

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 OPPOSITION TO DEFENDANTS'
MOTIONS *IN LIMINE* TO EXCLUDE DAMAGES EVIDENCE**

Plaintiffs, Alina Boyden and Shannon Andrews (collectively "Plaintiffs"), through their undersigned counsel, respectfully submit the following brief in opposition to Defendants' Motions *in Limine* to exclude evidence of various damages (Dkt. # 188).

INTRODUCTION

Defendants seek to exclude four categories of damages evidence related to: (1) Plaintiff, Shannon Andrews', facial feminization surgical procedures; (2) Andrews' distress before March 2014; (3) Andrews' distress related to prior wording of the Exclusion; and (4) Plaintiff, Alina Boyden's, damages before 2015.

Defendants seek to limit Plaintiffs' damages by attempting to erect walls around Plaintiffs' emotional distress, arguing that distress occurring before Plaintiffs were subject to the Exclusion is wholly irrelevant to distress experienced while they

received coverage under the terms of the Uniform Benefits. Defendants would deprive Plaintiffs from fully describing the distress sustained by operation of the Exclusion and ignores the principle that defendants in discrimination cases – like other tortfeasors – take their plaintiffs as they find them. *See Williamson v. Handy Button Machine Company*, 817 F. 2d 1290, 1294 (7th Cir. 1987) (race discrimination contributed to deterioration of plaintiff’s pre-existing mental condition; preexisting mental state was relevant to damages caused by discrimination).

Distress related to excluded medical procedures is relevant to Plaintiffs’ emotional and mental states existing immediately prior to being subjected to the Exclusion at issue in this case. Such evidence provides background and context upon which the damages caused by Defendants’ imposition of the Exclusion rests. The Court should deny Defendants’ Motions *in Limine* to Exclude Evidence of Various Damages and allow the jury to determine an appropriate sum of money that fairly compensates Plaintiffs for their emotional distress and mental anguish.

ARGUMENT

I. Evidence of Damages Related to Shannon Andrews’ Facial Feminization Surgery is Relevant and Admissible Because Defendants’ Exclusion of Medical Coverage for This Procedure was the Direct and Proximate Result of Her Damages.

In Motion *in Limine* No. 1, Defendants assert that Andrews should be prevented from introducing evidence of damages related to the denial of coverage for her facial feminization surgery because she cannot show a causal link between Defendants’ actions and denial of coverage, claiming that “[a]s 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.” (Dkt. # 188, p. 5). The Court should deny Defendants’ Motion *in Limine* No. 1 because: 1) Andrews was not enrolled in the WPS health plan when she obtained facial feminization surgery; and 2) the Uniform Benefits contract is the only document which governed whether Andrews received coverage for her facial feminization procedures and therefore is the only cause of the denial of coverage for her surgery.

First, Andrews was not enrolled in WPS when she received her facial feminization procedures. As of January 1, 2018, WPS no longer participated in the State of Wisconsin Group Health Insurance Program and, accordingly, was not Andrews’ insurer. (Decl. of Nicholas E. Fairweather, Exhibit B (Screenshot of ETF Website)). Andrews seeks damages for the facial feminization surgery (hereinafter “FFS”) she received in February, 2018. (Dkt. # 177-1, p. 6). Thus, the existence of any WPS policy excluding coverage for FFS procedures is irrelevant to Andrews’ claim for reimbursement of the expenses she incurred in 2018.¹

Second, the policies of Andrews’ third-party insurer are irrelevant because the “Uniform Benefits contract” is the only “document that provides the criteria used to determine whether coverage is available for surgery to treat a medical condition, injury, infection, or congenital condition.” (Decl. of Nicholas E. Fairweather, Exhibit A (State Defendants’ Responses and Objections to Plaintiffs’ Second Set of Requests for Production of Documents and Things, p. 3-4); State Defendants’ Response to

¹ All of Andrews’s FFS procedures were performed in 2018. (Dkt. # 99, ¶ 27).

Plaintiffs' Proposed Findings of Fact. (Dkt. # 122 at ¶ 82). In fact, the Uniform Benefits are instituted specifically to *prevent* what Defendants claim has occurred here – different participating health plans providing different benefits. (Deposition of Lisa M. Ellinger (Dkt. # 68 at 38:10-19 (“uniform benefits was instituted to ensure that all those health plans were administering the same benefits package.”)). Defendants fail to explain how a policy document from a “third-party insurer” could deny coverage if such coverage were available under the terms of the Uniform Benefits, which apply to every health plan offered to state employees.

If the jury or the Court determines that the Exclusion violates any or all of the protections available to Andrews under Title VII, the ACA, and Equal Protection, it necessarily follows that an insurer participating in the GHIP cannot exclude these services. If Andrews cleared Defendants' “first hurdle,” there would be no “second hurdle” to clear and she would have obtained coverage for the FFS procedures without obstruction.

II. Evidence of Damages Related to Andrews' and Boyden's Emotional Distress Predating Their Coverage Under the Uniform Benefits is Relevant and Admissible Because it Provides Context for Plaintiffs' Diagnoses of Gender Dysphoria.

Defendants' Motions *in Limine* Nos. 2 and 4 seek to exclude evidence of Plaintiffs' emotional distress that occurred prior to working for the State of Wisconsin, which provided health insurance subject to the Uniform Benefits. While their prior emotional distress cannot provide the basis for Plaintiffs' damages as there is no causal connection between it and the coverage exclusion that Plaintiffs argue is unlawful, evidence related to the prior distress contextualizes, and is inseparable

from, the emotional distress caused by the coverage exclusion. The jury cannot fully understand the extent of Plaintiffs' distress caused by the Exclusion without hearing evidence related to Plaintiffs' prior distress associated with their gender dysphoria.

Evidence is relevant if it possesses "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Here, Plaintiffs' distress – and the extent of that distress – resulting from the Exclusion is clearly informed by related distress sustained prior to the Exclusion. Simply, it is "more probable" that Plaintiffs suffered distress as a result of any delay in obtaining gender confirmation surgery due to the Exclusion if they had been suffering similar distress before the delay occurred.²

Defendants contend that any distress resulting from Plaintiffs' inability to obtain gender reassignment surgery before they began working for their respective state employers has no relationship to the Exclusion and thus is irrelevant. (Dkt. # 188, pp. 8, 11). But Defendants miss their mark. Evidence of prior distress does not need to have a relationship *to the Exclusion* to be relevant and admissible. Plaintiffs' prior emotional distress is not only relevant but indispensable in order to understand the extent of Plaintiffs' damages caused by the coverage exclusion. As such it is relevant and the jury must be allowed to consider it in determining Plaintiffs' non-economic compensatory damages.

² Any improper inference a jury may draw from this evidence is easily addressed by issuing the jury a limiting instruction.

III. The 2012 Language of the Exclusion is Relevant to Andrews' Claim for Compensatory Damages.

Defendants' Motion *in Limine* No. 3 should be denied because evidence related to the Exclusion's offensive prior wording is relevant to Andrews' claim for compensatory damages.³

As a preliminary issue, contrary to Defendants' assertion, Andrews was employed by the Board of Regents at the University of Wisconsin in 2012. After receiving her Ph.D. in molecular biology at Princeton University, Andrews returned to Wisconsin to work as a post-doctoral fellow in a genetics laboratory. She had access to health insurance during that time and it was then that she became familiar with the Exclusion language as it existed in 2012, including the reference to "sexual transformation." Deposition of Shannon Andrews, ___:___.⁴

Andrews' familiarity with the 2012 Exclusion language is certainly relevant to her mental and emotional state when she began employment in her current position. The hostility exhibited in the 2012 language of the Exclusion, causing mental anguish and emotional distress, was compounded when Defendants reconsidered the Exclusion but, rather than removing it, simply decided to change the language while maintaining the exclusion itself. Again, Defendants take Plaintiffs as they find them;

³ Cases cited by Defendants in support of their contention that Andrews cannot recover these damages are inapposite here. (See Defendants' Motions *in Limine* (Nos. 1-4) to Exclude Evidence of Various Damages (Dkt. # 187) at 10, n. 4). Plaintiffs are not making a hostile work environment claim, and they are not arguing that the offensive prior language of the exclusion violated the law because it was offensively-worded. Rather, this evidence would only be introduced as part of Andrews' damages, not liability.

⁴ Ms. Andrews testified to these facts during her deposition, which Defendants took on September 13, 2018, the day before this filing. As such, the transcript has not yet been produced.

here, Plaintiffs' pre-existing emotional distress and mental anguish was part and parcel of the distress caused by Defendants.

For all of these reasons, the Court should deny Defendants' Motions *in Limine* to exclude evidence of various damages in their entirety.

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