IN THE IOWA SUPREME COURT
No. 20-0484

JESSE VROEGH,
Appellee/Cross-Appellant,

v.
IOWA DEPARTMENT OF CORRECTIONS,
IOWA DEPARTMENT OF ADMINISTRATIVE
SERVICES and PATTI WACHTENDORF
(in her individually and official capacities) ,
Appellants,

and WELLMARK INC, d/b/a
WELLMARK BLUE CROSS
AND BLUE SHIELD OF IOWA,
Cross-Appellee,

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE SCOTT D. ROSENBERG, JUDGE

APPELLANTS' IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES and PATTI WACHTENDORF (in her individually and official capacities) FINAL BRIEF AND ARGUMENT

THOMAS J. MILLER
Attorney General of Iowa
WILLIAM A. HILL
Assistant Attorney General
Special Litigation Division
Hoover State Office Building
Des Moines, IA 50319
(515) 281-7055
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND MISCELLANEOUS:

STATEMENT OF ISSUES

I. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL BASED ON ERRORS IN THE JURY INSTRUCTIONS ISSUED BY THE TRIAL COURT WHICH MISSTATED THE LAW AND RESULTED IN PREJUDICE TO THE IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES AND PATTI WACHTENDORF?

CASES AND MISCELLANEOUS:

Fry v. Blauvelt, 818 N.W.2d 123 (Iowa 2012)

Boyle v. Alum–Line, Inc., 710 N.W.2d 741 (Iowa 2006)

Thompson v. City of Des Moines, 564 N.W.2d 839 (Iowa 1997)

Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016).

DeBoom v. Raining Rose, Inc., 772 N.W.2d 1 (Iowa 2009)

Bostock v. Clayton County, ___ U.S. ___, 140 S.Ct. 1731 (2020)

Good v. Iowa Department of Human Services, 924 N.W.2d 853 (Iowa 2019)

Covington v. Reynolds ex. rel. State of Iowa, 2020 WL 4514691 (Iowa App. 2020)

Hawkins v. Grinell Regional Medcial Center, 929 N.W.2d 261 (Iowa 2019)

Woodbury County v. Iowa Civil Rights Comm'n, 335 N.W.2d 161

Farmland Foods, Inc. v. Dubuque Human Rights Commission 672 N.W.2d 733 (Iowa 2003)

Cerro Gordo Cnty. Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192 (Iowa 1987)

Valline v. Murken, 669 N.W.2d 260, 2003 WL 21361344, *5 (Iowa Ct. App. 2003)

Walker v. AT & T Technologies, 995 F.2d 846 (8th Cir. 1993)

Scamardo v. Scott Cnty., 189 F.3d 707 (8th Cir. 1999)

Belk v. Sw. Bell Tel. Co., 194 F.3d 946 (8th Cir. 1999)

Stemmons v. Missouri Department of Corrections, 82 F.3d 817 (8th Cir. 1996)

II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW RELEVANT AND COMPELLING EVIDENCE THAT AS TO THE WHICH IMPACTED THE SUBSTANTIAL RIGHTS OF IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES AND PATTI WACHTENDORF?

CASES AND MISCELLANEOUS:

Mohammed v. Otoadese, 738 N.W.2d 628 (Iowa 2007).

Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000)

Iowa R. Evid. 5.103(a)

Iowa Rule of Evidence 5.608(b)

Glaze v. Childs, 861 F.3d 724 (8th Cir. 2017)

Froning & Deppe, Inc. v. South Story Bank & Trust Co.,327 N.W.2d 214 (Iowa 1982)

Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388 (Iowa 2001)

Palmer v. Tandem Mgmt. Servs., Inc., 505 N.W.2d 813 (Iowa 1993)

Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990)

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE SEX DISCRIMINATION ISSUE TO BE SUBMITTED TO THE JURY?

CASES AND MISCELLANEOUS:

Boyle v. Alum–Line, Inc., 710 N.W.2d 741 (Iowa 2006)

Thompson v. City of Des Moines, 564 N.W.2d 839 (Iowa 1997)

Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016).

Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470 (Iowa 1983)

Grimm v. US W. Commc'ns, Inc., 644 N.W.2d 8 (Iowa 2002)

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

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

State v. McKinley, 860 N.W.2d 874 (Iowa 2015)

IV. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE CLAIM OF VROEGH TO PROCEED AGAINST THE IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES FOR ASSERTING THAT A OFFERING EMPLOYEES HEALTH INSURANCE WITH NON-COVERED PROCEDURES IS EVIDENCE OF WAGE DISCRIMINATION?

CASES AND MISCELLANEOUS:

Fry v. Blauvelt, 818 N.W.2d 123 (Iowa 2012)

Boyle v. Alum–Line, Inc., 710 N.W.2d 741 (Iowa 2006)

Iowa Code § 216.6A(2)(a)

Iowa Code § 216.6A(3)(d)

AFSCME Iowa Council 61 v. Iowa Public Employment Relations Bd., 846 N.W.2d 873 (Iowa 2014)

City of Dubuque v.Iowa Public Employment Relations Bd., 444 N.W.2d 495 (Iowa 1989)

Iowa Code section 20.10

Fort Dodge Community Sch. Dist. v. PERB, 319 N.W.2d 181 (Iowa 1982)

Iowa Code Section 20.9

AFSCME Iowa Council 61, 846 N.W.2d at 879

Scottsbluff Policy Officers Ass'n v. City of Scottsbluff, 805 N.W.2d 320 (Neb. 2011)

Loral Defense Systems-Akron v. N.L.R.B., 200 F.3d 436 (6th Cir. 1999)

St. Clair Intermediate Sch. Dist. v. Intermediate Educ. Ass'n., 581 N.W.2d 707 (Mich. 1998)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court as it presents a substantial question of law, is a case of first impression and presents an issue of broad public importance. Iowa Court Rule 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case Jesse Vroegh was a former employee of Iowa Department of Corrections ("IDOC") who was employed as a Registered Nurse at the Iowa Correctional Institution for Women ("ICIW") from approximately July 2009 to December of 2016. Vroegh is a transgender male, who was assigned the female gender at birth but identifies as a male. On or about June 18, 2015, Vroegh requested to start using the male restroom and locker room at work. Vroegh alleged that the IDOC and Patti Wachtendorf ("Wachtendorf"), then Warden, did not permit him to use the male restroom and locker room on or about November 4, 2015, and they discriminated against him on the basis of sex and gender identity.

During Vroegh's employment with IDOC, Vroegh had State of Iowa Blue Access health insurance which contained non-covered procedures. In the fall of 2015, Vroegh sought to be 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 Vroegh that gender reassignment surgery was not covered under Blue Access and denied the pre-approval. Vroegh appealed the denial with Wellmark, but Vroegh never contacted Iowa Department of Administrative Services ("IDAS") or IDOC about the denial. Vroegh alleges that IDAS and IDOC engaged in unequal pay discrimination on the basis of sex and gender identity when they offered health insurance that excluded gender re-assignment surgery. Vroegh contended that the acts of IDOC, Wachtendorf, and IDAS constitute direct evidence of sex and gender identity discrimination in violation of the Iowa Civil Rights Act.

This matter was tried beginning February 9, 2019, with judgment on the jury's verdict entered on February 14, 2019.[1] The jury verdict found in favor of Vroegh's sex discrimination and gender identity discrimination against IDOC and Patti Wachtendorf, awarding Vroegh $100,000 in emotional distress damages, in favor of Vroegh's sex discrimination and gender identity discrimination against IDAS, awarding Vroegh $20,000 in emotional distress damages, and found IDAS and IDOC did not prove their affirmative defense.

[1]Vroegh underlying claim against Wellmark was dismissed prior to trial and is the subject of Vroegh's cross appeal.

Following the verdict, the IDOC, IDAS and Patti Wachtendorf filed a Motion for New Trial and a Judgment Notwithstanding the Verdict. In a Ruling on Defendants' Motion for New Trial and Judgment Notwithstanding the Verdict, the motion was denied. Following such a determination, a timely notice of appeal was filed.

Course of Proceedings. On August 28, 2017 Jesse Vroegh filed the present action against the IDOC, IDAS, Patti Wachtendorf and Wellmark stemming from the allegation allegations of discrimination stemming from Vroegh's employment at ICIW. (Petition; App. 11-21). In response, a motion to dismiss was filed by the IDAS which was granted in part and denied in part. (Order Re: Motions to Dismiss, December 12, 2017; App. 70-81).[2] After an amended pleading, (Amended Complaint, December 12, 2017; App. 49-61), on January 3, 2018 the State of Iowa denied the allegations raised by Vroegh. (Answer, 1/3/2018; App. 82-89).

Following summary judgment proceedings, the trial began on February 9, 2019. On February 14, 2019 the jury found in favor of Vroegh's sex discrimination and gender identity discrimination against the IDOC and Patti Wachtendorf, awarding Vroegh $100,000 in emotional

[2]The motion filed by Wellmark was granted – which is subject to the cross appeal by Vroegh.

distress damages. (Jury Verdict; App. pp. 1504-1508). In addition, the jury found for Vroegh in the sex discrimination and gender identity discrimination against Iowa Department of Administrative Services, awarding $20,000 in emotional distress damages. *Id.* The trial court denied the State of Iowa's post-trial motions and this appeal followed.

Factual Background. Jesse Vroegh is a former employee of Iowa Department of Corrections ("IDOC") who was employed as a Registered Nurse at the Iowa Correctional Institution for Women ("ICIW") from approximately July 2009 to December of 2016. Vroegh is a transgender male, who was assigned the female gender at birth but identifies as a male. (Transcript, Vol II, p. 191, line 23- p. 193, line 2). On or about June 18, 2015, Vroegh requested to start using the male restroom and locker room at work. Vroegh alleges that when IDOC 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 IDOC, Vroegh 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. Vroegh appealed the denial with Wellmark, but Vroegh never contacted Department of Administrative Services (“DAS”) or IDOC about the denial. Vroegh alleged that DAS and IDOC 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. Vroegh contends that the acts of IDOC, Wachtendorf, and DAS constitute direct evidence of sex and gender identity discrimination in violation of the Iowa Civil Rights Act.

The evidence established that IDOC 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, (Transcript, Vol V, p. 113, lines 6 - p. 115, line 5; Vol V., p. 117, line 1- p. 118., line 10), 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.

In July of 2009, Vroegh was hired as a registered nurse for the ICIW located in Mitchellville, Iowa. In October of 2014, Vroegh informed his supervisor, Kerri Freidhof ("Freidhof") that he was starting the process of becoming a man. Freidhof shared that information with Vroegh's other supervisor, Patrick Whitmore, per Vroegh 's request and Wachtendorf and Medical Director Dr. Harbans Deol ("Dr. Deol") with Vroegh's consent. On June 18, 2015, Vroegh spoke to Freidhof to make a request to start using the men's restroom and locker area. (Vol III. Transcript, p 176, line 4 - p. 178, line 15). At ICIW, the staff's 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"). (Transcript, Vol II, p. 191, line 23- p. 193, line 2).

On November 4, 2015, Vroegh and union representative Todd Givens met with Wachtendorf, Dr. Deol, and Freidhof to discuss Vroegh 's request. During the meeting, in an effort to accommodate Vroegh 's request and to balance concerns of other staff, Vroegh was asked if he had any suggestions. Vroegh 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. (Transcript, Vol II, p. 213, l. 6 - p. 216, l 3). At the meeting, Vroegh told Wachtendorf, Dr. Deol, and Freidhof that they not share information about Vroegh 's transition with others but to direct them to Vroegh. After the meeting, IDOC and Wachtendorf changed the two gender specific restrooms in Building A to gender neutral restrooms and put in a locker per Vroegh 's suggestion. (Transcript, Vol V, p. 113, lines 6 - p. 115, line 5; Vol V., p. 117, line 1- p. 118, line 10).

On February 4, 2016, Vroegh 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 Vroegh's use was a permanent arrangement to accommodate Vroegh's request. *Id.*

During Vroegh 's employment with ICIW, the State of Iowa offered eligible employees health insurance, one of which was Blue Access. Vroegh 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. (Exhibit 15; Exhibit App. pp. 219-316). In the fall of 2015, Vroegh 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 Vroegh that gender reassignment surgery was not covered under Blue Access and denied the pre-approval. (Transcript, Vol II, p. 179, line 19 - p. 182, line 12).

Vroegh appealed the denial with Wellmark, but Vroegh never contacted DAS or DOC about the denial. Based on such facts, Vroegh brought this action.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL BASED ON ERRORS IN THE JURY INSTRUCTIONS ISSUED BY THE TRIAL COURT WHICH MISSTATED THE LAW AND RESULTED IN PREJUDICE TO THE IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES AND PATTI WACHTENDORF.

Standard of Review "We review the denial of a motion for new trial based on the grounds asserted in the motion." *Fry v. Blauvelt,* 818 N.W.2d 123, 128 (Iowa 2012) (*internal quotation marks omitted*). If the motion is based on a legal question, the review is for correction of errors at law. *Id.* As the basis for the motion for a new trial is based on alleged error in jury instructions, review is for legal error. *See Boyle v. Alum–Line, Inc.*, 710 N.W.2d 741, 748

(Iowa 2006). Jury instructions "must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide." *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). A district court's refusal to give a requested jury instruction is reviewed for correction of errors at law. *See Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016).

Instructional errors do not merit reversal unless prejudice results. *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009). Prejudice occurs and reversal is required if jury instructions have misled the jury, or if the district court materially misstates the law. *DeBoom*, 772 N.W.2d at 5.

Preservation of Error There was a substantial dispute as to the applicable law and jury instructions that were to be presented – which were discussed prior to submission and following the trial in post-trial motions. *(See* Ruling on Defendants Motion for New trial and Judgment Notwithstanding the Verdict ("Ruling"), pp. 26-30; 39-51; App. pp. 1578-1582; 1591-1603). The issues were raised and considered by the trial court.

Argument At trial, there was a contentious debate as to the jury instructions that were to be presented in this matter.[3] At this point, some of the issues as to the jury instructions have been resolved, but many issues remain as to the instructions provided by the trial court to the jury. On appeal, the State of Iowa argues that the trial court submitted incorrect statements of the law to the jury and the result prejudiced the ultimate outcome achieved in this case.[4]

[3]The State of Iowa is certainly aware that the law regarding transgender rights has been litigated in the last year. *See Bostock v. Clayton County*, ___ U.S. ___, 140 S.Ct. 1731 (2020) ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids"). Even in the Iowa courts, there have been challenges to the ability for Medicaid to pay for such treatments, *Good v. Iowa Department of Human Services*, 924 N.W.2d 853 (Iowa 2019), and even the amendments to the applicable statute following such decisions. *Covington v. Reynolds ex. rel. State of Iowa*, 2020 WL 4514691 (Iowa App. 2020).

[4]At trial, there was an issue as to whether the motivating factor versus the determining fact test should have been submitted. *See* Ruling on Defendants' Motion For New Trial and Judgment Notwithstanding the Verdict, pp. 41-43; App. pp. 1593-1595. In *Hawkins v. Grinell Regional Medcial Center*, 929 N.W.2d 261, 272 (Iowa 2019) decided after the jury verdict in this case, the issues was decided. (" Therefore, in discrimination and retaliation cases under ICRA, we apply the *Price Waterhouse* motivating-factor standard in instructing the jury and the defendant is entitled to an instruction on the same-decision defense recognized in *Price Waterhouse* if properly pled and proved').

A. The Business Judgment Rule Instruction.

The first alleged error is with regard to the failure of the trial court to submit the issue of the business judgment rule to the jury. The State of Iowa submitted a proposed jury instruction to the Court concerning the employer's business judgment. Defs' Proposed Jury Instruction No. 15A; App. p. 1388. The business judgment instruction was especially important in this case where the jury could have easily disagreed with the decision of IDOC and/or Wachtendorf[5] or believed the decision to be hard or unreasonable, and disagreed with DAS or believed the decision to include gender re-assignment surgery as one of the many non-covered items in a

[5] Vroegh listed Patti Wachtendorf in her individual and official capacity but presented no evidence that Wachtendorf acted in her individual capacity. Indeed, *all* evidence related to Wachtendorf was within her role as the Warden of ICIW. The State of Iowa preserved error by timely moving for directed verdict on Plaintiff's claims against Wachtendorf in her individual capacity. Judgment notwithstanding verdict should therefore be entered in her favor. *See* Iowa R. Civ. P. 1.1003(2) ("If the movant was entitled to a directed verdict at the close of all the evidence, and moved therefore, and the jury did not return such verdict, the court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant."). "Where no substantial evidence exists to support each element of a plaintiff's claim, the court may sustain a motion for directed verdict." *Figley v. W.S. Indus.*, 801 N.W.2d 602, 609 (Iowa Ct. App. 2011) quoting *Godar v. Edwards*, 588 N.W.2d 701, 705 (Iowa 1999); *see also Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 859 (Iowa 2001). There was no evidence that the decision was to Vroegh was made by Wachtendorf in her individual capacity.

health plan to be harsh or unreasonable. However, an employer's harsh or unreasonable decision is not tantamount to discrimination.

In *Woodbury County v. Iowa Civil Rights Comm'n*, 335 N.W.2d 161, 166 (Iowa 1983), the Iowa Supreme Court first applied in a discrimination case what is commonly referred to as the "business judgment rule." In that case, the court stated: "'An employer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination. . . . The [trier of fact] must understand that its focus is to be on the employer's motivation, however, and not on its business judgment.'" *Id.* (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir.1979)). In *Farmland Foods, Inc. v. Dubuque Human Rights Commission*, the Iowa Supreme Court again recognized the business judgment rule for the proposition that such business judgments will not normally be actionable as adverse. 672 N.W.2d 733, 743 (Iowa 2003) (citing *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1244 (11th Cir. 2001)); *see also Cerro Gordo Cnty. Care Facility v. Iowa Civil Rights Comm'n*, 401 N.W.2d 192, 197 (Iowa 1987) ("We may examine the employer's motive to determine whether the employer was moved by

discriminatory bias rather than business judgment.")

The Iowa Court of Appeals also recognizes the business judgment rule and established the following limits of judicial authority in employment discrimination cases:

> *"[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination."*

Valline v. Murken, 669 N.W.2d 260, 2003 WL 21361344, *5 (Iowa Ct. App. 2003) (quoting *Mower v. Westfall*, 177 F.Supp.2d 940, 952 (S. D. Iowa 2001)) (emphasis in original).

In *Walker v. AT & T Technologies*, the Eighth Circuit Court of Appeals held the defendant was prejudiced by the district court's failure to instruct the jury on the substantive rule that the defendant was entitled to exercise its business judgment in making decisions concerning the plaintiff. 995 F.2d 846, 850 (8th Cir. 1993). Accordingly, the district court was reversed and the defendant was granted a new trial. *Id.*; *see also Scamardo v. Scott Cnty.*, 189 F.3d 707, 711 (8th Cir. 1999) (reversing district court for failure to submit business judgment instruction); *Belk v. Sw. Bell Tel. Co.*, 194 F.3d 946, 953 (8th Cir. 1999) (stating defendant was prejudiced by

failure to give business judgment instruction because without the appropriate instruction, it is not so apparent that the jury "clearly rejected" defendant's business necessity defense). In *Stemmons v. Missouri Department of Corrections*, 82 F.3d 817, 819 (8th Cir. 1996), the court stated that "[i]n an employment discrimination case, a business judgment instruction is 'crucial to a fair presentation of the case,' [and] the district court must offer it whenever it is proffered by the defendant." *Id.* (quoting *Walker*, 995 F.2d at 849).

The trial court denied such a request for such an instruction – holding that "the business judgment jury instruction would have been an inaccurate statement of the law". (Ruling, p. 49; App. p. 1601). The logic of the trial court was that the State had not offered a legitimate non-discriminatory reason not to let Vroegh use the male bathroom as she desired. Pursuant to the logic of the trial court, there would have been no legitimate reason for Vroegh not to use to be allowed to use the men's bathroom. In short, pursuant to the logic of the trial court it was per se discrimination for the Warden or any other prison official not to allow Vroegh to use such facilities.

That is exactly why the business judgment rule – in particularly as

applied to a prison – is required. The Warden was concerned not only about the rights of others and their response – but she also believed that she had reached an agreement with Vroegh as to the restroom that she was to use. While the trial court may not have believed the statements made by the Warden or her justification, this was a jury decision.

The court compounded this error by including Jury Instruction No. 17 which provided that:

> Employers may not discriminate against an employee based on the employee's sex of gender identity because *it received complaints from other employees or believes that others may be uncomfortable with the employee based on his sex of gender identity.*

(Ruling, p. 48; App. p. 1600). (emphasis added). In short, the trial court refused to provide the business judgment rule, but also instructed that any justification provided by the State of Iowa was legally insufficient.

The problem with the instructions was that in the realm of any business – including a prison, there are not always legal absolutes. While not to diminish whatever rights that Vroegh may have, the State of Iowa and the Warden still had to operate a prison – a difficult task on a good day. The prison operates to serve the functions of maintaining order and security

in holding a dangerous population within the walls of the prison – and is not the optimal place to initiate social change.

While ultimately, the jury may not have accepted the argument that the prison officials argument with respect to the business judgement rule, the State at least have been allowed to make such an argument. The business judgment rule was an essential claim tot he facts in this case and the State of Iowa was prejudiced by not being allowed to present such a defense.

B. "Same Decision"Instruction.

The second error is the trial court's instructions that it failed to include the "same decision" affirmative defense instruction. (*See* Ruling, pp. 57- 59; App. pp. 1609-1611). The "same decision" instruction was explained in *Hawkins*: (which was decided after the verdict in this case)

> In Iowa, we have taken the first step and adopted the motivating-factor standard under our statutes rather than the determining-factor standard. *Haskenhoff*, 897 N.W.2d at 634, 637; *DeBoom*, 772 N.W.2d at 13. The motivating-factor standard is a lower standard than the determining-factor standard. *DeBoom*, 772 N.W.2d at 13. Prior to Congress amending the federal civil rights statute, the Supreme Court decided that when the employee gets the motivating-factor standard for causation, it is only fair to allow the employer an

> affirmative defense. *Price Waterhouse*, 490 U.S. at 244–45, 109 S. Ct. at 1787–88 (plurality opinion). Thus, when an employee proves discrimination was a motivating factor in the employer's actions, the employer could avoid liability "by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the Vroegh 's gender [or other protected characteristics] into account." Id. at 258, 109 S. Ct. at 1795.
>
> Although we have said it only in dicta, we believe that under the ICRA an employer should be entitled to the same-decision affirmative defense because we have adopted the motivating-factor test for causation in ICRA discrimination cases. This will allow an employer to avoid damages liability when the employee proves by a preponderance of the evidence that the discrimination was a motivating factor in the employer's actions.

Hawkins, 929 N.W.2d at 271-2.

The result of *Hawkins* is that when the motivating factor test is used then the "same decision" instruction must be given. In this case, the "motivating factor" factor test was used by the trial court, but without the "same decision" instruction. The rationale of the trial court was that the State of Iowa failed to raise the "same decision" language as an affirmative defense. (Ruling, p. 58; App. p. 1610). The problem with such a

determination is that an affirmative defense is not the only way in which such a defense can be raised. In *Hawkins* the Supreme Court explained:

> Therefore, in discrimination and retaliation cases under ICRA, we apply the *Price Waterhouse* motivating-factor standard in instructing the jury and the defendant is entitled to an instruction on the same-decision defense recognized in *Price Waterhouse* if properly pled and proved. *See* Iowa R. Civ. P. 1.421 ("Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto, or in an amendment to the answer made within 20 days after service of the answer, ***or if no responsive pleading is required, then at trial***."). To clarify, we no longer rely on the *McDonnell Douglas* burden-shifting analysis and determinating-factor standard when instructing the jury.

Id. at 272. (Emphasis added).

In this case it was not clear at the time prior to trial that the trial court would use the "motivating factor" test in the instructions. The State of Iowa had requested the "determining factor" test. However, once the "motivating factor" test was identified as the potential instruction, counsel argued for the "same decision" instruction. Counsel for Vroegh argued that there was no "same decision" defense that applies under the Iowa Civil Rights Act". (Transcript, Vol VII, p. 5., line. 15 - p. 7, line, 18). Likewise, the trial court

held that "the mere act of requesting the same decision instruction is not enough to overcome Defendant's waiver". (Ruling, p. 59; App. p.1611).

The issue is that the language in *Hawkins* that the parties in the case are "entitled" to the same decision defense when the motivating factor test is used. In essence, it is a package deal – the "motivating factor" test must be used in conjunction with the "same decision" instruction. In this case, the State of Iowa requested the defense be at the same of the discussion with regard to instructions and argued for their inclusion.

While the trial court used the correct standard articulated in *Hawkins* as to the motivating factor test, it can discount the same decision defense when it is timely presented to it. The instruction was provided to the court and should have been submitted.

II. THE TRIAL COURT ERRED IN REFUSING TO ALLOW RELEVANT AND COMPELLING EVIDENCE THAT AS TO THE WHICH IMPACTED THE SUBSTANTIAL RIGHTS OF IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES AND PATTI WACHTENDORF.

Standard of Review A trial court's decision to admit relevant evidence is reviewed for an abuse of discretion. *See Mohammed v. Otoadese*, 738 N.W.2d 628, 631 (Iowa 2007). "An abuse of discretion

occurs when 'the court exercise[s] [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.' " *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000) *(en banc*) (*alteration in original*) (*quoting Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997)). Grounds or reasons are clearly untenable if they are not supported by substantial evidence or if they are based on an erroneous application of law. Id. "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party ...." Iowa R. Evid. 5.103(a).

Preservation of Error There was a substantial dispute as to the evidentiary questions in regard to Vroegh which were raised at the time of trial and which were discussed prior to submission and following the trial in post-trial motions. *(See* Ruling on Defendants Motion for New Trial and Judgment Notwithstanding the Verdict, pp. 30-39; App. pp. 1582-1591).

Argument While the State of Iowa has argued that the instructions in this action were flawed – and that they were prejudiced, the trial court also abused their discretion in refusing to allow certain testimony at trial with regard to Vroegh. The trial in this matter was contentious – and the credibility of the parties central to any determination. The problem was that

there was critical evidence as to Vroegh – which was excluded by the trial court. As in *Hawkins*, while there were errors alleged by the trial court in the jury instructions, there are significant evidentiary issues to be considered on retrial. The critical evidence was offered by the State of Iowa in an offer of proof, (Transcript, Vol VI, pp. 4, line 6 - p. 9, line 25), and discussed by the trial court in post-trial rulings. (Ruling, pp. 30-39; App. pp. 1582-1591).

A. Vroegh's Character for Untruthfulness.

On December 8, 2016, Vroegh was terminated from employment at ICIW for printing and sending confidential medical records of an offender to an unauthorized outside party in violation of the prison's rules. Vroegh's termination was upheld in arbitration. The reason for Vroegh's termination was relevant evidence. First, the reason for Vroegh's termination is relevant evidence as to his character for truthfulness. The evidence of witness credibility is always a fundamental reason for the outcome. Here, the termination evidence demonstrated Vroegh's character for truthfulness. Specifically, the acts occurred at Vroegh's place of employment and during the investigation he claimed that he did not send the documents. The evidence established that he did send the documents—and was terminated. Vroegh chose to be untruthful in regards to his actions as an employee and

that fact should have been presented in response to all of his actions as an employee.

Iowa Rule of Evidence 5.608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in rule 5.609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.[1]

A similar issue was considered in *Glaze v. Childs*, 861 F.3d 724 (8th Cir. 2017), where evidence of a prison staff's termination for passing a cigarette to an offender was requested to be excluded from a trial which focused on a separate conduct of the prison staff. The Eighth Circuit held:

> Before trial, the court granted Childs's motion in limine to exclude evidence that Childs resigned from the Center in lieu of accepting termination of his employment. Childs resigned after he was accused of passing a cigarette to an inmate in violation of institutional policy. After the verdict in favor of Childs, Glaze moved for a

[1] "Federal Rule of Evidence 608(b) provides that the court may allow specific instances of a witness's conduct 'to be inquired into if they are probative of the character for truthfulness or untruthfulness of ... the witness.'" *United States v. Olsson*, 713 F.3d 441, 445 (8th Cir. 2013) (quoting Rule 608(b)), *vacated on other grounds by*, 571 U.S. 985 (2013).

new trial based on the exclusion of evidence. Glaze argued that the reason for Childs's termination showed "dishonest character" and that the rules of evidence allowed its admission. The district court concluded, however, that Childs's resignation was "not indicative of [his] character for truthfulness" and that "the underlying 'bad act' of passing cigarettes to an inmate is not the type of 'bad act' evidence which is admissible under the rules of evidence." We review the district court's rulings for abuse of discretion. *Schultz v. McDonnell Douglas Corp.*, 105 F.3d 1258, 1259 (8th Cir. 1997).

Glaze contends that evidence about Childs's resignation was admissible under Rule 404(b). That rule precludes a litigant from introducing "[e]vidence of a crime, wrong, or other act ... to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." But the court may allow evidence of prior bad acts "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Glaze does not identify a permissible purpose for the resignation evidence under the rule; he asserts only that the evidence established Childs's "intentional disregard for standards of conduct." His argument seems to be that because Childs violated institutional policy on one occasion, he likely disregarded the alleged warning from Boyce on another. This is the type of propensity evidence that the rule prohibits. The district court thus did not abuse its discretion in ruling that the resignation evidence was inadmissible under Rule 404(b).

Glaze argues alternatively that the court should have allowed cross-examination about the resignation under Rule 608(b), because it was a specific instance of conduct that was probative of Childs's character for untruthfulness. The proffered evidence, however, did not

> involve *deceit or fraud*. There was no claim that Childs lied about passing cigarettes, only that he violated policy by doing so. The court thus properly declined to allow inquiry about the incident under Rule 608(b).

Glaze v. Childs, 861 F.3d 724 (8th Cir. 2017).

In the present case, the evidence the State of Iowa sought to introduce involved deceit and fraud by Vroegh. Here, Vroegh claimed that he did not send the medical records or that they may have been mistakenly placed in the wrong envelope. Vroegh's action in secretly sending out confidential medical records and then denying doing so is evidence involving deceit and fraud. The State of Iowa was prejudiced from the exclusion of evidence because they could not show Vroegh's character for untruthfulness.

The State of Iowa was further prejudiced when the Court denied the State of Iowa's request to refer to Vroegh's "end of employment" as "unrelated" to the issues in this case. Specifically, Plaintiff was permitted to state that Vroegh's "employment ended on December 8, 2016" and that he "left employment" which left the impression that Vroegh voluntarily left employment because he was not willing to the endure the restroom/locker room arrangement and was not willing to endure having a health insurance plan that did not cover gender re-assignment surgery. The State of Iowa

sought to minimize the misimpression by seeking to state that Vroegh's end of employment for unrelated reasons, which the trial court denied.

The trial court reasoned that "any inquiry into Vroegh's termination and related alleged dishonesty is irrelevant to the case". (Ruling, p. 34; App. p. 1586). The problem with such a statement is that credibility of any witness is always relevant. The jury had to decide multiple factual credibility issues with regard to Vroegh – stemming from his actions and potential damages. If the jury would have known that Vroegh was fired – and the reason for the firing – their assessment of Vroegh would have changed. In short, Vroegh cannot artificially limit the evidence to only the favorable facts that he wanted to present – and ignore the totality of the situation.

B. Vroegh's Motive.

The trial court also excluded Exhibit S and Vroegh's testimony which was relevant to show Vroegh's motive for the lawsuit and suing Patti Wachtendorf, especially in her individual capacity. (Exhibit S; Exhibit App. p. 518). Vroegh's statements about putting Wachtendorf's "head on a stake" "nailing her coffin" and visiting Vroegh's friend in Florida with the extra money from this lawsuit after he filed his ICRC complaint and had a

press conference about his allegations, but before any findings by the ICRC or filing of the present lawsuit, illustrates Vroegh's motive. The State of Iowa was materially and substantially prejudiced by this exclusion of evidence and are entitled to a new trial.

The ruling of the trial court was premised on the determination that "the facts regarding Vroegh's motive in bring this case immaterial to resolving the dispute on its merits." (Ruling, p. 38; App. p.1590). Specifically, the trial court held that Vroegh';s animosity towards Wachtendorf was irrelevant to whether he was discriminated against". *Id.*

A plaintiff who brings a lawsuit in bad faith or with ulterior motives can constitute an abuse of process if proven by the defendant. *Froning & Deppe, Inc. v. South Story Bank & Trust Co.*,327 N.W.2d 214, 215 (Iowa 1982). An "[a]buse of process is the 'use of the legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it was not designed."*Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 398 (Iowa 2001) (*quoting Fuller v. Local Union No. 106 of United Bhd. of Carpenters & Joiners of Am.*, 567 N.W.2d 419, 421 (Iowa 1997)). An action for abuse of process can be brought even if the plaintiff has cause to bring their lawsuit if the primary purpose of the action was improper.

Palmer v. Tandem Mgmt. Servs., Inc., 505 N.W.2d 813, 817 (Iowa 1993). To prove an abuse of process, a party must prove that the plaintiff "used the legal process primarily for an impermissible or illegal motive." *Wilson v. Hayes*, 464 N.W.2d 250, 266 (Iowa 1990). Moreover, "there is no abuse of process when the action is filed to intimidate and embarrass a defendant knowing there is no entitlement to recover the full amount of damages sought. Proof of an improper motive by the person filing the lawsuit for even a malicious purpose does not satisfy [the requirement] that the legal process was used in an improper manner." *Palmer*, 505 N.W.2d at 817 (*citing Grell v.Poulsen*, 389 N.W.2d 661, 664 (Iowa 1986)).

The fundamental element of damage for Vroegh in this case was emotional distress. The evidence was needed not just for an abuse of legal process claim, but for other purposes as well. The evidence of Vroegh's disdain for the Warden were certainly relevant when assessing her alleged level of emotional distress. Basically, the emotional distress that he alleged he experienced as a result of the alleged discrimination or his disdain for the Warden.

Simply put, an argument for emotional distress damages in a vacuum is not a complete picture of the events. Vroegh's "emotional distress" was

related to his vengeance against the Warden, rather than any true emotional turmoil. Such evidence, if allowed to be presented, would have clarified his true intentions as to his emotional status.

III. THE TRIAL COURT ERRED IN ALLOWING THE SEX DISCRIMINATION ISSUE TO BE SUBMITTED TO THE JURY.

Standard of Review As the basis for the motion for a new trial is based on alleged error in jury instructions, review is for legal error. *See Boyle v. Alum–Line, Inc.*, 710 N.W.2d 741, 748 (Iowa 2006). Jury instructions "must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide." *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). A district court's refusal to give a requested jury instruction is reviewed for correction of errors at law. *See Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016).

Preservation of Error There was a substantial dispute as to the applicable law and jury instructions that were to be presented – which were discussed prior to submission and following the trial in post-trial motions. *(See* Ruling on Defendants Motion for New Trial and Judgment Notwithstanding the Verdict, pp. 9-19; App. pp. 1561-1571). The issues were raised and considered by the trial court.

Argument Vroegh cannot maintain his sex discrimination claims under the ICRA as a matter of law. In *Sommers v. Iowa Civil Rights Commission*, the Iowa Supreme Court held that "sex" under the ICRA did not encompass transsexuals. 337 N.W.2d 470, 474 (Iowa 1983); *Grimm v. US W. Commc'ns, Inc*., 644 N.W.2d 8, 16 (Iowa 2002) (citing *Sommers* as holding transsexual not covered). The *Sommers* court "distinguish[ed] between the terms 'sex' and 'gender'" by stating "sex 'connotes the anatomical qualities that determine whether one is male or female, while gender relates to behavior, feelings, and thoughts and does not always correlate with one's physiological status.'" *Sommers*, 337 N.W.2d at 473 (quoting *Doe v. Minn. Dep't of Public Welfare and Hennepin County Welfare Bd.*, 257 N.W.2d 816, 818 (Minn. 1977)). The *Sommers* court noted that the common usage of the term "sex" denotes male or female and explained that the "primary concern" of the legislatures was "to place women on an equal footing with men in the workplace." *Sommers*, 337 N.W.2d at 473-74.

Federal Title VII cases interpreting "sex" to encompass gender identity, moreover, are inapposite. Significantly, Title VII does not expressly include "gender identity" as a protected class, however, the ICRA

expressly includes "gender identity" as a protected class. Thus, federal courts interpreting Title VII must use the protected class of "sex" to determine if alleged discrimination because of gender identity will be protected under Title VII. *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In Iowa, however, the ICRA expressly protects against alleged discrimination because of gender identity. Indeed, to read "sex" as synonymous with "gender identity" would render the inclusion of "gender identity" in the ICRA superfluous. *See Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999) (stating "maxim of statutory evaluation" is "that laws are not to be construed in such a way as to render words superfluous"); *State v. McKinley*, 860 N.W.2d 874, 882 (Iowa 2015) ("We presume statutes or rules do not contain superfluous words."). Accordingly, because "sex" under the ICRA does not encompass transsexuals, Vroegh could not maintain his sex discrimination claim on the basis of being a transgender male as a matter of law and it was error for the Court to permit the sex discrimination claim to proceed to verdict and the resulting verdict finding for Vroegh on the sex discrimination is contrary to law.

In the alternative, even if Vroegh (a transgendered male) could

maintain a sex discrimination claim as a matter of law, the sex discrimination verdict was not sustained by sufficient evidence. The entirety of Vroegh's evidence at trial was focused on Vroegh being a transgendered male with a diagnosis of gender dysphoria. Vroegh argued that because he is a *transgendered* male he was not permitted to use men's restroom and locker room like other male staff. Plaintiff did not present *any* evidence that Plaintiff was not permitted to use the men's restroom and locker room because of his sex or that he was denied gender re-assignment surgery under the terms and conditions of the Blues Access health plan in 2015 because of his sex. All evidence centered on Vroegh's gender identity.

The need to distinguish the distinct legal concept of "sex" and "gender identity" was highlighted between an exchange of notes between the jury and trial court. Specifically, the jury had inquired as to the difference between "sex and "gender identity". (Jury Question; App. p. 1486). The trial court responded that sex is a term used to assign or identity an individual's gender and gender identity is one component of sex. (Trial Court Response – Jury Question; App. p.1487).

This answer permitted the jury to interchange the term "sex" with "gender identity." Under *Sommers*, the term "sex" and "gender" was distinguished as "sex 'connotes the anatomical qualities that determine whether one is male or female, while gender relates to behavior, feelings, and thoughts and does not always correlate with one's physiological status.'" *Sommers*, 337 N.W.2d at 473 (quoting *Doe*, 257 N.W.2d at 818). Here, instead of answering that Vroegh's sex was either male or female, based on the answer, it permitted the jury to find sex discrimination

In reviewing post-trial motions, the trial court rejected the holding of *Sommers*. (Ruling, p. 15; App. p.1567). The problem is that sex discrimination can not be based solely on gender discrimination. In essence, the trial court allowed a "sex" discrimination claim for a female to prevail on a claim for them to use the male bathroom.

IV. THE TRIAL COURT ERRED IN ALLOWING THE CLAIM OF VROEGH TO PROCEED AGAINST THE IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES FOR ASSERTING THAT A OFFERING EMPLOYEES HEALTH INSURANCE WITH NON-COVERED PROCEDURES IS NOT DIRECT EVIDENCE OF WAGE DISCRIMINATION.

Standard of Review "We review the denial of a motion for new trial based on the grounds asserted in the motion." *Fry v. Blauvelt*, 818 N.W.2d 123, 128 (Iowa 2012) (*internal quotation marks omitted*). If the motion is based on a legal question, the review is for correction of errors at law. *Id.* As the basis for the motion for a new trial is based on alleged error in jury instructions, review is for legal error. *See Boyle v. Alum–Line, Inc.*, 710 N.W.2d 741, 748 (Iowa 2006).

Preservation of Error The issue as to the claim against the IDAS was first raised in the motion to dismiss filed by the State of Iowa. (Order Re: Motion to Dismiss, 12/12/2017; App. pp. 70-81) . In post-trail motions, the issues was again raised as to the fact that damages were awarded against IDAS for emotional distress. (Ruling, p. 54; App. p. 1606) .

Argument Vroegh contends that because his health insurance did not cover a specific benefit — gender reassignment surgery—it is direct evidence of wage discrimination – for which the jury awarded emotional distress damages against IDAS. Vroegh, 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 Vroegh. The fact that the Blue Access health insurance plan elected by

Vroegh 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 Vroegh. Indeed, Vroegh'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 Vroegh 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 is 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. Vroegh did 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, Vroegh was subject to the same wages, i.e., health insurance, afforded to eligible employees. Vroegh, 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 established the that IDOC and

IDAS did not discriminate against Vroegh 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 Vroegh's pre-approval, not his sex and gender identity. Iowa Code § 216.6A(3)(d).

The premise of Vroegh's claim against IDAS is that IDAS 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." (Petition; App. p.10). Plaintiff contends that the employer-sponsored health care plan did not cover gender reassignment surgery. *Id.* (referring to language in State of Iowa Blue Access Benefit Booklet "Not covered: Gender reassignment surgery"). Thus, the only basis to include DAS as a party to this lawsuit is premised on IDAS' alleged involvement in the decision to select the employer-sponsored health care plans. However, under Chapter 20, DAS does not and cannot unilaterally change health insurance benefits or coverage (i.e., not covering gender reassignment surgery), as "insurance" is a mandatory collective bargaining subject.

During the relevant time period, Vroegh was a public employee employed by a public employer. *See* Iowa Code § 20.3(9) & (10). Vroegh, moreover, was represented by a public employee organization (a union). *See* Iowa Code § 20.3(4).

While the Iowa Legislature substantially amended the Iowa Public Employment Relations Act in HF 291 and such amendments became effective with the Governor's signature on February 17, 2017, the events alleged in the Petition occurred prior to the amendments. Accordingly, any discussion of the Act will be to the Act as it existed at the time of the alleged events of this lawsuit. Iowa Public Employment Relations Act, Iowa Code chapter 20, in turn, governs collective bargaining for public employees. *See AFSCME Iowa Council 61 v. Iowa Public Employment Relations Bd.*, 846 N.W.2d 873, 876-78 (Iowa 2014) (noting "PERA governs collective bargaining between public employers and public employee organizations" and recognizing that "AFSCME is an employee organization certified by the [Public Employment Relations Board] to represent certain State employees in collective bargaining"). Iowa Code section 20.9 identifies seventeen items that are subject to *mandatory* collective bargaining procedures. *Id.* at 878-79.

Designation of an item as a mandatory subject of bargaining is significant for at least two reasons. First, if "a proposal is a mandatory subject of bargaining, the public employer and the employee organization must meet to negotiate the terms of the proposal." *City of Dubuque v.Iowa Public Employment Relations Bd.*, 444 N.W.2d 495, 496 (Iowa 1989) (citing *Northeast Comm. Sch. Dist. v. PERB*, 408 N.W.2d 46, 47 (Iowa 1987)). Second, a public employer may commit a prohibited practice under Iowa Code section 20.10 by unilaterally changing a mandatory subject of bargaining. *See Fort Dodge Community Sch. Dist. v. PERB*, 319 N.W.2d 181 (Iowa 1982) (judicial review from PERB determination that public employer committed prohibited practice by unilaterally adopting a plan that covered a mandatory subject of bargaining).

Under Iowa Code section 20.9, "insurance" is included as a mandatory subject of collective bargaining. Iowa Code § 20.9. Pursuant to Iowa Code section 20.6(1), the Iowa legislature delegated to PERB the authority to interpret mandatory bargaining terms. *See AFSCME Iowa Council 61*, 846 N.W.2d at 879 (stating "[c]onsistent with legislative intent, PERB must give each topic in section 20.9 'its common and ordinary meaning within the structural parameters imposed by section 20.9'"

(internal citation omitted)). In exercising such authority, PERB "has long held that virtually all aspects of insurance benefits, coverage and the administration of insurance plans, including self-funded plans (with the sole exception of the identity of the carrier) are within the scope of the mandatory topic. . . ." Accordingly, because insurance is a mandatory subject of bargaining, the State of Iowa and Vroegh's certified public employee organization negotiated all material aspects of the health insurance benefits and entered into a contract (*i.e.*, collective bargaining agreement), which governs the health insurance benefits for all union-covered employees, including Vroegh.

Thus, the non-coverage of gender reassignment surgery under the health insurance falls within the scope of "insurance" as a mandatory topic of negotiation and the State is not only required to provide the insurance benefits that were negotiated between the State and Vroegh's employee organization, but also, the State or DAS cannot alter coverage unilaterally without committing a prohibited practice and violating Iowa Code section 20.10. *See, e.g.*, *Scottsbluff Policy Officers Ass'n v. City of Scottsbluff*, 805 N.W.2d 320, 330 (Neb. 2011) (holding public employer's "unilateral implementation to the health insurance exclusions, premiums, copays,

deductibles, and maximum out-of-pocket expenses constitutes a per se violation of the duty to bargain in good faith") ; *Loral Defense Systems-Akron v. N.L.R.B.*, 200 F.3d 436, 439 (6th Cir. 1999) (finding employer violated the National Labor Relations Act by unilaterally changing health care plan covering union employees); *St. Clair Intermediate Sch. Dist. v. Intermediate Educ. Ass'n.*, 581 N.W.2d 707, 709 (Mich. 1998) (stating party breached duty to bargain over mandatory topics by unilaterally changing health insurance benefits). Thus, Iowa Code chapter 20 requires the State to negotiate with the union over "insurance." At all times material, PERB, the governmental entity with Chapter 20 oversight, interpreted "insurance" to cover virtually all aspects of insurance benefits and coverage. Therefore, as required by Chapter 20, the State provides health insurance to union covered employees pursuant to the health insurance provisions of the applicable collective bargaining agreement. Furthermore, the State or DAS cannot change those health insurance benefits and coverage unilaterally. Accordingly, any "involvement" DAS may had in selecting the employer sponsored health care plans does not in any way implicate the benefits and coverage under the health care plans, as such were negotiated terms pursuant to Chapter 20. DAS, therefore, did not make *any* decision related

to the benefits and coverage at issue, and moreover, could not unilateral change the negotiated benefits and coverage. Thus, Vroegh should not have been allowed to proceed against IDAS for any claim of relief.

Even if the alleged emotional distress damage claim is considered, the claim for such damages does not make sense. The claim that IDAS – following the insurance agreement negotiated as a part of the collective bargaining agreement – should have unilaterally expanded the coverage for Vroegh for a non-covered term is not the type of claim that could have be anticipated by IDAS. Any claim as to a non-covered procedure should have been presented in the course of contract negotiations.

As a result, the emotional distress that the jury awarded is not based on an even that they somehow had a role in creating. The contract for insurance was subject to an agreement – and they can not be held responsible to an individual member of a bargaining unit for not having a specific benefit in the insurance package.

CONCLUSION

The jury verdict must be reversed and this matter remanded for a new trial and/or dismissal.

THOMAS J. MILLER
Attorney General of Iowa

/s/ WILLIAM A. HILL
WILLIAM A. HILL
Assistant Attorney General
Special Litigation/Corrections
Hoover State Office Building
Des Moines, IA 50319
(515) 281-7055
FAX: (515) 281-4902
ATTORNEYS FOR APPELLANT

REQUEST FOR ORAL ARGUMENT

The State of Iowa requests oral argument in this matter. The legal issues are complex and oral argument may help to clarify the issues on appeal.

THOMAS J. MILLER
Attorney General of Iowa

/s/WILLIAM A. HILL
WILLIAM A. HILL
Assistant Attorney General
Special Litigation/Corrections
Hoover State Office Building
Des Moines, IA 50319
(515) 281-7055
FAX: (515) 281-4902
ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

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

   - This brief contains 8,893 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1)

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

   - This brief has been prepared in a proportionally spaced typeface using WordPerfect 8.0 in Times New Roman font, size 14.

/S/WILLIAM A. HILL
WILLIAM A. HILL
Assistant Attorney General
Special Litigation/Corrections
Hoover State Office Building
Des Moines, IA 50319
(515) 281-7055
FAX: (515) 281-4902
ATTORNEY FOR APPELLANT

4/28/2021
Date