

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 SUPPORT OF SUBMITTING
OUT-OF-POCKET LOSSES TO JURY**

Plaintiffs, by their undersigned attorneys, request that the Court submit the question of relief for Plaintiffs' out-of-pocket costs for treatment of their gender dysphoria to the jury.

Under Title VII, "make-whole" monetary relief, such as back pay and "out-of-pocket healthcare costs," is equitable in nature and ordinarily to be decided by the court. *Stragapede v. City of Evanston*, 125 F. Supp. 3d 818, 823, 831 (N.D. Ill. 2015). However, a jury may decide the amount of such relief upon consent of the parties and the court. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 500-501 (7th Cir. 2000). A court may also of its own initiative have the jury act in an advisory capacity in setting the amount of out-of-pocket health care costs to which plaintiffs are entitled. *Id.* at 501 (*citing* Fed. R. Civ. P. 39(c)).

Moreover, monetary relief under section 1557 of the Affordable Care Act appears likely to be classified as compensatory damages subject to trial by jury, even if the relief could be characterized as the sort of “make-whole” relief that would be equitable for purposes of Title VII. *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1119 (11th Cir. 2007) (in Rehabilitation Act and ADA case, “compensatory damages are designed to make the plaintiff whole. . . .”); *see also Pals*, 220 F.3d at 499 (noting that while back pay is equitable relief under 42 U.S.C. § 2000e-5(g), it may be considered “‘compensatory damages’ as that term may be used colloquially, or even ‘compensatory damages’ as lawyers normally employ the term.”).

Accordingly, because Defendants are likely entitled to have a jury determine the amount of all monetary relief under the ACA and the Plaintiffs consent to having the jury determine the amount of monetary equitable relief under Title VII, Plaintiffs ask that the question of the amount of such relief be submitted to the jury.

Dated this 27th 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 M. Madden, State Bar No. 1089238
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

**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**

Counsel for Plaintiffs,

By: */s/ John A. Knight*

John A. Knight

Email: jknight@aclu.org

ACLU Foundation

Lesbian Gay Bisexual Transgender Project

Carolyn M. Wald

Email: cwald@aclu-il.org

Roger Baldwin Foundation of ACLU, Inc.

150 North Michigan Avenue, Suite 600

Chicago, Illinois 60601

Telephone: (312) 201-9740