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' BRIEF IN OPPOSITION TO STATE DEFENDANTS' SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs, Alina Boyden and Shannon Andrews ("Plaintiffs"), through their undersigned attorneys, submit this brief in opposition to State Defendants' Supplemental Motion for Summary Judgment (Dkt. # 141) made pursuant to this Court's Order on June 25, 2018. (Dkt. # 109). Defendants ask this Court to grant summary judgment to seven Group Insurance Board ("GIB") members,[1] in their individual capacities, who were added by amendment on June 25, 2018. *Id.* In doing so, Defendants advance one argument on behalf of the seven GIB members: qualified immunity shields the newly added GIB members from individual liability for damages in this case. In addition, State Defendants ask for summary judgment on behalf of GIB member Theodore Neitzke in his individual capacity due to a

[1] Michael S. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, J.P. Wieske, and Bob Ziegelbauer.

purported lack of personal involvement, despite the fact that Mr. Neitzke was involved in the closed session discussions that led to the reinstatement of the Exclusion at issue. Because Neitzke may have contributed to the decision to reinstate the exclusion and because he voted against removing the Exclusion at a subsequent GIB meeting, summary judgment cannot be granted based on lack of personal involvement in the deprivation of Plaintiffs' equal protection rights.

For the reasons set forth in Plaintiffs' brief in opposition to the State Defendants' initial motion for summary judgment (Dkt. # 115) and as explained below, qualified immunity does not shield the newly added GIB members from liability for discrimination on the basis of transgender status and sex under the Equal Protection Clause of the United States Constitution.

ARGUMENT

The Court shall only grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Summary judgment is not appropriate nor is it available if the jury can reasonably find, based on the evidence presented, for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

I. Summary judgment should not be granted to Theodore Neitzke, in his individual capacity, simply because he exited the meeting prior to the vote to reinstate the Exclusion.

Whether Defendant Neitzke had personal involvement in the Plaintiffs' constitutional deprivations is a disputed issue and cannot be determined without a

trial. To be held personally liable for damages under Section 1983, there must be "some causal connection" between the state action complained about and the official sued. *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983).

The Seventh Circuit has repeatedly held that the state official's involvement need not be direct. *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Koutnik v. Brown*, 351 F.Supp.2d 871, 876 (W.D. Wis. 2004); *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir. 1985). Indeed, a defendant may be personally involved in a constitutional deprivation simply if it occurs with the defendant's knowledge and he fails to act to stop it. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

In asserting that Defendant Conlin should not be held liable for the harm caused by the Exclusion,[2] Defendants have argued throughout this litigation that no action on reinstating the Exclusion could have taken place without authorization from the GIB. (Dkt. # 81, p. 38 ("Secretary Conlin's position as ETF's Secretary does not render him liable for GIB's decisions.").) The State has also asserted that the GIB is the sole decision maker for health insurance benefits in the State of Wisconsin. *Id.* at 4-5.

Defendants argue that certain GIB members were not sufficiently involved as decision makers simply because they did not cast a vote at the meeting at which the GIB voted to reinstate the challenged Exclusion. (Dkt. # 142, p. 3). But casting a vote in favor of the challenged Exclusion is not the only way a Defendant GIB member could have been personally involved in the harm caused to Plaintiffs. So

[2] As explained in Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, Conlin is sufficiently personally involved in the deprivation of Plaintiffs' rights to be liable for damages in his individual capacity. (Dkt. # 115 at 25-30).

long as there is "some causal connection" between the government official's action and the constitutional deprivation, there is personal involvement. For example, Defendant Wieske repeatedly lobbied to have the GIB reconsider the Exclusion. (Dkt. # 96, ¶¶ 112-113). Had he been unable to attend the hastily called December 30, 2016 meeting and therefore unable to cast a vote, Defendant Wieske would still have a sufficient causal connection to be liable for the constitutional deprivation.

Similarly, Mr. Neitzke may have supported the Exclusion in discussions that led to reinstating the Exclusion in the closed session meeting that took place on December 30, 2016 or elsewhere. Unlike Defendants Day and Thompson, who actively voiced their opposition to the discriminatory nature of the Exclusion, and cast "no" votes, there is no indication that Defendant Neitzke spoke against reinstating the Exclusion. (Pls.' Resp. to Defs.' Add'l PFOF in Supp. of Suppl. Mot. for Summ. J., ¶ 181). While the minutes of the December 30, 2016 meeting do not reflect Defendant Neitzke's stance, Defendant Neitzke spoke and voted against removing the Exclusion when the issue was raised again in May 2017. (*Id.*, citing Dkt. # 103-22, p. 10 ("Mr. Neitzke provided his reasoning for his vote, stating he voted no on the motion because . . ."); Dkt. # 68, Ellinger Dep. 152:19-22)). In opposing the motion to remove the Exclusion for the 2019 calendar year, Defendant Neitzke was personally involved in preventing the GIB from reducing ongoing damage to Plaintiffs. There remains a genuine dispute of material fact as to Defendant Neitzke's involvement in the reinstatement of the Exclusion and

subsequent failure to rescind it. The Court should deny Defendants' motion for summary judgment regarding Neitzke's individual liability.[3]

II. Qualified immunity does not shield the GIB Defendants from liability in their individual capacity because the GIB members were on notice of their unconstitutional conduct.[4]

In arguing that each GIB Defendant is entitled to qualified immunity because of the lack of clearly established law prohibiting discrimination based on gender identity, Defendants again misunderstand the purpose and scope of qualified immunity and what constitutes "clearly established" law. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The purpose of qualified immunity is simply to ensure that any government official subject to individual liability is on notice of the unlawful nature of their conduct. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

However, notice of the unlawful nature of the challenged government action only requires sufficient clarity about the "contours" of the constitutional right at issue such that a "reasonable official would understand what he is doing violates that right." *Id.* ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.").

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[3] Defendants have not moved to dismiss the official capacity claims for injunctive relief against Neitzke.

[4] Plaintiffs incorporate by reference their arguments against the application of qualified immunity to Defendant Conlin in Plaintiff's Brief in Opposition to State Defendant's Motion for Summary Judgment (Dkt. # 115, pp. 30-35).

Likewise, a clearly established right does not require a case "directly on point" to show a government official violated a constitutional right. *Estate of Simpson v. Yellowstone County*, 229 F.Supp.3d 1192, 1207 (D. Montana 2017) (citing *Ashcroft v. al-Kidd,* 563 U.S. 731, 741 (2011)). Indeed, government officials can be on notice that their conduct may violate established law "even in novel factual circumstances." *Hope*, 536 U.S. at 741. In *Mitchell v. Kallas*, 895 F.3d 492 (7th Cir. 2018), the Court of Appeals recently warned against "fram[ing] the right too narrowly" in assessing a claim of qualified immunity in a case seeking damages for denial of hormone therapy to a transgender prisoner, rejecting the defendant's argument that qualified immunity should apply because "no binding decision guarantees inmates the right to a speedier gender dysphoria evaluation or short-term hormone therapy prior to release." *Id.* at 499.

Even requiring the facts of a case to be "materially similar" is too rigid. *Hope*, 536 U.S. at 739 (rejecting "rigid gloss on the qualified immunity standard" requiring that facts of established cases be "materially similar"). Defendants' repeatedly assert that only controlling law expressly holding that health plans *must* cover "sex reassignment procedures" would be sufficient to deny qualified immunity. (Dkt. # 142 at 6). But, "[t]hat formulation . . . frames the right too narrowly." *Mitchell*, 895 F.3d at 499. As explained in Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, there was sufficient law putting GIB members on notice that singling out transgender individuals for unequal treatment would violate the constitution, either because discrimination based on gender identity is a form of sex

discrimination subject to heightened equal protection scrutiny, or because transgender identity itself is at least a quasi-suspect basis for classification, and thus independently subject to heightened scrutiny. (Dkt. # 115 p. 30-35).

Defendants rely on *Mullinex v. Luna*, 136 S. Ct. 305 (2018) (per curiam), to support their claim that highly similar factual and legal precedent is required to put a governmental official on notice of unconstitutional conduct. In reaching the conclusion that a police officer was entitled to qualified immunity, the Court in *Mullinex* emphasized the uncertainty of Fourth Amendment case law applicable to the use of deadly force by police. Determining whether the Fourth Amendment prohibits a particular search or use of force involves the application of an inherently unpredictable "reasonableness" balancing test and so will rarely place an action's illegality beyond debate. *Id.* at 308-9 ("The relevant inquiry is whether existing precedent placed the conclusion that Mullinex acted unreasonably under the circumstances 'beyond debate.'"). In a Fourth Amendment case, such as *Mullinex,* where the underlying substantive law's "hazy border[s]" do not offer predictive guidance to police officers, *Saucier v. Katz*, 533 U.S. 194, 206 (2001), qualified immunity is important to give officers "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. at 743.

In contrast, the legality of a discriminatory governmental policy under the Equal Protection Clause is more predictable, particularly when the policy's classification results in application of heightened or strict scrutiny, which, while not

always "fatal in fact," is rarely satisfied. *See, e.g., United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (hereinafter "*VMI*") (describing "strong presumption that gender classifications are invalid" and the "demanding" "burden of justification" that "rests entirely on the State"). In such circumstances, an official is only entitled to qualified immunity if the policy is objectively legally reasonable. *See Auriemma v. Rice*, 910 F.2d 1449, 1452-57 (7th Cir. 1990) (in Equal Protection case, qualified immunity inquiry focuses on "objective legal reasonableness of the official's acts"; court rejects qualified immunity because "[a]ny police chief who thought he could demote and promote only along allegedly clear racial lines could not be a reasonable police chief.").

In *Johnson v. California*, 543 U.S. 499 (2005), the Supreme Court considered an Equal Protection challenge to the California correctional system's policy of racially segregating new prisoners in double-cells for the first sixty days in a new facility. Applying a deferential standard of review, rather than strict scrutiny, the district court "granted summary judgment to the defendants on the grounds they were entitled to qualified immunity because their conduct was not clearly unconstitutional," and the court of appeals affirmed. *Id.* at 504. The Supreme Court reversed and remanded, holding that the strict equal protection scrutiny usually applied to discrimination based on race applied in the prison setting. *Id.* at 511-515. Remand would have been unnecessary had the Court been able to conclude that Equal Protection law was not sufficiently clearly established to defeat qualified immunity.

Defendants argue they could not have known that their coverage exclusion violated Equal Protection because it is "neutrally applicable" to psychological disorders. (Dkt. # 142, p. 5). This argument again "frames the right too narrowly," *Mitchell*, 895 F.3d at 499. It also factually mischaracterizes the Exclusion that was applied to Plaintiffs, which expressly excludes "gender reassignment." (Dkt. # 96, ¶¶ 57-58). The gender reassignment Exclusion is not neutrally applicable, because it specifically targets gender affirming procedures. Any suggestion that GIB members believed the gender reassignment Exclusion was a neutrally applicable policy is contrary to the record. (Dkt. # 96, ¶ 62 ("The coverage exclusion is based on gender identity." (Godbe Decl., Ex. H, Jan. 31, 2017 ETF Memo to Health Plans ("the [Group Insurance] Board approved reinstating the exclusion of health benefits and services based on gender identity"); Godbe Decl., Ex. B, "It's Your Choice" Access Health Plan, p. 2 ("There will no longer be an exclusion related to benefits or services based on gender identity"); Godbe Decl., Ex. E, 2017 Benefit Year Uniform Benefits, p. 41 (exclusion for "Procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment"); Dkt. # 53, Deposition of Michael S. Farrell at 28:17-25 (describing Texas litigation as a challenge to federal rule forbidding "transgender exclusions" from health plans); Dkt. # 51, Deposition of Herschel Day at 49:17-50:3 (stating his view that the exclusion should be ended because it is "discriminatory and…[he] support[s] the right of transgender individuals to get the healthcare they need," and because "it's not costly to add it to the group plan")))).

Similarly, Defendants improperly attempt to formulate the contours of sex discrimination law in the narrowest possible way by suggesting there is no precedent supporting the application of heightened scrutiny to transgender status. (Dkt. # 142 at 5). *See Mitchell*, 895 F.3d at 499 (warning against "formulation" that "frames the right too narrowly"). Transgender status was recognized as a suspect or quasi-suspect class requiring heightened scrutiny review under the Equal Protection clause long before this case. (Dkt. # 115 p. 33 (citing cases applying heightened scrutiny to discrimination based on transgender status under the equal protection clause.)). Courts have long classified discrimination against transgender individuals as discrimination on the basis of sex, which is subject to heightened scrutiny. *Id.* Accordingly, GIB members were on notice that the facially discriminatory gender reassignment Exclusion would be subject to heightened scrutiny.

In another attempt to mischaracterize the facts, Defendants maintain that the state of Wisconsin may justify this gender reassignment Exclusion based on costs or public health concerns. Whether states can justify discrimination on such grounds is irrelevant in this case, because they were not the actual reasons for the exclusion, but post-hoc justifications that do not, and cannot, satisfy heightened scrutiny. *VMI*, 518 U.S. at 533.

GIB members knew both from ETF legal counsel and DOJ attorneys that the gender reassignment Exclusion likely discriminated on the basis of sex. (Dkt. # 113 ¶¶ 55-56). All GIB members were given legal memoranda and presentations

regarding the Exclusion over the course of GIB meetings in 2016. (*Id.*). While ETF counsel and the DOJ disagreed on whether the ACA regulations were enforceable, all GIB members were aware in 2016 of the potential for employment discrimination liability.

In addition to the case law putting GIB on notice that discriminating against transgender people violates equal protection, Eighth Amendment cases had, as a practical matter, rejected some of the very justifications Defendants now assert in support of the Exclusion. *See, e.g., Fields v. Smith*, 653 F.3d 550, 555-57 (7th Cir. 2011) (rejecting arguments that denial of hormone therapy and surgery to prisoners could be justified by cost concerns or medical uncertainty). Moreover, the fact that two GIB members actively voiced their concern about the discriminatory nature of reinstating the Exclusion further shows GIB's awareness of the liability attached to the Exclusion, and its application to Plaintiffs, in this case.

Under any objective legal standard, GIB members were on notice that the Exclusion, which applies only to transgender individuals, violates their right to equal protection.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully ask this Court to deny Defendants' Motion for Supplemental Summary Judgment.

Dated this 22nd day of August, 2018.

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