

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 *IN LIMINE* TO EXCLUDE EVIDENCE OR TESTIMONY
FROM DAVID V. WILLIAMS AND BRIEF IN SUPPORT OF MOTION**

Plaintiffs, Alina Boyden and Shannon Andrews, by their undersigned attorneys, and pursuant to Federal Rules of Evidence 702 and 403, hereby move to preclude Defendants, along with their witnesses and/or counsel, from directly or indirectly offering the testimony of, or documents generated by David V. Williams at trial pursuant to Federal Rules of Evidence 702 and 403.

ARGUMENT

Defendants have retained David V. Williams as an expert in this case to opine on the cost to the state of removing the coverage exclusion for medical and surgical treatments for gender dysphoria. (Dkt. # 91, Expert Report of David V. Williams ("Williams Report"). Defendants seek to use this testimony to justify their facially discriminatory policy, which applies a categorical exclusion of coverage for medically necessary care for transgender employees. However, the cost of these

treatments is not an issue in this case, nor is the cost of such treatments a legally valid defense against Plaintiffs' claims. Because Williams' testimony will not assist the jury in a fact at issue and is likely to confuse the issues, mislead the jury, and waste time, it should be excluded under Federal Rule of Evidence 702 and 403.

Under Fed. R. Evid. 702(a), a witness may only testify as an expert if his "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Williams' opinion does not meet this "helpfulness" requirement. Plaintiffs need not show that medical and surgical treatments for gender dysphoria are cheap or cost effective in order to prove their claims.

Further, Williams' opinion regarding the costs of these treatments is irrelevant because cost was not considered as part of GIB's decision to reinstate the coverage exclusion for these treatments. (Dkt. # 96, Plaintiff's Proposed Findings of Fact, "PPFOF", ¶ 133, 135). As explained fully in Plaintiff's Brief in Support of Their Motion for Partial Summary Judgment, Defendants' arguments regarding the costs of gender confirmation treatment are mere *post hoc* justifications created in response to litigation and did not actually motivate Defendants' decision to reinstate the exclusion and therefore are not a legally valid defense to any of Plaintiffs' claims. (Dkt. # 97, pp. 29-31 (post-hoc rationalizations do not satisfy heightened equal protection scrutiny); see also *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("Whether an employment practice involves disparate treatment [under

Title VII] through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination”).¹ Williams’ report, dated April 19, 2018, did not exist when GIB voted on December 30, 2016 to reinstate the exclusion; therefore, his opinion could not have formed a basis for GIB’s decision. (PPFOF ¶¶ 124,125; Williams Rep. at 18). Additionally, several GIB members will testify that they did not discuss the cost of these procedures prior to voting to reinstate the exclusion. (PPFOF 133, 135). Further, even if GIB had considered the cost of coverage when it voted to reinstate the exclusion, this is not a legitimate non-discriminatory justification for its facially discriminatory policy. *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). Because GIB was not motivated by considerations of coverage cost when it voted to reinstate the exclusion and because such justifications are not a legally valid defense to its facially discriminatory policy, Williams’ testimony on this subject is completely irrelevant to the issues in this case and should be excluded.

¹ This Court has already determined in this case that “facial discrimination is a flavor of disparate treatment – one in which the burden-shifting framework of *McDonnell Douglas* is inappropriate.” (Dkt. # 67, Opinion and Order on Defendants’ Motion to Dismiss, p. 17) (citing *See Reidt v. Cty. of Trempealeau*, 975 F.2d 1336, 1340–41 (7th Cir. 1992); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Because *McDonnell Douglas* burden-shifting is inappropriate on Plaintiffs’ Title VII claim, Defendants’ purported legitimate non-discriminatory reason for reinstating the exclusion is irrelevant.

Because the ACA’s non-discrimination provisions incorporate the standards of other non-discrimination statutes, *see Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017), *post-hoc* non-discriminatory justifications are also irrelevant to Plaintiffs’ section 1557 claims.

Even if Williams' testimony did have some minor probative value, it should be excluded under Rule 403 because "its probative value is substantially outweighed by a danger of . . .confusing the issues, misleading the jury. . . [and] wasting time." Fed. R. Evid. 403. Due to the complicated nature of Williams' benefits pricing methodology, his testimony (and subsequent rebuttal testimony of Plaintiffs' expert on the costs of coverage) will be extensive and time-consuming, resulting in a substantial waste of time. Additionally, this testimony is likely to mislead and confuse the jury into believing that cost is a viable non-discriminatory justification for the coverage exclusion or that it must decide whether the cost of coverage was high enough to justify the exclusion. However, these are not issues for the jury to decide. Because any probative value Williams' testimony could have is substantially outweighed by a danger of wasting time, confusing the issues, and misleading the jury, it should be excluded under Rule 403.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court preclude Defendants from offering testimony or evidence from David V. Williams on the basis of Fed. R. Evid. 702 and 403.

Dated this 7th day of September, 2018.

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