IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

JESSE VROEGH, Plaintiff, v. IOWA DEPARMTNET 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.	Case No. LACL138797 **STATE DEFENDANTS' MOTION TO DISMISS DEPARTMENT OF ADMINISTRATIVE SERVICES AS A PARTYAND TO DISMISS COUNTS II, III AND IV**

COME NOW the Iowa Department of Corrections, Iowa Department of Administrative Services, and Patti Wachtendorf (hereinafter "State Defendants") pursuant to Iowa Rule of Civil Procedure 1.421 and state:

INTRODUCTION

On August 28, 2017, Jesse Vroegh ("Plaintiff") filed a five count petition alleging sex and gender identity discrimination in violation of Chapter 216 (Iowa Civil Rights Act) and in violation of the Equal Protection provisions of the Iowa Constitution against the State Defendants (Count I-IV), and sex and gender identity discrimination in provisions and administration of benefits against Defendant Wellmark, Inc. d/b/a Wellmark Blue Cross and Blue Shield of Iowa in violation of Chapter 216 (Count V). Plaintiff alleges that he began employment at the Mitchellville Correctional Institute for Women as a Registered Nurse in 2009. Pet. ¶ 22. In Count I, Plaintiff alleges that State Defendants Iowa Department of Corrections ("DOC") and Wachtendorf discrimination against him on the basis of his sex and gender identify

in violation of Chapter 216 when he (born a female but identifies as a male) was not permitted to use the male restroom and male locker rooms available to employees at the Mitchellville Correctional Institute for Women. *See* Pet. ¶¶ 11, 20, 22-23, 28-29, 32, 35. In Count II, Plaintiff alleges that the State Defendants DOC and Iowa Department of Administrative Services ("DAS") discrimination against him on the basis of his sex and gender identify in violation of Chapter 216 when he was denied equal access to health care benefits based on his sex and gender identity. Pet. ¶ 44. Specifically, Plaintiff alleged that DOC "denied transgendered employees the same level of health care benefit coverage that it provided to non-transgendered employees" and that DAS "was involved in the decision to select and offer. . . employer-sponsored health care plan which discriminated against transgendered employees" as the health care plan deprived Plaintiff coverage "for a medically necessary surgical procedure." Pet. ¶¶ 42-43, 45. In Count III, Plaintiff alleges that the State Defendants discriminated against him on the basis of sex in violation of the Equal Protection provisions of the Iowa Constitution, Article I, section 6 and Article I, section 1, when he was denied the use of restrooms and locker rooms that matched his gender identity, and denied health care coverage for medically necessary surgery. Pet. ¶¶ 48-52. Lastly, in Count IV, Plaintiff alleges that the State Defendants discriminated against him on the basis of transgender status in violation of the Equal Protection provisions of the Iowa Constitution, Article I, section 6 and Article I, section 1, when he was denied the use of restrooms and locker rooms that matched his gender identity, and denied health care coverage for medically necessary surgery. Pet. ¶¶ 53-57. Plaintiff seeks the same relief for Counts I-IV, namely, monetary damages, attorney fees, and specific equitable and injunctive relief. Pet. at p.8-9.

ARGUMENT

I. Department of Administrative Services Must be Dismissed as a Party

Plaintiff's claims against DAS fail to state a claim for which relief may be granted and DAS should be dismissed as a party to this lawsuit as a matter of law (Counts II, III, and IV).[1] The premise of Plaintiff's claims against DAS is that DAS was "involved in the decision to select and offer to employees of the Iowa Department of Corrections only employer-sponsored health care plans which discriminated against transgender employees." Pet. ¶ 43. Plaintiff contends that the employer-sponsored health care plan did not cover gender reassignment surgery. Pet. ¶ 7 (Ex. A) (referring to language in State of Iowa Blue Access Benefit Booklet "Not covered: Gender reassignment surgery"). Thus, the only basis to include DAS as a party to this lawsuit is premised on DAS' alleged involvement in the decision to select the employer-sponsored health care plans. However, under Chapter 20,[2] DAS does not and cannot unilaterally change health insurance benefits or coverage (i.e., not covering gender reassignment surgery), as "insurance" is a mandatory collective bargaining subject.

During the relevant time period, Plaintiff was a public employee employed by a public employer. *See* Pet. ¶¶ 2, 22; *see also* Iowa Code § 20.3(9) & (10). Plaintiff, moreover, was represented by a public employee organization (a union). *See* Pet. ¶ 7 (Ex. A) (referring to "my union representative, Todd Givens" being present at a meeting); *see also* Iowa Code § 20.3(4).

[1] Plaintiff only asserts Count I against Iowa Department of Corrections and Wachtendorf, and only asserts Count V against Wellmark Inc.

[2] While the Iowa Legislature substantially amended the Iowa Public Employment Relations Act in HF 291 and such amendments became effective with the Governor's signature on February 17, 2017, the events alleged in the Petition occurred prior to the amendments. Accordingly, any discussion of the Act will be to the Act as it existed at the time of the alleged events of this lawsuit.

Iowa Public Employment Relations Act, Iowa Code chapter 20, in turn, governs collective bargaining for public employees. *See AFSCME Iowa Council 61 v. Iowa Public Employment Relations Bd.*, 846 N.W.2d 873, 876-78 (Iowa 2014) (noting "PERA governs collective bargaining between public employers and public employee organizations" and recognizing that "AFSCME is an employee organization certified by the [Public Employment Relations Board] to represent certain State employees in collective bargaining"). Iowa Code section 20.9 identifies seventeen items that are subject to *mandatory* collective bargaining procedures. *Id.* at 878-79. Designation of an item as a mandatory subject of bargaining is significant for at least two reasons. First, if "a proposal is a mandatory subject of bargaining, the public employer and the employee organization must meet to negotiate the terms of the proposal." *City of Dubuque v. Iowa Public Employment Relations Bd.*, 444 N.W.2d 495, 496 (Iowa 1989) (citing *Northeast Comm. Sch. Dist. v. PERB*, 408 N.W.2d 46, 47 (Iowa 1987)). Second, a public employer may commit a prohibited practice under Iowa Code section 20.10 by unilaterally changing a mandatory subject of bargaining. *See Fort Dodge Community Sch. Dist. v. PERB*, 319 N.W.2d 181 (Iowa 1982) (judicial review from PERB determination that public employer committed prohibited practice by unilaterally adopting a plan that covered a mandatory subject of bargaining); *Des Moines Ass'n of Professional Firefighters, Local No. 4. v. PERB*, No. 15-0456, 2016 WL 541071, at *2-4 (Iowa Ct. App. Feb. 10, 2016) (examining whether public employer committed prohibited practice by making unilateral change to terms of the CBA that were mandatory subjects of bargaining). "It is well established that an employer's unilateral change in a mandatory subject of bargaining without first providing notice and opportunity to bargain constitutes a violation of section 20.10(1) and 20.10(2)(a), (e) and (f)" of PERA. *In the Matter*

of Chauffers, Teamsters and Helpers, Local Union No. 238, PERB Case No. 7107, 2006 WL 6036018, at *2 (Iowa PERB Aug. 25, 2006).

Under Iowa Code section 20.9, "insurance" is included as a mandatory subject of collective bargaining. Iowa Code § 20.9; *see also AFSCME Local 1068 v. Howard County*, PERB Case No. 6234, 2001 WL 36163931, at *4 (Iowa PERB Sept. 7, 2001) (stating "'[i]nsurance' is a mandatory subject of bargaining"). Pursuant to Iowa Code section 20.6(1), the Iowa legislature delegated to PERB the authority to interpret mandatory bargaining terms. *See AFSCME Iowa Council 61*, 846 N.W.2d at 879 (stating "[c]onsistent with legislative intent, PERB must give each topic in section 20.9 'its common and ordinary meaning within the structural parameters imposed by section 20.9'" (internal citation omitted)). In exercising such authority, PERB "has long held that virtually all aspects of insurance benefits, coverage and the administration of insurance plans, including self-funded plans (with the sole exception of the identity of the carrier) are within the scope of the mandatory topic. . . ." *Mt. Pleasant Educ. Ass'n. v. Mt. Pleasant Comm. Sch. Dist.*, PERB Case No. 5894, 1999 WL 34970345, at *11 (Iowa PERB June 28, 1999); *see also AFSCME Local 1068*, 2001 WL 36163931, at *4 (stating "[t]he Board has long held that almost all aspects of insurance benefits, coverages and the administration of insurance plans, including self-funded plans (with the exception of the identity of the carrier) are within the scope of the 'insurance' topic").

Accordingly, because insurance is a mandatory subject of bargaining, the State of Iowa and Plaintiff's certified public employee organization negotiated all material aspects of the health insurance benefits and entered into a contract (*i.e.*, collective bargaining agreement), which governs the health insurance benefits for all union-covered employees, including Plaintiff. Thus, the non-coverage of gender reassignment surgery under the health insurance falls within the

scope of "insurance" as a mandatory topic of negotiation and the State is not only required to provide the insurance benefits that were negotiated between the State and Plaintiff's employee organization, but also, the State or DAS cannot alter coverage unilaterally without committing a prohibited practice and violating Iowa Code section 20.10. *See, e.g.*, *Scottsbluff Policy Officers Ass'n v. City of Scottsbluff*, 805 N.W.2d 320, 330 (Neb. 2011) (holding public employer's "unilateral implementation to the health insurance exclusions, premiums, copays, deductibles, and maximum out-of-pocket expenses constitutes a per se violation of the duty to bargain in good faith"); *Loral Defense Systems-Akron v. N.L.R.B.*, 200 F.3d 436, 439 (6th Cir. 1999) (finding employer violated the National Labor Relations Act by unilaterally changing health care plan covering union employees); *St. Clair Intermediate Sch. Dist. v. Intermediate Educ. Ass'n.*, 581 N.W.2d 707, 709 (Mich. 1998) (stating party breached duty to bargain over mandatory topics by unilaterally changing health insurance benefits).

Thus, Iowa Code chapter 20 requires the State to negotiate with the union over "insurance." At all times material, PERB, the governmental entity with Chapter 20 oversight, interpreted "insurance" to cover virtually all aspects of insurance benefits and coverage. Therefore, as required by Chapter 20, the State provides health insurance to union covered employees pursuant to the health insurance provisions of the applicable collective bargaining agreement. Furthermore, the State or DAS cannot change those health insurance benefits and coverage unilaterally. Accordingly, any "involvement" DAS may had in selecting the employer-sponsored health care plans does not in any way implicate the benefits and coverage under the health care plans, as such were negotiated terms pursuant to Chapter 20. DAS, therefore, did not make *any* decision related to the benefits and coverage at issue, and moreover, could not unilateral change the negotiated benefits and coverage. Thus, Plaintiff failed to state a claim for

which relief may be granted against DAS. Accordingly, the Court should dismiss DAS as a party to this lawsuit.

II. Count II Must be Dismissed For Failure to State a Claim

Plaintiff's claims against DAS and DOC in Count II fail to state a claim for which relief may be granted and should be dismissed as a matter of law. Count II as it relates to DAS is discussed above. Similarly, in Count II against DOC, Plaintiff alleges that DOC "provides employer-sponsored health care benefits to its employees" and DOC "denied transgender employees the same level of health care benefit coverage that it provided to non-transgender employees." Pet. ¶¶ 41-42. This claim against DOC is premised on the factual allegation that the employer-sponsored health plans does not cover gender re-assignment surgery. Pet. ¶ 7 (Ex. A) (referring to language in State of Iowa Blue Access Benefit Booklet "Not covered: Gender reassignment surgery"). As set forth more fully above, because "insurance" is a mandatory bargaining subject, DOC (like DAS discussed above) cannot and does not have the ability to unilaterally change benefits and coverage under the health care plans, as such were negotiated terms pursuant to Chapter 20. Thus, Plaintiff failed to state a claim for which relief may be granted in Count II as to both DAS and DOC. Accordingly, the Court should dismiss Count II in its entirety for failure to state a claim for which relief can be granted.

III. Counts III and IV Must be Dismissed For Failure to State a Claim

Plaintiff's constitutional claims (Counts III and IV) fail to state a claim for which relief may be granted and should be dismissed as a matter of law. In *Godfrey v. State of Iowa et al.*, the Iowa Supreme Court held that the dismissal of the equal protection claims on the basis of sexual orientation and being homosexual was appropriate because Chapter 216 provided an adequate and appropriate remedy. 898 N.W.2d 844, 847 (Iowa 2017) (noting that the majority concluded that "the remedy provided by chapter 216 [was] adequate under the facts and circumstances of

this case" to properly dismiss the sexual orientation and homosexual equal protection counts). While the majority in *Godfrey* noted that "it would recognize a tort claim under the Iowa Constitution when the legislature has not provided an adequate remedy" (Justices Appel, Wiggins, Hecht, and Cady), Chief Justice Cady "part[ed] ways with the majority opinion" because Chief Justice Cady found that the Iowa Civil Rights Act provided an adequate remedy for claims "against the State for discrimination on the basis of sexual orientation." *Id.* at 880 (Cady, C.J., concurring in part and dissenting in part). Specifically, Chief Justice Cady stated that "the remedies provided in the ICRA are robust" to serve as "an adequate deterrent of any alleged unconstitutional conduct." *Id.* at 881 (Cady, C.J., concurring in part and dissenting in part). Chief Justice Cady went on to state that "when the claimed harm is largely monetary in nature" and the claims are premised on "the State in its capacity as an employer, the ICRA exists to vindicate the constitutional right to be free from discrimination." *Id.* (Cady, C.J., concurring in part and dissenting in part). The other three justices (Justices Mansfield, Waterman, and Zager) making up the majority on this issue, stated that in cases where employment discrimination is the wrong alleged, ICRA provides the exclusive and adequate remedy. *See id.* at 890-93 (Mansfield, J., dissenting).

Here, the basis of Plaintiff's constitutional claims (Counts III and IV) are premised on discrimination on the basis of sex and gender identity (being transgender) arising out of alleged acts by the State Defendants while he was an employee of the Iowa Department of Corrections. *See* Pet. ¶¶ 47-57. Significantly, his constitutional claims—denied the use of restrooms and locker rooms that matched his gender identity and denied health care coverage for medically necessary surgery (Counts III and IV)—are the exact same basis for his Chapter 216 claims (Counts I and II). *See Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014) ("For

purposes of reviewing a ruling on a motion to dismiss, we accept as true the petition's well-pleaded factual allegations, but not its legal conclusions."). Plaintiff, moreover, seeks the same relief for Counts I-IV (captioned under one heading), namely, monetary damages, attorney fees, and specific equitable and injunctive relief. Pet. at p.8-9; *see Godfrey*, 898 N.W.2d at 881 (Cady, C.J., concurring in part and dissenting in part) (stating that while ICRA does not provide punitive damages, "it provides full compensation and attorney fees"). Here, Chapter 216 provides a full remedy for Plaintiff. Thus, under *Godfrey*, Plaintiff cannot maintain his constitutional claims. *See Shumate*, 846 N.W.2d at 507 ("We will affirm a district court ruling that granted a motion to dismiss when the petition's allegations, taken as true, fail to state a claim upon which relief may be granted."). Accordingly, this Court should dismiss Counts III and IV in their entirety for failure to state a claim for which relief can be granted.

CONCLUSION

For the reasons stated above, State Defendants respectfully request that the Court grant their motion to dismiss and dismiss DAS as a party to the lawsuit, and dismiss Counts III and IV of the petition.

Respectfully submitted,

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