SUPREME COURT NO. 19-0304
POLK COUNTY DISTRICT COURT NO. LACL138797

IN THE SUPREME COURT OF IOWA

Jesse Vroegh,

Plaintiff-Appellant,

v.

Wellmark Inc., d/b/a Wellmark Blue Cross and Blue Shield of Iowa,

Defendant-Appellee,

and

Iowa Department of Corrections, Iowa Department of Administrative Services, and Patti Wachtendorf, Individually and in her Official Capacities,

Defendants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE DAVID MAY

PROOF BRIEF OF APPELLANT

Rita Bettis Austen
ACLU of Iowa Foundation
505 Fifth Ave., Ste. 808
Des Moines, IA 50309
Phone: (515) 243-3988
Fax: (515) 243-8506
Email: rita.bettis@aclu-ia.org

Shefali Aurora
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: 515.243.3988
Fax: 515.243.8506
Email: Shefali.Aurora@aclu-ia.org

John A. Knight*
ACLU Foundation
Lesbian Gay Bisexual Transgender & HIV Project
150 North Michigan Avenue, Suite 600
Chicago, Illinois 60601
Telephone: 312-201-9740
E-mail: jaknight@aclu.org

Melissa C. Hasso
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

**Motion for Admission PHV filed*

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Iowa Supreme Court Cases

U.S. Supreme Court Cases

Other Cases

Iowa Statutes

Other Statutes

Court Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable jury could find that Wellmark is liable as a "person".

Authorities

Sahai v. Davies, 557 N.W.2d 898 (Iowa 1997)

Beattie v. Wells Fargo Bank, N.A., No. 4:09-cv-0037, 2009 WL 10703095 (S.D. Iowa July 2, 2009)

Iowa Code § 216.6

Iowa Code § 216.6A

Dindinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)

Vivian v. Madison, 601 N.W.2d 872 (Iowa 1999)

42 U.S.C.A. § 2000e-2

Asplund v. iPCS Wireless, Inc., 602 F. Supp.2d 1005 (N.D. Iowa 2008)

Johnson v. BE & K Construction Co., LLC, 593 F. Supp.2d 1044 (S.D. Iowa 2009)

Whitney v. Franklin Gen. Hosp., 2015 WL 1809586 (N.D. Iowa 2015)

2. Whether a reasonable jury could find that Wellmark is liable as an "agent".

Authorities

Boyden v. Conlin, No. 17-cv-264-WMC, 2017 WL 5592688 (W.D. Wis. Nov. 20, 2017)

Boyden v. Conlin, 341 F.Supp.3d 979, 982 (W.D. Wis. 2018)

Deeds v. City of Marion, 914 N.W.2d 330 (Iowa 2018)

Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006)

C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC, 784 N.W.2d 753 (Iowa 2010)

Pillsbury Co. v. Ward, 250 N.W.2d 35 (Iowa 1977)

Vischering v. Kading, 368 N.W.2d 702 (Iowa 1985)

Frontier Leasing Corps. v. Links Eng'g, LLC, 781 N.W.2d 772 (Iowa 2010)

Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983)

Gulino v. New York State Educ. Dep't, 460 F.3d 361 (2d Cir. 2006)

City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)

Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994)

Williams v. Banning, 72 F.3d 552 (7th Cir. 1995)

U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd., 55 F.3d 1256 (7th Cir. 1995)).

Brown v. Bank of America, N.A., 5 F. Supp. 3d 121 (D. Me. 2014)

Alam v. Miller Brewing Co., 709 F.3d 662 (7th Cir. 2013)

DeVito v. Chicago Park Dist., 83 F.3d 878 (7th Cir. 1996)

E.E.O.C. v. Benicorp Ins. Co., No. 00-014, 2000 WL 724004 (S.D. Ind. May 17, 2000) (unreported decision)

EEOC Compliance Manual, Section 2, § III.B.2, available at https://www1.eeoc.gov/policy/docs/threshold.html#2-III-B-2

Tovar v. Essentia Health, 857 F.3d 771 (8th Cir. 2017)

David Wahlberg, *Jury awards $780,000 to two transgender women at UW in state ban of health coverage*, Wisconsin State Journal (Oct. 12, 2018), *available at* https://madison.com/wsj/news/local/health-med-fit/jury-awards-to-two-transgender-women-at-uw-in-state/article_b6452d36-c717-5d33-a9f3-298aa4a1689a.html

3. Whether a reasonable jury could find that Wellmark is liable as an "aider and abettor".

Authorities

Iowa Code § 216.11

Blazek v. U.S. Cellular Corp., 937 F. Supp. 2d 1003 (N.D. Iowa 2011)

Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994)

Tubbs v. United Cent. Bank, 451 N.W.2d 177 (Iowa 1990)

State ex rel. Goettsch v. Diacide Distributers, Inc., 561 N.W.2d 369 (Iowa 1997)

Good et al. v. Iowa Dep't of Hum. Servs., 924 N.W.2d 853 (Iowa 2019)

State v. Maxwell, 743 N.W.2d 185 (Iowa 2008)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it presents "substantial issues of first impression," "fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court," and "substantial questions of enunciating or changing legal principals." Iowa R. App. P. 6.1101(2)(c), (d), (f).

STATEMENT OF THE CASE

A. Nature of the Case

In this appeal, the Court is asked to decide whether a third-party administrator of a facially discriminatory employee health benefits plan can be liable for its important role in creating and administering the discriminatory plan under the Iowa Civil Rights Act ("ICRA") under three theories and Code sections: (1) as a "person" under Iowa Code §§ 216.6 and 216.6A, (2) as an "agent" of the employer under §§ 216.6 and 216.6A, or (3) as an "aider and abettor" to the employer under § 216.11.

B. Procedural History

Plaintiff Jesse Vroegh ("Vroegh") was hired to work as a nurse at the Iowa Correctional Institution for Women ("ICIW") in Mitchellville, Iowa in July 2009. (P. App. 376-78).[1] Vroegh is a man who is transgender. He began medical treatment for gender dysphoria in March 2014. (Am. Pet. ¶¶ 11-20, P. App. 3). On August 28, 2017, Vroegh sued his former employer, the Iowa Department of Corrections ("IDOC"); Patti Wachtendorf, the warden at ICIW; the Iowa Department of Administrative Services ("DAS");[2] and Wellmark, Inc. Vroegh's claims were:

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

- Discrimination in the provision and administration of benefits on the basis of gender identity and sex against the IDOC and the IDAS, for denying Vroegh the same level of healthcare benefit coverage that they provide to

---

[1] Vroegh is no longer employed with ICIW. (P. App. 423, Vroegh dep. 92:9-11).

[2] Vroegh collectively refers to Defendants IDOC, the IDAS, and warden Patti Wachtendorf as "State Defendants."

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).

Following discovery, Vroegh and Wellmark filed cross motions for summary judgment. (Vroegh Mot. Summ. J; Wellmark Mot. Summ. J.; Ruling at 2.) State Defendants resisted Vroegh's motion for summary judgment but did not file their own summary judgment motion. (State Resistance; Ruling at 2.)

Vroegh resisted Wellmark's motion for summary judgment on three alternative bases of Wellmark's liability for discriminatory practices under ICRA: (1) as "persons" under Iowa Code §§ 216.6 and 216.6A, (2) as agents of the State under §§ 216.6 and 216.6A, and (3) as aiders and abettors to the State under § 216.11. (Pl. Br. in Resistance to Wellmark's Mot. for Summary J. at 2, *passim*.)

On January 23, 2019, the district court denied Vroegh's motion for summary judgment against State Defendants and Wellmark, and granted Wellmark's motion for summary judgment, finding that, as a matter of law, Wellmark could not be liable for its

role in the discrimination in employment and compensation alleged by Vroegh under Iowa Code §§ 216.6, 216.6A, or 216.11. (Ruling at 23-28.)

In the subsequent trial against State Defendants, the jury found State Defendants liable for discrimination on the basis of sex and gender identity both on Vroegh's claim about restroom and locker room usage and on his claim related to his denial of health insurance benefits, under Iowa Code §§ 216.6 and 216.6A, awarding Mr. Vroegh $120,00.00 in combined emotional distress damages. (Civil Verdict; J. Entry, Feb.14, 2019).

Vroegh timely filed Notice of Appeal of the district court's grant of summary judgment for Wellmark. (Not. of Appeal at 1-2.) Thus, this appeal presents the question of whether Wellmark may be liable as a matter of law as the third-party administrator of the discriminatory employee health benefits plan that resulted in Vroegh's denial of necessary medical care under ICRA. Iowa Code §§ 216.6; 216.6A; 216.11. Neither the restroom claim nor Vroegh's claim against State Defendants related to his denial of health insurance coverage are before the Court in this appeal.

STATEMENT OF THE FACTS

Vroegh was assigned the female gender at birth. (Pl. App. 3). By the third grade, he recognized that his internal sense of his gender did not match with his birth-assigned gender. (Pl. App. 3, 416, Vroegh dep. 46:8-13). He felt pressured to play with girls, use the girl's restrooms, wear pink clothes and dresses, and generally "play the role" of a girl when he knew he belonged with the other boys. (Pl. App. 417-18, Vroegh dep. 53:12-55:20). This caused him great stress and anxiety throughout his childhood. (*Id.*). 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. (Pl. App. 414-15, Vroegh dep. 21:1-23:12; Pl. App. 416-18, Vroegh dep. 46:4-53:7).

In 2014, Vroegh was diagnosed with gender dysphoria. (Pl. App. 416, Vroegh dep. 46:4-7; Pl. App. 328, Dr. Freund Report). 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;
> (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.

(Pl. App. 321-22, Dr. Freund Report; Pl. App. 351-52, Dr. Priest Report). Gender dysphoria can cause considerable distress, and the rates of depression, anxiety, and suicide are significantly higher for those with gender dysphoria than for the non-transgender population. (*Id.*). There is medical consensus based on decades of research that hormone therapy and gender-affirming surgery are two medically necessary and effective treatments for gender dysphoria and its accompanying distress for many patients. 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. (Pl. App. 326-28, Dr. Freund Report; Pl. App. 352-53, Dr. Priest Report; Pl. App. 379-80, APA Position Statement on Access to Care for Transgender and Gender Variant Individuals; Pl. App. 381-85, ACOG Committee Opinion; Pl. App. 386-89, WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.).

Vreogh experienced many serious symptoms of gender dysphoria, including pervasive depression and anxiety. (Pl. App. 414-15, Vroegh dep. 20:18-23:12). Since 2014, he has been treated for gender dysphoria by Joseph Freund, M.D., who has expertise in treating patients with this condition. (Pl. App. 321-330, Dr. Freund Report). Vroegh has followed all medical advice Dr. Freund has given him in treating his gender dysphoria, including undergoing a social transition, which includes using the men's restrooms and locker rooms consistent with his gender identity. (*Id.*, Pl. App. 328-29). Vroegh also began hormone therapy with testosterone in late 2014. (*Id.*). As a result, Vroegh began experiencing physical changes

resulting in his body conforming more closely to one typically associated with men. It was a relief for Vroegh to have his physical body finally starting to match who he knew he was internally. (Pl. App. 419-20, Vroegh dep. 76:11-79:17).

Consistent with Dr. Freund's treatment plan, by mid-2015 Vroegh was consistently using men's restrooms in public places. (Pl. App. 442, Vroegh dep. 180:1-8). By 2016, Vroegh's birth certificate and driver's license reflected his male gender. (Pl. App. 17, 18). In 2016, he legally changed his name to Jesse, a name that was consistent with his male identity. (Pl. App. 14-16). In short, Vroegh is a man and has taken steps to transition medically and socially to live more consistently with his maleness. (*Id.*; Pl. App. 459, Wachtendorf dep. 152:2-7).

But Vroegh's transition was impeded by discriminatory treatment in his employment, where he was denied use of the men's restrooms and locker room, and was denied coverage for medically necessary top surgery under his employee health benefits plan.[3] A

[3] In February 2019, the Polk County jury found that State Defendants discriminated against Vroegh in his employment in

key part of Vroegh's gender transition was undergoing top surgery to reconstruct his chest to accord more closely with his male gender. (Pl. App. 328, Dr. Freund Report). 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. (*Id.*). Research has shown that gender-affirming surgery reduces or even eliminates symptoms of gender dysphoria in most individuals, contributing to an improvement in mental health and quality of life. (Pl. App. 353-55, Dr. Priest Report 3-5; Pl. App. 321-28, Dr. Freund Report). Access to needed medical intervention, including insurance coverage, is a critical part of successful treatment for gender dysphoria. (Pl. App. 355-56, Dr. Priest Report; Pl. App. 321-28, Dr. Freund Report).

---

both ways. (Civil Verdict; J. Entry, Feb.14, 2019.) In addition to the $20,000 in emotional distress damages resulting from the denial of coverage for his medically necessary top surgery, it awarded him $100,000 in emotional distress damages resulting from State Defendants denying him the use of the men's restrooms and locker room at work, on the basis of Vroegh's sex and gender identity in violation of ICRA. Iowa Code §§ 216.6; 216.6A.

Consistent with the consensus of the medical and mental health communities, Wellmark's own internal "Gender Reassignment Surgery" policy, in place since June 2013, recognized 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. (Pl. App. 468-72). Consistent with the ICRA's prohibition on sex and gender identity discrimination in employment, the Iowa Civil Rights Commission's ("ICRC") guidance to employers even states that, as of July 1, 2007 when the ICRA was expanded to include gender identity and sexual orientation, employers were required to provide insurance benefits to employees in a nondiscriminatory manner. (Pl. App. 462-67, ICRC Guidance). 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 ("Plan") in 2014, 2015 and 2016. The 2014 Plan contained the following exclusion under "Mental Health Services: **Sexual**

disorders and gender identity disorders." (Pl. App. 54, 2014 Plan p. 18). The 2015 Plan 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."** (Pl. App. 152, 2015 Plan, p. 23). In the 2016 Plan, the gender identity-based exclusions remained in place; "**Gender identity disorders**" were still excluded from mental health coverage, and "**Gender reassignment surgery**" was excluded from surgical coverage. (Pl. App. 243, 248, 2016 Plan, pp. 21, 26).

In the fall of 2015, Vroegh sought coverage for top surgery through his Plan. (Pl. App. 478-489, 496-502). His physicians submitted documentation to Wellmark confirming that the procedure was medically necessary. (Pl. App. 478-495). There is no dispute that Vroegh's surgery was medically necessary. (Pl. App. 478-495; 402, Gutshall dep. 88:24-89:12; Pl. App. 468-72, 505-06). Nonetheless, Wellmark denied his request for coverage. (Pl. App. 474-77, 404, Dr. Gutshall dep. 94:12-18). Vroegh appealed, and Wellmark upheld the decision to deny coverage. (Pl. App. 490-504).

The denial was based on one reason only: the Plan expressly excluded coverage for all treatment for gender dysphoria, including gender affirming surgery, regardless of medical necessity. (Pl. App. 498, 402, 404, Dr. Gutshall dep. 86:6-87:20; 94:3-18). Vroegh's Plan did cover the same procedure for employees who were undergoing the procedure for medically necessary reasons other than as treatment for a gender dysphoria. (Pl. App. 395, Dr. Gutshall dep. 49:6-12). The only identified surgical exclusion in the Plan was for gender affirming surgery (called "gender reassignment surgery" by the Plan)—surgery that only transgender people with gender dysphoria need. (Pl. App. 398, Dr. Gutshall dep. 71:7-11; Pl. App. 152, 248). The *only* reason Vroegh was treated differently and denied coverage for medically necessary services was because he is transgender. (*Id.*).

There is no dispute as between Wellmark and Vroegh in this appeal that the Plan contained facially discriminatory language that resulted in the denial of benefits for Vroegh based on his sex and gender identity. While State Defendants attempted to argue the underlying health benefits Plan was not discriminatory,

Wellmark took no position on the question of whether the underlying Plan violated ICRA in cross summary judgment proceedings, instead arguing that as a third-party administrator of the Plan, it could not be liable as a matter of law for any such violation. (Ruling at 18; Wellmark's Summ. J. Br.) Wellmark assumed for purposes of its motion for summary judgment that the Plan was discriminatory. (Wellmark Summ. J. Br. at 24.)

Additionally, in the subsequent jury trial against State Defendants, the jury found that the Plan at issue in this appeal was discriminatory, awarding Vroegh $20,000 in emotional distress damages for the discriminatory denial of his medically necessary top surgery. (Civil Verdict; J. Entry, Feb.14, 2019.) Additionally, the denial of coverage for medically necessary care for treatment of gender dysphoria in Medicaid was determined to be discriminatory under the Iowa Civil Rights Act by this Court in *Good*. *Good et al. v. Iowa Dep't of Hum. Servs.*, 924 N.W.2d 853, 862 (Iowa 2019) (holding that the same exclusion in Iowa Medicaid was

discriminatory on the basis of gender identity).[4] Thus, the discriminatory nature of the Plan is not at issue in this appeal; the

---

[4] The Iowa Legislature has since amended Iowa Code § 216.7. Division XX of House File 766 ("the Division"), codified at Iowa Code § 216.7(3) (2019). The Division, entitled "Provision of Certain Surgeries or Procedures--Exemption from Required Accommodations or Services," was passed by the Iowa Legislature on April 27, 2019, and signed by the Governor on May 3, 2019, with an immediate effective date. The Division provides:

> Sec. 93. *Section 216.7*, Code 2019, is amended by adding the following *new subsection*:
>
> NEW SUBSECTION. 3. *This section* shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder.

Id. (emphasis added.) The Division facially discriminates against transgender Iowans by creating an exception to the Iowa Civil Rights Act's protections against discrimination in public accommodations, specifically allowing discrimination against transgender people in the provision of publicly funded, medically necessary healthcare. While the unconstitutionality of the Division is plain, it is not at issue in this case, because the Division by its own terms only amended Iowa Code § 216.7, governing public accommodations, and did not alter the ICRA sections governing employment and compensation discrimination, as provided for in Iowa Code §§ 216.6, 216.6A, and 216.11.

only question presented is whether Wellmark, as a third-party administrator of the Plan, may be held jointly liable for it.

The record evidence presented by Vroegh in resisting Wellmark's motion for summary judgment, which must be viewed in favor of Vroegh as the resisting party, demonstrates a genuine issue of material fact as to the role Wellmark played in the underlying discriminatory Plan, both in terms of design and administration, which require reversal of the district court's grant of summary judgment. *See Goodpaster v. Schwan's Home Servs., Inc.*, 849 N.W.2d 1, 6-7 (Iowa 2014) (stating record must be viewed in favor of nonmoving party to determine if any genuine issue of material fact existed). These additional facts specific to Wellmark's role are as follows.

Wellmark first proposed a version of the Plan's discriminatory policy language in response to the State's Request for Proposal ("RFP"). (Wellmark App. 502-568 (RFP); Supp. P. App. 565, Holland dep. 11:11-12:18; Pl. Supp. App. 546B, Nelson dep. 19:23-20:14). That Plan excluded medically necessary mental health and counseling services to treat gender dysphoria, but did not exclude

gender affirming surgery. (Pl. App. 58, 2014 Plan benefit booklet, p. 22). The exclusion for gender affirming surgery was not added to the Plan until 2015. (Pl. App. 152, 2015 Plan benefit booklet, p. 23; P. App. 393, Gutshall dep. 39:21-41:15; Pl. App. 317, Wellmark Ans. to Int. 18). This change came about because Wellmark, not the State, re-drafted the Plan to exclude that coverage. (*Id.*). Dr. Gutshall, Wellmark's Medical Director, characterized this exclusion as a "clarification" of existing unwritten policy or practice, not an addition. But that assertion does not overcome the genuine issue of material fact on the question of Wellmark's liability, which must be decided by the jury, because the prior policy on its face said nothing about the exclusion of gender-affirming surgery. Wellmark's interpretation of the Plan to enforce an exclusion, when Wellmark itself through Dr. Gutshall perceived the language of the exclusion as needing "clarification", shows the key role it played both in administering the Plan and in suggesting language to ensure that Vroegh was denied coverage.

Indeed, the insurance billing code for Vroegh's medically necessary gender affirming chest surgery procedure was one for a

covered service, and Wellmark's own claim processing staff determined it was a covered benefit under the Plan. (P. App. 496). It was only Wellmark's own application of the bar on gender affirming surgery—which it proposed and crafted—to what was otherwise a covered benefit under the Plan that led to its denial of Vroegh's medically necessary care. (Pl. App. 496-502; P. App. 152, 2015 Plan benefit booklet, p. 23; P. App. 393, Gutshall dep. 39:21-41:15; P. App. 317, Wellmark Ans. to Int. 18).). But for Wellmark's actions, there would be no exclusion of gender affirming surgery in the State's employer-sponsored health insurance ban at the time Vroegh sought coverage, and his physician's request for pre-approval of his procedure would have been granted.

Indeed, the record presented by Vroegh in resisting Wellmark's motion for summary judgment shows that the relationship between Wellmark and the State was one in which the State relied heavily on Wellmark to guide its decisions about which services were covered under the Plan. (Pl. Supp. App. 569, Holland dep. 26:5-27:18; Pl. Supp. App. 559, Pierson dep. 16:10-17:5; Pl. Supp. App. 523-24, Beichley dep. 14:23-15:18, 17:17-18:23).

Underscoring this closely intertwined relationship, the State sought advice from Wellmark in construing what benefits should be covered under an entirely different program, Iowa Medicaid, which is not administered by Wellmark, because the State relied on Wellmark to determine what health insurance coverage was appropriate. (Wellmark App. 833-35, Dep. Ex. 54). To support its argument below that it bears no responsibility for the discrimination Vroegh experience, Wellmark relied heavily on two emails that Wellmark employee Amanda Nelson sent to State Defendants in June 2015 and November 2015 regarding, respectively, the terms of Iowa Medicaid[5] and Vroegh's email to Wellmark asking if there was an employer-sponsored plan available that would cover his medically necessary care. (Wellmark Summ. J. Br. at 24-25; Wellmark App. 831, 833, Dep. Ex. 49).

---

[5] The enforcement of the same exclusion in Iowa Medicaid, referenced by Wellmark in Amanda Nelson's June 2015 email, has subsequently been held to be a violation of the Iowa Civil Rights Act by this Court in *Good*. 924 N.W.2d at 862; *See also Boyden v. Conlin*, 341 F.Supp.3d 979, 982 (W.D. Wis. 2018) (granting summary judgment against the State of Wisconsin for denying healthcare coverage for gender affirming surgery to transgender state employees under federal equal protection clause, Title VII and the Affordable Care Act.).

However, notwithstanding Wellmark's arguments to the contrary, the June 2015 and November 2015 emails show that Wellmark's role in discriminating against Vroegh was substantial, and independent from the actions of State Defendants. DAS staff did not believe Wellmark was offering it the option to add coverage; rather, DAS staff reasonably interpreted Amanda Nelson's emails as instead guiding them in how to interpret the State's then-current Plan. The DAS staff testified that they understood the email to mean that the Plan only excluded coverage for surgery based on Wellmark's addition of the exclusionary language. (Pl. Supp. App. 540-42, Leichti dep. 33:6-38:12 ("Q: And why would you conclude that none of the plans covered that treatment? A: Wellmark had indicated it's not currently covered." . . .Q: You didn't look at Ms. Nelson's question to you as seeking guidance as to whether they should go ahead and deny the services or not? A: No."); Pl. App. 317, Wellmark Ans. to Int. 18; Pl. App. 393, Gutshall dep. 39:21-41:15.).

Consistent with this role, and to its credit, Wellmark later successfully pushed for a new Plan, which took effect in January 2017—after Vroegh's employment with the State ended—based on

its determination that this discriminatory exclusion violated federal Affordable Care Act ("ACA") non-discrimination requirements. (Wellmark App. 812-14; Pl. Supp. App., 549, 553, Nelson dep. 46:12-24, 48:22-49:1, 70:2-14).[6] Consistent with the close relationship between Wellmark and State Defendants in Plan design and administration, that recommendation came with specific suggested remedial language to remove the discriminatory exclusion Wellmark had drafted. (Wellmark App. 816-17; Wellmark Br. at 25) ("The State, however, never requested to add gender reassignment surgery to its Blue Access health benefit plan until after the passage of the ACA guidance in 2016 and a subsequent recommendation from Wellmark that the State add this coverage."). It was possible for either Wellmark or the State to suggest changes to the Plan terms; in practice, however, only Wellmark initiated Plan changes. (Pl. Supp. App. 546, Nelson dep. 13: 13-23; Pl. Supp. App. 559-60, Pierson dep. 16:10-18:25).

---

[6] Beyond showing Wellmark's key role in crafting the Plan, this fact also demonstrates that Wellmark and State Defendants had knowledge that the plan terms discriminated against transgender employees.

Thus, a reasonable jury could find that the facts show that Wellmark exercised a critical role in controlling the design and administration of the discriminatory Plan. Wellmark's claims regarding the RFP, the Master Service Agreement ("MSA"), the authority State law gives to third-party administrators of public employer healthcare, and the approval given to various State plans by the Iowa Insurance Division, alternatively argued as defenses by Wellmark below (Wellmark Summ. J. Br. 4, 5, 6)), all fail to change the facts regarding Wellmark's critical role or shield Wellmark from liability for its role.

Indeed, the State's RFP contained no request or term to exclude gender affirming surgery; Dr. Gutshall's claim that the policy excluded gender affirming surgery at least as far back as 2007 was belied by the plain language of the Plans themselves, which contained no such exclusion until, at the direction of Dr. Gutshall, Wellmark added it in 2015. (Pl. App. 58, 2014 Plan benefit booklet p. 22, showing no gender reassignment surgery exclusion; P. App. 152, 2015 Plan benefit booklet p. 23, showing newly-added

exclusion; Pl. App. 317, Wellmark Ans. to Int. 18; Pl. App. 393, Gutshall dep. 39:21-41:15).[7]

The RFP also specifically provided that the Vendor "shall comply with all applicable federal, state, and local laws, rules, ordinances, regulations and orders when performing the services under this Agreement, including without limitation, all laws applicable to the prevention of discrimination in employment . . ." (Wellmark App. 555, RFP). This provision would require Wellmark to comply with the Iowa Civil Rights Act's prohibition against discrimination based on sex and gender identity.

Based on these contested material facts, contrary to the picture Wellmark tried to paint below that it simply "administered the plan in accordance with the plan terms determined by the employer sponsor," (Wellmark Summ. J. Br. at 4), a reasonable fact-finder could find that Wellmark substantially assisted, encouraged,

---

[7] Below, Wellmark claimed the opposite formulation, stating "the State's 2012 RFP did not include coverage for transgender related treatment." (Wellmark Summ. J. Br. at 5.) But a reasonable fact-finder could reject this claim, because the Plan did include coverage for medically necessary surgery, and did not exclude coverage for gender affirming surgery. (Pl. Supp. App. 594-95, 2013 Plan booklet pp. 21-22).

and even at times was the primary driver of the discrimination at issue here—making it liable directly as a person engaging in employment discrimination, as an agent of State Defendants, and/or as an aider and abettor of discrimination under ICRA.

ARGUMENT

I. Vroegh was entitled to a jury trial on the merits of his ICRA claims against Wellmark.

In resisting summary judgment, Vroegh demonstrated a genuine issue of material fact existed to support his claims against Wellmark (1) as directly liable as a "person" under sections 216.6 and 216.6A of ICRA for its unlawful discrimination against Vroegh in employment, (2) as an agent of the State in the provision of employment benefits under the same sections, and (3) as an aider and abettor of the unlawful employment discrimination by State Defendants under section 216.11. Because Wellmark did not meet its substantial burden of proving an absence of any material factual disputes as required for the district court to dismiss Vroegh's claims, the question of Wellmark's liability under any of the theories asserted by Vroegh must be determined by the jury, rather

than on summary judgment. Therefore, the district court's grant of summary judgment for Wellmark should be reversed.

A. Error Preservation

Vroegh preserved error on each of his ICRA claims against Wellmark in his resistance to Wellmark's motion for summary judgment, on which the district court ruled. (Pl. Resistance to Summ. J. at 2, *passim* (setting out that "Wellmark may be liable for discriminatory practices under ICRA (1) as "persons" under Iowa Code §§ 216.6 and 216.6A, (2) as agents of the State under §§ 216.6 and 216.6A, and (3) as aiders and abettors to the State under § 216.11.").

B. Standard of Review

This Court reviews "a decision by the district court to grant summary judgment for correction of errors at law. Summary judgment is proper when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law. The burden is on the moving party to demonstrate that it is entitled to judgment as a matter of law." *Goodpaster*, 849 N.W.2d at 6 (quotations and citations omitted). In determining

whether the moving party has met this burden, this Court "view[s] the record in the light most favorable to the nonmoving party. Even if facts are undisputed, summary judgment is not proper if reasonable minds could draw from them different inferences and reach different conclusions." *Id.* (quotations and citations omitted).

C. A reasonable jury could find that Wellmark is liable as a "Person".

The district court determined that Wellmark could not be liable as a person under ICRA based on its reading of *Sahai*, and its erroneous statement that:

> [I]t is undisputed that the State selected the coverage it wished to provide under the plan. Wellmark could not expand the available coverage. It is also undisputed that the State's chosen plan did not provide coverage for care related to gender dysphoria. Therefore, as the administrator of the State's plan, Wellmark had to deny Vroegh's request for care. Wellmark was not in a position to act otherwise.

(Ruling at 24) (citing *Sahai v. Davies*, 557 N.W.2d 898, 901 (Iowa 1997) and *Beattie v. Wells Fargo Bank, N.A.,* No. 4:09-cv-0037, 2009 WL 10703095, at *5 (S.D. Iowa July 2, 2009)). The district court did not cite any record evidence to support these purportedly "undisputed" facts, and ignored the facts and arguments that

Vroegh argued disputing precisely those contentions in his Resistance to Wellmark's motion. (*Id.*) (ignoring, inter alia, Vroegh's Resistance Br. at 14-15, supported by record evidence, stating that "[a] reasonable jury could conclude that Wellmark's role also far exceeded that of the physician in *Sahai* . . . It could find that Wellmark was the driving force in excluding gender affirming surgery from coverage in the 2015 plan, as well as denying Vroegh's request for preauthorization for a mastectomy procedure, . . . Wellmark acting on its own initiative, took discriminatory actions against Vroegh. . . . Wellmark was in a position to control large portions of the design and administration of the discriminatory plan.") The district court also granted summary judgment based on *its own determination of fact* that the State of Iowa had a policy or practice of denying coverage for gender affirming surgery prior to the suggestion of Wellmark's medical director, Dr. Guttshall, to add the exclusion of coverage for gender affirming surgery to the plan language. (Ruling at 25). The district court made this determination despite its acknowledgment that there existed a genuine dispute of material fact on that matter, and in violation of

the governing legal standard requiring that a genuine dispute of facts be construed in the light favorable to the nonmoving party. *Id.*

To the contrary, viewing the facts in Vroegh's favor as required, a reasonable jury could find Wellmark is directly, jointly and severally liable under sections 216.6 and 216.6A as a "person" that discriminated against Vroegh because of its role in designing and administering the discriminatory Plan. ICRA is explicit in barring discrimination in wages and benefits paid to employees on the basis of the employee's gender identity and sex. Iowa Code §§ 216.6; 216.6A; *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 564 (Iowa 2015) (determining section 216.6A was added in 2009 to eliminate discrimination in compensation). While section 216.6 also bars discrimination in compensation on the basis of membership in a protected class, liability under section 216.6 requires a showing of intent. *Dindinger*, 860 N.W.2d at 564. By contrast, "Section 216.6A of the Iowa Code . . . creates an entirely new cause of action: strict liability on the part of employers for paying unequal wages." *Id.* (explaining that "Section 216.6A addresses this issue by including additional remedies and making the claim intent-neutral.

Under § 216.6A, it does not matter why the wages are discriminatorily less; it matters only that they are less.")

Under ICRA, both employers and non-employer "persons" are liable for engaging in employment discrimination. Iowa Code § 216.6(1)(a) ("It shall be an unfair or discriminatory practice for any . . . *person* to . . . discriminate in employment against any applicant for employment or any employee.") (emphasis added); *Vivian v. Madison*, 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" and holding non-employer supervisor directly liable.) "Person" is defined in the statute 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(2).

As a result, ICRA does not require a party to be an employer in order for it to be liable for employment discrimination. *Sahai*, 557 N.W.2d at 901. In *Sahai*, this Court pointed to the plain text of ICRA to hold that illegal discrimination 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 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 district court had affirmed the administrative judge's conclusion below that "not only employers but all entities that play a role in hiring decisions[8] are subject to the statutory prohibitions against employment discrimination." *Id.* at 900. The Court then 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 third-party physician and clinic did not play a role

---

[8] While Sahai was concerned with discrimination in hiring, its interpretation of ICRA is applicable to all employment-related decisions.

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.

On a certified question from the federal district court, this Court recognized that liability under ICRA is broader than under Title VII, reaching non-employer "persons." *Vivian*, 601 N.W.2d at 874. In *Vivian*, it held that supervisors may be individually liable for employment discrimination under § 216.6(1)(a). *Id.* It reasoned that giving 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.

In *Asplund*, the federal district court denied a motion to dismiss a supervisor in a Section 216.6 "person" claim. 602 F. Supp.2d at 1011. The Court recognized that "[u]nlike Title VII, under ICRA a plaintiff's direct supervisor may be held individually liable for his unfair and discriminatory practices." *Id.* at 1010. In denying the motion, the court relied on the allegations that the

supervisor's name was listed on the letter terminating the plaintiff and retaliated against the plaintiff for reporting sexual harassment. *Id.* at 1011.

More recently, in *Johnson v. BE & K Construction Co., LLC*, the federal district court determined that under both ICRA's direct liability for "persons" provision and its "aiding and abetting" provision, an African American employee could sue her former employer's client for demanding that her employer terminate her for conduct that did not result in termination for white employees. 593 F. Supp.2d 1044, 1050 (S.D. Iowa 2009). The *Johnson* opinion 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." *Id.* at 1049, 1050; *see also Whitney v. Franklin Gen. Hosp.*, 2015 WL 1809586, at *9 (N.D. Iowa 2015) (unpublished decision) (holding corporations providing management services to hospital could be liable under ICRA for discrimination against hospital employee).

A reasonable jury could conclude that Wellmark's role with respect to the discrimination Vroegh experienced far exceeded that of the physician in *Sahai*, and was at least as substantial as the role of the non-employer defendants in *Vivian*, *Asplund*, and *Johnson*. It could find that Wellmark was the driving force in excluding gender affirming surgery from coverage in the 2015 Plan, (Pl. App. 152, 2015 Plan benefit booklet, p. 23; Pl. App. 393, Gutshall dep. 39:21-41:15; Pl. App. 317, Wellmark Ans. to Int. 18), as well as in denying Vroegh's request for preauthorization for his medically necessary mastectomy procedure, despite its own acknowledgement that a medically necessary mastectomy procedure is otherwise a covered benefit for conditions other than gender dysphoria. (Pl. Supp. App. 533, Gutshall dep. 86:6-20; Pl. App. 496-500). As a factual matter, Wellmark played an outsized role in setting the terms of the discriminatory employment benefits policy. What's more, unlike the physician in *Sahai*, Wellmark's role was at minimum to administer the discriminatory benefits policy to all State employees. Like the non-employer defendant in *Asplund*, Wellmark's name, not State Defendants, was found on the denials

of Vroegh's claim, and the ultimate denial of his appeal. (P. App. 474-477, 496-504). Wellmark's customer service agents, not employees at DAS, were Vroegh's point of contact. (*Id.*). And like the non-employer defendant in *Asplund*, both Wellmark and State Defendants, but often, Wellmark acting on its own initiative, took discriminatory actions against Vroegh. Finally, as in *Johnson*, Wellmark was in a position to control large portions of the design and administration of the discriminatory Plan, and the record shows that it did in fact exercise significant control over the discriminatory provisions governing Vroegh's care. (Wellmark App. 502-568 (RFP); Pl. Supp. App. 565, Holland dep. 11:11-12:18; Pl. App. 546B, Nelson dep. 19:23-20:14; Pl. Supp. App. 152, 2015 Plan benefit booklet, p. 23; P. App. 393, Gutshall dep. 39:21-41:15; Pl. Supp. App. 317, Wellmark Ans. to Int. 18).

The district court ignored all this record evidence Vroegh cited to show that Wellmark had significant control over the essential aspect of Vroegh's employment that is at issue in this case—his access to medically necessary care under his employee health benefits coverage. Viewing the facts in Vroegh's favor as required,

a reasonable jury could conclude that Wellmark's role in plan design and administration was sufficient to hold Wellmark liable for its discriminatory actions as a "person" under the ICRA sections 216.6 and 216.6A.

Given the genuine dispute of material fact that exists on this issue, the district court erred in granting Wellmark's motion for summary judgment, and this Court should reverse the district court below and allow Vroegh's claims against Wellmark to go to the jury.

D. A reasonable jury could find that Wellmark is liable as an "Agent".

The district court also erred in summarily granting Wellmark's motion for summary judgment on Vroegh's claims that Wellmark discriminated against him on the basis of his gender identity and sex as an *agent* of the State under Sections 216.6 and 216.6A. (Ruling at 26). It determined that "an independent contractor who administers a health plan according to an employer's chosen terms should not be considered 'an agent of [the] employer with respect to employment practices, but rather a provider or vendor of services.'" (*Id.*) (citing *Boyden v. Conlin*, No. 17-cv-264-WMC, 2017 WL 5592688, at *3 (W.D. Wis. Nov. 20, 2017)

(hereinafter "*Boyden* MTD Order"). The district court entered this finding as a matter of law and without reference to any facts in the record or application of the facts to this Court's identified test to determine the existence of an agency relationship. The district court's summary judgment determination on Vroegh's agency claim thus was in error on two grounds: (1) because the Court resolved a genuine issue of material fact against Vroegh regarding Wellmark's assertion that State Defendants, rather than Wellmark, determined the terms of the discriminatory Plan; and (2) because the Court's finding that a third-party administrator of an employer's discriminatory health care plan cannot act as an agent of the employer was wrong as a matter of law. Because a reasonable jury could conclude that Wellmark acted on behalf of the State as its agent in discriminating against Vroegh, the district court's grant of summary judgment to Wellmark on this theory of liability should also be reversed.

Under ICRA, non-employers may be liable as agents of the employer. In recently setting forth the standard for determining whether an agency relationship existed between an employer and a

third-party in ICRA cases, this Court cited the Restatement (Third) of Agency, defining agency as "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." *Deeds v. City of Marion*, 914 N.W.2d 330, 349 (Iowa 2018) (citing Restatement (Third) of Agency § 1.01, at 17 (Am. Law Inst. 2006) (quotations omitted)). In *Deeds,* the Court determined that a physician hired by the City, as the employer, to determine medical fitness of its job applicants for an emergency firefighter position, was not acting as an agent of the employer. *Id.*[9] There, the Court reasoned that "there [was] no evidence that the City 'controlled' or had a right to control *how* [the third party physician] performed her physical examinations; rather, she exercised her own independent medical judgment." *Id.*

But in this case, Wellmark describes itself as acting under the State's control in Plan design and administration and the record

---

[9] The Court in *Deeds* addressed the question of whether the physician acted to aid and abet the discrimination separately, which is discussed in I.E of this Argument, below.

supports a finding that Wellmark was acting as an agent for the State. Wellmark has tried to have it both ways in this case. In one breath, it has argued that it cannot be found to be a "person" engaging in a discriminatory employment practice because it was "merely" a third-party administrator acting under the control of the State in the manner in which it decided health benefit claims; in the next breath, it argued that it is not an "agent" of the State because it was acting independently of the State and not subject to the State's control. (*Compare* Wellmark Summ. J. Br. at 14-15 ("between the State and Wellmark, the State was and is responsible for maintaining, designing, and funding its health benefit plans . . . the State is ultimately responsible for the denial of benefits; it has the right to make final determinations regarding claims, appeals, and claims exceptions") *with Id.* at 17 ("the State does not control or have a right to control how Wellmark performs its administrative duties").

In support of its argument that it is not an agent of the State below, Wellmark cited the MSA with the State, which purported to disclaim an agency relationship, and argued it "[m]erely

administer[ed] the State's chosen plan in accordance with its terms." (Wellmark Summ. J. Br. at 16-17). However, as this Court has previously determined, agency relationships may arise outside of a formal contract. Wellmark cannot rely on the language of the written contract it had with the State to avoid the actual agency relationship that existed between Wellmark and the State related to the design and administration of employment insurance benefits. *See C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753, 759 (Iowa 2010) (holding agency relationship plausibly existed to defeat summary judgment motion, despite language in contract between presumptive agent and principal expressly disavowing one). This Court explained that "although the contracts state that Royal Links is not an agent of C & J, such a contractual statement is not necessarily conclusive as to the non-existence of such a relationship." *Id.* at 760 (quotation and citation omitted).

Typically, whether an agency-principal relationship exists is a factual question for the fact-finder. *Pillsbury Co. v. Ward*, 250 N.W.2d 35, 38 (Iowa 1977). "An agency relationship may be actual

(express or implied) or apparent." *C & J Vantage Leasing,* 784 N.W.2d at 759. "For apparent authority to exist, the principal must have acted in such a manner as to lead persons dealing with the agent to believe the agent has authority." *Id.* (citing *Vischering v. Kading,* 368 N.W.2d 702, 711 (Iowa 1985)); *see also Frontier Leasing Corps. v. Links Eng'g, LLC,* 781 N.W.2d 772, 776 (Iowa 2010) ("Apparent authority is authority the principal has knowingly permitted or held the agent out as possessing."). Thus, while the MSA between the State and Wellmark is one piece of evidence that *the fact-finder*—not the district court on summary judgement—may consider in determining whether an agency-principal relationship existed, it is not determinative.

Here, and as set forth by Vroegh in resisting Wellmark's summary judgment motion, the State held Wellmark out as having the authority to make determinations regarding coverage claims and appeals to Wellmark, and Wellmark in turn set forth an appeals process for Vroegh and all State employees that did not at any point include appeal to the State, independent of Wellmark, if an employee was dissatisfied with Wellmark's decision. (Pl. App.

198-200, 2015 Plan benefit booklet, "Appeal Process"; Pl. App. 474-76. Wellmark denial letter to Vroegh with summary of appeal process; Pl. App. 478-95, appeal documents Vroegh submitted to Wellmark; Supp. P. App. 547, Nelson dep. 41:1-19; Pl. Supp. App. 529-32, Gutshall dep. 24:23-34:10, 87:24-94:18). The State relied heavily on Wellmark to act on its behalf, both as to Plan design, and administration. (*Id.*; Pl. App. 393, Gutshall dep. 39:21-41:15; P. App. 317. Wellmark Ans. to Int. 18); Pl. Supp. App. 560-61 (Pierson dep. 18:4-25, 27:22-28:14).

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" even under the narrower statutory language found in Title VII and the ADA. *Vivian*, 601 N.W.2d at 873 (because "ICRA was modeled after Title VII of the United States Civil Rights Act, Iowa courts turn to federal law for guidance in evaluating . . . ICRA"). For example, in *Spirt v. Teachers Ins. & Annuity Ass'n*, 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), *vacated on other grounds*, 463 U.S. 1223 (1983). The 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[ed] solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, [were] so closely intertwined with those universities, . . . that they may be deemed an 'employer' for purposes of Title VII." *Id.*[10]

[10] While subsequent cases in the Second Circuit have cautioned against a "broad reading" of the *Spirt* decision, they have also reaffirmed the decision's core holding that "where an employer has delegated one of its core duties to a third-party that third-party can

In addition, the *Spirt* court looked to the public policy objectives underlying Title VII—which are shared by ICRA. *Id.* Relying on precedent from the United States Supreme Court[11] 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.*

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.[12] *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n*

---

incur liability under Title VII." *See Gulino v. New York State Educ. Dep't*, 460 F.3d 361, 377 (2d Cir. 2006).

[11] The *Spirt* court relied on the U.S. Supreme Court's decision in *City of Los Angeles, Dep't of Water & Power v. Manhart*, 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." 435 U.S. 702, 718, n. 33 (1978).

[12] Although the *Spirt* decision addressed the definition of an "employer" under Title VII, and not the ADA, the First Circuit

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 both the company's self-funded medical reimbursement plan, and the trust that administered the plan, alleging that the plan's 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]

---

noted that "[t]here is no significant difference between the definition of the term 'employer' in the two statutes." *Carparts ,* 37 F.3d at 16. 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 1276, 1279-80 (7th Cir. 1995)).

'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." *Id.* at 134.

In the Seventh Circuit, in *Alam v. Miller Brewing Co.*, 709 F.3d 662 (7th Cir. 2013), the court 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 (quotations omitted). Similarly, in *DeVito v. Chicago Park Dist.*, 83 F.3d 878 (7th Cir. 1996), the Seventh Circuit concluded that under the ADA 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) —since the Personnel Board was the Park District's agent. *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);

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.*") (emphasis added).

And in *Tovar*, the Eighth Circuit overturned the district court's dismissal of the non-employer third-party administrators of the health plan named as co-defendants. *Tovar v. Essentia Health*, 857 F.3d 771, 775-76, 778 (8th Cir. 2017) (ACA case) ("If the third-party administrators] provided [the employer] with a discriminatory plan document, [the employee's] alleged injuries could well be traceable to and redressable through damages by those defendants notwithstanding the fact that [the employer] subsequently adopted the plan and maintained control over its terms.").

These cases applying analogous federal antidiscrimination statutes show that Wellmark may be held liable as an agent of Vroegh's employer under ICRA for its substantial role in the design and administration of discriminatory employment benefits. Like in *Spirt* and *Carparts*, Wellmark exercised control over an important aspect of Vroegh's employment—his access to health care through his employer-provided health insurance coverage—and acted on behalf of Vroegh's employer in both the design and administration of employee health benefits. Wellmark's role and actions were "so intertwined" with the employer in regard to this aspect of employment that for the purposes of ICRA, Wellmark acted as Vroegh's employer when it came to his employer-sponsored healthcare plan. But for Wellmark's actions, the Plan would not contain the discriminatory exclusion of gender affirming surgery at issue in this case, given that the exclusion was added by Dr. Gutshall. (Pl. App. 317, Wellmark Ans. to Int, 18; Pl. App. 393, Gutshall dep. 39:21-41:15). Nor would Vroegh's physician's request for pre-authorization of coverage have been denied. (Pl. App. 496-500).

In granting summary judgment to Wellmark, the district court cited the *Boyden* case from a federal district court in Wisconsin, as did Wellmark in its motion. (Ruling at 26; Wellmark Br. in Supp. of Summ. J. at 17-18) (citing *Boyden* MTD Order at *3). But *Boyden* does not support the district court's sweeping determination that a third-party administrator of a discriminatory health benefits plan could never be liable as an agent of the employer under ICRA. In *Boyden*, the judge ultimately determined that the State of Wisconsin was liable under federal equal protection, the ACA, and Title VII for its discriminatory exclusion of gender affirming surgery on the two transgender plaintiffs' motion for summary judgment on the issue of liability, and a jury subsequently awarded the two plaintiffs $780,000 in damages on those claims. *Boyden*, 341 F.Supp.3d at 982; David Wahlberg, *Jury awards $780,000 to two transgender women at UW in state ban of health coverage*, Wisconsin State Journal (Oct. 12, 2018), *available at* https://madison.com/wsj/news/local/health-med-fit/jury-awards-to-two-transgender-women-at-uw-in-state/article_b6452d36-c717-5d33-a9f3-298aa4a1689a.html.

While the judge dismissed the private third-party insurance administrator from the suit, it did so based on the specific facts at play in Wisconsin between the state employer and the private third-party administrator, which are quite different than in Iowa. *Boyden* MTD Order at *3-5. In *Boyden*, the district court acknowledged that third-party administrators *could* act as agents of the employer in providing discriminatory benefits under Title VII, but determined, based on the specific facts of that case, that there was no agency relationship between the employer and the private third-party administrator there. *Id.* at *4 (examining the facts of the case pursuant to the tests of agency liability under *Spirt*, *Carparts*, and *Alam*). It did not find, as the district court erroneously did in Vroegh's case, that a third-party administrator could never be liable.

Indeed, the third-party state agency that administered the benefits available to all Wisconsin state employees, ETF, was not dismissed in that case. The court reasoned that "the injury can be fairly traced to ETF. ETF's role as *administrator* of the group health program makes it and [the Secretary of ETF] proper

defendants . . . there appears no dispute that GIB sets policy, ETF administers it." *Boyden* MTD Order at *4 (emphasis added). The court specifically referenced its earlier determination that "[i]f anything, an agency relationship exists between plaintiff's employers and ETF/GIB, as the factual allegations suggest that plaintiff's employers delegated to ETF/GIB the responsibility to determine which services should be covered under all of the offered health insurance plans." *Id.* at *8. Thus, in *Boyden*, the judge refused to dismiss the agency that played a role similar to Wellmark's role here because the plaintiff's injuries could be traced to its role as an administrator of the state employee health plans.

Wellmark's relationship to the State and its role in the challenged discrimination against Vroegh was much more substantial than the private third-party administrator that was dismissed in the *Boyden* case. In *Boyden*, the court relied on the fact that the third-party administrator chosen by the plaintiff was one of several options provided to her, and that the State of Wisconsin set the terms of the state insurance coverage. *Id.* at *3. In contrast, here, Wellmark was the sole third-party administrator of state

employee insurance Plans available to Vroegh. Moreover, its role in designing and administering the health insurance benefits was a substantial and active one, both in adding the discriminatory exclusion effective in the 2015 Plan, and in denying Vroegh coverage despite its own determination that his mastectomy was a covered benefit, but-for its intended purpose to treat his gender dysphoria. (Pl. App. 496).

Like in *Spirt* case, Wellmark and the State "were so closely intertwined" when it came to the provision of health insurance to public employees, and specifically Vroegh, that Wellmark "could be deemed [an] agent[] of the employer." *Id.* And like *Spirt* and *Carparts*, the State may have set forth broad guidelines as to coverage in its RFP, but it delegated to Wellmark a central role in drafting of the specific coverage terms, and indeed, it was Wellmark, not the State, that pushed for the addition of the exclusion of gender affirming surgery to the State's Plan in 2015. (Supp. P. App. 569, Holland dep. 26:5-27:18; Supp. P. App. 559, Pierson dep. 16:10-17:5; Supp. P. App. 523-24, Beichley dep. 14:23-

15:18, 17:17-18:23; P. App. 317, Wellmark Ans. to Ins. 18; P. App. 393, Gutshall dep. 39:21-41:15).

The State also delegated to Wellmark the job of running the State's employer-sponsored health care insurance plan to meet its obligations to its employees. (Wellmark App. 574-81, MSA; Pl. Supp. App. 546, Nelson dep. 11:6-11; Pl. Supp. App. 559-60, Pierson dep. 16:5-17:5,18:15-19:6). The State further delegated the claims appeals process to Wellmark, as set out for employees in their coverage manuals and in Wellmark's denial of coverage to Vroegh. (Pl. Supp. App. 541, Liechti dep. 36:12-18; Pl. App. 198-200, 2015 Plan benefit booklet, "Appeal Process"; Pl. App. 474-76, Wellmark denial letter to Vroegh with summary of appeal process; P. App. 478-95, appeal documents Vroegh submitted to Wellmark; Supp. P. App. 547, Nelson dep. 41:1-19; Pl. Supp. App. 529-32, Gutshall dep. 24:23-34:10, 87:24-94:18).

Vroegh thus asserted ample record evidence, entirely ignored by the district court, that showed that the State looked to Wellmark to make coverage decisions both as to employee health insurance and even the State's Medicaid program, not the other way around.

A reasonable jury could find that in all the critical ways, and distinct from the facts in *Boyden*, Wellmark called the shots when it came to denying Vroegh benefits for his medically necessary care. As a result, a reasonable jury could find that Wellmark exercised sufficient control and participation in the State's provision of the State's discriminatory insurance policies to hold it liable as an agent of the State for discrimination under ICRA.

Summary judgment in favor of Wellmark on this ground was therefore reversible error for two reasons. First, third-party administrators may be liable as agents for employment discrimination under sections 216.6 and 216.6A. Second, the existence of an agency relationship is one for the jury and the record evidence, construed in a light favorable to Vroegh, demonstrates a genuine dispute of material fact regarding the agency relationship between the State and Wellmark in the provision and administration of employee health benefits.

E. A reasonable jury could find that Wellmark is liable as an "Aider and Abettor".

The district court also erred in granting summary judgment to Wellmark on Vroegh's claim that Wellmark was liable as an aider

and abettor to the state's unlawful discrimination under Iowa Code section 216.11. (Ruling at 27). Again asserting the facts it relied on were "undisputed" and ignoring Vroegh's recitation of disputed facts requiring adjudication by a jury, the court instead made its own (erroneous) factual findings in favor of Wellmark. (*Id.*) The district court cited no concession by Vreogh or any record evidence to support its finding. (*Id.*) And while Wellmark and Vroegh set forth alternative tests to determine the factual question of aiding and abetting liability under ICRA, the district court did not even engage in any application of the facts to any of the tests. (*Id.*)

Under the appropriate standard governing summary judgment motions, the district court should have allowed the factual question of whether Wellmark aided and abetted the State's discrimination against Vroegh in violation of ICRA to go to a jury, because in light of the genuine dispute of material fact surrounding Wellmark's role as aider an abettor, a reasonable jury could find Wellmark liable under Section 216.11. As set forth below, as a non-employer "person," a third-party insurance administrator may be held liable for aiding and abetting discrimination. Here, when

viewed in Vroegh's favor, the facts show that Wellmark either acted directly in the design and administration of discriminatory benefits, or aided and abetted the creation and administration of the discriminatory employment condition—or both.

Under ICRA, it is "an unfair or discriminatory practice for . . . any person to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter." Iowa Code § 216.11(1); Iowa Code § 216.2(2).

Courts in Iowa have held a range of "persons" subject to aiding and abetting liability under § 216.11(1). *See Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003, 1025 (N.D. Iowa 2011) (holding that co-workers may be subject to individual liability under § 216.11(1)); *Johnson*, 593 F. Supp. 2d at 1050 (holding that a client of an employee may face individual liability 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.

Further, if the legislature wanted to "limit liability under § 216.11 to employers and their supervisory employees, it easily could have done so by using terminology other than the broadly defined term 'persons.'" *Id.*

The aiding and liability provision of ICRA is one of the ways that ICRA is different from, and broader than, Title VII. *Vivian*, 601 N.W.2d at 874. Section 216.11 has been applied numerous times by the federal district courts in Iowa deciding ICRA claims, and just a few months ago by this Court in *Deeds*.

In *Asplund*, the district court denied a motion to dismiss a non-employer defendant, finding that regardless of whether the defendant would be liable under 216.6 directly as a "person," which it also found amounted to a "colorable claim," the plaintiff had stated a claim for relief that the defendant aided and abetted the underlying employment discrimination. *Asplund*, 602 F. Supp.2d at 1011. The court reasoned that the facts pled by the Plaintiff had asserted a colorable claim under 216.11, even though the second level supervisor was not the "employer." *Id.* at 1011. These were that "the presence of Defendant McCombes's name on the Letter

tends to show that, at the very least, Defendant McCombes participated in the decision to fire Plaintiff." *Id.* It also pointed to the fact that "Plaintiff alleges that *all* Defendants, including Defendant McCombes, 'took adverse action against Plaintiff because he reported Defendant Cochuyt's unwelcome sexual relationship with a subordinate employee.'" *Id.* Finally, "Defendant McCombes's unannounced visit to the store and the hostile questioning of Plaintiff might also qualify as encouraging the commission of an unfair or discriminatory practice." *Id.*

In *Johnson*, the federal district court denied the non-employer defendant's motion to dismiss the aiding and abetting claim, finding that the plaintiff had alleged facts, which if taken as true, stated a claim for relief under section 216.11. 593 F. Supp. 2d at 1053. Those claims were that the non-employer defendant had "demanded that [the employee] be fired" and "discriminated against [her] race by influencing the decision of [the employer] to terminate her." *Id.* at 1053 n.7. Thus, it held "if [the non-employer defendant] is found to have intentionally aided, abetted, compelled or coerced BE & K into discharging Plaintiff's employment on the basis of her

race, ADM would be in violation of the ICRA pursuant to § 216.11." *Id.* at 1052. "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.*

Likewise, in *Blazek,* the 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 at 1023. 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).

This Court has set forth alternative tests for aiding and abetting liability under ICRA, but has not yet decided among them. Wellmark set forth one test, borrowed from the Restatement of Torts, the federal district court suggested a different test, borrowed from criminal law, and the plain text of Section 216.11 may yet

demand a third. However, Vroegh prevails under any of these, as set forth below.

First, Wellmark cited three business tort cases for its suggested test for aider and abettor liability. (Wellmark Br. in Supp. of Summ. J. at 21) (citing *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994), *Tubbs v. United Cent. Bank*, 451 N.W.2d 177, 182 (Iowa 1990), and *State ex rel. Goettsch v. Diacide Distributers, Inc.*, 561 N.W.2d 369, 377 (Iowa 1997). Under Wellmark's suggested test, aiding and abetting liability is established when "there is a wrong to the primary party, knowledge of the wrong on the part of the aider, and substantial assistance by the aider in the achievement of the primary violation." (Wellmark Summ. J. Br. at 21).

A second possible test for aiding and abetting liability was set out by the federal district court in *Asplund*. There, the court suggested drawing upon the definition of aiding and abetting from criminal cases 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.'" *Asplund*, 602 F.Supp.2d at 1011.

The Iowa Supreme Court referred both to the first and second tests, without expressly adopting either, in the *Deeds* case. *See Deeds*, 914 N.W.2d at 350 (citing, *inter alia*, the *Ezzone* and *Tarr* Second Restatement of Torts standard *and* the *Asplund* test used in criminal jurisprudence.)

A third possible test includes those elements set out in the plain text of ICRA prohibiting aiding and abetting a discriminatory practice: "It shall be an unfair or discriminatory practice for . . . [a]ny person to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter." Iowa Code § 216.11(1). By its own terms, the elements appear to be (1) an intentional act; (2) aiding, abetting, compelling, or coercing another (3) to engage in any of the practices declared unfair or discriminatory by this chapter. *Id.* This is the test used by the federal district court in *Johnson*. 593 F.Supp.2d at 1051 ("Accordingly, if ADM is found to have intentionally aided, abetted, compelled or coerced BE & K into

discharging Plaintiff's employment on the basis of her race, ADM would be in violation of the ICRA pursuant to § 216.11."); *see also Id.* n.7 (also favorably noting the standard taken from criminal law as laid out in *Asplund*).

Viewing the facts in Vroegh's favor, a reasonable jury could conclude that Wellmark's conduct met any or all of these tests for aiding and abetting liability under Iowa Code section 216.11. Taking the first test, proposed by Wellmark: The discrimination against Vroegh in his compensation by denying him health care benefits on the basis of his gender identity and sex was the "wrong" at issue. Wellmark's "knowledge of the wrong" is demonstrated by the fact that it crafted the discriminatory exclusion at issue in this case (*Id.*; Pl. App. 58, 2014 Plan booklet; Pl. App. 152, 2015 Plan booklet) and applied it to Vroegh, (Pl. App. P. App. 398, 404, Gutshall dep. 70:3-71:11, 94:1-18; Pl. App. 496-500), while knowing the care was determined to be medically necessary by his treating physicians and in accord with the medical consensus. (Pl. App. 468-472, Dep. Ex. 69 (Wellmark 2013 Gender Reassignment policy); Pl. App. 402, Gutshall dep. 86:21-87:20, 89:4-12). Finally, Wellmark

took the requisite "substantial assistance" of the wrong at every step of the way—in proposing and drafting the discriminatory exclusion at issue (*Id.*; Pl. App. 58, 2014 Plan booklet; Pl. App. 152, 2015 Plan booklet), in acting as the point of contact for Vroegh to receive and deny his inquiry regarding coverage given his civil rights to nondiscrimination in health care and employment (Pl. App. 474-77, 496-504), in acting as the go-between between Vroegh and DAS with respect to his coverage (Wellmark App. 830-31), in denying his initial claim in the first instance (Pl. App. 474-77), and in upholding the denial upon appeal even though his claim was what would have been a "covered benefit" had it not been for treatment of Vroegh's gender dysphoria. (Pl. App. 398, 404, Gutshall dep. 70:3-71:11, 94:1-18; P. App. 496-500).

Likewise, under the second test, rooted in criminal law, Wellmark actively participated in and encouraged the discrimination against Vroegh prior to the commission of the discriminatory practice and at the time of its commission. It did so in promulgating the design of discriminatory benefit provisions and denying him coverage for medically necessary care. (Pl. App. 317,

Wellmark Ans. to Int. 18; Pl. App. 393, Gutshall dep. 39:21-41:18). Wellmark—not the State—took the initiative to redraft the State's benefit Plan to specifically add the exclusion of gender affirming surgery to the 2015 Plan where it had not been before (*Id.*; Pl. App. 58, 2014 Plan booklet; Pl. App. 152, 2015 Plan booklet), and Wellmark officials directed its claims staff to deny coverage of Vroegh's surgery, despite the fact that the mastectomy procedure for which he sought coverage was a covered benefit if medically necessary but not intended to treat gender dysphoria. (Pl. App. 398, 404, Gutshall dep. 70:3-71:11, 94:1-18; Pl. App. 496-500). Wellmark in fact concedes that gender affirming surgery is medically necessary for individuals such as Vroegh, as acknowledged in its own "Gender Reassignment Policy." (Pl. App. 468-472, Dep. Ex. 69 (Wellmark 2013 Gender Reassignment policy); Pl. App. 402, Gutshall dep. 86:21-87:20, 89:4-12).

Finally, a reasonable jury could find that Wellmark is liable under the third potential test based on the plain language of the statute, because it acted intentionally to aid the State in unlawful employment discrimination on the basis of Vroegh's gender identity

and sex. It did so based on the exclusion of gender affirming care at issue in this case, (*See* Pl. Mot. for Summ. J.), even though it understood that it was the consensus of the medical community that gender affirming care, including surgery, is medically necessary to treat gender dysphoria. (Pl. App. 468-472, Dep. Ex. 69 (Wellmark 2013 Gender Reassignment policy); Pl. App. 402, Gutshall dep. 86:21-87:20, 89:4-12). Vroegh informed Wellmark that denying him coverage violated his rights under federal and State civil rights law, (cite ex. 49) and Wellmark had been on notice since at least 2010 when the ACA took effect that such exclusions discriminated against transgender people on the basis of sex. *See also Tovar*, 2018 WL 4516949 at *3-4 (determining that defendants were on notice that exclusion of gender affirming surgery was illegal sex discrimination since the ACA was adopted in 2010, and thus, defendants were deliberately indifferent to the misconduct).

Thus, like the defendants in *Asplund*, 602 F. Supp.2d at 1011, Wellmark "participated" in the discriminatory practice at issue in this case and "took adverse action" against him, both in its active role in developing the discriminatory exclusion at its own initiative,

applying it to deny Vroegh's claim despite his plea for nondiscriminatory treatment, and in denying his appeal. For all the same reasons, Wellmark "influenced the decision" of the employer to engage in the discriminatory practice. *See Johnson*, 593 F. Supp.2d at 1053; *see also Blazek*, 937 F. Supp.2d at 1023. Wellmark intentionally pushed the State to put in place a more clearly discriminatory coverage policy in 2015 than it had prior to that point and actively participated in the discrimination by administering it against Vroegh knowing its position was not supported by medical consensus according to its own "Gender Reassignment Surgery." (Pl. App. 398, 404, Gutshall dep. 70:3-71:11, 94:1-18; Pl. App. 496-500).

Wellmark cited to the *Deeds* case below in support of its contention that it cannot be liable under an aiding and abetting theory. (Wellmark Summ. J. Br. at 21-22). That argument fails, because the two grounds that required dismissal of the defendant in *Deeds* are completely inapplicable here. In *Deeds*, the plaintiff argued that the physician, who determined that an applicant for an emergency firefighter position was not medically fit for duty, aided

and abetted the employer's discriminatory decision not to hire him. *Deeds*, 914 N.W.2d at 350. In upholding summary judgment for the city and the physician, the Court based on its "hold[ing] that the plaintiff could not prove the City discriminated against him *because* of his MS when the City was unaware he had MS . . . The physician, in turn, is not liable for providing her independent medical opinion or for aiding and abetting without proof the City intentionally discriminated against the plaintiff." *Id.* at 334. In other words, if there is no discriminatory employment practice, there is nothing to aid and abet. *Id.* at 350 ("We agree with the court of appeals that a plaintiff must first establish the employer's participation in a discriminatory practice before a third-party can be found liable for aiding and abetting."). In Vroegh's case the record plainly shows that unlawful employment discrimination occurred when he was denied coverage for gender affirming surgery—the jury has already determined that the denial of coverage for Vroegh's medically necessary mastectomy pursuant to the exclusion in the Plan was discriminatory under both sections 216.6 and 216.6A. (Civil Verdict; J. Entry, Feb.14, 2019). That result was also required by

this Court's decision in *Good* earlier this year, determining that the same exclusion in Iowa Medicaid was unlawful discrimination on the basis of gender identity under ICRA's protections against discrimination in public accommodations. *Good,* 924 N.W.2d at 862. *Deeds* is easily distinguishable from this case on that basis alone.

Deeds is further distinguishable because here, unlike in *Deeds* and *Sahai*, Wellmark did not act to provide an independent medical opinion or deny coverage to Vroegh based on its independent medical expertise regarding medical necessity. Wellmark does not contest the medical necessity of Vroegh's gender affirming surgery. (Pl. App. 42). *Deeds* did not address the question of whether third-party administrators can be liable as persons or as aiders-and-abettors under ICRA; to the contrary, the Court's holding restricting aiding and abetting liability was expressly limited to medical "clinic[s] and its doctors when (1) the clinic plays an advisory role in the employer's hiring decision and (2) [t]he advice being sought was an independent medical judgment." *Id.* at 350. The *Deeds* facts are in no way similar to Wellmark's role vis-à-vis the State in this case.

As Vreogh argued and supported with record evidence below, Wellmark was not simply a passive conduit in the design and administration of the State's discriminatory insurance policy and the subsequent denial of Vroegh's benefits for medically necessary care. Indeed, more than just providing substantial assistance, a jury could easily find that it played a primary role in creating the discriminatory policy and administering it. Those are fact questions for the jury, and this Court should reverse the district court's grant of Wellmark's motion for summary judgment below.

CONCLUSION

For the foregoing reasons, Vroegh respectfully seeks an order reversing and remanding this matter back to the district court and requiring that Vroegh be permitted to try his case against Wellmark to the jury.

STATEMENT ON ORAL ARGUMENT

Petitioner respectfully requests oral argument.

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/ Shefali Aurora
Shefali Aurora, AT00012874
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: 515.243.3988
Fax: 515.243.8506
Email: Shefali.Aurora@aclu-ia.org

/s/ John A. Knight
John A. Knight*
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

*Motion for Admission *pro hac vice* filed

ATTORNEYS FOR PETITIONER

COST CERTIFICATE

I hereby certify that the cost of printing this application was $0.00

and that that amount has been paid in full by the undersigned.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

> [x] this brief contains 12,809 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or
>
> [ ] this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

> [x] this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14 point, or
>
> [ ] this brief has been prepared in a monospaced typeface using MS Word 2007 with __ characters per inch and ___ style.

/s/ Rita Bettis Austen
RITA BETTIS AUSTEN (AT0011558)
ACLU Foundation of Iowa, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317