IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JESSE VROEGH, Plaintiff, v. IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES, WELLMARK INC. d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA and PATTI WACHTENDORF, Individually and in her official capacities, Defendants.	CASE NO. LACL138797 **ORDER RE: MOTIONS TO DISMISS**

The court has before it two motions to dismiss. The first was filed by the Iowa Department of Corrections, the Iowa Department of Administrative Services and Patti Wachtendorf ("the State defendants"). This matter was presented to the court in a hearing on October 12, 2017. The second motion to dismiss was filed by Wellmark, Inc. ("Wellmark") on October 27, 2017. A hearing was held on this motion on December 12, 2017. The State defendants seek to dismiss counts II, III and IV and the plaintiff's claim for punitive damages. Wellmark seeks an order dismissing count V. The plaintiff resisted both motions. The court having reviewed the submissions of the parties and having heard the arguments of counsel orders as follows.

DISCUSSION OF LAW APPLICABLE TO MOTIONS TO DISMISS

A motion to dismiss is directed to the pleadings and therefore facts outside the pleadings should not be considered.[1] Well-pleaded facts are admitted, but not the conclusions.[2] In considering a motion to dismiss, the court must not consider factual allegations contained in the motion or documents attached to the motion.[3] "[W]e accept as true the allegations of the petition and the contents of uncontroverted affidavits."[4] "When the parties want to rely on facts not contained in the pleadings, the more appropriate procedure to follow is that outlined for summary judgments."[5]

"In a motion to dismiss the movant 'admits the well-pleaded facts in the pleading [which the movant might dispute,] for the purpose of testing their legal sufficiency.'"[6] The Iowa Supreme Court has defined well-pleaded facts as

> those to which the substantive law annexes consequences. They are facts from which proceed rights and obligations and wrongs. They are the facts which enter into and create jural relations between persons[.][7]

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[1] *Estate of Dyer v. Krug,* 533 N.W.2d 221, 223 (Iowa 1995) (citing *Troester v. Sisters of Mercy Health Corp.,* 328 N.W.2d 308, 310 (Iowa 1982)).
[2] *Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 891 (Iowa 2014).
[3] *Turner v. Iowa State Bank & Trust Co. of Fairfield*, 743 N.W.2d 1, 3 (Iowa 2007) (citing *Berger v. Gen. United Grp., Inc.*, 268 N.W.2d 630, 634 (Iowa 1978)).
[4] *Addison Ins. Co. v. Knight, Hoppe, Kurnik & Knight, L.L.C., 734 N.W.2d 473, 476 (Iowa 2007) (quoting Aquadrill, Inc. v. Envtl. Compliance Consulting Servs., Inc., 558 N.W.2d 391, 392 (Iowa 1997)).*
[5] *Estate of Dyer*, 533 N.W.2d at 223 (citing *Troester*, 328 N.W.2d at 311; Iowa R. Civ. P. 1.981).
[6] *Haupt v. Miller*, 514 N.W.2d 905, 907 (Iowa 1994) (quoting *Jones v. Madison Cty.*, 492 N.W.2d 690, 693–94 (Iowa 1992)).
[7] *Bailey v. Iowa Beef Processors, Inc.*, 213 N.W.2d 642, 648 (Iowa 1973) (internal citations omitted) (distinguishing facts from ultimate conclusions of law).

When the factual allegations are based on a document such as a contract, the document may be incorporated into the pleading by referring to the document and attaching a copy.[8] "Such exhibits then become a part of the pleading."[9] Courts may also take judicial notice of extraneous facts for the purpose of considering them for a motion to dismiss.[10] The court may take judicial notice of matters of common knowledge or those "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned".[11]

Iowa Rule of Civil Procedure 1.421(1)(f) governs motions to dismiss for failure to state a claim upon which any relief may be granted. Such motions should be rarely granted.[12] Only when a plaintiff's petition "on its face shows no right of recovery under any state of facts," is it proper to grant a motion to dismiss.[13]

STATE'S MOTION TO DISMISS

1. Count II

The State argues that the Department of Administrative Services ("DAS") should be dismissed as a party in counts II, III and IV. This is based upon the State's position that the health care plan was negotiated between the union that represented Vroegh and the State and DAS cannot unilaterally change health insurance benefits or coverage since it was a mandatory

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[8] 11 Ia. Prac., Civil & Appellate Procedure § 10:23 (2015 ed.); 61A Am. Jur. 2d *Pleading* § 67 (Feb. 2016 update); see *also Sitlzer v. Peck*, 162 N.W.2d 449, 453 (Iowa 1968) (upholding the trial court's grant of a motion to dismiss when the plaintiff "properly pleaded and proved the existence of a construct contract").

[9] 11 Ia. Prac., Civil & Appellate Procedure § 10:23 (2015 ed.); *see also Wells v. Wilcox*, 28 N.W. 29, 30 (1886).

[10] *Turner*, 743 N.W.2d at 3 (citing *Winneshiek Mut. Ins. Ass'n v. Roach*, 132 N.W.2d 436, 443 (Iowa 1965)).

[11] Iowa R. of Evid. 5.201.

[12] *Robinson v. State, 687 N.W.2d 591, 592–93 (Iowa 2004).*

[13] *Schaffer v. Frank Moyer Constr., Inc., 563 N.W.2d 605, 607 (Iowa 1997); accord Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).*

subject of collective bargaining at the time the employer-sponsored health care plan involved in this case became a part of the collective bargaining agreement. Vroegh alleges that DAS "was involved in the decision to select and offer to employees of the Iowa Department of Corrections only employer-sponsored health care plans which discriminated against transgender employees.[14] The State also argues that count II should be dismissed against the other defendants since it was a mandatory subject of collective bargaining.

At this stage of the proceedings Vroegh alleges that DAS was involved in the selection and offering of the health care plan in dispute which Vroegh asserts discriminated against him based upon his sexual orientation.[15] As to the other defendants Vroegh alleges they "denied transgender employees the same level of health care benefit coverages that it provided to non-transgender employees."[16]

The court finds, taking the well-pleaded facts of the petition as true, plaintiff established the possibility of a valid recovery.[17] Plaintiff's claim has a valid possibility of recovery based upon the court's decision in *Polk County Secondary Roads v. Iowa Civil Rights Com'n* where the court held that "the arbitration of civil rights violations is against public policy [and] [p]rovisions for arbitration in a collective bargaining agreement do not override statutory civil rights provisions."[18] Likewise, plaintiff should be allowed to develop the roles of each of the State defendants in the selection, design and negotiation of the health plan that was placed in the collective bargaining agreement. At this stage based upon Vroegh's allegations the court cannot determine that DAS had no role in those decisions. In addition, Vroegh should be allowed to

[14] Amended Petition ¶ 43
[15] *Id.*
[16] *Id* at ¶ 42
[17] *Turner v. Iowa State Bank & Trust Co*., 743 N.W.2d 1, 3 (Iowa 2007)
[18] 468 N.W.2d 811, 816 (Iowa 1991)

demonstrate whether the other State defendants discriminated against him based upon the health plan that was selected, designed, negotiated and administered. The court does not find that simply because the health plan was placed in the collective bargaining agreement by negotiation that its discriminatory effect cannot be challenged as a violation of chapter 216. The State's motion to dismiss should be denied as to count II on both issues raised.

2. Counts III and IV

The State argues that counts III and IV should be dismissed because of the Supreme Court's decision in *Godfrey v. State*.[19] In counts III and IV Vroegh seeks money damages not for violations of chapter 216 but violations of the equal protection rights he has under the Iowa Constitution. The State argues that he cannot pursue constitutional claims since the rights and remedies provided under chapter 216 are sufficient.

In *Godfrey* a plurality of the court recognized a party could seek money damages for violations of a person's right to equal protection under Article I, section 6 of the Iowa Constitution.[20] A majority of the court, however, affirmed the dismissal of the plaintiff's equal protection claims "because of the adequacy of remedies under the Iowa Civil Rights Act."[21] The State does not challenge Vroegh's claims under count I that arise under chapter 216. A majority of the court, likewise, stated that the State could not be held liable for punitive damages since they are not allowed under chapter 216.[22] Based upon *Godfrey* the court finds that counts III and IV of Vroegh's claim should be dismissed for failure to state a claim upon which relief can be granted.

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[19] 898 N.W.2d 844 (Iowa 2017)
[20] *Id.* at 872
[21] *Id.* at 876, 880 & 882
[22] *Id.* at 880, 898

WELLMARK'S MOTION TO DISMISS

Wellmark seeks dismissal of count V. Wellmark contends that Vroegh has not stated a claim upon which relief can be granted against it because Wellmark is not Vroegh's employer and did not design the health plan that was placed in the collective bargaining agreement nor did they improperly administer its terms.

Vroegh alleges that Wellmark provides medical plans to employees of the State.[23] The plans Wellmark provides "do not provide coverage for transgender employees for medical treatment and procedures that it covers for non-transgender employees"[24] thus discriminating against transgender employees by denying medical care "based upon the member's transgender status, gender identity and sex."[25] Vroegh further alleges that Wellmark failed to provide health care plans that did not discriminate on the basis of transgender status, gender identity and sex.[26] These acts deprived Vroegh of coverage for medically necessary surgical procedures.[27] All of these acts were carried out by Wellmark as an agent for the State.[28]

Wellmark, in its reply brief, argues that Vroegh in his resistance to the motion to dismiss, asserts claims not only for an unfair employment practice under section 216.6 but also for wage discrimination in employment under section 216.6A and aiding and abetting under 216.11. Wellmark asserts that these claims should be dismissed since there are no factual allegations in the amended petition asserting those claims. Wellmark also challenges Vroegh's present attempts to assert discrimination based upon plan design and rather than administration of the plan as asserted in the hearing on the State's motion to dismiss.

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[23] Amended Petition ¶ 67
[24] *Id.* ¶ 68
[25] *Id.* ¶ 69
[26] *Id.* ¶ 70
[27] *Id.* ¶ 71
[28] *Id.* ¶ 72

While the court feels that the allegations asserted by Vroegh barely meet the definition of well-pleaded facts the court recognizes our Supreme Court's admonition to avoid the temptation to strike a vulnerable petition at the early stages of the case.[29]

The court finds that Vroegh has pled sufficient facts that the court must accept as true at this juncture. Those facts are that Wellmark discriminated against Vroegh in providing a medical health plan to the State for its employees that failed to provide him medical coverage for his gender dysphoria. In addition, Vroegh alleges that Wellmark failed to propose a plan to the State that provided coverage for Vroegh's medical treatments related to his gender dysphoria.[30] Providing a medical plan could include designing a plan.

The court finds that Vroegh has pled sufficient facts that the court must accept as true at this juncture that Wellmark discriminated against him in administering the plan. A generous examination of paragraphs 41-45 in conjunction with paragraph 71 and the allegations set forth in his Iowa Civil Rights complaint which was appended to and made part of his petition[31] establish the possibility of a valid claim against Wellmark in its decision to deny coverage for his medical treatments related to his gender dysphoria.

The next argument is whether Wellmark can be held liable as an agent of the State. The Iowa Supreme court cases cited by counsel suggest to this court that the court might hold a third party liable for discriminatory acts if the third party has some control or dominion over provisions of the employee's terms of employment.[32] It is unclear at this stage of the proceedings

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[29] *Cutler v. Klass, Whicher, & Mishne,* 473 N.W.2d 178, 181 (Iowa 1991)
[30] *Id.* ¶¶ 67 & 70
[31] *Id.* ¶ 7 (Exhibits A, B and C)
[32] *Sahai v. Davis,* 557 N.W.2d 898, 901 (Iowa 1997) (person guilty of discrimination need not be the actual employer of the discriminated person); *Johnson v. BE&K Construction Co., LLC,* 593 F. Supp. 2d 1044, 1050 (S.D. Iowa 2009) (third party who is not employer could be held liable if the third party was in a position to control the employer's hiring decisions)

the actual role Wellmark had in the selection and design of the medical health plan that excluded coverage for transgender medical treatment. As noted above there are sufficient facts pled that could establish that Wellmark suggested which provisions to include or not include. Discovery will ultimately determine how much control Wellmark exercised with regard to this provision of the medical health plan.

While Vroegh did not specifically plead a claim under section 216.11 Vroegh asserted that Wellmark was acting as an agent for the State and is thus jointly and severally liable.[33] Based upon this allegation Wellmark is on notice that Vroegh sees its role as either an agent of the State in selecting the coverage or as an aider and abettor. Accordingly, the court finds that Wellmark's motion on this issue should be denied.

Finally, the court must address Vroegh's claim for injunctive relief now that the medical health plan at issue was amended effective January 1, 2017 to remove the exclusionary language which is the basis of this lawsuit. This needs to be addressed in the context of Vroegh's termination of his employment with the State in September 2016. While Vroegh has a claim for any damages he may have suffered while an employee the court questions Vroegh's attempt to litigate the administration of a medical health plan where he is no longer a participant and was never subject to its terms.

First, Wellmark argues that Vroegh does not have standing to assert a claim for injunctive relief. The medical health plan under which he was a participant no longer exists and he is no longer an employee of the State so he is not subject to the amended medical health plan.[34]

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[33] Amended Petition ¶ 72

[34] The amended petition has no factual assertion that Vroegh left eh employ of the State. Counsel for Vroegh informed the court of this fact during the hearing on the motion to dismiss. The court can consider this fact since the court finds it is one of those facts of which the court can take judicial notice since it is a statement of counsel for Vroegh.

Wellmark relies on the court's decision in *Alons v. Iowa Dist. Ct. for Woodbury County,*[35] where the court held that a "complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected" to have standing.[36] The injunctive relief sought by Vroegh was

> . . . to effectively prevent future discrimination on the basis of gender identity or transgender status by directing Defendant Wellmark, Inc. stop offering employer–sponsored medical plans which discriminate against members based on their sex, gender identity or transgender status, and amend its current plans to provide equal and nondiscriminatory coverage for transgender members.[37]

Here the employer-sponsored health plan offered by the State to its employees no longer denies surgery for transgender reassignment. This was the exclusion in the previous plan that is the subject of this case. Thus, the language that Vroegh argues was discriminatory has been eliminated. What he sought in injunctive relief is gone. Additionally, Vroegh is no longer an employee of the State so he cannot argue that the State has discriminated against him in the designed or administration of the amended plan.

Vroegh argues the court should still consider Vroegh's injunctive relief under the public policy exception to the mootness doctrine. The court does not find that his request for injunctive relief should be considered based upon this exception.

In deciding whether a claim that has become moot should be considered the court is to apply a three part test. That test examines "(1) the public or private nature of the question presented, (2) desirability of an authoritative adjudication for future guidance of public officials, and (3) likelihood of future recurrence of the same or similar problem."[38] The first two factors

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[35] 698 N.W.2d 858 (Iowa 2005)
[36] *Id.* at 864
[37] Amended Petition at 12, ¶ B
[38] *Rush v. Ray,* 332 N.W.2d 325, 326 (Iowa 1983)

assist the court in determining whether the question is one of great public importance.[39] The court does not find the question presented here is of great public importance.

First, the question presented involves actions of a non-governmental entity as it relates to a private citizen and the impact a medical health plan has on that private individual. While Vroegh believes that a verdict in his favor sends a message to the public and medical health companies in particular the resolution of the injunctive relief would generally only be applicable to Vroegh and his medical condition and treatment not the public. Injunctive relief in this case against Wellmark would only pertain to Wellmark's actions vis-à-vis its interactions with the State and the medical health plans it may provide or administer for the State.

Second, Vroegh has asserted no facts that suggest Wellmark is administering the amended plan in a discriminatory manner. There are no facts that any other State employee has requested medical coverage for gender dysphoria treatment under the amended plan and been denied coverage.

In the area of medical health plans the it is common knowledge that they are many different kinds of plans with various terms and conditions. The terms and conditions of those plans vary. The coverages provided vary. An adjudication in this case on the limited issue raised by Vroegh will provide no additional guidance that is not already provided under chapter 216-a person cannot discriminate based upon sex, gender identity or sexual orientation in the design or administration of the medical health plan. Whether a medical health plan's design or its administration is discriminatory will depend on the facts of each individual case and the conditions of the person seeking coverage.

[39] *Id.*

Under the present facts of this case Vroegh cannot establish that the amended plan is facially discriminatory or as applied. On this request for relief Wellmark's motion should be granted.

IT IS THEREFORE ORDERED that the State defendants' motion to dismiss is **DENIED** as to count II.

IT IS FURTHER ORDERED that the State defendants' motion to dismiss is **GRANTED** as to counts III and IV.

IT IS FURTHER ORDERED that Wellmark's motion to dismiss as to count V is **DENIED** for the alleged actions of Wellmark prior to January 1, 2017.

IT IS FURTHER ORDERED that Wellmark's motion to dismiss as to count V, specifically Vroegh's request for injunctive relief for Wellmark's actions after January 1, 2017 is **GRANTED.**

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACL138797	JESSE VROEGH VS IOWA DEPARTMENT OF CORRECTIONS

So Ordered

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa