

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

<p>JESSE VROEGH,</p> <p>Plaintiff,</p> <p>v.</p> <p>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,</p> <p>Defendants.</p>	<p>Case No. LACL138797</p> <p>STATE DEFENDANTS' TRIAL BRIEF</p>
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State Defendants, by and through undersigned counsel, and pursuant to the Trial Scheduling Order in this matter, hereby submit the following trial brief:

I. INTRODUCTION

Jesse Vroegh (“Plaintiff”) is a former employee of Iowa Department of Corrections (“DOC”) who was employed as a Registered Nurse at the Iowa Correctional Institution for Women (“ICIW”) from approximately July 2009 to December of 2016. Plaintiff is a transgender male, who was assigned the female gender at birth but identifies as a male. On or about June 18, 2015, Plaintiff requested to start using the male restroom and locker room at work. Plaintiff alleges that when DOC and Patti Wachtendorf (“Wachtendorf”), then warden, did not permit him to use the male restroom and locker room on or about November 4, 2015, they discriminated against him on the basis of sex and gender identity. Moreover, during his employment with DOC, Plaintiff had State of Iowa Blue Access health insurance which contained non-covered procedures. In the fall of 2015, Plaintiff sought to get pre-approved for a mastectomy, otherwise

referred to as “top surgery” for transgendered individuals. Wellmark Blue Cross Blue Shield (“Wellmark”) the administrator of the insurance plan informed Plaintiff that gender reassignment surgery was not covered under Blue Access and denied the pre-approval. Plaintiff appealed the denial with Wellmark, but Plaintiff never contacted Department of Administrative Services (“DAS”) or DOC about the denial. Plaintiff alleges that DAS and DOC engaged in unequal pay discrimination on the basis of basis of sex and gender identity when they offered health insurance that excluded gender re-assignment surgery. Plaintiff contends that the acts of DOC, Wachtendorf, and DAS constitute direct evidence of sex and gender identity discrimination in violation of the Iowa Civil Rights Act. The evidence will show that DOC and Wachtendorf merely adopted a transgender employee’s recommendation to create gender neutral restrooms and locker area in an effort to balance the concerns and needs of all employees, and that the Blue Access insurance plan for 2015 and 2016 did not amount to unequal pay because it contained numerous other exclusions and non-covered procedures that effected all insured-employees, irrespective of sex or gender identity.

ANTICIPATED FACTS

In July of 2009, Plaintiff was hired as a registered nurse for the ICIW located in Mitchellville, Iowa. At that time, Plaintiff presented as a female and ICIW staff considered Plaintiff to be a female. Plaintiff used the women’s restroom and locker room at ICIW. In October of 2014, Plaintiff informed his supervisor, Kerri Freidhof (“Freidhof”) that he was starting the process of becoming a man. Freidhof shared that information with Plaintiff’s other supervisor, Patrick Whitmore, per Plaintiff’s request and Wachtendorf and Medical Director Dr. Harbans Deol (“Dr. Deol”) with Plaintiff’s consent. On June 18, 2015, Plaintiff spoke to Freidhof to make a request to start using the men’s restroom and locker area. At ICIW, the staff

only restrooms are all single occupancy gender neutral restrooms except for the restroom stalls physically located in the men's and women's locker room in the administration building ("Building A") and one set of restrooms in the clinic area in building H ("Building H").

On November 4, 2015, Plaintiff and union representative Todd Givens met with Wachtendorf, Dr. Deol, and Freidhof to discuss Plaintiff's request. During the meeting, in an effort to accommodate Plaintiff's request and to balance concerns of other staff, Plaintiff was asked if he had any suggestions. Plaintiff proposed making the two gender specific single occupancy restrooms in Building A into two gender neutral restrooms and putting a locker in the gender neutral restroom for his use. At the meeting, Plaintiff told Wachtendorf, Dr. Deol, and Freidhof that they not share information about Plaintiff's transition with others but to direct them to Plaintiff. After the meeting, DOC and Wachtendorf changed the two gender specific restrooms in Building A to gender neutral restrooms and put in a locker per Plaintiff's suggestion. On February 4, 2016, Plaintiff requested a chair to use in the gender neutral restroom which was granted. Wachtendorf will testify that she believed that changing the two restrooms to gender neutral restrooms and adding a locker for Plaintiff's use was a permanent arrangement to accommodate Plaintiff's request.

During Plaintiff's employment with ICIW, the State of Iowa offered eligible employees health insurance, one of which was Blue Access. Plaintiff enrolled in the Blue Access plan for calendar years 2015 and 2016. One of the non-covered procedures in the Blue Access plan for 2015 and 2016 included gender reassignment surgery. In the fall of 2015, Plaintiff sought to get pre-approved for a mastectomy, otherwise referred to as "top surgery" for transgendered individuals. Wellmark, the administrator of the insurance plan, informed Plaintiff that gender

reassignment surgery was not covered under Blue Access and denied the pre-approval. Plaintiff appealed the denial with Wellmark, but Plaintiff never contacted DAS or DOC about the denial.

SUMMARY OF ARGUMENT

A. Adopting Plaintiff's Suggestion to Convert Two Restrooms to Gender Neutral Restrooms and Adding a Locker for his use is Not Direct Evidence Discrimination

Plaintiff suggests that in *any* instance where a transgender employee does not use the gender specific restroom or locker room that the transgender employee associates with, that is direct evidence of sex and gender identity discrimination. However, given the undisputed facts in this case, accommodating a transgender employee's request to create a gender neutral restroom or locker area for his use is not direct evidence of discrimination. Here, DOC and Wachtendorf did not force Plaintiff to use the women's restroom or locker room consistent with Plaintiff's assigned sex at birth. Rather, during a meeting to discuss Plaintiff's request to use the male restroom and locker room, Plaintiff suggested that the two single-occupancy gender specific restrooms in the administration building be converted to two gender neutral restrooms and to put in a locker in the converted gender neutral restroom for his use. Plaintiff stated at that meeting that he would be "happy" with that arrangement. DOC and Wachtendorf then converted the two restrooms and placed a locker for Plaintiff's use. DOC and Wachtendorf believed that this arrangement satisfied Plaintiff's request.¹ Here, Plaintiff cannot establish direct evidence of sex or gender identity discrimination under the facts of this case. The evidence will show that DOC and Wachtendorf did not discriminate against Plaintiff on the basis of his sex or gender identity when they accommodated his request .

¹ It is significant to note that during this time, Plaintiff informed DOC and Wachtendorf *not* to inform others about his transition. Therefore, male staff would not have any information about Plaintiff's transition and would have just been presented with a female co-worker using the men's restroom and locker room.

B. Offering Employees Health Insurance with Non-Covered Procedures is Not Direct Evidence of Wage Discrimination

Plaintiff contends that because his health insurance did not cover a specific benefit—gender reassignment surgery—it is direct evidence of wage discrimination. Plaintiff, however, was not subject to unequal wages because of his sex or gender identity. Specifically, the “benefit” at issue in this case—health insurance—was provided equally to Plaintiff. The fact that the Blue Access health insurance plan elected by Plaintiff did not cover gender reassignment surgery is not a violation of section 216.6A(2) because the underlying benefit, health insurance, was equally provided to Plaintiff. Indeed, Plaintiff’s sex or gender identity did not result in him getting paid wages “at a rate less than the rate paid to other employees who are employed within the same establishment for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” *See* Iowa Code § 216.6A(2)(a). The terms of the Blue Access applied equally to all employees, regardless of their protected status under the ICRA. The fact that Plaintiff was denied coverage for a specific procedure consistent with the terms of Blue Access is not direct evidence of sex or gender identity discrimination under section 216.6A. Rather, it demonstrates the contrary, that the denial was not due to sex or gender identity, but a result of applying the terms and conditions of the health insurance plan. *See* Iowa Code § 216.6A(3)(d) (stating affirmative defense when a “[p]ay differential is based on any other factor other than the . . . sex . . . [or] gender identity. . . of such employee”).

Here, the Blue Access benefits booklet lists numerous procedures covered and not covered by the plan. One of the procedures not covered by Blue Access during the relevant time period (2015 and 2016) was gender reassignment surgery. This non-covered item applied

equally to all employees who elected Blue Access. The procedure was not covered under Blue Access regardless of whether an employee was a male, female, transgendered, or non-transgendered. Plaintiff will not be able to establish that the plan language, which included gender reassignment surgery as a non-covered procedure, is direct evidence of unequal pay discrimination because of an individual's sex or gender identity, especially given that not all transgender individuals would seek gender reassignment surgery, e.g., mastectomy. Rather, it was a non-covered procedure much like infertility treatment (which presumably would affect more females), wig or hair pieces (which presumably would affect more males), or morbid obesity treatment (which would affect all genders). Here, Plaintiff was subject to the same wages, i.e., health insurance, afforded to eligible employees. Plaintiff, therefore, cannot establish direct evidence of unequal pay discrimination of the basis of sex or gender identity under the facts of this case. The evidence will show that DOC and DAS did not discriminate against Plaintiff of the basis of his sex or gender identity when they applied the terms of the health insurance at issue. Rather, the application of the terms and conditions of the health insurance plan resulted in the denial of Plaintiff's pre-approval, not his sex and gender identity. Iowa Code § 216.6A(3)(d).

CONCLUSION

For the reasons stated above, DOC, Wachtendorf, and DAS did not discriminate against Plaintiff because of his sex or gender identity. DOC, Wachtendorf, and DAS will move for a directed verdict at trial, and if the claims survive the motion, DOC, Wachtendorf, and DAS anticipate that the jury should return a verdict in their favor.

Respectfully submitted,

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