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' MOTIONS IN LIMINE (NOS. 1–4) TO EXCLUDE EVIDENCE OF VARIOUS DAMAGES

INTRODUCTION

Defendants, in accordance with the Court's Preliminary Pretrial Conference Order (Dkt. 37), submit the following motions in limine related to Plaintiffs' damages requests. All these motions ultimately rest on Federal Rules of Evidence 401 and 402, which provide that only relevant evidence is admissible at trial and that relevant evidence makes a fact of consequence more or less probable than it would be without the evidence. None of the damages evidence challenged here is relevant and admissible, since none of it is causally connected to the conduct that Plaintiffs challenge—the coverage exclusion for procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment (the "Exclusion").

Defendants' Motion in Limine No. 1 seeks to exclude evidence of Plaintiff Shannon Andrews' purported damages related to the coverage denial for her facial feminization surgery because, even without the Exclusion, her third-party insurer had its own categorical exclusion that would have prevented coverage. Defendants' Motion in Limine No. 2 seeks to exclude evidence of Andrews' claimed damages before 2014, since she did not work in a position affected by the Exclusion until then. Defendants' Motion in Limine No. 3 seeks to exclude evidence of Andrews' distress related to the prior wording of the Exclusion, because she never alleged that this wording itself violated any substantive law (and it did not, even if she had). And Defendants' Motion in Limine No. 4 seeks to exclude evidence of Boyden's claimed damages before 2015, since she did not work in a position affected by the Exclusion until then. Since causation is absent in each instance, the damages evidence is irrelevant and should be excluded.

MOTIONS IN LIMINE

I. Applicable causation principles.

Proof of causation is a basic requirement of each of Plaintiffs' claims under Title VII, the Affordable Care Act, and 42 U.S.C. § 1983. "A plaintiff must prove a causal link between the violation and the injury for which he is seeking damages." *Baer v. City of Wauwatosa*, 716 F.2d 1117, 1121 (7th Cir. 1983). "Causation is a standard element of tort liability, and includes two

requirements: (1) the act must be the 'cause-in-fact' of the injury, i.e., 'the injury would not have occurred absent the conduct'; and (2) the act must be the 'proximate cause,' sometimes referred to as the 'legal cause,' of the injury, i.e., 'the injury is of a type that a reasonable person would see as a likely result of his or her conduct.'" *Whitlock v. Brueggemann*, 682 F.3d 567, 582 (7th Cir. 2012) (citation omitted) (applying these causation principles to § 1983 claim). Although Title VII does not contain a strict cause-in-fact (or "but-for") causation standard for status-based discrimination claims, it still requires a showing of proximate cause. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348–49 (2013) (no "but-for" causation in Title VII discrimination claims); *Shick v. Illinois Dep't of Human Servs.*, 307 F.3d 605, 614 (7th Cir. 2002) (proximate cause required under Title VII).

Under standard proximate cause principles, a party may not be held liable for damages that result from an intervening (or superseding) cause. *See Shick*, 307 F.3d at 614–15 (applying superseding cause principles to Title VII claim). More specifically, "[i]f an act that intervenes between the defendant's conduct and the plaintiff's injury is not reasonably foreseeable, this intervening act is the independent cause of the injury, and it breaks the causal chain that would establish the defendant's liability." *Suzik v. Sea-Land Corp.*, 89 F.3d 345, 348 (7th Cir. 1996).

Where plaintiffs lack evidence that the challenged conduct caused a claimed category of damages, motions in limine are properly granted to exclude evidence of those damages. *See, e.g.*, *Kiswani v. Phoenix Sec. Agency, Inc.*, 247 F.R.D. 554, 559 (N.D. Ill. 2008) (excluding evidence of four types of damages where causation absent); *Euroholdings Capital & Inv. Corp. v. Harris Tr. & Sav. Bank*, 602 F. Supp. 2d 928, 939 (N.D. Ill. 2009) (same, regarding lost profits damages). More generally, motions in limine restricting damages evidence should be granted where the damages sought are not obtainable as a matter of law. *See Iron Dynamics v. Alstom Power, Inc.*, No. 06-cv-357, 2008 WL 2078621, at *2 (N.D. Ind. May 15, 2008); *Boomsma v. Star Transp., Inc.*, 202 F. Supp. 2d 869, 880 (E.D. Wis. 2002); *Farley v. Miller Fluid Power Corp.*, No. 94-C-2273, 1997 WL 757863, at *4 (N.D. Ill. Nov. 24, 1997).

II. Defendants' Motion in Limine No. 1: Exclude damages evidence related to Shannon Andrews' facial feminization surgical procedures.

Plaintiff Shannon Andrews seeks damages based on the roughly $50,000 it cost her to pay for facial feminization surgery, along with mental distress associated with the coverage denial and delay in obtaining this treatment. (Roth Decl. Ex. A (Pls.' Resp. to 2nd Set of Interrog. at 3–4, 6–7).) She should not be allowed to offer this evidence at trial because she cannot prove that Defendants' actions—specifically, creating and applying the

Exclusion—caused her this harm. Her third-party health insurer also did not provide coverage for facial feminization surgeries, through a policy independent of the Exclusion. Since Andrews cannot show a causal link between her facial feminization damages and the Exclusion, this evidence is irrelevant under Federal Rules of Evidence 401 and 402 and should be excluded.

Andrews cannot demonstrate either aspect of causation—"but for" or proximate cause—regarding these purported damages. Andrews' claim for facial feminization surgery had to clear at least two hurdles before she would have received coverage: (1) no Uniform Benefits provision prohibited coverage; and (2) no policy in her third-party health plan prohibited coverage. If the Exclusion had not existed, her insurance claim could have cleared the first hurdle, but it would have tripped over the second.

As a matter of policy, Andrews' third-party health insurer, WPS Health Insurance ("WPS"), categorically does not provide coverage for facial feminization procedures of the kind Andrews received. The WPS "Treatment of Gender Dysphoria" coverage policy that applied when Andrews received her facial feminization surgery stated that "[c]ertain ancillary procedures . . . are exclusions of the health plan for all individuals or are considered cosmetic, when performed as part of gender reassignment." (Dkt. 91-2:6.) It specifically identified "[b]ody contouring (e.g., fat transfer, lipoplasty,

panniculectomy)", "brow lifts", "[f]ace/forehead lift and/or neck tightening", "[f]acial bone remodeling for facial feminization", "rhinoplasty", and "trachea shave" as procedures categorically excluded from coverage. (Dkt. 91-2:6–7.)

While it is not yet clear exactly which facial feminization procedures Andrews received[1], this WPS policy excluded from coverage all of the procedures she likely received. [redacted] (Roth Decl. Ex. B.) The WPS gender dysphoria policy categorically excludes all of these procedures from coverage. (Dkt. 91-2:6–7.)

Given this WPS policy, Andrews would not have received insurance coverage for her facial feminization procedures, even if the Exclusion had not existed. This means she cannot establish causation. She would have paid the $50,000 cost herself and suffered mental anguish due to a coverage denial and delayed treatment, even without the Exclusion—which precludes but-for causation. Likewise, WPS's separate and independent coverage exclusion would have caused her injuries, even without the Exclusion—an intervening

[1] Andrews has not yet been deposed, and her discovery responses do not identify the specific procedures she received. Defendants reserve the right to supplement this motion in limine, once that information is obtained.

[2] https://www.uofmhealth.org/conditions-treatments/surgery/plastic/cosmetic/facial/chin (last visited September 7, 2018).

act which precludes proximate cause. *See Thayer v. Chiczewski*, 705 F.3d 237, 252 (7th Cir. 2012) ("It may be dishonorable to act with an unconstitutional motive . . . but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway.") (citing *Hartman v. Moore*, 547 U.S. 250, 260 (2006)).

Since Andrews cannot establish causation for this aspect of her claims, all evidence of damages related to her facial feminization procedures is irrelevant and should be excluded.

III. Defendants' Motion in Limine No. 2: Exclude damages evidence related to Shannon Andrews' distress before she began employment covered by the Uniform Benefits.

Evidence related to Andrews' distress before she began working at a job covered by the Uniform Benefits also should be excluded as irrelevant under Federal Rules of Evidence 401 and 402. She contends that she "first took steps to receive GCS [i.e. "gender confirmation surgery"] in 2012 and then discovered the coverage exclusion, which made it harder to find a therapist to treat her dysphoria because there were no in-network resources to do so, which in turn delayed her GCS." (Roth Decl. Ex. A (Pls.' Resp. to 2nd Set of Interrog. at 4).) But she did not begin working at the University of Wisconsin

in a position covered by the Uniform Benefits until March 2014.[3] (Dkt. 108-1:20 ¶ 73.)

Any distress resulting from her inability to obtain gender reassignment surgery before she began working at the University of Wisconsin has no relationship to the Exclusion and thus is irrelevant. That is, nothing in the Uniform Benefits made it "harder to find a therapist to treat her dysphoria" before she even worked in a position to which the Uniform Benefits applied. If her prior insurer had a coverage exclusion that prevented her from seeking therapy for her dysphoria, she may have a claim against that entity—but such a claim has nothing to do with Defendants' actions here. Since causation is absent between the Exclusion and Andrews' purported damages from before March 2014, this irrelevant evidence should be excluded.

IV. Defendants' Motion in Limine No. 3: Exclude damages evidence related to Shannon Andrews' distress over the Exclusion's prior wording.

Andrews also seeks damages because, in 2012, "the coverage exclusion used the language 'sexual transformation,'" which purportedly "produced

[3] Andrews alleges that she was unemployed in the fall of 2012 and then "found employment and began taking hormones in October 2013." (Dkt. 108-1:20 ¶ 72.) She does not allege that this 2013 employment was through a state entity covered by the Uniform Benefits.

additional anxiety and stress for Ms. Andrews [since] this offensive and demeaning language made her feel unsafe in bringing her need to transition to her primary healthcare provider." (Roth Decl. Ex. A (Pls.' Resp. to 2nd Set of Interrog. at 4).) Any evidence related to this argument should be excluded as irrelevant under Federal Rules of Evidence 401 and 402 for two reasons.

First, this so-called "offensive and demeaning language" is not the basis for any of Andrews' claims. (*See generally* Dkt. 108-1.) Rather, her claims allege that the Exclusion's effect—preventing coverage for gender reassignment surgeries—violates Title VII, the Affordable Care Act, and the Equal Protection Clause. (*See, e.g.*, Dkt. 108-1 ¶¶ 109, 114, 123.) She can only obtain damages caused by those violations, since, again, "[a] plaintiff must prove a causal link between the violation and the injury for which he is seeking damages." *Baer*, 716 F.2d at 1121. *See also Lenard v. Argento*, 699 F.2d 874, 891 (7th Cir. 1983) (a plaintiff "should be allowed to argue damages . . . if any, caused as the result of the violation of his constitutional rights"). Put differently, Andrews has never alleged that the prior Exclusion's use of so-called "offensive and demeaning language" violated Title VII, the

Affordable Care Act, or the Equal Protection Clause.[4] She thus is not entitled to damages based on any distress that wording may have caused her.

Second, as explained above, Andrews was apparently not even working in a position covered by the Uniform Benefits until 2014. (Dkt. 108-1:20 ¶ 73.) The language used by the Uniform Benefits before Andrews began working at a job covered by them could not possibly have affected whether she discussed transition with her doctor. Again, causation is lacking for this theory of damages and so any related evidence is irrelevant.

V. Defendants' Motion in Limine No. 4: Exclude damages evidence related to Alina Boyden's distress before she began employment covered by the Uniform Benefits.

For the same reasons discussed above in Defendants' Motion in Limine No. 2, evidence related to Boyden's distress before she began working at a job covered by the Uniform Benefits also should be excluded as irrelevant under Federal Rules of Evidence 401 and 402. Boyden did not begin working in a

[4] Even if Andrews had pleaded such a claim, it would fail. An isolated use of language that is not objectively offensive and was not even directed at Andrews cannot support liability under any of her causes of action. *Cf. Ellis v. CCA of Tennessee LLC*, 650 F.3d 640, 648 (7th Cir. 2011) (in a Title VII claim based on comments, they must be "objectively . . . offensive" and "isolated incidents, unless 'extremely serious,' will not support a hostile work environment claim" (citation omitted)); *Dewalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000) ("The use of racially derogatory language, while unprofessional and deplorable, does not violate the Constitution. . . . Standing alone, simple verbal harassment does not . . . deny a prisoner equal protection of the laws."); *Gabrielle M. v. Park Forest-Chicago Heights, IL. Sch. Dist. 163*, 315 F.3d 817, 823 (7th Cir. 2003) (actionable harassment under Title IX is "severe, pervasive, and objectively offensive").

position covered by the Uniform Benefits until May 2015. (Dkt. 108-1:16 ¶ 52.) Any distress associated with her lack of gender dysphoria treatment before that date has nothing to do with the Exclusion, and so all evidence related to purported damages before then is irrelevant and should be excluded.

CONCLUSION

Defendants respectfully request that all damages evidence be excluded from trial that relates to (1) Andrews' facial feminization surgery; (2) Andrews not obtaining gender reassignment surgeries before March 2014; (3) Andrews' mental distress resulting from the Exclusion's prior wording; and (4) Boyden not obtaining gender reassignment surgeries before May 2015.

Dated this 7th day of September, 2018.

Respectfully submitted,

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