IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

JESSE VROEGH, Plaintiff, v. **IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES, and PATTI WACHTENDORF, Individually and in her Official Capacities,** Defendants.	*	Case No. LACL138797 **PLAINTIFF'S SUPPLEMENTAL BRIEF IN RESISTANCE TO DEFENDANTS' MOTION FOR NEW TRIAL**

BACKGROUND INFORMATION

Following a jury trial which resulted in a Plaintiff's verdict on Vroegh's claims of discrimination based on sex and gender identity under the Iowa Civil Rights Act, Defendants (collectively, "the State") moved for a New Trial and Judgment Notwithstanding the Verdict. A hearing on the State's Motion was held on December 6, 2019. At the hearing, the State raised a new issue not presented in its motion, arguing that the Court erred in denying an instruction on the "same decision" affirmative defense. For the reasons set forth below, the Court was correct in denying a "same-decision" affirmative defense and it would have been error to have instructed the jury as the State requested.

ARGUMENT

I. The State was Not Entitled to a "Same-Decision" Instruction Because it Did Not Plead the Same-Decision Affirmative Defense.

The same-decision defense was codified in the federal Civil Rights Act of 1991, which modified Title VII by codifying the motivating-factor standard and same-decision framework

adopted by the Supreme Court in *Price Waterhouse v. Hopkins. Hawkins v. Grinnell Reg'l Med. Ctr.,* 929 N.W.2d 261, 268 (Iowa 2019), citing *Price Waterhouse,* 490 U.S. 228, 258 (1989). In *Hawkins,* decided after Vroegh's trial concluded, the Iowa Supreme Court for the first time held that employers in mixed motives cases under the ICRA are entitled to the same-decision affirmative defense recognized by *Price Waterhouse. Hawkins,* 929 N.W.2d at 272. Following *Price Waterhouse,* "[w]hen an employee proves discrimination was a motivating factor in the employer's actions, the employer could avoid liability 'by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender [or other protected characteristics] into account.'" *Hawkins* at 272, citing *Price Waterhouse,* 490 U.S. at 258, 109 C. Ct. at 1795. Adopting the *Price Waterhouse* framework, *Hawkins* held that the employer is entitled "to the same-decision affirmative defense because Iowa has adopted the motivating-factor standard for causation in ICRA discrimination cases." *Id.* at 272 (emphasis added). "This will allow an employer to avoid damages liability when the employee proves by a preponderance of the evidence that the discrimination was a motivating factor in the employer's actions." *Id.*

However, as explicitly stated in *Hawkins, supra*, the same-decision defense is an affirmative defense. The employer is entitled to a same-decision jury instruction only if the defense was "properly pled and proved." *Hawkins* at 272, citing Iowa R. Civ. P. 1.421 ("Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto, or in an amendment to the answer made within 20 days after service of the answer, or if no responsive pleading is required, then at trial."). The State did not plead the same-decision affirmative defense. (See Ex. A, State's Answer, filed Jan. 3, 2018). Because the State did not plead a "same-decision" affirmative defense, it was not entitled to an instruction on it. *Id.* "Failure to plead an affirmative

defense normally results in waiver of the defense, unless the issue is tried with the consent of the parties." *Dutcher v. Randall Foods,* 546 N.W.2d 889, 893 (Iowa 1996), citing *Nelson v. Leaders,* 140 N.W.2d 921, 924 (1966).

"Consent will not be found, however, where the evidence was also admissible on a different issue that *was* raised by the pleadings." *Id.* (internal citations omitted). As *Dutcher* explains,

> That is because a party cannot be expected to object to evidence on the basis that it goes to an issue not raised in the pleadings when the evidence is otherwise admissible on an issue properly raised. Additionally, when evidence is relevant to an issue properly in the case, its introduction would not signal to the opposing party that a new issue is being tried.

Dutcher, 546 N.W.2d at 893.

To the extent the State argues that the parties tried this unasserted affirmative defense by consent, that argument fails. The State presented no evidence of any legitimate, nondiscriminatory reasons for its decisions to refuse to allow Vroegh to use the restrooms and locker rooms consistent with his gender identity, or to deny Vroegh insurance coverage for medically necessary treatment. Even if the State now attempts to characterize some evidence presented at trial as reasons for its actions that were unrelated to Vroegh's sex or transgender status, Vroegh clearly did not consent to the admission of such evidence for purposes of proving the State's unpled affirmative defense.

Vroegh was never on notice of such a defense,[1] and as *Hawkins* makes clear, an employer can only raise a same-decision defense at trial if it was properly pled. *Hawkins,* 929 N.W.2d at 272. *See also, e.g., Coe v. N. Pipe Prods.,* 589 F.Supp.2d 1055, 101 (N.D. Iowa 2008) ("[T]his

[1] To the extent the State intends to rely on its "affirmative defense" in ¶ 9 of its Answer, "Defendants reserve the right to assert additional affirmative defenses and points of law," this argument fails, as a "catch all" assertion does not qualify as a properly pleaded affirmative defense. *See, e.g., Lane v. Page,* 272 F.R.D. 581, 601 (D. N.M. 2011) ("A reservation of unpled defenses is not a defense of any kind, much less an affirmative one") (internal citations omitted); *Kinsmen v. Winston,* No. 6:15-cv-696-Orl-22GJK, 2015 U.S. Dist. LEXIS 194060, at *23 (M.D. Fl. Sept. 15, 2015) (affirmative defense that "purports merely to reserve the right to assert further defenses and claims are not defenses at all").

court does not believe that a trial judge would allow a defendant to present any evidence to support a "same decision" defense unless the plaintiff was pursuing a "mixed motives" claim . . . *and the defendant had pleaded the "same decision" test as an affirmative statutory defense . . .*") (emphasis added). The Court correctly declined to instruct the jury on a same-decision defense for this reason alone.

II. The "Same Decision" Defense is Not Applicable to the Facts of This Case.

A district court must give a requested instruction if the instruction (1) correctly states the law, (2) has application to the case, and (3) is not stated elsewhere in the instructions. *Weyerhaeuser v. Thermogas Co.,* 620 N.W.2d 819, 823 (Iowa 2000). The submission of instructions upon issues that have no support in the evidence is error. *Vachon v. Broadlawns Med. Found.,* 490 N.W.2d 820, 822 (Iowa 1992); *Bride v. Heckart,* 556 N.W.2d 449, 152 (Iowa 1996) ("The submission of instructions upon issues that have no support in the evidence is error."); *Vetter v. State,* No. 16-0208, 2017 Iowa App. LEXIS 495, at *26 (Iowa Ct. App. May 17, 2017) (unpublished decision) (same). Even if the State had pled a same-decision affirmative defense, it would have been error to so instruct the jury because it is inapplicable to the facts of this case.

First, the same-decision defense does not apply to a facially discriminatory policy, like the one at issue here, barring transgender men from using the men's restrooms at work in the prison. The motive or reasons for a facially discriminatory policy, like the State's restroom and locker room policy here, is immaterial to deciding the claim. When there is a facially discriminatory policy at issue, no additional evidence of intent to discriminate is required. *See, e.g, Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991) (no further proof of intent is necessary where a challenged employment policy is facially discriminatory, since "[w]hether an employment practice

involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination").

Second, the same-decision defense is not available to the State because this is not a mixed-motive case. The same-decision defense is inapplicable when the defendant offers only discriminatory alternative bases for its decision. The same-decision defense applies in cases where an employer demonstrates that it would have taken the same action in the absence of the impermissible (i.e., discriminatory) motivating factor. *Hawkins* at 268, citing 42 U.S.C. § 2000e-5(g)(2)(B); *Id.* at 270, citing to dicta in *Boelman v. Manson State Bank,* 522 N.W.2d 73, 78 (Iowa 1994) ("Once the employee proves a mixed motive, the burden of proof shifts to the employer to show that it would have made the same decision in the absence of the discriminatory motive") and *Landals v. George A. Rolfes Co.,* 454 N.W.2d 891, 894 (Iowa 1990) ("[T]he employer has the burden of proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the improper factor.").

Here, the State only asserted a single alternative basis at trial for its decision to deny Vroegh use of restrooms and locker rooms consistent with his gender identity: purported "complaints from others" about a transgender male using the male facilities. However, this basis is itself discriminatory as a matter of law. The ICRA does not include an exception allowing employers to engage in workplace discrimination out of a concern that others are uncomfortable or complain about the protections the ICRA requires. Iowa Code Chapter 216. *See also, e.g., Schroer v. Billington*, 577 F.Supp.2d 293, 302 (D.D.C. 2008) ("Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices."); *see also Sommerville v. Hobby Lobby Stores*, ALS No. 13-0060C, at 3 (Ill. Hum. Rts. Comm'n 2015) (May 15, 2015 Recommended Liability Determination), at 11 ("the prejudices of coworkers or

customers is part of what the [Illinois Human Rights] Act was meant to prevent") (adopted in relevant part by the Commission, Nov. 2, 2016) (Attached as Ex. A to Pl's MSJ Br.). The importance of such an exception, if it were permissible, becomes clear when considering what would happen if an employer were permitted to make a female sit apart from coworkers because another co-worker felt uncomfortable working around women, or were to refuse a black employee to use the drinking fountain because it made his co-workers uncomfortable. The same rationale applies here, and any such excuse raised by Defendants is patently unacceptable to justify discriminatory conduct under ICRA. Therefore, the Court properly instructed the jury. (Jury Instr. No. 17).

The State at oral argument for the first time argued that the jury could have considered a second "nondiscriminatory" motive for denying Vroegh use of the men's restrooms and locker rooms: Warden Wachtendorf's belief that she had an "agreement" with Vroegh that he would instead use the "separate but equal" unisex bathroom. The uncontroverted evidence showed Vroegh was persistent in his request to use the men's facilities, and was never given the option to use the male facilities. To the contrary, his only option was to use the all-gender restroom while Wachtendorf worked on a final policy. Even if the jury were to find that Wachtendorf truly held this belief, her belief would not negate the undisputed fact that the State denied Vroegh use of the men's facilities based on his sex and transgender status, which constitutes a violation of his rights under the ICRA as a matter of law.

As for the State's discriminatory denial of insurance benefits for Vroegh, the State never provided evidence of a "legitimate, nondiscriminatory" reason, unrelated to Vroegh's sex or gender identity, for denying Vroegh coverage for what it admitted was medically necessary medical care.

Third, the undisputed facts of this case do not support the State's attempt to convert it into a mixed-motive case. Cases in which the same-decision defense is applicable contain evidence of a basis for an employment decision unrelated to the protected characteristic at issue. *Hawkins,* 929 N.W.2d at 272, citing *Price Waterhouse,* 490 U.S. at 258, 109 S. Ct. at 1795. In *Hawkins,* the plaintiff argued that the defendant terminated him because of his age and disability – i.e., his status as a cancer patient – and retaliated against him for refusing to resign. *Id.* at 265. The defendant claimed its decisions were based on work performance issues. *Id.* at 265. In other words, the jury could have found that the employer would have fired Hawkins for poor performance, even had he been younger and/or not had cancer. In *Landals,* the employer claimed its decision not to recall the plaintiff was based not on his age, but because of a decrease in sales and profits and resultant layoffs and job consolidations. *Landals,* 454 N.W.2d at 894 (cited by *Hawkins* at 270). In *Boelman,* the employer claimed that the plaintiff had personality and emotional problems that prevented him from competently performing his job. *Boelman,* 522 N.W.2d at 80-81. In other words, each of the employers in these cases presented evidence that, taking the protected characteristic out of the equation, they would have terminated the plaintiffs anyway.

Here, the State offers no rationale for its actions that is unrelated to Vroegh's sex or gender identity. To justify a "same-decision" instruction, the State must have presented evidence that even if Vroegh had *not* been transgender, it *still* would not have permitted him to use the restrooms and locker rooms consistent with his gender identity for reasons unrelated to his sex or transgender status. In addition to a complete lack of evidence supporting such a reason, this argument is illogical. It is uncontested that cisgender men were permitted to use the men's restrooms and

lockerrooms. Had Vroegh been a *cisgender* male,[2] the State would have allowed him to use the men's restrooms and locker rooms like the other male employees. Similarly, in regard to its denial of insurance benefits for top surgery, the State would have needed to present evidence that even if Vroegh were *not* transgender, it still would have denied him benefits for surgery that it admitted was medically necessary, for some unarticulated reason unrelated to his sex or transgender status. If such a rationale exists, the State presented no evidence of it at trial. The Wellmark policy terms the State elected excluded coverage for Vroegh's medically necessary surgery only because it was for "gender reassignment" surgery. (Trial Ex. 15, 2015 Wellmark plan, p. 12). Moreover, as Wellmark Insurance medical director Dr. Gutshall testified, the State had authority to instruct Wellmark to cover Vroegh's surgery if it chose to do so. The State never made such a request during Vroegh's employment.

With no facts presented to the jury to support a "same-decision" instruction, it would have been error to give it. *Vachon,* 490 N.W.2d at 822; *Vetter,* Iowa App. LEXIS at *26.

III. Any Error for Failing to Give the "Same-Decision" Instruction was Harmless.

Finally, even if the State had properly pled a "same-decision" affirmative defense (which it did not), and the Court should have given an instruction on it (which it was not required to do), the failure to give the instruction was harmless.

On appeal, reversal based on an erroneous jury instruction is only warranted if the error is prejudicial. *Herbst v. State,* 616 N.W.2d 582, 585 (Iowa 2000); *Vetter,* 2017 Iowa App. at *22. "We assume prejudice unless the record affirmatively establishes that there was no prejudice." *Rivera v. Woodward Res. Ctr.,* 865 N.W.2ds 887, 903 (Iowa 2015); *Vetter,* 2017 Iowa App. at *22.

[2] Cisgender: "of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth." https://www.merriam-webster.com/dictionary/cisgender.

For the same reasons as set forth above—where the only reason given for the employment decision is the employee's protected characteristic—any error in failing to give a "same-decision" defense would be harmless.

Additionally, in the December 6, 2019 hearing on post-trial motions, the State characterized its "business judgment rule" as a variation of the "same-decision" defense. While the State is incorrectly conflating the two, as the "same-decision" defense is an affirmative defense that must be properly pled and can still result in equitable relief, the analysis under the facts here is similar and reaches the same result even assuming the State had pled the affirmative defense as required. In *Vetter,* the Court of Appeals found the court's denial of the State's requested "business judgment rule" instruction harmless because the only reason given for the employer's actions in terminating the plaintiff was his disability:

> Assuming the business judgment instruction [requested by the State] is a correct statement of the law, the trial court's failure to give the instruction was harmless. The *Woodbury County* case, like the other cases cited by the State, is a case involving indirect evidence of discrimination, analyzed under the *McDonnell Douglas* burden-shifting test . . . As we have already stated, the only reason the DNR provided for Vetter's termination related to his disability. Because this reason is direct evidence of discriminatory animus, there is no need to use the *McDonnell Douglas* burden-shifting test . . . The State was not prejudiced by the court's failure to give the requested instruction.

Vetter, 2017 Iowa App. at *24 (internal citations omitted).[3] A failure to give the State's requested "same-decision" instruction, if it were required, would be harmless here for the same reason: the only reasons the State gave for its actions were based expressly on Vroegh's sex and gender identity. *See also, e.g., Lambert v. Ackerley*, 180 F.3d 997, 1009 (9th Cir. 1999) (en banc) (holding

[3] See also Plaintiff's Brief in Resistance to Defendants' Motion for New Trial and Judgment Notwithstanding the Verdict, pp. 10-15, filed March 7, 2019, regarding the inapplicability of the State's requested "Business Judgment Rule" instruction to the facts of this case.

a district court's failure to give a same decision instruction harmless because "the evidence before the jury strongly support[ed] the conclusion that the plaintiffs were discharged in retaliation for their overtime complaints and that they would *not* have been discharged had they not engaged in this protected conduct").

CONCLUSION

The Court did not abuse its discretion by declining to issue a "same-decision" instruction. The State did not properly plead the "same-decision" affirmative defense as a prerequisite to raising this defense. Moreover, the instruction was not required because the evidence at trial did not support a "same-decision" defense, and even the instruction had been required, the failure to give it was harmless because the alternative bases for the decision asserted were also discriminatory as a matter of law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on Dec. 16, 2019.

By:_____U.S. Mail _____ Facsimile
_____ Hand Delivered _____ Overnight Courier
_____ Certified Mail X_____ Other: E-file_____

Signature Melissa C. Hasso