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

ALINA BOYDEN,
and
SHANNON ANDREWS,

Plaintiffs,

vs.

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

Defendants.

Case No.: 17-cv-264

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiffs submit this memorandum of law in support of their motion for leave to file an amended complaint pursuant to Fed. R. Civ. P. 15(a). Plaintiffs seek leave to file a Second Amended Complaint (Exhibit A) to add: (1) a new plaintiff Wren Logan, another transgender state employee who has been harmed by the same insurance exclusion of treatments for gender dysphoria that is being challenged by plaintiffs Alina Boyden and Shannon Andrews; (2) Ms. Logan's employer, the University of Wisconsin Hospitals and Clinics Authority, and its chief executive,[1] as defendants under Title VII; and (3) the eleven members of the Group Insurance Board ("GIB") as defendants in

[1] Plaintiffs recognize that this Court may dismiss these UWHCA employer defendants on the same standing grounds as it dismissed the other employer defendants. (Dkt. 67 at 7-8.) Plaintiffs include them to preserve claims against them on appeal, should that be necessary.

their official and individual capacities for purposes of plaintiffs' equal protection claims under 42 U.S.C. § 1983.

Ms. Logan's experience with the exclusion is materially similar to the experiences of existing plaintiffs and her addition will not affect the current litigation schedule or prejudice defendants. The GIB is statutorily responsible for setting state employee health insurance policy, including establishing a uniform health benefits package, which is administered by defendants Department of Employee Trust Funds ("ETF") and ETF Secretary Conlin. In this case, the health benefits package adopted by GIB excluded coverage of treatments for gender dysphoria for all but one month, from January 1, 2017, until January 31, 2017. The individual members of the GIB who would be added as defendants in the proposed amended complaint voted unanimously, in July 2016, to remove the exclusion, as recommended by ETF staff after the issuance of regulations under the Affordable Care Act's ("ACA") non-discrimination provision, and all but two of the members present in December 2016 voted to reinstate the exclusion, despite the contrary recommendations of ETF staff. GIB as an entity has been a defendant to Plaintiffs' Title VII and ACA claims since the time the case was filed and three GIB members have already been deposed and the deposition of another has been scheduled. Addition of the GIB members will not affect the trial schedule or prejudice the defendants.

FACTS AND PROCEDURAL HISTORY

The original Complaint in this action was filed on April 7, 2017. (Dkt. 1.) It alleged that the exclusion of treatments for gender dysphoria for transgender

employees violated plaintiffs' rights under the Equal Protection Clause and section 1557 of the Affordable Care Act. The First Amended Complaint was filed as a matter of right on June 16, 2017. (Dkt. 27.) It added employment discrimination claims under Title VII of the Civil Rights Act of 1964, and allegations related thereto. Rather than answering the Complaint, State Defendants moved to dismiss[2] on June 22, 2017. (Dkt. 28.) Defendants' motion did not address the merits of Plaintiffs' claims, but argued that Plaintiffs had named improper defendants. On May 11, 2018, this Court granted in part and denied in part the motion to dismiss. (Dkt. 67.)

Pursuant to the pretrial order, the parties exchanged initial disclosures in October 2017, and Plaintiffs initiated discovery in November 2017. (Fairweather Decl. ¶ 2.) Plaintiffs have served multiple sets of requests for admissions, interrogatories and requests for production, and taken depositions of seven witnesses, including Defendant Conlin, three members of Defendant GIB, and four other employees of defendant ETF. (Fairweather Decl. ¶¶ 3-4.) The deposition of another GIB member is scheduled for later this month and the parties are in the process of scheduling depositions of Defendants' experts, who were disclosed on April 19, 2018. (Fairweather Decl. ¶ 4.) Because

[2] Plaintiffs have named as State Defendants the State of Wisconsin Department of Employee Trust Funds ("ETF"); the Wisconsin Group Insurance Board ("GIB"); Robert J. Conlin, the Secretary of ETF ("Conlin" or "the Secretary"); the Board of Regents of the University of Wisconsin System (the "Regents"); Raymond W. Cross, the President of the University of Wisconsin System ("Cross" or "the President"); and Rebecca M. Blank, Chancellor of the University of Wisconsin Madison ("Blank" or "the Chancellor"). This Court granted Defendant Dean Health Plan's motion to dismiss on November 20, 2017, (Dkt. 44), and also dismissed the Regents, Cross, and Blank on May 11, 2018 (Dkt. 57). The involuntarily dismissed Defendants remain in the amended complaint, in the event Plaintiffs seek to revive claims against them in any appellate proceedings. Plaintiffs do not intend to litigate claims against them further in the district court. This motion does not involve the claims against Dean Health Plan. Accordingly, the State Defendants will be referred to in this brief simply as "Defendants."

Defendants in their motion to dismiss challenged standing and the involvement of the named Defendants in the deprivation of Plaintiffs' rights, some of the Plaintiffs' discovery efforts focused on the roles of and relationships among ETF, GIB and state employers with respect to offering, establishing, administering and enforcing the terms of the state employee health insurance plans' benefits package, which contains the challenged exclusion. (Fairweather Decl. ¶ 5.) In addition to confirming the integral roles that Secretary Conlin and ETF play in researching, recommending, administering and enforcing the health benefits package, including the exclusion at issue in this case, the discovery revealed that at least two members of the GIB were actively involved in the effort to have the GIB reconsider its July 2016 decision to eliminate the exclusion of treatments for gender dysphoria, leading ultimately to its reinstatement. (Fairweather Decl. ¶ 6.) Discovery also confirmed the existence of other state employees beyond Ms. Boyden and Andrews who needed the treatments singled out by the exclusion. (Fairweather Decl. ¶ 7.)

Defendants have propounded little in the way of written discovery, requested no documents other than Plaintiffs' medical records related to gender dysphoria, and have not deposed Plaintiffs, their physicians or their expert. (Fairweather Decl. ¶ 8.) Defendants' experts expressed no opinions that relied on any individual facts about Plaintiffs. (Fairweather Decl. ¶ 9.) It thus appears that Plaintiffs' individual circumstances will play no role in Defendants' dispositive motions that are currently due on June 8.

Plaintiffs have moved expeditiously to ascertain the facts of Ms. Logan's case and prepare an amended pleading to add her as a Plaintiff. (Fairweather Decl. ¶ 10.) They have begun the process of obtaining copies of her pertinent medical records, and will provide copies to Defendants upon request, should the motion to amend be granted. (Fairweather Decl. ¶ 11.)

ARGUMENT

Amended complaints are designed to revise initial pleadings to add information relevant to the original claims. Rule 15(a)(2) provides that, after the initial time to amend as a matter of course has passed, "a party may amend its pleading only with the opposing party's consent or the court's leave." A court should freely give leave when justice so requires, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962), even if leave is sought after a ruling on a motion to dismiss has been entered. *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 519-20 (7th Cir. 2015) ("Unless it is *certain* from the face of the complaint that any amendment would be futile or otherwise unwarranted, the district court should grant leave to amend after granting a motion to dismiss." (emphasis in original)).

The standards governing Rule 15 motions after the time to amend as a matter of course has elapsed generally focus on whether an amendment would prejudice defendants. *See Glatt v. Chi. Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996). "The Seventh Circuit, in general, focuses on the questions of fair notice and absence of undue prejudice when determining whether it is appropriate to add in a new party."

Robbins v. Lading, No. 10-CV-605-WDS, 2012 WL 2906247, at *3 (S.D. Ill. July 16, 2012) (citing *Paskuly v. Marshall Field & Co.*, 646 F.2d 1210, 1211 (7th Cir.1981).)

Leave to amend the complaint should be granted unless the moving party has unduly delayed, the opposing party will suffer prejudice, or the pleading is futile. *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 792 (7th Cir. 2004). However, delay on its own is usually not reason enough for a court to deny a motion to amend, unless the opposing party is prejudiced by the delay. *See id.*

Moreover, leave to file an amended pleading should be granted when the amendment promotes "judicial economy and the most expeditious way to dispose of the merits of the litigation." *Hartley v. Wisconsin Bell, Inc.*, 167 F.R.D. 72, 74 (E.D. Wis. 1996). Courts grant leave to amend to add a new plaintiff where the new plaintiff alleges "essentially the same claims" as the named plaintiffs and where the proposed new plaintiff would just file her own lawsuit to which defendants would have to respond in any event if the amendment were denied, particularly when, as here, the original action can proceed without further delay. *See Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723, 733 n.10 (N.D. Ill. 1996) (citing *Sogevalor, S.A. v. Penn. Central Corp.*, 137 F.R.D. 12, 14 (S.D.Ohio 1991)). Amendments are proper when the underlying claims and the remedies sought have not changed. *Lanigan v. LaSalle Nat. Bank*, 108 F.R.D 660, 663 (N.D. Ill. 1985).

Ms. Logan does not raise any new claims, nor does she add any new facts to the case that would necessitate a change in Defendants' approach to defending this case. Defendants have not sought discovery against the existing Plaintiffs, other than copies

of their medical records (which Plaintiffs have already requested from Ms. Logan's providers), nor have Defendants sought to depose them. Adding another plaintiff would not interfere with the existing trial schedule, and does not affect the Defendants' litigation strategy, which does not appear to depend on individual facts about the Plaintiffs, but upon legal arguments and general facts about gender identity, gender dysphoria and its treatment. Even if Defendants did need additional discovery from a new plaintiff, they would not be prejudiced by the proposed amendment, because discovery has not yet concluded and there is ample time to pursue discovery against Ms. Logan, should the Defendants choose to do so.

Defendants should also be considered to be on notice that other Plaintiffs would likely emerge. They have undoubtedly been aware that state employees with gender dysphoria besides Ms. Boyden and Ms. Andrews would be affected by the exclusion, and discovery quickly confirmed the existence of such individuals. (Fairweather Decl. ¶ 7.) Moreover, denying the amendment would simply prompt the proposed plaintiff to seek relief by filing an individual suit of her own, which would impede, rather than advance judicial efficiency.

Adding the individual members of the GIB directly relates to Plaintiffs' existing claims regarding the Defendants' improper denial of transition-related health insurance coverage to state employees at issue in this case.[3] The proposed amendment alleges

[3] This Court's recent decision on Defendants' motion to dismiss (Dkt. 67) makes clear that Plaintiffs have standing to assert their section 1983 claims against Defendant Conlin and that Conlin is a proper defendant under section 1983, because of his role in administering and enforcing the challenged exclusion. However, in an abundance of caution, and to ensure that

that the eleven named GIB members are vested with the statutory authority to take action regarding the scope of the state employee health benefits package, including benefit exclusions such as the exclusion at issue in this case; that they did *not* take action prior to July 2016, to eliminate the discriminatory exclusion, resulting in a denial of coverage for Andrews' gender confirmation surgery in October 2015; and that they affirmatively *took* action in December 2016 to reinstate the exclusion, resulting in a denial of coverage for all of the plaintiffs. It also alleges that GIB member J.P. Wieske took affirmative action to have GIB consider reinstating the exclusion.

Defendants will not be prejudiced by this amendment because discovery is ongoing, dispositive motion deadlines have not passed, and trial is still six months away. *See generally Freeman v. City of Milwaukee*, No. 13-CV-918, 2015 WL 13001541, at *2 (E.D. Wis. Jan. 9, 2015) (finding that no prejudice would occur from an amendment to the pleadings with dispositive motions still pending and a trial date ten months away). Moreover, the GIB members have been on notice of these claims since the initial filing of this case in April 2017.

Similarly, adding the University of Wisconsin Hospitals and Clinics Authority ("UWHCA") and its chief executive, Alan S. Kaplan, as defendants will not prejudice Defendants.[4] UWCHA and Mr. Kaplan have been on notice due to the fact that two of

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they can obtain complete relief, Plaintiffs seek leave to add GIB members as defendants to their section 1983 claims. *Cf. Int'l Ass'n Machinists Dist. 10 v. Wisconsin*, 194 F. Supp. 3d 856, 861-63 (W.D. Wis. 2016) (although standing existed as to DWD Secretary, court granted leave to amend to add chair of Wis. Empl. Relations Comm'n, where chair was necessary to obtain broad facial relief sought).

[4] As noted above, these Defendants may be dismissed for the same reasons this Court dismissed Defendants Board of Regents, Blank and Cross.

UWHCA managing board members are already defendants in this case. Moreover, UWHCA will be represented by the same attorneys at the Department of Justice already defending this matter, as it is a state entity. The claims and remedies sought are identical to those of the existing Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court grant their motion for leave to file an amended complaint.

Dated this 11th day of May, 2018.

Respectfully submitted,

Counsel for Plaintiffs,

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-wi.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

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