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' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL

INTRODUCTION

Plaintiffs have sought discovery related to the reasons why Defendant, Group Insurance Board ("GIB"), voted after a three-and-a-half (3.5) hour closed session on December 30, 2016 to reinstate an exclusion of health care benefits to treat gender dysphoria. State Defendants have refused to allow responses to questions or Plaintiffs' use of documents regarding the reasons for reinstating the exclusion. Defendants claim that the communications in closed session have a "tangential relationship to GIB's decision" to reinstate the exclusion, and because the State is not relying on the contingencies developed in the closed session to defend this case, its claims of attorney-client privilege to prevent discovery about the closed session is not an abuse of the privilege. These arguments should be rejected.

ARGUMENT

I. Defendants Have Waived Attorney-Client Privilege Over Discovery Related to the Reasons Offered at the Time of Reinstatement of the Exclusion

The record shows that the reasons Defendants reinstated the exclusion involve the injunction in the Texas litigation regarding enforcement of the HHS rule as well as the fulfillment of the other contingencies set by GIB, not the rationales offered now by Defendants' lawyers regarding the costs and efficacy of surgery to treat gender dysphoria. (Dkt. # 63, Defendants' Brief in Opp. to Mot. to Compel ("D.'s Br.") at 2.) Far from being "tangential," Michael Farrell, GIB chair, testified that, "in terms of [his] role [as a GIB member] to provide the coverage that is needed by members," he "vote[d] to reinstate the exclusion . . . [*e]xclusively* because of the expected and then ultimately known injunction that occurred at the end of December of 2016." (Dkt. # 53, Deposition of Michael Farrell ("Farrell Dep.") at 56:1-6.) (emphasis added) (*see also* Farrell Dep. 58:12-16.)[1]

Similarly, Tara Pray believed the Department of Justice ("DOJ") weighed in on the issue of the exclusion "because of the Texas lawsuit." (Dkt. # 69, Deposition of Tara Pray ("Pray Dep.") at 178:11-19, 186:10-23 (she understood that GIB voted to reinstate the exclusion based on the DOJ's concerns related to the Texas lawsuit); *see also* Dkt. # 68, Deposition of Lisa Ellinger ("Ellinger Dep.") at 127:8-15 (purpose for calling the December 30, 2016 GIB meeting was anticipation of action in the Texas

[1] Defendants' argument that Farrell was speaking in his personal capacity (D.'s Br. 17), is unsupported by the record. (Farrell Dep. 55:3 to 56:6) (responding to question in his official role "to establish policy to provide coverage for the medical care that is medically necessary or needed by members.")

lawsuit); Dkt. # 54, Deposition of Robert Conlin ("Conlin Dep.") at 131:2-8 (the December 30, 2016 GIB meeting was called because "there was an indication that there might be a decision coming from Texas").) This reasoning is consistent with GIB's initial decision to end the exclusion because of the ACA final regulations. (Farrell Dep. 55:16-25, *see also* Correspondence Memo from Tara Pray to Group Insurance Board (June 22, 2016), *available at* http://etf.wi.gov/boards/agenda-items-2016/gib0712/item3a.pdf at 3, last accessed May 14, 2018.) But as early as August 12, 2016, the DOJ was publicly urging GIB to reinstate the exclusion because of the State's position, asserted in a publically-available memo and the Texas litigation, that the ACA regulations were illegal. (*See* Correspondence Memo from Sara Brockman to Group Insurance Board (Aug. 12, 2016), Attachment A, *available at* http://etf.wi.gov/boards/agenda-items-2016/gib0816/item7a.pdf ("Aug. 12, 2016 Memo"), last accessed May 14, 2018.) With respect to Defendants' current argument that cost was a reason for reinstating the exclusion, board members Farrell and Day confirmed that the cost of adding the coverage would be minimal. (Farrell Dep. 167:10-25; Dkt. # 51, Deposition of Herschel Day ("Day Dep.") at 61:14-63:8.) *See also* Aug. 12, 2016 Memo Attachment B, p. 2 (cost of removing exclusion "anticipated to be low").)[2]

GIB's public disclosures in depositions, meeting minutes, and public memoranda of the reasons for reinstating the exclusion, (the contingencies

[2] Defendants' reference, (D.'s Br. 8) to Farrell's testimony regarding his "earliest days of recognizing the exclusion existed" does not in any way suggest that his vote to reinstate the exclusion was based on an understanding that the surgery is "cosmetic," rather than medically necessary care.

established during the December 30, 2016 closed session), are sufficient to support implied waiver of the attorney-client privilege. The implied waiver doctrine "is based on considerations of fairness," meaning "parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." *Patrick v. City of Chicago*, 154 F. Supp. 3d 705, 711 (N.D. Ill. 2015).

This is the situation presented here. Defendants' actual, contemporaneous reasons for reinstating the exclusion are central to deciding this case. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017). Preventing Plaintiffs from discovering those actual reasons through overbroad privilege instructions that prevent deponents from answering questions about the closed session raises this fundamental question of fairness. (*See* Dkt. # 56, Plaintiffs' Memo. In Supp. of Mot. to Compel, at 4-6 (defense counsel's privilege objections to these relevant questions.)) Effectively, this objection permits Defendants to craft post-hoc rationale for reinstatement in response to litigation, while preventing Plaintiffs from disputing whether these reasons were actually considered by GIB members in making the reinstatement decision. Defendants' use of cost and efficacy rationales, while claiming privilege regarding the actual deliberations and documents related to reinstatement of the exclusion is an "abuse [of] the privilege by asserting claims the opposing party cannot adequately dispute," justifying a finding of implied waiver.[3] *Patrick*, 154. F. Supp. 3d at 711.

[3] Even if rational basis review were the proper standard, Plaintiffs would be entitled to discovery regarding the genuineness of Defendants' asserted rationales for the discriminatory classification. *See*

The cases cited by Defendants are not to the contrary. In *In re Von Bulow*, the Second Circuit's rejection of an argument for waiver depended on its conclusion that the partial disclosures were being used "without prejudice to the opposing party." *In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987). Similarly, in *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, the First Circuit rejected the government's argument for implied waiver because the communication over which privilege had been waived was "*not thereafter used by the client to gain adversarial advantage in judicial proceedings*. 348 F.3d 16, 24 (1st Cir. 2003) (emphasis added). The same cannot be said here, where Defendants' public disclosure of some information regarding GIB's reinstatement of the exclusion while later claiming that the reinstatement was based on other considerations has severely prejudiced Plaintiffs.

Here, Defendants argue that because they have not put the injunction and other contingencies at issue, the testimony of Mr. Farrell and documents disclosing that the contingencies have been met, including the grant of the Texas injunction, and the exclusion will be reinstated, do not support an implied waiver of related documents and testimony from the closed session. (D.'s Br. 13-14.) However, Defendants' assertion of reasons for the reinstatement of the exclusion not identified by any contemporaneous documents or witness testimony have done just that – put

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Bassett v. Snyder, 59 F. Supp. 3d 837, 852 (E.D. Mich. 2014) (finding no cost savings rational basis to support discriminatory legislation in part because a review of evidence regarding legislation's analysis of fiscal impact when it passed the legislation indicated that Defendant's after-the-fact cost justification had no substance but was "nothing more than a Potemkin Village").

at issue whether these new reasons were in fact discussed in the closed session. Defendant also argues that disclosure related to the injunction and other contingencies is inconsequential, because they are not "policy reasons," (D.'s Br. 15), but fails to offer any legal support for this assertion, especially in light of Mr. Farrell's statement that the only reason for the reinstatement of the exclusion was the injunction. (Farrell Dep. 56:1-6.)[4] Labeling these reasons as something other than policy does not change the fact that these were the only reasons offered at the time.

II. Defendants Have Waived Privilege Over the Fiduciary Duty Memo

For similar reasons of fairness, Plaintiffs are entitled to production of the January 13, 2017 DOJ memo on fiduciary duty that Defendants have attempted to claw back. GIB member Day was asked whether he was concerned that reinstating the exclusion would violate his fiduciary duty, and while he initially answered that he had concerns, when asked how his fiduciary duty may have been implicated, defense counsel prevented him from testifying on the basis of attorney-client privilege. (Day Dep. 89:21-91:25.) By publicizing the DOJ's conclusion "confirming that the action taken does not constitute a breach of the Board's fiduciary duties," (*see* Correspondence Memorandum from Robert Conlin to GIB (Jan. 30, 2017),

[4] *Wi-LAN, Inc. v. LG Elecs., Inc.*, cited by Defendants, concerned whether the sending of a single letter containing counsel's legal opinion on a patent dispute waived attorney-client privilege for *all* documents and communications between counsel and their client. 684 F.3d 1364, 1367 (Fed. Cir. 2012). The court determined that considerations of fairness are necessary both in determining whether a party must disclose communications over which it is claiming privilege as well as the scope of the waiver. *Id.* at 1370-74; *see also Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (express waiver of privilege over legal memoranda disclosed to an outside auditor did not extend to *all* communications addressing broader tax issues). Here, Plaintiffs are not seeking such a broad waiver. Fairness requires disclosure limited to the testimony and documents regarding GIB's 2016 decision to reinstate the exclusion.

available at http://etf.wi.gov/boards/agenda-items-2017/gib0208/item4.pdf, last accessed May 14, 2018) while asserting alternative rationales for the reinstatement of the exclusion, Defendants have waived any claim of privilege over the memo. Fiduciary duty was plainly contemplated by GIB as one of the bases for its decision to reinstate the exclusion.

Defendants' reliance in *In re von Bulow* again overstates the case. Here, the publically-given rationale for reinstatement of the exclusion was the four (4) contingencies, including the DOJ's conclusion that reinstatement would not violate GIB's fiduciary duty. (*See* Jan. 30, 2017 Memo ("the Board approved reinstating the exclusion of health benefits and services based on gender identity after certain contingencies were met.")) Unlike *von Bulow*, the rationale for reinstating the exclusion has been squarely placed at issue in this litigation. As such, fairness requires a finding that Defendants have waived attorney-client privilege over this memo.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court grant their Motion to Compel (Dkt. # 55), allowing Plaintiffs to retain and use the closed meeting minutes and fiduciary duty memo Defendants seek to claw back, and to re-open depositions to seek testimony related to the December 30, 2016 closed session meeting.

Dated this 14th day of May, 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: jknight@aclu.org
ACLU Foundation
Lesbian Gay Bisexual Transgender Project
150 North Michigan Avenue, Suite 600
Chicago, Illinois 60601
Telephone: (312) 201-9740