

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' PROPOSED
AMENDMENTS TO JURY INSTRUCTIONS**

Pursuant to the Court's Pretrial Conference Order (Dkt. 215), Defendants respond to Plaintiffs' proposed amendments to introductory and closing jury instructions regarding the available categories of compensatory damages (Dkt. 218).

I. Response to Plaintiffs' proposed changes to introductory jury instructions.

Defendants agree with the three categories contained in Plaintiffs' proposed amendments to the introductory jury instructions. Defendants also agree with Plaintiffs (Dkt. 219) that the jury should decide whether Plaintiffs' out-of-pocket medical expenses are recoverable as damages, rather than submitting the issue to the Court to resolve as a form of equitable relief.

II. Response to Plaintiffs' proposed changes to closing jury instructions.

Defendants do not agree that the closing jury instructions should contain examples of the specific kinds of payments the jury may include in the three proposed damages categories. Providing such examples would be improper for three reasons. First, they are unnecessary. Plaintiffs will be free during opening and closing statements to present the specific expenses and emotional distress they contend should be awarded under each category. There is no need for the jury instructions to repeat arguments that Plaintiffs will surely make. Second, these examples risk creating jury confusion. Including them may lead the jury to assume that the Court has already concluded that these damages have already been proven, and that the jury need only put a price tag on them. That assumption would be false—the jury must first decide whether Plaintiffs have proved that the coverage exclusion caused each type of damages and, if so, only then their amount. Third, these examples risk creating jury bias. By expressly connecting the coverage exclusion at issue to a variety of purported damages and using words like “humiliation,” the proposed examples may lead the jury to believe that coverage exclusions like this one typically cause those kinds of damages, making them more likely to award damages without regard to the evidence than under a more neutral instruction.

Accordingly, Defendants propose the following edits to Plaintiffs' proposed closing jury instructions:

In assessing damages here, you should consider the following types of compensatory damages:

a. The costs of surgeries and hormone therapy received and paid for by the plaintiffs that were not covered by their State employee health insurance because of the exclusion, including costs of financing that medical care, ~~such as penalties associated with early withdrawals from retirement accounts;~~

b. The reasonable costs of other medical care that plaintiffs reasonably needed, actually received, and paid for that would not have been necessary if the exclusion had not existed, ~~such as Ms. Boyden's co-payments for testosterone blockers which could have been discontinued if she had obtained surgery and co-payments for additional psychotherapy Ms. Andrews received to help cope with gender dysphoria that would have been alleviated by earlier surgery;~~

c. Mental and emotional suffering resulting from the exclusion. ~~This includes the continued mental and~~

~~emotional pain and suffering from gender dysphoria that plaintiffs experienced because the exclusion of coverage prevented or delayed plaintiffs from receiving treatment they needed. It also includes any other mental or emotional pain and suffering that plaintiffs experienced during their employment as a result of being subject to the exclusion, such as the humiliation of being subjected to a policy that discriminated against them. No evidence of the dollar value of physical, mental or emotional pain and suffering has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate plaintiffs for the injury they have sustained.~~

Dated this 1st day of October, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

Electronically signed by:

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