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9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 Russell B. Toomey,

12 Plaintiff,

13 v.

14 State of Arizona, *et al.*

15 Defendants.

CV-19-00035-TUC-RM

**DEFENDANTS STATE OF
ARIZONA’S, ANDY TOBIN’S, AND
PAUL SHANNON’S REPLY IN
SUPPORT OF MOTION FOR
CLARIFICATION**

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17 The Court’s August 9, 2022 Order granting State Defendants’ Motion for
18 Reconsideration (the “Order”) (Doc. 278) precludes State Defendants from “arguing that
19 they held a good-faith subjective belief that their decision to maintain the exclusion for
20 gender reassignment surgery was legal.” (Doc. 278 at 6.) The Order does not preclude
21 State Defendants from presenting any specific evidence. (*See generally* Doc. 278.) To be
22 clear, State Defendants will not argue that they had a good-faith subjective belief that the
23 exclusion for gender reassignment surgery (the “Exclusion”) was legal, consistent with the
24 Order. In an abundance of caution, however, State Defendants simply seek clarification
25 regarding the application of the Order to certain evidence, which is relevant to State
26 Defendants’ remaining arguments. Based on the positions taken and arguments made by

1 Plaintiff in response to State Defendants’ Motion for Clarification, it is even more evident
2 that clarification is warranted.

3 **I. STATE DEFENDANTS REQUEST CLARIFICATION OF THE ORDER.**

4 **A. Plaintiff Mischaracterizes the Scope and Impact of the Order.**

5 Plaintiff mistakenly argues that the Order “forbids State Defendants from presenting
6 evidence that goes to their subjective state of mind.” (Doc. 287, at 5:5–21.) As explained
7 in the Motion and above, the Order does not go so far and does not preclude State
8 Defendants from presenting any specific evidence. (*See generally* Doc. 278.) That fact is
9 precisely why the Motion was necessary. State Defendants believe that the specific
10 evidence summarized in the Motion is not impacted by the Order, but do not want to
11 inadvertently violate this Court’s Order. The fact Plaintiff now strongly argues, contrary to
12 the plain language of the Order, that such evidence may not be used, further demonstrates
13 why clarification is needed.

14 In addition, Plaintiff appears to argue that the Order precludes all evidence of State
15 Defendants’ state of mind on any topic and at any time in 2016. (*See* Doc. 287, at 5:3–5.)
16 Again, the Order is not so broad. The Order precludes State Defendants’ defense that they
17 had a good faith belief that the Exclusion was legal. (Doc. 278, at 6.) Nothing in the Order
18 precludes State Defendants from discussing their state of mind generally during the
19 decision-making process or the factors that they were considering. Indeed, such a mandate
20 would make no sense because, absent a finding that the Exclusion is facially discriminatory,
21 Plaintiff must prove that State Defendants had a discriminatory motive when they made the
22 decision to maintain the Exclusion—essentially, that they had a discriminatory state of
23 mind. *See Ricci v. DeStefano*, 557 U.S. 557, 557 (2009); *Hazen Paper Co. v. Biggins*, 507
24 U.S. 604, 610 (1993).

25 Very curiously, Plaintiff now even argues that the issue in this case has nothing to
26 do with State Defendants’ state of mind or intent when State Defendants maintained the

1 Exclusion in 2016, but also admits Plaintiff will challenge State Defendants’ “motivation
 2 for maintaining it in 2016.” (*See* Doc 287, at 2:2-10, 24-28.) Plaintiff’s doublespeak in this
 3 regard is perplexing and further demonstrates why clarification is needed.¹

4 **B. The Evidence Summarized in the Motion is Relevant.**

5 Plaintiff incorrectly argues that the evidence summarized in the Motion is irrelevant
 6 because it only goes to State Defendants’ defense regarding their good faith belief that the
 7 Exclusion was legal. (Doc. 287, at 3:22–4:17.) As outlined in the Motion, each of the three
 8 enumerated categories of evidence is relevant to the remaining legal disputes in this matter.

9 **1. The State of The Law in 2016**

10 First, Plaintiff **admits** that the legal landscape is relevant to establishing and
 11 explaining the background of State Defendants’ decision to maintain the Exclusion in 2016.
 12 (Doc. 287, at 5 fn. 3.) This is the exact purpose for which State Defendants intend to utilize
 13 the evidence. (*See* Doc. 283, at 3:14–18.) As such, it appears that the parties are in
 14 agreement on this issue.

15 Although the parties’ agreement is sufficient here, State Defendants will also address
 16 Plaintiff’s remaining arguments.

17 *First*, it cannot credibly be disputed that the state of the law in 2016 is irrelevant to
 18 this dispute. In order to prove his claims, absent a finding that the Exclusion is facially

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¹ If Plaintiff is suggesting that State Defendants’ state of mind is irrelevant, particularly at the time the Exclusion was maintained for the 2017 plan year after exploring the issue in 2015 and 2016 based on regulations implemented to address Affordable Care Act Section 1557, it begs the question why Plaintiff prolonged this matter by conducting extensive discovery (including numerous depositions) about intent. It is even more perplexing why Plaintiff forced extensive motion practice trying unsuccessfully to obtain attorney-client privileged communications about those regulations. State Defendants are dismayed that, after all that time and related costs incurred by State Defendants, Plaintiff now, having lost in his efforts to obtain such information, admits the fundamental issue in this case is not “whether the State Defendants believed that [the Exclusion] was [lawful] when they decided to maintain it in 2016.” (Doc 287 at 2:2-4.) Until the Court granted State Defendants’ Motion for Reconsideration, State Defendants’ intent and state of mind had been Plaintiff’s primary focus in discovery in this case.

1 discriminatory, Plaintiff must prove that the Arizona Department of Administration
2 (“ADOA”) had discriminatory motive when it maintained the Exclusion. *See Ricci*, 557
3 U.S. at 557; *Hazen Paper Co.*, 507 U.S. at 610; Doc. 134, at 2:5–10. Whether or not the
4 Exclusion was legal in 2016, the May 18, 2016 final rule implementing non-discrimination
5 provisions under Section 1557 of the ACA (the “2016 Rules”), and the legal challenges to
6 the 2016 Rules all bear directly upon an analysis of the ADOA’s motive when making its
7 decision regarding the Exclusion. Moreover, this historical background is necessary to
8 discuss the current interpretations of Section 1557. Although Plaintiff decided not to pursue
9 any claims under Section 1557, Section 1557 continues to guide the coverage that Congress
10 intended be required under the health plans. As a result, a discussion of Section 1557 and
11 the 2016 Rules is certainly relevant.

12 *Second*, Plaintiff’s claims will be decided by the Court, not a jury. The Motion and
13 the instant dispute relates to the parties’ dispositive motion briefing, not trial. If this matter
14 proceeds to trial, neither party has requested a jury and the time to do so has now passed.
15 FRCP 38.1; Doc. 128, at 13:24–25. As such, the Court will hear and analyze any evidence
16 presented, including the evidence summarized in the Motion. It strains credulity to suggest
17 that the Court will be confused and misled by State Defendants’ evidence.² Indeed, case
18 law supports that evidentiary exclusions carry far less weight in a bench trial than a jury
19 trial. *See E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994) (“in a bench trial,
20 the risk that a verdict will be affected unfairly and substantially by the admission of
21 irrelevant evidence is far less than in a jury trial”); *Gulf States Utilities Co. v. Ecodyne*

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23 ² This argument contradicts Plaintiff’s prior agreement that, “If the Court determines that
24 the [] evidence is precluded by the [] Order, the parties agree that the [] evidence should not
25 be considered by the Court . . .” (Doc. 281, at 2:20–22.) The parties did not want to delay
26 the dispositive motion briefing schedule. (*Id.* at 2:16-20.) That agreement was reached, in
part, because Plaintiff argued that any unintentional violation of the Court’s order would
only be problematic if State Defendants were presenting evidence at trial to a jury.
Whereas, here, Plaintiff argued the evidence at issue would only be included in a motion
for summary judgment where there is no jury and no possible prejudice.

1 *Corp.*, 635 F.2d 517, 519 (5th Cir. 1981) (“excluding relevant evidence on the basis of
2 ‘unfair prejudice’ [in a bench trial] is a useless procedure”).

3 Therefore, State Defendants request confirmation that they are not precluded from
4 discussing the background and application of Section 1557 or the 2016 Rules in their
5 dispositive motion briefing.

6 **2. Communications Pre-Dating Consultation with Legal Counsel**

7 Plaintiff concedes that “nothing in the [] Order says there is a temporal limit on what
8 is precluded.” (Doc. 287, at 6:23–24.) This is another important reason why State
9 Defendants require clarification of the Order.

10 Communications regarding the legality of the Exclusion which were received prior
11 to the time that ADOA consulted legal counsel are relevant to the factual background
12 surrounding its decision to maintain the Exclusion. The Order does not preclude State
13 Defendants from discussing the factors that they considered when they made the decision;
14 it only precludes the argument that State Defendants had a good faith belief regarding the
15 *legality* of the Exclusion. (*See* Doc. 278, at 6.) The communications that ADOA received
16 from each of its insurance vendors, medical consultants, news sources, and public
17 presentations are relevant to whether it had discriminatory motives when it maintained the
18 Exclusion. Use of these communications does not implicate Plaintiff’s fairness concerns
19 because many of these communications occurred prior to the date that ADOA consulted
20 legal counsel regarding the legality of the Exclusion. (*See, e.g.*, Doc. 223, Declaration of
21 Ryan Curtis in Support of Objection to Order Compelling Production (“Curtis Decl.”), at
22 Exhibits 1–5 (discussions with insurance vendors and consultants occurring from October
23 2015 through June 2016.)

24 Finally, Plaintiff fails to address State Defendants’ concern that Plaintiff will use the
25 same communications against them. It would be manifestly unfair to permit Plaintiff to
26 utilize communications between ADOA and third parties to argue that State Defendants

1 intended to discriminate against transgender employees, but to not permit State Defendants
2 to utilize the same documents in their defense. This would allow Plaintiff to wield these
3 facts to attack State Defendants, while State Defendants' hands are tied—unable to defend
4 themselves with the same facts.

5 Therefore, State Defendants request confirmation that they are not precluded from
6 presenting communications regarding the legality of the Exclusion which were received
7 prior to consultation with counsel in their dispositive motion briefing.

8 **3. Testimony from Third-Party Witnesses**

9 Plaintiff's argument against this category of documents primarily rehashes the
10 arguments made against the first two categories of documents. (Doc. 287, at 7:11–9:3.)
11 Namely, Plaintiff argues that (1) Section 1557 is not relevant and (2) evidence of Section
12 1557 is unfairly prejudicial. (*Id.*) As noted above, a discussion of Section 1557 and the
13 2016 Rules is plainly relevant to both State Defendants' purported motive³ and the
14 treatments that plans were required to be provided or that could be excluded under the health
15 plans. Secondly, this evidence does not implicate the fairness concerns underlying the
16 Order and such concerns are not material when the evidence will be evaluated by the Court,
17 as here. This evidence is unrelated to any legal advice State Defendants received. For these
18 reasons, the Court should disregard Plaintiff's arguments and confirm that State Defendants
19 are not precluded from introducing testimony from third-party witnesses regarding their
20 interpretation of § 1557.

21 Plaintiff also argues that Ms. Christina Corieri—one of the third-party witnesses
22 which may be called by State Defendants—is not a neutral witness and may be aligned with
23 State Defendants.⁴ (Doc. 287, at 8:9–9:19.) Such an analysis is irrelevant. The Court may

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25 ³ The Order does not preclude State Defendants from presenting any evidence explaining
all of its motives. The Order only precludes State Defendants from arguing that they had a
good-faith belief the Exclusion was legal.

26 ⁴ Plaintiff's argument that State Defendants intend to use Mr. Corieri's testimony to their

1 not weigh credibility in deciding the parties' dispositive motions. *See T.W. Elec. Serv., Inc.*
2 *v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987); *Musick v. Burke*, 913
3 F.2d 1390, 1394 (9th Cir. 1990); *Bator v. State of Hawai'i*, 39 F.3d 1021, 1026 (9th Cir.
4 1994). At most, at trial, this could affect the weight the Court gives to such testimony, but
5 not its admissibility. The Order should not be read to preclude this evidence.

6 Therefore, State Defendants request confirmation that they may use deposition
7 testimony offered by Ms. Corieri and any other third-party witnesses regarding the legality
8 of the exclusion.

9 **II. CONCLUSION**

10 State Defendants request that the Court clarify its Order granting the Motion for
11 Reconsideration and confirm that they may introduce evidence of (1) the state of the law in
12 2016, (2) communications pre-dating consultation with legal counsel, and (3) testimony
13 from third-party witnesses. Because dispositive motions are due by September 26, 2022,
14 State Defendants ask for expedited consideration of this Motion, but note that as previously
15 agreed to and ordered, State Defendants may include the evidence at issue in the pending
16 Motion and that the Court will not consider such evidence if it is ultimately precluded. (*See*
17 *Doc. 285.*)

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26 benefit is a red herring. (*See Doc. 287 at 7 fn.5.*) Obviously, all parties will present
evidence that supports their positions and arguments. The fact that State Defendants may
cite testimony from Ms. Corieri to support their positions has no bearing on its admissibility.

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DATED this 13th day of September, 2022.

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