

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

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ALINA BOYDEN and  
SHANNON ANDREWS,

Plaintiffs,

v.

Case No. 17-CV-0264

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

Defendants.

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**BRIEF IN SUPPORT OF STATE DEFENDANTS’  
SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT**

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**BACKGROUND**

On June 25, 2018, this Court granted in part and denied in part Plaintiffs’ motion for leave to file a second amended complaint (Dkt. 74), thereby allowing Plaintiffs to add, among others, seven members of the Group Insurance Board (GIB) as defendants to this action: Michael S. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurbert, Theodore Neitzke, J.P. Wieske, and Bob Ziegelbauer (“GIB Defendants”).<sup>1</sup> Plaintiffs’ second amended complaint brings 42 U.S.C. § 1983 claims against them in their individual (and official) capacities, alleging equal protection violations based

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<sup>1</sup> The Court’s order also allowed Plaintiffs to sue four other GIB members in their official capacities only—Francis Sullivan, Jennifer Stegall, Herschel Day, and Nancy Thompson, but this motion does not concern them.

on sex and transgender status. (Dkt. 74-1:27–29 ¶¶ 110–20.) The Court allowed the GIB Defendants to join the previously-filed summary judgment motion of State Defendants (Dkt. 80), including but not limited to the qualified immunity defense (Dkt. 109:3). The GIB Defendants were also permitted to set forth any other defense. (Dkt. 109:3 n.4.) They do both here.

## ARGUMENT

### **I. Summary judgment must be granted to Theodore Neitzke, in his individual capacity, based on lack of personal involvement.**

As previously explained,<sup>2</sup> liability against individuals under 42 U.S.C. § 1983 “require[s] personal involvement in the alleged constitutional deprivation.” *Palmer v. Marion Cty.*, 327 F.3d 588, 594 (7th Cir. 2003). That is, personal liability “can only be based on a finding that the defendant caused the deprivation at issue.” *Id.* (citation omitted). An equal protection claim against a government supervisor requires a showing of intentional discrimination—that is, a showing that the official intended to discriminate on the basis of a protected class. *Ashcroft v. Iqbal*, 556 U.S. 667, 676 (2009). Purposeful discrimination requires more than “intent as volition or intent as awareness of consequences.” *Id.* (quoting *Personnel Adm’r of Mass. v. Feeney*,

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<sup>2</sup> GIB Defendants hereby incorporate by reference the arguments set forth in sections I.B.1. of State Defendants’ opening (Dkt. 81:40–43) and reply summary judgment briefs (Dkt. 126:33–36).

442 U.S. 256, 279 (1979)). It instead involves a decisionmaker acting “because of,” not merely “in spite of,” [the action’s] adverse effects upon an identifiable group.” *Id* (alteration in original).

Here, the undisputed evidence indicates that GIB member Neitzke was not personally involved in any alleged constitutional violation. The Group Insurance Board met on December 30, 2016, and during this special meeting there was a vote to reinstate the Exclusion. (DFOF ¶ 61.) The evidence in support of the undisputed factual finding shows that Neitzke attended this meeting by telephone and participated in a closed session with legal counsel. (DFOF ¶ 176.) The closed session portion of the meeting convened at 3:13 p.m. (DFOF ¶ 177.) Neitzke departed the meeting at 5:00 p.m. (DFOF ¶ 178.) The closed session did not end until 6:24 p.m. (DFOF ¶ 179.) And in open session there was a vote by GIB to reinstate the Exclusion. (DFOF ¶ 180.) Thus, because he left the meeting during the closed session, Neitzke was one of the two members who were absent and did not vote in open session. (DFOF ¶ 181.) Because Neitzke did not vote to reinstate the Exclusion, he did not “cause[] the deprivation at issue.” *Palmer*, 327 F.3d at 594. Therefore, Neitzke is like those persons whom Plaintiffs have sued only in their official capacities: Jennifer Stegall, Francis Sullivan, Herschel Day, and Nancy Thompson—GIB members who occupy seats but did not vote to reinstate the Exclusion. (Dkt. 108-1.)

Because Defendant Neitzke does not have the requisite personal involvement in any injury to Plaintiffs, judgement should be entered in his favor as to Plaintiffs' § 1983 equal protection claims in his individual capacity.

**II. Summary judgment must be granted in all the GIB Defendants' favor, in their individual capacities, based on qualified immunity.**

Also as explained before,<sup>3</sup> qualified immunity shields officials from liability where their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (citation omitted). The undisputed facts foreclose Plaintiffs' 42 U.S.C. § 1983 equal protection claims against GIB members in their individual capacities on the ground of qualified immunity.

The GIB defendants contend that they did not violate Plaintiffs' equal protection rights,<sup>4</sup> but even assuming for the moment they did, the unlawfulness of their conduct was not “clearly established at the time.” *Reichle v. Howards*, 566 U.S. 658, 664 (2012). Existing law must have placed the constitutionality of their conduct “beyond debate.” *Mullenix v.*

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<sup>3</sup> GIB Defendants hereby incorporate by reference the arguments set forth in sections I.B.2. of State Defendants' opening (Dkt. 81:43–46) and reply summary judgment briefs (Dkt. 126:36–40).

<sup>4</sup> GIB Defendants hereby incorporate by reference the arguments set forth in sections I.A. of State Defendants' opening (Dkt. 81:17–39) and reply summary judgment briefs (Dkt. 126:21–33).

*Luna*, 136 S.Ct. 305, 308 (2015) (per curiam). Here, GIB members voted to reinstate the Exclusion in December 2016. (DPFOF ¶ 61.) At that time, however, there was no precedent putting them on notice: (1) whether coverage exclusions neutrally applicable to psychological disorders can be viewed as discrimination on the basis of sex or transgender status; (2) whether transgender status entitles Plaintiffs to heightened equal protection scrutiny; or (3) whether states may justify coverage exclusions like the one here by pointing to health care costs or public health concerns. Plaintiffs' brief in response to State Defendants' motion for summary judgment cites no Supreme Court or Seventh Circuit precedent showing that the GIB members should have known that a vote to reinstate the Exclusion was certain to violate Plaintiffs' rights under the Equal Protection Clause. (Dkt. 115:33.) Nor does the brief display "a clear trend in the caselaw" that the Seventh Circuit would say "with fair assurance that the recognition of the right by a controlling precedent was merely a questions of time." *Kemp v. Liebel*, 877 F.3d 346, 351 (7th Cir. 2017) (quoting *Jacobs v. City of Chicago*, 215 F.3d 758, 767 (7th Cir. 2000)). Indeed, the following May the Seventh Circuit declined to hold that transgender status even comprised a suspect class. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017).

In the absence of controlling case law concluding that state health plans must cover sex reassignment procedures, the GIB Defendants did not “knowingly violate the law” when they voted to reinstate the Exclusion. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (citation omitted). Because Plaintiffs have the burden to prove that qualified immunity does not apply, *see Kemp v. Liebel*, 877 F.3d 346, 351 (7th Cir. 2017), and they cannot meet that burden here, their constitutional claims fail.

### CONCLUSION

The GIB Defendants ask this Court to grant them summary judgment as to Plaintiffs’ § 1983 equal protection claims against them in their individual capacities.

Dated this 1st day of August, 2018.

Respectfully submitted,

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