

IN THE SUPREME COURT OF IOWA

NO. 15-0695

CHRISTOPHER J. GODFREY,

Plaintiff/Appellant,

vs.

STATE OF IOWA, et al.,

Defendants/Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE BRAD MCCALL, JUDGE
POLK COUNTY NO. LACL 124195

APPELLEES' FINAL BRIEF AND ARGUMENT

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**STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW**

**A. PLAINTIFF’S STATE CONSTITUTIONAL CLAIMS
ARE PREEMPTED BY CHAPTER 216**

CASES AND MISCELLANEOUS:

Moorman Mfg. Co. v. Bair, 254 N.W.2d 737 (Iowa 1977)

State v. Seering, 701 N.W.2d 655 (Iowa 2005)

Fennelly v. A-1 Mach. & Tool Co., 728 N.W.2d 163 (Iowa 2006)

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Smidt v. Porter, 695 N.W.2d 9 (Iowa 2005)

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Iowa Code § 729.1

Borschel v. City of Perry, 512 N.W.2d 565 (Iowa 1994)

Hamilton v. First Baptist Elderly Hous. Found., 436 N.W.2d 336 (Iowa 1989)

**B. DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE
IOWA CONSTITUTION ARE NOT SELF-EXECUTING**

CASES AND MISCELLANEOUS:

Iowa R. App. P. 6.903(2)(g)(1)

Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014)

Kistler v. City of Perry, 719 N.W.2d 804 (Iowa 2006)

State ex rel. Halbach v. Claussen, 250 N.W. 195 (Iowa 1933)

Commonwealth v. Maxwell, 27 Pa. 444 (Pa. 1856)

Pierce v. Green, 294 N.W. 237 (Iowa 1940)

Van Baale v. City of Des Moines, 550 N.W.2d 153 (Iowa 1996)

Rants v. Vilsack, 684 N.W.2d 193 (Iowa 2004)

Redmond v. Ray, 268 N.W.2d 849 (Iowa 1978)

Miller v. Marshall Cnty., 641 N.W.2d 742 (Iowa 2002)

State v. Wiederien, 709 N.W.2d 538 (Iowa 2006)

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Neb. Rev. Stat. § 20-148

Neb. Const. Art. III, § 30

Mass. Gen. Laws Ann. Ch. 12, § 11I

N.J. Stat. Ann. § 10:6-2

Ark. Code Ann. § 16-123-105

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Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)

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Wilkie v. Robbins, 551 U.S. 537 (2007)

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Bosh v. Cherokee Bldg. Auth., 305 P.3d 994 (Okla. 2013)

Perry v. City of Norman, 341 P.3d 689 (Okla. 2014)

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Rockhouse Mountain Property Owners Ass'n, 503 A.2d 1385 (N.H. 1986)

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Bd. of Cnty. Comm'rs of Douglas Cnty. v. Sundheim, 926 P.2d 545 (Colo. 1996)

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Godfrey v. Branstad, 56 F. Supp. 3d 976 (S.D. Iowa 2014)

Hinshaw v. Smith, 436 F.3d 997 (8th Cir. 2006)

Conklin v. State of Iowa, 2015 WL 1332003 (Iowa Ct. App. Mar. 25, 2015)

C. THIS COURT SHOULD NOT CREATE A NEW CAUSE OF ACTION

CASES AND MISCELLANEOUS:

Iowa R. App. P. 6.903(2)(g)(1)

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Terry Carpenter, Inc. v. Neb. Liquor Control Comm'n, 120 N.W.2d 374
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Wooley v. Madison Cnty., Tenn., 209 F. Supp. 2d 836 (W.D. Tenn. 2002)

Cunha v. City of Algona, 334 N.W.2d 591 (Iowa 1983)

D. IOWA PRECEDENT DOES NOT SUPPORT A NEW CAUSE OF ACTION UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE IOWA CONSTITUTION

CASES AND MISCELLANEOUS:

Sun Valley Iowa Lake Ass'n v. Anderson, 551 N.W.2d 621 (Iowa 1996)

State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)

Iowa R. App. P. 6.903(2)(g)(1)

Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014)

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McClurg v. Brenton, 98 N.W. 881 (Iowa 1904)

Krehbiel v. Henkle, 121 N.W. 378 (Iowa 1909)

Girard v. Anderson, 257 N.W. 400 (Iowa 1934)

Van Baale v. City of Des Moines, 550 N.W.2d 153 (Iowa 1996)

Pierce v. Green, 294 N.W. 237 (Iowa 1940)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because it presents issues that require the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

On January 11, 2012, Plaintiff filed a petition alleging violation of Chapter 216 on the basis of sexual orientation and retaliation against all Defendants. On February 8, 2012, Defendants filed their answer and affirmative defenses. On August 6, 2012, Plaintiff filed a motion to amend petition, alleging new claims of unjust enrichment against all Defendants, breach of implied covenant of good faith and fair dealing against the State, breach of contract against all Defendants, violation of procedural and substantive due process against all Defendants, violation of due process against the State and individual Defendants, violation of equal protection against the State, violation of equal protection against all individual Defendants, interference with contract relationship against individual Defendants, interference with prospective business advantage against individual Defendants, defamation against Defendants Reynolds, Albrecht, Branstad, and Boeyink, and extortion against Defendants Findley and Boeyink. On September 13, 2012, Defendants filed their answer and affirmative defenses. On September 26, 2014, Plaintiff filed his second motion to amend petition, alleging new claims

of defamation against Defendant Branstad in his individual capacity. On November 3, 2014, Defendants filed their answer and affirmative defenses.

On November 13, 2014, Plaintiff filed his third motion to amend petition to include Defendant Branstad on the extortion claim, and alleging another claim of defamation against Defendant Branstad in his individual capacity. All counts of the petition, including the constitutional claims (Counts VI-IX), seek monetary damages. On December 31, 2014, Defendants filed a motion for partial summary judgment as to Counts VI-IX (Iowa constitutional claims), seeking summary judgment as a matter of law. Specifically, under the plain language *and* Iowa precedent, the Iowa constitution is not self-executing, and even if it were, Plaintiff's specific Iowa constitutional claims would be preempted by Chapter 216. *See Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 37 (Iowa 1993) (holding that Chapter 216 provides the exclusive remedy for conduct prohibited under that statute). Here, Plaintiff expressly alleges (1) he was deprived of property rights without due process for partisan political purposes and/or "*because of his sexual orientation*" (App. p. A-15-16, Count VI, Pet. ¶ 92) (emphasis added); (2) he was deprived of liberty interests without due process based on Defendants' "illegal . . . demands" and being "never provided with advanced notice of the DEFENDANTS' planned actions" nor "provided with an opportunity to be heard" (App. p. A-17, Count VII, Pet. ¶¶ 97-98); (3) he was deprived of "equal protection

of the laws [when the State] engag[ed] in a practice or custom with the purpose and intent to *discriminate against individuals based on their sexual orientation, including Plaintiff*” (App. p. A-18, Count VIII; Pet. ¶ 104) (emphasis added); and (4) Defendants deprived him of “equal protection of the laws by establishing, maintaining, and/or enforcing policies that *treat homosexual appointive state officers differently than heterosexual appointive state officers*, by slandering them and illegally reducing their salaries” and “[a]lternatively, if the acts complained of were not committed by the individual DEFENDANTS pursuant to an official policy, practice or custom of the State, they were committed by the above-named DEFENDANTS, acting under color of law, with the purpose and intent to *discriminate against homosexual individuals, including Plaintiff*” (App. p. A-19, Count IX, Pet. ¶¶ 112-13) (emphasis added). The district court granted Defendants’ motion for partial summary judgment as to Counts VI-IX following *Conklin v. State of Iowa*, No. 14-0764, 2015 WL 1332003, at *5 (Iowa Ct. App. Mar. 25, 2015).

SUMMARY OF FACTS

Governor Branstad had conversations with numerous Iowa business leaders and they told him that Plaintiff had not been fair and even-handed in his role as Workers’ Compensation Commissioner. App. p. A-42, Answer ¶ 58B. On December 3, 2010, Governor Branstad sent letters to thirty individuals in key

positions in state government requesting that each submit a letter of resignation that Governor Branstad could either accept or reject. Seven of the individuals, who received these letters, including Plaintiff, were serving fixed terms. App. p. A-40-41, Answer ¶ 37. The salary ranges applicable to Plaintiff as an appointed, nonelected official are set by the Iowa legislature with approval by the Governor of the State of Iowa, and by law the Governor of the State of Iowa is given the exclusive authority to set the salary of each appointed, nonelected state employee within that range, including Plaintiff's salary. 2008 Iowa Acts Ch. 1191, § 14. Plaintiff brought this current lawsuit, alleging among other claims, due process and equal protection violation of the Iowa Constitution. Defendants filed a partial motion for summary judgment as to the state constitutional claims (Counts VI-IX) which the district court granted. Plaintiff timely filed for interlocutory appeal.

ARGUMENT

A. PLAINTIFF'S STATE CONSTITUTIONAL CLAIMS ARE PREEMPTED BY CHAPTER 216

This Court need not address the constitutional issue in this appeal. This Court can fully resolve this appeal on the issue of preemption. *See Moorman Mfg. Co. v. Bair*, 254 N.W.2d 737, 749 (Iowa 1977) (“We prefer to decide cases on nonconstitutional grounds when possible. . . . We do not consider constitutional questions unless it is necessary for the disposition of the case.” (citations omitted)); *State v. Seering*, 701 N.W.2d 655, 663 (Iowa 2005) (stating the Iowa Supreme

Court has a “duty to avoid constitutional questions not necessary to the resolution of an appeal”). While the district court did not address preemption in the order, this Court may uphold the district court’s ruling on this ground because the issue was presented to the district court. *See* App. p. A-72, Defs.’ Mot. for Partial Summ. J. Re Counts VI-IX; App. p. A-84-86, Defs.’ Memo. in Support of Partial Mot. for Summ. J. at 8-10; App. p. A-157-158, Defs.’ Reply Br. at 6-7; *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 163, 177 (Iowa 2006) (stating “[w]e may uphold a district court ruling on appeal on grounds not relied upon by the district court if the grounds were presented to the district court”).

It is well settled that Chapter 216 provides the *exclusive* remedy for conduct prohibited by the Iowa Civil Rights Act (“ICRA”). In *Northrup v. Farmland Indus. Inc.*, 372 N.W.2d 193, 196-97 (Iowa 1985), the Iowa Supreme Court held that Chapter 216 provided the exclusive remedy for particular conduct prohibited under that statute. *See also Greenland*, 500 N.W.2d at 38 (stating “alternative claims are thus preempted if [plaintiff] must prove discrimination to be successful in them”); *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 857 (Iowa 2001) (same); *Smidt v. Porter*, 695 N.W.2d 9, 17 (Iowa 2005) (“To the extent the ICRA provides a remedy for a particular discriminatory practice, its procedure is exclusive and the claimant asserting that practice must pursue the remedy it affords.” (cases cited therein)). The Iowa Supreme Court stated that

“[p]reemption occurs unless the claims are separate and independent, and therefore incidental, causes of action.” *Channon*, 629 N.W.2d at 857 (quoting *Greenland*, 500 N.W.2d at 38). That is, “[i]f, under the facts of the case, success on the non-ICRA claims requires proof of discrimination, such claims are not separate and independent.” *Id.* The test for preemption is “whether, in light of the pleadings, discrimination is made an element of” the non-ICRA claims. *Id.* (internal quotation omitted).

Here, in Counts VI-IX of his Third Amended Petition¹:

Count VI: Plaintiff expressly alleges he was deprived of due process when he was demanded to resign for strictly partisan political purposes and/or “*because of his sexual orientation.*” App. p. A-15-16, Pet. ¶ 92 (emphasis added).

Count VII: Plaintiff alleges a due process violation based on Defendants’ “illegal. . . demands” and being “never provided with advanced notice of the DEFENDANTS’ planned actions” nor “provided with an opportunity to be heard.” App. p. A-17, Pet. ¶¶ 97-98.

Count VIII: Plaintiff alleges, “The State of IOWA deprived Plaintiff of equal protection of the laws by engaging in a practice or custom with the purpose and intent to *discriminate against individuals based on their sexual orientation*, including Plaintiff.” App. p. A-18, Pet. ¶ 104 (emphasis added).

Count IX: Plaintiff alleges “DEFENDANTS, while acting under color of law, deprived Plaintiff of equal protection of the laws by establishing, maintaining, and/or enforcing policies that *treat*

¹ In Counts I and II, Plaintiff alleges sexual orientation discrimination and retaliation under Chapter 216 against all Defendants. App. p. A-8-10, Pet. ¶¶ 59-67.

homosexual appointive state officers differently than heterosexual appointive state officers, by slandering them and illegally reducing their salaries” and “[a]lternatively, if the acts complained of were not committed by the individual DEFENDANTS pursuant to an official policy, practice or custom of the State, they were committed by the above-named DEFENDANTS, acting under color of law, with the purpose and intent to discriminate against homosexual individuals, including Plaintiff.” App. p. A-19, Pet. ¶¶ 112-13 (emphasis added).

Plaintiff further *admitted* the “same facts are relevant to each of Plaintiff’s [discrimination and constitutional] claims” in this case. *See* App. p. A-129, Pl.’s Resistance to Defs.’ Mot. at ¶ 3 (“While the same facts are relevant to each of Plaintiff’s claims, the harm he has suffered consists of more than just a civil rights violation. Plaintiff properly brought his claim under the Iowa Civil Rights Act for the discrimination he suffered. Plaintiff also properly brought his claims under the Iowa Constitution for the constitutional wrongs he suffered.”); App. p. A-150, Pl.’s Response to Defs.’ Statement of Undisputed Facts ¶¶ 7, 9 (admitting the equal protection claims allege discrimination based on Plaintiff’s sexual orientation); *see also Channon*, 629 N.W.2d at 857 (“[i]f, under the facts of the case, success on the non-ICRA claims requires proof of discrimination, such claims are not separate and independent”).

Plaintiff’s pleadings and admissions “clearly establish” that the operative facts which he alleges give rise to his claims under Chapter 216 are the same as those upon which he relies for his constitutional claims. *See Channon*, 629 N.W.2d at 858 (agreeing with district court that plaintiff’s pleadings clearly

establish that her emotional distress claim was based on her allegations of discrimination and therefore was preempted). The mere fact that Plaintiff characterizes his sexual orientation discrimination claims as constitutional claims does not change the analysis. *See Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 637-38 (Iowa 1990) (stating ICRA preempts wrongful discharge premised on Iowa Code section 729.1 which makes it a simple misdemeanor to violate Article I, section 4 of the Iowa Constitution). Here, Plaintiff's constitutional claims are not separate and independent from his Chapter 216 claims. In this case, Chapter 216 preempts Plaintiff's constitutional claims given that "in light of the pleadings, discrimination is made an element of" his constitutional claims. *See Greenland*, 500 N.W.2d at 38; *Channon*, 629 N.W.2d at 858 (citing *Borschel v. City of Perry*, 512 N.W.2d 565, 567-68 (Iowa 1994) (holding that civil rights statute preempts claim of wrongful discharge in violation of public policy when the claim is premised on discriminatory acts); *Vaughn*, 459 N.W.2d at 639 (holding that civil rights statute preempted claims of wrongful discharge, unfair employment practices, and termination in bad faith and actual malice because all were premised on religious discrimination); *Hamilton v. First Baptist Elderly Hous. Found.*, 436 N.W.2d 336, 341 (Iowa 1989) (stating that the civil rights statute preempts independent common law actions also premised on discrimination)).

Accordingly, because Plaintiff's alleged state constitutional claims are entirely preempted by Chapter 216, this Court need not consider the constitutional issue. To the extent, however, the Court is inclined to do so, Defendants address the issue as set forth below.

B. DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE IOWA CONSTITUTION ARE NOT SELF-EXECUTING

Plaintiff preserved error on the issue of self-execution but Plaintiff did not provide references to the places in the record where the issue was raised and decided. Iowa R. App. P. 6.903(2)(g)(1). The standard of review for rulings on motions for summary judgment is for correction of legal errors. *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 65 (Iowa 2014). The standard of review for constitutional issues is de novo. *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006).

1. Plain language

Article XII, section 1 of the Iowa Constitution states: "This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. *The general assembly shall pass all laws necessary to carry this constitution into effect.*" (emphasis added). The plain language of the Iowa Constitution provides that it is not self-executing and that legislation *shall* be passed to carry it into effect. The Iowa Supreme Court previously stated that the Iowa Constitution "is in no sense self-executing." *State ex rel. Halbach v. Claussen*, 250 N.W. 195,

200 (Iowa 1933). That is, the constitutional provisions “are directed to the Legislature, whose duty it is to make provision for carrying [the Constitution’s provision] into effect.” *Id.* The Iowa Supreme Court explained, “[a] constitution cannot execute itself. It is a frame or a plan of government. It lays down certain great and fundamental principles . . . but all auxiliary rules which are necessary to give effect to these principles must, from the necessity of the case, come from the legislatures.” *Id.* (quoting *Commonwealth v. Maxwell*, 27 Pa. 444 (Pa. 1856)).

In *Pierce v. Green*, the Iowa Supreme Court specifically analyzed the equal protection clause in the context of taxation and valuation of property. 294 N.W. 237, 243 (Iowa 1940). The *Pierce* court stated that “[t]o accomplish the purpose of the equality and uniformity provisions of the constitution it [was] necessary that there be uniformity, not only in the rate or percentage of taxation, but also in the rate or percentage of the valuation of property, which is taken as the base to which the rate of taxation is to be applied.” *Id.* Significantly, the Iowa Supreme Court stated, “[t]he provisions of the State Constitution, above noted [equal protection clause], are *not self-executing*, but *require legislative action to make them effective.*” *Id.* (emphasis added).

In *Van Baale v. City of Des Moines*, the Iowa Supreme Court analyzed the equal protection clause in the context of an employment case and again stated that it was not self-executing. 550 N.W.2d 153, 157 (Iowa 1996). In *Van Baale*, a

police officer was terminated from employment and he sued his employer, alleging among other claims, violation of equal protection. *Id.* at 155. The Iowa Supreme Court affirmed the district court’s dismissal of the equal protection claim because plaintiff did not assert a viable claim, in that he failed to specify any class of persons treated in a different manner than plaintiff. *Id.* at 157. The Supreme Court explained, “[a]lthough the equal protection clause creates a constitutionally protected right, it is *not* self-enforcing. Equal protection rights may be enforced *only* if the Congress or a legislature provides a means of redress through appropriate legislation.” *Id.* (internal citation omitted) (emphasis added).

“In construing the Iowa Constitution, [the courts] generally apply the same rules of construction that [the courts] apply to statutes.” *Rants v. Vilsack*, 684 N.W.2d 193, 199 (Iowa 2004) (citation omitted). The purpose “is to ascertain the intent of the framers” of the constitution. *Id.* (citation omitted). To achieve this purpose, the courts “‘must look first at the words employed, giving them meaning in their natural sense and as commonly understood.’” *Id.* (quoting *Redmond v. Ray*, 268 N.W.2d 849, 853 (Iowa 1978)). Moreover, “[e]ach term is to be given effect, so that no single part is rendered insignificant or superfluous.” *Miller v. Marshall Cnty.*, 641 N.W.2d 742, 749 (Iowa 2002); *see also State v. Wiederien*, 709 N.W.2d 538, 546 (Iowa 2006) (“It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”

(internal quotations and citation omitted)). If the drafters of the Iowa Constitution had intended the Iowa Constitution to be self-executing, they would have said so, rather than expressly stating that “[t]he *general assembly shall* pass all laws necessary to carry this constitution into effect.” (emphasis added). If the Iowa Constitution was self-executing, these words would be superfluous.

By contrast, Article I, section 18 is the one self-executing provision of the Iowa Constitution’s Bill of Rights with regard to entitlement to money damages, which states that “private property shall not be taken for public use without just compensation first being made.” This provision (the only provision in the Bill of Rights which explicitly authorizes an award of money damages) shows that the drafters of the Iowa Constitution knew how to authorize such an award if they wanted to. *See State ex rel. Halbach*, 250 N.W. at 212 (Kintzinger, J., dissenting) (“Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.” (citation omitted)). The Iowa Constitution does not authorize general lawsuits for money damages other than in the context of eminent domain. *See generally City of Beaumont v. Bouillon*, 896 S.W.2d 143, 149 (Tex. 1995) (rejecting argument to interpret Texas Constitution’s provision permitting money damages specifically for eminent domain to other contexts); *see also Dorwart v. Caraway*, 58 P.3d 128, 136

(Mont. 2002) (“applying a cause of action for money damages for violations of those *self-executing* provisions of the Montana Constitution” (emphasis added)).

Some states that have recognized a direct cause of action under their state’s constitution have clauses different from Iowa’s on this issue. For example, Maryland’s Constitution provides “[t]he General Assembly *shall have power to pass* all such Laws as may be necessary and proper for carrying into execution the powers vested, by this Constitution, in any Department, or office of the Government, and the duties imposed upon them thereby.” Md. Const. art. III, § 56 (emphasis added). In contrast, as it pertains to Article XIII (formation of new counties), the drafters of the Maryland Constitution provided, “[t]he General Assembly *shall pass* all such Laws as may be necessary more fully to carry into effect the provisions of this Article.” Md. Const. art. XIII, § 2 (emphasis added); *see also* Md. Const. art. I, § 7 (“The General Assembly *shall pass* Laws necessary for the preservation of the purity of Elections.”) (emphasis added).

Maryland’s Declaration of Rights, moreover, provides that inhabitants of “Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six.” Md. Const. Decl. of Rights, art. V. Maryland’s highest court used the plain language of its constitution to recognize a cause of action under Articles 24 (due process) and 26 (search and seizure), stating:

By Article 5 of the Maryland Declaration of Rights, all ‘Inhabitants of Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on the Fourth day of July, Seventeen hundred and seventy-six. . . .’ Under the common law of England, where individual rights, such as those now protected by Article 26, were preserved by a fundamental document (*e.g.*, the Magna Carta), a violation of those rights generally could be remedied by a traditional action for damages.

Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921, 923-24 (Md. 1984).²

2. Iowa Legislature Has Not Enacted Necessary Legislation to Authorize Claims for Money Damages for Alleged Violation of the Iowa Constitution

The Iowa legislature has not enacted any law which provides for a cause of action for money damages based on alleged violations of procedural and substantive due process (Counts VI and VII) and equal protection clauses (Counts VIII and IX) of the Iowa Constitution. Unlike the U.S. Congress, which enacted 42 U.S.C. § 1983 to provide for a cause of action against state employees for alleged violations of the United States Constitution, or other states, which passed statutes specifically authorizing suits for monetary damages for alleged violations of the state constitution, the Iowa legislature has not enacted such a statute. *See, e.g.*, Cal. Civ. Code § 52.1(b) (“Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured

² By statute, “the General Assembly of Maryland long ago recognized that one whose rights under certain provisions of the Maryland Constitution [Articles 21, 23, 28, and 29] were violated was entitled to bring an action at law.” *Widgeon v. E. Shore Hosp. Ctr.*, 479 A.2d 921, 926 (Md. 1984).

by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with . . . may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages. . . .”); Me. Rev. Stat. Ann. 5, § 4682³ (authorizing any person “whose exercise or enjoyment” of rights secured by federal constitutional or statutory rights or “rights secured by the Constitution of Maine or laws of the State” to “institute and prosecute in that person’s own name and that person’s behalf a civil action for legal or equitable relief.”); Neb. Rev. Stat. § 20-148 (stating that any person or company who subjects a citizen of the state or person within the jurisdiction of the state “to the deprivation of any rights, privileges or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action. . . .”);⁴ Mass. Gen. Laws Ann. Ch. 12, § 11I (authorizing “[a]ny person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with” to bring a civil action on his own behalf for “injunctive and other appropriate equitable relief as provided for in said

³ Maine’s statute is patterned on section 1983 and disposition of claims under the latter controls claims under the former. *See Forbis v. City of Portland*, 270 F. Supp. 2d 57, 61 (D. Me. 2003).

⁴ Nebraska’s state constitution contains a provision similar to Article XII, section 1 of the Iowa Constitution, *see* Neb. Const. Art. III, § 30 (“The Legislature shall pass all laws necessary to carry into effect the provisions of this constitution.”), and Nebraska legislature enacted a state analogue to section 1983.

section, including the award of compensatory money damages.”); N.J. Stat. Ann. § 10:6-2 (“Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.”); Ark. Code Ann. § 16-123-105 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.”).

The very existence of these statutes shows that state legislatures know how to provide for civil damage lawsuits for violation of a state constitution. The fact that the Iowa legislature has not chosen to do so speaks to the intent of that body. *See Pierce*, 294 N.W. at 243 (stating equal protection clause is “not self-executing, but require[s] legislative action to make [it] effective.”); *Van Baale*, 550 N.W.2d at 157 (stating “equal protection clause . . . is not self-enforcing. . . . [e]qual

protection rights may be enforced only if the Congress or a legislature provides a means of redress though appropriate legislation”). Thus, given the plain language of Iowa’s Constitution and the Iowa legislature not enacting necessary legislation, this Court should hold that the Iowa Constitution is not self-executing and decline to give weight to other jurisdictions which recognized such a cause of action.⁵

3. Iowa Should Not Adopt *Bivens*

Plaintiff requests this Court to ignore the plain language of the Iowa Constitution and disregard *Northrup* and its progeny to create a new cause of action in this employment case by following *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Cf. *Varnum v. Brien*, 763 N.W.2d 862, 878 n.6 (Iowa 2009) (stating that federal precedent is instructive in interpreting the Iowa Constitution, but refusing to “follow it blindly”). In *Bivens*, the plaintiff alleged that federal agents, under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations without a warrant and that unreasonable force was employed in making the arrest. 403 U.S.

⁵ In *McCabe v. Macaulay*, the United States District Court for the Northern District of Iowa, on a motion to dismiss, predicted that the Iowa Supreme Court would recognize a *Bivens* analogue for alleged *First* and *Fourth* Amendment violations. See 551 F. Supp. 2d 771, 785 (N.D. Iowa 2007). The *McCabe* court’s determination, which is not binding authority, is ultimately moot because the state constitutional claims were dismissed for failure to exhaust administrative remedies under Chapter 669. *Id.* at 785-86. Here, Plaintiff’s claims arise from allegations of employment discrimination on the basis of sexual orientation, which can adequately (and exclusively) be remedied by the ICRA.

at 389. In *Bivens*, the United States Supreme Court inferred a cause of action for a violation of the Fourth Amendment of the United States Constitution because the *Bivens* court noted that Congress had not provided another remedy, equally effective, to protect plaintiff's rights in that case. *See* 403 U.S. at 396-97.

The United State Supreme Court explained:

[T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. . . . But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Minneci v. Pollard, 132 S. Ct. 617, 621 (2012) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (internal citations and quotations omitted)).

The cases cited by Plaintiff, and cases decided *after* those cases, all recognize that if alternative remedies exist, then it is inappropriate to imply a constitutional remedy. In *Brown v. State of New York*, the Court of Appeals of New York recognized an implied constitutional remedy in the context of a search and seizure case because the plaintiffs had no other available remedy. 674 N.E.2d 1129, 1138-41 (N.Y. 1996). In *Martinez v. City of Schenectady*, decided by the same court five years after *Brown*, noted the "narrow remedy" established in *Brown* and further emphasized the lack of any alternative remedy, declaratory or

injunctive, that was available to the plaintiffs. 761 N.E.2d 560, 563 (N.Y. 2001). That is, for the *Brown* plaintiffs “it was damages or nothing.” *Id.* In *Bosh v. Cherokee Bldg. Auth.*, the Oklahoma Supreme Court, in answering a certified question, held that detainees in a detention center had a private cause of action under the state’s constitution for excessive force. 305 P.3d 994, 1001 (Okla. 2013). A year later, the Oklahoma Supreme Court clarified the holding in *Bosh* and held that a claim for excessive force directly under the Oklahoma Constitution could not be brought when an alternative remedy, in that case the Oklahoma Governmental Tort Claims Act, was available. *Perry v. City of Norman*, 341 P.3d 689 (Okla. 2014) (noting that *Bosh* was the progeny of *Washington v. Barry*, 55 P.3d 1036 (Okla. 2002)).

Other state courts have refused to imply a constitutional remedy when an adequate remedy is already available. For example, the Connecticut Supreme Court concluded that “as a general matter, we should not construe our state constitution to provide a basis for the recognition of a private damages action for injuries for which the legislature has provided a reasonably adequate statutory remedy. This conclusion accords with the constitutional principle of separation of powers and its requirement for judicial deference to legislative resolution of conflicting considerations of public policy.” *Kelley Property Dev., Inc. v. Town of Lebanon*, 627 A.2d 909, 922 (Conn. 1993). In *Shields v. Gerhart*, the Vermont

Supreme Court concluded that the due process clause of the Vermont constitution was not self-executing, but concluded, however, that the freedom of speech clause was self-executing. 658 A.2d 924, 928-30 (Vt. 1995). The *Shields* court explained that the self-executing nature of the freedom of speech clause did not necessarily mean that monetary damages were appropriate for its violation. *Id.* at 930. The Vermont Supreme Court stated “[w]here the Legislature has provided a remedy, although it may not be as effective for the plaintiff as money damages, we will ordinarily defer to the statutory remedy and refuse to supplement it” and concluded that monetary damage was inappropriate for violations of freedom of speech, as the plaintiff had other adequate remedies. *Shields*, 658 A.2d at 934-35 (citing *King v. Alaska State Housing Auth.*, 633 P.2d 256, 260-61 (Alaska 1981) (Alaska Supreme Court dismissing denial of due process claim because of availability of a contract remedy); *Provens v. Stark Cnty. Bd. of Mental Retardation*, 594 N.E.2d 959, 965-66 (Ohio 1992) (Ohio Supreme Court dismissing damages claim based on the Ohio Constitution by a public employee alleging employer discriminated against her in retaliation because plaintiff’s rights were protected by the Ohio Civil Rights Commission and collective bargaining arbitration such that she had “sufficiently fair and comprehensive remedies”); *Rockhouse Mountain Property Owners Ass’n*, 503 A.2d 1385, 1388-89 (N.H. 1986) (holding damages inappropriate remedy for equal protection violations because statute provided adequate remedy)); *see also*

Wilkerson v. Duke Univ., 748 S.E.2d 154, 159 (N.C. Ct. App. 2013) (stating “in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim” under the state constitution, but “when an adequate remedy in state law exists, constitutional claims must be dismissed”) (internal citations and quotations omitted); *Bd. of Cnty. Comm’rs of Douglas Cnty. v. Sundheim*, 926 P.2d 545, 553 (Colo. 1996) (stating if other adequate remedies exist, including section 1983, it is not appropriate to recognize an implied state constitutional cause of action).

The United States Supreme Court, moreover, has retreated from the holding in *Bivens*:

After twice following the lead of *Bivens*, and recognizing the availability of a constitutional tort action . . . the high court for the past two decades repeatedly has refused to recognize a federal constitutional tort action for money damages in cases presenting that issue. (*Chappell v. Wallace* (1983) 462 U.S. 296, 305, [103 S. Ct. 2362, 76 L.Ed.2d 586] (*Chappell*) [alleged equal protection violations by superior officer in United States military]; *Bush v. Lucas* (1983) 462 U.S. 367, 103 S. Ct. 2404, 76 L.Ed.2d 648 (*Bush*) [alleged First Amendment violation against federal agency employee by superiors]; *United States v. Stanley* (1987) 483 U.S. 669, 107 S. Ct. 3054, 97 L.Ed.2d 550 [alleged due process violations by military personnel during the course of active military service]; *Schweiker v. Chilicky* (1988) 487 U.S. 412, 108 S. Ct. 2460, 101 L.Ed.2d 370 (*Schweiker*) [alleged due process violation by government officials, resulting in deprivation of Social Security benefits]; *FDIC v. Meyer* (1994) 510 U.S. 471, 114 S. Ct. 996, 127 L.Ed.2d 308 (*Meyer*) [alleged due process violation concerning employment termination by federal agency]; *Correctional Services Corp. v. Malesko* (2001) 534 U.S. 61, 68, 122 S. Ct. 515, 520, 151 L.Ed.2d 456, (*Malesko*) [alleged Eighth

Amendment violation by private operator of federal prison halfway house].)

In each of these more recent cases, the high court found . . . that the absence of a “complete” alternative remedy will not support an action for damages, so long as a “meaningful” alternative remedy in state or federal law is available. . . .

Katzberg v. Regents of Univ. of Cal., 58 P.3d 339, 344 (Cal. 2002).

The U.S. Supreme Court, itself, noted their continued retreat from recognizing *Bivens* actions in the employment context:

In *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L.Ed.2d 846 (1979), the Court considered a former congressional employee’s claim for damages suffered as a result of her employer’s unconstitutional discrimination based on gender. The Court found a damages action implicit in the Fifth Amendment’s Due Process Clause. *Id.*, at 248–249, 99 S. Ct. 2264. In doing so, the Court emphasized the unavailability of “other alternative forms of judicial relief.” *Id.*, at 245, 99 S. Ct. 2264. And the Court noted that there was “no evidence” that Congress (or the Constitution) intended to foreclose such a remedy. *Id.*, at 247, 99 S. Ct. 2264.

In *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L.Ed.2d 15 (1980), the Court considered a claim for damages brought by the estate of a federal prisoner who (the estate said) had died as the result of government officials’ “deliberat[e] indifferen[ce]” to his medical needs—indifference that violated the Eighth Amendment. *Id.*, at 16, n. 1, 17, 100 S. Ct. 1468 (citing *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L.Ed.2d 251 (1976)). The Court implied an action for damages from the Eighth Amendment. 446 U.S. at 17–18, 100 S. Ct. 1468. It noted that state law offered the particular plaintiff no meaningful damages remedy. *Id.*, at 17, n. 4, 100 S. Ct. 1468. Although the estate might have brought a damages claim under the Federal Tort Claims Act, the defendant in any such lawsuit was the employer, namely the United States, not the individual officers who had committed the violation. *Id.*, at 21, 100 S. Ct. 1468. A damages remedy against an individual officer, the Court added, would prove a

more effective deterrent. *Ibid.* And, rather than leave compensation to the “vagaries” of state tort law, a federal *Bivens* action would provide “uniform rules.” 446 U.S. at 23, 100 S. Ct. 1468.

Since *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action. These instances include:

(1) A federal employee’s claim that his federal employer dismissed him in violation of the First Amendment, *Bush, supra*, at 386–388, 103 S. Ct. 2404 (congressionally created federal civil service procedures provide meaningful redress);

(2) A claim by military personnel that military superiors violated various constitutional provisions, *Chappell v. Wallace*, 462 U.S. 296, 298–300, 103 S. Ct. 2362, 76 L.Ed.2d 586 (1983) (special factors related to the military counsel against implying a *Bivens* action), *see also United States v. Stanley*, 483 U.S. 669, 683–684, 107 S. Ct. 3054, 97 L.Ed.2d 550 (1987) (similar);

(3) A claim by recipients of Social Security disability benefits that benefits had been denied in violation of the Fifth Amendment, *Schweiker v. Chilicky*, 487 U.S. 412, 414, 425, 108 S. Ct. 2460, 101 L.Ed.2d 370 (1988) (elaborate administrative scheme provides meaningful alternative remedy);

(4) A former bank employee’s suit against a federal banking agency, claiming that he lost his job due to agency action that violated the Fifth Amendment’s Due Process Clause, *623 *FDIC v. Meyer*, 510 U.S. 471, 484–486, 114 S. Ct. 996, 127 L.Ed.2d 308 (1994) (no *Bivens* actions against government agencies rather than particular individuals who act unconstitutionally);

(5) A prisoner’s Eighth Amendment-based suit against a private corporation that managed a federal prison, *Malesko*, 534 U.S. at 70–73, 122 S. Ct. 515 (to permit suit against the employer-corporation would risk skewing relevant incentives; at the same time, the ability of a prisoner to bring state tort law damages action against *private*

individual defendants means that the prisoner does not “lack effective remedies,” *id.*, at 72, 122 S. Ct. 515).

Minneeci, 132 S. Ct. at 622-23.

Here, this Court should not recognize a *Bivens* analogue because as set forth above, Plaintiff not only has a complete and meaningful remedy under Chapter 216—it is his exclusive remedy. As noted above, Plaintiff *admitted* that the “same facts are relevant to each of Plaintiff’s [discrimination and constitutional] claims” in this case, which includes allegations that he was deprived of due process for “partisan political purposes and/or because of his sexual orientation.” *See* App. p. A-129, Pl.’s Resistance to Defs.’ Mot. at ¶ 3; App. p. A-15-16, Pet. ¶ 92. To the extent the Court finds that “partisan political purposes” is not preempted by the ICRA, despite Plaintiff’s admission, Plaintiff still has adequate and available remedies under section 1983, as well as injunctive and declaratory relief.⁶ *See, e.g., Hinshaw v. Smith*, 436 F.3d 997, 1008 (8th Cir. 2006) (discussing section 1983 political affiliation cases) (cases cited therein); *see also Conklin*, 2015 WL 1332003, at *5 (stating that availability of section 1983 cause of action is a factor counseling hesitation for creating an implied cause of action for violation of the Iowa Constitution); *Sundheim*, 926 P.2d at 553 (stating if other adequate remedies

⁶ Plaintiff, in fact, filed a parallel federal action seeking monetary damages under section 1983 for due process and equal protection violations under the U.S. Constitution on the basis of partisan political reasons and sexual orientation. *Godfrey v. Branstad*, 56 F. Supp. 3d 976, 981-82 (S.D. Iowa 2014).

exist, including section 1983, it is not appropriate to recognize an implied state constitutional cause of action).

C. THIS COURT SHOULD NOT CREATE A NEW CAUSE OF ACTION

Plaintiff preserved error on the issue of the judicial branch being the appropriate branch to create an implied constitutional cause of action but Plaintiff did not provide references to the places in the record where the issue was raised and decided. Iowa R. App. P. 6.903(2)(g)(1). The standard of review for rulings on motions for summary judgment is for correction of legal errors. *Freeman*, 848 N.W.2d at 65. The standard of review for constitutional issues is de novo. *Kistler*, 719 N.W.2d at 805.

This Court should not create a new cause of action for alleged violations of the due process and equal protection clauses of the Iowa Constitution in this employment case. Iowa courts “protect the supremacy of the constitution” by determining whether a challenged law is constitutional or unconstitutional. *See, e.g., Varnum*, 763 N.W.2d at 862. That, however, is very different than *creating* a new cause of action for money damages for the violation itself. In this employment case, Plaintiff already has an adequate remedy. The plain language of the Iowa Constitution, moreover, provides that it is not self-executing.

Judicial recognition of such a cause of action despite the plain language of Article XII, section 1 of Iowa’s Constitution would, moreover, raise serious

separation of powers concerns. As the Iowa Court of Appeals correctly stated, “given the express language in article XII, which grants the legislature the power to enact laws to carry the constitutional provisions into effect, it would create a significant separation-of-powers issue were we to judicially imply a remedy in the absence of a statute.” *Conklin*, 2015 WL 1332003, at *4 (citing *Klouta v. Sixth Judicial Dist. Dep’t of Corr. Serv.*, 642 N.W.2d 255, 260 (Iowa 2002) (“The separation-of-powers doctrine is violated ‘if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch.’” (internal citation omitted))). “Clearly, when the constitution explicitly states that it is within the province of the legislature to establish remedies, were we to judicially create a cause of action, it would violate the separation-of-powers doctrine—we would be exercising ‘powers granted by the constitution to another branch.’” *Id.* (quoting *Klouta*, 642 N.W.2d at 260).

Other states have also expressed separation of powers concerns. *See id.* at *3 (citing “*Lewis v. State*, 629 N.W.2d 868, 870 (Mich. 2001) (holding the court could not create a judicial remedy for a violation of the Michigan Constitution because to do so would violate the separation-of-powers doctrine, given its constitution granted the legislature the power to enact laws putting the constitutional provisions into effect); *Bandoni v. State*, 715 A.2d 580, 595 (R.I. 1998) (relying on a provision in the Rhode Island Constitution very similar to

article XII, and concluding, ‘we are of the opinion that the creation of a remedy in the circumstances presented by this case should be left to the body charged by our Constitution with this responsibility’”); *see also Terry Carpenter, Inc. v. Neb. Liquor Control Comm’n*, 120 N.W.2d 374, 380 (Neb. 1963) (“Under the separation of powers which inheres in our system of government, legislative power governing the rights and duties of persons is conferred entirely on the elected legislative body.”). *See also Tallman v. Elizabeth Police Dep’t*, 344 F. Supp. 2d 992, 997 (W.D. Ky. 2004) (“Plaintiffs have asserted claims under. . . the Kentucky State Constitution; however, they do not list any state statutory vehicle, such as § 1983 for federal constitutional violations, for vindicating state constitutional rights.”); *Blinka v. Washington State Bar Ass’n*, 36 P.3d 1094, 1102 (Wash. Ct. App. 2001) (“Washington courts have consistently rejected invitations to establish a cause of action for damages based on constitutional violations ‘without the aid of augmentive legislation . . .’” (internal quotation omitted)); *Hunter v. City of Eugene*, 787 P.2d 881, 884 (Or. 1990) (“Lacking legislative guidance, this court is in a poor position to say what should or should not be compensation for violation of a state constitutional right and what limitations on liability should be imposed. . . . If an implied private right of action for damages for governmental violations of Article I, section 8, and other nonself-executing state constitutional provisions is to exist, it is appropriate that it come from the legislature, not by

action of this court.”); *Jones v. City of Philadelphia*, 890 A.2d 1188, 1213 (Pa. Commw. Ct. 2006) (declining to create new cause of action for violation of state constitution noting that “a decision to create a cause of action for damages for a constitutional violation, in the first instance, is more appropriate for the legislature”); *Wooley v. Madison Cnty., Tenn.*, 209 F. Supp. 2d 836, 844 (W.D. Tenn. 2002) (stating “it is well established that Tennessee does not recognize an implied private cause of action for damages based upon violation of the Tennessee Constitution”); *Lewis v. State of Mich.*, 629 N.W.2d 868, 868 (Mich. 2001) (holding that a judicially inferred private cause of action will not be recognized for violation of the state constitution against the state “because the plain language of this constitutional provision [Article 1, section 2] leaves its implementation to the Legislature”).⁷

D. IOWA PRECEDENT DOES NOT SUPPORT A NEW CAUSE OF ACTION UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE IOWA CONSTITUTION

Plaintiff did not preserve error on Iowa jurisprudence supporting a private cause of action. Plaintiff did not raise this issue with the district court and this Court should not consider it. *See Sun Valley Iowa Lake Ass’n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996) (stating “issues must be raised and decided by the

⁷ In *Cunha v. City of Algona*, the Iowa Supreme Court strongly indicated the very same thing, in the context of municipal defendants, stating that “a cause of action for deprivation of constitutional due process of law does not exist apart from statute.” 334 N.W.2d 591, 594-95 (Iowa 1983).

district court before they may be raised and decided on appeal”); *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (“Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to [appellate court] that was not first sung in trial court.”); Iowa R. App. P. 6.903(2)(g)(1). The standard of review for rulings on motions for summary judgment is for correction of legal errors. *Freeman*, 848 N.W.2d at 65. The standard of review for constitutional issues is de novo. *Kistler*, 719 N.W.2d at 805.

The “historical” cases cited by Plaintiff to support the creation of a new cause of action under the due process and equal protection clauses of the Iowa Constitution are inapposite. As noted above, Plaintiff did not raise this issue before the district court, so it should not be considered by this Court. *See Rutledge*, 600 N.W.2d at 325 (“Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to [appellate court] that was not first sung in trial court.”). The cases cited, moreover, are factually, and more importantly, legally distinguishable from this employment case seeking a cause of action for alleged violations of the due process and equal protection clauses of the Iowa Constitution. In *McClurg v. Brenton*, the case involved trespass of appellant’s home in the middle of the night. 98 N.W. 881, 882-83 (Iowa 1904) (stating it “must be borne in mind that this is not an action for malicious prosecution or malicious arrest, but for an alleged wrongful and unauthorized

trespass”). The issue in *McClurg* was whether the appellant gave consent for appellees to enter his home. *Id.* at 882. The Iowa Supreme Court reversed the trial court directing a verdict against the appellant because given the evidence, the jury could have found that appellant did not give consent. *Id.* at 881, 883. *Krehbiel v. Henkle* is a malicious prosecution and abuse of process case. 121 N.W. 378, 379 (Iowa 1909). In *Girard v. Anderson*, the case involved allegations of only conversion and trespass, arising out of a contract for the sale of a piano which contained language which permitted the seller to enter buyer’s property, with or without force, and without process of law to take possession of the piano if buyer failed to pay the balance due on a specified date. 257 N.W. 400, 400-01 (Iowa 1934). The issue in *Girard* was whether the trial court erred in giving a jury instruction that effectively stated that the contractual language was legal and binding. *Id.* at 401. The Iowa Supreme Court reversed, explaining that such a contractual term was against public policy. *Id.* at 403. These cases cited by Plaintiff, which are common law tort cases, do not lend support to this Court creating a new cause of action for an alleged violation of the due process and equal protection clauses of the Iowa Constitution. *See Van Baale*, 550 N.W.2d at 157; *Pierce*, 294 N.W. at 243.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court affirm the district court's order granting Defendants' Motion for Partial Summary Judgment Re Counts VI-IX.

REQUEST FOR ORAL ARGUMENT

Defendants request oral argument.

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 7,878 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

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

/s/Jeffrey S. Thompson
Signature

10/23/2015
Date