

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 SPECIAL VERDICT FORM – LIABILITY AND DAMAGES**

Plaintiffs, by their undersigned counsel, hereby respond to Defendants' Proposed Special Verdict Form.

As a preliminary matter, Plaintiffs object to the use of separate verdict questions for each plaintiff on the issues of liability for the reasons stated in Plaintiffs' Response to Defendants' Proposed Jury Instruction No. 1. Plaintiffs also object to all uses of the phrase "because of sex" or "on the basis of sex" for the reasons stated in Plaintiffs' Response to Defendants' Proposed Jury Instruction No. 3. Plaintiffs propose substituting the phrase "on the basis of transgender identity" for each use of "because of sex" in Defendants' Proposed Verdict Form.

Liability – Title VII

Question 1, 3, 5, 7: Plaintiffs object to these questions because these are legal issues which have already been decided by this Court. (Dkt. # 67, May 11, 2018 Decision and Order on Defendants’ Motion to Dismiss, “Decision and Order” at 16).¹ 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.

Question 2, 4, 6, 8: Plaintiffs object to these questions because they misstate the applicable legal standard. Because the exclusion is facially discriminatory, Plaintiffs need not show intent in order to prevail on their Title VII claims. *See UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

Liability – ACA

Questions 1 and 2: Plaintiffs object to these questions because the language misstates the applicable legal standard. Because the exclusion is facially discriminatory, Plaintiffs need not show intent. *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)

¹Though 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 “plaintiffs employers delegated to ETF/GIB the responsibility” to determine services covered).

(under Title VII, when an employer institutes a facially discriminatory policy, intent is irrelevant).

Liability – Equal Protection

Questions 1 and 2: Plaintiffs object to these questions because they are convoluted and confusing. Plaintiffs propose the following alternative language: “Was [individual defendant] personally involved in the decision to exclude medical coverage for ‘gender reassignment’ procedures or services?”

Question. 3: Plaintiffs object to this question in its entirety because intent is irrelevant to Plaintiffs’ Equal Protection claim. *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 579 (7th Cir. 2014); *United States v. Virginia*, 518 U.S. 515, 531-533 (1996). Rather, the verdict form should ask a single question applicable to all defendants: “Did Defendants violate Plaintiffs’ right to Equal Protection of the law by excluding coverage for procedures, services, and supplies related to medical treatment for gender dysphoria?”

Damages

Plaintiffs object to this special verdict form because the damages are incomplete and do not contain punitive damages. See Plaintiff’s Proposed Special Verdict Form – Damages (Dkt. # 163).

Dated this 14th day of September, 2018.

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