IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

JESSE VROEGH, Plaintiff, v.	* * * * * * * *	Case No. LACL138797
IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES, WELLMARK INC., d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA, and PATTI WACHTENDORF, Individually and in her Official Capacities, Defendants.	* * * * * * * * *	**PLAINTIFF'S TRIAL BRIEF**

Table of Contents

I. INTRODUCTION & PROCEDURAL BACKGROUND 3

II. APPLICABLE LAW 9

A. The ICRA Must Be Construed as Broadly as Possible to Effectuate its Purposes of Eliminating Employment Discrimination 9

B. Gender Identity Discrimination Claim Against State Defendants and Patti Wachtendorf Based on Denying Vroegh the Use of Men's Restrooms and Locker Rooms 10

C. Sex Discrimination Claim Against State Defendants and Patti Wachtendorf Based on Denying him Use of the Men's Restrooms and Locker Rooms 13

D. Sex and/or Gender Identity Discrimination Against the State and Wellmark Based on the Provision and/or Administration of a Discriminatory Healthcare Insurance Coverage Plan 15

III. DAMAGES 22

A. Emotional Distress Damages 22

B. Compensation for Out-of-Pocket Chest Surgery Costs 23

C. A Jury's Award May Only Be Disturbed for Compelling Reasons 23

D. Attorney's Fees and Expenses 24

IV. EVIDENTIARY ISSUES 24

A. Leading Questions May be Used During Direct Examination of Current and Past State and Wellmark Employees. 24

B. Leading Questions May be Used to Refresh Recollection. 25

V. CONCLUSION 26

I. INTRODUCTION & PROCEDURAL BACKGROUND

The Iowa Department of Corrections hired Plaintiff Jesse Vroegh ("Vroegh") to work as a nurse at the Iowa Correctional Institution for Women ("ICIW") in Mitchellville, Iowa in July 2009.[1]

Vroegh is a transgender man and was assigned the female gender at birth. By the third grade, he recognized that his internal sense of his gender did not match with his birth-assigned female gender. He felt pressured to play with girls, use the girl's restrooms, wear girls' clothes and dresses, and generally "play the role" of a girl when he knew he was a boy. This caused him great stress and anxiety throughout his childhood. In his teen years and as a young adult, Vroegh's struggle with his gender identity led to significant relationship problems with his family and diagnoses of depression and anxiety.

In 2014, Vroegh was diagnosed with gender dysphoria. As Vroegh's treating physician and expert witness, Joseph Freund, M.D., and expert witness Jacob Priest, Ph.D.,[2] will testify, gender dysphoria (previously known as "gender identity disorder") is defined as follows:

> Gender dysphoria occurs when there is a difference between a person's experienced/expressed gender and their gender assigned at birth, resulting in significant distress. To meet the diagnostic criteria (as codified in the Diagnostic and Statistical Manual of Mental Disorders Version 5), an adult must report at least two of the following:
>
> (1) A marked incongruence between one's gender identity and one's primary and/or secondary sex characteristics;
> (2) A strong desire to be rid of one's primary and/or secondary sex characteristics;
> (3) A strong desire for the primary and/or secondary sex characteristics of the other gender;
> (4) A strong desire to be the other gender;

[1] Vroegh is no longer employed with ICIW.

[2] Defendants have designated no expert witnesses in this matter to rebut Dr. Freund's or Dr. Priests testimony.

(5) A strong desire to be treated as the other gender;
(6) A strong conviction that one has the typical feelings and reactions of the other gender.

Gender dysphoria can cause considerable distress, and the rates of depression, anxiety, and suicide are significantly higher for transgender people with gender dysphoria than the non-transgender population. There is medical consensus based on decades of research that social transition, hormone therapy and gender-affirming surgery are medically necessary and effective treatments for gender dysphoria and its accompanying distress for many transgender patients. There is medical consensus that for some transgender people, surgery is the *only* effective means to treat gender dysphoria. It is also widely recognized in the medical community that denial of access to this medically necessary treatment, including exclusion of insurance coverage, causes significant damage to mental health and quality of life. Only transgender people have gender dysphoria.

Vroegh experienced many serious symptoms of gender dysphoria, including pervasive depression and anxiety. Since 2014, he has been treated by Joseph Freund, M.D., who has particular expertise in treating patients with gender dysphoria. Vroegh has followed all medical advice Dr. Freund has given him in treating his gender dysphoria, such as undergoing social transition to living his life as the man that he is in all ways, including using the men's restrooms and locker rooms consistent with his gender identity. Vroegh also began hormone therapy with testosterone in late 2014. As a result, Vroegh began experiencing physical changes associated with male puberty that he did not experience as a teen. It was a relief for Vroegh to have his physical body finally starting to match who he knew himself to be.

Consistent with Dr. Freund's treatment plan, by mid-2015 Vroegh was using men's restrooms in public places. By 2016, Vroegh's birth certificate and driver's license reflected his

male gender. In 2016, he legally changed his name to Jesse, a name that was consistent with his male identity. In short, Vroegh is a man.

By the fall of 2014, Vroegh was ready to transition fully at work. He told his supervisor, Kerri Freidhof, that he was transitioning to living and presenting full-time as male, and Freidhof reported that information to the Warden, Patti Wachtendorf. In July 2016, when Vroegh legally changed his gender to male on his identification documents, he requested that work colleagues refer to him using male pronouns instead of female pronouns. Freidhof notified Wachtendorf of this change as well.

Over the next several months, Vroegh also requested permission to use the men's restrooms and locker rooms at work because he is male. Vroegh's requests to use the men's restrooms and locker facilities were important because the use of restrooms and other gender-specific facilities consistent with an individual's gender identity is a critical part of a successful gender transition, and failure to do so can undermine an effective medical treatment plan for individuals with gender dysphoria.

The Iowa Civil Rights Commission ("ICRC") instructs employers that the Iowa Civil Rights Act requires that employers permit employees to use sex-specific restrooms in accordance with their gender identity, rather than their assigned gender at birth. As warden, Wachtendorf had authority to adopt procedures to implement policies to be followed at ICIW. Nonetheless, Wachtendorf denied Vroegh's requests on multiple occasions. Rather than allowing Vroegh to use the men's restrooms and locker rooms, Warden Wachtendorf's solution was what she characterized as "compromise"—ordering two restrooms in the Administrative Building to be converted into "unisex" single-user restrooms which Vroegh could use. Vroegh did not even work in the Administration Building; he worked in the "H" (Health Services) Building. Under

Wachtendorf's "compromise," Vroegh had to leave the H Building, walk outside, and work his way through various security measures involving other staff in order to finally gain admittance into the Administration Building whenever he needed to use the restroom, and then repeat the process to return to his work station after using the restroom. Getting to the men's restroom on the first floor of the H Building where he worked, like the other men, would have taken Vroegh just a few seconds to a minute, and would not involve any additional security checks or interactions with other staff. The evidence will show, not surprisingly, that other male staff members who were *not* transgender did not have to trek to the Administration Building and wait for access whenever they needed the restroom; they could use any men's restroom they liked.

It is undisputed that Vroegh requested to use the men's restroom and locker room facilities like other men were allowed to do. It is also undisputed that Warden Wachtendorf and the IDOC repeatedly and unequivocally denied that request, and even threatened to write him up if he violated the rule they set, for him alone, prohibiting him from using the men's facilities. The evidence will show that their decision undermined Dr. Freund's treatment plan for Vroegh, thereby significantly worsening his stress, depression and anxiety and making his transition even more painful and difficult.

Another key part of Vroegh's gender transition was undergoing chest surgery, or "top surgery," to reconstruct his chest to accord more closely with his male gender. Typically, a transgender man's body dysphoria centers on his breasts, which are a constant reminder that his body is not "right" or consistent with his male identity, thus contributing to depression and anxiety. Vroegh's experts will testify that research has shown gender-affirming surgery reduces or eliminates symptoms of gender dysphoria in transgender individuals—like Vroegh—for whom it has been determined to be medically necessary, contributing to an overall improvement in mental

health and quality of life. Access to such necessary medical intervention, including insurance coverage, is critical to the successful treatment of gender dysphoria. Consistent with the consensus of the medical and mental health community, Wellmark's own internal "Gender Reassignment Surgery" policy, in place since June 2013, recognizes the clinical basis of gender dysphoria, the distress individuals with gender identity suffer, and the medical necessity of gender affirming surgery for individuals who meet the medical criteria. Moreover, consistent with the ICRA's prohibition on sex and gender identity discrimination in employment, the Iowa Civil Rights Commission's longstanding guidance to employers states that, as of July 1, 2007 when the ICRA was expanded to include gender identity, employers are required to provide insurance benefits to employees in a nondiscriminatory manner. Nevertheless, Vroegh was denied insurance coverage for the gender affirming surgery he needed.

Vroegh, through his employment with the State, was covered by the State of Iowa Blue Access Plan administered by Wellmark in 2014, 2015 and 2016. The State's Wellmark Blue Access Plan for Plan Year 2014 contains the following exclusion under "Mental Health Services: **Sexual disorders and gender identity disorders."** The State's Blue Access Plan for 2015 had the same "Sexual disorders and gender identity disorders" exclusion from Mental Health Services coverage, and added the following gender identity-based coverage exclusion under "Surgery: **Gender reassignment surgery."** In the 2016 Blue Access Plan, the gender identity-based exclusions remained in place; "**Gender identity disorders**" were still excluded from mental health coverage, and "**Gender reassignment surgery**" was still excluded from surgical coverage.

In the fall of 2015, Vroegh sought coverage for his top surgery through his Wellmark Blue Access Plan. His physicians submitted documentation to Wellmark confirming that the procedure was medically necessary for him. There is no dispute that Vroegh's gender affirming top surgery

was medically necessary according to Vroegh's physicians and consistent with Wellmark's internal "Gender Reassignment Policy".[3] Nonetheless, Wellmark denied his request for coverage. Vroegh appealed, and Wellmark upheld the decision to deny coverage. The denial was based on one reason only: the Wellmark policy expressly excluded coverage for *all* treatment for gender dysphoria, including gender affirming surgery, regardless of medical necessity. The process the policy set forth and that Wellmark followed was not even to consider medical necessity if a coverage exclusion applied. Vroegh's Wellmark policy did cover the same procedure for employees who were undergoing the procedure for medically necessary reasons other than as treatment for a gender dysphoria. The only specifically identified surgical exclusion in the State's Wellmark policies was for gender affirming surgery, which it called "gender reassignment surgery." The *only* reason Vroegh was treated differently and denied coverage for medically necessary services was because his surgery was required to treat his gender dysphoria, which is to say, because he is transgender, the only population that has gender dysphoria.

On August 28, 2017, Vroegh brought suit against his former employer, the IDOC; Patti Wachtendorf, the warden at ICIW; the Iowa Department of Administrative Services ("IDAS");[4] and Wellmark, Inc. for sex and gender discrimination in violation of the Iowa Civil Rights Act. Vroegh's claims to be determined at trial are as follows:

- Discrimination based on <u>gender identity</u> and <u>sex</u> under the Iowa Civil Rights Act ("ICRA") against his former employer, the IDOC, and supervisor, Patti Wachtendorf, in that they refused to allow Vroegh to use the restroom and locker facilities consistent with his gender identity; (Am. Pet., Count I) (emphasis added);

---

[3] Vroegh was finally able to undergo top surgery in December 2018 after saving the funds to pay for it.

[4] Vroegh collectively refers to Defendants IDOC, the Department of Administrative Services, and warden Patti Wachtendorf as "State Defendants."

- Discrimination in the provision and administration of benefits on the basis of gender identity and sex against the IDOC and the IDAS, in that these Defendants denied Vroegh the same level of healthcare benefit coverage that they provide to non-transgender employees; (Am. Pet., Count II) (emphasis added); and

- Discrimination in the provision and administration of benefits on the basis of gender identity and sex in violation of the ICRA, against Wellmark, Inc. (Am. Pet., Count V) (emphasis added).

II. APPLICABLE LAW

A. The ICRA Must Be Construed as Broadly as Possible to Effectuate its Purposes of Eliminating Employment Discrimination.

The Iowa Civil Rights Act prevents an employer from discriminating against an employee because of his or her sex or gender identity. The general provisions provides,

> It shall be an unfair or discriminatory practice for any person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, **or to otherwise discriminate** in employment against any applicant for employment or any employee because of the age, race, creed, color, **sex**, sexual orientation, **gender identity**, national origin, religion, or disability of such applicant or employee . . .

Iowa Code § 216.6(1)(a) (2017) (emphasis added).

The overriding principle guiding interpretation of the ICRA is its express mandate that the ICRA "shall be construed broadly to effectuate its purposes." Iowa Code § 216.18(1). This section has led Iowa courts to adopt broad definitions under the Act in order to eliminate employment discrimination. *Goodpaster v. Schwan's Home Servs., Inc.,* 849 N.W.2d 1, 10 (Iowa 2014). *Goodpaster* underscores the importance of the ICRA's broad construction mandate and its substantive impact on case outcomes. *Id. See also Pippen v. State*, 854 N.W.2d 1, 28 (Iowa 2014) (an Iowa court "faced with competing legal interpretations of the Iowa Civil Rights Act must keep in mind the legislative direction of broadly interpreting the Act when choosing among plausible legal alternatives"). Failure to interpret the ICRA as broadly as possible, as the ICRA expressly

mandates, has led to reversals of district court decisions. *Goodpaster, supra; Hollinger v. State,* No. 15-2012, 2016 Iowa App. LEXIS 1310, at *13-15 (Iowa Ct. App. Dec. 21, 2016).

B. Gender Identity Discrimination Claim Against State Defendants and Patti Wachtendorf Based on Denying Vroegh the Use of Men's Restrooms and Locker Rooms

1. Elements of claim

To establish his ICRA claim of gender identity discrimination against the State Defendants and Patti Wachtendorf based on the denial of his requests to use the men's restrooms and locker room consistent with his gender identity, Vroegh must prove the following:

1. Vroegh was an employee of the State of Iowa;
2. Defendants discriminated against Vroegh in the terms and privileges of employment by denying him use of the men's restrooms and/or locker room consistent with his gender identity;
3. Vroegh's gender identity was a motivating factor in Defendants' decision to deny him use of the men's restrooms and/or locker room;
4. Defendants' conduct in denying Vroegh use of the men's restrooms and/or locker room was a proximate cause of damage to Vroegh; and
5. The nature and extent of his damages.

Deboom v. Raining Rose, Inc., 772 N.W.2d 1, 12 (Iowa 2009); *see also Baker v. John Morrell & Co.,* 220 F. Supp. 2d 1000, 1014 (N.D. Iowa) (denial of equal access to bathroom facilities constitutes "alteration to terms and conditions of employment") (citing *Stapp v. Overnite Transp. Co.,* 995 F. Supp. 1207, 1213 (D. Kan. 1998) (holding employee suffered adverse employment action because of "her inability to gain equal access to toilet and shower facilities at defendant's various terminals and service centers").

Whether the ICRA requires employers to provide employees use of single-sex spaces consistent with their gender identity, including restrooms and locker rooms as the ICRC has concluded, is strictly a legal issue for the Court to decide; the jury cannot be charged with

determining the legal scope of the ICRA.[5] For this claim, the factual issues for the jury to determine are (a) whether Defendants in fact denied Vroegh use of the men's restrooms and locker room, (b) whether they denied Vroegh such use because of his gender identity and, (c) if so, any damages that conduct caused Vroegh. Trial testimony will confirm that Defendants knew of Vroegh's transition, that Vroegh repeatedly requested permission to use the men's facilities consistent with his gender identity, and that Defendants repeatedly and consistently denied his requests.

In short, as the evidence will show, the sole reason for Defendants' discriminatory treatment of Vroegh—by banning him from using the men's restroom, threatening him with discipline for doing so, isolating and stigmatizing him by requiring him to use a separate, single-user "unisex restroom," and requiring him to travel outside the Health Services building where he worked to use the separate single-user restroom in the Administrative building—was his status as transgender. That discriminatory treatment is a literal violation of the express prohibition on employment discrimination on the basis of gender identity in the ICRA.

2. Objections or concerns by others is not an excuse to discriminate.

Warden Wachtendorf is expected to testify that the reason she denied Vroegh's requests to use the men's facilities was because she had received complaints from approximately four or five other staff members that they were uncomfortable with allowing Vroegh in the men's restrooms and locker room.[6] But the ICRA does not include an exception allowing employers to discriminate

[5] Vroegh refers the Court to his Motion for Partial Summary Judgment and the cases cited therein.

[6] In her deposition, Wachtendorf was able to identify only one of the alleged complainers, Chris Wolfe. Chris Wolfe is expected to testify, consistent with his deposition testimony, that he never made such a complaint.

against an employee based on his or her protected class based on alleged concerns or complaints raised by co-workers. Iowa Code §216.6(1)(a).

However, the motive or reasons for a facially discriminatory policy, like the State's restroom and locker room policy here, is immaterial to deciding the claim. When there is a facially discriminatory policy at issue, no additional evidence of intent to discriminate is required. *See, e.g, Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991) (no further proof of intent is necessary where a challenged employment policy is facially discriminatory, since "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination").

What's more, the State's assertions about the alleged discomfort of male staff is not a legitimate basis for discrimination in employment. The ICRA does not include an exception allowing employers to engage in workplace discrimination out of a concern that others are uncomfortable or complain about the protections the ICRA requires. Iowa Code Chapter 216. *See also, e.g., Schroer v. Billington*, 577 F.Supp.2d 293, 302 (D.D.C. 2008) ("Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices."); *see also Sommerville v. Hobby Lobby Stores*, ALS No. 13-0060C, at 3 (Ill. Hum. Rts. Comm'n 2015) (May 15, 2015 Recommended Liability Determination), at 11 ("the prejudices of coworkers or customers is part of what the [Illinois Human Rights] Act was meant to prevent") (adopted in relevant part by the Commission, Nov. 2, 2016) (Attached as Ex. A to Pl's MSJ Br.).

The importance of such an exception, if it were permissible, becomes clear when considering what would happen if an employer were permitted to make a female sit apart from co-workers because another co-worker felt uncomfortable working around women, or were to refuse a black employee to use the drinking fountain because it made his co-workers uncomfortable. The

same rationale applies here, and any such excuse raised by Defendants is patently unacceptable to justify discriminatory conduct under ICRA.

C. Sex Discrimination Claim Against State Defendants and Patti Wachtendorf Based on Denying Him Use of the Men's Restrooms and Locker Rooms

1. *Elements of claim*

To establish his ICRA claim of sex discrimination against the State Defendants and Patti Wachtendorf based on the denial of his requests to use the men's restrooms and locker room consistent with his gender identity, Vroegh must prove the following:

1. Vroegh was an employee of the State of Iowa;
2. Defendants discriminated against Vroegh in the terms and privileges of employment by denying him use of the men's restrooms and/or locker room;
3. Vroegh's sex was a motivating factor in Defendants' decision to deny him use of the men's restrooms and/or locker room;
4. Defendants' conduct in denying Vroegh use of the men's restrooms and/or locker room was a proximate cause of damage to Vroegh; and
5. The nature and extent of his damages.

Whether discrimination against an employee because they are transgender is a form of sex discrimination under the ICRA is a legal issue to be determined by the Court. In *Price Waterhouse v. Hopkins*, the United States Supreme Court held that sex discrimination encompasses discrimination based on a person's failure to conform to stereotypical gender norms. 490 U.S. 228, 250–52, 258 (1989) (plurality opinion); *see also id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring). Since *Price Waterhouse*, numerous federal courts have recognized that discrimination against transgender persons is sex discrimination.[7] Keeping in mind the

[7] See Plaintiff's Brief in Support of Motion for Partial Summary Judgment and cases cited therein. Many of the cases cited establish that barring an employee or student from use of gender-

modern scientific understanding of "sex" and the rationale relied upon in *Price Waterhouse* and its progeny, denying an employee the use of sex-specific restrooms and locker rooms is sex discrimination under the ICRA for the same reasons it is gender identity discrimination.

The Iowa Supreme Court's decision in *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983), is based on an outdated and constricted definition of "sex" borrowed from federal case law that has been superseded by intervening decisions. In *Sommers*, the Court held that ICRA's prohibition against sex discrimination did not encompass discrimination based on "transsexualism." 337 N.W.2d at 473–74. But *Sommers* was predicated on a narrow definition of "sex" based on the Eighth Circuit's decision in *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), as well as other federal decisions that have been "eviscerated by Price Waterhouse." *See Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).[8] A transgender individual by definition does not fit the "gender norms" expected through established sex stereotypes, thereby falling directly within *Price Waterhouse's* umbrella of sex discrimination. Interpreting the ICRA as broadly as required, the legal question as to whether discrimination against a transgender employee constitutes sex discrimination under the ICRA has been answered.

---

appropriate restrooms at work or at school are sex discrimination cases under federal law or were decided based on both federal law and state law from other states.

[8] In addition to *Sommers v. Budget Mktg., Inc.*, the Iowa Supreme Court in *Sommers v. Iowa Civil Rights Comm'n*, cited *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977), and *Voyles v. Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975), all cases that were decided prior to *Price Waterhouse* and are no longer treated as authoritative. *See, e.g.*, *Radtke v. Miscellaneous Drivers & Helpers Union Loc. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) ("In any case, the 'narrow view' of the term 'sex' in Title VII in . . . *Sommers* [*v. Budget Mktg., Inc.*] 'has been eviscerated by *Price Waterhouse*.'"); *Schwenk*, 204 F.3d at 1201-01; *M.A.B.*, 286 F. Supp. 3d at 714.

As above, the remaining factual questions for the jury are (a) whether Defendants in fact denied Vroegh use of the men's restrooms and locker room, (b) whether they denied Vroegh such access because of his sex and, (c) if so, any damages that conduct caused Vroegh. Vroegh will meet his burden of proving each of these elements at trial. As above, alleged complaints from others did not give Defendants a license to violate the ICRA and discriminate against Vroegh based on his sex.

D. Sex and/or Gender Identity Discrimination Against the State and Wellmark Based on the Provision and/or Administration of a Discriminatory Healthcare Insurance Coverage Plan

The evidence will show that during his employment, Vroegh was denied coverage for medically-necessary gender affirming surgery pursuant to a health insurance policy which expressly denied coverage for gender affirming surgery (which the policy called "[g]ender reassignment surgery") and treatment for gender dysphoria (which the policy called "gender identity disorders"). The discriminatory policy at issue was provided by the State Defendants to Vroegh and other State employees as a benefit of employment, and was administered by Defendant Wellmark, Inc.

The ICRA bars discrimination in wages and benefits paid to employees on the basis of the employee's sex or gender identity. Iowa Code § 216.6; Iowa Code § 216.2A(2)(a), (b). Since only transgender persons are impacted by the condition of gender dysphoria, such a policy excludes health care coverage only for transgender employees such as Vroegh and is discriminatory on its face on the basis of gender identity under the ICRA.[9] For the same reasons

---

[9] The Polk County district court recently struck down an exclusion in Iowa Medicaid for gender affirming surgery, determining that the exclusion facially violated the ICRA prohibition on gender identity discrimination and the equal protection guarantee of the Iowa Constitution. *See Good v. Iowa Dept. of Hum. Servs.*, CVCV054956 and CVCV055470 (consolidated) at 19-20 (June 7, 2018) (order stayed by stipulation of the parties pending expedited appeal to the Iowa Supreme

as set forth above, the denial of health insurance coverage to Vroegh for treatment of gender dysphoria also violates ICRA's prohibition against discrimination in employee benefits on the basis of sex. Iowa Code §§ 216.6; 216.2A(2)(a), (b). Again, this is because discrimination against someone because they are transgender is at its core a form of discrimination on the basis of sex. The jury may find that both the State and Wellmark discriminated against Vroegh based on sex by denying him coverage for medically necessary treatment because he is transgender and therefore fails to conform to stereotypical gender norms. *See R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 576–77; *Whitaker*, 858 F.3d at 1049; *Glenn*, 663 F.3d at 1316; *Schwenk*, 204 F.3d at 1201–1202.[10]

1. *Elements of claim*

a. The State's and Wellmark's liability as "employers" under the ICRA.

To establish his ICRA claim of sex and/or gender identity discrimination against the State Defendants based on the provision or administration of discriminatory insurance benefits, Vroegh must prove the following:

1. Vroegh was an employee of the State of Iowa;
2. The Defendants discriminated against the plaintiff in the provision or administration of employee benefits on the basis of sex and/or gender identity;
3. Defendants' conduct was a proximate cause of damage to Vroegh; and

Court (Order Granting Stay and Expedited Appeal, *Good v. Iowa Dept. of Hum. Servs.*, No. 18-1158 (Iowa July 19, 2018)) (Attached as Ex. B). As Chief Judge Gamble explained, "[t]he language of the Regulation was added for the express purpose of denying coverage of sex reassignment surgery. Thus, through the Regulation, DHS is excluding Iowa Medicaid coverage for surgical treatment of Gender Dysphoria purely on the basis that it is treatment of gender dysphoria of transgender individuals." *Id.*

[10] Vroegh refers the Court to his Brief in Support of Motion for Partial Summary Judgment and additional cases cited therein.

4. The nature and extent of his damages.

The elements of Vroegh's claim against Wellmark as an "employer" will vary only slightly:

1. Wellmark is a person as defined in the ICRA;
2. Wellmark exercised control over an important aspect of Vroegh's employment in the provision and/or administration of employee benefits;[11]
3. Wellmark discriminated against Vroegh in the provision of employee benefits on the basis of sex and/or gender identity;
4. Wellmark's conduct was a proximate cause of damage to Vroegh; and
5. The nature and extent of his damages.

Through the evidence presented at trial, the jury may return a verdict against both the State Defendants and Wellmark as "employers" under the ICRA. The jury will see that the plain text of the Wellmark plan issued to Vroegh and other State employees singled out transgender claimants for discriminatory treatment by denying them coverage for medically necessary care needed only by transgender persons. As transgender people are the only individuals who have a medical need for surgical procedures related to "gender reassignment,"[12] "transsexualism," or "gender identity

[11] *See, e.g., Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 16-18 (1st Cir. 1994) (holding independent insurance entities—including the trust that administered the employer's health benefit plan—could be sued under the Americans with Disabilities Act (ADA) for discriminatory healthcare coverage as "employers" if "they functioned as [plaintiff's] 'employer' with respect to his employee health care coverage, that is, if they exercised control over an important aspect of his employment" or they "act[ed] on behalf of the entity in the matter of providing and administering employee health benefits," *id.* at 17, even if they "did not have authority to determine the level of benefits, and even if [the employer] retained the right to control the manner in which the Plan administered these benefits." *Id.*)

[12] "Gender reassignment" is a misleading way of describing the treatment for gender dysphoria, since persons' gender identity is not changed, but rather is affirmed, through the medical procedures that help conform their body to line up with their gender.

disorders,"[13] categorically excluding such coverage is discriminatory on its face. Discrimination against transgender people is, by its very nature, discrimination on the basis of gender identity. By definition, people are transgender because their birth-assigned gender fails to match their core understanding of their gender (their "gender identity").[14]

The evidence will also show that the Wellmark plans at issue categorically prohibited transgender individuals from receiving insurance benefits for surgical care that were available to nontransgender individuals for conditions other than gender dysphoria. Specifically, Wellmark denied Vroegh's request for benefits for a mastectomy procedure, and the evidence presented at trial will show that this was a covered procedure for non-transgender claimants; the only basis for the denial was that Vroegh's mastectomy procedure was for treatment of his gender dysphoria.

Vroegh anticipates that the State and Wellmark will blame each other for the presence of the facially discriminatory plan terms at issue. State witnesses are expected to testify that Wellmark presented plan language, including the terms excluding coverage for treatment of gender dysphoria, for the State's review and approval, and that Wellmark proposed and implemented changes to the terms of coverage when it saw fit. Wellmark witnesses will likely testify that only the State could determine policy terms and that they were simply a passive "administrator." The evidence will show that *both* the State and Wellmark played an integral role in the development

---

[13] "Transsexualism" and "gender identity disorder" are the former medical diagnosis used for the condition that is now diagnosed as gender dysphoria.

[14] *See Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018); Brief of Amici Curiae American Academy of Pediatrics, American Psychiatric Association, American College of Physicians, and 17 Additional Medical and Mental Health Organizations in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273, 2017 WL 1057281, at *5 (Mar. 2, 2017).

and application of the discriminatory exclusion. While the State's and Wellmark's liability as Vroegh's employer under the ICRA is clear, the jury may also hold Wellmark liable under one or more of the following additional two theories, beyond its liability as an employer, discussed above[15]:

b. Wellmark's liability as an agent of the State.

"Agency has been defined as a fiduciary relationship which results from (1) manifestation of consent by one person, the principal, that another, the agent, shall act on the former's behalf and subject to the former's control and, (2) consent by the latter to so act." *Pillsbury Co. v. Ward*, 250 N.W.2d 35, 38 (Iowa 1977). *See also Deeds v. City of Marion*, 914 N.W.2d 330, 349 (Iowa 2018) (agency is "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and *subject to the principal's control*, and the agent manifests asset or otherwise consents so to act") (citing Restatement (Third) of Agency § 1.01, at 17 (Am. Law Inst. 2006) (internal quotations omitted)). Typically, whether an agency-principal relationship exists is a factual question for the fact-finder. *Id.*

To prove his claim against Wellmark as an agent of the State, Vroegh must prove:

1. Wellmark acted as an agent of the State;
2. Wellmark acted on behalf of the State in the matter of providing and administering employee benefits;
3. Wellmark discriminated against Vroegh in the provision of employee benefits on the basis of sex and/or gender identity;
4. Wellmark's conduct was a proximate cause of damage to Vroegh; and

[15] Thus, the jury may find that Wellmark is liable under any of three theories: (1) as an employer under 216.6 and 216.6A; (2) as an agent of the state under 216.6 and 216.6A; and (3) as an aider and abettor of the state under 216.11.

5. The nature and extent of his damages.

The evidence will show that Wellmark played a substantial role in the design and administration of employment benefits. Through its control over an important aspect of Vroegh's employment—his access to health care through his employer-provided health insurance coverage—the jury could find that Wellmark acted on behalf of the State in both or either of the design and administration of employee health benefits. Wellmark's role and actions were "so intertwined" with the State's in regard to this aspect of Vroegh's employment that for the purposes of ICRA, the jury may find that Wellmark acted as Vroegh's employer when it came to his employer-sponsored healthcare plan. In other words, the jury could find that but for Wellmark's actions, the State's benefit plan would not contain the discriminatory exclusion of gender affirming surgery at issue in this case and/or would not have been applied to him to deny his coverage benefit for medically necessary surgery. This finding is highly likely given that the exclusion was added to the plan by Wellmark's medical director, Dr. Timothy Gutshall and that Wellmark administered the plan with a high degree of autonomy on behalf of the state, which ratified Wellmark's actions administering the plan on its behalf.

c. Wellmark's liability as an aider and abettor to the State's discriminatory actions.

The jury may also find Wellmark liable for its role in aiding and abetting the State's discrimination against Vroegh under the ICRA, § 216.11. Under this section, it is "an unfair or discriminatory practice for . . . any person[16] to intentionally aid, abet, compel, or coerce another

[16] Under the ICRA, "person" is defined as "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the State of Iowa and all political subdivisions and agencies thereof." Iowa Code § 216.2(12).

person to engage in any of the practices declared unfair or discriminatory by this chapter." Iowa Code § 216.11(1). Wellmark's status as a third-party administrator is not a bar to the jury's finding it liable under this section. *See, e.g., Johnson v. BE & K Construction Co.*, LLC, 593 F. Supp. 2d 1044, 1050 (S.D. Iowa 2009) (holding that the employer's customer could face liability for race discrimination as an "aider and abettor" under § 216.11(1)). Indeed, "the plain language of the statute is unambiguous and subjects 'any person' to liability under the ICRA for intentionally aiding, abetting, compelling, or coercing another person to engage in discriminatory practices prohibited by the ICRA." *Id.* at 1052.

Thus, to prove his claim against Wellmark as an aider and abettor, Vroegh must prove the following:

1. Wellmark is a person as defined in the ICRA;
2. Wellmark intentionally aided, abetted, compelled, or coerced the State to engage in discriminatory actions in the provision of employee benefits on the basis of sex and/or gender identity;
3. Wellmark's conduct was a proximate cause of damage to Vroegh; and
4. The nature and extent of his damages.

Vroegh will prove each of these elements at trial. Again, the evidence will show that Wellmark is a "person" under the ICRA; that it played a substantial role in the design and administration of the discriminatory insurance plan at issue; that it was in fact the driving force in developing the explicit policy exclusion for gender affirming surgery, which Dr. Timothy Gutshall, Wellmark's Medical Director, developed and implemented; and that Wellmark made the ultimate decision to deny Vroegh's request for chest surgery solely because it was for treatment of gender dysphoria, even while acknowledging that such treatment was medically necessary and was a covered benefit for non-transgender claimants.

III. DAMAGES

Under the ICRA, a plaintiff is entitled to damages for injury caused by the discriminatory conduct, "which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees." Iowa Code § 216.15(8). In this case, Vroegh seeks emotional distress damages from all Defendants and compensation for his out-of-pocket costs incurred in getting the chest surgery, which Defendants denied him based on the discriminatory Wellmark plan exclusion.

A. Emotional Distress Damages

The ultimate goal of compensating an injured person is to place her in the position she would have been in had there been no injury. *Hy-Vee Foods Stores, Inc. v. Iowa Civil Rights Comm'n,* 453 N.W.2d 512, 531 (Iowa 1990). This includes an award of emotional distress damages. Emotional distress and suffering includes mental anguish, anxiety, embarrassment, loss of enjoyment of life, a feeling of uselessness, or other emotional distress. *Estate of Pearson v. Interstate Power & Light Co.*, 700 N.W.2d 333, 346 (Iowa 2005). There is no "exact or mathematical standard" for the determination of emotional distress damages. *Id.*; *Shepard v. Wapello County*, 303 F. Supp. 2d 1004, 1024 n.10 (8th Cir. 2003). Expert medical testimony is not required, as the testimony of the plaintiff, members of his family and those who observed him may suffice. *Webner v. Titan Distribution, Inc*. 267 F3d. 828 (8th Cir. 2001); *Forshee v. Waterloo Indus. Inc.*, 178 F.3d 527, 531 (8th Cir. 1999); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997).

Iowa courts recognize that emotional distress damage awards fall particularly within the province of the jury. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891-92 (Iowa 1996); *Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 704 (Iowa 1994). "Awards for pain and suffering are highly subjective and should be committed to the sound discretion of the

jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 763 (8th Cir. 2003), quoting *Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1193 (8th Cir. 2000).

There is no heightened evidentiary burden for emotional distress awards in employment cases. *See, e.g., Niblo v. Parr Manufacturing, Inc.*, 445 N.W.2d 351, 355 (Iowa 1989) ("We see no logical reason to require a plaintiff to prove that the emotional distress was severe when the tort is retaliatory discharge in violation of public policy"); *Hy-Vee Foods Stores, Inc. v. Iowa Civil Rights Comm'n,* 453 N.W.2d 512, 526 (Iowa 1990) ("A civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct"). Instead, Iowa courts simply review jury awards to determine whether they have substantial evidentiary support in the record, for "if the verdict has support in the evidence the [other factors, including prejudice,] will hardly arise." *Miller v. Young*, 168 N.W.2d 45, 53 (Iowa 1969).

B. Compensation for Out-of-Pocket Chest Surgery Costs

Vroegh will present evidence that he paid out of his own pocket for the chest surgery for which Defendants denied him benefits due to the discriminatory insurance plan exclusion. Vroegh should be compensated for this amount in order to be "made whole" in this case.

C. A Jury's Award May Only Be Disturbed for Compelling Reasons

The determination of damages is traditionally a jury function. *Estate of Pearson,* 700 N.W.2d at 346. Therefore, a jury's assessment of damages should be disturbed "only for the most compelling reasons." *Id.*, citing *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). A jury award should be reduced only if it (1) is flagrantly excessive or inadequate, (2) is so out of reason as to shock the conscience or sense of justice, (3) raises a presumption it is a result of passion,

prejudice or other ulterior motive, or (4) lacks evidentiary support. *Id*. "Certainly where the verdict is within a reasonable range as indicated by the evidence the courts should not interfere with what is primarily a jury question." *Kautman v. Mar-Mac Comm. School Dist.*, 255 N.W.2d 146, 147-48 (Iowa 1977).

D. Attorney's Fees and Expenses

Vroegh is also entitled to an award of attorney's fees and expenses if he prevails at trial. Iowa Code § 216.15(8). In the event of a verdict in Vroegh's favor, he will file an application for an award of fees and expenses.

IV. EVIDENTIARY ISSUES

A. Leading Questions May be Used During Direct Examination of Current and Past State and Wellmark Employees.

At trial, Vroegh will call current State and Wellmark employees as witnesses during his case-in-chief. The Iowa Rules of Evidence authorize Vroegh's counsel to conduct these direct examinations through the use of leading questions: "When a party calls a hostile witness, an adverse party, *or a witness identified with an adverse party*, interrogation may be by leading questions." Iowa R. Evid. 5.611(c) (emphasis added). Similarly, Iowa Code § 624.1 provides that an officer, director or managing agent may be called by an adverse party and examined by leading questions. However, upon cross examination, the adverse party may not examine the friendly witness by leading questions. *In re Herm's Estate,* 284 N.W.2d 191, 197-8 (Iowa 1979). Where an adverse witness is shown to be friendly or biased toward the cross examiner, the reason for the rule allowing leading questions on cross examination, because of assumed hostility, ceases to exist. *Id*.

Individuals currently employed by the State or Wellmark fall into the "witness identified with an adverse party" category, and the Court should permit leading questions of such witnesses in direct examination by Vroegh's counsel. *See*, *e.g*., *Bouge v. Smith's Management Corp*., 132 F.R.D. 560, 571 (D. Utah 1990) (finding that current employees of defendant fell within Rule 611(c)); *Martinkovic by Martinkovic v. Bangash*, Not Reported in F.Supp., 1987 WL 28400 at *3 (N.D. Ill. 1987) ("Of course, plaintiffs may examine current employees of defendant as adverse witnesses under Rule 611(c) Fed. R. Evid."); *Haney v. Mizell Memorial Hosp*., 744 F.2d 1467, 1478 (App. Ala. 1984) ("Since Nurse Williamson, an employee of one of the defendants present when the alleged malpractice may have occurred, certainly was identified with a party adverse to Haney, the district court misread Rule 611(c) when it refused to allow Haney to lead him until actual hostility was established.").

Conversely, the Court should require Defendants to conduct their cross-examination of current and former State and Wellmark employees only through non-leading questions. For example, in *GAB Business Services*, *Inc.* v. *Moore*, 829 S.W.2d 345, 351 (Tex. App. 1992), the appellate court affirmed the exclusion at trial of deposition testimony of a former employee elicited by employer-defendant's counsel on cross examination by way of leading questions and relied on Rule 611(c) in doing so. *See also, e.g., Sunderman v. State Farm Fire & Cas. Co*., 978 P.2d 1167 (Wyo. 1999) (affirming trial court's prohibition of employee-defendant's counsel's use of leading questions on matters of substance on cross examination).

B. Leading Questions May be Used to Refresh Recollection.

Because of the passage of a significant period of time since the events at issue, Vroegh anticipates that some witnesses will not have complete recollection of the facts. It therefore may become necessary for counsel to refresh the witnesses' recollection. The Iowa Rules of Evidence

permit the use of leading questions during direct examination "as may be necessary to develop that witness's testimony." Iowa R. Evid. 5.611(c). *See also* Moore's Fed. Practice § 611.3(c) p. 268 - 69; 3 Wigmore §§ 774-778.

It is permissible to refresh recollection *orally*; when the witness has exhausted his or her recollection, the questioner may use leading questions to refresh it. McCormick on Evidence (Chapter 2, § 6 p. 12) states the rule as follows:

> Similarly, when a witness has been fully directed to the subject by non-leading questions without securing from him a complete account of what he is believed to know, his memory is said to be "exhausted" and the judge may permit the examiner to ask questions which by their particularity may revive his memory but which of necessity may thereby suggest the answer desired.

V. CONCLUSION

Vroegh will brief any additional factual or legal issues at the Court's request. Vroegh reserves the right to supplement his briefing on any issue or contention raised by any Defendant.

Respectfully Submitted:

/s/ Rita Bettis Austen
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: (515) 207-0567
Fax: (515) 243-8506
Email: Rita.Bettis@aclu-ia.org

/s/ John A. Knight
John A. Knight, PHV001725
ACLU Foundation
Lesbian Gay Bisexual Transgender Project
160 North Michigan Avenue, Suite 600
Chicago, Illinois 60601
Telephone: (312) 201-9740
E-mail: jaknight@aclu.org

/s/ Melissa C. Hasso
Melissa C. Hasso, AT0009833
SHERINIAN & HASSO LAW FIRM
521 E. Locust Street
Suite 300
Des Moines, IA 50309
Telephone (515) 224-2079
Facsimile (515) 224-2321
E-mail: mhasso@sherinianlaw.com

ATTORNEYS FOR PLAINTIFF

Copies to:

Angel A. West, AT0008416
Leslie C. Behaunek, AT0011563
NYEMASTER GOODE, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: aaw@nyemaster.com
mef@nyemaster.com
lcbehaunek@nyemaster.com
ATTORNEYS FOR DEFENDANT WELLMARK, INC.

Julia Kim
Julia.Kim@ag.iowa.gov
William A. Hill
William.Hill@ag.iowa.gov
Assistant Attorneys General
Hoover State Office Building
1305 East Walnut St.
Des Moines, IA 50319
Telephone: 515-281-5164
Fax: 515-281-4209

ATTORNEYS FOR STATE DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on January 22, 2019

By:_____U.S. Mail _______ Facsimile
______ Hand Delivered _______ Overnight Courier
______ Certified Mail x_______ Other: E-File

Signature s/Dani Welsch