

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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

Case No. 17-cv-264

v.

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

Defendants.

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF
MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

Plaintiffs submit this reply brief in support of their motion for leave to file an amended complaint pursuant to Fed. R. Civ. P. 15(a). (Dkt. # 74.) Plaintiffs have sought leave to file a Second Amended Complaint to add: (1) a new plaintiff Wren Logan, another transgender state employee who has been denied insurance coverage for surgery to treat her gender dysphoria because of the same provision that is being challenged by plaintiffs Alina Boyden and Shannon Andrews; (2) Ms. Logan's employer, the University of Wisconsin Hospitals and Clinics Authority as defendant under Title VII and its chief executive, Alan Kaplan, under 42 U.S.C. § 1983 (2012);¹ and (3) the eleven (11) members of the Group Insurance Board ("GIB")

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. Plaintiffs also note that their opening brief erroneously requested leave to name Kaplan as a defendant under Title VII, rather than Section

as defendants in their official capacities for purposes of injunctive relief for plaintiffs' equal protection claims under 42 U.S.C. § 1983, and the seven (7) members of the GIB who were on the GIB in December 2016, and did not vote against reinstating the exclusion. (Declaration of Nicholas E. Fairweather in Supp. of P.'s Mot. to Amend Compl., Ex. 1, Amended Complaint ("Am. Compl.")).

Plaintiffs filed the instant motion on May 25, 2018, fourteen (14) days after this Court issued its decision granting in part and denying in part Defendants' motion to dismiss. (Dkt. # 67 (filed May 11, 2018)). Defendants filed a brief in opposition to the motion to amend on June 5, 2018. (Dkt. # 84, 86). On May 31, 2018, Defendants served Plaintiffs with a notice of their intention to file a motion under Rule 11 for sanctions, on the grounds that Plaintiffs' proposed Second Amended Complaint improperly repleaded dismissed claims against Defendants UW Board of Regents, UW President Raymond Cross and UW Chancellor Rebecca Blank, and alleged "frivolous" individual capacity claims against four (4) GIB members who had voted against reinstatement of the exclusion or had not been on the GIB at the time the exclusion was reinstated. (Atty Decl. ¶ 3.)

The parties met and conferred by telephone on June 7, 2018, but were unable to reach a resolution that would entirely obviate the need for this Court to rule on Plaintiffs' motion for leave to file an amended complaint. (Atty Decl. ¶ 5.) In response to Defendants' objections, Plaintiffs file with this brief an amended complaint which omits parties to which Defendants objected in their notice of intent

1983. The proposed second amended complaint, filed here as an attachment to the Declaration of Attorney Nicholas E. Fairweather, correctly asserts only Section 1983 claims against Kaplan.

to file a Rule 11 motion. (Am. Compl.) Plaintiffs do continue to seek leave to file a corrected amended complaint, for the reasons set forth below.

ARGUMENT

I. Plaintiffs' Corrected Second Amended Complaint

Defendants argue in their opposition to this motion that repleading claims against dismissed defendants is unnecessary to preserve those claims on appeal, citing *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 683 (7th Cir. 1990), and *Smith v. Nat'l Health Care Servs.*, 934 F.2d 95, 98 (7th Cir. 1991). (Dkt. # 86 at 6). *Bastian* and *Smith* both hold that a plaintiff need not replead dismissed *claims* in a subsequent amended complaint in order to preserve them for appeal. However, because the *defendants* against whom the dismissed claims were asserted remained in both of those cases after dismissal of some of the claims against them, neither *Bastian* nor *Smith* necessarily or directly resolves the question of whether a ruling that results in the outright dismissal of a *party* remains appealable against the dismissed party if the party is not included in a subsequent amended pleading.

Cases in other circuits indicate that an appeal from a final judgment extends to all antecedent interlocutory rulings, including dismissal of a defendant at an earlier stage of the case. *See, e.g., Carvalho v. Equifax Info. Servs., L.L.C.*, 615 F.3d 1217, 1227 (9th Cir. 2010), *opin. amended on denial of reh'g en banc*, 629 F.3d 876, 887 (9th Cir. 2010); *see also* Wright & Miller, 15A Fed. Prac. & Proc. Jurs. § 3905.1, & n.11 (2d Ed.). The Seventh Circuit has held in a somewhat related context that an interlocutory order severing claims against one defendant is appealable from the

final judgment in the severed case, at least when the severance order appears on the docket of that case. *Taylor v. Brown*, 787 F.3d 851, 856-57 (7th Cir. 2015). Because these cases did not involve an appeal of the dismissal of a defendant *after plaintiffs filed an amended complaint that omitted the defendant*, they, too, do not directly answer the question of whether it is necessary to retain dismissed defendants in subsequent amended complaints to preserve appeal rights as to those dismissed parties.

However, the underlying rationale for the final judgment rule – that “judicial economy is served by the consolidation of as many issues in a litigation as possible in a single appeal,” *Taylor*, 787 F.3d at 856 – also supports a rule that it is unnecessary to include dismissed defendants in subsequent amended pleadings, for “it is prudence and economy . . . for parties not to reassert a position” in an amended complaint “that the trial judge has rejected.” *Bastian*, 892 F.2d at 683. Moreover, Defendants, by taking the position here that it is unnecessary to replead against dismissed defendants, would likely be estopped from asserting that failing to do so waived Plaintiffs’ right to raise the dismissal on appeal. Accordingly, while Plaintiffs do not believe that their request to file an amended complaint naming the dismissed Defendants for purposes of avoiding waiver was frivolous, they submit herewith a corrected second amended complaint that omits claims against the state employer defendants (the University of Wisconsin Board of Regents, UW President Raymond Cross and UW Chancellor Rebecca Blank) this Court previously dismissed on standing grounds. (Am. Compl.).

In their opposition to the motion for leave to file an amended complaint, Defendants also contend that suing GIB members who voted against reinstating the exclusion or were not on the Board at the time the vote occurred in their individual capacities is frivolous, because their lack of intent to discriminate insulates them from a finding that they were “personally involved” in the deprivation of Plaintiffs’ equal protection rights. (Dkt. # 86 at 7-8).

Defendants’ argument fails for a number of reasons. First, it reflects Defendants’ misunderstanding of the nature of the personal involvement requirement in Section 1983 actions challenging application of an unconstitutional policy or rule of law, as opposed to the discretionary misconduct of individual state employees or officials. In cases challenging a rule of law, it is involvement of the rulemakers (here, the members of GIB) in the application of the discriminatory rule, not the intent of any particular rulemaker, that supplies the necessary personal involvement. *See, e.g., Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995) (“[A] person aggrieved by the application of a legal rule does not sue the rule maker . . . [h]e sues the person whose acts hurt him.”); *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) (“[W]hen a plaintiff challenges . . . a rule of law, it is the state official designated to enforce that rule who is the proper defendant . . .”); *Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987) (“a controversy exists not because the state official is himself a source of injury, but because the official represents the state whose statute is being challenged as the source of the injury”).

In this case, the GIB members are part of the process that led to the deprivation of Plaintiffs' rights, even if their votes reflect a desire that the rule not be adopted.

Second, Defendants emphasize only the GIB's decision to reinstate the exclusion. (Dkt. # 86 at 7-9.) But in their Complaint, Plaintiffs challenge the exclusion itself, not one decision to reinstate it. The exclusion has existed since 1994, but was not removed by Defendants until 2016, despite earlier requests from UW and other employers. Plaintiff Andrews was harmed by the exclusion *before* the GIB's vote to reinstate it, and its reinstatement continues to cause compensable injuries to Plaintiffs by depriving them of effective treatment. The four (4) defendants who never voted to reinstate the exclusion nonetheless failed to remove the exclusion at an earlier date and/or continue to fail to take action to remove the exclusion now.

The challenged rule in this case is discriminatory on its face, so further inquiry into the defendants' "intent" is unnecessary, as this Court has recognized with respect to Title VII claims. (Dkt. # 67 at 17); *see also Reidt v. County of Trempealeau*, 975 F.2d 1336, 1340-41 (7th Cir. 1992). The same is true in cases challenging facially discriminatory rules under the Equal Protection Clause. *Wayte v. United States*, 470 U.S. 598, 608 n. 10 (1985) ("A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification").

A defendant's asserted lack of animus toward the protected class is no defense to a challenge to application of a rule that discriminates against that class.

It is not necessary to show that a defendant harbors malice, hatred or ill-will toward those disadvantaged by a discriminatory law. *See Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985) (discrimination motivated by “negative attitudes,” “fear” or “irrational prejudice” actionable, even when not motivated by ill-will). Even benevolent intentions do not insulate a facially discriminatory policy from invalidation. *See Int’l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991) (“[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy”); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (“legislative assurances of good intention cannot suffice” to support a facially discriminatory policy); *Johnson v. California*, 543 U.S. 499, 506 (2005) (segregating inmates by race at jail intake subject to strict scrutiny, even where purpose was to prevent racial violence).

However, the four (4) GIB members named as defendants in Plaintiffs’ amended complaint who did not vote in favor of reinstating the exclusion are not necessary for Plaintiffs to secure monetary relief. As this Court has recognized, Conlin is a proper defendant to Plaintiffs’ Section 1983 individual capacity claims. (Dkt. # 67 at 14). Defendants do not argue that the other GIB members are improper defendants for individual capacity claims. And suing only those members of a multi-member governmental body who voted for a challenged decision appears to be an acceptable way to proceed. *See, e.g., Ward v. Hickey*, 781 F. Supp. 63, 65 (D. Mass. 1989) (plaintiff teacher sued only members of the hiring committee that

voted against her reappointment). Accordingly, Plaintiffs have filed a corrected second amended complaint that omits individual capacity claims against GIB members Day, Thompson, Stegall and Sullivan.

II. Plaintiffs' Motion for Leave to Amend Was Not Unduly Delayed and Does Not Prejudice Defendants

Defendants oppose Plaintiffs' filing of the amended complaint on two (2) additional grounds: undue delay and prejudice. (Dkt. # 86 at 9-15). Neither should prevent Plaintiffs from filing their amended complaint.

A. The Addition of Individual GIB Members Is Not Undue Delay

With regard to undue delay, Defendants appear to object only to the addition of the individual GIB members as Defendants. As Defendants correctly note, Plaintiffs could, in theory, have sought leave to add the individual board members as defendants earlier in this case. However, the need to and propriety of adding such individuals as board members turned on resolution of issues that were the subject of Defendants' motion to dismiss, which was not decided until May 11, 2018, just two (2) weeks before Plaintiffs moved to amend.

When a plaintiff "could reasonably have expected that the allegations in her original complaint would survive a motion to dismiss," it is not undue delay to await a ruling on such a motion before moving to amend. *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 523-24 (7th Cir. 2015). It was not unreasonable for Plaintiffs to expect that their individual and official capacity claims under Section 1983 against Conlin, Blank and Cross would survive Defendants' motion attacking standing and the sufficiency of allegations of

involvement in the deprivation of their rights. While this Court denied Defendants' motion to dismiss the Section 1983 claims against Conlin, the dismissal of Blank and Cross for failure to satisfy the minimal traceability/causation requirement for standing, and the qualification that the allegations against Conlin were sufficient "at the pleading stage" (Dkt. # 67 at 14-15) introduced sufficient uncertainty that seeking leave to add the GIB members as defendants appeared prudent to Plaintiffs.

Defendants claim that the addition of the GIB members "burdens" them because they have already filed their motion for summary judgment and "would need to conduct additional discovery" in order to file "another summary judgment motion." (Dkt. # 86 at 11). But Defendants' motion for summary judgment was not filed at the time Plaintiffs moved for leave to file their amended complaint. Moreover, courts allow amended pleadings to be filed while summary judgment motions are pending. *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).

More significantly, Defendants have not specified the discovery that would be necessary to file a motion for summary judgment on behalf of the GIB members. They propounded minimal discovery to Plaintiffs prior to filing the pending motion for summary judgment and rely primarily on declarations, their experts' opinions and deposition testimony *taken by Plaintiffs* to support their summary judgment motion. (Dkt. # 88 (Defs.' Proposed Findings of Fact)). Their merits arguments with

respect to the Section 1983 claims do not depend on any facts about Conlin, instead relying on arguments for rational basis scrutiny and whether the asserted state interests satisfy such scrutiny. (Dkt. # 81 at 13-34). Their qualified immunity argument with respect to Conlin asserts only that there was no “clearly established law” that the exclusion violates equal protection (Dkt. # 81 at 39-42), an argument that succeeds or fails with respect to individual GIB defendants in exactly the same way it succeeds or fails with Conlin. And Defendants’ argument on summary judgment that Conlin was not sufficiently “personally involved” turns on Defendants’ assertions that it was GIB’s decision – in other words, the votes of the individual GIB defendants whom Plaintiffs’ seek to add in their amended complaint – not Conlin’s, to impose the discriminatory exclusion. (Dkt. # 81 at 38 (“GIB sets the Uniform Benefits, and GIB decided to reinstate the exclusion”). The purpose of the Federal Rules is to produce not only a speedy, but a “just” determination of every action (Fed. R. Civ. P. 1), preferably on the merits. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (purpose of rules is “to facilitate a proper decision on the merits”) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). The addition of these individual GIB members as defendants does not change Defendants’ arguments for summary judgment, and thus does not burden them.

B. Adding Proposed Plaintiff Wren Logan Is Not Prejudicial to Defendants

Similarly, Defendants argue that the addition of Logan’s claims to the complaint should be rejected because it would result in undue prejudice. (Dkt. #86 at 11-15). But Defendants’ argument depends on a series of incorrect assertions

about the nature of Logan's claims and the defendants against whom those claims are asserted. At a fundamental level, it is difficult to see how adding Logan's claims to this suit is any more "prejudicial" to the State Defendants than the filing of an entirely new action with Logan as the named plaintiff would be, but this is apparently the result Defendants seek.

In claiming prejudice, Defendants fixate on the addition of Logan's employer, the University of Wisconsin Hospitals and Clinics Authority ("UWHCA"), as a defendant, asserting that UWHCA is a "private entity; it is not a state entity." (Dkt. # 86 at 12-13). While UWHCA is not an arm of the state for purposes of sovereign immunity, that does *not* mean it is not a state entity for other purposes. *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 769, 771-72 (7th Cir. 2005) (UWHCA is "a hybrid entity; it has characteristics of both a state agency and a private foundation"); *see also Rouse v. Theda Clark Med. Ctr, Inc.*, 2007 WI 87, ¶ 40, 302 Wis. 2d 358, 381 (UWHCA is a "political corporation" for purposes of statute requiring notice of claim as precondition to suit against governmental entities).

In this case, Chapter 40 of the Wisconsin Statutes makes clear that UWHCA is a state entity for purposes of employee benefits, including the benefits provided to Logan through Defendants, Conlin, ETF and GIB. Pursuant to Wis. Stat. § 40.02(54)(h), "State agency" means any office, department or independent agency in the executive, legislative and judicial branches of state government *and includes the following: ... The University of Wisconsin Hospitals and Clinics Authority.*" (emphasis added). Pursuant to Wis. Stat. § 40.02(25)(b)2g., Logan is an "Eligible

employee . . . For the purpose of group health insurance coverage . . .,” because she is a “graduate assistant” or “other employee-in-training . . . of the University of Wisconsin Hospitals and Clinics Authority . . . employed on at least a one-third full-time basis with an expected duration of employment of at least 6 months.” Similarly, Plaintiff Alina Boyden is an “eligible employee” for purposes of group health insurance coverage pursuant to Wis. Stat. § 40.02(25)(b)2, a nearly identical sub-paragraph of the same statute. *Id.* (eligible employees include those “employed as a teaching assistant or graduate assistant and other employees–in-training . . . of the board of regents of the university, who are employed on at least a one-third full-time basis”).

Defendants Conlin, ETF and GIB are statutorily responsible for setting and enforcing employee health insurance policy, including the uniform health benefits package, not only for UW employees like Boyden and Andrews, but for employees of UWHCA, such as proposed plaintiff Logan. Wis. Stat. § 40.52(1) (GIB “shall establish by contract a standard health insurance plan in which all insured employees shall participate . . .”), 40.52(3) (GIB, “after consulting with the board of regents of the University of Wisconsin System, shall establish the terms of a health insurance plan for graduate assistants, for teaching assistants, and for employees-in-training . . .”), 40.52(4) (GIB, “after consulting with the board of directors of the University of Wisconsin Hospitals and Clinics Authority, shall establish the terms of a health insurance plan for graduate assistants, and for employees-in-training”). Thus, any difference between UWHCA and the other State Employers is immaterial

to the central factual and legal questions in this case. Indeed, one would expect that UWHCA would promptly move to dismiss on the same grounds the Board of Regents, Cross and Blank successfully asserted in their motion to dismiss.²

These same statutes belie Defendants' assertion of a need to ascertain whether joinder of claims against UWHCA in this lawsuit is proper. (Dkt. # 86 at 13-14). The gravamen of the claims of Boyden, Andrews and Logan is the same: a challenge to the discriminatory exclusion of coverage of transition-related care – a policy adopted by Defendant GIB, enforced by Defendants Conlin and ETF, and contained in the plans offered by “state agency” employers like UW and UWHCA under Chapter 40. It cannot be seriously argued that Logan's claims do not arise from the same core “transaction, occurrence, or series of transactions or occurrences” – the adoption and enforcement of the discriminatory exclusion – that gave rise to Boyden's and Andrews' claims.

Finally, it is difficult to see how denying the motion to amend would alleviate any prejudice to Defendants – or be in the interests of judicial economy. Leave to file an amended pleading should be granted when the amendment promotes “judicial economy and is the most expeditious way to dispose of the merits of the litigation.” *Hartley v. Wis. Bell*, 167 F.R.D. 72, 74 (E.D. Wis. 1996). If leave to amend is denied, Logan will simply file a separate lawsuit alleging the same claims against the same defendants as she proposes to do in the proposed amended

² Plaintiffs do not know whether, as Defendants assert (Dkt. # 86 at 13), the Wisconsin Department of Justice would be able to provide representation to UWHCA and Kaplan, given UWHCA's designation as a “state agency” under Wis. Stat. § 40.02(54)(h). In any event, it is difficult to see how Conlin, ETF and GIB are “prejudiced” by UWHCA's need to retain separate counsel.

complaint, requiring Defendants to undertake whatever additional discovery or motion practice that might be required in this case. *See Orłowski v. Dominick's Finer Foods*, 937 F. Supp. 723, 733 n.10 (N.D. Ill. 1996) (citing *Sogevalor, SA v. Penn Cent. Corp.*, 137 F.R.D. 12, 14 (S.D. Ohio 1991)).

Defendants request, if this Court grants this motion to amend, that they be given additional time to take discovery “to ascertain the basis for Plaintiffs’ claims” and file a dispositive motion. (Dkt. # 86 at 15-16). Plaintiffs submit that this Court (or the Magistrate Judge) should consider any such modifications in a scheduling conference after the amended complaint has been filed and served on UWHCA and Kaplan. Plaintiffs are willing to expedite any discovery that may be necessary and will accommodate efforts to streamline consideration of dispositive motions so that Logan’s claims do not unnecessarily delay resolution of this matter.

CONCLUSION

For the foregoing reasons and those set forth in their memorandum in support of the motion, Plaintiffs request that this Court grant their motion for leave to file an amended complaint.

Dated this 14th day of June, 2018.

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