

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

WHITMAN-WALKER CLINIC, INC., *et al.*,

*Plaintiffs,*

v.

U.S. DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, *et al.*,

*Defendants.*

Case No. 1:20-cv-01630

**DECLARATION OF DR. DEBORAH FABIAN, MD**

I, Deborah Fabian, declare as follows:

1. I am a 70-year-old transgender woman.
2. I am an orthopedic surgeon and an employee of the Indian Health Service, a health care agency within the U.S. Department of Health and Human Services (“HHS”). The Indian Health Service is responsible for providing federal health care services to Native Americans and Alaska Natives.
3. I received my medical degree from Hahnemann Medical College (now part of Drexel University College of Medicine) in Pennsylvania in 1975. I was a resident in general surgery (1975-77), and later orthopedic surgery (1980-83) at Dartmouth Medical School in New Hampshire. I am board certified by the American Board of Orthopedic Surgery and am a Fellow in the American Academy of Orthopedic Surgeons.
4. I served in active duty in the United States Navy from 1977 to 1980, and served in the active reserves from 1991 to 1997.
5. I am a member of GLMA: Health Professionals Advancing LGBTQ Equality.

6. I currently work as an orthopedic surgeon at Gallup Indian Medical Center (“GIMC”), a 99-bed hospital in Gallup, New Mexico run by the Indian Health Service. GIMC is on the border of the Navajo Nation. Our patient population is over 99% Native Americans, primarily Navajo, as well as Apache and Pueblo. Clinical specialties at GIMC include Internal Medicine, Cardiology, Anesthesia, OB/GYN, General Surgery, Orthopedics, Ophthalmology, ENT, Radiology, Pathology, Pediatrics, Psychiatry, Emergency Medicine, and Urology. GIMC is the only hospital that provides these specialty health care services in over a 100-mile radius. The workload at GIMC is one of the largest within the Indian Health Service with 250,000 outpatient encounters and 5,800 inpatient admissions annually.

7. I am submitting this Declaration in support of Plaintiffs’ Motion for a Preliminary Injunction to prevent the revised regulation under Section 1557 of the Affordable Care Act (“ACA”), published by HHS on June 19, 2020 (the “Revised Rule”), from taking effect. The Revised Rule eliminates explicit regulatory protections for LGBTQ people in health care that were included in the original regulation under Section 1557, which was promulgated in May 2016 (“2016 Final Rule”).

8. I have practiced orthopedic surgery for nearly 40 years, including as the Chief of Surgery at Metrowest Medical Center in Framingham, Massachusetts.

9. I began to transition to live as the woman that I am in 2009. I was fortunate to have the loving support of my wife and family during this process. I began fully presenting as female in all aspects of my life, including my medical practice, in 2011.

10. As a result, however, my medical practice suffered and, notwithstanding my years of experience and credentials, it was difficult for me to secure employment as a transgender woman.

11. Women—let alone transgender women—are a rarity in the highly-specialized field of orthopedic surgery, where, according to a 2018 report from the Association of American Medical Colleges, women make up just 5% of the active physicians in orthopedic surgery.<sup>1</sup>

12. Based on my experience, I have a deep appreciation for the legal understanding that discrimination based on transgender status is discrimination based on sex. In March 2016, in a case in which I was a plaintiff, a federal district court held that “Employment discrimination on the basis of transgender identity is employment discrimination ‘because of sex’ and constitutes a violation of Title VII of the Civil Rights Act.” *Fabian*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016). This ruling is consistent with the 2016 Final Rule promulgated by HHS a few months later.

13. Having encountered difficulty securing employment after my transition to live openly as a transgender woman, I was finally able to secure employment as an orthopedic surgeon at Bayne-Jones Army Community Hospital at Fort Polk, a United States Army base in Vernon Parish, Louisiana.

14. Living and working in health care as a transgender woman in Louisiana was not easy.

15. I have had numerous former colleagues at Fort Polk tell me they did not want me to work there or were apprehensive about my becoming their colleague because of my transgender status, but that after meeting me and getting to see me work, they appreciated me as a colleague.

16. I encountered more overt forms of discrimination as well. In early 2017, following the start of the Trump Administration, a colleague rose up to speak during an all-staff meeting at the hospital at Fort Polk. There were approximately 350-400 staff members at this meeting. This

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<sup>1</sup> Association of American Medical Colleges, *Physician Specialty Data Report: Active Physicians by Sex and Specialty, 2017* (2018), <https://www.aamc.org/data-reports/workforce/interactive-data/active-physicians-sex-and-specialty-2017>.

colleague then proceeded to refer to me by male pronouns—misgendering me—and to say that I was “disgusting” and that “God thinks you’re disgusting.”

17. In 2018, I moved to New Mexico and began working as an orthopedic surgeon at GIMC.

18. As a transgender physician, HHS’s announcement of the Revised Rule has caused me a great deal of distress and frustration. Having had personal experience with discrimination and having had my right to be free from such discrimination recognized by a court because discrimination based on transgender status is discrimination based on sex, I have a unique appreciation for the regulatory protections contained in the 2016 Final Rule and what they mean for health care professionals like myself and for our LGBTQ patients.

19. As a result of the Revised Rule, I worry that LGBTQ health care professionals and patients will now face more discrimination in the course of their employment and health care, respectively. Indeed, the Revised Rule invites such discrimination and adopts the narrow view of discrimination “on the basis of sex” that was rejected in my case in 2016.

20. I also worry that the Revised Rule will cause patients to delay necessary health care as a result of fear of discrimination. This in turn will have negative health outcomes for the patients, whose conditions may worsen and become more acute.

21. In addition, the Revised Rule no longer treats the Indian Health Service, of which GIMC is a part, as a covered entity under Section 1557 of the ACA. This means that health care professionals like myself and our patients, including LGBTQ patients, will no longer, according to HHS, be protected from discrimination in health care pursuant to Section 1557. And while New Mexico has explicit statutory protections from discrimination based on sexual orientation and gender identity, such protections are inapplicable to a federal entity like GIMC.

22. GIMC provides health care services, including gender affirming care, to approximately 100-150 transgender, gender nonconforming, and two-spirit Native American patients. I have asked GIMC management what the Revised Rule will mean for these patients and whether GIMC will commit publicly not to discriminate on the basis of sexual orientation, gender identity, or transgender status. To date, I have been told only that GIMC is part of HHS and they cannot contradict what HHS has said.

23. I am particularly worried about how the Revised Rule will affect GIMC's and our nation's efforts to stem the COVID-19 pandemic.

24. GIMC has already seen a large shift in how it operates as a result of the COVID-19 pandemic. Over 90% of the hospital beds GIMC are currently full as a result of COVID-19. GIMC has also stopped providing some of its specialty services, directing patients to hospitals that are at least 2 hours away, and my colleagues and I have mostly been working on COVID-19 testing and the treatment of patients who test positive for COVID-19 and develop symptoms.


25. Just a couple of weeks ago, one of my transgender patients tested positive for COVID-19. I worry about what may happen to this patient if the Revised Rule were allowed to take effect and she were to develop COVID-19 symptoms.

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26. As a health care professional, I have experienced discrimination on the basis of my transgender status. The Revised Rule defies the legal and medical understanding of discrimination "on the basis of sex," an understanding that encompasses discrimination based on gender identity or transgender status and from which I have previously benefited. The Revised Rule poses serious and ongoing threats to the health and overall wellbeing of transgender, gender nonconforming, and two-spirit people, including those I care for at GIMC.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 5 day of July, 2020.

A handwritten signature in black ink, appearing to read "Deborah Fabian MD", written over a horizontal line.

Deborah Fabian, MD