

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' OBJECTION TO DEFENDANTS'
PROPOSED ADDITIONAL LANGUAGE**

In response to this Court's invitation (Dkt. # 215-1), Defendants have proposed additional jury instruction language concerning the Group Insurance Board's vote to remove the coverage exclusion. Defendants propose inserting at the end of the current page 1 of the Court's "Introductory Instructions" the following: "However, the Defendant State of Wisconsin Group Insurance Board has since decided to end this coverage exclusion, so state employees may obtain these benefits in the future." Plaintiffs believe the proposed language has the potential to confuse or prejudice jurors and that it is not necessary to achieve the purported purpose of clarifying for jurors that Plaintiffs do not seek future damages. Plaintiffs propose the following alternative language to achieve the same purpose: "Plaintiffs seek damages for the period beginning with the start of their employment by their current employers and

ending with the conclusion of the trial. Plaintiffs do not seek damages for future harm.”

Defendants proposed instruction is misleading as written. First, it inaccurately suggests that coverage is immediately available to Plaintiffs and other state employees going forward, even though the GIB’s recent decision leaves the exclusion in effect until at least January 2019. It could also be read to suggest that Plaintiffs may be able to submit claims for benefits for services they have already received and paid for, even though the GIB’s action is not retroactive. Finally, by omitting the history of the GIB’s previous removal and reinstatement of the exclusion, it suggests that future coverage is a *fait accompli*, despite the narrow GIB vote and continued controversy.

Although the rules of evidence do not directly apply to jury instructions, the principles animating Federal Rule of Evidence 403 are instructive here. A district court should exclude even relevant evidence if the “probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues [or] misleading the jury” Fed. R. Evid. 403. Defendants seek to have information presented to the jury through the proposed instruction that implies the GIB’s vote to remove the exclusion, which does not take effect until January 2019 (if at all), is somehow relevant to the damages Plaintiffs seek in this case. The GIB vote is not relevant to the damages Plaintiffs have already suffered. It would only be relevant to damages after January 2019, if Plaintiffs were seeking monetary relief for future injury. Since Plaintiffs are not seeking damages beyond the date of this trial, the recently adopted

GIB policy is irrelevant to the facts the jury must decide and would likely introduce confusion, rather than clarity. Any minimal probative value of presenting this statement to the jury is outweighed by the danger of confusion and unfair prejudice to Plaintiffs.

Introducing information about the GIB's action through an unnecessary instruction could prejudice Plaintiffs by suggesting that GIB took prompt and decisive action to correct its unlawful behavior, thus inappropriately eliciting sympathy for the Defendants. Such information is similar to evidence of "subsequent remedial measures" that are inadmissible under FRE 407. In general, such evidence is excluded because its prejudicial effect outweighs its probative value. *See Flaminio v. Honda Motor Co.*, 733 F.2d 463, 469 (7th Cir. 1984) (finding the district court properly excluded evidence of subsequent remedial measures under Rule 407 because prejudicial effect outweighed the probative value and no exception applied). Although it is ordinarily defendants who seek exclusion of evidence of subsequent remedial measures, there is no reason that such information should be admitted over plaintiffs' objections. The jury should focus on damages during the relevant period and not be distracted by the irrelevant actions of the GIB affecting a period that is not relevant to damages. *Thakore v. Universal Mach. Co. of Pottstown*, 670 F. Supp. 2d 705, 710 (N.D. Ill. 2009) ("Such evidence also distracts the jury from the relevant time frame for its inquiry. . .").

The Defendants' additional proposed language is unnecessary to explain to the jury that the damages period does not continue into the future. In order to ensure the jury has clear instructions at the outset, Plaintiffs suggest the following language: "Plaintiffs seek damages for the period beginning with the beginning of their employment with their current employer and ending with the conclusion of the trial. Plaintiffs do not seek damages for future harm." This will be sufficient to allow the jury to "focus on the relevant retrospective damages issues" (Defs. Prop. Add'l Language (Dkt. # 217) at 2) before evidence is taken, and will be reinforced by the parties' agreed damages period instruction before deliberation.

In the event the Court is inclined to provide some information about the GIB's action, Plaintiffs ask that it be made clear that the exclusion will remain in effect until January 2019, that the GIB has several meetings prior to the removal of the exclusion, and that the GIB in 2016 first voted to remove the exclusion, then voted to reinstate it shortly before it was to expire.

For the reasons stated above, Plaintiffs ask this Court to inform the jury in its introductory instructions only that the Plaintiffs do not seek damages beyond the date of trial, without attempting to explain the GIB's actions or this Court's likely future entry of an injunction.

Dated this 1st day of October, 2018.

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