

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' BRIEF IN SUPPORT OF PROPOSED JURY INSTRUCTIONS

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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