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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v. Case No. 17-CV-0264

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

Defendants.

REPLY BRIEF IN SUPPORT OF STATE DEFENDANTS' SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The constitutionality of the Wisconsin Group Insurance Board's (GIB) coverage exclusion for gender reassignment surgical procedures (the "Exclusion") has been hotly contested in this case, which alone means that qualified immunity protects GIB's members from individual liability. Only a knowing violation of clearly established law can defeat qualified immunity; Plaintiffs' opposition brief identifies nothing of the sort. Plaintiffs mainly argue that Defendants have defined the constitutional right at issue too narrowly but, even if so, Plaintiffs still identify no Supreme Court or Seventh Circuit cases showing that GIB's action violated clearly established law. Equal protection principles as applied to transgender status and health

insurance issues like this one are far too unsettled to conclude that GIB members knew that the equal protection clause prohibited their December 2016 decision to reinstate the Exclusion.

As for GIB member Theodore Neitzke, Plaintiffs still cannot identify any evidence that he was personally involved in GIB's decision. It remains undisputed that he did not vote at the December 2016 GIB meeting that sits at the core of Plaintiffs' case. They resort to speculation about what Neitzke might have done or said during the December 2016 closed session meeting, but speculation cannot defeat summary judgment.

Summary judgment should be granted to the individual GIB members on all of Plaintiffs' claims against them.

ARGUMENT

I. Plaintiffs identify no evidence that Neitzke had adequate personal involvement in GIB's decision to reinstate the Exclusion.

"As the 'put up or shut up' moment in a lawsuit, summary judgment requires a non-moving party to respond to the moving party's properly-supported motion by identifying specific, admissible evidence showing that there is a genuine dispute of material fact for trial." *Grant v. Trs. of Indiana Univ.*, 870 F.3d 562, 568 (7th Cir. 2017) (citation omitted). Accordingly, "[s]peculation is insufficient to withstand summary judgment." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1127 (7th Cir. 1996).

Plaintiffs cannot survive summary judgment as to Neitzke because they concede that their individual capacity claim relies on speculation, not evidence. They merely suspect that Neitzke "*may* have supported the Exclusion" at the December 30, 2016, GIB meeting or perhaps "elsewhere." (Dkt. 148:4 (emphasis added).) But they identify no evidence to support their speculation. Rather, they argue that there is "no indication that Defendant Neitzke spoke against reinstating the Exclusion" (Dkt. 148:4), but that mistakes Plaintiffs' burden at summary judgment. Offering evidence of personal involvement is their job—Neitzke has no burden to negate it. If Neitzke did not advocate for the Exclusion during GIB's December 30 meeting, he had no personal involvement in the challenged decision, even accepting Plaintiffs' so-called "lobbying" theory of personal involvement.[1] Since Plaintiffs identify no evidence of Neitzke "lobbying," they cannot survive summary judgment even under their own flawed legal theory.

Plaintiffs also point to Neitzke's later vote against removing the Exclusion at the May 24, 2017, GIB meeting. (Dkt. 148:4–5.) But Plaintiffs' second amended complaint does not challenge that action. Rather, it

[1] Defendants disagree that so-called "lobbying" alone could support an individual capacity claim against Neitzke, since it is undisputed that he did not vote. (Dkt. 149:2 (Pls.' Resp. to DFOF ¶ 181).) Plaintiffs offer no authority to support the overbroad theory that anyone who lobbies a policy-maker subjects themselves to individual capacity equal protection claims.

challenges GIB's December 2016 decision to reinstate the Exclusion (Dkt. 108-1:14–15 ¶ 48), and so Neitzke's May 2017 vote is irrelevant to Plaintiffs' claim against him. In fact, this lawsuit had already been filed by May 2017 and the original complaint (like the amended ones) made no mention of Neitzke's May 2017 vote. (Dkt. 1; 27; 108-1.) Neitzke's actions after this complaint was filed and not alleged in any versions of the complaint obviously cannot create individual liability.

Even if Neitzke's after-the-fact vote were relevant, Neitzke's expressed reasons for his vote further demonstrate that he is entitled to qualified immunity. Since this lawsuit had already been filed, Neitzke explained that he voted to preserve the status quo (i.e. not to remove the Exclusion) given his concerns about "uncertainty in relation to court rulings" and not "creat[ing] legal liability for the Board." (Dkt. 103-22:10.) Neitzke's expression of uncertainty demonstrates that he did not knowingly violate any of Plaintiffs' constitutional rights. He is entitled to summary judgment.[2]

[2] Plaintiffs wrongly state that "Defendants have not moved to dismiss the official capacity claims for injunctive relief against Neitzke." (Dkt. 148:5 n. 3). Defendants seek summary judgment on *all* official capacity claims against *all* official capacity Defendants, for the reasons explained in Defendants' original summary judgment brief. (Dkt. 81:15–35.) Defendants did not raise official capacity arguments in their supplemental motion for summary judgment because this Court only sought briefing on "unique grounds for summary judgment" regarding the GIB members. (Dkt. 109:3.) Since Plaintiffs' official capacity claims against GIB members are identical to their official capacity claim against Secretary Conlin,

II. Plaintiffs fail to defeat qualified immunity for GIB members.

In opposing qualified immunity for GIB members in their individual capacity, Plaintiffs rehash the same arguments they made in opposing Secretary Conlin's qualified immunity request. Defendants incorporate their response to those arguments here. (*See* Dkt. 126:36–40.)

In short, Plaintiffs still identify no precedent showing that GIB members would have "known for certain that the conduct was unlawful" when they voted to reinstate the Exclusion in December 2016. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1867 (2017). Plaintiffs primarily respond that Defendants define the right at issue too narrowly (Dkt. 148:6–7), but they offer no alternative definition of the right that would have been clearly established to "every reasonable official" encountering this equal protection issue. *District of Columbia v. Westby*, 138 S. Ct. 577, 590 (2018).

Rather, Plaintiffs seem to say that GIB must have known that their action was unlawful just because Plaintiffs are entitled to heightened scrutiny. (Dkt. 148:6–10.) But it is nowhere near "clearly established" that Plaintiffs here *are* entitled to heightened scrutiny. This Court, when considering similar claims brought by transgender plaintiffs in another case, noted only that "heightened scrutiny *may* be appropriate" and declined to

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Defendants did not repeat their official capacity arguments in their supplemental motion.

expressly hold that it *was* appropriate. *Flack v. DHS*, No. 18-cv-309, 2018 WL 3574875, at *15 (W.D. Wis. July 25, 2018) (emphasis added). Plaintiffs' citation of a few non-precedential cases does not establish a clearly-established right, especially when many other courts have found that transgender status does not merit heightened scrutiny. (*Compare* Dkt. 81:25 n.7 (collecting cases), *with* Dkt. 97:28–29 (collecting cases).) This simply is not the "robust consensus of cases of persuasive authority" that the Supreme Court has instructed is necessary to defeat qualified immunity. *Ascroft v. al-Kidd,* 563 U.S. 731, 741–42 (2011) (citation omitted).

And even if heightened scrutiny is appropriate, which is an open question, the mere application of heightened scrutiny here does not guarantee that Plaintiffs win. This Court has explained in a similar context that "[t]he outcome of plaintiffs' equal protection claim *may largely* turn on the standard of review." *Flack*, 2018 WL 3574875, at *15 (emphasis added). Defendants have two key state interests—reducing health insurance costs and declining to cover procedures of dubious efficacy—that justify the Exclusion, even under heightened scrutiny.

Since it is unclear whether either heightened scrutiny applies or the standard of review alone determines the outcome, Plaintiffs are simply wrong that GIB members must have known that voting to reinstate the Exclusion violated their constitutional rights.

This uncertainty distinguishes this case from *Johnson v. California*, 543 U.S. 499 (2005), on which Plaintiffs rely. That case involved a different, well-accepted suspect class—race—and thus a more exacting standard of review than Plaintiffs seek here—strict scrutiny. Moreover, the Supreme Court did not even resolve in *Johnson* whether qualified immunity applied. Rather, it remanded for consideration of that issue. *Johnson*, 543 U.S. at 523 ("I agree that a remand is appropriate for a resolution of the issue of qualified immunity.") (Stevens, J., dissenting). That obviously means qualified immunity still might have been appropriate, even though strict scrutiny applied—which further undermines Plaintiffs' apparent position that once any form of heightened scrutiny applies to an equal protection claim, qualified immunity is categorically unavailable.

As for the dispute over whether the Exclusion merely reflects a neutral surgical coverage exclusion that applies to all psychological disorders (Dkt. 148:9), this disagreement further demonstrates why qualified immunity applies. Only acts that are unconstitutional "beyond debate" can defeat qualified immunity. *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (per curiam). Plaintiffs cite a smattering of Wisconsin Department of Employee Trust Funds' ("ETF") —not GIB's—characterizations of the Exclusion as relying on

gender identity, but that misses the mark for two reasons.[3] (Dkt. 148:9.) First, ETF's view of the Exclusion has nothing to do with whether GIB members knew their actions violated clearly established law. Second, ETF's subjective characterizations have no legal effect. Only an objective analysis matters here—does the Exclusion, in fact, represent a neutral surgical coverage exclusion on the basis of psychological conditions or not? So long as the Exclusion represents one element of a neutral exclusion—and it does (*see* Dkt. 81:20–24)—there is no discrimination. The dispute over that objective inquiry shows that qualified immunity is appropriate, regardless of ETF's descriptions.

Plaintiffs similarly discount the legitimate dispute over whether the asserted state interests of cost and medical efficacy can satisfy heightened scrutiny here. (Dkt. 148:10.) They rely solely on their "post-hoc justifications" argument but, again, that contested issue cannot show that GIB members knew they were acting unlawfully. (*See* Dkt. 126:18–20.) Moreover, the Exclusion has existed since 1994—Plaintiffs make no effort to explain why

[3] Plaintiffs do cite a single reference from a GIB defendant—Michael Farrell—to "transgender exclusions," but his shorthand accurately described the federal Department of Health and Human Services regulations that were being challenged in the referenced Texas litigation, not the Exclusion at issue here. As for cited comments by Herschel Day, another GIB member, he is not a defendant in his individual capacity and his views are his own and cannot be imputed to the defendant GIB members.

GIB members in 2016 had to "re-justify" an exclusion that had been in place for over 20 years. And on the merits of the two asserted state interests, Plaintiffs wrongly suggest that *Fields v. Smith*, 653 F.3d 550, 555-57 (7th Cir. 2011), rejected those interests. (Dkt. 148:11.) That case involved an Eighth Amendment claim, which does not involve a similar heightened scrutiny analysis that examines state interests.

Lastly, Plaintiffs point to memos from ETF and lawyers at the Department of Justice that disagreed over the enforceability of relevant Affordable Care Act regulations. (Dkt. 148:10–11.) That argument is strange, since GIB's awareness of a good-faith dispute on this issue and the mere "potential for employment discrimination liability" (Dkt. 148:11) reveals no knowledge of clearly established law that could defeat qualified immunity. The same goes for the "concern" expressed by two GIB members. (Dkt. 148:11.) A "concern" over possible liability expressed by two GIB members is not equivalent to a knowing violation of law by all the others.

CONCLUSION

Defendants respectfully request that summary judgment be granted in favor of the individual GIB members on all claims against them, in both their individual and official capacities.

[signature page follows]

Dated this 4th day of September, 2018.

Respectfully submitted,

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