, both obligated to independently weigh in on the complaint, declined to pursue the matter and concurred with Maloney's request to withdraw and closed the case.² Thus, the Bureau has no "authority" to revisit this matter.

C. Charging Party's Rebuttal:

Maloney states she filed her original discrimination complaint on May 22, 2018. She withdrew her complaint³ to seek assistance of counsel. She asked the Bureau if she could withdraw her unadjudicated complaint without prejudice and refile the same complaint. Maloney was told that a charging party could refile so-long-as it had not passed the statute of limitations. Maloney further states since the investigation into her original complaint had not concluded when she withdrew it, there are no laws or regulations that would prohibit her refile of the same complaint with the Bureau.

D. Documents:

- Yellowstone County Group Health Benefit Plan.
 - In the Exclusions and Limitations section, No. 25 (page 65) identifies, "Services or supplies related to sexual reassignment and reversal of such procedures" are excluded under the plan.
 - The plan provides coverage for outpatient mental health treatment for "recognized Mental Illness; and the treatment must be reasonably expected to improve or restore the level of functioning that has been affected by the Mental Illness."
- Provider Remittance Summaries dated May 29, 2018, and June 11, 2018, indicating Maloney's sessions with Fry on April 20, 2018, and May 15, 2018, were not covered by insurance; specifically stating, "These services are not a benefit under the plan. Please refer to the sexual reassignment and reversal exclusion in the Exclusion and Limitations section of your plan booklet."

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² The Bureau does not confer with the EEOC regarding requests to withdraw nor does the Bureau provide legal advice to participants in the administrative process.

³ Maloney filed her original complaint against the County on May 22, 2018, under her former name (██████████). She requested to withdraw that complaint on June 27, 2018. Based on Maloney's request, the Bureau closed her case without completing an investigation or issuing a finding.

III. ANALYSIS

On May 22, 2018, under her former name (██████████), Maloney filed a complaint with the Bureau against the County alleging discrimination by denying her insurance coverage for services related to sex reassignment. Maloney withdrew that complaint on June 27, 2018. Maloney then filed the current complaint on September 28, 2018. Maloney establishes the allegations contained in this complaint are timely.

In its response, the County argues the Bureau does not have the authority to consider Maloney's complaint because she had filed previously and then withdrew her complaint. It is unclear what the County means when it says the Bureau does not have the "authority" to consider this complaint.

By statute, if a charging party files with the Bureau, the Bureau *shall* conduct an investigation. *Mont. Code Ann. 49-2-504(1)(emphasis added)*. A charging party is free to withdraw that complaint but (as noted in the Bureau's withdrawal form) this may end a charging party's right to pursue a remedy under the laws enforced by the Bureau. This isn't because the Bureau will not investigate a subsequent complaint, rather it is because a charging party's allegations may become "untimely" and if a complaint is untimely it will be dismissed. *Mont. Code Ann. 49-2-501(4)*.

When Maloney withdrew her first complaint, the Bureau had not rendered a decision on her allegations. When Maloney refiled, her allegations were still timely. By statute, the Bureau was obligated to conduct an investigation.

In another argument raised by the County, it suggests the Bureau advised the County that it was not discriminating. Prior to this investigation, the County contacted the Bureau to ask whether its exclusion of reassignment surgery was discriminatory under the Montana Human Rights Act. The Bureau responded and told the County that it had not analyzed the issue and was unaware of clear guidance. The County now argues:

The Montana Human Rights Bureau is charged with enforcing State and Federal laws that prohibit unlawful discrimination. The Bureau Chief would not have answered the County's question by stating: "The Bureau has not analyzed this issue and I don't know the answer to your question. In fact, I'm unaware of clear guidance," [i]f such an exclusion was discriminatory.

It appears the County is asserting that because the Bureau had not analyzed the issue and was unaware of clear guidance, its decision to exclude reassignment surgery was not discriminatory. This does not make sense and does not merit further analysis.

Looking at the substantive allegations in Maloney's complaint, it was filed as discrimination based on sex in employment, the provision of governmental services, and insurance. Since the County was acting in its capacity as an insurance provider for the asserted adverse act, the Bureau will analyze this complaint under the insurance provision.

It is unlawful for an insurance provider to discriminate against a person on the basis of sex Section 49-2-309, MCA. The statute says:

49-2-309. Discrimination in insurance and retirement plans. (1) It is an unlawful discriminatory practice for a financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.

The County has a self-funding Group Health Benefit Plan, meaning the County decides what to cover and what not to cover. There's no dispute the plan excludes coverage for services and procedures specific to sex reassignment. The County did not offer any substantive basis for its decision to exclude reassignment services from the plan. For example, the County did not cite to medical necessity, cost associated, efficacy, or safety of the procedures involved.⁴ The plan itself does not explain the reason for the exclusion simply stating it will not pay for any "[s]ervices or supplies related to sexual reassignment and reversal of such procedures." Given this, it appears the County's decision to exclude reassignment services is based solely on a person's status as transgender.⁵

In 1989, our United States Supreme Court held that "...we are beyond the day when an employer [can] evaluate employees by assuming or insisting that they matched the stereotypes associated with their group..." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). The *Price Waterhouse* case recognized that under Title VII of the Civil Rights Act, sex discrimination went beyond discrimination based on an employee's biological sex. Said another way, the Court acknowledged the protected class of sex can include an allegation where an employee asserts she or he was treated differently based on the failure to conform to a gender stereotype.

In the past decade, the *Price Waterhouse* rationale has been used to support a finding of discrimination where a respondent treated a charging party differently based on gender stereotypes, including cases where the charging party is transgender. See *Smith v. City of Salem*, F.3d 566 (6th Cir. 2004); *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (2012). As noted in a 2018 decision, a transgender person is someone who fails to identify with his or her gender and is "inherently gender non-conforming." *EEOC v. R.G.*, 884 F.3d 560, 576 (6th Cir. 2018).

Our Montana Supreme Court has routinely advised the Bureau to follow federal guidance when it does not conflict with our statute. See e.g., *McDonald v. Dep't of Enviro. Quality*, 2009 MT 209 (The Court considered ADA regulations persuasive to the extent they were not inconsistent with the MHRA.) Accordingly, the Bureau has incorporated federal guidance and the Bureau views discrimination based on a person being transgender as discrimination on the basis of sex.

In 1993, our Montana Supreme Court reviewed a similar case where an insurance policy carved out a medical procedure, specifically "normal pregnancy and childbirth." *Bankers Life*

⁴ The plan provides for medically necessary services, presumably if the plan covered reassignment and it was determined that the reassignment was not medically necessary there would be no obligation for the plan to provide or pay for the surgery.

⁵ Both parties were provided an opportunity to elaborate on their respective arguments, but neither provided any additional information.

Casualty v. Peterson, 263 Mont. 156 (1993). In ruling on that case, the Court acknowledged that pregnancy is a condition unique to women. The Court held any classification which relies on pregnancy as the determinative criterion is a distinction based on sex. Similarly, in this case, only persons who are transgender are seeking reassignment procedures. If an insurance product carves out medical procedures, relying only a person's status as transgender as the determinative criterion, this is a distinction based on sex and it violates the Montana Human Rights Act's insurance provision.

Guidance and case law aside, if you stand back and look at the issue raised, the County is denying medical procedures related to changing from one sex to another sex. If Montana has a statute that says an insurance product cannot discriminate on the basis of "sex" and an insurance product denies coverage for procedures involved in changing from one sex to another sex, it seems like a leap of logic to argue this is not "sex" discrimination.

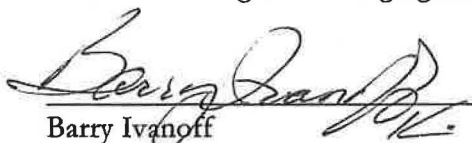
Additionally, the plan provides coverage for recognized mental illnesses and states, "... the treatment must be reasonably expected to improve or restore the level of functioning that has been affected by the Mental Illness." However, the plan excludes coverage for GD-related treatments even though GD is a diagnosed condition under the Diagnostic and Statistical Manual (DSM-5). It is reasonable to assume services and procedures related to the treatment of GD would likely improve or restore one's level of functioning.

Similar to the analysis above, the County's exclusion can only be attributed to one reason, the fact the person is transgender, since "services or supplies related to sexual reassignment" is specific to those with GD. In other words—but for the employee being transgender—the employee would have received coverage under the plan for similar treatment related to a qualifying medical or mental health diagnosis.

I find that the County discriminated against Maloney based on sex when it denied her healthcare coverage under its healthcare plan that excludes "services or supplies related to sexual reassignment."

CONCLUSION

Based on my investigation, I find **reasonable cause** to believe unlawful discrimination occurred as alleged in Charging Party's complaint.


Barry Ivanoff
Montana Human Rights Bureau

3-27-19
Date