In The Iowa Supreme Court
Supreme Court No. 20-0484

JESSE VROEGH,

Plaintiff-Appellee/Cross-Appellant,

vs.

IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES, and PATTI WACHTENDORF, Individually and in her Official Capacities,

Defendants-Appellants,

and

WELLMARK INC., d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA,

Defendant-Cross-Appellee.

Appeal from the District Court for Polk County
The Honorable David May (summary judgment)
The Honorable Scott Rosenberg (jury trial)

Cross-Appellee Wellmark's Final Brief
(Oral Argument Requested)

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Division I

Under the Iowa Civil Rights Act, to be liable for a discriminatory employment practice, a party must have control over the challenged decision. Vroegh, a State employee, sought preauthorization for gender-dysphoria-related surgery. Wellmark, third-party administrator for the State's self-funded employee health benefit plan ("Plan"), administered claims based on the Plan's coverage terms that the State controlled and established. Based on a Plan exclusion, Wellmark denied the request. Should Wellmark be liable?

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[1] The 2021 Iowa Code is cited unless the statute in place at the relevant time was different in a way that materially impacts the analysis in this appeal.

Restatement (Third) of Agency § 1.01 (2006)

Routing statement

If the Court reaches the substantive issues in this cross-appeal, the Supreme Court should retain the cross-appeal. Iowa R. App. P. 6.1101(2)(c). The issues raised are substantial issues of first impression regarding whether to expand liability for discriminatory employment practices under the Iowa Civil Rights Act beyond a plaintiff's employer and a plaintiff's supervisor to include a third-party administrator performing claims-administration activity. Here, Wellmark served as a third-party administrator and was contractually obligated to process claims based on the terms of the State's self-funded employee medical benefit plan. Those benefit plan terms and exclusions were controlled and determined by the State, which was the plan sponsor and plan administrator.

As reflected in Wellmark's pending motion to dismiss, the issues in the cross-appeal are moot because Plaintiff Jesse Vroegh has already obtained a monetary judgment against Defendant Iowa Department of Administrative Services (DAS) based on the

employment practice—denial of medical coverage for top surgery—that he asserted against Wellmark. Furthermore, the State has since eliminated the at-issue exclusion from its plan.

Statement of the case

A. Nature of the case.

Vroegh, a former State employee, filed this Iowa Civil Rights Act (ICRA) lawsuit against Wellmark and his former employer, the Iowa Department of Corrections (IDOC), Patti Wachtendorf, and the Iowa Department of Administrative Services (DAS) (collectively, "State Defendants"), alleging a discriminatory employment practice based on the denial of Vroegh's preauthorization request for top surgery.[2] (App. 49-61, 1404-1432).

Under a contract with DAS, Wellmark was the third-party administrator for the State of Iowa Blue Access Plan ("Blue Access Plan" or "Plan"), one of the State's self-funded employee health benefit plans. (App. 715-834, 1408). As an IDOC employee, Vroegh

was a participant in the Blue Access Plan. (App. 14 ¶ 22, 1408). In September 2015, Vroegh sought preauthorization for "top surgery," a mastectomy to reduce his breast size as treatment for gender dysphoria. (App. 1409; Conf. App. 11). Wellmark administered the State's Plan in accordance with the Plan's coverage terms and denied the preauthorization request based on the Plan's exclusion for "gender identity disorders" and "gender reassignment surgery." (App. 1409-1410). Since then, the State eliminated these exclusions, consistent with the 2016 Affordable Care Act final rules. (App. 77-80, 530-635, 837-975). 45 C.F.R. Subt. A, Subch. A, Pt. 92; 45 C.F.R. § 92.207.

Before trial, Vroegh and Wellmark filed competing motions for summary judgment. (App. 99-101, 982-985). The district court accurately described the relevant legal question as whether Wellmark, the third-party administrator for the State's Plan, "should

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[2] Wellmark had no involvement in Vroegh's other claims regarding access to workplace restrooms and locker rooms. (App. 10-20, 82-98).

be liable for the State's failure to provide such care." (App. 1426). At all relevant times, the State was responsible for and had sole control over the Plan's coverage terms, including exclusions from coverage. (App. 147-635, 715-834; Conf. App. 37 [11:6-11], 42-44 [32:12-34:17, 36:6-13, 39:11-21], 53 [82:6-19], 56-58 [15:4-18:24, 37:6-21], 64 [66:11-25]). The district court granted Wellmark's motion for summary judgment, denied Vroegh's motion, and dismissed Wellmark from the case. (App. 1404-1432). Vroegh's claims proceeded to a jury trial against the State Defendants, which resulted in a verdict in Vroegh's favor. (Supp. App. 4-7).

B. **Course of proceedings.**

On August 28, 2017, Vroegh filed suit against Wellmark and the State Defendants. (App. 11-20). Vroegh asserted only one ICRA claim against Wellmark, described as "Discrimination in Provision and Administration of Benefits Based on Sex and Gender Identity." (App. 19-20). Vroegh alleged that "Wellmark failed to propose to Defendant State of Iowa any medical benefit plans that did not discriminate

against plan members based on their transgender status, gender identity, or sex." (App. 19 ¶ 62). Vroegh also pleaded that "[a]s an agent of the employer, the State of Iowa, Wellmark is jointly and severally liable for illegal discrimination that has caused Vroegh damage." (App. 19 ¶ 64). Vroegh later filed an Amended Petition, pleading the same substantive claims. (App. 49-60).

C. Disposition of the case in the district court.

1. Order granting summary judgment in Wellmark's favor and dismissing Wellmark.

Over the course of litigation, Vroegh developed multiple theories for his single-count employment-discrimination claim against Wellmark: disparate-treatment discrimination under Iowa Code section 216.6; wage discrimination under Iowa Code section 216.6A; and aiding and abetting under Iowa Code section 216.11. On November 6, 2018, Wellmark moved for summary judgment, addressing Vroegh's myriad legal theories seeking to hold Wellmark liable for employment discrimination. (App. 99-101). Vroegh also

moved for summary judgment, which Wellmark resisted. (App. 982-985).

On January 23, 2019, Judge David May granted Wellmark's motion for summary judgment, denied Vroegh's motion, and dismissed Wellmark from the case. (App. 1404-1432). Relevant to the issues in this appeal, the district court identified these undisputed facts:

> 19. Wellmark denied coverage. Wellmark did not deny coverage based upon any medical necessity determination. Rather, Wellmark's denials were based on the fact that coverage was excluded under the State of Iowa's health benefit plan.
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> 20. Wellmark's denial of Vroegh's request was required by the terms of the State's written plan documents.
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> 21. Blue Access is a self-funded plan provided by the State.
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> 22. Wellmark serves as a third-party administrator pursuant to a Master Services Agreement or "MSA."
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> 23. Because Blue Access is a "self-funded" plan, the State is responsible for paying all claims.

* * *

> 25. Under the terms of the MSA, Wellmark is an independent contractor.
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> 26. The State is responsible to determine what benefits will be provided to State employees.
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> 27. The State is also responsible for any changes to plan benefits. The State can make coverage changes at any time.
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> 28. Wellmark administers the plan according to the benefit design and benefits selection provided by the State.
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> 29. Wellmark cannot make an exception to a plan term unless the State instructs it to do so.
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> 30. Wellmark provides the State with proposed documents, such as red-lined plan books, relating to coverage. Wellmark can and has proposed changes in coverage options. Ultimately, though, the State alone determines what benefits will be provided, and what benefits will not.

(App. 1409-1411).

a. **Section 216.6 claim.**

The district court rejected Vroegh's section 216.6 disparate-treatment discrimination liability theory against Wellmark, concluding the statute "requires the defendant to have been 'in a position to' exercise appreciable control over the discriminatory act,

i.e., the State's refusal to pay for Vroegh's care." (App. 1427). The district court found the undisputed facts established the State had exclusive authority to select the Plan's coverage terms, while Wellmark had no authority to expand coverage under the State's Plan. (App. 1427).

Vroegh argued that Wellmark was the "driving force" behind the denial of coverage, based on a Wellmark employee's mere suggestion that the State clarify the language in its Benefits Booklet regarding "gender reassignment surgery." (App. 1428). The district court rejected Vroegh's "driving force" argument, finding the Plan had previously excluded "coverage for all treatment for gender dysphoria" and Vroegh's top surgery fell within the scope of that exclusion, apart from the separate, more specific exclusion for gender-reassignment surgery that the State added in 2015. (App. 1428). The district court held that "Vroegh's gender-affirming surgery would not have been covered *even if* the 'gender

reassignment surgery' exclusion had never been included in the plan." (App. 1428) (emphasis in original).

b. **Section 216.6A claim.**

The district court rejected Vroegh's argument that Wellmark could be liable for wage discrimination under section 216.6A. (App. 1428-1429). The district court recognized that Vroegh admitted Wellmark was not Vroegh's "employer." (App. 1429 (citing Pl. Statement of Undisputed Facts in support of Motion for Partial S.J. ¶ 19)). Vroegh argued that Wellmark could be liable as an "agent of [Vroegh's] employer" under section 216.6A. (App. 1428-1429). The district court rejected Vroegh's argument, holding that Wellmark, "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.'" (App. 1429 (quoting *Boyden v. Conlin*, No. 17-CV-264-WMC, 2017 WL 5592688, at *3 (W.D. Wis. Nov. 20, 2017))).

c. Section 216.11 aiding-and-abetting claim.

The district court rejected Vroegh's aiding-and-abetting theory under Iowa Code section 216.11. Analyzing Iowa law, the district concluded that in Iowa, "liability for 'aiding and abetting' only attaches if one's 'encouragement or assistance' to the primary wrongdoer 'is a substantial factor in causing the resulting' harm." (App. 1430 (quoting *Heick v. Bacon*, 561 N.W.2d 45, 53 (Iowa 1997))). The district court found that Vroegh "did not receive coverage because of the State's 'independent volitional act' to exclude coverage for all forms of care for gender identity disorders, including gender dysphoria." (App. 1430 (quoting *Heick*, 561 N.W.2d at 53)). The district court reasoned that "the State had chosen not to provide coverage" for the treatment Vroegh sought, so "there would not have been coverage for [the top] surgery *regardless of* Wellmark's involvement." (App. 1430) (emphasis in original).

2. Jury verdict in Vroegh's favor on ICRA top surgery claim.

On February 4, 2019, the case proceeded to a jury trial on Vroegh's claims against the State Defendants. (App. 1554). Judge Scott Rosenberg presided over the jury trial. *Id*.

Although Vroegh initially intended to request damages for the expense associated with top surgery, (App. 1361-1362, 1368; Pl. Trial Brief 22-23), he withdrew that request and ultimately elected to seek damages for only past and future emotional distress. (App. 1463, 1467; Supp. App. 7). When the district court proposed a verdict form that asked the jury to award damages for "the decision to deny him health insurance coverage" with lines for only past and future emotional distress, Vroegh lodged no objection. (Supp. App. 7; Trial Transcript Vol. 6, 109:10–113:2, 121:21-127:3; Trial Transcript Vol. 7, 4:6-48:13).

On February 13, 2019, the jury returned a verdict. (Supp. App. 4-7). For Vroegh's claims regarding denial of coverage for top surgery, the jury found Vroegh proved liability for sex and gender-

identity discrimination against DAS. *Id*. For damages associated with Vroegh's ICRA claims based on the denial of coverage, the jury awarded Vroegh $20,000 for past emotional distress and no damages for future emotional distress. *Id*.

On February 19, 2019, the district court entered judgment for $20,000 against DAS and in favor of Vroegh based on the denial of top surgery coverage. (App. 1506-1507). The district court awarded Vroegh interest from the date of judgment, plus costs. *Id*.

D. **Post-trial proceedings.**

On March 13, 2019, Vroegh filed an application for attorneys' fees and expenses, asserting he was a prevailing party and requesting a fee award, in part for his attorneys' work on the ICRA claims based on the denial of health benefits. (App. 1537-1547). During a December 6, 2019 hearing on post-trial motions, Vroegh's own counsel (and the State Defendants' counsel) conceded that the ICRA claims against DAS and Wellmark relating to the provision or administration of

health benefit coverage "were indistinguishable." (12/6/2019 Hearing Transcript, pp. 15, 28-29).

The district court granted Vroegh's motion, awarding $348,227.24 for attorneys' fees and costs against the State Defendants. (App. 1619). As the State Plan eliminated the at-issue exclusion in 2017, no equitable remedies were requested. (App. 77-80). With the damages and fee awards, Vroegh received the complete relief available under the ICRA. *See* Iowa Code § 216.15(9)(a)(8); Iowa Code § 216.16(6).

Statement of the facts

A. Statutory framework for the State's self-funded employee health benefit plan.

The State may establish an employee group health plan under Iowa Code chapter 509A. Any self-funded health benefit plan offered by the State is subject to rules adopted by the Iowa Insurance Commissioner. Iowa Code § 509A.14. The Iowa Insurance Commissioner must ensure any such plan "shall include all coverages and provisions that are required by law in insurance

policies for the type of risk that the self-insurance plan is intended to cover." *Id.* In providing such a plan, the State may contract with an insurance company that meets the statutory requirements. Iowa Code § 509A.6. From 2013-2016, the Iowa Insurance Division reviewed and approved each State-sponsored health benefit plan, including the State's Blue Access Plan that covered Vroegh. (App. 835-836; Conf. App. 31 [55:9-57:1]).

B. The State of Iowa Blue Access Plan.

Vroegh's benefit plan, the State of Iowa Blue Access Plan, was self-funded, so the State was responsible for paying all claims. (App. 147-635, 715-834; Conf. App. 37 [11:6-11], 43 [36:6-13], 57 [18:3-6]). Since at least 2006, the Blue Access Plan excluded coverage for gender reassignment. (Conf. App. 57 [19:22-21:25]; App. 1273 [21:2-24]).

C. The State contracted with Wellmark to serve as the third-party administrator for the Plan.

DAS (representing the State) and Wellmark entered into a Master Services Agreement for Medical and Pharmacy Benefits

("MSA"), effective January 1, 2013 through December 31, 2018. (App. 715-834). DAS and Wellmark entered into the MSA "for the purpose of retaining Wellmark to provide administrative services and provider network access services in connection with the State's group medical program and group pharmacy program." (App. 715-834).

1. **The MSA recognized Wellmark's independent-contractor role.**

The MSA expressly stated that Wellmark's status "shall be . . . an independent contractor." (App. 744). Additionally, "Wellmark, its employees, agents and any subcontractors performing under this Agreement, *are not employees or agents of the State of Iowa or any agency, division or department* of the State." (App. 744) (emphasis added). Further, the MSA expressly disclaimed a principal-agent relationship and stated that neither party had authority to bind the other:

> Nothing in this Agreement shall be construed as creating or constituting the relationship of a partnership, joint venture, (or other association of any kind or agent and principal relationship) between the parties hereto. Each party shall be deemed to be an independent contractor

> contracting for services and acting toward the mutual benefits expected to be derived here from. No party, unless otherwise specifically provided for herein, has the authority to enter into any contract or create an obligation or liability on behalf of, or in the name of, or binding upon another party to this Agreement.

(App. 744-745).

2. The State was Plan Sponsor and Plan Administrator.

The MSA recognized that State was "the plan administrator and plan sponsor." (App. 727). In the MSA, "Plan means any of the group health benefit plans sponsored by the State, the terms of which are described in the Benefits Document a*s approved by the State and the Iowa Insurance Division* and distributed or made available to Plan Members." (App. 719) (emphasis added). The Blue Access Plan is one of multiple State plans that Wellmark administered under the MSA. (App. 712, 719).

Under the MSA, the State's responsibilities included:

- "[r]eviewing and approving drafts of Benefits Document(s) provided by Wellmark";

- "determining that the Benefit Documents meet its legal obligations and advising Wellmark of any necessary revisions";
- "[r]eserving the right to make final determinations regarding claims, claims internal appeals, or claims exceptions, except to the extent expressly delegated to, and accepted by Wellmark in Sections 5.1.3 and 5.1.5 of this Agreement";
- "[p]roviding to Wellmark in the time and manner agreed to by the parties written notice of the benefit design and benefit selections for each Plan, changes in benefits at renewal, or material modifications in benefits at any time during the Rating Period."

(App. 727-728).

3. **Wellmark provided claim administration services.**

Wellmark administered the State's Plan according to the benefit design and benefits selection provided in writing by the State. (App. 727-731; Conf. App. 27 [70:16-24], 22-24 [55:2-56:11, 63:1-64:1, 90:25-92:10], 35 [72:4-20], 38-39 [17:18-18:4], 53 [82:2-19]). Wellmark could not independently change the Plan language without direction from the State, which retained final authority as to all terms of its Plan. (App. 727-728; Conf. App. 22-24 [55:2-56:11, 63:1-64:1, 90:25-92:10], 27

[70:16-24], 29 [60:3-6], 35 [72:4-20], 43 [36:6-13], 53 [82:2-19], 58 [37:10-25], 64 [66:1-25]).

Nothing in the MSA assigned to Wellmark a duty to analyze coverage and propose changes in coverage terms to the State. (App. 727-728, 744-745). Instead, the State retained responsibility for determining what benefits were provided to State employees, including an obligation to inform Wellmark if it wanted to change any benefits for the Plan. (App. 715-834; Conf. App. 27 [70:16-24], 22-24 [55:2-56:11, 63:1-64:1, 90:25-92:10], 35 [72:4-20], 41 [27:9-20], 43 [36:6-13], 53 [82:2-19], 63 [59:12-20, 61:1-5]).

Wellmark was responsible for preparing "draft Benefits Document(s)" that "show[ed] changes from prior versions." (App. 721). Wellmark provided these drafts "for the State's review and approval," with redlining to show the changes from prior versions. (App. 721, 835-836). Additionally, the MSA specified that benefits documents could be amended or revised "to reflect plan changes as determined by the State or changes required by law," and the State

was "responsible for determining that the Benefit Documents [met] its legal obligations." (App. 721, 727). Any such changes were "subject to approval by the Iowa Insurance Division." (App. 721, 836).

D. For self-funded group health benefit plans, plan sponsors are responsible for plan design.

A self-funded plan determines what benefits the plan will provide. Wellmark merely receives "an administrative fee to administer the benefits that [the self-funded plan sponsor tells Wellmark] they want administered." (Conf. App. 56 [17:20-23]). *See also* Conf. App. 37 [11:1-11], 38-39 [17:18-18:4], 41 [27:9-20], 43 [36:6-13], 53 [82:2-19].

As a third-party administrator, Wellmark's role is to respond to a self-funded plan sponsor's direction regarding what benefits the plan will provide. When a new self-funded plan initially enters into a contract for Wellmark to serve as a third-party administrator, the self-funded plan sponsor provides its preferred coverage terms to Wellmark. Then, Wellmark creates a benefit booklet for the sponsor

to revise and approve, and Wellmark subsequently administers claims in accordance with the coverage terms approved by the plan sponsor. (Conf. App. 39 [18:17-20:14], 56 [17:20-23]). If a self-funded plan sponsor wants to add benefit coverage to its plan, Wellmark assists the plan sponsor in adding the covered service to the plan and administers the benefit. (Conf. App. 37 [11:6-11], 41 [27:9-20], 43 [36:6-13], 53 [82:2-19], 56 [15:4-17:23], 65-66 [102:22-109:23]).

When Wellmark brought coverage issues to other self-funded plan sponsors, at times, other self-funded plan sponsors decided to change or provide exceptions to the coverage terms for their health benefit plans. (Conf. App. 53-54 [85:9-86:12]).

E. Under the MSA, Wellmark provided redlined Plan documents to DAS.

Wellmark had an obligation to draft benefits documents "setting forth the benefits, terms and conditions of the Plan as determined by the State." (App. 721). State employees at DAS reviewed the draft benefits documents, including any redlines that "show[ed] changes from prior versions," then informed Wellmark

whether the State wanted to make changes to the terms of coverage. (App. 721; Conf. App. 21 [26:5-27:12], 31 [54:16-57:6], 33-34 [17:17-20:24], 35 [73:9-17]). Annually, the State reviewed and approved the terms of coverage, through multiple layers—including the Executive Council—before the final Plan coverage terms were ever finalized. (Conf. App. 20 [18:2-19:10]). Additionally, the State retained the ability to make coverage changes to its health benefit plans at any time. (Conf. App. 42-44 [32:12-34:17, 39:11-21], 58 [37:6-21]).

In 2014, Wellmark brought to the State's attention that the Blue Access Plan excluded coverage for "sexual identification or gender disorders" but did not specifically address gender-reassignment surgery, and suggested for clarification purposes that, because the State had excluded and intended to exclude coverage for such surgery, the State expressly describe the exclusion. (Conf. App. 57 [19:22-21:25], 59 [39:21-41:18]). Although this exclusion was delineated in the 2015 Benefit Booklet, it was not new to the Plan; "transgender-related services," including gender-reassignment

surgery, had been excluded from coverage since at least 2006. *Id.;* App. 1273 [21:2-21].

In June 2015 and November 2015, Wellmark brought to the State's attention that if the State chose to do so, it could provide coverage for gender-reassignment surgery, and presented a link to Wellmark's internal medical policy for gender reassignment treatment or procedures. (App. 976-981; Conf. App. 39-40 [21:22-22:20, 24:13-22], 42 [31:4-32:24], 43-44 [37:13-38:24], 47-49 [53:16-60:21]). The State chose not to add coverage for gender-reassignment surgery. (Conf. App. 39-40 [21:6-22:20, 24:13-22], 42 [31:4-32:24], 47-49 [53:16-60:21]).

F. Since 2013, Wellmark had an internal medical policy for gender reassignment.

Since March 2013, Wellmark's internal medical policy for gender reassignment has been available as an option for any self-funded plan or group who elected to cover gender reassignment treatment or procedures. (Conf. App. 65-66 [102:22-109:23], 67-68 [114:11-120:7]). The internal medical policy for gender reassignment

has been available online for review by any self-funded plan or group considering coverage options. (Conf. App. 40 [22:1-23:24]).

The State had online access to Wellmark's medical policy for gender reassignment. (Conf. App. 40 [22:3-24:25]). On at least two occasions in 2015, Wellmark made DAS employees aware of the internal medical policy. (Conf. App. 40 [22:3-24:25], 42-44 [31:15-32:24, 36:20-38:24], 47-49 [53:16-60:21]). For years 2013, 2014, 2015, or 2016, the State never requested to add coverage for gender-reassignment surgery to the Blue Access Plan. (Conf. App. 43 [35:3-24]).

G. **Vroegh's preauthorization request for top surgery.**

Vroegh submitted a preauthorization request for gender reassignment surgery, which Wellmark processed to deny based on the coverage terms of the State's Blue Access Plan. (Conf. App. 11-18). In denying Vroegh's request for benefits, Wellmark complied with its contractual obligations to the State by administering the Plan pursuant to its terms. (App. 363, 715-834; Conf. App. 8-17, 60-61 [44:6-

46:11], 72-73 [257:16-258:5]). For years 2013-2016, treatment for gender dysphoria was always excluded from coverage in the Blue Access Plan. (App. 147-529; Conf. App. 59 [39:25-41:3], 62-63 [57:10-60:2]). As third-party administrator, Wellmark could not make an exception to a health benefit plan term. (Conf. App. 64 [66:11-14]).

The State, on the other hand, as the owner of the self-funded Plan, could through an exception process choose to provide coverage for medical treatment even if coverage was expressly excluded by the Plan's terms. (Conf. App. 45 [44:1-22]). However, the State declined to make an exception for Vroegh. (App. 976).

Alternately, the State could have changed the coverage terms and added coverage for gender-reassignment surgery, including the top surgery for which Vroegh sought preauthorization, consistent with Wellmark's internal medical policy. (App. 976-979; Conf. App. 41-42 [26:11-27:15, 27:25-30:6, 31:19-33:24]). Wellmark would have administered that benefit in accordance with the new coverage terms

dictated by the State. (Conf. App. 43 [36:6-13], 53 [82:2-19], 56 [15:4-17:23], 65-66 [102:22-109:23], 67-68 [114:11-120:7]).

H. **ACA Guidance in 2016.**

When the government issued Affordable Care Act guidance issued in 2016,[3] Wellmark notified the State that the newly promulgated final rules might impact the State's Plan, asked the State to review its Plan, and asked the State to advise Wellmark as to whether the State wanted to change its Plan. (App. 841-844, 856-954; Conf. App. 45-47 [45:3-50:13], 49-50 [61:7-62:23], 51-52 [68:2-72:24]). The State referred the issue to the Attorney General's Office, and a State attorney contacted Wellmark representative Amanda Nelson for additional information, which she provided. (App. 955-956). Effective January 1, 2017, the State added coverage for transgender-related medical treatment to its employer-sponsored Plan.[4] (App.

[3] 45 C.F.R. Subt. A, Subch. A, Pt. 92; 45 C.F.R. § 92.207.
[4] While the Plan did not affirmatively state it covered transgender-related medical treatment, the exclusions that the Plan previously stated were removed. (App. 546-569).

546-569). Before the ACA final rules issued in 2016, the State did not request to add coverage for gender-reassignment surgery to the Plan. (App. 840-854, 961-963; Conf. App. 43 [35:8-24], 45-47 [45:3-50:13], 49-50 [61:7-62:23], 51-52 [68:2-72:24]).

Argument

Division I

I. As third-party administrator for the State's 2015 Blue Access Plan, Wellmark did not engage in a discriminatory employment practice for which liability may be assessed.

The ICRA does not regulate a third-party administrator's determination denying a preauthorization request for top surgery when the denial was based on the Plan's terms and exclusions. The undisputed facts establish that the State—not Wellmark—controlled the coverage terms of the State's self-funded Plan. Vroegh acknowledges that unassailable fact in his appellate brief: "Vroegh elicited testimony by DAS officials that 'the State had the ultimate authority and responsibility to determine the terms and coverage for the health benefit plans.'" (Vroegh Proof Brief 92). Wellmark's role was to administer claims and preauthorize requests consistent with

the Plan's terms that the State authorized. The district court made no error of law in granting summary judgment in Wellmark's favor.

Error preservation. Wellmark agrees that Vroegh preserved error on his argument seeking reversal of the district court's ruling granting summary judgment in Wellmark's favor.

Standard of review. This Court reviews a district court's ruling granting a summary-judgment to correct errors at law. *Deeds v. City of Marion,* 914 N.W.2d 330, 339 (Iowa 2018). When the record shows "no genuine issues of material fact and the moving party is entitled to judgment as a matter of law," summary judgment is appropriate. *Hedlund v. State*, 930 N.W.2d 707, 715 (Iowa 2019) (citing Iowa R. Civ. P. 1.981(3)). Review is "limited to whether a genuine issue of material fact exists and whether the district court correctly applied the law." *Id.* (citation omitted).

A. The Court should consider only the summary-judgment record in reviewing the merits of Vroegh's cross-appeal.

The only relevant record for Vroegh's cross-appeal, in which he argues the district court erred in granting summary judgment in

Wellmark's favor, is the summary-judgment record. Iowa R. Civ. P. 1.981(3) ("judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); *Susie v. Fam. Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 336-37 (Iowa 2020) ("If the nonmoving party cannot generate a prima facie case in the summary judgment record, the moving party is entitled to judgment as a matter of law.").

Vroegh nevertheless cites trial testimony[5] and trial exhibits in support of his cross-appeal argument that the district court erred in granting summary judgment. *See* Vroegh Proof Brief pp. 101 (trial transcript and exhibits), 102-103 (exhibits), 110 (transcript and exhibits), 118 (exhibits), 121-122 (exhibits), 123 (transcript and

[5] In its motion to dismiss the cross-appeal as moot, Wellmark cites trial transcript excerpts involving proceedings outside the jury's presence, but those citations are presented to establish mootness, not to justify the district court's summary-judgment ruling as correct.

exhibits), 130 (exhibits), 131 (transcript and exhibits), 132-134 (exhibits), 136 (transcript and exhibits).

These materials are not part of the summary-judgment record. Vroegh did not present this evidence to the district court in resisting Wellmark's motion for summary judgment. The district court did not consider this evidence in granting summary judgment. Indeed, because trial had not commenced, these materials were not even in existence when the summary-judgment ruling issued. In deciding the cross-appeal, the Court should disregard Vroegh's citations to trial transcripts and trial exhibits because they were not part of the summary-judgment record.

B. The undisputed facts establish that Wellmark did not engage in a discriminatory employment practice when it performed services as third-party administrator for the State's Plan.

Vroegh focuses on whether Wellmark is a proper party to be held liable for a discriminatory employment practice under the ICRA. Vroegh's various liability theories arise from his underlying assumption that Wellmark had a "role in creating . . . the

discriminatory Plan" and "crafting the Plan." (Vroegh Proof Brief 41, 45). His assumption is at odds with the undisputed facts, which show that Wellmark didn't create the Plan, didn't have control over the Plan's terms, didn't modify the Plan to expand exclusions in 2015, and merely administered claims in the manner dictated by the Plan. On these undisputed facts, Vroegh cannot show that Wellmark engaged in a discriminatory employment practice for which it may be liable under the ICRA.

1. Wellmark did not establish the Plan's coverage terms and exclusions.

Vroegh predicates his liability arguments by assuming Wellmark is responsible for the so-called "facially discriminatory plan." (Vroegh Proof Brief 27). He even hints that Wellmark is responsible for the Medicaid administrative rule this Court held violated the ICRA in *Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853, 862-63 (Iowa 2019). (Vroegh Proof Brief 43). In fact, Wellmark had no involvement in the Iowa Medicaid rule, although State representatives that Wellmark interacted with informed Wellmark

that they endeavored to ensure the Plan was a mirror image of Iowa Medicaid. (Conf. App. 40-41 [24:13-26:1]).

Wellmark administered the State's Plan according to the benefit design and benefits selection parameters provided in writing by the State. (App. 712, 727-731; Conf. App. 27 [70:16-24], 22-24 [55:2-56:11, 63:1-64:1, 90:25-92:10], 35 [72:4-20], 38-39 [17:18-18:4]). Even Vroegh admits the State's "ultimate authority and responsibility to determine the terms and coverage." (Vroegh Proof Brief 92).

The MSA required Wellmark to process claims and provide State employees with a network of providers. (App. 715-834). Benefits Booklets, provided to Blue Access Plan participants—including Vroegh—reiterated Wellmark's role as a claims administrator. (App. 148, 242, 338, 431). For 2013, 2014, 2015, and 2016 Benefits Booklets, the opening page informed participants that the State sponsored and funded the Plan, while Wellmark provided only administrative services and provider network access:

NOTICE

> This group health plan is sponsored and funded by your employer or group sponsor. . . . Wellmark provides administrative services and provider network access only. . . .

(App. 148, 242, 338, 431).

Additionally, the Plan's Benefits Booklets expressly informed participants (including Vroegh) that the State had authority and control over coverage terms. After the table of contents, section 13—"About this Benefit Booklet"—clarified that the employer or group sponsor retained authority to terminate, amend, or modify coverage; any amendments or modifications had to be made in writing; and would bind the participants:

> **Please note:** Your employer or group sponsor has the authority to terminate, amend, or modify the coverage described in this benefit booklet at any time. Any amendment or modification will be in writing and will be as binding as this benefit booklet. . . .

(App. 151, 245, 341, 434).

The Blue Access Plan Benefits Booklets reiterated the State's role in controlling changes in Plan terms under the heading "General Provisions:"

> **Authority to Terminate, Amend, or Modify**
>
> Your employer or group sponsor has the authority to terminate, amend, or modify the coverage described in this benefit booklet at any time. Any amendment or modification will be in writing and will be as binding as this benefit booklet. . . .
>
> **Authorized Group Health Plan Changes**
>
> No agent, employee, or representative of [Wellmark] is authorized to vary, add to, change, modify, waive, or alter any of the provisions described in this benefit booklet. This benefit booklet cannot be changed except by one of the following . . . .

(App. 221, 317, 413, 512).[6]

This unambiguous language communicated that the State was responsible for the Plan's coverage terms, and that Wellmark had no authority or control over those terms. Even Vroegh conceded DAS

[6] In 2015-2016, the heading was slightly different, with one word change: "Authorized Group Benefits Plan Changes." (App. 413, 512).

made the decision "to select and offer" the Plan to IDOC employees. (App. 54 ¶ 43).

2. In 2015, Wellmark did not expand the Plan's exclusion.

Vroegh contends that Wellmark "re-drafted the Plan" and was the "driving force" in establishing the Plan's language expressly excluding "gender reassignment surgery" contained in the 2015 Benefits Booklet. (Vroegh Proof Brief 42, 101). Yet since at least 2006, the State's Plan excluded coverage for treatment associated with gender dysphoria. (App. 1273 [21:2-21]). The district court correctly rejected Vroegh's argument on this point and found no material factual dispute existed for trial. (App. 1428).

First, as already discussed—and as Vroegh concedes—as the Plan administrator and Plan sponsor, the State was responsible for establishing the Plan's coverage terms and exclusions. Even if, as Vroegh suggests, Wellmark proposed a "new" exclusion, there is no disputed material fact that the State—not Wellmark—had the ultimate authority to approve and accept the change. *See* App. 721;

Vroegh Proof Brief 92 ("'State had the ultimate authority and responsibility to determine the terms and coverage for the health benefit plans.'").

The summary-judgment record includes testimony from DAS employee Jim Pierson, whose work responsibilities included State employee health benefit plans, that he and others working for the State reviewed draft benefit documents with redlines from Wellmark; he passed his thoughts and comments on to his supervisors. (App. 1270-1273 [8:2-11:9, 15:11-20:8]). DAS employee Ed Holland acknowledged it was the State's responsibility to ensure the draft benefit documents met the State's legal obligations. (Conf. App. 20 [18:2-19:10], 22 [55:14-56:11], 24 [90:5-92:10]). He agreed the State was responsible for advising Wellmark regarding any necessary revisions to benefit documents. *Id.*

Moreover, Kevin Beichley, DAS risk and benefits bureau chief, confirmed that after multiple people at the State reviewed and commented about draft benefit documents with redlines, Karin

Gregor (his superior) had authority to accept or decline any proposed changes. (Conf. App. 34-35 [20:4-24, 73:9-17]). Beichley also agreed it was the State's ultimate responsibility to establish the terms and coverage for its health benefit plans, and the State had the authority to change those terms. (Conf. App. 35 [72:4-20]). Pierson confirmed that after the State approved the health benefit plans, those documents were sent to the Iowa Insurance Division for review and approval. (Conf. App. 31 [55:20-57:6]). The State Plan could not be finalized until the Iowa Insurance Division approved it. *Id.* Nothing about the State witnesses' testimony suggests the State was simply following Wellmark's lead. Instead, the State endeavored to ensure the Blue Access Plan "match[ed] up with how the Medicaid program works." (Conf. App. 40 [24:13-26:17]).

Second, the language clarifying the exclusion to include "gender reassignment surgery" added in 2015 had no material impact on Vroegh's claim. Just as Wellmark could not add coverage terms to the State's Plan, Wellmark could not eliminate an exclusion.

As Vroegh concedes, the State—and only the State—held that "ultimate authority." *See* Vroegh Proof Brief 92. *See also* App. 721.

Vroegh nevertheless contends "Wellmark, not the State, re-drafted the Plan to add that exclusion" for gender-reassignment surgery. (Vroegh Proof Brief 42). The record does not support Vroegh's argument. Wellmark complied with its contractual obligations under the MSA by providing redlines and suggesting language for the State's consideration to clarify the coverage terms and exclusions that were *already in place* under the State's Plan. (Conf. App. 21 [26:5-27:12], 31 [54:16-57:6], 33-34 [17:17-20:24], 35 [73:9-17], 57 [18:17-24], 59 [41:4-18]).

DAS employee Pierson testified the Plan excluded treatment associated with gender dysphoria in 2006, when he started working for the State. (App. 1273 [21:2-24]). Dr. Gutshall testified that at least back to 2007, the State's Plan had excluded treatment associated with gender dysphoria. (Conf. App. 57 [19:22-21:25], 59 [39:21-41:18]). In 2014, Wellmark suggested adding language stating the Plan excluded

gender-reassignment surgery—a specific type of treatment for gender dysphoria—to provide clarification, not to exclude a procedure that was previously covered. (Conf. App. 57 [19:22-21:25], 59 [39:21-41:18]). Vroegh failed to generate a factual dispute that before 2017, the Plan covered gender-reassignment surgery, including top surgery. The district court correctly found no factual dispute on this issue, concluding "Vroegh's gender-affirming surgery would not have been covered even if the 'gender reassignment surgery' exclusion had never been included in the plan." (App. 1428).

Vroegh's argument assumes that every possible treatment and care exclusion must be expressly stated in a health benefit plan. From a practical standpoint, that approach is not feasible. *See Brigolin v. Blue Cross Blue Shield of Mich.*, No. 11-1525, 2013 WL 781639, at *5 (6th Cir. Mar. 4, 2013) (recognizing the plaintiffs' argument "would require BCBSM to exhaustively list every conceivable medical service that its policies do *not* cover, which the plaintiffs concede is practically impossible for BCBSM to do.") (emphasis in original).

Plan documents communicating benefits to plan participants would be cumbersome, potentially hundreds of pages in length if every single procedure or treatment allowed and excluded was expressly identified. To avoid identifying every possible covered or excluded treatment or procedure, the Plan's Benefits Booklets specified: "even if a service is not specifically described as being excluded, it might not be covered." (App. 151, 245, 341, 434).

3. Wellmark administered claims based on the Plan's terms.

In assigning significance to Wellmark's role in the claim appeal process, Vroegh reveals a fundamental misunderstanding. As a third-party administrator, Wellmark performed claim-administration activity consistent with the Plan's terms of coverage. (App. 722-731; Conf. App. 56 [17:20-23]). *See also* Conf. App. 37-39 [11:1-11, 17:18-18:4], 41 [27:9-20], 43 [36:6-13], 53 [82:2-19]. Wellmark denied Vroegh's preauthorization request for top surgery because the requested procedure was not a covered benefit under the State's Plan.

Here, Wellmark administered the Plan in accordance with its terms—as it was contractually obligated to do—and denied Vroegh's preauthorization request because his "medical coverage specifically states, 'Not Covered: Gender reassignment surgery.'" (App. 363; Conf. App. 8-18, 60-61 [44:6-46:11], 72-73 [257:16-258:5]).

As a *claim* administrator (not the *plan* administrator) considering a preauthorization request, Wellmark first asked: Is the procedure a covered benefit? If that answer was yes, the second question was: Is the procedure medically necessary? Here, Wellmark could not get past the first step, because as discussed, the top surgery procedure wasn't covered. Beyond that claim-administration decision, Wellmark didn't have authority to modify the Plan or make an exception to the Plan for Vroegh. Only the State could make a modification or exception to the Plan's coverage terms.

Although Wellmark did not have the authority to make an exception to the Plan's terms, Wellmark brought Vroegh's benefits concern to the State's attention in November 2015. In response, the

State declined to make an exception to the Plan's coverage terms for Vroegh or otherwise change the coverage terms. (App. 715-834, 976-978; Conf. App. 39-40 [21:22-22:20, 24:13-22], 42-45 [31:4-39:21, 44:1-22], 47-49 [53:16-60:21], 64 [66:1-25]). These options were in the State's sole control. Had the State changed the coverage terms for its employer-sponsored plans, or made an exception in Vroegh's case, Wellmark would have administered Vroegh's preauthorization request in accordance with those amended terms.

C. Wellmark cannot be liable for a discriminatory employment practice based on a coverage determination that was based on the Plan's terms.

1. In its role as third-party administrator, Wellmark was not a "person" or "agent" under section 216.6.

The State is ultimately responsible for a denial of benefits; it has the right to make final determinations regarding claims, appeals, and claim exceptions. (App. 715-834). Yet Vroegh contends that Wellmark should be liable under Iowa Code section 216.6 for an alleged discriminatory *employment* practice. Under the ICRA, it is an unfair or discriminatory practice for any "[p]erson to . . . otherwise

discriminate in employment against any . . . employee because of the . . . gender identity" of the employee. Iowa Code § 216.6(1); *see also* Iowa Code § 216.2(15). Wellmark cannot be liable under section 216.6 because: (1) Wellmark did not exercise control over the State's employment decisions such that it could be held liable as a "person" under section 216.6, and (2) Wellmark was not acting as an agent of the State in a manner that could subject Wellmark to liability for employment practices under section 216.6.

a. **Wellmark cannot be liable as a "person."**

As a matter of law, the district court correctly rejected Vroegh's claim that Wellmark engaged in a discriminatory employment practice for which it should be liable as a "person." This Court has repeatedly held that "[o]bviously only the employer, and not third parties" can engage in "unfair or discriminatory practice[s]" within the scope of section 216.6(1), even though the statute uses the word

"person" instead of "employer."[7] *See Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, Inc.*, 473 N.W.2d 31, 35 (Iowa 1991); *see also Zepeda v. Fort Des Moines Men's Corr. Facility*, 586 N.W.2d 364, 365 (Iowa 1998); *Sahai v. Davies*, 557 N.W.2d 898, 901-03 (Iowa 1997). Wellmark was not, and had never been, Vroegh's employer. During the relevant time period, Vroegh was employed by the State of Iowa.

This Court has limited the scope of liability for employment practices to employers and supervisors. *Godfrey*, 898 N.W.2d 879 at n.8 (Appel, J.), 881 (Cady, C.J.). Vroegh nevertheless relies on federal district court decisions analyzing whether corporate entities, individual supervisors, or coworkers satisfy the ICRA's "person" definition in the context of an employment relationship. (Vroegh

[7] This Court recognizes a narrow exception that a complainant-plaintiff's supervisor may be subject to individual liability in addition to a complainant-plaintiff's employer, which is inapplicable here because Wellmark never supervised Vroegh. *See Godfrey v. State*, 898 N.W.2d 844, 879 n.8, 881 (Iowa 2017); *Vivian v. Madison*, 601 N.W.2d 872, 875-78 (Iowa 1999).

Proof Brief 99-102).[8] None analyzes whether the ICRA includes within its scope a third-party claim administrator's decision applying the terms of a benefit plan established by a plan sponsor that is also the plaintiff's employer. Furthermore, from a procedural standpoint, most of these rulings were decided at an early stage of the case when the district court was required to accept the facts pleaded as true.

In this appeal, the Court need not define who qualifies as a "person" under section 216.6. In enacting the ICRA to regulate employment practices, the General Assembly could not have intended to include within the scope of liability a third-party administrator's action in denying a preauthorization request for medical treatment based on an unambiguous coverage exclusion that

[8] Citing *Neppl v. Wells Fargo Bank, N.A.*, No. 4:19-cv-00387-JAJ, 2020 WL 3446280, at *3 (S.D. Iowa Mar. 27, 2020); *Whitney v. Franklin Gen. Hosp.*, No. C 13-3048-MWB, 2015 WL 1809586, at *9 (N.D. Iowa Apr. 21, 2015); *Johnson v. BE & K Constr. Co., LLC,* 593 F. Supp. 2d 1044, 1049-50 (S.D. Iowa 2009); *Asplund v. iPCS Wireless, Inc.*, 602 F. Supp. 2d 1005, 1010-1011 (N.D. Iowa 2008).

the employer—as plan sponsor and plan administrator—included in its self-funded group health benefit plan.

Expanding the ICRA to cover a third-party administrator's claim-administration decisions would create considerable chaos in the claims-administration context. Vroegh suggests Wellmark should have approved his preauthorization request. If Wellmark had done that, who would have been liable for paying Vroegh's top-surgery claim? The State would not have been contractually obligated to reimburse Wellmark for the surgery because it wasn't covered under the terms of the self-funded Plan. (App. 731). Should Wellmark have just paid for the surgery out of its operating expenses account?

And if Vroegh contends Wellmark should have been proactive in reviewing the State's Plan and identifying potential discriminatory coverage terms, must all claim administrators ensure each and every coverage term of every plan they service does not pose legal risk—even though such review is not within the scope of their contract, and they are not compensated for that service? Vroegh's view seems to be

that claim administrators should act as unretained legal counsel for the plans they service in addition to administering claims. Here, the State retained that responsibility in the MSA, and in fact relied on its attorneys in the Attorney General's Office and within DAS to review Plan terms and provide legal advice to the State about coverage. (App. 727, 840-963).

As a matter of law Wellmark cannot be held liable under the ICRA. As discussed, control over the Plan's terms always rested with the State. *See also* Vroegh Proof Brief 92. As a third-party administrator, Wellmark has no control over the State's employment decisions. As set forth in Iowa Code chapter 509A and the MSA, the State was responsible for maintaining, designing, and funding its employer-sponsored health benefit plans. (App. 727-731). This means that the employer "endures the financial risk associated with being responsible for paying health care charges incurred by its employees," and the employer has contracted with Wellmark—a third party administrator—"to perform certain administrative

functions for the employer and each plan." *See America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1324 (11th Cir. 2014). (App. 338). *See also Zolner v. U.S. Bank Nat'l Ass'n*, No. 4:15-cv-00048, 2015 WL 7758543, at *4 (W.D. Ky. Dec. 1, 2015) (collecting cases finding third-party administrators administering FMLA leave benefits for employers did not exercise sufficient control over employees of companies for which they administered benefits to be held liable under the FMLA). Wellmark was merely a third-party administrator. The district court correctly held that Wellmark lacked the requisite control to support liability under Iowa Code section 216.6.

b. **Wellmark cannot be liable as an agent.**

Vroegh also contends Wellmark should be liable under section 216.6 as an "agent" of the State. As discussed, the MSA defines the parties' relationship as *not* one of agency. (App. 744-745).

Wellmark cannot be deemed the State's agent as a matter of common law, either. This Court rejected a comparable argument, finding a doctor who performed pre-employment medical

examinations for an employer could not be liable under the ICRA as an "agent" of the employer. *Deeds*, 914 N.W.2d at 348-50. This Court explained:

> Dr. McKinstry is not a City employee; she and the UnityPoint defendants are independent contractors hired by the City. This is no nefarious shell game to avoid ICRA liability; Iowa municipalities the size of Marion would not ordinarily have a physician on staff as a city employee but rather routinely outsource employment physicals to medical clinics employing the doctor. Deeds made no showing of a principal–agent relationship between the City and the UnityPoint defendants. The Restatement (Third) of Agency defines "agency" as[:]
>
> [T]he 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 assent or otherwise consents so to act. . . .
>
> There is no evidence that the City "controlled" or had a right to control *how* Dr. McKinstry performed her physical examinations; rather, she exercised her own independent medical judgment.

Id. (quoting Restatement (Third) of Agency § 1.01, at 17 (2006)) (emphasis in original). *See also Zepeda*, 586 N.W.2d at 365 ("The most that can be said against the defendant facility is that its conduct in advising [the plaintiff's] employer may have provided information or

misinformation that prompted employers to fire him. The defendant facility did not thereby become [the plaintiff's] employer, or 'discriminate in employment,' as contemplated in Iowa Code section 216.6(1)(a). [The third party's] actions were its own, and did not come under the control of the facility.").

Administering the State's Plan in accordance with its terms did not transform Wellmark into an agent of the State that could be liable for the *State*'s decision controlling Plan design. The facts are undisputed that the State (not Wellmark) controlled and established the Plan's coverage terms. Granted, the State expected Wellmark to perform its contractual obligations under the MSA. But having a contractual relationship is different from controlling or having a right to control.[9] *See Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 696-97 (Iowa 2009).

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[9] Courts recognize some "control" is inherent in an independent-contractor relationship, whether expressly memorialized in a written contract or implicit in the course of dealing. *See, e.g.*, *Karlson v. Action Process Serv. & Private Investigations, LLC*, 860 F.3d 1089, 1093 (8th Cir.

The undisputed evidence shows the State did not control or have a right to control Wellmark, an independent, private corporation. Under the MSA, Wellmark was an independent contractor, providing claims administration and health and care management services in accordance with the terms of the Plan sponsored and approved by the State. (App. 743-745; Conf. App. 43 [36:6-13, 37:13-19], 53 [82:6-19]). The contract between the State and Wellmark expressly disclaimed a principal-agent relationship and stated that neither party had the authority to bind the other. *Id.*

Vroegh relies on *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983). *Spirt* is inapposite as the facts are distinguishable. In *Spirt*, TIAA and CREF, both responsible for administering retirement annuity plans across the nation, used sex-based mortality tables. 691 F.2d at 1062-63. One company was a variable annuity company and the other was

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2017); *Ernster v. Luxco, Inc.*, 596 F.3d 1000, 1002-03, 1005-06 (8th Cir. 2010).

an insurance company; neither was a third-party administrator. *Id.* at 1064-65. The court held TIAA and CREF, and the plaintiff's employer were "so closely intertwined" that they could be deemed an "employer" under Title VII because they existed solely for the purpose of enabling the employer to delegate the responsibility of providing retirement benefits and because employee participation in the plan was mandatory.[10] *Id.* at 1063. Moreover, a critical fact underlying this decision was that TIAA and CREF (not the plaintiffs' employers) were solely responsible for the decisions to use the sex-based mortality tables. *Id*. at 1062-63, 1068-69. In a similar vein, Vroegh cites as dispositive EEOC Compliance Manual language referring to "an insurance company that provides discriminatory benefits," which in turn relies on *Spirt*. (Vroegh Proof Brief 116).

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[10] Other courts have questioned whether *Spirt* remains good law. *See, e.g., Klassy v. Physicians Plus Ins. Co.*, 276 F. Supp. 2d 952, 959 (W.D. Wis. 2003), *aff'd*, 371 F.3d 952 (7th Cir. 2004); *Scaglione v. Chappaqua Cent. Sch. Dist*., 209 F. Supp. 2d 311, 315 (S.D.N.Y. 2002).

Here, in response to a 2012 RFP, the State selected Wellmark as a *third-party administrator*—not as an insurer providing insurance coverage. (App. 648-714). Wellmark does not exist solely for the State to delegate its responsibility to provide health benefits to its employees; and did not control or establish Plan design. Plan participation by State employees is not mandatory.

Courts considering comparable issues have rejected the theory that a third-party administrator may be liable, as an agent of the employer, for the employer's substantive decisions.[11] *See, e.g., Klassy*,

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[11] Vroegh's discussion regarding distinguishable federal cases requires only a brief response. *See, e.g., Alam v. Miller Brewing Co.*, 709 F.3d 662, 669 (7th Cir. 2013) (entity that was not the plaintiff's employer could not be held liable as an employer under Title VII because the entity did not prevent the plaintiff from accessing "employment opportunities" and did not control the only employment relationship alleged in complaint); *DeVito v. Chicago Park Dist.*, 83 F.3d 878, 882 (7th Cir. 1996) (remanding to determine whether personnel board was an employer under ADA); *Brown v. Bank of Am., N.A.*, 5 F. Supp. 3d 121, 134 (D. Me. 2014) (denying motion to dismiss and allowing the plaintiff an opportunity to develop factual record regarding agent's role); *Jones v. Montachusett Reg'l Transit Auth.*, Civil No. 4:19-cv-11093-TSH, 2020 WL 1325813, at *7 (D. Mass. Feb. 7, 2020) (recognizing "low standard to survive

276 F. Supp. 2d at 960 (finding third-party administrator was not an agent of the plaintiff's employer, and thus plaintiff could not maintain action for religious discrimination); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000) (dismissing discrimination claim against insurance company that was "simply the administrator" of the employer's plan).

In a similar case in Wisconsin federal court, the plaintiff brought suit against her employer and the third-party administrator of the employer's plan, alleging both discriminated against her based on gender by denying coverage for gender dysphoria treatment. *Boyden v. Conlin*, 2017 WL 5592688, at *1. Whether the third-party administrator could be held liable under Title VII turned on whether it was an agent of the employer. *Id.* Holding that merely offering or administering health benefits was insufficient to make the third-party administrator the employer's agent, the court explained:

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dismissal" on Rule 12 motions while employee/independent contractor issue is more appropriate for summary judgment).

> [T]o be an "agent" under Title VII, one must be empowered with respect to employment practices, like the right to hire and fire, supervise work, set schedules, pay salary, withhold taxes, or provide benefits. . . . Because [the third-party administrator] is only responsible for administering its health plans according to these dictated terms, [the third party administrator] is not an agent of plaintiff's employer with respect to employment practices, but rather a provider or vendor of services. . . . [T]o hold otherwise would necessarily mean that [the third party administrator] and all other health providers would be deemed at least an agent for every employer who contracted to provide healthcare plans to its employees, even though they have no discretion as to the scope of health benefits covered.

Id. at *3-5. *Accord Tovar v. Essentia Health*, 857 F.3d 771, 781 (8th Cir. 2017)[12] (Benton, J., concurring in part and dissenting in part) (finding no plausible theory of liability against defendant serving as a third party administrator enforcing the employer's health plan, which excluded any services or surgery for gender reassignment); *Baker v. Aetna Life Ins. Co.*, 228 F. Supp. 3d 764, 770-71 (N.D. Tex. 2017)

[12] In *Tovar*, the court addressed Article III standing, *not* whether a third-party insurance company could be held liable as an employer (or an agent of an employer) under an employment discrimination statute. 857 F.3d at 778-79.

(dismissing gender-discrimination claim arising from denial of coverage for breast implants deemed "medically necessary" to treat the plaintiff's gender dysphoria, as the third-party administrator was not an agent of the employer; the ability to approve or deny benefit claims did not constitute authority "with respect to employment practices").

Similarly, in this case, Wellmark "[wa]s only responsible for administering [the State's] health plans according to . . . dictated terms," and Wellmark was simply a "provider or vendor of services." *See Boyden*, 2017 WL 5592688, at *3-5. The State was fully responsible for "the scope of health benefits covered" under its self-funded Plan. *See id. See also* App. 727-731; Conf. App. 37-39 [10:21-11:11, 13:4-21, 17:18-18:4], 41 [26:11-27:15], 43 [34:9-37:19], 53 [82:6-19], 59 [39:21-41:18]. As a matter of law, Wellmark cannot be liable as the State's agent.

2. In its role as third-party administrator, Wellmark cannot be liable for wage discrimination under section 216.6A.

The ICRA prohibits wage discrimination "against any employee" by "any employer or agent of any employer." Iowa Code § 216.6A. The ICRA defines "employee" as including "any person employed by an employer." Iowa Code section 216.6A does not include the more general reference to "persons" in defining an unfair or discriminatory practice. *Compare* Iowa Code § 216.6A(2)(a) (does not include "persons" in the category of who may be found liable) *with* Iowa Code § 216.6 (does include "persons" in the category of who may be found liable). Consequently, liability for "persons" under section 216.6 is inapplicable to a section 216.6A claim.

Furthermore, as discussed under section 216.6, Vroegh's wage-discrimination claim fails as a matter of law because Wellmark was not Vroegh's employer or an agent of Vroegh's employer. The district court correctly granted summary judgment in favor of Wellmark on Vroegh's section 216.6A claim.

3. In its role as third-party administrator, Wellmark cannot be liable for aiding and abetting under section 216.11.

The district court correctly rejected Vroegh's theory that Wellmark should be liable for aiding and abetting under Iowa Code section 216.11. Wellmark did not fall within the scope of the aiding-and-abetting provision, and Wellmark did not intentionally aid or abet discrimination.

Section 216.11 states it is 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." Iowa Code § 216.11. This Court has not directly addressed the scope of the aiding-and-abetting provision, but the standard for liability must be more stringent than liability under section 216.6. Federal courts in Iowa have interpreted the scope narrowly, covering only non-supervisory coworkers and clients of the employer. *See Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003, 1024 (N.D. Iowa 2011); *Johnson*, 593 F. Supp. 2d at 1049-50. *See also*

Vivian, 601 N.W.2d at 877-78 ("the Iowa legislature intended the ICRA to be broad enough to embrace *supervisor liability* inasmuch as it included an aiding and abetting statute specifically prohibiting a discriminatory practice by 'any person.'") (emphasis added).

Courts in other jurisdictions interpreting similar aiding-and-abetting employment-practice statutes have found the scope of liability only "extends to those who are in a supervisory role as 'only supervisors can share the discriminatory purpose and intent of the employer that is required for aiding and abetting.'" *Brzozowski v. Pa. Tpk. Comm'n*, 165 F. Supp. 3d 251, 263 (E.D. Pa. 2016) (quoting *Holocheck v. Luzerne Cty. Head Start, Inc.*, 385 F. Supp. 2d 491, 497 (M.D. Pa. 2005)); *see also Ivan v. Cty. of Middlesex*, 595 F. Supp. 2d 425, 463 (D.N.J. 2009) (granting summary judgment in favor of non-supervisor defendants); *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 129 (3d Cir. 1999) (holding New Jersey law imposes aiding-and-abetting liability only on supervisory employees). As Wellmark was neither a supervisor of Vroegh nor an employee of the State, the

preauthorization denial does not fall within the narrow scope of section 216.11.

a. **Under the applicable standard, Wellmark's action fell short of aiding and abetting.**

Even if the scope of section 216.11 was sufficiently broad to cover Wellmark, Vroegh's claim for aiding and abetting would nonetheless fail. Vroegh contends on appeal that there are three possible tests for aiding and abetting that may apply here, including the test articulated by the district court, which relied on this Court's decision in *Heick v. Bacon*, 561 N.W.2d 45 (Iowa 1997).

The district court adopted the most applicable test based on Iowa precedent. Under Iowa law, to establish ICRA aiding and abetting, the plaintiff must show: "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." *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994); *see also Tubbs v. United Cent. Bank*, 451 N.W.2d 177, 182 (Iowa 1990). The three factors should be considered in relation to one another, particularly the

knowledge and substantial assistance factors. *State ex rel. Goettsch v. Diacide Distribs., Inc.*, 561 N.W.2d 369, 377 (Iowa 1997).

The "plaintiff must first establish the employer's participation in the discriminatory practice." *Deeds*, 914 N.W.2d at 350. This is consistent with the principles set forth in the Restatement (Second) of Torts section 876(b), which Iowa courts have consistently relied on in other areas to delineate the parameters of civil liability for aiding and abetting, and suggests the Iowa Supreme Court would use the Restatement in interpreting section 216.11. *See, e.g., Shea v. Lorenz*, No. 14-0898, 2015 WL 4158781, at *8 (Iowa Ct. App. Jul. 9, 2015); *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 171 (Iowa 2002); *Goettsch*, 561 N.W.2d at 377; *Ezzone*, 525 N.W.2d at 398; *Tubbs*, 451 N.W.2d at 182.

The underlying wrong must be distinct from the conduct alleged to aid and abet the wrong. *See Coogan v. FMR, LLC*, 264 F. Supp. 3d 296, 308 (D. Mass. 2017) (applying section 876(b) and explaining an aiding-and-abetting claim requires a showing of "a wholly individual and distinct wrong"); *McNeail-Tunstall v. Marsh*

USA, 307 F. Supp. 2d 955, 974 (W.D. Tenn. 2004) ("Liability requires affirmative conduct by the individual defendant; a failure to act or mere presence during the employer's discrimination is insufficient. Liability, however, is not imposed based on the individual defendant's own discriminatory acts; it requires distinct conduct that aids or abets discrimination by the employer."). Likewise, the alleged aider and abettor cannot also be the primary tortfeasor; arguing that defendants aided and abetted themselves in committing discriminatory practices is "nonsensical." *D.W. v. Radisson Plaza Hotel Rochester*, 958 F. Supp. 1368, 1381 (D. Minn. 1997).

Here, Vroegh failed to generate a factual dispute that Wellmark could be liable. Vroegh's agency argument assumes that Wellmark dictated the terms of the State's Plan. As discussed, the record does not support that assumption. Vroegh's aiding-and-abetting claim, on the other hand, assumes the *State* dictated the terms of its Plan (a fact that is supported by the undisputed evidence in the record), and that

Wellmark separately and intentionally aided and abetted the State in a discriminatory practice.

The undisputed evidence demonstrated that the State—and only the State—had authority to determine what would and would not be covered by the State's Plan, regardless of any conduct by Wellmark. (App. 715-834; Conf. App. 27 [70:16-24], 22-24 [55:2-56:11, 63:1-64:1, 90:25-92:10], 29 [60:3-6], 35 [72:4-20], 43 [36:6-13], 53 [82:2-19], 58 [37:10-25], 64 [66:1-25]). When a new self-funded plan initially enters into a contract with Wellmark, the self-funded plan sponsor provides its preferred coverage terms to Wellmark, and Wellmark then creates the benefit booklet and administers the coverage terms requested by the plan sponsor. (Conf. App. 39 [18:17-20:14], 56 [15:4-17:23]). The State, as the Plan sponsor, had the sole power to alter coverage terms when it chose to do so. (App. 147-635, 715-834; Conf. App. 37 [11:1-11], 42-44 [32:12-34:17, 35:25-36:13, 39:11-21], 53 [82:6-19], 56-57 [15:4-18:24], 58 [37:10-21], 64 [66:15-25]).

Alternately, Vroegh supports the approach that some federal courts have applied interpreting section 216.11(1). These courts believe this Court might "draw upon its criminal jurisprudence 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 (citing *State v. Maxwell*, 743 N.W.2d 185, 197 (Iowa 2008)). *See also Johnson*, 593 F. Supp. 2d at 1053 n.7. These courts recognize a scienter requirement in the aiding-and-abetting provision of the ICRA, which at the very least requires that an alleged violator must know that his or her actions are aiding and abetting an act of discrimination. *See Johnson*, 593 F. Supp. 2d at 1052–53. Since liability for aiding and abetting must be based on knowingly and actively participating or encouraging discriminatory conduct, speculation falls short of generating a material factual issue for trial. *See McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). Even if the Court were to adopt this approach, the

district court correctly granted summary judgment, because Vroegh presented no evidence regarding scienter. Consequently, the district court correctly granted summary judgment.

Finally, Vroegh suggests another test that involves considering whether he established (1) an intentional act by Wellmark; (2) aiding or abetting the State; (3) to engage in a discriminatory practice. This so-called test mirrors the others and the end result is the same. The district court correctly granted summary judgment because Vroegh failed to generate a genuine issue of material fact for trial.

b. **Administering coverage terms was not aiding or abetting.**

Vroegh has not alleged a distinct wrong that could have aided the actionable wrong—the denial of benefits related to his gender identity. The Plan terms approved by the State expressly excluded coverage for transition-related benefits. (App. 337-429). Wellmark applied the exclusion as set forth in the Plan documents, as required under the terms of the MSA. (App. 337-429, 715-834; Conf. App. 8-18, 60-61 [44:6-46:11], 72-73 [257:16-258:5]). Through the exception

process, the State, as the owner of a self-funded health benefit plan, could choose to provide coverage for the medical treatment sought by Vroegh even though coverage was expressly excluded in the Plan terms. (App. 147-635; Conf. App. 45 [44:1-22]). Wellmark did not have the authority to make exceptions to a benefit coverage issue for the State's Plan. (Conf. App. 64 [66:11-14]).

c. **Providing redlined Benefits Booklets and otherwise calling the exclusion to the State's attention was not aiding and abetting.**

To the extent Vroegh's aiding-and-abetting claim is premised on Wellmark's act in providing redlined benefit booklets to the State for review and approval (as required by the MSA), the record is clear that the State held the ultimate decision-making authority to determine what benefits would and would not be provided under its state-sponsored plans. (App. 727-731; Conf. App. 27 [70:16-24], 22-24 [55:2-56:11, 63:1-64:1, 90:25-92:10], 29 [60:3-6], 35 [72:4-20], 42-44 [32:12-34:17, 35:25-36:13, 39:11-21], 53 [82:2-19], 58 [37:10-25], 64 [66:1-25]). The gender-reassignment-surgery exclusion was always part of

the State's Plan, at least as far back as 2006. (Conf. App. 57 [19:22-21:25], 59 [39:21-41:18], 63 [59:12-60:2]; App. 1273 [21:2-24]). If anything, when Wellmark provided the draft plan to the State for approval in 2014—wherein surgery for gender reassignment was listed as an exclusion in redlined fashion as a clarification to the existing exclusion—the State again had an opportunity to decide whether to expressly provide or exclude coverage for gender-reassignment surgery or any other related treatment. *Id.*

Further, in June 2015 and November 2015, Wellmark expressly brought to the State's attention the fact that the State's Blue Access Plan did not provide coverage for gender reassignment surgery, and that the State could provide coverage for such surgery if the State so elected. (Conf. App. 39-40 [21:22-22:20, 24:13-22], 42 [31:4-32:24], 47-49 [53:16-60:21]; App. 976-981). The State chose not to add coverage for gender-reassignment surgery when the exclusion was specifically brought to its attention in June 2015 and November 2015. (Conf. App. 39-40 [21:22-22:20, 24:13-22], 42 [31:4-32:24], 43 [35:14-24], 47-49

[53:16-60:21]). The State also declined to make an exception when Vroegh's concern was brought to the State's attention in November 2015—an exception that only the State had the power to grant. (App. 715-834, 976-978; Conf. App. 42-44 [31:9-34:17, 37:13-39:21], 45 [44:1-22], 47-49 [53:16-60:21]).

If the State had elected to add coverage for gender-reassignment surgery, including the top surgery sought by Vroegh, Wellmark would have administered that benefit in accordance with the new coverage terms dictated by the State. (Conf. App. 42-44 [32:6-34:17, 36:6-37:1, 38:25-39:21], 53 [82:6-19], 56 [15:4-17:23], 67-68 [114:11-120:7]). The State never requested to add such surgery to its Blue Access Plan until after the issuance of the ACA guidance in 2016. (Conf. App. 43 [35:8-24], 45-47 [45:3-50:13], 49-50 [61:7-62:18], 51-52 [68:2-72:24]). During the relevant period in this case, Wellmark always administered the State of Iowa Blue Access Plan in the same way regarding requests for coverage for gender-reassignment surgery, because such surgery was excluded from coverage in the

State of Iowa Blue Access Plan. (App. 147-529; Conf. App. 59 [39:21-41:18], 62-63 [57:10-60:2]).

Additionally, there is no evidence Wellmark substantially assisted or encouraged any of the alleged wrongful conduct against Vroegh. Administering the Plan in accordance with the terms dictated by the State, as Wellmark was contractually obligated to do, did not substantially assist the underlying discrimination. *See Heick*, 561 N.W.2d at 53.

Moreover, Wellmark's actions did not cause Vroegh's injury. *See id.* at 52. The State had the ultimate authority to change the coverage terms or provide an exception for Vroegh.

Finally, Vroegh cannot establish that Wellmark had the requisite intent to aid and abet the alleged discrimination. As Vroegh cannot meet his burden on any of the elements necessary to establish a claim for aiding and abetting, the claim must fail. The district court correctly granted summary judgment.

Conclusion

Wellmark Inc., d/b/a Wellmark Blue Cross and Blue Shield of Iowa, Defendant/Cross-Appellee, respectfully requests that the Court grant Wellmark's Motion to Dismiss Appeal as Moot, filed August 19, 2020. Alternatively, Wellmark requests that the Court affirm the judgment of the district court regarding the issues raised in this cross-appeal.

Request for oral argument

Wellmark Inc., d/b/a Wellmark Blue Cross and Blue Shield of Iowa respectfully requests oral argument regarding the issues presented in this appeal.

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[X] This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*g*)(1) because it contains 11,230 words, excluding the parts of the brief exempted by the rule.

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/s/ Debra Hulett

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I, Debra Hulett, certify that there were no costs to reproduce copies of Cross-Appellee's Final Brief because the appeal is being filed exclusively in the Appellate EDMS system.

/s/ Debra Hulett

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I hereby certify that on May 5, 2021, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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