

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

---

**ALINA BOYDEN and  
SHANNON ANDREWS,**

Plaintiffs,

Case No. 17-cv-264

vs.

**STATE OF WISCONSIN DEPARTMENT  
OF EMPLOYEE TRUST FUNDS, et al.,**

Defendants.

---

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL**

---

Plaintiffs move this Court for an order compelling Defendants to permit deposition testimony and produce documents concerning a December 30, 2016 closed-session meeting of the Defendant, Group Insurance Board (“GIB”). This case alleges discrimination on the basis of sex and transgender status in violation of the Equal Protection Clause, Title VII of the Civil Rights Act of 1964, and Section 1557 of the Affordable Care Act arising out of Defendants’ exclusion of necessary medical treatment for gender dysphoria from coverage under its state employee health insurance plans. These discrimination claims will turn, in part, on the Defendants’ reasons and justifications for the exclusion. Plaintiffs are entitled to inquire into GIB members’ intent or purpose as expressed in the closed session, and ask about and test the governmental interests advanced in support of the exclusion, including

whether those interests are pretextual, are sufficiently supported by evidence and are meaningfully advanced by the exclusion.

Defendants improperly seek to cloak their reasoning and justifications for the exclusion by asserting attorney-client privilege over the very meeting in which key decisions about the exclusion were made. In July 2016, Defendants, Department of Employee Trust Funds (“ETF”) and GIB amended the state health insurance plan, which covers employees of Defendant, Board of Regents, to end the exclusion of coverage for transition-related care in January 2017. (Dkt. # 27, Amd. Compl., ¶ 38.) However, in a memo dated August 10, 2016, the Wisconsin Department of Justice (“DOJ”) began urging ETF and GIB to consider reinstating the exclusion. (Dkt. # 54, Deposition of Robert J. Conlin (“Conlin Dep.”), at 70:13-71:4.) On December 30, 2016, Defendant GIB voted to reinstate the exclusion of health benefits and services related to gender reassignment, provided that four contingencies were met. On January 30, 2017, ETF decided the contingencies had been met, and reinstated the ban effective February 1, 2017. (Amd. Compl. ¶¶ 39, 40.)

Defendants have refused to allow deponents present at the December 30, 2016 closed session to provide testimony on the discussions during this meeting, claiming that because the board went into closed session to discuss pending or anticipated litigation with counsel, communications during the closed session were subject to attorney-client privilege, and gave deponents broad instructions that effectively barred testimony related to those discussions. Defendants have also

sought to claw back minutes from the closed session and a January 13, 2017 DOJ memo justifying reinstatement of the exclusion, which it maintains were inadvertently produced. Because Defendants have waived attorney-client privilege over the subject matter of the December 30, 2016 meeting, and cannot make a claim of privilege over discussions of reasons and justifications for reinstating the exclusion and adopting conditions for reinstatement during that session, Plaintiffs' motion to compel should be granted.

### **RELEVANT FACTUAL BACKGROUND**

On December 30, 2016, Defendant GIB held a hastily-organized meeting to consider reinstating the exclusion. (Conlin Dep. 127:23-130:23; 136:10-15.) A portion of that meeting was conducted in a closed session. (Dkt. # 52, Deposition of David Nispel ("Nispel Dep."), at 72:6-20.) ETF Attorney Nispel testified that he and DOJ Attorney Kevin Potter gave legal advice during the December 30, 2016 closed session. (*Id.* 74:17-21.) Upon returning to the open session, GIB voted to reinstate the exclusion once four contingencies had been met. (Declaration of Caitlin M. Madden ("Madden Decl."), Ex. A, December 30, 2016 Open Meeting Minutes, Bates No. ETF000571.) The listed contingencies were: a court ruling or administrative action enjoining, rescinding, or invalidating the HHS rule implementing section 1557 of the ACA; compliance with Wis. Stat. § 40.03(6)(c); renegotiation of cont[r]acts that maintain or reduce premium costs of the state; and subject to the DOJ's opinion that the action taken does not constitute a breach of board members' fiduciary duties. (*Id.*) According to these minutes, the "discussion of the gender

reassignment language proposed was based on the legality of the final HHS rule” implementing section 1557 of the ACA. (*Id.*) Defendants inadvertently produced, and then sought to claw back, the minutes from the closed session of the December 30, 2016 meeting. (Madden Decl. Ex. D, December 30, 2016 GIB Closed Session Minutes.) These minutes were also publicly disclosed on Defendant ETF’s website. (<http://etf.wi.gov/boards/agenda-items-2017/gib0208/item1b.pdf>; last accessed April 26, 2018.)

On January 30, 2017, Defendant, Robert J. Conlin, ETF Secretary, wrote a memo to the GIB “in consultation with ETF attorneys and [the Office of Strategic Health Policy], detailing the contingencies set by the GIB at the December 30, 2016 meeting, and reporting that those contingencies had been met.” (Madden Decl. Ex. B, D.’s Supplemental Responses to Discovery Requests, at 30.) The memo stated that “the Board approved reinstating the exclusion of health benefits and services based on gender identity after certain contingencies were met,” concluded that the four contingencies had been met, and provided details as to why ETF concluded they had been met. (Madden Decl. Ex. C, January 30, 2017 ETF Memorandum.) This memo was publicly posted on Defendant ETF’s website. (<http://etf.wi.gov/boards/agenda-items-2017/gib0208/item4.pdf>, last accessed April 23, 2018.)

During Attorney Nispel’s deposition, Defendants’ counsel objected to questions about what was discussed in the closed session as requesting “disclosure of attorney/client privilege in a closed session meeting.” (Nispel Dep. at 72:22-24.)

When asked whether the entire discussion in closed session constituted the provision of legal advice, Attorney Nispel responded that “the three and a half hours were conferring with legal counsel concerning the advice that’s cited in that statute[Wis. Stat. § 19.85].” (*Id.* 72:24-73:20.) Counsel similarly prevented GIB board member Herschel Day from answering questions related to the discussions during the closed session. (Dkt. # 51, Deposition of Herschel Day (“Day Dep.”) 80:22-81:7.) Day and Attorney Nispel were also prevented from answering questions about the development of the four contingencies during the closed session. (Day Dep. 83:20-85:23; Nispel Dep. 84:25-85:9 (Defendants’ Counsel: “We’ve taken the position that you know what the contingencies are. They derive from advice given during a closed session. And the reasons that they are written the way they were are privileged.”).)

GIB chair Michael Farrell was similarly prevented from answering questions related to the discussions that took place during the closed session relating to the reinstatement of the exclusion:

Q: Okay. Where did that understanding come from?

A: Of what an injunction means?

Q: Of the Texas litigation and its impact on the reinstatement of the exclusion.

MR. KILPATRICK: Objection to the extent it would reveal attorney-client communications. I’ll direct you not to answer.

[...]

Q: And I’m just trying to understand whether you did that on advice of counsel or whether you had other reasons for reinstating the exclusion.

A: It was entirely because of the injunction.

Q: It was entirely because counsel advised you that you should vote to reinstate the exclusion. Is that your testimony?

MR. KILPATRICK: Objection, again, as to revealing attorney-client communications. I instruct you not to answer.

MR. KNIGHT: He spoke publicly -- he publicly voted to reinstate the exclusion. I believe I'm entitled to ask about the reason for that. I'm not asking him for the advice, the specific advice. I'm simply asking whether that was the basis for voting to reinstate the exclusion.

Q: Can you answer my question?

MR. ROTH: I'll instruct you not to answer if it would reveal attorney-client communications.

Q: If you can answer why you voted -- why did you vote to reinstate the exclusion. That's my only question.

A: My only response to that is because of the injunction.

(Dkt. # 53, Deposition of Michael Farrell ("Farrell Dep.") at 56:17-58:20.)

Defendants' counsel also prevented witnesses from providing testimony related to the DOJ's January 13, 2017 fiduciary duty memo. (Conlin Dep. 170:23-171:3; Nispel Dep. 92:3-93:13; Day Dep. 90:10-91:25.)

In the course of discovery in this matter, Plaintiffs served the following Interrogatory on Defendants:

**INTERROGATORY NO. 2:** Identify and describe all reasons why the State of Wisconsin has the Gender Confirmation Treatment Exclusion, including, but not limited to, each and every state or governmental interest that you contend is advanced by the Gender Confirmation Treatment Exclusion, and a detailed explanation for why you contend that the Exclusion furthers that state interest, and all facts in support of your explanation.

(Madden Decl. Ex. B.) Defendants initially responded on January 16, 2018 claiming that the interrogatory was “premature” because the state interests would be the subject of expert testimony and averring generally to the purposes of Ch. 40 of the Wisconsin Statutes. Plaintiffs objected to the insufficiency of this response on March 15, 2018 and again on April 17, 2018. Defendants then finally provided the following supplemental response on April 20, 2018:

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 2:** In addition to the state interests contained in Wis. Stat. § 40.01(1), the coverage exclusion contained in the Uniform Benefits section IV.A.1.c. furthers the state interests in (1) avoiding potential costs associated with the coverage at issue; and (2) declining to provide coverage for treatments that are experimental and have not been demonstrated to be safe and effective for treating gender dysphoria.

(*Id.*)

#### **DISCOVERY DISPUTE**

Defendants initially produced the minutes from the December 30, 2016 closed session in response to Plaintiffs’ Requests for Production as well as the January 13, 2017 DOJ memo pertaining to fiduciary duties. (Madden Decl., Ex. E, Fiduciary Duty Memo.) On March 16, 2018, Defendants sent Plaintiffs a letter requesting that a number of documents, including the January 13, 2017 fiduciary duty memo attached to an email Bates labeled ETF01893 be clawed back. (Ex. F to Madden Decl., March 16, 2018 Claw back Letter.)<sup>1</sup> In addition, during Day’s April 2, 2018, deposition, Defendants’ counsel stated their intention to claw back the closed

---

<sup>1</sup> This memo was attached to an email with the Bates label ETF001893. In some subsequent correspondence, the memo is mislabeled as attached to “ETF001983.”

session minutes, asserting they are covered by attorney-client privilege and were inadvertently produced. (Day Dep. 82:4-20.)

Plaintiffs responded to Defendants' claw back request in a letter dated April 3, 2018, asserting that Defendants had waived any privilege over the fiduciary duty memo by providing the conclusion of that memo in numerous publically-produced documents. (Madden Decl. Ex. G, April 3, 2018 Discovery Claw Back Response Letter.) Defendants responded with a letter dated April 6, 2018, that continued to assert attorney-client privilege over the fiduciary duty memo. (Madden Decl. Ex. H, April 6, 2018 Claw Back Letter.)

On April 12, 2018, after deponents Day, Nispel, and Farrell had been prevented by counsel from answering questions about the reasons for reinstating the exclusion and development of the contingencies that took place during the closed session, counsel for Plaintiffs and Defendants met and conferred on multiple issues, including testimony related to the closed session and the closed session meeting minutes and fiduciary duty memo which Defendants seek to claw back. (Madden Decl. ¶ 6.) In that discussion, Defendants agreed that deposition testimony pertaining to the portions of the closed session that involved policy considerations and did not involve attorneys providing legal advice were discoverable, but stated that any questions related to legal advice behind the "four contingencies" on which the reinstatement of the exclusion was based would not be allowed. (*Id.*) Defendants also maintain that the fiduciary duty memo is protected by attorney-client privilege and not relevant. (*Id.*) Plaintiffs maintained that because the closed session is

where the GIB members decided to reinstate the exclusion and developed the “four contingencies” to be met to reinstate the exclusion, and because those contingencies and the legal conclusions of counsel determining they have been met were subsequently made public, including through the DOJ’s fiduciary duty memo, any attorney-client privilege has been waived. (*Id.*)

The parties conferred again on April 17, 2018. Plaintiffs expressed again that they must be permitted to inquire about the discussions during the December 30, 2016 closed session, and the reasons underlying the reinstatement and the four contingencies, and would move to compel such responses if necessary. (*Id.* ¶ 7.) Since one of those contingencies involves the January 13, 2017 DOJ memo regarding GIB’s fiduciary duty, Plaintiffs contended that they have the right to use that memo. (*Id.*) Defendants responded that because their defense does not rely on the discussions taking part during this closed session but rather upon the cost and efficacy justifications belatedly asserted in their supplemental interrogatory, this testimony is not relevant. (*Id.*)

On April 26, 2018, the parties confirmed that they have arrived at an impasse on this issue. (*Id.* ¶ 8.) This Motion follows.

## ARGUMENT

### **I. The Closed Session Testimony is Relevant**

Testimony related to the closed session and the meeting minutes memorializing that session is directly relevant to Plaintiffs’ case. A sex-based classification, including a classification based on a person’s identity as transgender,

such as the exclusion of health benefits at issue in this case, is subject to heightened scrutiny under the Equal Protection clause of the Constitution. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017). Under such scrutiny, courts must consider the government's actual, contemporaneous objectives in undertaking the challenged action, not the government's "hypothesized or *post hoc* justification created in response to litigation." *Id.*, citing *United States v. Virginia*, 518 U.S. 515, 533 (1996). Therefore, contrary to Defendants' assertions, Plaintiffs are entitled to inquire about the *actual* reasons for the challenged action, not a defendant's subsequent rationalizations. *Id.* at 1050-51.

Furthermore, under heightened scrutiny, a court must assess the factual basis for a defendant's asserted justifications for a discriminatory practice, rather than simply accept pretextual rationales. For example, in *Whitaker*, the defendant school district claimed that its policy preventing the plaintiff from using the restroom that corresponded with his gender identity was adopted to prevent the infringement of the privacy of other students. *Whitaker*, 858 F.3d at 1052. In rejecting this argument, the Seventh Circuit observed that the interest "must be weighed against the facts of the case and not just examined in the abstract, to determine whether this justification is genuine." *Id.* at 1052. Without any evidence that actual privacy concerns by other students existed, much less motivated the school's decision, defendant's argument failed. *Id.* Similarly, courts applying non-discrimination statutes, such as Title VII and Section 1557, may look to whether a

defendant's asserted "non-discriminatory basis" for a discriminatory rule is pretextual. *See, e.g., Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("plaintiff must . . . have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination"); *Wells v. Unisource Worldwide, Inc.*, 289 F.3d 1001, 1006 (7th Cir. 2002) ("To demonstrate pretext, [the plaintiff] must demonstrate that [the defendant]'s articulated reason for [the adverse employment action] either: (1) had no basis in fact; (2) did not actually motivate [the adverse employment action]; or (3) was insufficient to motivate [the adverse employment action]"); *see also Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017) (relying on Title IX and Title VII case authority to interpret claim under ACA).

In the instant case, the Court will consider evidence of the actual, contemporaneous reasons Defendants reinstated the transgender health benefits exclusion, and determine whether those reasons are sufficiently weighty government interests and whether the exclusion is sufficiently narrowly tailored to advance them. Plaintiffs must be able to ascertain what those reasons were and test the factual basis for the reasons by inquiring of witnesses who were present at the three and a half hour closed session at which the decision was made to reinstate the exclusion.

II. Defendants Have Waived Attorney-Client Privilege for the Closed Session and Fiduciary Duty Memo

[REDACTED]

[REDACTED]. To permit Defendants to provide some information publically justifying their decision, and then prevent Plaintiffs from discovery relating to the decision-making process, would allow Defendants to impermissibly use the attorney-client privilege as “both a sword and a shield.” *Acantha LLC v. Depuy Orthopaedic Inc.*, 2017 U.S. Dist. LEXIS 185607 at \*16-17 (E.D. Wis., Nov. 8, 2017) (internal citations omitted). Moreover, Plaintiffs are entitled to know the actual contemporaneous reasons for the reinstatement of the exclusion.

Relying on Fed. R. Civ. P. 26(b)(5)(B), Defendants have sought to claw back the December 30, 2016 closed session minutes as well as the January 13, 2017 DOJ memo regarding GIB’s fiduciary duty and asked Plaintiffs to destroy documents in their possession that were produced in the course of discovery and which Defendants now maintain are subject to the attorney-client privilege and should not

have been provided to Plaintiffs, including the closed session meeting minutes. (Day Dep. 82:4-12.) This Rule does not address whether the privilege has been properly asserted.

Attorney-client privilege can be waived when communications are relied upon during legal proceedings, which means the client “can be charged with waiving the privilege not only as to the particular communication that was disclosed, but as to all attorney-client communications concerning the same subject matter.” *Milwaukee Elec. Tool Corp. v. Chervon N. Am., Inc.*, No. 14-CV-1289-JPS, 2017 U.S. Dist. LEXIS 105925, at \*3 (E.D. Wis. July 10, 2017). The scope of the subject-matter waiver is determined based on “the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the parties of permitting or prohibiting further disclosures.” *Id.* at \*3-4 (citing *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349-50 (Fed. Cir. 2005)). In *Milwaukee Elec. Tool Corp.*, the Eastern District of Wisconsin considered the extent of subject matter waiver of attorney-client privilege where the plaintiff’s counsel disclosed in a declaration certain dates and meetings related to an invention at the center of the patent lawsuit. Defendants argued that this disclosure waived the attorney-client privilege for all facts relating to those meetings with counsel. The court noted that though the declaration disclosing certain facts was focused on the dates of particular meetings and documents, “it was equally important for [plaintiff’s counsel] to establish the legal conclusion that these matters related to.” *Id.* at \*7-8. The declaration disclosed more than dates and times, but concerned conclusions drawn from those meetings, which

implicated the attorney-client conversations that the plaintiff was attempting to shield from disclosure. *Id.* at \*8. Therefore, “[h]aving provided [counsel’s] opinion as to the legal import of his communications with his client, Plaintiffs cannot withhold those communications from Defendants’ independent review.” *Id.* at \*10.

This case presents a similar situation. Defendants ETF and GIB have made public statements describing the exclusion decision made in the closed session, including the open meeting minutes from December 30, 2016, which listed the contingencies developed based on the advice of counsel, and Defendant Conlin’s publically available January 30, 2017 memo explaining that the contingencies had been met, based in part on the fiduciary duty memo. (*See* <http://etf.wi.gov/boards/agenda-items-2017/gib0208/item4.pdf>, last accessed April 23, 2018.) The contingencies were developed during the closed session with the advice of counsel. (Farrell Dep. 148:18-19 (“Within the contingencies that were developed at the meeting on the 30th...”)) But Defendants’ Counsel has raised an objection to testimony about the development of the contingencies, claiming attorney-client privilege. (Nispel Dep. 84:13-85:6; Day Dep. 81:18-82:3.) Defendants have also stated that Conlin’s January 30, 2017 memo was written “in consultation with ETF attorneys and OSHP,” which constitutes another selective disclosure of privileged communications. (Madden Decl. Ex. B, at 30; *see also* Conlin Dep. 163:3-15 (he reviewed the DOJ fiduciary duty memo.)

The discussions in the closed session, where the GIB made its decision to reinstate the exclusion and set in motion the state actions challenged in this suit,

are central to Plaintiffs' claims. By publicizing the conclusions from the closed session, and the subsequent conclusions that the four contingencies had been met, Defendants have waived any attorney-client privilege. "The widely applied standard for determining the scope of a waiver of attorney-client privilege is that the waiver applies to all other communications relating to the same subject matter." *Acantha LLC*, 2017 U.S. Dist. LEXIS 185607 at \*17, quoting *Fort James Corp.*, 412 F.3d at 1349. Determining whether a particular action constitutes subject matter waiver is a balancing test considering "the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the parties of permitting or prohibiting future disclosures." *Id.* at 1349-50.

Here, Defendants have publicized statements about the four contingencies set during the closed session of the December 30, 2016 meeting and subsequent discussions determining whether those contingencies had been met, including the conclusion of the DOJ's fiduciary duty memo. Legal counsel were involved in the setting of the contingencies and confirming that they had been met. (Day Dep. 81:18-82:3; D.'s Supplemental Responses to Discovery, at 30.) This repeated disclosure, not just in the context of this litigation, but to the public as Defendants sought to justify the exclusion decision, supports finding that Defendants have waived attorney-client privilege as it relates to the closed session meeting minutes

and related testimony.<sup>2</sup>

Defendants' reliance on these four contingencies, including the entry of an injunction in the Texas litigation as the basis for their reinstatement of the exclusion *at the time of the decision* means that Plaintiffs are entitled to ask about the discussion of these contingencies and any other bases offered for reinstatement of the exclusion during those closed sessions and must be able to rely on documents related to these reasons. Defendants' effort to provide alternative after-the-fact reasons for the exclusion does not change Plaintiffs' right to this discovery. Accordingly, Plaintiffs should not have been prevented from asking about communications in closed session other than communications directly related to Nispel or DOJ providing legal advice in their capacity as lawyers for GIB and should be able to ask about all communications during the closed session for the reasons stated above.

---

<sup>2</sup> In addition, Plaintiffs should be permitted to reopen the depositions of those witnesses who were present at the December 30, 2016 GIB closed session, because the breadth of Defendants' objections thwarted the ability to inquire into clearly permissible topics of discussion that occurred during the closed session. The attorney-client privilege "protects confidential communications made between clients and their attorneys for the purpose of securing legal advice." *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 291 (7th Cir. 2002). Therefore, "advice on political, strategic, or policy issues...would not be shielded from disclosure by the attorney-client privilege." *In re Lindsey*, 158 F.3d 2163, 1270 (D.C. Cir. 1998); *see also In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007); *Republican Party of N. Carolina v. Martin*, 136 F.R.D. 421, 426 (D.N.C. 1991). Day, for example, was instructed not to respond to questions about *anything* that was discussed in closed session, with no qualification that the instruction pertained only to communications seeking or giving legal advice. (Day Dep. 81:1-7; 81:24-82:3.) Day understood the instruction to forbid discussion of the content of communications in closed session. (Day Dep. 85:16-23 (indicating he recalled discussion of contingencies, and when asked whether he could testify about them "subject to the ongoing objection of Mr. Roth, "stating "It was all in closed session.")) Because Day could not "recall what was closed and open in that meeting," the instruction effectively forbade him to testify about any communications, even those that were not for the purpose of securing legal advice, merely because they might have occurred in closed session. (Day Dep. 81:9-10.)

**CONCLUSION**

For the foregoing reasons, Plaintiffs request that this Court grant their Motion to Compel.

Dated this 27th day of April, 2018.

**HAWKS QUINDEL, S.C.**  
*Counsel for Plaintiffs,*

By: /s/ Nicholas E. Fairweather  
Nicholas E. Fairweather, State Bar No. 1036681  
Email: nfairweather@hq-law.com  
Michael R. Godbe, State Bar No. 1104823  
Email: mgodbe@hq-law.com  
Caitlin M. Madden, State Bar No. 1089238  
Email: cmadden@hq-law.com  
409 East Main Street  
Post Office Box 2155  
Madison, Wisconsin 53701-2155  
Telephone: (608) 257-0040  
Facsimile: (608) 256-0236

**AMERICAN CIVIL LIBERTIES UNION OF  
WISCONSIN FOUNDATION**  
*Counsel for Plaintiffs,*

By: /s/ Laurence J. Dupuis  
Laurence J. Dupuis, State Bar No. 1029261  
Email: ldupuis@aclu-wi.org  
Asma I. Kadri, VA State Bar No. 91290  
Email: akadri@aclu.org  
ACLU of Wisconsin Foundation  
207 East Buffalo Street, Suite 325  
Milwaukee, Wisconsin 53202  
Telephone: (414) 272-4032

**AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION**

*Counsel for Plaintiffs,*

By: */s/ John A. Knight*

John A. Knight

Email: jaknight@aclu.org

ACLU Foundation

Lesbian Gay Bisexual Transgender Project

150 North Michigan Avenue, Suite 600

Chicago, Illinois 60601

Telephone: (312) 201-9740