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THE SUPREME COURT OF IOWA

Supreme Court No. 18-0567
Polk County No. LACL128372

LARRY R. HEDLUND, Plaintiff-Appellant

vs.

STATE OF IOWA, K. BRIAN LONDON, COMMISSIONER OF THE IOWA DEPARTMENT OF PUBLIC SAFETY, Individually, CHARIS M. PAULSON, DIRECTOR OF CRIMINAL INVESTIGATION Individually, GERARD F. MEYERS, ASSISTANT DIRECTOR DIVISION OF CRIMINAL INVESTIGATION, individually, and TERRY E. BRANSTAD, Individually,

Defendants-Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE DAVID MAY

PLAINTIFF-APPELLANT FINAL REPLY BRIEF

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I. The Fact that Hedlund's Administrative Remedy Arises from Section 80.15, Rather than Chapter 8A Does Not Distinguish his Case from *Walsh v. Wahlert*

The State claims *Walsh* was an exceptionally narrow ruling, which only applies to merit employees. It also claims the statute which provides Hedlund's administrative remedy—Section 80.15—requires administrative exhaustion, unlike the provisions of Chapter 8A. The State then argues that because *Walsh* is distinguishable, the *Kerr* and *Papadakis* decisions control this case. None of these arguments are consistent with the logic or the outcome of *Walsh* and should be rejected.

A. Administrative Exhaustion Is Not Required to Bring Suit Under Section 70A.28

The State claims *Walsh* only applies to the specific facts of that case. Walsh was a merit-system employee who had protections under Iowa Code chapter 8A. The protections of 8A are very similar to the protections provided by Section 80.15. *Compare* Iowa Code § 8A.415 (2017) (allowing appeal of agency decision to PERB) *with* Iowa Code § 80.15 (2017) (allowing appeal of termination decision to PERB). Walsh brought a civil action for wrongful discharge under Section 70A.28—the same statute Hedlund used. The *Walsh* Court rejected the State's argument that the exclusivity provisions of 17A barred his suit under 70A.28. *See Walsh v.*

Wahlert, 913 N.W.2d 517 (Iowa 2018). Despite the striking similarities, the State nevertheless claims that *Walsh* does not apply to this case.

First, the *Walsh* court found that "nothing in Iowa Code chapter 8A expressly requires administrative exhaustion before a whistleblower launches a civil action under Iowa Code section 70A.28." *Id.* Similarly, nothing in section 80.15 expressly requires administrative exhaustion. The statute reads, in pertinent part:

> After the twelve months' service, a peace officer … is not subject to dismissal…unless charges have been filed with the department of inspections and appeals and a hearing held by the employment appeal board created by section 10A.601, **if requested by the peace officer**….

Iowa Code § 80.15 (2017) (emphasis added). The bold language above completely undermines any notion that administrative exhaustion is expressly required. It's simply an option.

The *Walsh* court also examined the legislative history of 8A and 70A.25 in determining that administrative exhaustion was not required. In this case, the protections of section 80.15 have been in place since 1935. *See* 1935 Iowa Acts ch. 48, § 6. When the legislature amended 70A.28 to add a civil remedy in 1989, the additional protections for peace officers under section 80.15 had been in place for more than fifty years. *See* 1989 Iowa Acts ch. 124, §§ 2-3 (codified at Iowa Code § 79.28 (Supp. 1989) (now §

70A.28)). Despite the existence of the administrative remedy for terminated peace officers, the text of 70A.28 does not distinguish between peace officers and other state employees. It follows that the legislature intended that peace officers covered by 80.15, and other state employees not covered by 80.15, should equally enjoy the protections of 70A.28. *Cf Walsh*, 913 N.W.2d at 525.

The statutory history of section 80.15 also confirms that no exhaustion requirement exists. In 1935 the Iowa legislature passed the first iteration of section 80.15 that read as follows:

> …. After six months' service no member of the patrol shall be subject to dismissal unless charges have been filed with the secretary to the executive council showing cause for dismissal of appointee as a member of the Iowa Highway safety patrol. A date **shall** be set for hearing before the executive council….[1]

1935 Iowa Acts ch. 48, § 6 (emphasis added). Four years later, in 1939, the Iowa Legislature amended the above section. After the amendments it read, in pertinent part:

> …. After the six months service, no member of the department, who shall have been appointed after having passed the before-mentioned examinations, shall be subject to dismissal unless charges have been filed with the secretary of the executive council and a hearing held before the executive council, **if requested by said member of the department**….

[1] This language never appeared in a published Iowa Code because the Code of Iowa was not published in 1937, and by 1939 this section had been amended by the legislature.

1939 Iowa Acts ch. 120, § 15 (codified at Iowa Code § 1225.19 (1939)) (emphasis added). Of particular importance is the legislature's addition of the highlighted language. Before the 1939 amendment, a termination hearing was obligatory. By 1939 amendment, a hearing was optional. Therefore, the legislature did not require, either explicitly or implicitly, administrative exhaustion.

Finally, the *Walsh* court addressed implied exhaustion and stated: "…we do not believe such exhaustion can be implied in light of the unequivocal legislative declaration that a whistleblower may bring a civil action to enforce Iowa Code section 70A.28." *Walsh*, 913 N.W.2d at 524. Because Hedlund is also suing under 70A.28, an exhaustion requirement cannot be implied given the "unequivocal legislative declaration that a whistleblower may bring a civil action to enforce Iowa Code section 70A.28." *Id***.**

B. *Kerr* And *Papadakis* Do Not Govern Hedlund's 70a Claim

The State claims that *Kerr* and *Papadakis* govern Hedlund's 70A claim, in part because the *Walsh* decision did not expressly overrule these two cases. The *Papadakis* ruling is easily distinguishable from this case. And while on its face it appears *Kerr* and *Walsh* conflict, the two cases are in fact distinguishable.

In *Papadakis v. Iowa State University of Science and Technology*, 574 N.W.2d 258, 259 (Iowa 1997), the plaintiff was a university employee who brought a declaratory judgment action pursuant to Iowa Rule of Civil Procedure 262 (renumbered as 1.1102) seeking a ruling that "his contract of employment extended beyond May 31, 1995." This Court held that the plaintiff's exclusive avenue for judicial review was through 17A.19. *Id.* at 260. Hedlund did not bring suit pursuant to a rule of civil procedure. He sued under a statute that expressly allows a civil action.

The State's claim that *Kerr v. Iowa Public Service Co.*, 274 N.W.2d 283 (Iowa 1979) governs this action is equally misguided. In *Kerr* the plaintiffs challenged a state agency's grant of an easement for the construction of power lines by a utility. *Id.* at 284. The plaintiffs did not seek a rehearing with the agency, but instead filed an action seeking an injunction prohibiting the utility from constructing the power lines. *Id.* at 285. However, section 476A.14, the statute the injunction was sought under, allowed a party to seek an injunction to stop construction only if the utility had not obtained a certificate from the agency. Section 476A.15 did not allow a party to challenge the issuance of the certificate itself. Therefore this section did not expressly allow for Kerr's action. *See* Iowa Code § 476A.15

(1977). In contrast, *Walsh* makes it abundantly clear that administrative exhaustion is not required before bringing suit under section 70A.28.

C. Hedlund's Conduct Falls Under the Protections of 70A.28

The State has advanced three arguments in support of their contention that Hedlund's conduct is not protected by Iowa Code section 70A.28. First, the State claims, for the first time, that his conduct does not rise to the level of whistleblowing. Second, that certain complaints don't qualify for protections because they were not made to the proper entities. Finally, that complaints against yourself are not actionable. All of these arguments should be summarily rejected.

1. Hedlund's Complaints Fall Under The Protections Of 70A.28 Because They Were a Protected Disclosure and Made to the Proper Entities

The State argues, for the first time on appeal, that Hedlund was not complaining about sufficiently egregious activities, and is therefore not afforded the protections of 70A.28. As a preliminary matter, the State did not make this argument to the district court, and therefore this issue was not preserved for appeal. But even if the Court reaches the merits of this argument, it should be rejected. The State argues that these complaints were not made to the proper authorities. But because at least three complaints

were made to either a law enforcement agency or a public official, this argument should also be rejected.

The three complaints that are protected are: (1) his April 17, 2013 complaint to the PSB regarding Paulson's distribution of an inappropriate email and the persistent misuse of physical fitness incentive days; (2) his May 29, 2013 complaint to the PSB against Meyers alleging violations of rules or mismanagement; and (3) his April 29, 2013 email to London regarding Governor Branstad's speeding SUV.

Iowa Code section 70A.28 provides protections for employees who make disclosures to a "public official or law enforcement agency[.]" Iowa Code § 70A.28(2) (2017). It is undisputed that the DPS is a law enforcement agency. The PSB is part of that agency. (APP.000381 p. 155:20-24) Therefore, the two complaints Hedlund made to the PSB were made to the proper entities. Furthermore, Hedlund's April 29, 2013 complaint was made to London, the Director of the DPS. It is undisputed that London was a public official within the meaning of 70A.28. All three complaints were made to the proper entities. *See* Iowa Code § 70A.28 (2017).

All three complaints meet the definition of a protected disclosure under §70A.28, which provides "if the employee reasonably believes the

information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Iowa Code § 70A.28(2) (2017).

Hedlund's April 17, 2013 complaint to the PSB about Paulson was regarding the misuse of time off for agents. (APP. 000509) Paulson did nothing to correct it. "This would appear to me to be a fraudulent use of taxpayer money at a minimum." (APP. 000510) Clearly, Hedlund reasonably believed the information evidenced a violation of law or rule, mismanagement, a gross abuse of funds, [and] an abuse of authority.

Hedlund's April 29, 2013 complaint about then Governor Branstad traveling a "hard 90" down a public highway similarly falls into multiple categories of 70A.28 protected disclosures. This complaint was about a "substantial and specific danger to public health or safety." *See* Iowa Code § 70A.28(2) (2017). In his complaint, Hedlund stated the speeding SUV violated Iowa law and posed a safety risk. "In addition to the well-known dangers of traveling at a high rate of speed, this incident further demonstrates how a situation like this can quickly put others at risk. In this case a school bus possibly full of children." (APP. 000437) Finally, Hedlund specifically complained about an "abuse of authority," stating "It is blatantly obvious to me that the Governor was in the vehicle, was aware the

vehicle was speeding and was by proxy, the cause of the vehicle to be speeding." *(Id.)*

Hedlund's complaint against Gerard Meyers that resulted in a PSB investigation also falls within the protections of section 70A.28. Hedlund complained about Meyers' instructing agents to simply ignore parking tickets issued by Iowa State University, Meyer's improper use of PT Fitness days off, PDQ falsification, and his failure to respond to calls and emails. As discussed above, the improper use of Fitness Days Off is protected. (*supra*) Hedlund also reasonably believed Meyers' instruction to ignore lawfully issued parking tickets was a violation of law or rule, mismanagement, a gross abuse of funds, and an abuse of authority.

Hedlund's complaint about a fraudulent "PDQ" is similarly protected. The PDQ was a document requesting a promotion for one of Meyers' subordinates that made blatant misrepresentations. Finally, Hedlund's complaint about a lack of responsiveness from Meyers constituted a complaint about "mismanagement," which is also protected.

2. Hedlund's Complaint is Actionable Under 70A.28

Hedlund's email dated April 29, 2013 in which he reported the Governor's speeding SUV was disclosed to London, a public official, and involved a violation of the law. (APP.000522-000524) The State claims that

because Hedlund styled the email as a "complaint against myself" that unravels the protection of the statute. That's just foolish. Nevertheless, the State cites to one portion of one sentence in an unpublished court of appeals decision, which does not stand for this proposition. *Hackman v. New Hampton Mun. Light Plant*, No. 14-1544, 2015; 2015 WL 5965197 (Iowa Ct. App. October 14, 2015) The State fails to mention that the court rejected the argument and instead casts it as the conclusion.[2] The entire sentence quoted from reads: "The Plant cites to dicta in *Marano* expressing the Federal Circuit's belief that the federal Whistleblower Protection Act (WPA) does not protect an employee who 'blew the whistle on his own misconduct in an effort to acquire the WPA's protection.'" *Id.* (*quoting Marano v. Dep't of Justice*, 2 F.3d 1137, 1142 n. 5 (Fed. Cir. 1993)). The court then states, "This piece of dictum, does not contemplate an employee's disclosure of his coworkers' misconduct in tandem with his own. **We *disagree* with the Plant's assertion that Hackman's disclosures of Heying's and Geschke's misconduct are not protected** by Iowa Code section 70A.29 and its underlying public policy." *Id.*

Second, Hedlund has not acknowledged that the complaint was against himself as the State claims. Hedlund's complaint was not limited to

[2] Defendants misleadingly quoted fragments of two different sentences from *Hackman* in their Memorandum of Authorities. Both sentences, when read in their entirety, stand for the opposite proposition that State asserts.

his misconduct, but the misconduct of others in connection with the speeding SUV. Similar to the situation in the *Hackman* case, Hedlund's April 29, 2013, complaint also concerned the actions of Gov. Branstad and two state troopers involved in the chase. *Id.* The Iowa Court of Appeals found that when a complaint deals with both the complainant's conduct and the conduct of co-employees, the complainant is granted the protections of 70A. *Hackman*, No. 14-1554, 2015 WL 5965197 (Iowa Ct. App. Oct. 14, 2015).

Moreover, even the State did not consider Hedlund's April 29, 2013 complaint to be a complaint solely against himself and his conduct. The State initiated and completed a PSB investigation into Troopers Steve Lawrence and Matthew Eimers based on Hedlund's April 29, 2013 complaint. (APP.000620) The Notice of Investigation that was sent to each trooper states: "the Professional Standards Bureau has received a complaint of misconduct filed against you by <u>SAC Larry Hedlund</u>." (*Id.*) Trooper Lawrence testified that he believed Hedlund's email was a complaint against him. (APP.000318 p. 37:1-25; 38:1-7)

Under the circumstances, it is clear Hedlund's complaints are protected.

D. 70A.28 Protects Hedlund's Actions Even Though They Were Similar To His "Normal" Duties

Iowa Code § 70A.28 was patterned after the federal Whistleblower Protection Act (WPA). Therefore, the State urges the Court to adopt a line of cases that found the WPA does not cover employees whose job duties include reporting government wrongdoing in the normal course of their duties. *See generally Willis v. Dep't of Agric.*, 141 f.3d 1139, 1144 (Fed. Cir. 1998);. *Huffman v. Office of Personnel Mgmt*, 263 F.3d 1341 (Fed Cir. 2001), *superseded in part by statute*. This is true even though these cases were overruled when Congress passed the Whistleblower Protection Enhancement Act, which added the following language: "If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8)[.]" 5 U.S.C. § 2302(f)(2). The State fails to articulate how or why the underlying purpose of Iowa's whistleblower statute is furthered by adopting this unduly wooden, and now discredited, interpretation of a similar federal statute. This Court should not adopt the federal court's earlier erroneous interpretation of the federal whistleblower act.

1. Work Done in the Normal Course of Employment is Protected by Iowa Law

No Iowa Court has ever found that disclosures made within the normal course of employment fall outside the protections of §70A.28.[3] Instead, the courts have held to the contrary.[4] *Shepard v. Wapello County*, 250 F. Supp.2d 1112, 1114 (S.D. Iowa 2003); *Tekippe v. State*, 2011 Iowa App. LEXIS 214, 1-2 (Iowa Ct. App. 2011).

The State also claims because Congress extended protection to disclosures made during an employee's normal duties, the combination of earlier federal precedent and silence on this issue by the Iowa Legislature creates some negative inference as to whether disclosures made by state employees in their normal duties are protected. This is not a correct interpretation: "Congressional reaction to a specific case decided by the United States Supreme Court does not shed light on the meaning of state law when there has been no comparable narrow state court precedent to stimulate a legislative override." *Pippen v. State*, 854 N.W.2d 1, 18 (Iowa 2014). In addition, courts should proceed with caution in drawing any conclusions from legislative inaction: "Rather than attempt to divine legislative intent in

[3] The State misleading suggests that Judge Hanson's ruling in *Manahl v. State* concerning dismissal of the 70A.28 claim was affirmed on appeal. Manahl only appealed dismissal of the public policy claim not the 70A.28 claim. The 70A.28 claim was not briefed or argued. Accordingly, the court affirming that the whistleblower statute does not protect disclosures of private wrongdoing has no precedential value. *Manahl v. State*, No. 16-2154 (Iowa Ct. App. 2017).

[4] It should be noted that the statute at issue in *Shepard* was §70A.29, which simply replicates the protective provisions of §70A.28 and applies them to political subdivisions in Iowa.

this fashion, we must remember that legislation sometimes persists on account of 'inattention and default rather than by any conscious and collective decision.'" *McElroy v. State*, 703 N.W.2d 385, 395 (Iowa 2005).

2. Even if this Court Applies the Federal Appeals Courts' Interpretations, Hedlund is still Protected By 70A.28

In *Huffman v. Office of Personnel Management*, a case cited favorably by the State, the court distinguished between three different types of whistleblowers. 263 F.3d 1341, 1352 (Fed. Cir. 2001). The first is an employee, who has "as a part of his normal duties, been assigned the task of investigating and reporting wrongdoing by government employees and, in fact, reports that wrongdoing through normal channels." *Id.* The court stated that law enforcement officers who are assigned to investigate other government employees, and employees of the inspector general's fall into this category. *Id.* They are not granted protections under the WPA. *Id.* at 1353.

The second type of whistleblower is an employee who has the same responsibilities as the first, but who "reports the wrongdoing outside of normal channels." *Id.* at 1354. The court stated that such an employee would be protected by the WPA. The third type of whistleblower is one who "is obligated to report the wrongdoing, but such a report is not part of the

employee's normal duties or the employee has not been assigned those duties." *Id.* The court held that a disclosure by this type of whistleblower is protected by the WPA, even though the employee had a duty to make the report and "the employee can also be disciplined for failure to make the report." *Id.* (citing *Watson v. Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995)).

Hedlund clearly falls within the third category of whistleblowers, and is therefore granted protections under the statute. Hedlund was a Special Agent in Charge, a supervisory position within the DPS. His primary duty as an SAC was to supervise other sworn peace officers. (APP.000627 ¶ 11) As a sworn peace officer, Hedlund had a statutory duty to enforce all state laws. Iowa Code §80.9A(5)(a). This statutory duty includes reporting criminal activity by citizens or government officials that he personally witnessed or became aware of during the course of a criminal investigation. (*Id.*) However, Hedlund was never assigned to investigate criminal activity by a public official or other law enforcement agencies. Additionally, during his tenure at DPS Hedlund was never assigned to PSB (internal affairs). Accordingly, he is entitled to the protections of 70A.28 even under the most narrow interpretation of the law.

E. Hedlund is Entitled to a Jury Trial and Emotional Distress Damages on his 70A.28 Claim

The issue of what damages are recoverable hinges on the interpretation of the term "affirmative relief" used by the legislature in section 70A.28. In *Sallee v. Stewart*, this Court outlined the interpretation framework it uses to analyze statutes:

> In interpreting a statute, we consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied. We seek to advance, rather than defeat, the purposes of the statute.
>
> …. If a statute is ambiguous, we may consider, among other matters, the object sought to be obtained, the circumstances under which the statute was enacted, the legislative history, the common law or former statutory provisions, the consequences of a particular construction, the administrative construction of the statute, and the preamble or statement of policy.

Sallee v. Stewart, 827 N.W.2d 128, 148 (Iowa 2013) (internal citations and quotation marks omitted).[5] Using this framework, it is clear that whistleblowers can collect compensatory damages.

1. The Language of 70A.28(5)(A) is Ambiguous

The types of damages recoverable under 70A.28(5)(a) is an unsettled issue of Iowa law. The State claims that the language "affirmative relief" and the phrase "or any other equitable relief" indicates affirmative relief can only be equitable in nature. That's not what the statute says. Furthermore, it

[5] The undersigned has failed to locate any valuable administrative construction precedent.

violates this Court's rules of statutory construction. This Court has consistently held that when the legislature uses the words "and" and "or" those words must be interpreted in context.

In this context, the legislature's use of the word "or" indicates that the preceding relief is not merely equitable in nature. Moreover, if the legislature had intended subsection 5(a) to only provide equitable relief, then the affirmative relief language would be superfluous. *See Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice*, 867 N.W.2d 58, 75 (Iowa 2015) Under the circumstances, it is clear that the term "affirmative relief" is not the same as "equitable relief."

The term "affirmative relief" appears in five other places in the Iowa Code: sections 70A.29, 232.73A, 729.6, 730.4 and 730.5. *See* Iowa Code §§ 70A.29, 232.73A, 729.6, 730.4, 730.5 (2017). None of them provide a definition of "affirmative relief." However, other sources of law are instructive. Black's Law Dictionary defines "affirmative relief" as " relief sought by a defendant by raising a counterclaim or cross-claim that could have been maintained independently of the plaintiff's action." RELIEF, Black's Law Dictionary (10th ed. 2014). In *Grantham v. Potthoff-Rosene Co.*, 131 N.W.2d 256, 260 (1965), this Court stated a counterclaim "is defined judicially as a cause of action in favor of defendant on which he

might have sued plaintiff and obtained affirmative relief in a separate action….” If a defendant can seek monetary damages through a counter-claim or cross-claim, it only follows that plaintiffs can seek monetary damages as affirmative relief.

In a 1985 opinion, just four years before the passage of section 70A.28, this court referred to claims for damages as “affirmative relief.” *Black v. Univ. of Iowa*, 362 N.W.2d 459, 461 (Iowa 1985)

2. The Purpose of 70A.28 Favors The Award of Compensatory Damages

The overall scheme of 70A.28 establishes a public policy against retaliatory discharge of public employees and considers the violation of the policy to be a public harm. *Worthington v. Kenkel*, 684 N.W.2d 228, 233 (Iowa 2004). It also seeks to protect whistleblowers and to discourage retaliation against them. *See id.* Interpreting 70A.28 to allow only equitable remedies runs contrary those goals.

3. Prior Common Law and the Circumstances under which the Civil Action Remedy were Enacted Favor the Award of Compensatory Damages

In 1988, this Court’s decision in *Springer v. Weeks* created a common law tort of wrongful discharge in violation of public policy. 429 N.W.2d 558 (Iowa 1988). Intrinsic in its creation was the collectability of compensatory damages for wrongful discharge. *See id.* at 559-60 (stating

"even under employment-at-will relationships, a remedy for damages may exist when the employment is terminated for reasons contrary to public policy."). Subsection 5(a) of 70A.28 was created the following year. *See Walsh*, slip. op. at 15. This Court also clarified that emotional distress damages are recoverable for retaliatory discharge in violation of public policy. *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 356 (Iowa 1989). Because both 70A.28 and the common law wrongful termination claim are concerned with the same conduct—reprisal against employees for engaging in protected activities—the logical conclusion is that actual damages are recoverable under 70A.28, as well as at common law claim.

F. Compensatory Damages Are Recoverable Under 70A.28 When Subsection 5(A) Is Read In Conjunction With The Entire Statute And Other Code Provisions

Statutes are to be read in their entirety. *See State v. Kostman,* 585 N.W.2d 209, 212 (Iowa 1998). Our rules of statutory construction provide that "[a]mendments by implication are not favored, and if possible statutes will be construed so as to be consistent with each other." *Caterpillar Davenport Emps. Credit Union v. Huston,* 292 N.W.2d 393, 396 (Iowa 1980).

The text of 70A.28(5)(a) supports a ruling that "affirmative relief" includes compensatory damages. This subsection states that an aggrieved

employee can collect "affirmative relief, including reinstatement with or without back pay. . ." Therefore, "affirmative relief" must include the remedies of reinstatement and back pay. Back pay, unlike front pay, is a legal remedy awarded by a jury. *See Vaughan v. Must, Inc.*, 542 N.W.2d 533, 540 (Iowa 1996) (stating "the trial court awarded damages in the form of front pay, liquidated damages, and attorneys fees. These awards are equitable remedies . . ."); *See also* 42 USC § 1981a(b) (stating that back pay is a compensatory damage excluded from the damages cap). Because "affirmative relief" includes the legal, compensatory remedy of back pay, affirmative relief must include more than only equitable remedies.

The other subsection of 70A.28 also supports Hedlund's position. The remedies under subsection 6 of 70A.28 are very broad. Subsection 6 states that if the Employment Appeal Board finds in favor of the employee, "the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board **may provide other appropriate remedies**." Iowa Code § 70A.28(6) (2017) (emphasis added). The language "other appropriate remedies" is exceptionally broad, enabling the public employee relations board to fashion any remedy it sees fit, which would include an award of compensatory damages.

In *Iron Workers Local No. 67 v. Hart*, this Court held that the courts, but not the Iowa Civil Rights Commission, can award money damages. 191 N.W.2d 758, 768 (Iowa 1971). The Court in *Hart* observed, "The Commission, armed with broad statutory powers to enjoin and to compel affirmative action to eliminate discriminatory practices may surely fashion a remedy without resort to issues courts are better adapted to litigate." *Id.* Surely the remedies available to an employee in district court are at least as broad as those available through the administrative process, especially when the courts are better adapted to litigate damages than administrative agencies. *See id.*

Finally, another provision of the Iowa Code strengthens the conclusion that compensatory damages are recoverable under 70A.28. The Iowa Civil Rights Act (ICRA) references "affirmative remedies." It states: "The election of an affirmative order under paragraph *"b"* of this subsection shall not bar the election of **affirmative remedies** provided in paragraph *"a"* of this subsection." Iowa Code § 216.15(9)(c) (2017) (emphasis added).

It is long settled law that victims of discrimination can recover compensatory damages *See* Iowa Code § 216.15(9)(a)(8) (allowing for "Payment to the complainant of damages for an injury caused by the

discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees.") Importantly, 9(c) refers to all of the remedies under 9(a)—which include actual damages—as "affirmative remedies." If "affirmative remedies" include actual damages, "affirmative relief," logically does as well.

II. AGE WAS A MOTIVATING FACTOR FOR HEDLUND'S TERMINATION

A. Hedlund Was Terminated

The State argues that Hedlund cannot bring an age discrimination claim because he retired and was not terminated. On the contrary, Hedlund was terminated for trumped up and spurious reasons on July 18, 2013, ultimately chose not to continue pursuing an administrative option that did not afford him adequate relief, and only agreed to a service retirement in order to preserve both his dignity and approximately $94,000 in banked sick leave. (APP.000628 ¶13) Absent the conduct of the Defendants, Hedlund would have worked at the Iowa DPS until reaching mandatory retirement age. (APP.000628 ¶14) The lower court correctly found these circumstances created a jury issue. (APP.000184)

B. *McDonnell Douglas* Should Not Be Used at Summary Judgment

Hedlund acknowledges that the *McDonnell Douglas* burden-shifting scheme has been recognized and utilized numerous times by this Court as well as lower Iowa courts. The State cites *McQuistion v. City of Clinton*, 872 N.W.2d 817 (Iowa 2015) in support of its position that *McDonnell Douglas* is alive and well and unassailable in Iowa. However, Ms. McQuistion brought her pregnancy discrimination claim under a different section of the Iowa Civil Rights Act ("ICRA") with notably different language than the claim pursued by Hedlund.

McQuistion was a pregnancy discrimination case challenging an employer's leave policy under Iowa Code §216.6(2)(a) which provides: "A written or unwritten employment policy or practice which excludes from employment applicants or employees because of the employee's pregnancy is a prima facie case violation of this chapter." This Court found that the use of the term *prima facie* in §216.6(2)(a) impliedly indicated legislative approval of the *McDonnell Douglas* test to "address employment policies that potentially discriminate against pregnant employees by mirroring language used in the analytical approach applied in that case." *McQuistion*, 872 N.W.2d at 828. Hedlund brought his claim under Iowa Code §216.6(1)(a), which unlike 216.6(2), does not contain the term *prima facie*,

but instead prohibits discrimination "because of" age. Iowa Code §216.6(1)(a).

In this case, the district court disregarded ageist remarks by the decisionmaker and proceeded to analyze the "indirect evidence" using Mc*Donnell Douglas.* The trial court, like all district courts, felt obliged to engage in the dubious task of determining whether evidence of discrimination is direct or indirect because under current law that is determinative of which analytical framework applies. *Vaughn v. Must, Inc*., 542 N.W.2d 533, 538 (Iowa 1996)(under the ADEA a plaintiff may establish age discrimination by one of two methods.) If a case is supported by circumstantial evidence then the *McDonnell Douglas* tripartite analysis comes into play. However, if "direct evidence" exists that decisionmakers placed reliance on illegitimate criterion in reaching their decision the "mixed motives" method of proof is applicable. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989).

The direct versus indirect evidence dichotomy is based on the erroneous assumption that direct evidence is somehow inherently more reliable than circumstantial evidence. The U. S. Supreme Court has debunked this notion: "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not

only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace v. Costa*, 539 U.S. at 100, 213 S. Ct. 2148 (2003) (*quoting*, *Rogers v. Missouri Pacific R. Co*., 352 U.S. 500 , 508 n.17 (1957)). *See, Ortiz v. Werner Enterprises, Inc*., 834 F.3d 760, 765 (7th Cir. 2016)("district courts must stop separating 'direct' from 'indirect' evidence and proceeding as if they were subject to different legal standards.")

Numerous courts have called into question the utility of mechanically applying the *McDonnell Douglas* tripartite test at summary judgment. The criticism of *McDonnell Douglas* is nowhere better summarized than Justice Wood's concurring opinion in *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012)(Wood, J. concurring):

> Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, as this case still illustrates, the various tests that we insist lawyers use have lost their utility. . . **In order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason.** Put differently, it seems to me that the time has come to collapse all these tests into one. We have already done so, when it come to the trial stage of the case. . . It is time to finish the job and restore needed flexibility to the pre-trial stage. *Id*. (citations omitted/emphasis added).

See also, *Quigg v. Thomas County School District*, 814 F.3d 1227, 1240 (11th Cir. 2016)(declining to use *McDonnell Douglas* and instead using a straightforward inquiry into whether plaintiff presented sufficient evidence of mixed-motive discrimination); *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 495 (D.C. Cir. 2008) (holding "the prima facie-case aspect of *McDonnell Douglas* […] is a largely unnecessary sideshow.); *Zamora v. Elite Logistics, Inc*., 478 F.3d 1160, 1167 (10th Cir. 2007) (Hartz, J., concurring) ("[w]e should not apply the framework of *McDonnell Douglas*… to review a summary judgment when the existence of a prima facie case is not disputed… Applying that framework is inconsistent with Supreme Court authority, adds unnecessary complexity to the analysis, and is too likely to cause us to reach a result contrary to what we would decide if we focused on 'the ultimate question of discrimination *vel non*.'" (citations omitted)); *Wright v. Murray Guard, Inc*., 455 F.3d 702, 716-21 (6th Cir. 2006) (Moore, J., concurring) (*McDonnell Douglas* is "ill-suited to the analysis of mixed-motive claims" at summary); *Griffith v. City of Des Moines*, 387 F.3d 733, 746-48 (8th Cir. 2004) (Magnuson, J., sitting by designation, concurring specially) ("the Supreme Court has gradually chiseled *McDonnell Douglas* away from its original failing framework to an analysis that still fails to give effect to the language of the Civil Rights Act,"

and opining that it should not be used to analyze Title VII claims at trial or at summary judgment); *Liu v. Amway Corp*., 347 F.3d 1125, 1140 n.6 (9th Cir. 2003) (Pregerson, J., dissenting in part) (" '[T]he process dictated by the Civil Rights Act of 1991 [in § 2000e-2(m)] is more useful than the analysis required by *McDonnell Douglas*.'" (quoting *Dare v. Wal-Mart Stores, Inc*., 267 F.Supp.2d 987, 991 (D.Minn. 2003)); Sandra F. Sperino, *Beyond McDonnell Douglas*, 34 Berkeley Journal of Employment & Labor Law 257,269 (2013)("The growing judicial discomfort with core features of *McDonnell Douglas* should raise questions about whether the test's three-part structure, its prima facie case, and its burden-shifting help or hurt the discrimination inquiry.")

III. PLAINTIFF'S TORTIOUS INFLICTION OF EMOTIONAL DISTRESS CLAIMS SHOULD BE PERMITTED TO PROCEED TO TRIAL

The State claims Hedlund cannot establish his Tortious Infliction of Emotional Distress claim (TIED) because the State's conduct was not outrageous as a matter of law, he did not suffer severe emotional distress, and the State is immune from such actions.

A. The State's Conduct Was Outrageous as a Matter of Law

The State claims its actions were not outrageous as a matter of law and cites a number of cases where other TIED or Intentional Infliction of

Emotional Distress (IIED) claims have failed. It is difficult to get these cases to a jury especially in employment cases. It should not be. Nevertheless, this Court has found employees can prevail when their boss's behavior crosses the line. *See Smith v. Iowa State Univ*., 851 N.W.2d 1, 29 (Iowa 2014) In this case, the State crossed the line. Its behavior was far more egregious than that of a typical bad boss, who lacks the wherewithal, the tools, and the sophistication of the State's top law enforcement agencies.

Paulson, the director of the DCI, claimed Hedlund was a homicidal, suicidal maniac. She knew he wasn't but covertly slid that claim into the infamous 500-page report after the investigation was concluded. Most bad bosses can "paper" a file. Few of them, however, get help "papering" a file from law enforcement officers as Paulson did. PSB officers were mandated by law to conduct an impartial investigation into the Director's allegations against Hedlund. Instead, they helped her paper his file. Paulson and London, the most powerful law enforcement officers in the state, then met with then Gov. Terry Branstad. Typical bad bosses may talk smack about employees, but few could ever get the Iowa Governor to hold a press conference to defame their employees before the entire state.

Furthermore, the defamatory statements were merely the ace the State played after carrying out an insidious campaign that crescendoed after a

month's-long period, during which Hedlund was accused of being a danger to himself and others and then dangerously taken out of service at home by officers in bullet proof vests for all of his neighbors, family and friends to see. That behavior simply goes beyond that of a "typical bad boss," who simply does not have the ability to humiliate an employee in a similar fashion. The DCI is an extraordinarily powerful organization and has the means to cause grave harm to Iowa citizens if it so chooses. In this case, it chose to maliciously malign one its own brethren with the help of the governor and the top leaders of the DPS and the DCI. Such behavior must not and should not be rewarded. To find that it is not actionable will only encourage similar conduct in the future.

B. The State is Not Immune

The State also claims that it is immune from suit under ITCA because all of the named Defendants were acting within the scope of their employment and their acts were the "functional equivalent" of a defamation claim, which is barred under the ITCA. It is true that claims which are "the functional equivalent of a section 669.14 exception to the ITCA" must be brought under the ITCA. *See Smith v. Iowa State University of Science and Technology*, 851 N.W.2d at 21. However, Hedlund's TIED claim is not the functional equivalent of a defamation claim, and the parts of Hedlund's

TIED claim that are based on false statements do not fail merely because they share some factual basis with a defamation claim.

In *Smith*, the State made the identical argument 851 N.W.2d at 20. The *Smith* Court rejected the State's argument, pointing out that "a mere conceivable similarity between issues arising in the claim . . . and issues which may arise in a claim [exempted from the ITCA] is insufficient to establish the nexus of functional equivalency." *Smith*, 851 N.W.2d at 21, citing *Trobaugh v. Sondag*, 668 N.W.2d 577, 584 (Iowa 2003). In support of its argument, the State cited *Minor v. State*, a case in which a mother whose child had been removed from her custody sued the state, claiming tortious infliction of emotional distress. 819 N.W.2d 383, 406–08 (Iowa 2012). Minor alleged that a DHS worker had obtained false information about her and presented it to the court in order to justify the removal of her children and inflict emotional distress on her. *Id.* at 407. To determine whether Minor's claims were the "functional equivalent" of misrepresentation or deceit, the Court looked at whether they would exist at all if the misrepresentation to the court had not happened. *Id.* at 408. The Court determined that all of Minor's claims were the functional equivalent of misrepresentation or deceit because they would not exist at all had the misrepresentation to the court not occurred. *Id.* at 407.

The *Smith* Court distinguished the facts in *Smith* from those in *Minor*, holding that the underlying conduct in *Smith* was "far broader than false statements." *Smith*, 851 N.W.2d at 21. Though the Court acknowledged that some of the "most distasteful conduct" in the *Smith* case was related to false statements, "there was a good deal more." *Id.* Here, it is clear that the underlying conduct related to Hedlund's TIED claim was much broader and more extensive than that required to bring a successful defamation claim.

CONCLUSION

For all the above reasons, Hedlund requests that the trial court's ruling dismissing Hedlund's Fourth Amended Petition be reversed.

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I certify that on **January 3, 2018** I electronically filed this Final Reply Brief with the Clerk of Court using the ECF system, which sent notification of same to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. of App. P. 6.903(1)(g)(1) because this brief contains 6,676 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of issues and certificates).

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 Microsoft Word 2010 in Times New Roman 14 pt.

By: **/s/THOMAS J. DUFF**