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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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| JESSE VROEGH,<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | Case No. LACL138797<br><br>**REPLY IN SUPPORT OF WELLMARK, INC., d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA'S MOTION TO DISMISS** |

## I. BECAUSE VROEGH'S ALLEGATIONS ARE PREMISED ON ALLEGED DISCRIMINATORY PLAN DESIGN AND NOT DISCRIMINATORY PLAN ADMINISTRATION, DISMISSAL OF THE THIRD-PARTY ADMINISTRATOR—WELLMARK—IS PROPER.

Plaintiff Jesse Vroegh's ("Vroegh" or "Plaintiff") allegations in this case are premised on an allegedly discriminatory plan design—that Vroegh's employer-sponsored medical benefit plan (the "Plan") itself is facially discriminatory. There is no allegation that the Plan terms were ambiguous and thus were administered by Wellmark in a discriminatory fashion. As noted in Wellmark's opening brief, "[T]hird party administrators are generally not responsible for the benefit design of the self-insured plans they administer and . . . ERISA . . . requires plans to be administered consistent with their terms." Department of Health and Human Services, Nondiscrimination in Health Programs and Activities; Final Rule, 81 Fed. Reg. 31,376, 31,432 (May 18, 2016) (codified at 45 C.F.R. Pt. 92).

At the hearing on the State's Motion to Dismiss, the Court and counsel for Vroegh engaged in the following colloquy:

> THE COURT: When you say its 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 the insurance policy that governed our client during his employment.

Ex. D at pp. 15, l. 14 – p. 16, l. 4. Counsel for Vroegh, therefore, clarified for the Court that what Vroegh is alleging in his Amended Petition is that the Plan itself was discriminatory—not Wellmark's administration of the Plan. Then, in his resistance brief, Vroegh argues 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," which is broader than what is contained in his Amended Petition. Resist. Br. p. 4. Because Vroegh is asserting discrimination with regard to the Plan *design*, and not the *administration* of the Plan, this Court should dismiss Vroegh's claim against Wellmark and address Vroegh's concerns with his employer.

## II. VROEGH'S EMPLOYMENT DISCRIMINATION CLAIM SHOULD BE LIMITED TO THE CLAIM ASSERTED IN HIS AMENDED PETITION.

In his Amended Petition, Vroegh alleged "Discrimination" pursuant to Iowa Code Chapter 216 and included factual assertions indicating he was asserting an "unfair employment practices" claim under Iowa Code Section 216.6. *See, e.g.*, Am. Pet. ¶ 72. In his Resistance to Wellmark's Motion to Dismiss, however, Vroegh expands upon the allegations in the Amended Petition to now say that he is alleging three separate violations of the ICRA: "unfair employment practices" under Iowa Code Section 216.6, "wage discrimination in employment"

under Iowa Code Section 216.6A, and "aiding and abetting" under Iowa Code Section 216.11. Resist. Br. p. 4, n. 2. Because Vroegh did not allege any equal pay claim or aiding and abetting claim against Wellmark in his Amended Petition, he cannot now bootstrap those claims to his Amended Petition in an attempt to avoid dismissal. The Court should disregard Vroegh's arguments regarding equal pay and aiding and abetting claims since such theories are not a part of his Amended Petition.

## III. VROEGH FAILS TO STATE A COGNIZABLE EMPLOYMENT DISCRIMINATION CLAIM AGAINST WELLMARK.

Under Iowa Code Section 216.6(1)(a):

> 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 . . . gender identity . . . of such applicant or employee . . . .

Vroegh does not contend that Wellmark was his employer; rather, he argues that Wellmark—as the third-party plan administrator for his employer-sponsored health benefit plan—was an *agent* of his employer for purposes of the ICRA. Am. Pet. ¶ 72. The Iowa Supreme Court has long-held that "[o]bviously only the employer, and not third parties" can engage in "unfair or discriminatory practice[s]" for purposes of Iowa Code Section 216.6(1)(a), with limited exception. *See Grahek v. Voluntary Hosp. Co-op. Ass'n of Iowa, Inc.*, 473 N.W.2d 31, 35 (Iowa 1991); *see also Zepeda v. Fort Des Moines Men's Corr. Facility*, 586 N.W.2d 364, 365 (Iowa 1998); *Sahai v. Davies*, 557 N.W.2d 898, 901-03 (Iowa 1997). The only narrow exception to this rule that has been recognized by the Iowa Supreme Court is liability for supervisors of the plaintiff employee who also worked for the employer company. *See Vivian v. Madison*, 601 N.W.2d 872, 875-78 (Iowa 1999).

In *Grahek*, the plaintiff asserted tort claims ostensibly because he had failed to exhaust his administrative remedies for purposes of bringing suit under the ICRA. *See* 473 N.W.2d at 33. He sued both his former employer—with whom he had a written employment agreement—as well as a third party who he alleged had intentionally interfered with his employment relationship. *Id.* The Court, in addressing whether Grahek's claim against the third party was preempted by Iowa Code section 601A.6(1)(a), now renumbered as Iowa Code section 216.6(1)(a), held as follows:

> Obviously only the employer, and not third parties, can discharge an employee. Moreover, we hold that the language "otherwise discriminate in employment" pertains only to employers. Therefore, acts of third parties are not 'unfair or discriminatory practice[s]' for purposes of section 601A.16(1), and actions against such third parties are not preempted by chapter 601A.

*Id.* at 35.

Several years later, the Court again had an opportunity to address whether third party non-employers could be held liable under the ICRA for alleged discriminatory conduct. *See* *Sahai*, 557 N.W.2d at 901. In *Sahai*, a physician (Sahai) was hired to conduct a physical examination of a job applicant. *Id*. at 899-900. Sahai learned during the examination that the job applicant was pregnant, and he recommended to the woman's prospective employer that she not be hired. *Id.* at 900. The Court held that under Iowa Code section 216.6(1)(a), the definition of "person" for purposes of attaching ICRA liability did not extend to Sahai. *Id.* at 901. The Court noted that there may be other avenues by which the job applicant could hold Sahai liable for his conduct, but the ICRA was inapplicable. *Id.* at 902-03.

In *Zepeda*, the plaintiff was an inmate at a state correctional facility. 586 N.W.2d at 364. Zepeda was hired for a work release job through Olsten Staffing Services, Inc. ("Olsten"). *Id.* at 365. The correctional facility learned from Zepeda's medical records that he had tested positive

for hepatitis C, and individuals at the facility told Olsten about Zepeda's positive test result. *Id.* at 364-65. Zepeda was thereafter removed from his work release job by Olsten. *Id.* at 365. Zepeda sued the correctional facility for unfair employment practices under the ICRA. *Id.* The Court affirmed the judgment against Zepeda, holding as follows:

> The most that can be said against the defendant facility is that its conduct in advising Zepeda's employer may have provided information or misinformation that prompted employers to fire him.
>
> The defendant facility did not thereby become Zepeda's employer, or "discriminate in employment," as contemplated in Iowa Code section 216.6(1)(a). Olsten's actions were its own, and did not come under the control of the facility.

*Id.* (citing *Sahai*, 557 N.W.2d 898). The Court further stated that in *Sahai*, it "rejected the civil rights claim against the physician, even though it appears the physician's advice controlled the employer's decision not to hire the plaintiff." *Id.* (citing *Sahai*, 557 N.W.2d at 901).

A year later, the Court answered a certified question in *Vivian*. In that case, Vivian filed suit against her employer and her supervisor. *See Vivian*, 601 N.W.2d at 872. The relevant issue in that case, for purposes of this Court's analysis, was whether Vivian's supervisor could be held liable under the ICRA as a "person" who allegedly engaged in unfair or discriminatory employment practices. *See id.* at 874-75. The Court discussed its previous decision in *Grahek* and distinguished the factual circumstances in the case before it, noting that the *Grahek* decision "did not address the question of whether a supervisor could be held personally liable under section 216.6(1)(a)." *Id.* at 875. The Court also discussed *Sahai* and again distinguished that case, recognizing that it left "open the possibility that supervisors are subject to individual liability." *Id.* at 875-76. The Court went on to look at federal district courts in Iowa and declined to follow the federal cases that relied on *Grahek* (which was factually distinguishable) and Title VII (which "differs significantly from the ICRA"). *Id.* at 876. The Court eventually

concluded that "the Iowa legislature intended the ICRA to be broad enough to embrace supervisor liability inasmuch as it included an aiding and abetting statute specifically prohibiting a discriminatory practice by 'any person.'" *Id.* at 877-78 (quoting Iowa Code § 216.11). A narrow exception was thus created, with the Court holding "that a supervisory employee is subject to individual liability for unfair employment practices under Iowa Code section 216.6(1) of the Iowa Civil Rights Act." *Id.* at 878. It is worth noting again that Wellmark is not Vroegh's employer and is not Vroegh's supervisor; Wellmark was the third-party administrator of the State's employer-sponsored health benefit plan.

Although two federal district court judges in Iowa have expanded the definition of "person" under the ICRA beyond the Iowa Supreme Court's holding in *Vivian* to include more than the plaintiff-employee's employer and supervisory employees,[1] this expanded definition has never been adopted by the Iowa Court of Appeals or the Iowa Supreme Court, and the purpose and language of the statute do not support adopting this expansive definition herein, as more fully set forth by the Iowa Supreme Court in the above-cited cases. In accordance with the language of the ICRA and the Iowa Supreme Court cases interpreting the statute, Vroegh fails to state a claim for relief against Wellmark.

## IV. THE FEDERAL AUTHORITY CITED BY VROEGH IS IRRELEVANT.

Vroegh has not alleged a Title VII or other federal claim in this case. His argument regarding federal authority in cases involving dissimilar federal statutes is therefore meritless. If he were attempting to use Title VII jurisprudence to interpret identical ICRA provisions, Iowa courts would entertain such advocacy as persuasive authority. *See Vivian*, 601 N.W.2d at 873. However, where the ICRA and Title VII differ, this Court must follow Iowa law. *See id.* at 874.

[1] *See Whitney v. Franklin Gen. Hosp.*, No. C 13-3048-MWB, 2015 WL 1809586 (N.D. Iowa Apr. 21, 2015); *Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003 (N.D. Iowa 2011); *Johnson v. BE & K Constr. Co.*, 593 F. Supp. 2d 1044 (S.D. Iowa 2009).

Curiously, Vroegh attempts to use federal jurisprudence regarding inapplicable federal statutes to support his state law claim while simultaneously arguing that Wellmark's citation to federal regulatory guidance in the context of the Affordable Care Act non-discrimination provision should be disregarded. Vroegh wants to have it both ways to save his ICRA claim. Regardless, controlling Iowa law requires dismissal of this case; the federal cases dealing with federal statutes cited by Vroegh are inapposite.

## V. VROEGH HAS RECEIVED THE REQUESTED INJUNCTIVE RELIEF AS OF JANUARY 1, 2017, SO ANY REQUEST FOR RELIEF AFTER JANUARY 1, 2017 IS MOOT.

Vroegh's employer amended its plan design, effective January 1, 2017, to provide benefits for gender identity disorder and gender reassignment surgery, by removing the exclusion for such services. *Compare* Ex. B, pp. 21 and 26, with Ex. C, pp. 22 and 26. Therefore, since January 1, 2017, Vroegh has received access to the benefits he desires.

In his Amended Petition against Wellmark, Vroegh requests the following injunctive relief:

> Award injunctive relief to effectively prevent future discrimination on the basis of gender identity or transgender status by directing that Defendant Wellmark, Inc. stop offering employer-sponsored medical plans which discriminate against members based on their sex, gender identity or transgender status, and amend its current plans to provide equal and nondiscriminatory coverage for transgender members.

Am. Pet. p. 12, ¶ B.

Vroegh concedes in his Resistance to Wellmark's Motion to Dismiss that the injunctive relief he seeks is only post-January 1, 2017. To the extent Vroegh attempts to dictate the terms of <u>other</u> employer-sponsored plans that are administered by Wellmark, he lacks standing to do so. *See Alons v. Iowa Dist. Ct. for Woodbury Cnty.*, 698 N.W.2d 858, 864 (Iowa 2005) (Recognizing "that a complaining party must (1) have a specific personal or legal interest in the

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litigation and (2) be injuriously affected" to have standing under Iowa law (quoting *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004))). Because Vroegh fails to satisfy either element of standing with regard to employer-sponsored health benefit plans to which he has no connection, the extensive injunctive relief he requests is legally unsupported. Vroegh's claim against Wellmark, to the extent he seeks any relief after January 1, 2017, is therefore moot and should be dismissed.

## CONCLUSION

Because Vroegh fails to state a claim for relief against Wellmark, dismissal with prejudice is appropriate.

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**CERTIFICATE OF SERVICE**

I certify that on December 1, 2017, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to the parties participating in the Court's electronic filing system.

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