

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.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

Defendants Wisconsin Department of Employee Trust Funds (ETF), Wisconsin Group Insurance Board (GIB), Robert J. Conlin, Michael S. Farrell, Stacey Rolston, Herschel Day, Charles Grapentine, Waylon Hurlburt, Theodore Neitzke, Jennifer Stegall, Robert Wimmer, Nancy Thompson, J.P. Wieske, and Bob Ziegelbauer, in accordance with the Court's Preliminary Pretrial Conference Order (Dkt. 37), submit their proposed jury instructions.

Defendants' Proposed Jury Instruction No. 1

Multiple claims / multiple defendants

You must give separate consideration to each claim and each party in this case. Although there are 14 defendants, it does not follow that if one is liable, any of the others is also liable. Although there are two plaintiffs, it does not follow that if one is successful, the other is too.

In considering a claim against a defendant, you must not consider evidence admitted only against other defendants.

Defendants' Proposed Jury Instruction No. 2

Burden of proof

When I say a particular party must prove something by “a preponderance of the evidence,” or when I use the expression “if you find,” or “if you decide,” this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

Defendants' Proposed Jury Instruction No. 3

Title VII claims - liability

Plaintiffs' Claims against ETF

In this case both Plaintiffs Alina Boyden and Shannon Andrews make a claim under Title VII of the Civil Rights Act of 1964 that prohibits “employers” from discriminating against an employee in the terms and conditions of employment because of the employee’s sex.

Plaintiffs Boyden and Andrews claim that they were denied State of Wisconsin state-employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment” in the Group Health Insurance Uniform Benefits because of their sex by the Wisconsin Department of Employment Trust Funds’ (ETF).

ETF denies that it is the Plaintiffs’ “employer” and that the Plaintiffs were discriminated against in any way.

To succeed on this discrimination claim against ETF, the Plaintiffs must prove by a preponderance of the evidence that ETF is their “employer” and that they were denied health insurance coverage for these procedures, services and supplies because of their sex.

To determine that ETF is the Plaintiffs’ “employer,” you must decide that it is an agent of the Board of Regents of the University of Wisconsin System,

for whom both Plaintiffs works. ETF is an agent only if (1) it exercises control over an important aspect of the Plaintiffs' employment, (2) significantly affects access of Plaintiffs to employment opportunities, or (3) if the Board of Regents delegates sufficient control of some traditional rights over employees to ETF.

If you find that the Plaintiffs have proved that ETF is their "employer" by a preponderance of the evidence, then you must determine whether ETF denied them the specific health insurance coverage because of their sex. However, if you find that the Plaintiffs did not prove that ETF is their "employer" by a preponderance of the evidence, then you must find for ETF.

To determine that the Plaintiffs were denied the specific health insurance coverage because of their sex, you must decide that ETF would not have denied them coverage had they been born of the female sex but everything else had been the same. If you find that the Plaintiffs have proved this by a preponderance of the evidence, then you must find for them. However, if you find that the Plaintiffs did not prove this by a preponderance of the evidence, then you must find for ETF.

Plaintiffs' Claims against GIB

In this case the Plaintiffs Alina Boyden and Shannon Andrews make a claim under Title VII of the Civil Rights Act of 1964 that prohibits "employers" from discriminating against an employee in the terms and conditions of employment because of the employee's sex.

Both Plaintiffs claim that they were denied State of Wisconsin state-employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment” in the Group Health Insurance Uniform Benefits because of their sex by the Group Insurance Board (GIB).

GIB denies that it is the Plaintiffs’ employer and that the Plaintiffs were discriminated against in any way.

To succeed on this discrimination claim against GIB, the Plaintiffs must prove by a preponderance of the evidence that GIB is their “employer” and that they were denied health insurance coverage for these procedures, services and supplies because of their sex.

To determine that GIB is the Plaintiffs’ “employer,” you must decide that it (1) has 15 or more employees, and (2) is an agent of the Board of Regents of the University of Wisconsin System, for whom the Plaintiffs work. GIB is an agent only if (1) it exercises control over an important aspect of the Plaintiffs’ employment, (2) significantly affects access of the Plaintiffs to employment opportunities, or (3) if the Board of Regents delegates sufficient control of some traditional rights over employees to GIB.

If you find that the Plaintiffs have proved that GIB is their “employer” by a preponderance of the evidence, then you must determine whether GIB

denied them specific health insurance coverage because of their sex. However, if you find that the Plaintiffs did not prove that GIB is their “employer” by a preponderance of the evidence, then you must find for GIB.

To determine that the Plaintiffs were denied the specific health insurance coverage because of their sex, you must decide that GIB would not have denied the Plaintiffs coverage had they been born of the female sex but everything else had been the same. If you find that the Plaintiffs have proved this by a preponderance of the evidence, then you must find for them. However, if you find that the Plaintiffs did not prove this by a preponderance of the evidence, then you must find for GIB.

Defendants' Proposed Jury Instruction No. 4

Affordable Care Act – liability

In this case both Plaintiffs Alina Boyden and Shannon Andrews make a claim under Section 1557 of the Patient Protection and Affordable Care Act (ACA) that prohibits “health programs or activities” from discriminating against a person on the basis of the person’s sex.

Both Plaintiffs claim that they were denied State of Wisconsin state-employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment” in the Group Health Insurance Uniform Benefits on the basis of their sex by the Wisconsin Department of Employment Trust Funds’ (ETF).

ETF denies the Plaintiffs were discriminated against in any way.

To succeed on this discrimination claim against ETF, the Plaintiffs must prove by a preponderance of the evidence that they were denied health insurance coverage for these procedures, services and supplies on the basis of their sex by ETF.

In order for the Plaintiffs to recover on this discrimination claim against ETF, they must prove that ETF intentionally discriminated against them.

To determine that the Plaintiffs were denied the specific health insurance coverage on the basis of their sex, you must decide that ETF would

not have denied the Plaintiffs coverage had they been born of the female sex but everything else had been the same. If you find that the Plaintiffs have proved this by a preponderance of the evidence, then you must find for them. However, if you find that the Plaintiffs did not prove this by a preponderance of the evidence, then you must find for ETF.

Defendants' Proposed Jury Instruction No. 5

Equal Protection Clause via 42 U.S.C. § 1983 - liability

Personal involvement

Robert Conlin is being sued as an individual.

To succeed on their equal protection claim, Plaintiffs Alina Boyden and Shannon Andrews must prove by a preponderance of the evidence that Conlin was personally involved in the denial of State of Wisconsin state-employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment” in the Group Health Insurance Uniform Benefits. You may not hold Conlin liable for what others did or did not do.

Conlin denies that he was personally involved and that the Plaintiffs were discriminated against in any way.

If you find that the Plaintiffs have proved by a preponderance of the evidence that Conlin was personally involved in the denial, then you must determine whether Conlin denied them specific health insurance coverage because of their sex. However, if you find that the Plaintiffs did not prove that Conlin was personally involved by a preponderance of the evidence, then you must find for Conlin.

Theodore Neitzke is being sued as an individual.

To succeed on their equal protection claim, Plaintiffs Alina Boyden and Shannon Andrews must prove by a preponderance of the evidence that Neitzke was personally involved in the denial of State of Wisconsin state-employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment” in the Group Health Insurance Uniform Benefits. You may not hold Neitzke liable for what others did or did not do.

Neitzke denies that he was personally involved and that the Plaintiffs were discriminated against in any way.

If you find that the Plaintiffs have proved by a preponderance of the evidence that Neitzke was personally involved in the denial, then you must determine whether Neitzke denied them specific health insurance coverage because of their sex. However, if you find that the Plaintiffs did not prove that Neitzke was personally involved by a preponderance of the evidence, then you must find for Neitzke.

Defendants' Proposed Jury Instruction No. 7

Equal Protection Clause via 42 U.S.C. § 1983 - liability

Discrimination on sex (individual and official capacity claims)

Plaintiffs Alina Boyden and Shannon Andrews are suing Defendants Robert Conlin, Michael Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurlburt, Theodore Neitzke, J.P. Wieske, Bob Ziegelbauer, Jennifer Stegall, Robert Wimmer, Herschel Day, and Nancy Thompson under 42 U.S.C. § 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their federal constitutional rights under color of state law. The Fourteenth Amendment to the United States Constitution protects persons from being subjected to discrimination, by persons acting under color of state law, on the basis of sex.

In order for the Plaintiffs to recover on this discrimination claim against these individual Defendants, they must prove that each of these individual Defendants intentionally discriminated against them.

In this case the Plaintiffs are alleging that the individual Defendants denied them State of Wisconsin state-employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment” in the Group Health Insurance Uniform Benefits.

The Plaintiffs must prove by a preponderance of the evidence that they were denied coverage by each of these individual Defendants because of their sex. To determine that the Plaintiffs were denied coverage because of their sex, you must decide that each of these individual Defendants would not have denied the Plaintiffs coverage had they been born of the female sex but everything else had been the same. If you find that the Plaintiffs have proved this by a preponderance of the evidence, then you must find for them. However, if you find that the Plaintiffs did not prove this by a preponderance of the evidence, then you must find for Defendants Conlin, Farrell, Rolston, Grapentine, Hurlburt, Neitzke, Wieske, Ziegelbauer, Stegall, Wimmer, Day, and/or Thompson.

Defendants' Proposed Jury Instruction No. 7

Damages (except as to § 1983 official capacity claims)

If you find that Plaintiffs Alina Boyden and Shannon Andrews have proved their Title VII, ACA, or equal protection individual capacity claims against Conlin, Farrell, Rolston, Grapentine, Hurlburt, Neitzke, Wieske, or Ziegelbauer, then you must determine what amount of damages, if any, the Plaintiffs are entitled to recover. The Plaintiffs must prove their damages by a preponderance of the evidence. If you find that the Plaintiffs have failed to prove all of their claims, then you will not consider the question of damages.

You may award compensatory damages only for injuries that the Plaintiffs have proved by a preponderance of the evidence were caused by a 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.

You should consider the following type of compensatory damages, and no others: The mental and emotional pain and suffering that the Plaintiffs have experienced. No evidence of the dollar value of mental/emotional pain and suffering 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 the Plaintiffs for the injury they have sustained.

For Plaintiff Shannon Andrews, you should also consider the reasonable value of medical care that Andrews reasonably needed and actually received.

Presiding Juror
Madison, Wisconsin

Dated this ____ day of October, 2018

Dated this 7th day of September, 2018.

Respectfully submitted,

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