IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

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

COMES NOW the Plaintiff, Jesse Vroegh, by and through his undersigned attorneys, and hereby resists the Motion to Dismiss filed by Defendant Wellmark, Inc., d/b/a Wellmark Blue Cross and Blue Shield of Iowa ("Wellmark"). In support thereof, Plaintiff states as follows:

BACKGROUND INFORMATION

Plaintiff Jesse Vroegh ("Vroegh") was employed as a nurse for the State of Iowa Department of Corrections from 2009 through December 8, 2016. (Pet. ¶ 22). Vroegh is a man who is transgender and began undergoing medical treatment for gender dysphoria in March 2014. (Pet. ¶¶ 11-20). Vroegh has brought the following claims in this suit against Wellmark, which has moved to dismiss:[1]

- COUNT V: Discrimination based on gender identity and sex under the Iowa Civil Rights Act against Wellmark in the provision and administration of benefits.

[1] Counts I-IV are against the State of Iowa, and include constitutional as well as ICRA claims.

Vroegh alleges that Wellmark provides medical benefits to State of Iowa employees, that it discriminates against transgender state employees with respect to employment by failing to cover certain medical treatments and procedures for transgender employees that it covers for non-transgender employees, and that it discriminated by failing to propose an employment benefit plan to the State of Iowa that did not discriminate against transgender state employees in this way. (Am. Compl. ¶¶ 67-70.). Vroegh further alleges that the benefits plan provided to the State of Iowa by Wellmark actually did deprive him of coverage for a medically necessary procedure. (Am. Compl. ¶ 71.) Finally, because of Wellmark's role in the design and administration of this discriminatory policy, Vroegh alleges that as an agent of the employer, the State of Iowa, Wellmark is jointly and severally liable for illegal discrimination that has caused Vroegh damage. (Am. Compl. ¶ 72.)

After exhausting his administrative remedies, Vroegh filed suit against Wellmark and State Defendants on August 28, 2017. The State Defendants filed a pre-answer Motion to Dismiss on September 21, 2017, requesting that the Court dismiss the Department of Administrative Services ("DAS") as a party and dismiss in full Counts II, III and IV of Vroegh's Petition. Vroegh resisted and a hearing was held on October 12, 2017. Thereafter, Wellmark filed its Motion to Dismiss on October 27, 2017. The Court has not yet ruled on the State Defendants' Motion to Dismiss.

For the reasons set forth below, Wellmark's motion should be denied in full.

ARGUMENT

I. The Legal Standard For A Motion To Dismiss.

In Iowa, the filing or granting of motions to dismiss is disfavored. *Henry v. Shober*, 566 N.W.2d 190, 191 (Iowa 1997) (*overruled on other grounds by Dickens v. Assoc. Anesthesiologists, P.C.*, 709 N.W.2d 122, 127 (Iowa 2006)). Iowa applies a notice pleading standard to petitions, and a petition will survive a motion to dismiss as long as the pleadings establish any possibility of valid

recovery. *Cutler v. Klass, Whicher, & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991). "In determining whether to grant the motion to dismiss, a court views the well-pled facts of the petition in the light most favorable to the plaintiff, resolving any doubts in the plaintiff's favor." *Turner v. Iowa State Bank & Trust Co.*, 743 N.W.2d 1, 3 (Iowa 2007). (citing *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004)). A defendant carries a heavy burden to succeed on a motion to dismiss:

> We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under [our rule governing motions to dismiss] dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal.

Cutler, 473 N.W.2d at 181. So long as the plaintiff's petition alleges facts which, when accepted as true, establish the possibility of a valid recovery, the court must overrule the motion to dismiss. *Id*. Since the advent of notice pleading under the Iowa Rules of Civil Procedure, "it is a rare case which will not survive a [motion to dismiss]." *Am. Nat'l Bank v. Sivers*, 387 N.W.2d 138, 140 (Iowa 1986).

Thus, the burden is on Wellmark, as the moving party, to establish that a sufficient basis exists to dismiss suit against it based on facts alleged on the face of the Petition. As set forth below, it cannot meet this burden.

II. Wellmark May Be Held Jointly And Severally Liable, Along with State Defendants, For The Provision And Administration Of Discriminatory Benefits In Violation Of ICRA.[2]

Wellmark's argument that Vroegh's claims against it should be dismissed because Wellmark was not Vroegh's employer and did not have "any control over any of the employment decisions made by the other defendants," (Wellmark's Mot. to Dismiss, at 5), ignores Vroegh's actual claim—that Wellmark is liable for its role in designing, implementing, and administering the discriminatory employment insurance benefit offered to Vroegh and other State employees in Iowa. For that, Wellmark may plainly be liable under ICRA directly or as an aider-and-abettor or agent of the State. Wellmark does not contest that it has a role in administering the discriminatory plan, which by itself is sufficient to hold it liable. And to the extent that Wellmark is claiming that it had no control over the plan design, even though Vroegh has alleged that it did, the fact question about Wellmark's role in devising the discriminatory plan cannot be determined in ruling on a motion to dismiss.

The Iowa Supreme Court and federal district courts interpreting ICRA have concluded that under ICRA non-employers who play a role in the discrimination experienced by an employee

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[2] Wellmark argues that "[t]o the extent Vroegh raises a public accommodation discrimination claim under Chapter 216, Vroegh fails to state a claim upon which relief may be granted." (Wellmark's Mot. to Dismiss at 6.). Vroegh disagrees with Wellmark's argument that "insurance companies are not places of public accommodation," (Wellmark's Mot. to Dismiss 9), since insurance is plainly a "service[ ]" or "good[ ]" offered to "non-members" by a "place, establishment, or facility." Iowa Code § 216.12(13)(a). In addition, Wellmark *has* a brick and mortar location from which it bases its operations in providing a service or benefit to the public in Iowa.

Nevertheless, Vroegh did not purchase his State employee insurance directly from Wellmark and has not asserted claims under the public accommodations provisions of ICRA in his petition. Rather, Vroegh's claims against Wellmark, as an agent of the State of Iowa for purposes of offering and administering a discriminatory insurance policy to State employees fall within the umbrella of the "unfair employment practices," "wage discrimination in employment," and "aiding and abetting" provisions of ICRA under Iowa Code §§ 216.6, 216.6A, and 216.11.

may be liable, either for their direct role in the discriminatory employment action or for aiding and abetting the discrimination. In addition, federal case law interpreting Title VII and the ADA to find insurance companies liable for the administration of discriminatory benefits provided to employees provides persuasive authority for why Vroegh's allegations are sufficient to support his ICRA claim for employment discrimination against Wellmark.

a. Iowa Supreme Court and federal district court opinions interpreting ICRA show that Vroegh's allegations are sufficient to show Wellmark's potential liability for employment discrimination directly and as an aider-and-abettor.

The Iowa Civil Rights Act ("ICRA") does not require a party to be an employer in order for it to be liable for employment discrimination. *Sahai v. Davies*, 557 N.W.2d 898, 901 (Iowa 1997). In *Sahai*, the Iowa Supreme Court pointed to the plain text of ICRA to hold that illegal discrimination in employment under ICRA has occurred when any *"[p]erson . . .* discriminate[s] in employment against . . . any employee because of . . . gender identity." *Id.*; Iowa Code § 216.6(1)(a) (emphasis added). Unlike Title VII, which applies to employers, employment agencies, and labor organizations, 42 U.S.C.A. § 2000e-2, ICRA applies more broadly to "persons" who "discriminate in employment." The Iowa Supreme Court reasoned that this language "extends the prohibition of the act to some situations in which a person guilty of discriminatory conduct is not the actual employer of the person discriminated against[.]" *Sahai*, 557 N.W.2d at 901. In *Sahai*, the administrative judge's conclusion that "not only employers but all entities *that play a role* in hiring decisions are subject to the statutory prohibitions against employment discrimination" was affirmed by the district court. *Sahai*, 557 N.W.2d at 900 (emphasis added). The Iowa Supreme Court upheld the conclusion that ICRA may apply to persons who are not a person's actual employer, but found as a factual matter that the physician and clinic where he worked did not play a role in the employer's adverse hiring decision since "the clinic's

role was advisory" based on "independent medical judgment, whereas the employer decided how to use that advice in making an employment decision." *Id.* at 901. Here, what role Wellmark played in setting the terms of the discriminatory employment benefits policy remains to be discovered as a factual matter; it is clear at this stage that, unlike the physician in *Sahai*, Wellmark's role was at minimum to administer the discriminatory benefits policy to all employees. But at this early stage, taking as true Vroegh's allegations that Wellmark played a role in the discriminatory employment action, Wellmark may be found directly liable under section 216.6(1) of ICRA in either or both of the design and administration of employment benefits, and for aiding and abetting illegal discrimination under section 216.11 of ICRA.

The Iowa Supreme Court again held that liability under ICRA is broader than Title VII in *Vivian v. Madison*, holding that supervisors may be individually liable for employment discrimination. 601 N.W.2d 872, 874 (Iowa 1999) (noting that "ICRA is sufficiently distinct from Title VII [on the question of individual liability for employment discrimination] so as to require an independent analysis."). In *Vivian*, the Court held that supervisors could be held personally liable under § 216.6(1)(a) because to give the word "person" the same meaning as "employer" "would strip the word 'person' of any meaning and conflict with our maxim of statutory evaluation that laws are not to be construed in such a way as to render words superfluous." *Id.* at 878. The Court noted this difference exists in three separate places in ICRA: the definition of an unfair or discriminatory practice under Iowa Code section 216.6(1)(a) (referring to "person"); that ICRA incorporates an aiding and abetting provision, Iowa Code section 216.11, that applies to "any person;" and the remedial sections of ICRA, allowing a claimant to "commence a cause of action for relief against a *person*, employer, employment agency, or labor organization" under Iowa Code section 216.15(1)." *Id.* at 873-74 (emphasis original) (determining "supervisors appear to fall

within the gamut of persons, particularly in light of section 216.18 which instructs us to construe this chapter broadly to effectuate its purposes.").

More recently, in *Johnson v. BE & K Construction Co., LLC*, 593 F. Supp. 2d 1044 (S.D. Iowa 2009), a federal district court determined that under both ICRA's direct liability provision, Iowa Code § 216.6(1), as well as its aiding and abetting provision, Iowa Code § 216.11, a plaintiff could sue her former employer's client for demanding that the employer terminate her for conduct (using the client's warehouse telephone to make a personal call) that did not result in termination for white employees. *Id.* at 1050; *see also Whitney v. Franklin Gen. Hosp.*, No. 13-3048, 2015 WL 1809586, *9 (N.D. Iowa Apr. 21, 2015) (unpublished decision) (holding that corporation and individual who were not Whitney's employer, but who exercised control over the operations of her employer, could be liable under ICRA.). In *Johnson*, the court cited *Sahai* and *Vivian* in reasoning that the plaintiff's complaint had alleged facts, which if true, stated a claim under ICRA, such that the plaintiff was entitled to proceed to discovery to reveal evidence of the claim that the defendant was "in a position to control [the employer's] hiring decisions." *Johnson*, 593 F. Supp. 2d at 1050.

Notably, interpreting ICRA's aiding and abetting provision, the court found that "*Vivian* supports a conclusion that ADM [the employer's client] can be subjected to liability under the plain language of § 216.11 if its actions are ultimately deemed to have intentionally aided or abetted a discriminatory act by BE & K [the employer]." *Id.* at 1052 (internal citations omitted.). The court speculated that the Iowa Supreme Court might draw upon the definition of aiding and abetting from the criminal context as laid out in *State v. Maxwell*, 743 N.W.2d 185, 197 (Iowa 2008) "and hold that 'aiding and abetting occurs under ICRA when a person actively participates or in some manner encourages the commission of an unfair or discriminatory practice prior to or

at the time of its commission.'" *Johnson*, 593 F. Supp. 2d at 1053 n.7 (quoting *Asplund v. IPCS Wireless, Inc.*, 602 F.Supp.2d 1005, 1011 (N.D. Iowa 2008)). The court noted that "[w]hile ADM denies this allegation, in a Motion to Dismiss, the court must presume the allegations to be true. Thus, when considered in the light most favorable to Plaintiff, it is reasonable to expect that discovery will lead to evidence of Plaintiff's claim under § 216.11." *Id.*

Likewise, in *Blazek v. U.S. Cellular Corp.*, another federal district court held that the plaintiff could proceed with a sexual harassment claim against non-supervisory coworkers under ICRA's aiding and abetting provision. 937 F. Supp. 2d 1003, 1023 (N.D. Iowa 2011). The court reasoned that, in stating that the harassers were the co-employees who harassed her and the investigator who accused her of having sexual relations with one of her harassers, respectively, the plaintiff had "plausibly alleged that the conduct of the individual co-workers did alter the terms of her employment." *Id.* (emphasis omitted).

In the present case, Vroegh has alleged sufficient facts to support his ICRA claims against Wellmark which, when presumed to be true, entitles him to proceed to discovery. This is true because Wellmark, with which the employer contracted to administer the employees' healthcare benefits, was in a position to control, and at minimum, contribute to the design of Vroegh's discriminatory employment benefits plan. Moreover, Wellmark agreed to administer those benefits in a discriminatory manner, and in so doing, deprived Vroegh of his rights to equal treatment in the provision of benefits on the basis of sex and gender identity under ICRA.

It is plausible that Wellmark either acted directly in the design and administration of discriminatory benefits, aided and abetted the creation and administration of the discriminatory employment condition, or both. Accordingly, Wellmark's motion should be denied.

b. Case law interpreting federal employment discrimination statutes to cover agents of employers who exercise control over an important aspect of employment supports a finding that Wellmark may be liable under ICRA here.

While ICRA has been interpreted to be broader than Title VII in allowing for third party liability in employment discrimination claims, it is notable that even under more limited statutory language found in federal employment discrimination statutes, the First, Second, and Seventh Circuits have held that a third party such as an insurance company that exercises control over an important employment benefit may be sued as an "employer" under Title VII and the Americans with Disabilities Act (ADA).

In *Spirt v. Teachers Ins. & Annuity Association*, the Second Circuit held that two independent insurance entities that managed a state university's retirement program could be held liable as an "employer" under Title VII. 691 F.2d 1054, 1062-63 (2d Cir. 1982), *cert. granted, judgment vacated on other grounds*, 463 U.S. 1223 (1983), and *cert. granted, judgment vacated sub nom.* The *Spirt* court held that the definition of an "employer" under Title VII was not limited to the common law definition of that term; rather, "it is generally recognized that the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law." *Id.* at 1063 (quotation and citation omitted). The court concluded that the defendant insurance companies, "which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities, . . . that they must be deemed an 'employer' for purposes of Title VII." *Id.*

In addition, the *Spirt* court looked to the public policy objectives underlying Title VII. Relying on precedent from the United States Supreme Court[3] and other federal courts of appeals, the *Spirt* court reasoned that allowing employers to delegate the administration of discriminatory programs to third parties, thereby immunizing the employer from liability, would "seriously impair the effectiveness of Title VII." *Id.*

Subsequent cases in the Second Circuit have cautioned against a "broad reading" of the *Spirt* decision, while reaffirming the decision's core holding that "where an employer has delegated one of its core duties to a third party that third party can incur liability under Title VII." *Gulino v. New York State Educ. Dep't*, 460 F.3d 361, 377 (2d Cir. 2006).

Similarly, the First Circuit held that two 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.[4] *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 16-18 (1st Cir. 1994). In that case, an HIV-positive employee of an automotive parts wholesale distributor sued the company's self-funded medical reimbursement plan and the trust that administered the plan, alleging that the plan's

[3] The *Spirt* court relied on the Supreme Court's decision in *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 732 (1978), where the Court stated: "We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer." *Manhart*, 435 U.S. at 718, n. 33.

[4] Although the *Spirt* decision addressed the definition of an "employer" under Title VII, and not the ADA, the First Circuit noted that "[t]here is no significant difference between the definition of the term 'employer' in the two statutes." *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 16 (1st Cir. 1994). The Seventh Circuit similarly recognizes that "Title VII, the ADA, and the Age Discrimination in Employment Act ('ADEA') use virtually the same definition of 'employer,' and . . . '[c]ourts routinely apply arguments regarding individual liability to all three statutes interchangeably.'" *Williams v. Banning*, 72 F.3d 552, 553-54 (7th Cir. 1995) (quoting *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d at 1279-80 (7th Cir. 1995)).

limit on benefits for HIV-related illnesses discriminated on the basis of a disability in violation of the ADA. *Id.* at 14-15.

Like the Second Circuit, the First Circuit in *Carparts* rejected a narrow interpretation of the statutory definition of an "employer" under the ADA, explaining that "[t]he issue before us is not whether defendants were employers of [the plaintiff] within the common sense of the word, but whether they can be considered 'employers' for purposes of Title I of the ADA . . ." *Id.* at 16. The entities could qualify as an "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.* Like the *Spirt* court, the *Carparts* court reasoned that a contrary rule—i.e., a rule that exempted a discriminatory benefits plan if the employer delegated responsibility to another entity—would impair the effectiveness of the ADA. *Id.* at 18.

More recently, in *Brown v. Bank of America, N.A.*, 5 F. Supp. 3d 121, 132 (D. Me. 2014), a district court held that an insurance company that administered an employee benefits plan could be held liable as the employer's "agent" under the ADA. *Id.* at 130-35 (citing *Carparts*, 37 F.3d at 17). The court found that notwithstanding more recent First Circuit precedent narrowing the scope of *Carparts*, an insurance company could be liable under the ADA where it "was 'intertwined' with [the employer] with respect to [plaintiff's] employee benefits, and that those benefits were a significant enough aspect of her employment, to meet the first *Carparts* test." 5 F. Supp. 3d at 134.

Finally, in *Alam v. Miller Brewing Co.*, 709 F.3d 662 (7th Cir. 2013), the Seventh Circuit also recognized that "Title VII plaintiffs may maintain a suit directly against an entity acting as

the agent of an employer if "the agent exercise[s] control over an important aspect of [the plaintiff's] employment," "the agent significantly affects access of any individual to employment opportunities," or "an employer delegates sufficient control of some traditional rights over employees to a third party." *Alam*, 709 F.3d at 669 (internal quotations omitted).

Similarly, in *DeVito v. Chicago Park Dist.*, 83 F.3d 878 (7th Cir. 1996), the Seventh Circuit concluded that an employee could sue his employer (the Chicago Park District) *and* the entity that adjudicates employment disputes on behalf of the Park District (the Personnel Board) under the ADA even though the Personnel Board was not the plaintiff's employer, since the Personnel Board was the Park District's agent and otherwise met the statutory definition of "employer." *Id.* at 881-82. *See also E.E.O.C. v. Benicorp Ins. Co.*, No. 00-014, 2000 WL 724004, *4 (S.D. Ind. May 17, 2000) (unreported decision) (insurance provider "could be considered an agent of [the charging party's] employer" since "an employer's agent who otherwise meets the statutory definition of an employer can be held liable under the ADA.").[5]

Consistent with the Iowa Supreme Court's holdings under ICRA as set forth above, these cases further confirm that Wellmark may be held liable as an agent of Vroegh's employer, the State of Iowa, in the provision and administration of employment benefits. Like in *Spirt* and *Carparts*, Vroegh has alleged that Wellmark exercised control over an important aspect of Vroegh's employment—his access to health care—and acted on behalf of Vroegh's employer in providing and administering employee health benefits. Wellmark's administration of the discriminatory benefits plan is sufficient by itself for it to be held liable under ICRA. Further

[5] *See also* EEOC Compliance Manual, Section 2, § III.B.2, *available at* https://www1.eeoc.gov/policy/docs/threshold.html#2-III-B-2 ("Liability of Agents") ("An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity. For example, an insurance company that provides discriminatory benefits to the employees of a law firm may be liable under the EEO statutes as the law firm's agent.").

factual development may also show that Wellmark exercised control, input, or direction in the creation of discriminatory employer-sponsored healthcare benefit plan itself. Dismissal at this early stage, without the opportunity to further develop these factual issues in discovery, would be improper.

III. Wellmark's Argument Based On The ACA Regulations And Its Representation Of Vroegh's Argument In Response To The State's Motion To Dismiss Are Meritless.

To support its argument that as a third party administrator, it cannot be held liable for the provision and/or administration of discriminatory benefits, (Wellmark's Mot. to Dismiss 10), Wellmark relies solely on the federal regulations interpreting the nondiscrimination provisions of the Affordable Care Act, despite the fact that Vroegh has not made such a claim. The cited regulation states that "third party administrator are *generally* not responsible for the benefits design of the self-insured plans they administer," Department of Health and Human Services, Nondiscrimination in Health Programs and Activities; Final Rule, 81 Fed Reg. 31,376, 432 (May 18, 2016) (codified at 45 C.F.R. Pt. 92) (emphasis added), but does not go so far as to state that they can never be responsible for those designs. Moreover, those regulations fail to address or offer any persuasive authority contradicting federal employment discrimination law showing that third party administrators may be liable for their role in administering discriminatory employer insurance plans, much less the question in the present case of who may be liable for employment discrimination under ICRA.

Wellmark argues in its Motion that "Vroegh's attorney confirmed at the hearing on the State's Motion to Dismiss that Vroegh is only asserting that the terms of the Plan are facially discriminatory; he is not asserting any claim of discrimination with regard to the way in which Wellmark administered the plan," citing to pages 15-16 of the hearing transcript. (Wellmark Br. at p. 6). No such statement exists in either the pages cited or any other part of the hearing transcript.

Vroegh's counsel was clearly engaged in a colloquy with His Honor regarding the role, if any, that a nonparty—the Plaintiff's labor union—played in negotiating insurance benefits, and whether such a role could negate the employer's liability as to Vroegh's constitutional claims as a matter of law. (Tr. of State's Mot. to Dismiss, 14-16.). Neither Wellmark nor the ICRA claims made against it were under discussion. Wellmark's representation to the Court that the discussion even reached a question, much less an answer, of what role Wellmark played in either designing or administering the discriminatory exclusion of transition-related surgical care is an extreme stretch.[6]

[6] The transcript clearly reflects that the discussion Wellmark references was in response to the State's attempt to argue that collective bargaining served as a shield to its discriminatory actions as an employer vis-à-vis insurance benefits. Counsel was addressing a question regarding whether the discriminatory treatment occurred in the absence of specific facially discriminatory language (i.e., an interpretation issue), or in addition to or as a result of specifically exclusionary language, drawing on the *Schiffman v. Cimarron Aircraft Corp.*, 615 F. Supp. 382, 386 (W.D. Okla.1985) case. Counsel did not address the question of what discriminatory treatment occurred in administering the exclusion, Wellmark's role with respect to the discrimination, or Vroegh's ICRA claims. However, it should be noted that administration of a facially discriminatory exclusion *is also* discrimination-as-applied:

> THE COURT: I'm assuming – And my next question is, on *Schiffman* did that contract that they negotiated with the insurance company, did the collective bargaining agreement specifically provide that it would not cover maternity benefits, or was that a decision that later was reached because somebody applied for maternity benefits and the company denied it based upon its interpretation of the contract language?
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> MS. BETTIS: That's a good question, Your Honor. My understanding is that the – in my remembering the case, my understanding is that the employees had voted to accept the specific discriminatory policy vis-à-vis these maternity benefits and that that is – I think I see where you're going with the question which is, did the collective bargaining agreement in this case specifically say transgender people are unable to access the specific insurance coverage benefits –
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> THE COURT: Exactly where I'm going.
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> MS. BETTIS: And I don't – So we don't have the collective bargaining agreement. What we know is that the insurance policy itself is facially discriminatory in that manner. And so to the extent that it was authorized – I mean, this is what I would say:

To the extent that it was authorized by the collective bargaining agreement expressly, then that collective bargaining agreement does not shield the State from its liability as an employer or the State in its capacity vis-à-vis the constitutional rights of our client.

And if it was not expressly covered, then the argument is irrelevant because it wasn't actually the subject of collective bargaining.

THE COURT: When you say it's facially unconstitutional, does the insurance – the health policy, does it specifically state, We will not cover surgery – the surgery that we're talking about here?

Or is it a situation where Mr. Vroegh made application for coverage and then the company looked at it and came – and by "company" I mean Wellmark – looked at it and said, "I'm sorry, but because of this language in the policy, that particular type of medical procedure is not covered under the policy?

MS. BETTIS: It's the former and not the latter, because by definition only transgender Iowans will have gender dysphoria, which is the specific type of medical need that was excluded from coverage by this insurance policy that governed our client during his employment.

THE COURT: So the policy specifically stated that it would not cover transgender –

MS BETTIS: Treatment for gender dysphoria and –

THE COURT: Okay. So there's specific language in the insurance policy?

MS. BETTIS: Yes, Your Honor.

THE COURT: Okay. I suppose at this juncture we don't know if the State and/or the union members who approved the collective bargaining agreement had a copy of that policy at the time this was presented to them.

MS. BETTIS: We don't know that. It's too early in the proceedings to say that. That's not in evidence at all. But what I would say is that either they didn't have that knowledge and then their argument doesn't pertain, or they did have that knowledge and their argument fails because to the degree that the agreement reached violated the Civil Rights Act or the Iowa Constitution, it's unenforceable anyway.

THE COURT: Thank you.

Tr. at 14 ll. 4 - 16 ll. 25.

To the contrary, Vroegh's petition clearly alleges that his claims against Wellmark are made as to both the plan's design, and its administration. (Am. Compl. at 11) ("Count V: Discrimination in provision *and administration* of benefits based on sex and gender identity".) (emphasis added). It is simply too early, without discovery, to know the extent of Wellmark's role in the design or administration of the discriminatory health care benefits provided to Vroegh. However, the fact that Wellmark points out later in its motion that the language expressly setting forth a discriminatory exclusion of transition-related care was deleted from the new employee insurance benefits policy which took effect on January 1, 2017, (Wellmark's Mot. to Dismiss 11), supports further inquiry into Wellmark's role in the policy design and administration, as well as in the deletion of the discriminatory exclusion.

Regardless, Vroegh's claims against Wellmark would not be resolved even in the absence of the insurance benefits' express and facial exclusionary language. The discriminatory treatment could have occurred—and may be occurring against other transgender employees today—even in the absence of such an exclusion. It is simply too early at this stage, absent discovery, to know the full extent of Wellmark's role. However, we do know that, based on the case law cited above, and depending on factual determinations yet to be made, Wellmark may be liable directly, as an aider-and-abettor, and as an agent of the employer in designing and administering the discriminatory healthcare benefits, even in its capacity as a third-party administrator.

Wellmark asserts that its factual contention that it has no control over the design or administration of the discriminatory plan is dispositive. However, in making this assertion, Wellmark actually underscores the presence of a material factual question that is in dispute. *Cutler*, 473 N.W.2d at 181 (to win a motion to dismiss, defendant must prove no possibility of a valid recovery). The question of its role in the design or administration of the discriminatory plan is a

matter on which discovery is needed and, ultimately, must be determined by the trier of fact. Indeed, in an apparent attempt to address the federal requirement of nondiscrimination in healthcare, through information-sharing or negotiation between Wellmark and the State of Iowa (which must still be discovered and adjudicated by the trier of fact), the Iowa Correctional Institute for Women "amended its plan, effective January 1, 2017, to provide benefit exception review for 'transgender individuals, sex-specific preventative care services . . . that his or her attending provider has determined are medically appropriate.'" (Wellmark's Resp. to ICRC Req. for Info., at 5 (Apr. 24, 2017)). In light of these contested facts and the need for further discovery, Wellmark, as the moving party, cannot establish at this preliminary stage that dismissal of Vroegh's claims is warranted.

IV. Discovery Is Required To Determine Whether Vroegh's Claims For Injunctive Relief After January 1, 2017 Are Moot.

Wellmark notes that the language expressly setting forth a discriminatory exclusion of transition related care was deleted from the new employee insurance benefits policy which took effect on January 1, 2017. (Wellmark's Mot. to Dismiss 11.). It argues that as a result of the deletion of the discriminatory provision from the policy after January 1, 2017, all of Vroegh's claims based on Wellmark's provision and administration of discriminatory benefits in violation of ICRA after that date are moot. (*Id*.).

Vroegh appreciates the fact that Wellmark deleted its discriminatory exclusion of medically necessary gender affirming surgical care from the policy provided to State employees as of January 1, 2017. However, discovery is needed to ascertain whether benefits are indeed paid to State employees for transgender-related medical care under their employer-provided Wellmark plan even after the revision. It is not uncommon for insurers to deny coverage for transition related surgery to transgender people even in the absence of such an exclusion, whether by consistently

determining such procedures are not medically necessary despite the recommendations from physicians, or other asserted bases.[7] Should additional factual development show that the State and Wellmark are now providing medically necessary transition related surgical care coverage to State employees, Vroegh would concede his ICRA claim against Wellmark as stated in Count V—as to *injunctive relief* only, and only after January 1, 2017—is moot. But discovery is required to determine whether that is the case. As stated in his petition, Vroegh's claims against Wellmark are for both the provision and administration of benefits in violation of ICRA. (Am. Pet., at 11).

In sum, at this preliminary stage of proceedings, and viewing the facts in the light most favorable to the plaintiff, *Turner*, 743 N.W.2d at 3, Wellmark cannot meet the high burden

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[7] *See, e.g.*, Xavier Persad, Human Rights Campaign, *Featured Criteria: Trans-Inclusive Health Benefits* 28 (2014), *available at* http://assets.hrc.org/files/assets/resources/MEI-2014-TransInclusiveHealthBenefits.pdf ("Even when health care plans do not explicitly contain "transgender exclusions," coverage of transition-related care is still often denied on the basis that it is cosmetic or experiential, and therefore perceived by the insurer to be not medically necessary. Furthermore, transgender people are even denied coverage for many of the procedures routinely provided to people who are not transgender (such as hysterectomies for transgender men)."); Transgender Law Center, *Transgender Health Benefits—Negotiating for Inclusive Coverage* 13 (2014), *available at* http://transgenderlawcenter.org/wp-content/uploads/2014/01/Health-Insurance-Exclusions-Guide-2-WEB.pdf ("Benefits policies that are fully inclusive put both the patient and medical providers in control of what medically necessary treatments can be utilized to treat medical conditions, including GID or Gender Dysphoria. Yet, even when insurance carriers offer inclusive benefits packages, they almost always still contain some restrictions that stop short of providing comprehensive coverage."); *see also* id., at 4 ("Insurers justify these exclusions by classifying treatments as cosmetic, experimental, and/or not medically necessary, despite scientific evidence to the contrary."). American Bar Association, Section of Labor and Employment Law, Employee Benefits Committee Newsletter (Summer 2015), *available at* https://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/2015/sum15/trans.html (plans may discriminate against transgender people "either explicitly or implicitly"); Kasandra Brabaw, *Some Health Insurance Companies Still Deny Care to Transgender People*, Refinery29 (Aug. 21, 2017), *available at* http://www.refinery29.com/2017/08/168961/health-insurance-company-deny-transgender-coverage-cosmetic; Molly Redden, *Health Insurance Companies Are Even More Horrible If You're Trans*, Mother Jones (Sept. 8, 2015), *available at* http://www.motherjones.com/politics/2015/09/transgender-healthcare-discrimination-obama-administration/ (noting "a substantial loophole when it comes to enforcing protections," explicit in the Affordable Care Act against discrimination against transgender patients.).

necessary to succeed on a motion to dismiss on either Vroegh's claims for damages prior to January 1, 2017,[8] or his claim for injunctive relief after January 1, 2017. *See also Cutler*, 473 N.W.2d at 181 (requiring defendant to prove no possibility of a valid recovery).

For all of these reasons, dismissal of Vroegh's claims against Wellmark is premature. Consideration of Wellmark's arguments is more appropriate after full discovery in summary judgment proceedings. Vroegh respectfully requests that the Court deny Wellmark's motion to dismiss in its entirety.

Respectfully submitted,

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[8] Vroegh's claims as stated in Count V of the petition against Wellmark, for *damages* resulting from the provision and administration of discriminatory benefits prior to January 1, 2017 and during his employment from 2009 through December 8, 2016 (Pet. ¶ 22), would not be mooted due to a subsequent change in policy regardless of the availability of injunctive relief after that date.

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ATTORNEYS FOR PLAINTIFF

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 Nov. 16, 2017

By: _____ U.S. Mail _____ Facsimile
_____ Hand Delivered _____ Overnight Courier
_____ Certified Mail X Other: E-Filed

Signature /s/ Jessica A. Molina