BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GARY L. LOUVAR, Claimant, vs. CITY OF CEDAR RAPIDS, Employer, Self-Insured, Defendants.		File Nos. 5048373 5052473 5055075 5055076 ARBITRATION DECISION Head Note No.: 2301

STATEMENT OF THE CASE

Gary Louvar filed four petitions for arbitration seeking workers' compensation benefits from, the employer, City of Cedar Rapids.

The matter came on for hearing initially on April 17, 2017, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The parties were unable to complete the hearing on that date and the matter was continued until May 17, 2017, at the Cedar Rapids IowaWORKS office. Again, it was not completed. The hearing was not completed. A third day was scheduled and held on June 2, 2017, in Des Moines, Iowa. The record in the case consists of Joint Exhibit 1; Claimant's Exhibits 2 through 23, including 18a and 18b (Exhibit 15 was withdrawn); Defense exhibits A through Q (exhibits I and J were withdrawn). All of these documents were reviewed in their entirety. In addition, sworn testimony was taken from claimant, Gary Louvar, his spouse, Kathy Louvar, and the City's witnesses, Constance Huber, Mark McMahon, Sven Leff and Lisa Miller over the three separate hearing dates. In addition, deposition testimony was secured from Kent Jayne, Jeff Marlin, Mark McMahon, and John Brooke, Ph.D. (Cl. Exs. 2 through 6) Administrative notice was taken of the entire agency file.

Erin Hines was appointed and served as the official court reporter on April 17, 2017. Jeanne Strand was appointed and served as the court reporter at the reconvened hearing on May 17, 2017. Finally, on June 2, 2017, Janice Doud was appointed and served as the court reporter in Des Moines. The parties argued this case and the matter was fully submitted on August 29, 2017.

ISSUES AND STIPULATIONS

Claimant has alleged four separate dates of injury. The dates alleged are November 6, 2013, December 10, 2014, March 25, 2015 and April 17, 2015. Claimant alleges he suffered mental-mental injuries on each of these dates which arose out of and in the course of his employment. His ultimate claim is that a variety of employment related actions taken by the City caused him severe emotional distress. The four

separate claims point to dates of different actions taken by the employer which allegedly cause the emotional distress. The claims are really plead in the alternative and the claimant is really alleging that these actions caused mental disability.

The defendant initially denies that there is subject matter jurisdiction for these claims, contending that, all of these claims are preempted by the Iowa Civil Rights Act. The defendant also denies that claimant suffered any compensable injury on any of these dates. The defendant further alleges that, even if there was an injury, under Iowa law, the injury did not result in any permanent or temporary disability.

Claimant is seeking benefits for permanent total disability for his injury and has pled the odd-lot theory. Claimant seeks payment for healing period benefits from February 20, 2014, through April 7, 2014. The elements which comprise the rate of compensation for each date of injury are stipulated. Claimant seeks medical expenses as set forth in claimant's exhibit 14. Defendant denies these expenses and further claims entitlement to a credit for medical payments which were made under the employer's group health program. Affirmative defenses have been waived.

FINDINGS OF FACT

Gary Louvar was 66 years old as of the date of hearing. He is married to Kathy Louvar and has two grown children. They reside together in Cedar Rapids, Iowa. Mr. Louvar graduated from high school in Cedar Rapids and earned a B.S. in physical education from Upper Iowa University in 1973. He has a varied and interesting work history. Prior to 1990, he worked as a teacher, a salesperson and ran a gold club. Beginning in 1990, he became a golf pro for the City of Cedar Rapids. He was initially an independent contractor and then became a City employee in 1996. He served as clubhouse manager and head professional for all of the City's golf courses. In 2001, the position of Golf Director was created. He applied for, however, was not hired for the position. He was assigned to run one of the golf courses. He ran various courses for the City of Cedar Rapids from that point through the date of his retirement.

Mr. Louvar testified live and under oath at hearing. He was professional, mild-mannered and straightforward. I find him to be highly credible. His testimony was remarkably consistent with his prior deposition testimony, as well as a great deal of lay evidence in the record. There was certainly nothing about his demeanor which caused me any concern about his truthfulness. Based upon the evidence presented at hearing as well as his presentation, Mr. Louvar appears to be a solid, upstanding member of his community. He has no previous significant psychiatric history.

Lisa Miller became the Golf Director in 2001. As mentioned above, Mr. Louvar had applied for this job as well, however, the position was awarded to Ms. Miller. Mr. Louvar had hired Ms. Miller as his assistant pro prior to that. Ms. Miller became Mr. Louvar's supervisor. Instead of running operations at all four golf courses, Mr. Louvar's job was to manage one course (Ellis, at the time), while the three other golf pros assumed oversight of their respective courses.

Claimant has claimed a succession of injuries resulting from allegedly improper, illegal or discriminatory employment actions taken by the City. He claimed that these instances caused him emotional distress and qualify as injuries under the Iowa Workers' Compensation Act.

The first injury alleged by claimant occurred November 6, 2013. (*See* Petition, File No. 5048373) To be sure, Mr. Louvar's relationship with Ms. Miller was strained prior to this date. There is a great deal of evidence in this record regarding his concerns about her management long before 2013. Mr. Louvar contends it was the cumulative effect of her "harassment" which culminated in him not being able to take it anymore in November 2013. Prior to November 2013, his daughter, a psychologist, recommended he document his interactions with his employer in a more formal way, which he did. His family was concerned with his difficulties at work and took an active role in supporting him.

It is also noted, that Mr. Louvar was diagnosed with leukemia in 2009. He underwent knee replacement surgeries in 2005, and in June 2013.

In approximately September 2013, the City placed Mr. Louvar on a Performance Action Plan wherein he was notified that his sales were low. On November 6, 2013, Ms. Miller informed Mr. Louvar that he was potentially to be subjected to discipline for failure to meet sales goals pursuant to the Performance Action Plan. (Transcript Volume II, pages 149-150, 333-334) The City set up a pre-disciplinary meeting for November 21, 2013. Prior to the meeting, Mr. Louvar sought legal counsel. On November 18, 2013, claimant's counsel sent a letter to Jeff Pomeranz, City Manager of Cedar Rapids (copied to Sven Leff, Director of Parks, Recreation) outlining a lengthy "Complaint of Discrimination and Harassment." (Claimant's Exhibit 11) In the ten page letter (plus attachments), counsel spelled out a detailed complaint alleging a pattern of age and disability discrimination and harassment against Ms. Miller. It details a number of specific allegations against Ms. Miller throughout 2012 and 2013 and before, including a prior complaint made in March 2012.[1] The November 2013, meeting was postponed at his attorney's request. (Claimant's Exhibit 11, page 189)

There is no doubt the potential of this meeting caused Mr. Louvar significant anxiety and stress. Mr. Louvar sought medical treatment from his brother, Richard Louvar, D.O., on December 16, 2013.

> Gary has been having increased stress and anxiety related to his work.
>
> Apparently he's concerned that he may be being setup for failure and has the feeling there's nothing he can do to succeed in his sales numbers.

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[1] Following the March 2012 complaint, Constance Huber testified that she perceived some strain between Mr. Louvar (as well as some other employees) and Ms. Miller and made suggestions to Ms. Miller about her management style. (Tr. Vol. III, pp. 543-44)

He has been asked by Lisa to meet with her and he feels that this is going to cause undue stress and anxiety.

He says that he has reached a breaking point and is experiencing sleepless nights and has difficulty concentrating because he's continually worried that he's going to lose his job, his health insurance, and will put is health in jeopardy.

He has asked to see a psychologist and also follow-up with Dr. Penningroth as to whether or not his anxiety state needs to be treated with medication.

Objective examination reveals that he looks fatigued, generally stressed and anxious.

DIAGNOSIS:

Adjustment disorder [309.9]

I think that a psychological series of counseling would be beneficial in terms of his ability to deal with the present work situation. I think that he would probably not need medication if he weren't so stressed over this but I'll let Dr. Penningroth decide what clinical course should be taken.

He should avoid meeting with Lisa until he can begin counseling.

(Cl. Ex. 1, p. 3)

Shortly after this visit with Dr. Louvar, claimant was seen by R. Paul Penningroth at Cedar Centre Psychiatric Group in December 2013. Dr. Penningroth took a history and examined Mr. Louvar.

HISTORY OF PRESENT ILLNESS: The patient is employed by the City of Cedar Rapids. He is in-charge of Gardener Golf Course. His immediate supervisor is named Lisa Miller. He sees her as victimizing and very harassing so much so now she [sic] even fears going to work and he feels that she is set him up for failure.

. . .

He states he is not happy. He is depressed. Family is worried about his change. He is fearful that if he says anything to anybody they will come back on him. She has fired three of her seasonal workers. He is constantly worried about losing his job. He is tense, nervous and anxious. If he has a meeting with her, he gets very anxious. He is tired. He has sleep apnea, but even with that and the CPAP, he does admit to some sleep disturbance. Appetite is increased.

(Cl. Ex. 1, p. 9) Dr. Penningroth diagnosed dysthymia, recommended psychological testing and prescribed Lexapro. "I am not sure if his anxiety and depression could be treated with medication or we will need all family psychotherapy or both." (Cl. Ex. 1, p. 10)

Mr. Louvar and his attorney met with Mr. Leff and Constance Huber, Human Resource Director for the City of Cedar Rapids in December 2013. Mr. Louvar spelled out all of his complaints, as well as his sales numbers which were analyzed in significant detail.

Claimant's spouse, Kathy Louvar, had prepared data from the City's Golf Trac system to demonstrate that his sales were actually very good and increasing in comparison to the other golf professionals. (Cl. Ex. 12) The City rejected this evidence at hearing, pointing out that the numbers were based upon the calendar year, not the fiscal year. The City suggested that claimant did have a problem with his sales. A great deal of evidence and testimony was presented on this at hearing. Mr. Louvar contended, with some support, that he was required to sell less desirable merchandise that other clubs were not. Overall, I find the claimant's evidence compelling. Whether it was out of Golf Trac or some other system, whether it was based upon a fiscal or calendar year, the reality is, the claimant's sales do not appear to me, to be substandard in comparison to the other golf professionals, particularly given the circumstances. It certainly calls into question why the City ever went down the road of initiating disciplinary procedures against Mr. Louvar in the first place. In any event, the City did not carry out its threat of discipline because Mr. Louvar's final sales numbers met were not substandard, even by the City's calculations.

The City presented evidence that it investigated Mr. Louvar's November 2013, complaint and found it to be without merit. (Tr. Vol. II, p. 255-56) The City did decide to honor Mr. Louvar's request for accommodation to not have one-on-one contact with Ms. Miller. (Tr. Vol. II, pp. 347-48) City witnesses testified that they believed they had complied with this accommodation request. (Tr. Vol. II, pp. 346-51, 363; Tr. Vol. III, pp. 488) According to the City's witnesses, they believed the restriction was being honored and that the plan was working. They had not received any complaints from Mr. Louvar until approximately March 2015.

Dr. Penningroth formalized the restriction in a letter dated January 29, 2014. "Please restrict Gary Louvar from all one:one meeting with Lisa due to his present level of anxiety. Meetings with a 3rd party present would be acceptable." (Cl. Ex. 1, p. 12) Various City officials met with Mr. Louvar on February 19, 2014. The following day, Mr. Louvar was hospitalized with pneumonia. He was off work for nearly a month, returning on March 17, 2014. Mr. Leff memorialized a work plan for him at that time, which included a discussion of his medical restriction against one-on-one contact. (Cl. Ex. 10, pp. 84-85)

Mr. Louvar began psychotherapy on March 6, 2014, with Angela Perkins, Psy.D. (Cl. Ex. 1, p. 13) He has continued psychotherapy through Cedar Centre through the date of hearing, in addition to regular medication checkups with Dr. Penningroth

(psychiatric care eventually switched to Bryan Netolicky, M.D.)[2] (Cl. Ex. 1, pp. 16-19, 22-25, 28-33, 35-38, 40-58) These providers also provided two opinion letters in 2014 which clearly set forth the basis of Mr. Louvar's ongoing and chronic emotional distress. (Cl. Ex. 1, pp. 20-21, 26-27)

Mr. Louvar again took medical leave in August 2014, for back surgery. He returned on October 20, 2014. During both of his medical leaves, another golf professional, Dustin Petrick, assumed Mr. Louvar's responsibilities during his absence. Mr. Petrick's wages were increased as a result and this additional cost was reflected in the budget. This resulted in Mr. Louvar's next claim of a work injury. On December 10, 2014, Ms. Miller informed him that he was over budget. Mr. Louvar testified that following that staff meeting, after the other golf professionals had left, Ms. Miller approached him in violation of the one-on-one restriction. He testified in detail.

> A. And she had broken that several times through the year, but on this particular day we had just finished a pros meeting. The other three pros kind of went their own way throughout the building, and I was standing there at the counter myself. And Lisa came up to me and told me that if I looked at the budget I would notice that my labor budget for the fiscal year, I had spent 72 percent of it already. And the fiscal year runs from July 1st through June 30th. So, in other words, I had March, April, May and June, four months yet that I was going to have to try to get by on 28 percent of my budget. And I knew at that time there was no possible way it could be done.

(Tr. Vol. II, pp. 152-53) He went on to testify that she presented this in a way which lead him to believe there was no solution to the problem. That evening he suffered severe distress and even had thoughts of suicide. His wife called Dr. Penningroth. (Tr. Vol. II, pp. 154-55) Mr. Louvar documented this in contemporaneous notes taken on December 10, 2014. "After our Pro's meeting Lisa made the statement that I was at 72% of my labor budget spent already and "I will have to find a way to not go over budget." (Cl. Ex. 10, p. 135) Mr. Louvar also stated this in a meeting with Dr. Penningroth in January 2015. (Cl. Ex. 1, p. 33) His wife testified that he had a meltdown on the evening of December 10, 2014, and she recounted what he had told her. (Tr., Vol. I, pp. 68-70)

Dr. Penningroth wrote a letter on January 29, 2015. He spelled out the above circumstances. "Again, please restrict Gary Louvar from all one to one meetings with Ms. Miller due to his current level of anxiety and depression. It would be best if a third party was present in any meetings. Or have a third party handle all communications

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[2] Mr. Louvar eventually switched his medical care from Dr. Netolicky to Jeffrey Wilharm, M.D., due to a deterioration in the doctor-patient relationship. (Tr. Vol. II, pp. 184-85) The medical note from March 2017, indicates that his initial agreement with the clinic indicated the physicians would have no involvement with any legal proceedings. Dr. Perkins suggested the need to transfer his care. (Cl. Ex. 1, p. 58)

between them." (Cl. Ex. 1, p. 34)

The City presented a significantly different explanation of the December 10, 2014, meeting. Mr. Leff testified that he told Mr. Louvar, upon his return to work from medical leave, that he had a "pass" on this budget issue. (Tr. Vol. II, pp. 490-93) Ms. Miller testified that she approached Mr. Louvar in the presence of other golf employees and reassured him that he did not need to worry about this budget being higher than usual. (Tr. Vol. III, pp. 490-93) She testified that he was already aware of the budget issue. This calls for a rather specific credibility determination. Based upon the position taken by the City, Mr. Louvar either dramatically misinterpreted Ms. Miller's explanation of his budget issue following the meeting, or he intentionally pretended like it was something it was not. While these scenarios are both possible, I do not find either to be likely. It does not make sense to me that Ms. Miller would approach the claimant about this topic at all without other managers present, particularly since Mr. Leff testified that he had already told Mr. Louvar that he had a "pass" on the budget. Furthermore, Mr. Louvar's reaction to this meeting is well-documented in his journal and the medical file. I do not believe he is faking his reaction for secondary gain. Based upon this record, Mr. Louvar's version of the events surrounding that meeting seems much more plausible.

After receiving the letter from Dr. Penningroth, Mr. Leff testified that he sought to find a different resolution to the ongoing problems between Mr. Louvar and Mr. Miller. His goal was to remove Mr. Louvar entirely from the management of Ms. Miller by finding him a different job for the City. (Tr. Vol. II, pp. 369-74) To that end, he prepared a letter dated March 25, 2015, stating that the City could no longer accommodate the burdensome restriction of preventing one-on-one contact between Mr. Louvar and his supervisor. This is Mr. Louvar's third claimed work injury. The letter recounted the City's past efforts to accommodate the restriction and explained why it was now impossible to continue honoring it. (Cl. Ex. 1, p. 85) The City offered Mr. Louvar three options to allow him to continue through to retirement. He could accept a seasonal Assistant Golf Professional position, he could accept a newly-created Special Projects position (reporting directly to Mr. Leff), or he could take a leave of absence. (Jt. Ex. 1, p. 86) The parties attempted unsuccessfully to reach a resolution. Mr. Louvar prepared retirement paperwork on April 17, 2015, his fourth and final alleged work injury date.

Mr. Louvar has not sought other employment since retiring from the City of Cedar Rapids. He remained retired through the date of this hearing.

There are a number of expert medical reports in this record.

Claimant retained James Gallagher, M.D., for an expert psychiatric opinion. Dr. Gallagher is a highly-qualified board certified psychiatrist. (Jt. Ex. 1, pp. 112-15) He evaluated Mr. Louvar on September 10, 2014, and prepared a report dated October 14, 2014. In a lengthy report, Dr. Gallagher accurately recounted the history of Mr. Louvar's difficulty at work. (Jt. Ex. 1, pp. 64-72) He reached the diagnosis of "major depressive episode, recurrent, of moderate proportions with anxious features." (Jt. Ex. 1, pp. 62, 72) He attributed this to claimant's stress at work. (Jt. Ex. 1, p. 62)

> I am of the opinion that such supervisory behavior, as subjectively reported and objectively attested to by others, led to the development of Mr. Louvar's significant anxious and depressive symptoms, which persist, and which are likely to worsen as he makes an attempt to return to work after recovering from his back surgery.

(Cl. Ex. 1, p. 72) He wrote a follow-up report in May 2015, after reviewing new information after claimant's separation from employment. (Jt. Ex. 1, pp. 105-106) I find Dr. Gallagher's medical opinions to be credible. They are consistent with the opinions outlined by the treating medical providers and the facts of the case.

Defendant retained John Brooke, Ph.D., a board certified Illinois psychologist, for an expert opinion. On April 8, 2015, the agency compelled Mr. Louvar to attend an evaluation with Dr. Brooke. Dr. Brooke performed an evaluation and report in April 2015. He took a history and opined that claimant did not suffer from major depression and that his complaints were likely exaggerated. (Jt. Ex. 1, p. 167) He diagnosed adjustment disorder. Dr. Brooke had not been licensed to practice as a psychologist in Iowa since some time in the 1990's. (Cl. Ex. 6, Brooke Depo, p. 344) He had allowed his Iowa license to lapse and did not renew it until 2016. (Cl. Ex. 6, Brooke Depo, p. 344) Dr. Brooke destroyed his file without providing notice to the parties and without recording what documents he reviewed. (Cl. Ex. 6, Brooke Depo, pp. 374-75) I do not find the opinions of Dr. Brooke particularly helpful in resolving the medical disputes in this case.

Two vocational opinions were also obtained. Claimant retained Kent Jayne and the City retained Lana Sellner. Mr. Jayne prepared multiple reports and testified via deposition. His first report was prepared on April 1, 2015, concluding that Mr. Louvar was entirely unemployable as a result of his alleged work injuries. "Given the confluence of his current limitations as understood, . . . it is unlikely that any feasible vocational rehabilitation plan would have a reasonable likelihood of success in returning Mr. Louvar to competitive employability unless these issues are addressed." (Cl. Ex. 3, p. 75) He maintained this opinion in his follow-up reports as well as his deposition. Ms. Sellner reached the opposite conclusion. She evaluated Mr. Louvar in November 2016, and concluded he had "no loss of access to the labor market given his restriction." (Jt. Ex. 1, p. 160)

Mr. Louvar has filed suit in the Iowa District Court for Linn County. (Def. Ex. L) The lawsuit alleges violations of Chapter 216, of The Code of Iowa, also known as the Iowa Civil Rights Act (hereafter, ICRA), including discrimination on the basis of age and disability by creating a hostile work environment, retaliation, adverse employment actions, constructive discharge and refusal to accommodate his disability. His pending discrimination claims precisely mirror the claims in his work injuries.

CONCLUSIONS OF LAW

The first question is whether these claims are preempted by the ICRA. If the acts or circumstances of the ICRA claim is based upon the same acts or circumstances of

the workers' compensation claims, the workers' compensation claims are preempted. Once this determination is made, the Division of Workers' Compensation no longer has subject matter jurisdiction.

> Under our workers compensation law, [an] employer's immunity is the quid pro quo by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common law verdicts.
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> Suckow v. NEOWA FS, Inc., 445 N.W.2d 776, 779 (Iowa 1989) (citations omitted). Streeby and Evans had a right of action against OHA, their employer, for sex discrimination under both state and federal law. See Iowa Code ch. 601A; 42 U.S.C. § 2000e, et seq. Indeed, both filed suits in state and federal court grounded on these laws. In these circumstances the quid pro quo for OHA's giving up its normal defenses is gone. *Therefore the basis for a workers compensation claim grounded on these same discrimination claims is likewise gone.*

Ottumwa Housing Auth. v. State Farm Fire, 495 N.W.2d 723, 729 (Iowa 1993) (*emphasis added*).

Ottumwa Housing Authority, involved a City agency suing its insurance carrier for coverage under both a general liability policy and workers' compensation. In understanding the ruling, it is crucial to understand the procedural and factual background. The facts are as follows:

> Joyce Kay Streeby and Lisa White Evans were employed by the Ottumwa Housing Authority. The executive director of OHA at that time was Ted Simpson.
>
> OHA was insured by State Farm Fire and Casualty Company. State Farm had issued to OHA two liability policies: (1) a general liability policy, and (2) a workers compensation and employers liability policy.
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> In September and October 1987, Streeby and Evans advised OHA that they were asserting claims against it based on Simpson's alleged sexual harassment. OHA passed this information on to State Farm which investigated the claims.
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> On October 15, 1987, Streeby and Evans filed complaints regarding Simpson's conduct with the Iowa Civil Rights Commission. OHA forwarded copies of these complaints to State Farm.
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> After receiving advice from its lawyers, State Farm denied coverage under the general liability policy for the civil rights sexual harassment claims. A short time later, State Farm likewise denied coverage under the workers compensation part of the second liability policy.

> Several months later Streeby filed for workers compensation. State Farm retained as its defense lawyers the same firm that had advised it to deny coverage under the general liability policy.
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> While Streeby's workers compensation claim was pending, Streeby and Evans filed a state court petition and a federal court complaint against OHA, Simpson, and the city of Ottumwa. The petition and complaint alleged identical claims of sexual harassment based on Simpson's alleged conduct. OHA forwarded the petition and complaint to State Farm. State Farm again sought advice about coverage concerning the two civil suits from the same firm that was representing it in the workers compensation proceedings.
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> Meanwhile Streeby dismissed her workers compensation proceeding. One day later State Farm's lawyers advised it that neither the general liability policy nor the workers compensation policy afforded coverage for the sexual harassment claims asserted in the state and federal lawsuits. Shortly thereafter, State Farm denied coverage and refused to defend OHA and Simpson in the state and federal lawsuits.
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> OHA then hired separate counsel for itself and Simpson to represent them in the state and federal cases. While these cases were pending, OHA filed this suit seeking a declaratory judgment that the policies afforded coverage and imposed a duty on State Farm to defend.
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> Eventually OHA, Simpson, and the city of Ottumwa reached a settlement with Streeby and Evans in the state and federal lawsuits. Following this settlement, OHA amended its pleadings in the declaratory judgment action. The amendment alleged a breach of contract, seeking damages for State Farm's (1) denial of coverage for sexual harassment claims in the two civil suits, (2) failure to defend those suits and (3) bad faith. The amendment sought judgment against State Farm for all amounts that OHA paid in settlement and defense of the state and federal lawsuits. The district court sustained State Farm's motion for summary judgment on these issues, and this appeal followed.

Id. at 725.

At the outset, it is noted that Ottumwa Housing Authority is not a traditional workers' compensation case. The employer was suing its insurance carrier for coverage for civil rights claims and it brought the workers' compensation coverage into the suit because one of the claimant's had filed (and then dismissed) a workers' compensation claim which was based upon the same acts or circumstances as her civil rights claim. Nevertheless, the Supreme Court held that when the basis for a workers' compensation claim is grounded upon the same discrimination claims, the workers' compensation claim is preempted. Id. at 729. To summarize, because the claimants' claims for workers' compensation were based upon the same acts or circumstances as

the civil rights claim, the workers' compensation claims were deemed "preempted" by the ICRA.

In 1996, the Supreme Court decided Baird v. Ottumwa Community School Dist., 551 N.W.2d 874 (Iowa 1996). In Baird, the agency granted summary judgment based upon the decision in Ottumwa Regional Housing, against an injured worker who had asserted a psychological injury resulting from abusive treatment by her supervisors. Id. at 875. She had also filed, and settled, a claim for sex discrimination under the ICRA. Id. The district court affirmed the agency's grant of summary judgment. The Supreme Court reversed, holding that there was a genuine issue of material fact as to whether her workers' compensation claim was the same as her claim under the ICRA. The Court stated:

> In urging that we should affirm the district court, the employer and insurance carrier assert that Baird specifically claims that the emotional stress that forms the basis of her workers' compensation claim is the result of sexual harassment. We find nothing in the record to support that contention other than the fact that a civil rights claim had been made. Baird's workers' compensation claim merely asserted that she had suffered emotional distress as the result of "abusive treatment by supervisors resulting in severe depression."
>
> It was never adjudicated by the civil rights commission or a court that the acts upon which the civil rights complaint was based in fact occurred or, if they did occur, whether this constituted sex discrimination in employment. The employer expressly denied the allegations of the civil rights complaint. The settlement agreement may be viewed as a method by which Baird's employer bought its peace on the civil rights claim, leaving the pending workers' compensation proceeding to run its course. Even if the acts alleged in the civil rights claim did constitute sex discrimination in employment, there is nothing in the present record from which we may determine whether those were the same acts or circumstances upon which Baird's workers' compensation claim is based.
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> It is manifest that not all circumstances that would create a compensable claim for emotional distress benefits under our decision in Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845, 851 (Iowa 1995), would give rise to a sexual discrimination claim under section 601A.6. Whether this is the situation in the present case is not without dispute in the record. Consequently, we conclude that a genuine issue of material fact exists concerning Baird's right to proceed with her workers' compensation claim. We reverse the judgment of the district court and remand the case to the industrial commissioner for further proceedings consistent with this opinion.

Baird at 876.

In the present case, Mr. Louvar contends that Baird stands for the proposition that if the civil rights case was not adjudicated by the civil rights commission or the court at the time of the workers' compensation hearing, there is no issue of preemption. I disagree. Baird merely stands for the proposition that summary judgment is not appropriate in a workers' compensation claim, when there is a genuine issue of material fact regarding whether the two claims were based upon the same acts or circumstances. The facts and procedural background of Baird are quite different from Mr. Louvar's case. In Baird, the claimant brought and settled a civil rights case. At the time the defendants filed for summary judgment in Baird, the claimant disputed that the acts and circumstances giving rise to the civil rights claims were identical to the acts and circumstances giving rise to the work injury claim. In the work injury claim, she was claiming that the abusive treatment by her supervisors caused severe depression. Id. at 876. Mr. Louvar, however, has conceded that the acts and circumstances giving rise to his civil rights claims, which are still pending, are precisely the same as the acts or circumstances which give rise to his work injury claim.

Claimant also relies upon the Supreme Court's decision in Cargill, Inc. v. Conley, 620 N.W.2d 496 (Iowa 2000). The facts of Conley were very different from the facts in Ottumwa Housing Authority and Baird. In Conley, the injured worker claimed industrial disability benefits for a low back injury. Conley, 620 N.W.2d at 498. He argued that, even though he was physically capable, his employer would not allow him to bid into certain jobs. Id. at 499. The injured worker in Conley also filed a civil rights claim for disability discrimination, alleging that the employer's refusal to allow him to bid into certain jobs was discriminatory. Id. The agency awarded the injured worker a 20 percent industrial disability, noting that the employer was preventing the injured worker from being eligible for certain jobs within the plant. Id. For all practical purposes, this was the same claim that the injured worker was making in his disability discrimination claim in district court. The District Court reversed the agency decision, citing Ottumwa Housing Authority. Conley at 500. The Supreme Court then reversed the District Court, holding that the employer had failed to preserve error by raising the issue before the agency. Conley at 500-501.

The Conley court went on to distinguish Ottumwa Housing Authority as follows:

> This case is unlike the factual situation presented in Ottumwa Housing Authority v. State Farm Fire & Casualty Co., 495 N.W.2d 723 (Iowa 1993), a case upon which Cargill relies. In Ottumwa Housing, this court held that the employees' claims of sexual harassment were not cognizable under the workers' compensation statute, but rather the employees had civil claims for sexual discrimination under state and federal law. 495 N.W.2d at 729. The distinguishing feature in Ottumwa Housing is that the alleged injury sustained by the employees was directly caused by the employer's discriminatory conduct; this injury and its cause were the same in the workers' compensation proceeding and in the civil suits. In contrast, in the present case, Conley potentially has viable claims for both workers' compensation benefits and civil damages. See 2A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 68.34(e), at 13–261

> (1994) (discussing problem of overlapping claims and suggesting that "a claimant may have a workers' compensation remedy for so much of his injury as the compensation act was designed to cover, and still have his typical civil rights remedies for any other injuries or losses stemming from the employment discrimination"). His claim for statutory benefits arises from his back injury; his claim for civil damages arises from the employer's allegedly discriminatory conduct. Although there may very well be an overlap between these two claims that might affect the determination of industrial disability in the workers' compensation action, this overlap is not a problem of subject matter jurisdiction.

Conley at 501-502. The Conley court distinguished Baird on the same basis. Conley at 501.

It is noteworthy that Conley was not a mental injury claim at all. It was a relatively simple, physical low back injury where the injured worker claimed that his employer discriminated against him on the basis of his disability resulting from that work injury. He sought to have that discrimination considered in his award of industrial disability. A clever defense attorney asserted that factor should not be included in the assessment of his industrial disability. In other words, the nature of the two claims were entirely different, it was only elements of damages which overlapped. The Supreme Court rejected such defense. Conley, however, has no practical application to Mr. Louvar's case.

In the recent unpublished decision of Delgado-Zuniga v. Dickey & Campbell Law Firm, WL4050285, No. 17-0099, (September 13, 2017), the Iowa Court of Appeals further addressed this issue.[3] The claimant in Delgado-Zuniga filed both a workers' compensation claim and a claim under the ICRA. It is undisputed that both claims were based upon the same acts or circumstances. The claimant settled his discrimination claim with the employer. Subsequently, his employer and its insurance carrier filed for summary judgment against the claimant on the basis of Ottumwa Regional Housing. Claimant's counsel did not respond to the Motion for Summary Judgment and it was granted by the agency. Claimant sued his attorney for legal malpractice for the failure to respond to the Motion for Summary Judgment. Claimant's attorney filed summary judgment against the claimant alleging that the workers' compensation claim was futile because both claims involved the same acts or circumstances, and consequently, the Division of Workers' Compensation lacked subject matter jurisdiction over the claim. The Court of Appeals agreed.

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[3] Claimant filed an Application for Leave to Supplement Post-Hearing Brief on November 26, 2017. The Application was granted and further helpful briefing was allowed. Claimant contended that the decision in Delgado-Zuniga should not be considered as it substantively changed the law which was in place at the time claimant's petition was filed. He further re-argued the inapplicability of Delgado-Zuniga. Claimant subsequently argued that defendants' brief should be struck because it was beyond the scope. This motion was denied.

> Unlike the factual circumstances in Baird, even considering the record in the light most favorable to Delgado, the record here shows the acts upon which his workers' compensation claim was based, as expressly described by Delgado on the workers' compensation claim form, stemmed from the same acts as his discrimination claim. Nevertheless, Delgado urges that we find a genuine issue of material fact exists because, since OHA and Baird, the agency "now holds that preemption only occurs when illegal discrimination has actually been established." However, we think that Delgado misinterprets the agency's stance. For instance, in Sharp v. University of Northern Iowa, the agency found "the claimant's alleged occurrences of discrimination [were] likely relate[d] to alleged incidents also underlying her claimed mental injury"; therefore, there was not a question of subject matter jurisdiction because the claimant's workers' compensation and civil discrimination claims overlapped. Iowa Workers' Comp. Com'n. File No. 5027941, 2012 WL 2244287, at *10 (May 14, 2012) (emphasis added). Here, Delgado's claims do not merely overlap like two circles in a Venn diagram, they are the same—there is only one circle. Thus, because the acts alleged in his workers' compensation claim were the same acts that formed the basis for his civil discrimination suit, the agency was without subject matter jurisdiction to hear his workers' compensation claim.

Id. at 4. Like the claimant in Delgado-Zuniga, Mr. Louvar urges this agency to hold that, if the civil rights claims have not been adjudicated to a final decision, the claimant is free to pursue both claims simultaneously. Claimant cites some agency support for this proposition.[4]

The Supreme Court, however, has not focused upon whether the illegal discrimination has been legally established in a final decision. The Court has instead focused on whether the claimant is making the same claims in the two proceedings. This appears to be the proper legal standard.

In this case, after hearing all of the evidence presented at hearing, I am fully convinced that his claims in the two matters are identical. I conclude all of Mr. Louvar's claims in his civil rights claims are based upon the same acts or circumstances as his claims in the workers' compensation claims. (See Def. Ex. L) His own testimony at

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[4] Doolin v. IES Utilities, File No. 5003461 (Appeal, December 31, 2003), Schnittjer v. Dubuque County, File No. 5031336 (Appeal, September 27, 2011). In the Schnittjer decision, the Commissioner's primary holding was that summary judgment should not have been granted against the claimant because the allegations in civil rights lawsuit "are for acts not made part of her pending workers' compensation petition." Id. at 4-5. In other words, in Schnittjer, the claimant had very carefully pled her cases to ensure that the claims were not based upon the same acts or circumstances. Therefore, summary judgment was not appropriate. The Commissioner did add (citing Doolin), that preemption is proper "only if illegal discrimination had been established." Id. at 5. This is not how I interpret Ottumwa Housing Authority, Baird, Conley and Delgado-Zuniga.

hearing confirms that his claims are the same. (Tr. Vol II, p. 237) Consequently, the agency does not have subject matter jurisdiction to proceed to the merits.

ORDER

THEREFORE IT IS ORDERED

Claimant takes nothing.

Costs are taxed to defendant.

Signed and filed this 9th day of April, 2018.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.