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 Reply Brief

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ARGUMENT

I. THE LOWER 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.

Contrary to the assertion made by Appellees-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," Appellant-Plaintiff Susan Ackerman ("Ackerman") did in fact preserve error on this issue by arguing to the lower court that examination of the CBA and any remedy it provides was inappropriate for a motion to dismiss. Twice in Ackerman's Brief in Support of Her Resistance to Defendants' Motion to Dismiss Count VIII of Plaintiff's Third Amended Petition at Law and Jury Demand ("Plaintiff's Resistance Brief") and twice during oral argument before the lower court, Ackerman argued that it would premature in ruling on a motion to dismiss for the lower court to consider the terms of the collective bargaining agreement (the "CBA"). (Appendix ("App.") at 24 ("Furthermore, the claim certainly survives a motion to dismiss because any analysis of whether Plaintiff has an adequate remedy under the CBA cannot occur at this early stage in the litigation."); *id.* at 28 ("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*, this Court should still deny the motion to dismiss because it is premature to make such fact-specific determinations at this early stage of the litigation."); *id.* at 91 ("It really does come down to a factual analysis as to whether provisions with a CBA employment agreement would provide the similar protections as afforded by the tort. And in this case at this level in a motion to dismiss we believe there's just not enough there for the Court to dismiss this claim."); *id.* at 95 ("Just regarding counsel's point about whether the protections are afforded under the CBA, if those would, therefore, somehow remove Ms. Ackerman from any protections under the tort claims, I believe that [] would be a premature determination [on] this motion to dismiss."). Ackerman has clearly preserved error on this issue of whether the Court erred by looking to the terms of the CBA in ruling on the motion to dismiss.

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). Defendants, however, assert that the lower court's consideration of the CBA is an "evidentiary ruling[]", and therefore

to be reviewed for an abuse of discretion. (Appellees' Proof Brief at 11). But Defendants only cite to one case to support their position, *Williams v. Heidcan*, 561 N.W.2d 817, 822 (Iowa 1997), and this decision was a review of a lower court's ruling on a Iowa Rule of Evidence 104(a) motion, not a motion to dismiss. This Court's standard of review of decisions on motions to dismiss – including whether a lower court properly considered facts outside the pleadings – is for corrections of errors at law. *See, e.g.*, *Crookham v. Riley*, 584 N.W.2d 258, 264 (Iowa 1998).

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).

Defendants argue that Ackerman made multiple references to the CBA in her Third Amended Petition, and therefore she incorporated the entirety of the CBA by reference, making the lower court's consideration of the same appropriate on a motion to dismiss. If this Court actually looks at

the Third Amended Petition, it is obvious that Ackerman only made one specific reference to terms of the CBA, 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). Defendants are correct in noting that Ackerman also stated in the Third Amended Petition that her "sick leave is a contractual benefit . . . ," (*id.* at 5), but the remaining paragraphs of the Third Amended Petition cited by Defendants on pages 12 and 13 of their Brief do not reference the terms of the CBA, just actions taken by Ackerman and the individual Defendants under the management / union framework.

Ackerman certainly did not intend to incorporate by reference the terms of the CBA – she, did not, for example, assert a breach of contract claim – and the references (specific or otherwise) to the CBA and the management / union framework are included to raise allegations of the individual Defendants' retaliatory and unlawful conduct against Ackerman, which culminated in the termination of her employment. The actual terms of the CBA are not essential to her underlying claims, and therefore they need not be incorporated by reference. *Cf. Verzani v. Costco Wholesale Corp.*, 641 F. Supp. 2d 291, 297-98 (S.D.N.Y 2009) *aff'd*, 387 Fed. App'x 50 (2d

Cir. 2010) ("[W]here the claim is for breach of contract, the complaint is deemed to incorporate the contract by reference because the contract is integral to the plaintiffs' claim."). The Court should not deem Ackerman to have incorporated the CBA into her Third Amended Petition based on such limited references, and therefore should hold that the lower court inappropriately considered its terms on a motion to dismiss.

Defendants then argue that if the Court deems that Ackerman did not incorporate by reference the CBA into the CBA, it was still appropriate for the lower court to have considered the CBA because it could have taken judicial notice of it. Defendants cite to numerous holdings from other courts which took judicial notice of CBAs. But the Iowa Supreme Court has never held that it is appropriate to take judicial notice of a public or private CBA.

In fact, the only Iowa case cited by either party regarding taking judicial notice of government contracts is *Warford v. Des Moines Metropolitan Transit Authority*, 381 N.W.2d 622 (Iowa 1986), in which the Court held it inappropriate to take judicial notice of an Iowa Code Chapter 28E agreement signed by political subdivisions in the Des Moines area. *Id.* at 623. The Court held judicial notice was inappropriate because the inter-government contract was "not the type of evidence that is 'common knowledge or capable of certain verification.'" *Id.* (citing *In re Marriage of*

Tresnak, 297 N.W.2d 109, 112 (Iowa 1980)).

Defendants argue that *Warford* is inapposite because it did not involve a public CBA, but rather a 28E agreement, and "[u]nlike the 28E agreement at issue in *Warford*, the public document at issue in this case is capable of accurate and ready determination." (Appellees' Proof Brief at 15). Defendants assert that the CBA is capable of accurate and ready determination because it is a public document readily available for review at DAS's website. But under this rationale, 28E agreements are also capable of accurate and ready determination, as all such agreements are required to be filed with the Iowa Secretary of State, Iowa Code § 28E.8(1)(a) (2015) ("Before entry into force, an agreement made pursuant to this chapter shall be filed, in an electronic format, with the secretary of state . . . .")[1], and are publicly available at the Secretary of State's website. *See* https://sos.iowa.gov/28E/Controller.aspx?cmd=SOSSearch (last accessed on September 9, 2016).

[1] Section 28E.8(1)(a) was passed into law in 1966. It was amended in 2007 to require that the agreements be filed electronically with the Secretary of State. 2007 Iowa Acts, ch. 158, § 2, 4. Prior to this amendment, the Section read: "Before entry into force, an agreement made pursuant to this chapter shall be filed with the secretary of state and recorded with the county recorder. In counties in which the office of county recorder is abolished, the agreement shall be recorded with the county auditor." *Id.* But since 1966, 28E agreements have been available to the public – electronic or otherwise – at the Secretary of State.

Yet, despite these 28E agreements being readily available to the public at the Secretary of State, the Supreme Court determined that it was inappropriate to take judicial notice of such an agreement, because it was "not the type of evidence that is 'common knowledge or capable of certain verification.'" *Warford*, 381 N.W.2d at 622. Following *Warford*'s holding, this Court should rule that the CBA, despite being a public, government contract, is not the type of evidence to which judicial notice can be taken, and reverse the lower court's decision which appears to have considered the terms and impact of the CBA.

And if it does not do so, and rules that it was proper to take judicial notice of the CBA, then such judicial notice needs to be limited to notice of the existence of the CBA. *See, e.g.*, *Team Enters., LLC v. Western Inv. Real Estate Trust*, 2009 U.S. Dist. LEXIS 48644, * 17-18, 2009 WL 1451635 (E.D. Cal., May 19, 2009) ("The existence and authenticity of a document which is a matter of public record is judicially noticeable . . . but the veracity and validity of their contents (the underlying arguments made by the parties, disputed facts, and conclusions of fact) are not.") (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)). So, if this Court determines that the lower court took judicial notice of the CBA and its terms to conclude that they barred Ackerman from pursuing her claim of wrongful discharge in

violation of public policy, then this Court should view that as a misuse of judicial notice, and reverse the lower court's decision.

Defendants' final argument regarding whether the lower court erred by considering the terms of the CBA is that there was no error because the lower court did not consider the CBA or its terms. Defendants state: "While recognizing Ackerman is covered under a CBA . . . , the district court neither cites nor quotes from the CBA and the court's analysis is not based on any specific provision." (Appellees' Proof Brief at 16). Defendants very well may be correct. The crucial portion of the lower court's ruling is its conclusion:

> Count VIII provides Plaintiff with an additional avenue for remedy through wrongful discharge. Plaintiff's employment is subject to a collective bargaining agreement, negotiated for her and others in her position. **To the extent that the 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.

(App. at 36 (emphasis added)).

Given that the lower court's ruling does not cite to any specific provision of the CBA, the lower court very well may have accepted Defendants' counsel assertion at the hearing that "there's a specific provision in the contract that deals exactly with what Ms. Ackerman is complaining of here," and decided that Ackerman, "[t]o the extent that" her

CBA provides for a wrongful discharge remedy, was barred from proceeding with her claim of wrongful discharge in violation of public policy. (*Id.* at 93). If that is the case, then the lower court made a much more substantial error than consideration of evidence outside the scope of the Third Amended Petition. It erred by making the blanket conclusion that any employee covered by a CBA, regardless of its specific terms, has no recourse through the tort of wrongful discharge in violation of public policy.

II. THE LOWER 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.

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). 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, as Defendants would have this Court conclude. 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.*

Defendants cite to *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109 (Iowa 2011) and *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 683 (Iowa 2001) to support their argument that "[w]rongful discharge is an

action that is only available to at-will employees." But these two cases make no such holding. In *Berry*, the Supreme Court begins its discussion regarding the intentional tort for wrongful discharge by stating that "Iowa is an at-will employment state," meaning that "absent a valid contract of employment, the employment relationship is terminable by either party at any time, for any reason, or no reason at all." *Berry*, 803 N.W.2d at 109 (internal quotations and citations omitted). The Court then states that "[n]evertheless, we have adopted a narrow public-policy exception to the general rule of at-will employment," and goes on to explain the public policy exception. *Id.* While the *Berry* Court states that "an at-will employee has a cause of action for wrongful discharge when the reasons for the discharge violate a clearly defined and well-recognized public policy," the Court never holds that a non-at-will employee does not have the same cause of action. *Id.* The Court is simply explaining the ground rules of Iowa employment – that Iowa is an at-will employment state, but that there is this public policy exception to at-will employment.

The *Harvey* decision is also inapposite, because in that case the Court considered "whether the wrongful discharge tort encompasses those who hire independent contractors, as well as the employer-employee relationship." *Harvey*, 634 N.W.2d at 683. In finding "no compelling need,

as we did for at-will employees, to support a wrongful termination tort for independent contractors," the Court at no point examined or concluded that non-at-will employees – as opposed to independent contractors – were barred from bringing the wrongful termination tort. *Id.* at 684.

Defendants argue that, aside from the *Conaway* case discussed below, Ackerman has not cited to any Iowa case applying the wrongful discharge tort to a non-at-will employee. But, inversely, Defendants have not and cannot cite to a single Iowa appellate decision holding that the wrongful discharge tort is not available to a non-at-will employee. The cases Defendants rely on all essentially state that the wrongful discharge tort is an exception to the rule of at-will employment, but, again, none of them hold as Defendants wish they did – "that the tort is solely available for at-will employees." (Appellees' Proof Brief at 22).

As mentioned above, the Supreme Court's decision in *Conaway*, while framed in terms of a federal preemption question, did hold 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) (emphasis added). 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 did not, as Defendants claim, only hold that federal law did not preempt state district courts from considering a wrongful termination tort claim. (Appellees' Proof Brief at 23). It held that "[t]he plaintiffs' actions are recognizable state tort claims" – that these plaintiffs, covered by a CBA, had recognizable state tort claims of wrongful discharge in violation of public policy. *Id.* at 800.

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) (2015). 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.

Defendants next attempt to spin Restatement of the Law, Employment § 5.01, cmt. g in their favor, by arguing that the Reporter's Note to comment "g" recognizes that some courts have not allowed employees covered by just-cause provisions of collective bargaining agreements to assert the wrongful discharge tort claim "because the tort is 'unnecessary to protect these employees.'" (Appellees' Proof Brief at 25, quoting Restatement of

the Law, Employment § 5.01, Reporter's Notes, cmt. g (2015)). But Defendants, of course, omit the next paragraph of the Notes, which concludes that "[t]he approach taken in these decisions is questionable because it gives less protection against violations of public policy for employees working under a collective-bargaining agreement than at-will employees." Restatement of the Law, Employment § 5.01, Reporter's Notes, cmt. g.

While Defendants argue that Ackerman is protected by a "just cause" termination provision and the "no reprisal" language of Iowa Code §70A.28(2) incorporated into Article II, Section 10 of the CBA, and therefore the tort is unnecessary to protect her, Defendants' argument, put into effect, would give less protection against violation of public policy for CBA employees than at-will employees, which is exactly what the Restatement criticizes those few cases for doing. As explained in Ackerman's Proof Brief, Defendants' argument, if accepted, would 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. (Appellant's Proof Brief at 23-24 (citing *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 769-70 (Iowa 2009) ("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.")).

Defendants next argue that the Restatement actually supports Defendants' contention that Ackerman is barred from asserting the tort claim. They raise two points, the first is that Reporter's Note to comment "e" provides that wrongful discharge claims in the civil-service context are often barred "in view of the comprehensive procedural and substantive nature of the statutory scheme," and second is that the Restatement states that when the public policy statute provides a remedy, courts have found those statutory remedies to be exclusive. As to the first point, and as argued in more detail in Ackerman's initial Brief, while the CBA borrows language from Iowa Code § 70A.28(2), the CBA does not provide for the same protections as those afforded by the tort, and therefore, under the Restatement, Ackerman's claim should be allowed to proceed. (Appellant's Proof Brief § II(C)2).

As to the second point, while Iowa Code § 70A.28(2), by its terms, can be enforced through civil action, the statutory remedy is not exclusive, as the Section also "articulate[s a] public policy by specifically prohibiting employers from discharging employees for engaging in certain conduct or

other circumstances," which can form the basis of a wrongful discharge tort claim. *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). While Section 70A.28(5) provides for affirmative relief including "reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs," it does not provide for recovery of damages (aside from potentially back pay), as the tort does. *Compare* Iowa Code 70A.28(5) (2015) *with Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 355-56 (Iowa 1989) (emotional distress damages recoverable); *Jasper*, 764 N.W.2d at 773 (punitive damages generally recoverable as well as emotional harm damages, loss of wages, and out-of-pocket expenses). Therefore, Defendants' arguments regarding exclusive remedies fail.

Perhaps the most glaring aspect of Defendants' brief is what is missing. Though Ackerman cites to seven decisions from five state supreme courts and the Tenth Circuit Court of Appeals for the position that a CBA-covered employee can pursue a wrongful discharge tort claim, Defendants do nothing to criticize or distinguish these cases. Aside from fleeting references to the "foreign adjudicatory" cited to in Ackerman's brief, (Appellees' Proof Brief at 24, 27), Defendants provide no argument specific

to these cases as to why this Court should not follow the persuasive reasoning of these decisions to hold that Ackerman, like the plaintiffs in those cases, should be able to assert a wrongful discharge claim despite being subject to a CBA. Defendants' failure to even address these cases shows the weakness in their argument – and the lower court's decision – that an employee covered by a CBA is barred from asserting a claim for wrongful discharge in violation of public policy.

Instead of even addressing the cases cited to by Ackerman, Defendants focus on the Eighth Circuit decision in *Hagen v. Siouxland Obstetrics & Gynecology, P.C.*, 799 F.3d 922 (8th Cir. 2015), and claim that the Eighth Circuit concluded the wrongful discharge tort is not available to employees employed under a contract. (Appellees' Proof Brief at 27). The Eighth Circuit, however, plainly made no such sweeping conclusion. Ackerman's Proof Brief discusses in detail why the *Hagen* case is both factually distinguishable from her employment situation, and legally supportive of allowing her claim to proceed beyond the pleadings stage. (Appellant Proof Brief § II(C)(3)). Therefore, she will here note only that the Eighth Circuit (i) ruled only that the *Hagen* plaintiff – a doctor subject to a negotiated, individual employment contract – did not have a compelling need for protection from wrongful discharge afforded by the tort; and (ii)

based its ruling – an appeal from a jury verdict and post-trial ruling in favor of the plaintiff – on the specific, developed facts of the case, consistent with Iowa Supreme Court precedent. *Hagen*, 799 F.3d at 930 ("The Supreme Court of Iowa has consistently and carefully applied its wrongful discharge tort precedents to the specific facts of each case."). By applying the wrongful discharge tort precedents cited herein and in Ackerman's proof brief, this Court should overturn the lower court's ruling, and allow Ackerman to proceed beyond the pleadings stage with her claim for wrongful discharge in violation of public policy.

CONCLUSION

For all of the reasons set forth above, this Court should reverse the lower 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,

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/s/ Wesley T. Graham
Wesley T. Graham

September 28, 2016
Date

CERTIFICATE OF FILING AND SERVICE

I, Wesley T. Graham, hereby certify that I electronically filed this Final Reply 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.

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