

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' RESPONSE AND OBJECTIONS TO DEFENDANTS'
PROPOSED JURY INSTRUCTIONS**

Plaintiffs, by their undersigned attorneys, hereby respond to Defendants' proposed jury instructions.¹

Defendants' Proposed Jury Instruction No. 1:
Multiple claims/multiple defendants

Plaintiffs object to this Proposed Jury Instruction. This case involves the discriminatory language of a single coverage policy. It is legally impossible for one plaintiff to be successful and the other to be unsuccessful on any of their claims (apart from individual damages).

¹ Plaintiffs note that Defendants have not followed the Court's Jury Trial Procedures for Pretrial Submissions as found in the Court's Attachments to Preliminary Pretrial Conference Order (Dkt. # 45) in that Defendants have not underlined any additions to the standard jury instructions and have not included in parenthesis any deletions to same. Further, Defendants have cited no legal authority in support of their proposed jury instructions.

Additionally, it is legally impossible for one defendant to be liable and the others to not be liable. This discriminatory coverage policy was reinstated by the combined actions of all defendants. Plaintiffs need not prove that each defendant had a discriminatory motive in order to prove any of their claims. Rather, the jury must evaluate the discriminatory policy on its face. *Reidt v. Cty. of Trempealeau*, 975 F.2d 1336, 1340–41 (7th Cir. 1992); *Prescott v. Rady Children's Hosp. -San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991); *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 579 (7th Cir. 2014). Because the claims against each defendant involve the same facially discriminatory policy and do not require proof of discriminatory intent, if the jury finds that Plaintiffs have met their burden on each claim, then all defendants are liable for that claim.

Defendants' Proposed Jury Instruction No. 2: Burden of proof

Plaintiffs object to this Proposed Jury Instruction as it is duplicative of this Court's standard closing instructions on Burden of Proof.

Defendants' Proposed Jury Instruction No. 3: Title VII claims – liability

Plaintiffs' Claims against ETF

Paragraph 1: Plaintiffs object to references to discrimination “because of the employee’s sex” in this paragraph and throughout Defendants’ Proposed Jury Instructions. This vague language improperly requires the jury to answer a purely legal question: whether discrimination on the basis of transgender identity constitutes discrimination on the basis of sex. Because the case law states that it

does, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018), all references to discrimination “because of sex” throughout these instructions should instead refer to discrimination “based on the employee’s transgender identity.”²

Plaintiffs also object to the inclusion of the word “employers” in quotations. Defendants seek to relitigate an issue which was already decided by this Court in its May 11, 2018 Decision and Order on Defendants’ Motion to Dismiss. (Dkt. # 67, “Decision and Order”). In its decision, the Court held that “defendants GIB and ETF are empowered to provide health insurance benefits to state employees, including plaintiffs. As such, the court finds that both are proper suable entities under Title VII.” (Decision and Order at 16).³ (See also Plaintiffs’ Brief in Opposition to State Defendants’ Motion for Summary Judgment (Dkt. # 115) at 36-38). Because

² Alternatively, if the Court declines to substitute the phrase “transgender identity,” Plaintiffs propose using the term “gender” instead of “sex.” Defendants use of the word “sex” is confusing in that it seems to require (and, in Proposed Jury Instructions Nos. 3 at 6 explicitly requires) Plaintiffs to prove that Defendants discriminated against them because of their sex assigned at birth. This is inconsistent with case law that makes clear that Title VII protects against discrimination both on the basis of “sex” and “gender.” See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241, 251 (1989) (question in Title VII sex discrimination case is “whether *gender* was a factor in the employment decision” or “*gender* played a part”) (emphasis added); see also *Whitaker*, 858 F.3d at 1049 (“the prohibition on sex discrimination ‘encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.’”) (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 3(6th Cir. 2004)); *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 702 (E.D. Wis. 1996) (“Title VII uses ‘sex’ in the sense of ‘gender.’”).

³ Though this decision was made at the pleading stage, Defendants have not disputed the dispositive fact that they provide health insurance benefits – which are undoubtedly “an important aspect of the Plaintiffs’ employment” – to state employees, as a result of a “delegat[ion of] sufficient control of some traditional rights over employees to ETF.” (See Dkt. # 88, State Defendants’ Proposed Findings of Fact in Support of Their Motion for Summary Judgment (“Def. PFOF”), ¶¶ 4-6, 11-16, 18-20, 22; Dkt. # 67, Opin. & Order on Motion to Dismiss at 17-18 (noting allegations that “plaintiff’s employers delegated to ETF/GIB the responsibility” to determine services covered).

Defendants' status as Plaintiffs' "employer" has already been determined in this case, this issue is not being tried to the jury. To the extent that Defendants dispute GIB and ETF's classifications as "employers" under Title VII on grounds not already foreclosed by the Court's Decision on its Motion to Dismiss, their statuses as employers are disputes of law, not fact, and must be decided by the Court.

Paragraph 2: Plaintiff objects to this paragraph because it is convoluted and confusing. Plaintiffs affirmatively propose the following language:

Plaintiffs claim that Defendants subjected them to discrimination 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.

Paragraph 3, 4 and 5: Plaintiff objects to ETF's denial that it was Plaintiffs' employer for the reasons stated above in response to Paragraph 1 of this Proposed Jury Instruction.

Paragraph 6 and 7: Plaintiffs object to this paragraph because it misstates Plaintiffs' burden in this case in that it appears to argue that Plaintiffs have a burden to prove intentional discrimination. They do not. Rather, as this Court has already noted, "When an employment practice involves explicit facial discrimination, as alleged here, the existence of a disparate treatment does *not* depend on the employer's intent." (Decision and Order at 17) (citations omitted) (emphasis in original).

Plaintiffs' Claims against GIB

Insofar as Defendants' Proposed Jury Instructions regarding Plaintiffs' Title VII claim against GIB are identical to those regarding their Title VII claim against ETF, Plaintiff raises the same objections.

Plaintiffs also object to the additional instruction that Plaintiffs must prove that GIB has fifteen or more employees in order to succeed on their claim against it. Plaintiffs do not dispute that GIB itself does not have fifteen or more employees. Rather, Plaintiffs have argued that the number of employees it has is irrelevant, as it is subject to affiliate liability by virtue of its affiliation with ETF, regardless of whether it meets the threshold number of employees required under Title VII. (Plaintiffs' Brief in Opposition to State Defendants' Motion for Summary Judgment (Dkt # 115) at 36-38). Whether GIB meets the definition of "employer" for purposes of Title VII is therefore purely a legal question and must be decided by the Court, not the jury.

Plaintiffs also object to separate jury instructions for their claims against ETF and GIB for the reasons stated in their Response to Defendants' Proposed Jury Instruction No. 1.

Defendants' Proposed Jury Instruction No. 4: Affordable Care Act – liability

Paragraphs 1, 2, and 4: Plaintiffs object to the phrase "on the basis of the person's sex" in paragraph one and "on the basis of their sex" in paragraphs two and four for the reasons stated in Plaintiffs' Response to Defendant's Proposed Jury Instruction No. 3. Plaintiffs propose substituting the "transgender identity" in place of "sex."

Plaintiffs also object to Paragraph 2 because it is convoluted and confusing and propose the following alternative language:

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.

Paragraphs 5 and 6: Plaintiffs object to these paragraphs on the grounds that they misstate the applicable legal standard. Because Defendants have employed a facially discriminatory policy, their intent is irrelevant. *Prescott v. Rady Children’s Hosp. San Diego*, 265 F. Supp. 3d 1090, 1098-99 (S.D. Cal. 2017) (recognizing that courts should look to Title IX and Title VII for guidance in interpreting section 1557 of the Affordable Care Act); *c.f. UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (under Title VII, when an employer institutes a facially discriminatory policy, intent is irrelevant).

Defendants’ Proposed Jury Instruction No. 5:
Equal Protection Clause via 42 U.S.C. § 1983- liability, personal involvement

Robert Conlin

Plaintiffs object to this Proposed Jury Instruction.⁴ As Plaintiffs explained in their Brief in Opposition to State Defendants’ Supplemental Motion for Summary Judgment (Dkt. # 148) a state official’s involvement need not be the direct cause or the only cause of a constitutional violation in order to satisfy the “personal involvement” requirement of § 1983 individual liability claims. (*Id.* at 3-4). Rather, in

⁴ This Proposed Jury Instruction appears to be patterned after Seventh Circuit Pattern Instruction 7.02. However, in Pattern Instruction 7.02, the Committee itself acknowledges that “[t]here are situations in which [this instruction] does not apply or may be inaccurate, for example, cases involving claims of failure to intervene, supervisory liability, conspiracy, or cases in which there are state law claims on which there is respondeat superior liability.” Such is the case here.

order to prove their individual liability claims against Defendants, Plaintiffs need only prove “a causal connection” between the constitutional violation and the state official. (*Id.* at 3)(citing *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983)).

Defendants’ proposed jury instruction is particularly confusing here where none of the individual defendants’ actions alone were sufficient to cause the injury; rather, each defendant played a part in the larger sequence of events which culminated in the reinstatement and enforcement of the exclusion of coverage for “gender reassignment” procedures or services to treat gender dysphoria that harmed the Plaintiffs. Because of this, the language “You may not hold [individual defendant] liable for what others did or did not do” is likely to be misleading.

Plaintiffs affirmatively propose the following language:

“Plaintiffs must prove by a preponderance of the evidence that [individual defendant] was personally involved in the conduct that Plaintiff complains about. “Personal involvement” does not mean that [individual defendant] was directly involved in the denial of medical coverage for a “gender reassignment” procedure or service or the only cause of the denial of coverage.

Rather, Plaintiffs must show some causal connection between the denial of coverage and [individual defendant]’s action or actions. [Individual defendant] can also be liable if [he/she] knew about the denial of coverage and failed to act to stop it.

Plaintiffs further object to the final paragraph of this Proposed Jury Instruction because it places a burden on Plaintiffs to prove individual discriminatory intent. Because Defendants have employed a facially discriminatory policy, Plaintiffs need not show any evidence of intent to prevail on their Equal Protection claim. *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 579 (7th Cir. 2014) (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (“the absence of a malevolent

motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect”).

Theodore Neitzke

Insofar as Defendant’s Proposed Jury Instructions regarding personal involvement of Defendant Neitzke are identical to those regarding Defendant Conlin, Plaintiffs raise the same objections.

Defendants’ Proposed Jury Instruction No. 6⁵:
Equal Protection Clause via 42 U.S.C. § 1983- liability, discrimination on sex
(individual and official capacity claims)

Plaintiffs object to the title of this jury instruction on the basis that it refers to discrimination on the basis of “sex.” For the reasons described above in Plaintiffs’ response to Defendants’ Proposed Jury Instruction No. 3, references to discrimination on the basis of sex should instead refer to discrimination on the basis of transgender identity.

Paragraph 1: Plaintiffs object to the final sentence of this paragraph because it misstates the law. The Equal Protection Clause guarantees all citizens the right to equal protection under the law. The Equal Protection Clause is not limited to preventing discrimination on the basis of sex or any other class.

⁵ In Defendants’ Proposed Jury Instructions, this is labeled as Defendants’ Proposed Jury Instruction No. 7, as is the following instruction regarding “Damages (except as to § 1983 official capacity claims).” There is no instruction labeled No. 6 in Defendants’ Proposed Jury Instructions, but Plaintiffs make this correction here for the sake of clarity.

Plaintiffs also object to Defendants' use of the qualifying phrase "by persons acting under color of state law." There is no dispute that Defendants were acting under the color of state law when they reinstated the coverage exclusion which is the subject of this lawsuit. This phrase serves only to unnecessarily confuse the jury.

Paragraph 2: Plaintiffs object to this paragraph in its entirety. As explained in response to Defendants' Proposed Jury Instruction No. 5, because Defendants have employed a facially discriminatory policy, Plaintiffs need not show any evidence of discriminatory intent to prevail on their Equal Protection claim. *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 579 (7th Cir. 2014) (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect").

Paragraph 3: Plaintiffs object to this paragraph because its reference to "individual Defendants den[ying] them. . . health insurance coverage" is confusing. Defendants have already proposed an instruction related to personal involvement of defendants Conlin and Neitzke, and do not appear to dispute that the remainder of the defendants had sufficient personal involvement to be personally liable if the policy is found to violate the Equal Protection Clause. Therefore, this paragraph serves no discernable purpose in guiding the jury and can only serve to add confusion.

Paragraph 4: Plaintiffs object to this paragraph in its entirety because it implies an element of discriminatory motive or intent which Plaintiffs need not prove. Further, this paragraph is confusing in that it requires the jury to determine that

Plaintiffs “were denied coverage by each of these individual Defendants because of their sex.” (emphasis added). No single defendant’s actions alone were sufficient to deny Plaintiffs coverage, but this instruction may mislead the jury into believing that they must find that each defendant’s actions were necessary and sufficient to deny Plaintiffs coverage. To the extent that this Court allows this instruction, Plaintiff again objects to the language “because of sex” and “had they been born of the female sex but everything else had been the same” for the same reasons as described above in response to Defendants’ Proposed Jury Instruction No. 3.

**Defendants’ Proposed Jury Instruction No. 7:
Damages (except as to § 1983 official capacity claims)**

Plaintiffs object to this instruction as it is incomplete. The final paragraph of this instruction should read “For Plaintiff Shannon Andrews, you should also consider the reasonable value of medical care that Andrews reasonably needed and actually received as well as the present value of the care that she is reasonably certain to need and receive in the future.” (addition underlined).

Additionally, this instruction must also include those damages for “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.”

Dated this 14th day of September, 2018.

HAWKS QUINDEL, S.C.

Counsel for Plaintiffs,

By: /s/ Nicholas E. Fairweather

Nicholas E. Fairweather, State Bar No. 1036681

Email: nfairweather@hq-law.com

Caitlin Madden, State Bar No.

Email: cmadden@hq-law.com

Michael R. Godbe, State Bar No. 1104823

Email: mgodbe@hq-law.com

Amanda M. Kuklinski, State Bar No. 1090506

Email: akuklinski@hq-law.com

409 East Main Street

Post Office Box 2155

Madison, Wisconsin 53701-2155

Telephone: (608) 257-0040

Facsimile: (608) 256-0236

**AMERICAN CIVIL LIBERTIES UNION OF
WISCONSIN FOUNDATION**

Counsel for Plaintiffs,

By: /s/ Laurence J. Dupuis

Laurence J. Dupuis, State Bar No. 1029261

Email: ldupuis@aclu-wi.org

Asma I. Kadri, State Bar No. 1114761

Email: akadri@aclu-wi.org

ACLU of Wisconsin Foundation

207 East Buffalo Street, Suite 325

Milwaukee, Wisconsin 53202

Telephone: (414) 272-4032

**AMERICAN CIVIL LIBERTIES UNION
FOUNDATION and ROGER BALDWIN
FOUNDATION OF ACLU, INC.**

Counsel for Plaintiffs,

By: */s/ John A. Knight*

John A. Knight, IL State Bar No. 6201433

Email: jaknight@aclu.org

ACLU Foundation

Lesbian Gay Bisexual Transgender Project

Carolyn M. Wald, IL State Bar No. 6324807

Email: cwald@aclu-il.org

Roger Baldwin Foundation of ACLU, Inc.

150 North Michigan Avenue, Suite 600

Chicago, Illinois 60601

Telephone: (312) 201-9740