

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

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ALINA BOYDEN and  
SHANNON ANDREWS,

Plaintiffs,

Case No. 17-cv-264

v.

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

Defendants.

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**PLAINTIFFS' PROPOSED JURY INSTRUCTIONS**

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Plaintiffs, Alina Boyden and Shannon Andrews, by their undersigned attorneys, hereby request that the Court give the attached jury instructions at the close of evidence in this case, in addition to its standard instructions.

**Plaintiffs' Proposed Jury Instruction No. 1**

**EQUAL PROTECTION**

Ms. Boyden and Ms. Andrews claim that Defendants violated their right to equal protection under the law by denying them medical coverage for a “gender reassignment” procedure or service to treat gender dysphoria, a serious medical condition only afflicting persons who are transgender. The Equal Protection Clause of the United States Constitution requires government entities to treat all similarly situated persons alike.

Because the Defendants have refused to cover these procedures on the basis of Plaintiffs' transgender identity, Defendants have the burden to prove “an exceedingly persuasive justification” for denying coverage for transition-related medical care. To prove they have an exceedingly persuasive justification, the Defendants must show that discriminating against transgender people: 1) serves important governmental objectives, and 2) is substantially related to achieving those important governmental objectives.

An “exceedingly persuasive justification” must be present at the time Defendants made the decision to exclude coverage for medical care for gender dysphoria. Justifications offered after the fact or justifications which did not actually motivate the Defendants' decision do not meet Defendants' burden.

Cost savings alone cannot constitute an “exceedingly persuasive justification” sufficient to meet Defendants' burden.

*Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017).

*United States v. Virginia*, 518 U.S. 515, 531-533 (1996).

*Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854 (E.D. Mich. 2014).

**Plaintiffs' Proposed Jury Instruction No. 2**

For you to find for the Plaintiffs on their Equal Protection claim, you do not need to find that the Defendants had an intention to discriminate against or harm transgender people when they adopted or carried out the exclusion of medical coverage for “gender reassignment.” Defendants can be liable for carrying out the exclusion, even if they did not intend to harm the Plaintiffs or disagreed with the exclusion.

*Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

*Johnson v. California*, 543 U.S. 499, 506 (2005).

*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”).

**Plaintiff's Proposed Jury Instruction No. 3**

**AFFORDABLE CARE ACT**

Ms. Boyden and Ms. Andrews claim that Defendants subjected them to discrimination under a health program on the basis of their transgender identity by denying them medical coverage for a “gender reassignment” procedure or service to treat gender dysphoria, a serious medical condition only afflicting persons who are transgender.

Under the Affordable Care Act, health programs are prohibited from discriminating against individuals on the basis of their transgender identity. In order to succeed on their Affordable Care Act claim, Plaintiffs must prove by a preponderance of the evidence that Defendants denied them medical coverage for a “gender reassignment” procedure or service related to their gender dysphoria.

*Prescott v. Rady Children's Hosp. San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017).

**Plaintiffs' Proposed Jury Instruction No. 4**

Seventh Circuit Pattern Instruction 3.01

TITLE VII EMPLOYMENT DISCRIMINATION

Ms. Boyden and Ms. Andrews claim that they were denied medical coverage by Defendants (because of their) based on their transgender identity. To succeed on this claim, Plaintiffs must prove by a preponderance of the evidence that Defendants denied them medical coverage for a “gender reassignment” procedure or service to treat gender dysphoria, a serious medical condition only afflicting persons who are transgender. (To determine that Plaintiffs were [*adverse employment action*] because of their [*protected class*], you must decide that Defendant would not have [*adverse employment action*] Plaintiffs had they been [*outside protected class*] but everything else had been the same.)

If you find that Plaintiffs have proved this by a preponderance of the evidence, then you must find for Plaintiffs. However, if you find that Plaintiffs did not prove this by a preponderance of the evidence, then you must find for Defendants.

*See Int'l Union v. Johnson Controls*, 599 U.S. 187, 199 (1991).

*Kentucky Ret. Sys. v. E.E.O.C.*, 554 U.S. 135, 147-48 (2008).

*Reidt v. County of Trempealeau*, 975 F.2d 1336, 1338, 1340 (7th Cir. 1992).

*Williams v. General Foods Corp.*, 492 F.2d 399, (7th Cir. 1974) (where employer applies facially discriminatory policy, “intention is not pertinent”).

**Plaintiffs' Proposed Jury Instruction No. 5**

Seventh Circuit Pattern Instruction 3.10

**COMPENSATORY DAMAGES**

You may award compensatory damages only for injuries that Plaintiffs have proved by a preponderance of the evidence were caused by Defendants' wrongful conduct. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

(In calculating damages, you should not consider the issue of lost wages and benefits. The court will calculate and determine any damages for past or future lost wages and benefits). You should consider the following types of compensatory damages, and no others:

1. The physical and mental/emotional pain and suffering and (disability) loss of a normal life that Plaintiffs have experienced and are reasonably certain to experience in the future. No evidence of the dollar value of physical or mental/emotional pain and suffering or (disability) loss of a normal life has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate Plaintiffs for the injuries they have sustained.

2. The reasonable value of medical care that Plaintiffs reasonably needed and actually received, as well as the present value of the care that they are reasonably certain to need and receive in the future.
3. Other out-of-pocket expenses incurred by Plaintiffs which they would not have incurred if Defendants had not discriminated against them, including costs associated with financing care that was not covered.

**Plaintiff's Proposed Jury Instruction No. 6**

Seventh Circuit Pattern Instruction 3.13

PUNITIVE DAMAGES

If you find for Ms. Boyden and Ms. Andrews, you may, but are not required to, assess punitive damages against Defendants. The purposes of punitive damages are to punish defendants for their conduct and to serve as an example or warning to Defendants and others not to engage in similar conduct in the future.

Plaintiffs must prove by a preponderance of the evidence that punitive damages should be assessed against Defendants. You may assess punitive damages only if you find that their conduct was in reckless disregard of Plaintiff's rights. An action is in reckless disregard of Plaintiffs' rights if taken with knowledge that it may violate the law.

Plaintiffs must prove by a preponderance of the evidence that Defendants (acted within the scope of their employment and) acted in reckless disregard of Plaintiffs' right not to be discriminated against. (In determining whether [Name] was a managerial employee of Defendant, you should consider the kind of authority Defendant gave him, the amount of discretion he had in carrying out his job duties and the manner in which he carried them out. You should not, however, award Plaintiffs punitive damages if Defendants prove that it made a good faith effort to implement an antidiscrimination policy).

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of Defendants' conduct;
- the impact of Defendants' conduct on Plaintiffs;
- the relationship between Plaintiffs and Defendants;
- the likelihood that Defendants would repeat the conduct if an award of punitive damages is not made;
- the relationship of any award of punitive damages to the amount of actual harm the Plaintiffs suffered.

Dated this 7th day of September, 2018.

**HAWKS QUINDEL, S.C.**

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**PLAINTIFFS' BRIEF IN SUPPORT OF PROPOSED JURY INSTRUCTIONS**

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Plaintiffs, Alina Boyden and Shannon Andrews, (collectively "Plaintiffs"), through their undersigned attorneys, submit this brief in support of their proposed jury instructions. Specifically, Plaintiffs seek instructions that make clear that Plaintiffs need not prove that Defendants acted with discriminatory intent because the challenged exclusion, by barring coverage of "surgery and sex hormones associated with gender reassignment," facially discriminates on the basis of gender and transgender identity.

**REQUESTED INSTRUCTIONS**

Plaintiffs request that the initial paragraph of the pattern Title VII jury instruction (7th Cir. Pattern J.I. Civ. 3.01) be modified as follows:

Ms. Boyden and Ms. Andrews claim that they were denied medical coverage by Defendants (because of their) based on their transgender identity. To succeed on this claim, Plaintiffs must prove by a preponderance of the evidence that Defendants denied them medical coverage for a “gender reassignment” procedure or service to treat gender dysphoria, a serious medical condition only afflicting persons who are transgender. (To determine that Plaintiffs were [*adverse employment action*] because of their [*protected class*], you must decide that Defendant would not have [*adverse employment action*] Plaintiffs had they been [*outside protected class*] but everything else had been the same.)

In addition to an instruction setting forth the heightened scrutiny test that Defendants must meet to satisfy the Equal Protection Clause, Plaintiffs also seek the following clarifying instruction regarding proof of intent:

For you to find for the Plaintiffs on their Equal Protection claim, you do not need to find that the Defendants had an intention to discriminate against or harm transgender people when they adopted or carried out the exclusion of medical coverage for “gender reassignment.” Defendants can be liable for carrying out the exclusion, even if they did not intend to harm the Plaintiffs or disagreed with the exclusion.

### ARGUMENT

As this Court recognized in its Opinion and Order denying Defendants’ motion to dismiss Plaintiffs’ Title VII claims:

When an employment practice involves explicit facial discrimination, as alleged here, the existence of a disparate treatment [under Title VII] does *not* depend on the employer’s intent. *See Int’l Union v. Johnson Controls*, 599 U.S. 187, 199 (1991). Instead, disparate treatment is demonstrated by the terms of the policy itself. *Id.*; *see also Kentucky Ret. Sys. v. E.E.O.C.*, 554 U.S. 135, 147-48 (2008).

(Dkt. # 67 at 17) (parenthetical and footnote omitted); *see also Reidt v. County of Trempealeau*, 975 F.2d 1336, 1338, 1340 (7th Cir. 1992); *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974) (finding that “intention is not pertinent” where

an employer applies a facially discriminatory policy); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018) (“transitioning status constitutes an inherently gender non-conforming trait”).

Equal protection claims challenging facially discriminatory policies similarly do not require additional proof of discriminatory intent. *See, e.g., 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.”); *Faulkner v. Jones*, 51 F.3d 440, 444 (4th Cir. 1995) (“[T]he male-only admissions policy of The Citadel is nevertheless an *explicit* gender-based classification. Although *facially neutral* statutes which have a discriminatory effect do not violate the Equal Protection Clause unless discriminatory intent can be demonstrated, discriminatory intent need not be established independently when the classification is explicit, as in this case”) (citing *Personnel Admin. v. Feeney*, 442 U.S. 256, 272-73 (1979)) (emphasis in original); *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (“[I]ntentional discrimination can be demonstrated in several ways. First, a law or policy is discriminatory on its face if it expressly classifies on the basis of race or gender.”); *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (“When racial classifications are explicit, no inquiry into legislative purpose is necessary.”).

Moreover, a lack of malice or even benevolent intentions on the part of an official enforcing a facially discriminatory policy does not insulate that official from liability. *See 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) (finding segregation of inmates by race after jail intake subject to strict scrutiny, even where purpose was to prevent racial violence).

Sex discrimination claims under Section 1557 generally follow the standards under Title IX. *See Prescott v. Rady Children's Hosp.*, 265 F. Supp. 3d 1090, 1098-99 (S.D. Cal. 2017) (applying Title IX standards to ACA § 1557 claim); *cf. Rumble v. Fairview Health Sys.*, No. 14-cv-2037, 2015 WL 1197415, \*10-1218 (D.Minn. March 16, 2015) (recognizing section 1557 “incorporates . . . Title IX, which prohibits discrimination on the basis of sex,” but finding that “Congress intended to create a new, health-specific, anti-discrimination cause of action that is subject to a singular standard” that nonetheless does not “create a new anti-discrimination framework that is completely ‘unbound by the jurisprudence of the four referenced statutes.’”). Courts “look[] to Title VII when construing Title IX.” *Whitaker v. Kenosha Unif. Sch. Dist.*, 858 F.3d 1034, 1047 (7th Cir. 2017); *see also Prescott*, 265 F. Supp. 3d at 1098-99. Because additional proof of intent is not required in a Title VII claim involving a facially discriminatory policy, such proof is also unnecessary for a Section 1557 or Title IX claim against such a policy.

### CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court adopt their proposed jury instructions.

Dated this 7th day of September, 2018.

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