

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' RESPONSE TO PLAINTIFFS' JURY INSTRUCTIONS  
AND SPECIAL VERDICT FORM QUESTIONS**

---

**ARGUMENT**

- A. Plaintiffs Proposed Jury Instruction No. 6 and Special Verdict Form Question Nos. 8 and 9, all of which improperly address punitive damages, should not be accepted.**

Plaintiffs filed a jury instruction that references punitive damages as to their Title VII claim and special verdict form questions concerning punitive damages without reference to any claim. Because Plaintiffs only specifically sought punitive damages under Title VII in their original complaint, later abandoned this demand, and never sought punitive damages in any subsequent amended complaints, Plaintiffs cannot now seek punitive damages at all.

## 1. Background.

Plaintiffs filed their complaint on April 7, 2017. (Dkt. 1.) It contained Title VII and the Patient Protection and Affordable Care Act (ACA) claims against the Department of Employee Trust Funds (ETF) and the Group Insurance Board (GIB), (Dkt. 1:22–24 ¶¶ 94–103, 24–25 ¶¶ 104–10), and claims against ETF Secretary Robert Conlin under the Equal Protection Clause via 42 U.S.C. § 1983 (Dkt. 1:20–22 ¶¶ 83–93). In the complaint’s prayer for relief, Plaintiffs specifically sought “[p]unitive damages for violation of Title VII.” (Dkt. 1:26.) It made no other demand for punitive damages as to any of the other claims.

On June 16, 2017, Plaintiffs filed an amended complaint. (Dkt. 27.) The claims remained the same. Plaintiffs’ prayer for relief did not change either—it also only sought punitive damages under its Title VII claims. (Dkt. 27:25.)

Defendants filed a motion to dismiss all claims along with a supporting brief. (Dkt. 28–29.) They argued that punitive damages against government entities were prohibited by the text of Title VII. (Dkt. 29:25.) In their response dated August 11, 2017, Plaintiffs unequivocally abandoned their demand for punitive damages in the lawsuit: “Plaintiffs also agree that the punitive damages claims under Title VII against the State Defendants (Defs.’ Br. at 22) [sic] may be dismissed.” (Dkt. 39:23 n.11.)

Several months later, on May 11, 2018, this Court issued its decision, granting in part and denying in part, Defendants' motion to dismiss. (Dkt. 67.) The Court acknowledged that Plaintiffs had abandoned their Title VII claim for punitive damages. (Dkt. 67:1–2 n.1.)

Then, in the midst of summary judgment briefing, on May 25, 2018, Plaintiffs filed a motion for leave to file a second amended complaint. (Dkt. 74.) This proposed complaint added as defendants the individual members of GIB, in their individual and official capacities, as to Plaintiffs' § 1983 claims. Also, in conformance with Plaintiffs' previous position abandoning its demand for punitive damages, the proposed pleading contained no demand for punitive damages. (Dkt. 74-1:32–33.)

On September 7, 2018, Plaintiffs proposed “Jury Instruction No. 6,” which concerns punitive damages. It references “Seventh Circuit Pattern Instruction 3.13.” (Dkt. 161:9.) This is a pattern jury instruction for punitive damages in employment discrimination claims under Title VII, § 1981, and the Age Discrimination in Employment Act (ADEA).<sup>1</sup> In addition, Plaintiffs proposed question nos. 8 and 9 in their proposed special verdict form on damages. They asked if “Defendants act[ed] in reckless disregard of Plaintiffs’

---

<sup>1</sup> Federal Civil Jury Instructions of the Seventh Circuit 58, 82–83 (2017 rev.) See [http://www.ca7.uscourts.gov/pattern-jury-instructions/7th\\_cir\\_civil\\_instructions.pdf](http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf) (last visited September 14, 2018).

rights” and, if so, “[w]hat amount of punitive damages do you award?” (Dkt. 163:2.)

**2. Plaintiffs abandoned their request for punitive damages under Title VII because it does not permit such relief.**

Plaintiffs’ attempt to resurrect their request for punitive damages under Title VII through a jury instruction and special verdict questions should be rejected for four reasons. First, Plaintiffs expressly abandoned punitive damages in their previous briefing. (Dkt. 39:23 n.11.) Second, this Court acknowledged Plaintiffs’ abandonment of their punitive damages request. (Dkt. 67:1–2 n.1.) Third, Plaintiffs’ second amended complaint—the operative pleading in this lawsuit—does not contain any demand for punitive damages. (Dkt. 74-1:32–33.) Fourth, federal law is clear: a plaintiff cannot seek punitive damages under Title VII against a government entity. 42 U.S.C. § 1981a(b)(1) (punitive damages only allowed against defendant “other than a government, government agency or political subdivision”); *Passanati v. Cook Cty.*, 689 F.3d 655, 677 (7th Cir. 2012) (holding that plaintiff’s government employer “cannot be held liable for punitive damages”). And here, Plaintiffs only sued two government entities under Title VII—ETF and GIB. (Dkt. 74-1:29.) Although Plaintiffs’ two special verdict questions (nos. 8 and 9) about punitive damages do not reference any specific claim,

they should be rejected to the extent they purport to enable punitive damages under Title VII for these same reasons.

Since Plaintiffs abandoned their improper request for punitive damages under Title VII, this Court should decline to adopt Plaintiffs' Proposed Jury Instruction No. 6 and special verdict questions 8 and 9.

**3. Plaintiffs should not be permitted at the eleventh-hour to seek punitive damages under their ACA or § 1983 claims.**

To the extent Plaintiffs contend they are entitled to seek punitive damages under their other claims—ACA and § 1983—that argument would also fail.

First, Plaintiffs never sought punitive damages in any of their complaints as to any claims other than Title VII. While a party need not necessarily include a demand for punitive damages in its complaint, *see Back Doctors Ltd. v. Metropolitan Property & Casualty Insurance Company*, 637 F.3d 827, 831 (7th Cir. 2011), the federal rules also require that “[i]f an item of special damage is claimed, it must be specifically stated.” Fed. R. Civ. P. 9(g). Here, Plaintiffs’ claims for punitive damages as to the ACA and § 1983 claims are not specifically stated.

Second, punitive damages are not permitted under the ACA anyway because punitive damages claims are not allowed under Title IX—the basis for the ACA.<sup>2</sup>

Third, even if no express prayer for punitive damages is required, Plaintiffs should not be able to seek them at the eleventh hour because Defendants had no notice that Plaintiffs intended to do so. Plaintiffs' abandoned Title VII punitive damages request, combined omitting any reference to punitive damages as to any other claim, did not place Defendants on notice that Plaintiffs would seek punitive damages as to their § 1983 and ACA claims. Moreover, none of Plaintiffs' several complaints contained any allegations that any of the defendants acted wantonly, egregiously, recklessly, or in willful disregard of Plaintiffs' rights—the necessary code words for punitive damages. *Back Doctors*, 637 F.3d at 831; *Bartlett v. NIBCO Inc.*, No. 08-cv-597, 2011 WL 1042324, \*3 (N.D. Ind. Mar. 18, 2011) (holding that plaintiff cannot seek punitive damages at trial due to failure to include facts in pleading putting defendant on notice of intent to seek such damages); *Newell v. Wis. Teamsters Joint Council No. 39*, No. 05-cv-552, 2007 WL 2874938, \*4 (E.D. Wis. Sept. 28, 2007) (“[T]he complaint must contain

---

<sup>2</sup> In *Barnes v. Gorman*, 536 U.S. 181 (2002), the Supreme Court held that punitive damages are not permissible under Title VI of the Civil Rights Act of 1964. The Court has used Title VI decisions to construe Title IX. See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

sufficient allegations to inform the defendant that punitive damages are on the table, so to speak.”). Plaintiffs’ pleadings result in the reasonable conclusion that Plaintiffs were *not* seeking punitive damages as to their § 1983 and ACA claims and that Defendants were *not* placed on notice that they would do so now.

Allowing Plaintiffs to seek punitive damages now, perhaps through filing a third amended complaint, would severely prejudice Defendants. Such prejudice is a sufficient reason for a district court to deny a plaintiff’s request for punitive damages at trial. *See Bartlett*, 2011 WL 1042324 at \*1 (*citing Kaszuk v. Bakery & Confectionery Union & Indus. Int’l. Pension Fund*, 791 F.2d 548, 559 (7th Cir. 1986)). For one, summary judgment briefing is over and discovery is now closed, so Defendants cannot now propound contention interrogatories asking Plaintiffs to disclose the facts upon which their punitive damages claims rest and then move for summary judgment. *See Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008) (district court did not abuse discretion in denying plaintiff’s attempt to amend complaint to add punitive damages claim after summary judgment and after close of discovery); *Kleinhans v. Lisle Sav. Profit Sharing Tr.*, 810 F.2d 618 (7th Cir. 1987) (same)); *Trotter v. B & W Cartage Co., Inc.*, 2006 WL 1004882, \*1 (S.D. Ill. 2006) (motion for summary judgment may be rendered as to the issue of the availability of punitive damages). Second, even if this Court were

to grant Defendants leave to seek discovery, they would be unduly burdened by such discovery because they are now engaged in pre-trial motions and preparation for trial beginning October 9. Finally, the potential for punitive damages might have changed Defendants' settlement position.

In sum, to the extent Plaintiffs' punitive damages jury instruction and special verdict questions apply to their § 1983 and ACA claims, they must be rejected because Plaintiffs failed to place Defendants on notice of punitive damages. Plaintiffs' jury instruction no. 6 and special verdict question nos. 8 and 9 should not be adopted.

**B. Plaintiffs' Proposed Jury Instruction No. 1 should not be adopted in full.**

Plaintiffs include in their equal protection jury instruction the following clause: "Because the Defendants have refused to cover these procedures on the basis of Plaintiffs' transgender identity . . . ." (Dkt. 161:2.) This is essentially an instruction that liability has been found, not an instruction on whether liability may be found. Defendants have disputed that the Exclusion is discriminatory, because the Uniform Benefits exclude all cosmetic treatments for psychological conditions—it treats cisgender and transgender individuals alike when it comes to these forms of treatment. (*See* Dkt. 80:20–24.) This clause must not be adopted because it assumes a disputed fact that is for the jury to decide. Moreover, this clause is part of a sentence that

assumes the proper level of scrutiny is intermediate scrutiny, not rational basis. (Dkt. 161:2.) To the extent intermediate scrutiny is not the proper level, the entire jury instruction must not be adopted.

In addition, this instruction includes the sentence: “Cost savings alone cannot constitute an ‘exceedingly persuasive justification’ sufficient to meet Defendants’ burden.” (Dkt. 161:2.) Plaintiffs cite five cases, but only a non-binding district court decision supports this proposition. *See Bassett v. Snyder*, 59 F. Supp. 3d 837, 854–55 (E.D. Mich. 2014) (“And, although the Sixth Circuit has not addressed the issue, the First and Ninth Circuits have held that cost savings alone are insufficient to justify an otherwise discriminatory statute.”). This “cost savings alone” sentence should not be included in the jury instruction.

**C. Plaintiffs’ Proposed Jury Instruction No. 2 should not be adopted.**

Plaintiff’s Proposed Jury Instruction No. 2 should be disregarded too. Plaintiffs claim that for the jury to find for them, it does not need to find that Defendants intended to discriminate. (Dkt. 161:4.) None of the decisions cited by Plaintiffs support this proposition, and for good reason, Plaintiffs are simply wrong. The Seventh Circuit has squarely held: “The equal protection clause of the Fourteenth Amendment protects individuals against intentional, arbitrary discrimination by government officials.” *Lauderdale v. Ill. Dep’t of*

*Human Servs.*, 876 F.3d 904, 909–10 (7th Cir. 2017) (citation omitted). Plaintiffs’ instruction assumes that the Exclusion is discriminatory on its face and thus there is no need for a showing of discriminatory intent, (Dkt. 186:2–4), but that has not been found by this Court, nor have Plaintiffs submitted a jury instruction to that effect. Plaintiff’s Proposed Jury Instruction No. 2 should not be adopted.

**D. Plaintiffs’ Proposed Jury Instruction No. 3 should not be adopted.**

Plaintiffs’ third proposed jury instruction has three flaws. First, it claims that the ACA prohibits discrimination on the basis of “transgender identity.” (Dkt. 161:5.) As Defendants argued in their briefs, the ACA cross-references Title IX, which uses the word “sex” rather than “transgender status” or “transgender identity.” Second, Plaintiffs again cite a district court decision, *Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017), in support of its position, which this Court is not bound to follow. Third, the jury instruction does not tell the jury that it must find that ETF committed intentional discrimination. See *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 582–83 (7th Cir. 2014) (“The discrimination must also be intentional in order to support a claim for damages under Title IX.”).

**E. Plaintiffs’ Proposed Jury Instruction No. 4 should not be adopted.**

Plaintiffs’ Title VII jury instruction also should not be accepted. As with the ACA, Title VII uses the term “sex” rather than “transgender identity.” And, as a result, the Seventh Circuit has squarely held that this federal law does not apply to transgender persons. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984). Therefore, the jury instruction should only include the term “sex.” Further, because Plaintiffs wholly fail to “fill in the blanks” in the final sentence of the first paragraph—regarding how to determine discrimination, Plaintiffs have forfeited the jury instruction and Defendants’ complete instruction should control.

**F. Plaintiffs’ Special Verdict Question Nos. 5 and 7 should not be adopted.**

In their Proposed Jury Instruction No. 5 and Special Verdict Question Nos. 5 and 7, regarding compensatory damages, Plaintiffs use the term “loss of normal life.” (Dkt. 161:7, 163:1–2.) This phrase, however, is preceded by the term “(disability)”, which implies an instruction for a disability-based claim. Such a phrase is not applicable to this lawsuit concerning transgender persons and gender dysphoria. Also, this phrase is not commonly understood and is defined in Plaintiffs’ jury instructions. The jury would be too confused about the meaning of this term to render a proper verdict. The phrase

“physical and mental/emotional pain and suffering” is the only proper one to include.

### CONCLUSION

Defendants ask that the Court decline to adopt Plaintiffs’ Proposed Jury Instruction No. 6 and Question Nos. 8 and 9 of their Special Verdict Form - Damages.

Defendants ask that the Court decline to adopt Plaintiffs’ Proposed Jury Instruction Nos. 2–4 at all.

Defendants ask that the Court decline to adopt Plaintiffs’ Proposed Jury Instruction No. 1 in full.

Defendants ask that the Court decline to adopt Plaintiffs’ Special Verdict Question Nos. 5 and 7.

Dated this 14th day of September, 2018.

Respectfully submitted,

BRAD D. SCHIMEL  
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick  
STEVEN C. KILPATRICK  
Assistant Attorney General  
State Bar #1025452

COLIN T. ROTH  
Assistant Attorney General  
State Bar #1103985

JODY J. SCHMELZER  
Assistant Attorney General  
State Bar #1027796

Attorneys for State Defendants

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-1792 (SCK)  
(608) 264-6219 (CTR)  
(608) 266-3094 (JJS)  
(608) 267-2223 (Fax)  
kilpatricksc@doj.state.wi.us  
rothct@doj.state.wi.us  
schmelzerjj@doj.state.wi.us