

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

CODY FLACK, *et al.*,
*individually and on behalf of all others
similarly situated,*

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES, *et al.*,

Defendants.

Case No. 3:18-cv-00309-wmc
Judge William Conley

CONSENT MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Under Rules 16(b)(4) and 15(a)(2) of the Federal Rules of Civil Procedure, Plaintiffs respectfully move the Court for leave to file a second amended complaint for the limited purposes of (1) conforming the definition and citations to the Challenged Exclusion at issue in this lawsuit to include Wis. Adm. Code § DHS 107.10(4)(p), which repeats the exclusion contained in Wis. Adm. Code § DHS 107.03(23); (2) substituting Wisconsin Department of Health Services (“DHS”) Secretary-Designee Andrea Palm, in her official capacity, for her predecessor Linda Seemeyer, as a defendant; and (3) conforming the language of the class definition in the complaint to the definition certified by the Court in its April 23, 2019 order. The proposed Second Amended Complaint is attached as Exhibit A to this motion, and a redline to the first Amended Complaint [ECF No. 85] is attached as Exhibit B.¹ Defendants, through counsel, have consented to this motion. In support of this motion, Plaintiffs state the following:

¹ The changes are on pages 1, 2, 7, 12, 35, 38, and 39-43 of the Second Amended Complaint.

1. In the Amended Complaint and other filings, Plaintiffs defined the Challenged Exclusion to refer to two provisions of Wisconsin's medical assistance regulations, Wis. Adm. Code § DHS 107.03(23)-(24). The first of these provisions, Wis. Adm. Code § DHS 107.03(23), categorically excludes Wisconsin Medicaid coverage for “[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics.” During discovery in this case, Plaintiffs reviewed documents and obtained testimony in a Rule 30(b)(6) deposition of DHS referring to an identical provision in the medical assistance regulations, Wis. Adm. Code § DHS 107.10(4)(p), which also identifies “[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics” from coverage under Wisconsin Medicaid. To ensure that the requested declaratory and injunctive relief in this case encompasses all of the relevant provisions of the medical assistance regulations, the Second Amended Complaint conforms the definition of and all references to the Challenged Exclusion from “Wis. Adm. Code § DHS 107.03(23)-(24)” to “Wis. Adm. Code §§ DHS 107.03(23)-(24), 107.10(4)(p).”

2. Linda Seemeyer is no longer the Secretary of DHS and Secretary-Designee Andrea Palm is currently serving in that role. *See* Defs.’ Br. in Opp. to Mot. for Summ. J. 2 n.1 [ECF No. 182]. Accordingly, the Parties agree that because Ms. Seemeyer was sued in her official capacity only, this Court may substitute Secretary-Designee Palm for Ms. Seemeyer, as a defendant. *See id.*; Fed. R. Civ. P. 25(d). The Second Amended Complaint is modified to reflect this substitution.

3. The proposed definition of the class in the Amended Complaint differed slightly from the class definition proposed by Plaintiffs in their subsequent motion for class certification and from the definition adopted by the Court in its April 23, 2019 order. Accordingly, the

Second Amended Complaint conforms the class definition to match the one ordered by the Court.

4. Federal Rules of Civil Procedure 16(b)(4) and 15(a)(2) govern whether Plaintiffs' motion for leave to file the proposed Second Amended Complaint should be granted. Under Rule 16(b)(4), amendments after the deadline require the party seeking leave to articulate "good cause." *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011). Once the moving party establishes "good cause" under Rule 16(b)(4), the court will apply the requirements of Rule 15(a)(2) to determine whether amendment is proper. *Riggins v. Walter*, 279 F.3d 422, 428 (7th Cir. 1995). Under that rule, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Because Rule 15(a)(2) "reflects a liberal attitude towards the amendment of pleadings," leave to amend should be granted unless "the moving party has unduly delayed in filing the motion, . . . the opposing party would suffer undue prejudice, or . . . the pleading is futile." See *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008) (quoting *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F. 3d 843, 848-49 (7th Cir. 2002)).

5. Good cause exists for Plaintiffs' proposed amendments. First, conforming the definition of the Challenged Exclusion to include an identical provision of DHS's medical assistance regulations is necessary to ensure that the Defendants will be fully enjoined from enforcing categorical exclusions on coverage for gender-confirming treatments if the Court issues a final ruling in their favor; to effectuate the final injunctive and equitable relief Plaintiffs are seeking; and to avoid the potential confusion by the Parties, third-party HMOs that administer Wisconsin Medicaid plans, Medicaid beneficiaries, and providers that might result from a vestige of the Challenged Exclusion remaining on the books following this litigation.

Accordingly, this change merely conforms the definition of the exclusion in the operative complaint to the correct regulatory provisions. The change will require no additional discovery or any changes to the existing case schedule. The other changes—substituting the current Secretary-Designee for her predecessor and conforming the class definition to that already ordered by the Court—are also intended to conform the operative complaint to current circumstances.

6. Because good cause exists and Defendants consent to this motion, the requirements of Rules 16(b)(4) and 15(a)(2) are satisfied.

Based on the foregoing, Plaintiffs respectfully request that the Court grant this motion and direct the Clerk of Court to file the proposed Second Amended Complaint as the operative complaint in this action.

Dated: May 23, 2019

Respectfully submitted,

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