STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NOS. 1570-2019 AND 1572-2019:

ELEANOR ANDERSEN MALONEY, Charging Party, vs. YELLOWSTONE COUNTY AND BOARD OF COUNTY COMMISSIONERS, Respondents.	**ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING CHARGING PARTY'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

* * * * * * * * * *

I. INTRODUCTION

Respondents filed a Motion for Summary Judgment on the grounds that there were no genuine issues of material fact regarding whether Charging Party was a member of a protected class, whether she was treated disparately even if she was a member of a protected class, and whether she had left her employment before completing an internal appeal process related to denial of insurance benefits for sexual reassignment and related services. Charging Party filed a motion for partial summary judgment on the grounds that there were no genuine issues of material fact with regard to whether Respondent's "sexual reassignment" exclusion was facially discriminatory on the basis of sex under Title VII, the Montana Human Rights Act, and the Governmental Code of Fair Practices. The parties were given an opportunity to fully brief the motion and engage in oral argument before the Hearing Officer. Respondents' motion is denied and Charging Party's motion is partially granted for the reasons stated below.

II. RELEVANT UNDISPUTED FACTS

1. Respondents (collectively "the County") are governed by a three-member elected Board of County Commissioners.

2. The Yellowstone County Attorney's Office (collectively the "County Attorney," unless more specifically referencing an individual) is responsible for prosecution of criminal matters throughout Yellowstone County, as well as civil complaints made against the County.

3. In late-2016, County Attorney employees reached out to Maloney in an effort to convince her to leave her then-present employment as an Assistant Attorney General with the State of Montana to work for the County Attorney as a prosecutor because County Attorney Scott Twito (Twito) believed Maloney's reputation as an outstanding attorney would make her a tremendous fit with the office.

4. Maloney, who was known as Michael Anderson at the time of her hire, ultimately accepted a position with the County Attorney as a Deputy County Attorney and started work on February 13, 2017.

5. Maloney is a woman who is transgender, which means that she has a female gender identity but the sex assigned to her at birth was male.

6. When hiring new employees, it is part of Twito's routine to notify them they should take a close look at the County's benefits and, if they have questions, to let him know.

7. Twito typically provides new employees with a benefit sheet that discusses the health insurance plans offered by the County and how to choose which to take.

8. Twito had a discussion with Maloney regarding the County's benefits and, to the best of his recollection, she did not ask any questions or have any concerns regarding the insurance plans at the time.

9. Maloney attended a new employee orientation in spring of 2017, at which new employees were given a copy of the existing insurance plans.

10. Yellowstone County provides healthcare coverage to its employees under two self-funded insurance plans which are part of the Yellowstone County Group Health Benefits Plan (collectively the "Plan").

11. As beneficiaries of a self-funded insurance plan, County employees pay premiums into the Plan fund, which is managed by the County and Board of Commissioners and used to fund the costs for employee coverage in accordance with the terms of the Plan. The County is responsible for establishing the level of employee contributions into the Plan.

12. The Plan is overseen by a third-party administrator (TPA). Although the County later contracted with another TPA in January, 2020, since 2016 and therefore at all times relevant herein, Employee Benefit Management Services (EBMS) was the County's TPA.

13. While employed by the County, Maloney was enrolled in the Plan.

14. At all relevant times, EBMS was an agent of the County.

15. The County bears ultimate responsibility for the Plan. The County and the Board of Commissioners are responsible for designing, implementing and overseeing the administration of the Plan, which includes making all decisions regarding which health care services are covered or excluded under the Plan. The Plan itself authorizes Respondents to amend the Plan, in whole or in part, and at any time.

16. As the County's TPA, EBMS handled ministerial matters with regard to the Plan, as well as claims adjustment. Claims adjustment involves overseeing the grant or denial of employee claims in accordance with the Plan, including determinations of whether services are medically necessary or excluded as set forth under the terms of the plans.

17. The Plans contain several different exclusions from coverage, which can sometimes stem costs associated with providing insurance coverage. The Plan specifically contains exclusions for treatments related to "sexual reassignment," including coverage for all services or supplies related to sexual reassignment and reversal of such procedures. Pursuant to this exclusion, the Plan denies all coverage for gender-affirming care, even when that care qualifies as medically necessary, as defined by the Plan.

18. Largely for privacy reasons, the County is typically not aware of specific medical claims made by employees, including denial of claims, unless an employee waives their privacy rights and notifies the County of a claim.

19. The Plan reviewed and adjusted at least semi-annually by the Yellowstone County Health Insurance Advisory Committee.

20. The Plan is funded by County taxpayer dollars, through a permissive levy placed on County citizens through their property taxes, and through the employees of the County themselves.

21. When an employee has a dispute over a claim, they may first raise their dispute with the TPA, which varies depending on the type of claim at issue. As a mere minister of the Plan and not the Plan administrator, however, a TPA does not have independent authority to amend or otherwise alter the Plan.

22. Transgender people may require treatment for gender dysphoria. Treatment for gender dysphoria can require medical steps to affirm one's gender identity and transition from living as one gender to another. This treatment, sometimes referred to as gender-affirming care, may include hormone therapy, gender affirming surgery, and other medical services that align individuals' bodies with their gender identities.

23. In September 2017, Maloney was diagnosed with gender dysphoria, and began hormone treatment. In December, 2017, Maloney began therapeutic counseling for treatment of emotional distress caused by her gender dysphoria.

24. Before beginning therapy and counseling, Maloney did not talk to anyone at the County or EBMS about the processes or payment.

25. In the fall of 2017, Maloney learned that EBMS believed payments were made by EBMS to service providers in error and would need to be recovered. This determination led to discussions between Maloney and EBMS regarding the plans and coverage for the treatment she sought.

26. Although pre-approval was not required to seek removal of the plans' sexual reassignment exclusion, on April 11, 2018, Maloney contacted EBMS regarding coverage of consults for facial feminization surgery. EBMS informed Maloney that the medical treatment she sought was within the scope of the "sexual reassignment" exclusion of the Plan.

27. April 12, 2018, Maloney provided the County with a letter asking her immediate supervisor, Chief Deputy Attorney Scott Pederson, to look into the possibly discriminatory practice of excluding medical services sought by Maloney under its insurance plans. Maloney noted in the letter that she had asked EBMS to reconsider its denials of payment.

28. Maloney and the County had discussions regarding Maloney's desire to obtain coverage for excluded medical services. Specifically, Maloney spoke with Dwight Vigness, the County's Human Resource Director, and also met with the County Commissioners during a discussion meeting to ask for both an exception to the policy and to ask that the policy be changed.

29. As of May 8, 2018, EBMS informed the County that the Plan denied coverage for the care Maloney was requesting because of the "sexual reassignment" exclusion. EBMS was awaiting direction from the County as to whether it should deny Maloney's claim pursuant to the exclusion or to make a benefit exception to authorize coverage

30. The County Commissioners hold approximately three discussion meetings a week, most weeks of the year. At these meetings, different topics are brought for discussion, including employee requests for discussion. County Commissioners cannot take action on items on their discussion agendas; rather, they can only take formal action at a regular meeting of the Board.

31. For a substantive change to be made to one of the County's health insurance plans, the Board of Commissioners must go through a lengthy and involved process. In particular, the process typically takes time and requires meetings of the County Insurance Committee, notifications to each of the Unions, and input from the County's TPA and consultant.

32. Removing an exclusion altogether involves a complicated process and consideration of a number of factors including reinsurance and stop loss, as well as the collective bargaining agreement of each of the County's unions.

33. On May 11, 2018, Maloney was notified by EBMS of an adverse pre-notification determination. This determination allowed Maloney to appeal the decision to EBMS through the process described in the Plans.

34. On May 24, 2018, Maloney resigned her employment with the County, effective Monday June 18, 2018. Maloney's stated reason for resigning was the Plan's "sexual reassignment" exclusion.

35. On June 9, 2018, Maloney received a notice denying payment for therapy services on April 20, 2018, as they were barred by the Plan's exclusion.

36. On June 14, 2018, EBMS sent Maloney a letter notice of the Plan's final determination denying coverage for care related to sexual reassignment. The notice also stated that the Plan did not provide for any additional appeals of the decision.

37. Notwithstanding EBMS' correspondence, at the time of Maloney's resignation, EBMS was still in discussions with the County regarding whether the County would take action to permit coverage of services sought by Maloney. Because EBMS was required to apply the plan language excluding coverage of services related to sexual reassignment, however, absent action by the County itself–such as through an exception or amendment to the plans–EBMS was not in a position to change its denials of coverage.

38. Prior to the present action, the County sought out information from the Human Rights Bureau and advised Maloney's Union to file an action for declaratory relief, so as to determine the County's obligations under the law.

39. In response to Maloney's notifying the County of her intent to seek gender reassignment, the County held sensitivity training for its staff in the County Attorney's office.

III. DISCUSSION

A. Standards for Summary Judgment

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila*, 249 Mont. 272, 280-81, 815 P.2d 139, 144-45 (1991). "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c), Mont. R. Civ. P.

The moving party "must show a complete absence of any genuine issue as to all facts shown to be material in light of the substantive principle that entitles that party to a judgment as a matter of law." *Bonilla v. University of Montana*, 2005 MT 183, ¶ 11, 328 Mont. 41, 116 P.3d 823. A "material" fact is one capable of affecting the substantive outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "'Material issues of fact are identified by looking to the substantive law which governs the claim.'" *Glacier Tennis Club at the Summit v. Treweek Constr. Co.*, 2004 MT 70, ¶ 21, 320 Mont. 351, 87 P.3d 431 (overruled in part on other grounds by *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 21, 336 Mont. 105, 152 P.3d 727; quoting *Babcock Place P'ship v. Berg, Lilly, Andriolo & Tollefsen, P.C.*, 2003 MT 111, ¶ 15, 315 Mont. 364, 69 P.3d 1145); *see also Anderson*, 477 U.S. 242 at 248; *Bonilla*, ¶¶ 11, 14. A dispute is "genuine" if there is enough evidence for a reasonable trier of fact to return a verdict for the non-movant. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). The inquiry is, essentially, ". . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

"The party opposing summary judgment must come forward with evidence of a substantial nature; mere denial, speculation, or conclusory statements are not sufficient." *McGinnis v. Hand*, 1999 MT 9, ¶ 18, 293 Mont. 72, 972 P.2d 1126 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262 (1997)). A tribunal reviews the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor and without making findings of fact, weighing the evidence, choosing one disputed fact over another, or assessing the credibility of witnesses. *Fasch v. M.K. Weeden Const., Inc.*, 2011 MT 258, ¶¶ 16-17, 362 Mont. 256, 262 P.3d 1117.

B. The Montana Human Rights Act Prohibits Discrimination Based on Sex.

The Montana Human Rights Act (MHRA) prohibits employers from "discriminat[ing] against [an employee] in compensation or in a term, condition or privilege of employment because of [the employee's] sex." Mont. Code Ann. § 49-2-303. This prohibition against sex-based discrimination applies to the provision of "fringe benefits available through employment, whether or not administered by the employer." Admin. R. Mont. § 24.9.604. The MHRA provides that a political subdivision of the state, including a local county, engages in an unlawful discriminatory practice when it withholds from or denies to a person any services, advantages or privileges because of sex. Mont. Code Ann. § 49-2-308(a).

A prima facie case of discrimination based on disparate treatment consists of proof:

> (i) That charging party is a member of a protected class or engaged in protected activity;
> (ii) That charging party sought and was qualified for an employment, housing, service, credit or other opportunity made available by the respondent; and
> (iii) That charging party was denied the opportunity, or otherwise subjected to adverse action by respondent in circumstances raising a reasonable inference that charging party was treated differently because of membership in a protected class or because of protected activity.

Admin. R. Mont. 24.9.610.

C. The Law Does Not Support Summary Judgment on the County's Motion for Summary Judgment Given the Facts Presented by the Parties; A Hearing is Necessary.

The County moved for summary judgment primarily on the grounds that the Charging Party cannot establish a prima facie case of discrimination, in large part because it is undetermined whether Maloney is a member of a protected class. The County does not cite to any law for this assertion, but rather points to the existence of a failed legislative bill for the proposition that the term "sex" under the Montana Human Rights Act (MHRA) does not include transgender status. For the reasons discussed below, the Hearing Officer finds that Maloney is, in fact, a member of a protected class, and that transgender status is included under the prohibition against sex discrimination.

Secondarily, the County also raises an argument that, even if she was a member of protected class, Maloney was not treated differently than similarly-situated individuals. As the Hearing Officer understands this argument, it essentially requires that one find Maloney was not a member of a protected class as transgender, and that both men and women seeking sexual reassignment were treated equally by the plan. By finding that transgender status is encompassed by the prohibition against sex discrimination, however, whether the Plan's exclusion equally applied to men and women is not the only measure of whether Maloney was treated differently than similarly-situated individuals. Likewise, regardless of whether the County treated Maloney with compassion and understanding, as it argues, is not relevant to whether Maloney was treated differently. At a minimum, there are disputed issues of material fact with regard to these issues which can only be resolved through a hearing.

The County also argues that, notwithstanding any of the foregoing, Maloney had not completed the process of appealing EBMS' decision before leaving her employment with the County. As was essentially conceded at oral argument, however, absent extraordinary intervention from the County, EBMS' decision was effectively final at the time Maloney left employment. To the extent it was not, this issue is a disputed fact. Furthermore, whether or not Maloney completed an administrative appeal process may go to other issues, but does not affect whether, as argued by Maloney, the plan exclusions were discriminatory.

D. The Law Does Support Partially Granting Charging Party's Motion for Partial Summary Judgment With Regard to a Violation of the MHRA.

Because the Montana Human Rights Act is closely modeled after Title VII, Montana references federal case law when interpreting and construing the Montana

Human Rights Act. *McDonald v. Department of Environmental Quality*, 2009 MT 209, ¶ 39 n.4, 351 Mont. 243, 214 P.3d 749. The United States Supreme Court recently issued a decision in *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 140 S. Ct. 1731 (2020), which is highly relevant to the present case. The *Bostock* decision covered three different cases brought before the court and involving allegations of harassment based on both sexual orientation and also transgender status. Of particular relevance here is the case of Aimee Stephens, who worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. As here when Stephens was first employed, she presented as a male. *Bostock*, 590 U.S. ___. After approximately two years, Stephens was diagnosed with gender dysphoria, and it was recommended she begin living as a woman. *Id*. Stephens ultimately informed her employer explaining that she intended to "'live and work full-time as a woman." *Id*. The funeral home fired her as a result, telling her "'this is not going to work out.'" *Id*. The Supreme Court ultimately held that the funeral home's actions violated Title VII because it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex:

> From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U. S. 228, 239, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality opinion).
>
> The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire

> based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.
>
> That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Id. In light of Montana's referral to federal law for guidance in interpreting the MHRA, *Bostock's* holding establishes that discrimination based on transgender status falls under the Act's prohibition on sex discrimination. While the Hearing Officer believes the United States Supreme Court's holding in *Bostock* is dispositive as to Maloney's motion for partial summary judgment, it is worth noting that *Bostock* is also consistent with the Montana Supreme Court's own holdings, which have generally construed the MHRA broader than Title VII.

In *Bankers Life & Cas. Co. v. Peterson*, 263 Mont. 156, 866 P.2d 241 (1993), the Montana Supreme Court expressly rejected the U.S. Supreme Court's contrary reasoning in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and held that held that pregnancy discrimination is included as part of sex discrimination under the MHRA. At issue in *Banker's Life* was a health insurance policy that excluded coverage for normal pregnancy and childbirth. *See Bankers Life*, 263 Mont. at 157-58, 866 P.2d at 242. The Montana Supreme Court reasoned that "distinctions based on pregnancy are sex-linked classifications." *Id.*, 263 Mont. at 160, 866 P.2d at 243. The Court further held that an insurance policy that excluded coverage for pregnancy-related care violated the MHRA because, "while men are-at least on the face of this policy-provided comprehensive coverage for major medical expenses, including male-specific conditions, women are not provided similar protection." *Id*. at 163.

Similarly, although this decision does not reach the constitutionality of the exclusion, in *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390,, 325 Mont. 148, 104 P.3d 445, the Montana Supreme court addressed a situation in which employees alleged the Montana University System's policy prohibiting employees from receiving dependent insurance coverage for their same-sex domestic partners violated their rights under the Montana Constitution. In finding a violation, the Court stated that, "[l]aws based on gender orientation are palpably sex-based. . . ." *Snetsinger*, ¶ 83 (Nelson, J., concurring).

There are no disputed facts with regard to the Plan's exclusionary language or its application to Maloney. With there being no material facts in dispute, and in light of the foregoing case law, the Plan's "sexual reassignment" exclusion violates the MHRA because it denies coverage to those of transgender status on the basis of sex. This decision does not go to medical necessity or whether there may be other, legitimate bases for these exclusions, as set forth by the County. While Respondent has also argued the plan exclusion is violative of the Montana Constitution, it is not necessary to reach that issue in this decision. This decision also does not directly find a violation of Title VII outside it's implications on the MHRA, as this tribunal's jurisdiction is limited to the MHRA.

E. The Law Does Not Support Granting Charging Party's Motion for Partial Summary Judgment With Regard To The Governmental Code of Fair Practices.

The Montana Governmental Code of Fair Practices (GCFP) provides that, "[s]tate and local government officials . . . shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to…sex[,]" and that, "local governmental agencies shall promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government." Mont. Code Ann. § 49-3-201. The GCFP also mandates that all local governmental services, "must be performed without discrimination based upon . . . sex." Mont. Code Ann. § 49-3-205(1). The GCFP further proscribes local governmental agencies from becoming, "a party to an agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices." Mont. Code Ann. § 49-3-205. Under the GCFP, state and local governmental agencies include "a county . . . or other unit of local government and any instrumentality of local government." Mont. Code Ann. § 49-3-101.

The County did not directly address Maloney's assertion the County had violated the GCFP in its briefing. Notwithstanding this oversight, there is a dearth of case law addressing how the GCFP would apply in the present situation. For example, it is unclear how an discriminatory exclusion in the County's insurance plans would affect hiring, promotion, equal employment opportunities, etc. It is further unclear how the exclusion would relate to governmental services. Ultimately, between a lack of clear law on the subject and also insufficient and/or disputed facts regarding how the GCFP would be implicated in this matter, summary judgment is inappropriate.

IV. CONCLUSIONS OF LAW[1]

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-505.

2. Maloney is a member of a protected class within the meaning of the MHRA on the basis of sex. Mont. Code Ann. § 49-2-101(19)(a).

3. Discrimination based on transgender status falls under the MHRA's prohibition on sex discrimination. Mont. Code Ann. § 49-2-303; *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 140 S. Ct. 1731 (2020)

4. Genuine issues of material fact do not exist with regard to Maloney's motion for partial summary judgment insofar as the Plan's "sexual reassignment" exclusion violates the MHRA because it denies coverage to those of transgender status on the basis of sex. Mont. Code Ann. § 49-2-303.

5. Except as specifically stated otherwise herein, genuine issues of material fact exist with regard to raised in the parties' motions for summary judgment, and due process requires development of additional facts through an evidentiary hearing. *See In the Matter of Peila*, 249 Mont. 272, 280-281, 815 P.2d, 144 (1991).

V. ORDER

IT IS THEREFORE ORDERED THAT:

1. Respondent's Motion for Summary Judgment is DENIED.

2. Charging Party's Motion for Partial Summary Judgment is partially GRANTED with respect to finding a violation of the Montana Human Rights Act. Charging Party's Motion for Partial Summary Judgment is otherwise denied.

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[1]Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece*, 110 Mont. 541, 105 P.2d 661 (1940).

DATED this 14th day of August, 2020.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: ______________________________
CHAD R. VANISKO
Hearing Officer

* * * * * * * * * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

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