IN THE SUPREME COURT OF IOWA

No. 16-0287

(Polk County No. LACL131913)

Susan Ackerman,

Plaintiff-Appellant,

vs.

State of Iowa, Iowa Workforce Development,
Teresa Wahlert, Teresa Hillary, and Devon Lewis

Defendants-Appellees

Appeal from the Iowa District Court in and for Polk County

The Honorable Scott D. Rosenberg

Plaintiff-Appellant's Final Brief

William W. Graham AT 0002953
Wesley T. Graham AT 0011184
Graham, Ervanian & Cacciatore, L.L.P.
317 6th Avenue, Suite 900
Des Moines, IA 50309
Telephone: 515-244-9400
Facsimile: 515-282-4235
wwg@grahamlawiowa.com
wtg@grahamlawiowa.com
ATTORNEYS FOR PLAINTIFF-APPELLANT

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court because it presents a fundamental and urgent issue of broad public importance requiring prompt determination by the Supreme Court, namely, whether an employee covered by a collective bargaining agreement (a "CBA") has a recognizable tort claim for wrongful discharge in violation of public policy. Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

On January 13, 2015, Plaintiff-Appellant Susan Ackerman ("Ackerman") filed a Petition in the Iowa District Court for Polk County against Defendants the State of Iowa, Iowa Workforce Development ("IWD"), Teresa Wahlert ("Wahlert"), Teresa Hillary ("Hillary") and Devon Lewis ("Lewis"), together herein referred to as "Defendants." On February 10, 2015, Ackerman filed an Amended Petition. On March 10, 2015, Defendants brought a motion to dismiss Counts II through VI of Ackerman's Amended Petition. The District Court denied this motion, in its entirety, on June 10, 2015. On June 25, 2015, the Court granted Ackerman's consented motion to amend her Amended Petition, and Ackerman filed her Second Amended Petition on July 6, 2015. On November 17, 2015, the Court granted Ackerman's consented motion to amend her Second Amended Petition, and Ackerman filed her Third Amended Petition on November 18, 2015 (the "Third Amended Petition").

The Third Amended Petition contained eight counts: Count I for violations of Iowa Code § 70A.28; Count II for defamation; Count III for intentional interference with contractual relations; Count IV for breach of contract – third-party beneficiary; Count V for violation of Iowa Code Chapter 22; Count VI for violation of the First Amendment under 42 U.S.C.

§ 1983; Count VII for intentional infliction of emotional distress; and Count VIII for wrongful discharge in violation of public policy. (Appendix ("App.") at 9-14). Counts VII and VIII were new theories of relief, asserted after Ackerman notified the State Appeal Board that she was withdrawing these claims from consideration pursuant to Iowa Code § 669.5. (*Id.* at 13-14).

On November 30, 2015, Defendants filed a Motion to Dismiss Count VIII of the Third Amended Petition, Ackerman's claim of wrongful discharge in violation of public policy (the "Motion to Dismiss"). The Defendants' sole argument in support of their motion was that Ackerman was not an at-will employee, but covered by a CBA, and therefore Ackerman was barred from bringing the claim for wrongful discharge in violation of public policy. (*Id.* at 16-21).

The District Court heard oral arguments on the Motion to Dismiss Count VIII on January 11, 2016. On January 26, 2016, the District Court issued its Ruling and Order on Defendants' Motion to Dismiss Count VIII of Plaintiff's Third Amended Petition and granted the Defendants' motion, resulting in dismissal of Count VIII of the Third Amended Petition (the "Ruling").

The Ruling first summarized the parties' respective arguments, and

the tort for wrongful discharge in violation of public policy. While it stated that Ackerman was relying on the Iowa Supreme Court decision *Conaway v. Webster City Prods., Co.*, 431 N.W.2d 795 (Iowa 1988) for her position that an employee covered by a CBA has a recognizable wrongful discharge tort claim, and also referenced two other Iowa Supreme Court decisions in support of its Ruling, the District Court primarily relied on the recent United States Court of Appeals for the Eighth Circuit case, *Hagen v. Siouxland Obstetrics & Gynecology, PC*, 799 F.3d 922 (8th Cir. 2015), in concluding that the wrongful discharge claim "under Iowa law is a narrow, well recognized exception to the at-will doctrine." (App. at 35 ("The 8th Circuit Court of Appeals essentially concluded that if an employee has other avenues to challenge his or her termination where the employee can argue that there was no just cause for the termination for engaging in protected activity then the tort of wrongful discharge does not apply.") (citing *Hagen*, 799 F.3d at 928-30)).

The District Court concluded that Ackerman's "employment is subject to a collective bargaining agreement, negotiated for her and others in her person." (App. at 36). Based on the Eighth Circuit's decision in *Hagen*, the District Court ruled that "[t]o the extent that the [collective bargaining] agreement provides for a remedy relating to wrongful discharge, Plaintiff is

not allowed to apply the narrow exception Iowa courts have reserved for at-will employment to her current situation," and therefore sustained Defendants' motion and dismissed Count VIII of Ackerman's Third Amended Petition. (*Id.*).

Ackerman timely filed her Application for Interlocutory Appeal from the Polk County District Court's Ruling of January 26, 2016, which the Iowa Supreme Court granted on March 25, 2016.

STATEMENT OF FACTS

Ackerman was an Administrative Law Judge ("ALJ") employed by IWD in its unemployment insurance appeals bureau (the "Bureau"). (App. 1-2). Ackerman was an ALJ with IWD from 2000 to 2015. (*Id.*).

During her first formal evaluation with IWD in 2002, Ackerman received a "meets or exceeds expectations." (*Id.* at 2). From 2003 through 2010, Ackerman received "exceeds expectations" in seven annual reviews and only one "meets expectation" in 2006. (*Id.*).

Ackerman's next formal review was completed by Wahlert on August 9, 2013. (*Id.*). Wahlert indicated Ackerman met expectations in two areas but provided no rating in the other six areas. Additionally, no overall rating was provided by Wahlert. (*Id.*). For her 2013-14 annual performance review, Ackerman received a "does not meet expectations / meets

expectations" rating, but that rating was in retaliation for Ackerman's protected conduct, as described in the Third Amended Petition. (*Id.*).

Wahlert was a political appointee by Governor Branstad, having been appointed as director of IWD in 2011. (*Id.*).

Since her appointment, Wahlert has interfered with the Bureau's work, attempting to turn a fair and impartial administration of unemployment benefits into a process that is biased in favor of employers over employees. (*Id.*).

Wahlert, Hillary and Lewis engaged in a systematic effort to harass and bully the Bureau's ALJs and other employees for purposes of either getting the ALJs to rule in favor of employers, or force out of the Bureau the ALJs who would not bend to Wahlert's will. (*Id.* at 4).

Beginning in the summer of 2013, Ackerman repeatedly made a concerted effort to stand up against Wahlert's, Hillary's and Lewis's actions, repeatedly speaking out on behalf of herself and her co-workers. (*Id.*).

On December 3, 2013, Ackerman went on FMLA leave for worsening depression due to job-related stress. Ackerman returned to work on December 30, 2013 and worked full-time in the office (*Id.* at 5).

Ackerman's sick leave is a contractual benefit and doctor's notes can only be requested if the employer suspects abuse. (*Id.*). Ackerman did not

abuse sick leave, but Wahlert and others at her direction questioned Ackerman about sick leave requests and demanded medical excuses while other employees requesting the same amount of time were not required to obtain medical excuses. (*Id.*). This further harassment caused Ackerman to go out on FMLA leave from March 6, 2014, through March 14, 2014. (*Id.* at 6).

In 2014, State Senator Bill Dotzler released a letter he sent to the Department of Labor requesting it investigate Wahlert's efforts to harass and improperly influence Bureau ALJs. (*Id.*). Senator Dotzler submitted supporting documents with his letter to the DOL, which included certain e-mail communications between Ackerman and Wahlert and Hillary. (*Id.*). Consequently, these documents became public. (*Id.*). Ackerman did not personally provide these e-mails to Dotzler. (*Id.*). In response to the publication of the communications, Wahlert subjected Ackerman to a disciplinary proceeding conducted by Jon Nelson. (*Id.*).

Ackerman again had to take FMLA leave from July 9, 2014, through August 4, 2014, due to anxiety and depression resulting from deteriorating work conditions. (*Id.* at 6-7).

In August 2014, Wahlert e-mailed Ackerman to set up a time for Ackerman's yearly evaluation. (*Id.* at 7). Subsequently, the Senate

Government Oversight Committee (the "Committee") subpoenaed Wahlert, Hillary, Lewis, Ackerman and other ALJs to testify before the Committee. (*Id.*). Wahlert then delayed the evaluations until after the ALJs testified, implying that the evaluations might turn on whether Ackerman and the other ALJs testified negatively against Wahlert, Hillary and Lewis. (*Id.*).

Ackerman provided testimony to the Committee regarding the Bureau's work environment, and the pressures put on the ALJs by Wahlert to render decisions in favor of employers. (*Id.*). She testified that the ALJs are powerless to stop what Wahlert is doing, but that they will continue to protest. (*Id.*).

Wahlert subsequently conducted Ackerman's yearly evaluation in November 2014, during which Wahlert gave Ackerman a "does not meet expectations / meets expectations" rating. (*Id.* at 7-8). This negative evaluation – the first in Ackerman's tenure at IWD – was in retaliation for Ackerman's testimony and other ongoing protected conduct, and was based on erroneous information and faulty application of the rating criteria. (*Id.*).

On December 11, 2014, Ackerman was suspended by IWD pending the completion of an investigation into an allegation of misconduct in the Bureau. (*Id.* at 8). There were no grounds for the suspension, and it was in retaliation for Ackerman's protected conduct. (*Id.*).

On January 11, 2015, Wahlert resigned as director of IWD and Beth Townsend was appointed acting director of IWD. (*Id.*). Townsend was subsequently appointed as director of IWD on February 3, 2015. (*Id.* at 9).

On January 30, 2015, after keeping Ackerman on suspension for over seven weeks, IWD terminated Ackerman based on the false allegation of misconduct in the Bureau. (*Id.* at 8). As with the suspension, there are no grounds for the termination, and it is in retaliation for Ackerman engaging in protected conduct. (*Id.*).

ARGUMENT

I. THE DISTRICT COURT ERRED BY CONSIDERING THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT AND PLAINTIFF'S GRIEVANCE FILING IN RULING ON DEFENDANTS' MOTION TO DISMISS.

A. Preservation of Error.

Ackerman preserved error by arguing to the lower court that examination of the CBA and any remedy it provides was inappropriate for a motion to dismiss, and further by timely filing an Application for Interlocutory Appeal from the Ruling and Order on Defendants' Motion to Dismiss Count VIII of Plaintiff's Third Amended Petition.

B. Standard of Review.

This Court's review of a district court's granting of a motion to dismiss is for correction of errors at law. *Mueller v. Wellmark, Inc.*, 818

N.W.2d 244, 253 (Iowa 2012). The Court's review is "limited to the issues raised and allegations contained in the petition. The well-pleaded facts are taken as true, and any ambiguity or uncertainty in the pleading is resolved in favor of the party resisting the motion." *Warford v. Des Moines Transit Auth.*, 381 N.W.2d 622, 623 (Iowa 1986).

C. Argument.

A motion to dismiss "cannot allege new facts not found in the pleadings unless judicial notice can be taken of the additional facts." *Warford*, 381 N.W.2d at 623; *Curtis v. Bd. of Supervisors*, 270 N.W.2d 447, 448 (Iowa 1978). The Court accepts "as true the facts alleged in the petition and typically do[es] not consider facts contained in either the motion to dismiss or any of its accompanying attachments." *Dier v. Peters*, 815 N.W.2d 1, 4 (Iowa 2012).

Ackerman made one general reference to the CBA in her Third Amended Petition, in paragraph 44, in which she stated that "IWD has failed to follow the protocols regarding Plaintiff's suspension required by the collective bargaining agreement covering Plaintiff, in further retaliation for Plaintiff's protected conduct." (App. at 8). Ackerman, in her Third Amended Petition, never referred to the specific terms of the CBA, nor specifically incorporated by reference the CBA into the allegations of the

Third Amended Petition.

In their motion, Defendants argued that Ackerman could not assert a claim for wrongful discharge in violation of public policy because the CBA provides Ackerman an adequate avenue to challenge her termination, thereby making the tort claim unnecessary. (App. at 19). Defendants not only provided the court with the website address to review the CBA, but also attached to their motion Ackerman's AFSCME Council 61 Grievance Form, stating her grievance related to her termination. (*Id.* at 19, 21). Defendants argued that the court could take judicial notice of the CBA because, they claimed, the CBA is part of the public record. (*Id.* at 19). At oral arguments, Defendants' counsel argued that the Court could "take notice of that collective bargaining agreement," because "it's a public record as posted on the Department of Administrative Services website." (*Id.* at 91-92). Defendants' counsel stated that "Section 10" of the CBA "specifically incorporates no reprisal language of the whistleblowing statute [Iowa Code § 70A.28] into the [CBA]. . . . [T]here's a specific provision in the contract that deals exactly with what Ms. Ackerman is claiming of here." (*Id.* at 93).

The court, at oral argument and in its Ruling, accepted Defendants' claim that it could consider the CBA's terms when rendering its decision. (*Id.*; App. at 35-36). The court and Defendants' counsel engaged in the

following discussion at the hearing:

> THE COURT: So you're saying she still has a right under the contract.
>
> MR. PETERZALEK: She, under the contract, could raise, and, in fact, is allowed to raise, the issue of her being terminated as a reprisal for her whistleblowing violation of the contract in a grievance and arbitration process. Absolutely.
>
> THE COURT: So the protection that the plaintiff is seeking here that violation of public policy or as a matter of public policy, that's still a protection she has.
>
> MR. PETERZALEK: It's a protection she has expressly under the contract and referring to Section 10 of the AFSCME contract.

(*Id.* at 93).

In its Ruling, the court concluded that Ackerman's "employment is subject to a collective bargaining agreement, negotiated for her and others in her person," and ruled that "[t]o the extent that the [collective bargaining] agreement provides for a remedy relating to wrongful discharge, Plaintiff is not allowed to apply the narrow exception Iowa courts have reserved for at-will employment to her current situation." (*Id.* at 36). In doing so, the court improperly considered the terms of the CBA.

While Ackerman alleged, in her Third Amended Petition, that her employment was subject to the CBA, she did not attach nor incorporate by reference the terms of the CBA. She simply alleged that "IWD has failed to follow the protocols regarding Plaintiff's suspension required by the

collective bargaining agreement covering Plaintiff, in further retaliation for Plaintiff's protected conduct." (*Id.* at 8). In making this one, general reference to the CBA, Plaintiff was not incorporating into her Third Amended Petition the entirety of the CBA and all of its terms. The CBA is outside the scope of the Third Amended Petition, making the court's consideration of it inappropriate.

By referring the Court to the terms of the CBA in their motion and at oral arguments, Defendants were alleging new facts not found in the pleadings, which is inappropriate "unless judicial notice can be taken of the additional facts." *Warford*, 381 N.W.2d at 623. But an agreement, such as the CBA, "is not the type of evidence that is 'common knowledge or capable of certain verification.'" *Id.* (Concluding that the "trial court should not have considered [an intergovernmental] agreement in its disposition of defendants' motion because it was outside the petition and not subject to judicial review."). Therefore, it was improper for the court to take judicial notice of the CBA. It was an error of law for the court to consider the CBA and its terms in concluding that "the [collective bargaining] agreement provides for a remedy relating to wrongful discharge," and this Court should reverse the lower court's ruling.

II. THE DISTRICT COURT ERRED BY HOLDING THAT THE TORT OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY WAS NOT AVAILABLE TO PLAINTIFF BECAUSE SHE WAS PARTY TO A COLLECTIVE BARGAINING AGREEMENT.

A. Preservation of Error.

Ackerman preserved error by timely filing an Application for Interlocutory Appeal from the Ruling and Order on Defendants' Motion to Dismiss Count VIII of Plaintiff's Third Amended Petition.

B. Standard of Review.

This Court's review of a district court's granting of a motion to dismiss is for correction of errors at law. *Mueller*, 818 N.W.2d 244, 253 (Iowa 2012). The purpose of a motion to dismiss is "to test the legal sufficiency of the petition." *Geisler v. City Council of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009). The Iowa Rules of Civil Procedure require only that a plaintiff set forth in the Petition "a short and plain statement of the claim showing that the pleader is entitled to relief." Iowa R. Civ. P. 1.403(1). A motion to dismiss is to be granted when a plaintiff fails to state a claim upon which relief can be granted. Iowa R. Civ. P. 1.421(1)(f).

"In determining whether to grant the motion to dismiss, a court views the well-pled facts of the petition 'in the light most favorable to the plaintiff with doubts resolved in that party's favor.'" *Geisler*, 769 N.W.2d at 165.

"A motion to dismiss is properly granted 'only when there exists no conceivable set of facts entitling the non-moving party to relief.'" *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004). "Such a motion . . . is sustainable only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts which could be proved in support of the claim asserted." *Berger v. General United Group, Inc.*, 268 N.W.2d 630, 633 (Iowa 1978).

C. Argument.

1. Under Iowa law, Employees Covered by a CBA have a Recognizable State Tort Claim for Wrongful Discharge in Violation of Public Policy.

The tort claim of wrongful discharge in violation of public policy is an "exception to the employment-at-will doctrine." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761 (Iowa 2009). The elements of the cause of action are: "(1) existence of a clearly defined public policy that protects employee activity; (2) the public policy would be jeopardized by the discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason for the employee's discharge; and (4) there was no overriding business justification for the termination." *Id.*

But simply because the tort is an exception to the employment-at-will doctrine, that does not make the claim only available to at-will employees.

The Iowa Supreme Court has never held as much, nor has the Court ever listed being an at-will employee as an element of the claim. *Id.*

The Supreme Court's decision in *Conaway* held that employees covered by a CBA still had "recognizable state tort claims" of wrongful discharge in violation of public policy, which were not preempted by the federal Labor Management Relations Act ("LMRA"). *Conaway v. Webster City Prods. Co.*, 431 N.W.2d 795, 800 (Iowa 1988). In *Conaway*, a decision issued just two months after the Court first recognized the wrongful termination tort in *Springer v. Weeks and Leo Co.*, 429 N.W.2d 558 (Iowa 1988), the Court examined whether two employees could bring wrongful discharge tort claims despite being covered by a CBA subject to the LMRA's requirement that suits for violation of CBAs be brought in federal court. *Conaway*, 431 N.W.2d at 796. The CBA contained a provision stating that employees may be discharged for "just cause." *Id.*; *cf.* Iowa Code § 20.7(3) (public employees subject to a CBA cannot be suspended or discharged except for "proper cause"). The two plaintiffs brought actions against the defendant for violation of the CBA and for wrongful discharge in violation of public policy. *Conaway*, 431 N.W.2d at 796. Defendant brought a motion to dismiss claiming that the tort actions were preempted by the LMRA, which the lower court granted. *Id.*

The Supreme Court reversed, holding that "the retaliatory tort actions relied on here are independent of the collective-bargaining agreement and are therefore not preempted by section 301 of the LMRA. This is so because resolution of these actions does not require an interpretation of the collective-bargaining agreement." *Id.* at 799; *see also McMicheal v. MidAmerican Energy Co.*, 2012 Iowa App. LEXIS 932, *12-13 (Iowa Ct. App., Oct. 31, 2012) ("Because [the plaintiff's] state law [wrongful discharge] claim can be resolved without interpreting the CBA, it is independent of the agreement.") (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988)). While the *Conaway* Court focused on the question of preemption as opposed to which employees had access to relief under the wrongful discharge tort, it nevertheless reached the conclusion that a CBA does not bar an employee subject to it from bringing a claim for wrongful discharge in violation of public policy.

Plaintiff is in the exact same position as the plaintiffs in *Conaway* – she is covered by a CBA and she cannot be suspended or discharged except for "proper cause." Iowa Code § 20.7(3). And, as in *Conaway*, being covered by a CBA and a "cause" provision thereunder should not prevent Plaintiff from asserting her "recognizable state tort claim[]" of wrongful discharge in violation of public policy.

Based on *Conaway* alone, the lower court should have denied Defendants' motion. At the pleadings stage, the court should have held that Ackerman, as an employee covered by a CBA, had a "recognizable state tort claim[]" under *Conaway*, and denied Defendants' motion. It should have held that Ackerman had stated a claim upon which relief could be granted. Instead, the court only referenced that Ackerman was relying on the *Conaway* decision for her position, (App. at 35), but it did not discuss *Conaway* in any detail, nor state why it was not following *Conaway*'s holding that employees covered by a CBA still had a recognizable claim for wrongful discharge in violation of public policy.

2. Incorporation of Iowa Code § 70A.28's Anti-Retaliation Language into the CBA Should Not Bar Plaintiff from Pursuing Her Claim for Wrongful Discharge in Violation of Public Policy.

Defendants argued at the hearing that *Conaway* was not applicable because, while in that case resolution of the claims did "not require an interpretation of the collective-bargaining agreement," such an interpretation is necessary in this case. Again, improperly referring to the terms of the CBA, which should not have been considered for purposes of a motion to dismiss, Defendants argued that the public policy on which Ackerman claims Defendants violated by terminating her was incorporated into the

CBA, and, therefore, resolution of her tort claim would require interpretation of the CBA. (App. at 92-93).

To explain, Ackerman alleges that she was discharged in retaliation for engaging in protected activity, including, but not limited to, testifying at the Committee hearing and disclosing information to public officials about Wahlert, Hillary and Lewis that evidenced a violation of law or rule, mismanagement, a gross abuse of funds, and/or an abuse of authority. (*Id.* at 14). Ackerman's activity is protected by Iowa Code §70A.28(2), which the Supreme Court has held to "articulate public policy by specifically prohibiting employers from discharging employees for engaging in certain conduct or other circumstances." *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 283 & n. 3 (Iowa 2000) (citing Section 79.28, which later was recodified at Section 70A.28).

Section 10 of Article II of the CBA specifically incorporates this "no reprisal" language of Section 70A.28(2). But simply because the CBA borrows language from Iowa Code does not mean that the court will be analyzing the terms of the CBA. Instead the court will be interpreting the statute which was incorporated into the CBA. "[R]esolution of [Ackerman's claim] does not require an interpretation of the collective-bargaining

agreement," *Conaway*, 431 N.W.2d at 799, and therefore Ackerman should be allowed to pursue her claim.

Additionally, it would go against public policy to bar Ackerman's wrongful discharge in violation of public policy claim based on the CBA incorporating the statutory language upon which her public policy claim is based. Such a holding would then allow employers to incorporate statutory language and other public policy language into CBAs and employment agreements, but severely limit the damages that would otherwise be available to the employee under the wrongful discharge claim. *Jasper*, 764 N.W.2d at 769-70 ("The legal remedy provided for victims of the tort covers the complete injury, including economic loss such as wages and out-of-pocket expenses, as well as emotional harm."). To allow employers to do so would completely undermine the reason tort exists: "[T]o protect those with a compelling need for protection from wrongful discharge." *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 303 (Iowa 2013). Furthermore, to allow employers to incorporate public policy into their contracts but then limit the remedies for breaches of the same for purposes of exempting themselves from wrongful discharge tort claims would in fact be a violation of Iowa law. *Jasper*, 764 N.W.2d at 761 ("While we continue to adhere to the doctrine of employment at will, we have always recognized

that parties may not incorporate matters into contracts that are contrary to our public policy.").

The lower court's ruling, and Defendants' arguments which the court accepted, would allow employers to contractually eviscerate the protections provided by the tort claim, and give employees working under a CBA less protection against violations of public policy than at-will employees. Restatement of the Law, Employment Law § 5.01, cmt. G (calling into question those jurisdictions which have excluded employees covered by just-cause provisions of CBAs from protection provided by the tort). Only a few courts that have reached the substantive question of whether, regardless of the federal preemption issue, the tort affords any protection for employees covered by a CBA, have concluded that it does not do so. *See, e.g.*, *Klepsky v. United Parcel Serv., Inc.*, 489 F.3d 263, 271 (6th Cir. 2007) (applying Ohio law); *Cullen v. E.H. Freidrich Co.*, 910 F. Supp. 815, 821 (D. Mass 1995) (applying Massachusetts law); *Paradis v. United Tech., Pratt & Whitney Div.*, 672 F. Supp. 67, 69-70 (D. Conn. 1987) (applying Connecticut law).

Most courts have reached the opposite conclusion – that employees covered by a CBA may still pursue a claim for wrongful discharge in violation of public policy. *Davies v. Am. Airlines*, 971 F.2d 463, 469 (10th

Cir. 1992) (holding that Oklahoma would permit a wrongful discharge action by an employee who could be fired only for "just cause" under a CBA); *Gonzalez v. Prestress Eng. Corp.*, 503 N.E.2d 308, 312 (Ill. 1986); *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280, 1283 (Ill. 1984) ("We consider, however, that in order to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective-bargaining agreement."); *Coleman v. Safeway Stores*, 752 P.2d 645, 652 (Kan. 1988) ("[E]mployees covered by collective bargaining agreements who are wrongfully discharged in violation of state public policy . . . have a tort cause of action for retaliatory discharge"); *Le Pore v. Nat'l Tool & Mfg. Co.*, 557 A.2d 1371, 1372 (N.J. 1989) ("[A]n employee covered by a collective-bargaining agreement, like an at-will employee, should be allowed to maintain an action for a wrongful discharge made in retaliation for reporting safety and health violations."); *Retherford v. AT&T Commc'ns*, 844 P.2d 949, 960 (Utah 1992) ("When an employer's act violates both its own contractual just-cause standard and a clear and substantial public policy, we see no reason to dilute the force of the double sanction. In such an instance, the employer is liable for two breaches, one in contract and one in tort. It therefore must bear the consequences of both"); *Smith v. Bates Tech.*

College, 991 P.2d 1135, 1141 (Wash. 2000) (holding that "while the contractual remedies available to certain employees redress violations of the underlying employment contract, these remedies do not protect an employee who is fired not only 'for cause' but also in violation of public policy. [Defendant's] position thus illogically grants at-will employees *greater* protection from these tortious terminations due to an erroneous presumption the contractual employee does not 'need' such protection").

These cases have held that employees covered by a CBA should be entitled to the protection afforded by the tort essentially for the same reason that this Court held in *Conaway* that an employee's wrongful discharge claim was not preempted by a CBA, despite the CBA having a "just cause" termination requirement. That is because, as stated by the Illinois Supreme Court:

> Where, as here, the State tort claim is based on a duty and right firmly rooted and fixed in an important and clearly defined public policy, evaluation of the tort claim does not in any way depend upon an interpretation of the "just cause" provision in a labor contract. Certainly a determination of whether an employee has been discharged in violation of clearly mandated public policy in no way turns upon whether the discharge was or was not "just" within the meaning of a labor contract. Were it otherwise, the public policy of this State would become a mere bargaining chip, capable of being waived or altered by the private parties to a collective bargain.

Gonzalez v. Prestress Eng. Corp., 503 N.E.2d at 312.

Employees subject to a CBA, such as Ackerman, should not be barred from pursuing a claim for wrongful discharge in violation of public policy merely because they are subject to a CBA. At the very least they should be allowed to plead the claim. Then, at the appropriate fact-finding stage of a case, a trial court would determine if in fact the CBA provides the same protections as afforded by the tort, thereby alleviating the need for access to the claim.

3. The District Court Erred by Relying on the Eighth Circuit's *Hagen* Decision.

The lower court focused its analysis on the Eighth Circuit decision, *Hagen v. Siouxland Obstetrics & Gynecology, P.C.*, 799 F.3d 922 (8th Cir. 2015). (App. at 35-36). The Iowa Supreme Court has held that while it gives "federal decisions deference and consideration," the Iowa Supreme Court has "final say" regarding Iowa law. *Pearson v. Robinson*, 318 N.W.2d 188 (Iowa 1982) ("Indeed defendants argue [a federal decision] is 'controlling' here; but, of course, it isn't."). Not only is the *Hagen* decision not binding precedent, its facts are inapposite. The plaintiff in that case was not subject to a CBA, but an individual employment agreement. The *Hagen* case involved a claim for wrongful discharge in violation of public policy brought by a doctor who was terminated because he obtained advice from several attorneys and filed a report with a hospital which criticized one of his

partners and two nurses about care that was provided to a woman before she gave birth to a stillborn child. *Hagen v. Siouxland Obstetrics & Gynecology, P.C.*, 964 F. Supp. 2d 951, 957-59 (N.D. Iowa 2013).

The plaintiff in *Hagen* was covered by an individual employment agreement, so the question became whether, as a contract employee, he could bring the wrongful discharge tort. The United States District Court for the Northern District of Iowa first certified to the Iowa Supreme Court three questions, one of which was whether Iowa law allows a contractual employee to bring a claim for wrongful discharge in violation of public policy, or whether the tort is available only to at-will employees. *Hagen*, 964 F. Supp. 2d 951. The Court declined to answer the certified questions, because it was split on the initial question of whether the conduct of the employee constituted protected conduct. *Hagen v. Siouxland Obstetrics & Gynecology, P.C.*, 849 N.W.2d 25 (Iowa 2014). Because it was split on the first question, it declined to answer the remaining two, including the question of whether Iowa law allows a contractual employee to bring a claim for wrongful discharge in violation of Iowa public policy. *Id.*

After the Iowa Supreme Court declined to answer the certified question, the Northern District, based on its prior Order certifying the question to the Iowa Supreme Court, *Hagen*, 964 F. Supp. 2d at 989-92, in

which it concluded Iowa's wrongful discharge tort should apply to both at-will and contractual employees, upheld the jury verdict in favor of plaintiff on the wrongful discharge claim. *Hagen v. Siouxland Obstetrics & Gynecology, P.C.*, 23 F. Supp. 2d 991, 1004 (N.D. Iowa 2014). The Eighth Circuit reversed, but its holding is much more limited than the lower court determined it to be.

The Eighth Circuit noted that the "Supreme Court of Iowa has consistently and carefully applied its wrongful discharge tort precedents **to the specific facts of each case**," *id.* at 930 (emphasis added), and thereby undertook an analysis of whether the plaintiff doctor needed the protection afforded by the wrongful discharge in violation of public policy tort claim. The Eighth Circuit determined that the plaintiff did not need such protection, as he had an adequate remedy at law pursuant to his "for-cause termination provision in a comprehensive Employment Agreement negotiated by [Plaintiff] when he joined his father's medical practice . . . ." *Id.* While holding that this plaintiff had an adequate remedy for wrongful discharge, the Eighth Circuit also concluded that the Iowa Supreme Court would extend the wrongful discharge tort to cover contractual employees who had a "without-cause" termination provision in their contract. *Id.* at 929.

The Eighth Circuit did not address the *Conaway* case, as it was

dealing with an individual employment contract, not a CBA. Similarly, it did not address the cases from other jurisdictions which held that an employee covered by a CBA could bring a wrongful discharge claim. Instead the Eighth Circuit only noted that "[c]ourts in other States are divided over whether to limit the tort to at-will employees," and cited to *Willitts v. Roman Catholic Archbishop of Boston*, 581 N.E.2d 475, 479 (Mass. 1991) and *Keveney v. Mo. Military Acad.*, 304 S.W.2d 98, 102-03 (Mo. 2010). Both of those cases, however, involved teachers subject to individual employment agreements, not CBAs.

So even if the Court decides to follow the Eighth Circuit's holding, the only relevant aspect of that ruling is the court reiterating that the validity of these tort claims must be determined by the "specific facts of each case." Therefore, under *Hagen*, the lower court still should have denied the motion to dismiss because it was premature to make such fact-specific determinations at that early stage of the litigation.

Defendants' position – stated both in their motion and at oral arguments – is that the tort for wrongful discharge in violation of public policy is only available to at-will employees:

> THE COURT: And the State's view is then wrongful discharge would only apply to a non-collective bargaining or non-employee at will.

> MR. PETERZALEK: Well, it would apply to essentially an at-will employee only. It wouldn't apply to people that are statutorily protected, protected by a collective bargaining agreement or employment contract, which was the case in Hagen.

(App. at 88; *id.* at 17).

The lower court seems to have adopted Defendants' argument that *Hagen* creates a blanket ban on employees subject to either a CBA or individual employment contract from being able to seek recourse provided by the tort of wrongful discharge in violation of public policy. As discussed above, that is farther than the Eighth Circuit went in *Hagen*. Even if the Court agrees with the lower court and determines that *Hagen* is persuasive, it should still not, as the lower court did, conflate individual employment contracts with CBAs.

Instead, the Court should note the distinction between employees subject to CBAs and employees subject to an individual employment agreement, a distinction that supports allowing an employee subject to a CBA to pursue a wrongful discharge claim even if employees subject to individual contracts are not allowed to do so. The distinction is that an employee entering into an employment agreement does so on her own accord, while, as noted by the Kansas Supreme Court, "decisions to enter collective bargaining agreements are made by majority vote." *Coleman*, 752

F.2d at 651. "Thus, a number of employees who may have voted not to enter into the agreement are forced to accede to the will of the majority. The employee subject to a collective bargaining agreement whose individual right has been violated, is forced to submit his grievance under an agreement which was never designed to protect individual workers, but to balance the individual against the collective interest." *Id.* Therefore, employees subject to a CBA have a "compelling need for protection from wrongful discharge," *Dorshkind*, 835 N.W.2d at 303, and should be allowed to pursue a wrongful discharge claim.

This Court could reaffirm its decision in *Conaway* that plaintiffs such as Ackerman who are subject to a CBA still have a recognizable claim for wrongful discharge in violation of public policy.

CONCLUSION

For all of the reasons set forth above, this Court should reverse the district court's Ruling and reinstate Count VIII of Ackerman's Third Amended Petition.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rules 6.903(i) and 6.908(1) of the Iowa R. App. P., Appellant Susan Ackerman hereby requests oral argument.

Respectfully submitted,

/s/William W. Graham
William W. Graham AT0002953

/s/ Wesley T. Graham
Wesley T. Graham AT0011184
Graham, Ervanian & Cacciatore, LLP
317 Sixth Avenue, Suite 900
Des Moines, IA 50309
Telephone: (515) 244-9400
Fax: (515) 282-4235
Email: wwg@grahamlawiowa.com
wtg@grahamlawiowa.com
ATTORNEYS FOR PLAINTIFF-APPELLANT

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/s/ Wesley T. Graham
Wesley T. Graham

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CERTIFICATE OF FILING AND SERVICE

I, Wesley T. Graham, hereby certify that I electronically filed this Final Brief with the Clerk of the Iowa Supreme Court through the Court's Electronic Document Management System on the 28th day of September, 2016, with service to be made electronically on all parties of record.

/s/ Wesley T. Graham
Wesley T. Graham AT 0011184
Graham, Ervanian & Cacciatore, L.L.P.
317 6th Avenue, Suite 900
Des Moines, IA 50309-3719
Telephone: 515-244-9400
Facsimile: 515-282-4235
wtg@grahamlawiowa.com

ATTORNEY FOR PLAINTIFF-APPELLANT