

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' MOTION FOR LEAVE TO FILE
SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT
AS TO GROUP INSURANCE BOARD MEMBERS**

Plaintiffs, Shannon Andrews and Alina Boyden, through their undersigned attorneys, move this Court for leave to file a Supplemental Brief for Summary Judgment, attached hereto as Exhibit A.

Plaintiffs' Motion for Leave to File a Second Amended Complaint was filed with this Court on May 25, 2018. Plaintiffs filed their Motion for Partial Summary Judgment on June 8, 2018. On June 25, 2018, the Court granted, in part, Plaintiffs' Motion for Leave to File a Second Amended Complaint. (Dkt. # 109). The operative pleading as described in the Court's June 25, 2018 Order added the eleven (11) members of the Group Insurance Board, seven (7) in their personal or individual capacities, and four (4) in their official capacities.

Plaintiffs seek leave to file their Supplemental Motion for Summary Judgment to incorporate the eleven (11) GIB members added as Defendants pursuant to the Court's June 25, 2018 Order. Further support for this Motion is set forth in the accompanying proposed Supplemental Motion for Summary Judgment and Plaintiffs' Proposed Findings of Fact in support thereof.

Dated this 5th day of September, 2018.

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Exhibit A

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STATE OF WISCONSIN DEPARTMENT
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Defendants.

**PLAINTIFFS' BRIEF IN SUPPORT OF SUPPLEMENTAL MOTION
FOR SUMMARY JUDGMENT AS TO GROUP INSURANCE BOARD MEMBERS**

INTRODUCTION

On June 25, 2018, the Court granted, in part, Plaintiffs' Motion for Leave to File their Second Amended Complaint. (Dkt. # 109). The Second Amended Complaint added the following members of Defendant GIB as defendants to Plaintiffs' Equal Protection claims under 42 U.S.C. § 1983, in their individual and official capacities: Michael D. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurlburt, Theodore Neitzke, J.P. Wieske and Bob Ziegelbauer. The Second Amended Complaint added Jennifer Stegall, Robert Wimmer,¹ Herschel Day, and Nancy Thompson as defendants to these claims in their official capacities.

¹ Robert Wimmer replaced Francis Sullivan on the Board and has been substituted as a party, per Fed. R. Civ. P. 25(d). (Dkt. # 145).

Prior to the Court's June 25, 2018 ruling, Plaintiffs moved for partial summary judgment against the GIB, the Department of Employee Trust Funds, and Robert Conlin, Secretary of ETF. Plaintiffs now move the Court for partial summary judgment against the seven (7) individual members of the GIB, named in their official and individual capacities, and against Stegall, Wimmer, Day, and Thompson, named in their official capacities.

ARGUMENT

In their Second Amended Complaint, Plaintiffs bring Equal Protection claims against eleven (11) members of the GIB, in their official capacities. (Dkt. # 108-1). The Court, in granting Plaintiffs' Motion for Leave to Amend, credited Plaintiffs' explanation for their delay in seeking to add the individual GIB members as defendants until after the Court ruled on Defendants' Motion to Dismiss. (Dkt. # 109 at 2). It directed that Plaintiffs' Second Amended Complaint is the operative pleading. The Court further directed that defendants were not required to file an answer, motion or response. Defendants did not answer or otherwise respond to the amended complaint. As the Court recognized in its order, "defendants do not appear to oppose plaintiffs' request to add claims for injunctive relief against all members in their official capacities." (Dkt. # 105).

Plaintiffs' briefing in support of their Motion for Partial Summary Judgment and in opposition to defendants' Motion for Summary Judgment demonstrates that the State Defendants violated Plaintiffs' constitutional right to equal protection by denying coverage for treatment related to gender dysphoria. (Dkt. # 97, pp. 25-36;

Dkt. # 115, pp. 15-35; Dkt. # 130, pp. 16-31). Plaintiffs now move the court for partial summary judgment on these claims against those individual members of the GIB included as defendants following the Court's June 25, 2018 ruling. Specifically, Plaintiffs seek injunctive relief against all current members of the GIB in their official capacities ordering them to provide coverage for "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment," and a declaration of individual liability against all members of the GIB who did not vote against reinstatement of the exclusion of such procedures, services and supplies at the December 30, 2016 meeting of the GIB (*i.e.*, Michael D. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurlburt, Theodore Neitzke, J.P. Wieske and Bob Ziegelbauer).

Since the Board's collective action in adopting and reinstating the exclusion was the result of the individual Board members' votes, and those members are now included as defendants in the operative pleading – Plaintiffs' Second Amended Complaint – the Court should grant summary judgment against the individual members on Plaintiffs' Equal Protection claims for all of the reasons set forth in Plaintiffs' Motion for Partial Summary Judgment. Indeed, in asserting that Defendant Conlin should not be held liable for the harm caused by the Exclusion,² Defendants have suggested throughout this litigation that GIB members who adopted the policy were the proper defendants. (Dkt. # 81 at 4-5 (GIB is "sole decision

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).

maker” for health benefits); 38 (“Secretary Conlin’s position as ETF’s Secretary does not render him liable for GIB’s decisions.”)).

The voting histories of individual GIB members further supports summary judgment against them on Plaintiffs’ Equal Protection claims. On July 12, 2016, the GIB voted unanimously to remove the health care coverage exclusion. (Plaintiffs’ Proposed Findings of Fact in Support of Supplemental Motion for Partial Summary Judgment, “PPFOF,” ¶ 2). Following this vote, GIB member Wieske actively pursued reinstatement of the exclusion. (Dkt. # 96 PPFOF 112, 113).³ He brought up possible reinstatement of the exclusion multiple times. (Dkt. # 96 at 113).

On December 29, 2016, GIB member and chair Farrell instructed defendant Conlin to call a meeting for the following day, December 30, 2016, which was the “last day of the year.” He recognized the difficulty in “pull[ing] off a full board meeting with 24 hours’ notice.” (Dkt. # 96 at 122).⁴

On December 30, 2016, GIB members Farrell, Rolston, Grapentine, Hurlburt, Wieske, and Ziegelbauer voted to reinstate the health care coverage exclusion if four (4) contingencies were met. (PPFOF ¶ 2). Neitzke did not participate in this vote.

On May 24, 2017, Farrell, Grapentine, Neitzke, Wieske, and Ziegelbauer voted to maintain the coverage exclusion for plan year 2018. Rolston did not participate in this vote. (PPFOF ¶ 3)

³ This proposed finding of fact is “undisputed [by Defendants] for purposes of summary judgment.” (Dkt. # 122, at 43).

⁴ This proposed finding of fact is “undisputed [by Defendants] for purposes of summary judgment.” (Dkt. # 122, at 44).

For all of these reasons, and for those set forth in Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs request partial summary judgment against the seven (7) individual members of the GIB, Defendants Farrell, Rolston, Grapentine, Hurlburt, Neitzke, Wieske, and Ziegelbauer named in their official and individual capacities, and against Defendants Stegall, Wimmer, Day, and Thompson, named in their official capacities.

Dated this 5th day of September, 2018.

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Exhibit B

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**PLAINTIFFS' PROPOSED FINDINGS OF FACT IN SUPPORT OF
SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT
AS TO GROUP INSURANCE BOARD MEMBERS**

1. On July 12, 2016, State of Wisconsin Group Insurance Board (“GIB”) members Farrell, Cyganek, Day, Carlson, Grapentine, Heifetz, Rolston, Thompson, Wieske, and Ziegelbauer voted to remove the health care coverage exclusion for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment.” GIB member Neitzke was not present for the vote. (August 30, 2018 Stipulation, ¶ 7).

2. On December 30, 2016, GIB members Carlson, Farrell, Grapentine, Hurlburt, Rolston, Wieske, and Ziegelbauer voted to reinstate the healthcare coverage exclusion that had been removed pursuant to the July 12, 2016 vote. (August 30, 2018 Stipulation, ¶ 8).

3. On May 24, 2017, GIB members Farrell, Grapentine, Neitzke, Wieske, and Ziegelbauer voted to maintain the coverage exclusion for the plan year 2018. Members Heifetz and Rolston abstained. Thompson and Day voted to remove the exclusion. (August 30, 2018 Stipulation, ¶ 9).

Dated this 5th day of September, 2018.

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Exhibit C

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Defendants.

STIPULATION REGARDING GIB MEMBERS

Plaintiffs, Alina Boyden and Shannon Andrews, through their undersigned attorneys, and the Defendants, through their undersigned attorneys, hereby stipulate to the following:

1. At least as early as 2004 (for the 2005–2007 state budget) and as recently as 2008 (for the 2009–2011 state budget), the Teaching Assistants' Association (“TAA” or “Graduate Worker Union of UW-Madison”) submitted requests to the Department of Employee Trust Funds and/or the Group Insurance Board (“GIB”) to remove the coverage exclusion related to “sex transformation surgery and sex hormones related to such treatments.”

2. As of October 5, 2015, the GIB consisted of the following individuals:

- a. Jon Litscher
- b. Bonnie Cyganek

- c. Michael Farrell
 - d. Danielle Carne
 - e. Terri Carlson
 - f. Herschel Day
 - g. Charles Grapentine
 - h. Michael Heifetz
 - i. Theodore Neitzke
 - j. Daniel Schwartz
 - k. Nancy Thompson
3. In November 2015, Stacey Rolston replaced Danielle Carne on the GIB.
4. As of April 5, 2016, the GIB consisted of the following individuals:
- a. Jon Litscher
 - b. Bonnie Cyganek
 - c. Michael Farrell
 - d. Terri Carlson
 - e. Herschel Day
 - f. Charles Grapentine
 - g. Michael Heifetz
 - h. Theodore Neitzke
 - i. Stacey Rolston
 - j. Daniel Schwartz
 - k. Nancy Thompson

5. Bob Ziegelbauer and J. P. Wieske joined the GIB in May and June of 2016, respectively. They replaced Jon Litscher and Daniel Schwartz.

6. As of October 5, 2016, the GIB consisted of the following individuals:

- a. Michael Farrell
- b. Bonnie Cyganek
- c. Herschel Day
- d. Terri Carlson
- e. Charles Grapentine
- f. Michael Heifetz
- g. Theodore Neitzke
- h. Stacey Rolston
- i. Nancy Thompson
- j. J. P. Wieske
- k. Bob Ziegelbauer

7. On July 12, 2016, the following GIB members voted unanimously to remove the health care coverage exclusion for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment” (Ted Neitzke was not present): Michael Farrell, Bonnie Cyganek, Herschel Day, Terri Carlson, Charles Grapentine, Michael Heifetz, Stacey Rolston, Nancy Thompson, J. P. Wieske, Bob Ziegelbauer.

8. On December 30, 2016, GIB members acted in the following ways regarding the health care coverage exclusion for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment”:

- a. Terri Carlson, Michael Farrell, Charles Grapentine, Waylon Hurlburt, Stacey Rolston, J. P. Wieske, and Bob Ziegelbauer voted to reinstate the coverage exclusion if four contingencies were met;
- b. Herschel Day and Nancy Thompson voted not to reinstate the coverage exclusion;
- c. Bonnie Cyganek and Theodore Neitzke did not participate in the vote to reinstate the coverage exclusion.

9. On May 24, 2017, GIB members acted in the following ways regarding the health care coverage exclusion for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment”:

- a. Nancy Thompson and Herschel Day voted to withdraw the coverage exclusion for the plan year 2018;
- b. Michael Farrell, Charles Grapentine, Theodore Neitzke, J. P. Wieske, and Bob Ziegelbauer voted not to withdraw the coverage exclusion for the plan year 2018;
- c. Michael Heifetz and Stacey Rolston abstained from the vote.

10. On August 22, 2018, GIB members acted in the following ways regarding the health care coverage exclusion for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment”:

- a. Herschel Day, Michael Farrell, Charles Grapentine, Stacey Rolston and Nancy Thompson voted to remove the coverage exclusion;
- b. Waylon Hurlburt, Jennifer Stegall, J.P. Wieske and Bob Ziegelbauer voted not to remove the coverage exclusion;
- c. Bob Wimmer abstained from the vote; and
- d. Theodore Neitzke did not participate in the vote.

Dated this 30th day of August, 2018.

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