IN THE IOWA SUPREME COURT

NO. 16-0287

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
HONORABLE SCOTT D. ROSENBERG, JUDGE

APPELLEES' FINAL BRIEF AND ARGUMENT

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I hereby certify that on the 27th day of September 2016, I filed this Appellees' Final Brief with the Clerk of the Iowa Supreme Court by EDMS.

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ROUTING STATEMENT

Because this appeal involves application of existing legal principles, this case can and should be transferred to the Iowa Court of Appeals pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case:

On February 12, 2016, Plaintiff-Appellant Susan Ackerman filed an Application for Interlocutory Appeal, seeking interlocutory review from the district court's January 26, 2016 Ruling and Order on Defendant's Motion to Dismiss Count VIII of Plaintiff's Third Amended Petition. (App. pp. 38-77; Pl's App. for Interlocutory Appeal). Within said Ruling, the district court dismissed Plaintiff's wrongful discharge in violation of public policy claim. (App. p. 36; 1/26/16 Ruling at p. 3). In an Order dated March 25, 2016, this Court granted Ackerman's application for interlocutory review. (App. pp. 78-80; 3/25/16 S. Ct. Order).

Course of Proceedings and Disposition in District Court:

On November 18, 2015, Plaintiff-Appellant Susan Ackerman ("Ackerman") filed a Third Amended at Law and Jury Demand. (App. pp.1-15; Third Amend. Pet.). Within her Petition, Ackerman raised a number of claims,

including a cause of action identified as: "Count VIII: Wrongful Discharge in Violation of Public Policy." (App. p. 14; Third Amend. Pet. p. 14).

On November 30, 2015, Defendants State of Iowa, Iowa Workforce Development, Teresa Wahlert, Teresa Hillary, and Devon Lewis (collectively referred to as the "State") filed a Motion to Dismiss Count VIII of Plaintiff's Third Amended Petition." (App. pp. 16-22; 11/30/15 Motion to Dismiss). The State argued, in part, that the cause of action of wrongful termination in violation of public policy may only be brought by at-will employees and because Ackerman's employment was governed by a collective bargaining agreement ("CBA") which is governed by Iowa Code chapter 20 and which contains a provision that prevents employment discipline absent just cause, Ackerman cannot bring a wrongful discharge claim as a matter of law. (App. pp. 17-19; 11/30/15 Motion to Dismiss). On December 14, 2015, Ackerman filed a resistance and on December 24, 2015, the State filed a reply. (App. pp. 22-33; 12/14/15 Resistance; 12/24/15 Reply).

The State's motion came before the district court for hearing on January 11, 2016. (App. p. 34; 1/26/16 Ruling p. 1). In a Ruling and Order filed on January 26, 2016, the district court granted the State's

motion and ordered Count VIII (wrongful termination in violation of public policy) of Ackerman's Third Amended Petition be dismissed. (App. p. 36; 1/26/16 Ruling p. 3). The district court observed that the wrongful discharge tort is an exception to the general rule of at-will employment and given her employment was covered under the terms of a CBA, Ackerman "is not allowed to apply the narrow exception Iowa courts have reserved for at-will employment to her current situation." (App. p. 36; 1/26/16 Ruling p. 3).

On February 12, 2016 and pursuant to Iowa Rule of Appellate Procedure 6.104(1), Ackerman filed an Application for Interlocutory Appeal, which this Court granted on March 25, 2016. (App. pp. 38-80; 2/12/16 Application; 3/25/16 S. Ct. Order).

STATEMENT OF THE FACTS

For purposes of considering the motion to dismiss, the State accepts the "well-pleaded facts" and those facts of which judicial notice may be taken. *See Young v. HealthPort Tech., Inc.*, 877 N.W.2d 124, 127 & n1. (Iowa 2016).

The Iowa legislature created Defendant Iowa Department of Workforce Development ("IWD") "to administer the laws of this state relating to unemployment compensation insurance, job placement and

training, employment safety, labor standards, and workers' compensation." Iowa Code section 84A.1(1). From 2011 through January 11, 2015, Defendant Teresa Wahlert served as the IWD director. (App. p. 1; Third Amend. Pet. p. 1). IWD employed Ackerman as an administrative law judge in its unemployment insurance appeals bureau. (App. pp. 1-2; Third Amend. Pet. at pp. 1-2). Defendants Hillary and Lewis were Ackerman's co-workers. (App. pp. 3-4; Third Amend. Pet. at pp. 3-4).

Ackerman's IWD employment is governed under the terms of a CBA between the State of Iowa and the American Federation of State, County, and Municipal Employees, Council 61 ("AFSCME").[1] (App. p. ; Third Amend. Pet. at p. 8, ¶ 44). Employees covered under the AFSCME CBA may only be suspended, discharged, or subjected to any other disciplinary action for "just cause." *See* https://das.iowa.gov/sites/default/files/hr/documents/union_contracts/AFSC

[1] Ackerman contends the district court erred in considering the terms of the collective bargaining agreement. Appellant's Brief at pp. 12-17. However, as will be discussed in greater detail below, *see infra* Issue I, Ackerman's contentions are off-base for any number of reasons, not the least of which being, the very issue she presented to this Court as a reason for accepting interlocutory review (*i.e.*, "whether an employee covered by a collective bargaining agreement ("CBA") has a recognizable tort claim for wrongful discharge in violation of public policy"), *see* App. pp. 38-39; 2/12/16 Application at pp. 1-2, affirmatively invokes the governing collective bargaining agreement.

ME_contract.2015-17.pdf (last accessed on September 19, 2016) (discipline found at Article IV, section 9). Furthermore, Article II, section 10 provides:

> The Employer shall not take reprisal action against an employee for disclosure of information by that employee to a member of the General Assembly, the Legislative Service Agency or the respective caucus staff of the General Assembly, or for disclosure of information which the employee reasonably believes is evidence of a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

https://das.iowa.gov/sites/default/files/hr/documents/union_contracts/AFSCME_contract.2015-17.pdf (last accessed on September 19, 2016).

On or about January 30, 2015 and following an investigation, IWD terminated Ackerman. (App. p. 8, ¶¶ 43, 46-48; Third Amend. Pet. at p. 8, ¶¶ 43, 46-48).[2] Within Count VIII of her Third Amended Petition, Ackerman contends the termination occurred in violation of public policy; namely, for testifying at the Senate Government Oversight Committee and for "disclosing information to public officials about Wahlert, Hillary and Lewis that evidenced a violation of law or rule,

[2] Currently before the district court and in a case captioned and docketed as *AFSCME Iowa Council 61 v. State of Iowa*, Case No. CVCV051735 (Polk County), AFSCME is seeking to vacate the third-party neutral's award, affirming Ackerman's termination pursuant to Iowa Code section 679A.12.

mismanagement, a gross abuse of funds, and/or an abuse of authority."[3] (App. p. 14, ¶ 81; Third Amend. Pet. at p. 14, ¶ 81).

Additional facts will be discussed as necessary throughout the arguments of this brief.

ARGUMENT

I. APPELLANT FAILED TO PRESERVE ERROR ON HER CLAIM THE DISTRICT COURT ERRONEOUSLY CONSIDERED EVIDENCE AND EVEN IF ERROR WERE PRESERVED, APPELLANT HAS NOT DEMONSTRATED REVERSIBLE ERROR.

Issue Preservation

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before [an appellate court] will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (citations omitted). While asserting within her brief she presented the issue to the lower court, Appellant's Brief p. 12, Ackerman failed to cite to any portion of the record to support this assertion. Despite noting that the State requested the district court take judicial notice of Ackerman's post-termination grievance and applicable

[3] This language is identical to the language set forth in Article II, section 10 of the CBA as well as to language contained in Iowa Code section 70A.28—a statute that serves as the basis for Ackerman's Count I claim.

CBA, nowhere within her Resistance to Defendants' Motion to Dismiss or her accompanying brief does Ackerman resist the State's request or otherwise assert the district court's consideration of such material is improper. To the contrary, throughout her district court and appellate filings, Ackerman affirmatively invoked the fact that she is covered by a CBA as support for her argument that dismissal is improper. In fact, in her Application for Interlocutory Review, Ackerman identifies her employment being governed by a CBA as a central fact to the issue presented. *See* App. pp. 38-39; 2/12/16 Application at pp. 1-2 (stating the issue presented is "whether an employee covered by a collective bargaining agreement . . . has a recognizable tort claim for wrongful discharge in violation of public policy"). Simply put, Ackerman failed to present to the district court the arguments she seeks to assert herein.

Ackerman also asserts error was preserved by virtue of her "timely filing an Application for Interlocutory Review . . . ." Appellant's Brief at p. 12. However, error "is not preserved by filing a notice of appeal" and while such an assertion is "a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation." Thomas A. Mayers & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39,

48 (Fall 2006). Rather, as noted above, "the error preservation rules [generally] require a party to raise an issue in the trial court and obtain a ruling from the trial court" and filing a notice of appeal simply "divests the trial court of jurisdiction." *Id.*

Finally, even had Ackerman argued to the district court that judicial notice could not be taken, the district court did not decide the issue. In order to have preserved error in light of the Ruling entered, Ackerman should have filed a motion requesting the district court address the issue. *Taft v. Iowa Dist. Ct.*, 828 N.W.2d 309, 323 (Iowa 2013).

For these reasons, not only did Ackerman fail to preserve error, she affirmatively referenced and relied upon the CBA in both her district court and appellate filings.

Standard of Review

Generally, evidentiary rulings are reviewed under an abuse of discretion standard. *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997). *But see Wells Fargo Bank, N.A. v. Nancy J. Nevins & Re/Max West Realty, Inc.*, No. 13-0944, 2014 WL 957616, at *1 (Iowa Ct. App. March 12, 2014) (appearing to review district court's decision to take judicial notice of evidence under an error of law standard).

Argument

Ackerman complains the district court erred in considering the CBA and that she merely "made one general reference to the CBA in her Third Amended Petition . . . ." Appellant's Brief at p. 13. However, a review of her Third Amended Petition reveals Ackerman made repeated CBA references; namely:

- In ¶ 15, Ackerman referenced a CBA group grievance concerning her peers and the work place;
- in ¶ 16, Ackerman alleged Wahlert violated the resolution to the CBA group grievance alleged in the preceding paragraph;
- in ¶¶ 24 & 25, Ackerman referenced a grievance she filed under the CBA;
- in ¶ 29, Ackerman asserts that sick leave is a benefit under the CBA (Article IX, section 10) and further references under what circumstances the CBA allows management to request medical certification/verification;
- in ¶ 44, Ackerman specifically avers that a CBA covers her employment and alleges IWD failed to follow the provisions of the CBA in its discipline of her;
- in ¶¶ 46 & 47, Ackerman references her union steward.

(App. pp. 3-4, 5, 8; Third Amend. Pet. pp. 3-4, 5, 8).

Additionally, while criticizing the district court for concluding her "employment is subject to a collective bargaining agreement" that "provides for a remedy relating to wrongful discharge," Appellant's Brief p. 15,

Ackerman, herself, asserted as much within her Third Amended Petition (as set forth above) and her district court brief. Specifically, within her brief in opposition to the motion to dismiss, Ackerman stated "she is covered by a CBA and she cannot be suspended or discharged except for 'proper cause.'" (App. p. 26; 12/14/15 Brief at p. 4). *See also* App. p. 24; 12/14/15 Brief at p. 2 (stating Ackerman "is subject to a CBA that allows for certain limited employee protections and remedies"). Simply put, there is no need to examine whether judicial notice could be taken given that all references the district court made were to facts presented by Ackerman. For this reason alone, no basis for reversal exists. *See e.g.*, *Homan v. Branstad*, 864 N.W.2d 321, 324 (Iowa 2015) (considering governmental report where plaintiff, in part, cited the report in the petition).

Next, even assuming judicial notice of the CBA was taken, Ackerman failed to demonstrate such was improper. Judicial notice of adjudicative facts (*i.e.*, controlling or operative facts, as opposed to background facts, which helps the court determine how the law applies to the parties) may be taken where the fact is generally known within the court's jurisdiction or where the fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Rhodes v. State*, 848 N.W.2d 22, 31 (Iowa 2014) (quoting Iowa R. Evid. 5.201(b)). As part

of its motion to dismiss, the State directed the district court to the applicable CBA published by the Iowa Department of Administrative Service, which, in part, is responsible for executive branch human resource management and, specifically, "the negotiation and administration of collective bargaining agreements on behalf of the executive branch of the state and its departments and agencies as provided in chapter 20." Iowa Code section 8A.402(1)(g). Thus, the CBA "is a matter of public record and easily verifiable." *Williams v. Aona*, 210 P.3d 501, 511 n.6 (Haw. 2009) (taking judicial notice of a public sector CBA). *See also Stone v. Writer's Guild of America West, Inc.*, 101 F.3d 1312, 1313-14 (9th Cir. 1996) (taking judicial notice of CBA in reviewing motion to dismiss because "its authenticity is not at issue, and it is referred to in the complaint"); *Jestice v. Butler Tech. and Career Dev. Sch. Bd. of Educ.*, No. 1:11-cv-101, 2012 WL 71021, at *2 (S.D. Ohio Jan. 10, 2012) (taking "judicial notice of the collective bargaining agreement as a public document"); *Pro-Football, Inc. v. McCants*, 51 A.3d 586, 596 n.6 (Md. 2012) (taking judicial notice of the National Football League's CBA, which was accessed via website); *Bonner v. County of San Diego*, 139 Cal. App. 4th 1336, 1342 n.3 (Cal. Ct. App. 2006) (taking judicial notice of CBA for limited purpose). As noted by one court, judicial notice may be taken of a

CBA in adjudicating a motion to dismiss because "such documents properly are considered [ ] materials 'not subject to reasonable dispute' because they are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Densmore v. Mission Linen Supply*, F. Supp. 3d , , 2016 WL 696503, at *4 (E.D. Cal. Feb. 22, 2016) (citations omitted). The Eighth Circuit Court of Appeals has even taken judicial notice of arbitration decisions awarded under a collective bargaining agreement. *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 n.3 (8th Cir. 1994). As established through the above-referenced authority, because the CBA governing Ackerman's employment is a public document, capable of accurate and ready determination, judicial notice is proper.

The only authority cited by Ackerman in support of contention that judicial notice may not be taken is *Warford v. Des Moines Metropolitan Transit Authority*, 381 N.W.2d 622 (Iowa 1986). Appellant's Brief at p. 16. Ackerman asserts *Warford* stands for the proposition that an agreement, such as the CBA, "is not the type of evidence that is 'common knowledge or capable of certain verification.'" Appellant's Opening Brief at p. 16 (quoting *Warford v. Des Moines Metropolitan Transit Authority*, 381 N.W.2d at 623). Review of *Warford* clearly distinguishes that case from the

present matter. Contrary to Ackerman's suggestion, *Warford* did not involve a public collective bargaining agreement, but rather, a 28E agreement purportedly signed by the political subdivisions in the Des Moines area. *Warford v. Des Moines Metropolitan Transit Authority*, 381 N.W.2d at 623. Unlike the 28E agreement at issue in *Warford*, the public document at issue in this case is capable of accurate and ready determination. The district court was provided with the website from the state department possessing the statutory authority to "administer the collective bargaining agreements on behalf of the executive branch . . . ." Iowa Code section 8A.402(a)(g). *See also* https://das.iowa.gov/human resources/collective-bargaining (last accessed on September 19, 2016) (copies of all executive branch collective bargaining agreements).

Finally, assuming arguendo that judicial notice could not have been taken of the CBA, any error was immaterial and harmless. *See* Iowa Code section 619.16 (providing "[t]he court, in every stage of an action, must disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect"). *See also In re Detention of Blaise*, 830 N.W.2d 310, 320 n.6 (Iowa 2013) (referring to section 619.16 as one of Iowa's harmless-error statutes). While recognizing Ackerman is

covered under a CBA (a fact Ackerman herself alleged within paragraph 44 of her Third Amended Petition), the district court neither cites nor quotes to any specific provision of the CBA and the court's analysis is not based on any specific CBA provision. (App. pp. 34-36; 1/26/16 Ruling pp. 1-3). Simply put, other than acknowledging the existence of the CBA, Ackerman can point to no aspect of the Ruling as evidence the district court improperly relied on any provision of the CBA. Therefore, even if error were found to exist, it does not warrant reversal.

II. THE DISTRICT COURT PROPERLY GRANTED THE STATE'S MOTION TO DISMISS AND ORDERED COUNT VIII (WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY) OF THE THIRD AMENDED PETITION BE DISMISSED.

Issue Preservation

The State does not assert Ackerman failed to preserve error on her substantive appeal of the district court's dismissal of Count VIII of the Third Amended Petition.

Standard of Review

"The grant or denial of a motion to dismiss is reviewed for errors at law." *McGill v. Fish*, 790 N.W.2d 113, 116 (Iowa 2010) (citation omitted). For purposes of adjudicating a motion to dismiss, the court accepts as true "the well-pleaded facts in the petition, but not the conclusions." *Ostrem v.*

Prideco Secure Loan Fund, LP, 841 N.W.2d 882, 891 (Iowa 2014) (quoting *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 8 (Iowa 2006)).

Argument

1. Introduction.

"Iowa follows the majority of states by carving out a public-policy exception to the general rule of at-will employment for wrongful-discharge claims." *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 300 (Iowa 2013). The wrongful discharge cause of action was created as "the public-policy exception to the employment-at-will doctrine." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761 (Iowa 2009) (citations omitted).

In *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 280-81 (Iowa 2000), the Court traced the history of the at-will employment doctrine and the exceptions thereto. The Court noted the roots of at-will employment were more than a century old, perhaps originating in an 1877 treatise, and in direct contradiction to the traditional English rule, which presumed employment was for a one-year term. *Id.* at 280 & 280 n.1 (citations omitted). According to the Court, through the passage of time, the doctrine began to weaken and in recent years, "three exceptions to the at-will employment doctrine have surfaced to add employee protections to the

employer/employee relationship," namely: "(1) discharges in violation of public policy, (2) discharges in violations of employee handbooks which constitute a unilateral contract, and (3) discharges in violation of a covenant of good faith and fair dealing." *Id.* at 280-81 (citations omitted). Iowa only adopted the first two exceptions. *Id.* at 281. With respect to the exception relevant to this appeal, this Court "adopted a narrow public-policy exception to the general rule of at-will employment," which "limits an employer's discretion to discharge an at-will employee when the discharge would undermine a clearly defined and well-recognized public policy of the state." *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109 (Iowa 2011).

Undisputedly, Ackerman is not an at-will employee. (App. p. 8, ¶ 44; Third Amend. Pet. p. 8, ¶ 44). Instead, Ackerman's employment is governed under the terms of a collective bargaining agreement authorized under Iowa Code chapter 20. (App. p. 8, ¶ 44; Third Amend. Pet. p. 8, ¶ 44). Notwithstanding the protections she possesses under the CBA (and notwithstanding the fact the "public policy" upon which Ackerman seeks to base her claim already provides for a legislative created cause of action, *see* Iowa Code section 70A.28), Ackerman contends the fact she is not an at-will employee should not bar her claim.

2. The Iowa Supreme Court has Held Claims for Wrongful Termination in Violation of Public Policy are only Available for At-will Employees.

The district court properly concluded the wrongful termination in violation of public policy cause of action is limited to at-will employees and because Ackerman's employment was subject to a CBA, Ackerman "is not allowed to apply the narrow exception Iowa courts have reserved for at-will employment . . . ." (App. p. 36; 1/26/16 Ruling p. 3). Within her Opening Brief, Ackerman disagrees, asserting the Iowa Supreme Court has never limited the wrongful termination exception to at-will employees. Appellant's Brief p. 19.

Contrary to Ackerman's suggestion, this Court clearly and unequivocally recognized the wrongful termination tort as solely a limited and narrow exception to the employment at-will doctrine. *See Theisen v. Covenant Med. Center, Inc.*, 636 N.W.2d 74, 79 (Iowa 2001) (holding that as an exception to the at-will employment doctrine, an "employer may not terminate an employee for a reason that violates public policy"); *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 220 (Iowa 1996) (recognizing a discharge that violates a well-recognized and defined public policy as a "narrow exception" to the at-will employment doctrine). In *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 282 (Iowa 1995), the Court recalled that the wrongful

termination tort was created based on a "perceived need to protect employees from the harshness of the at-will doctrine . . . ." To this point, the wrongful discharge claim simply "exists as a narrow exception to the general at-will rule," *Ballalatak v. All Iowa Agriculture Ass'n*, 781 N.W.2d 272, 275 (Iowa 2010), to "limit[] an employer's discretion to discharge an at-will employee . . . ." *Jones v. University of Iowa*, 836 N.W.2d 127, 143-44 (Iowa 2013). Need for this judicially created cause of action was "derived from the inequity of the bargaining position in a typical at-will employer-employee relationship, and the inability of employees to otherwise obtain protection." *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 684 (Iowa 2001).

Wrongful discharge is an action that is only available to at-will employees. *See Berry v. Liberty Holdings, Inc.*, 803 N.W.2d at 109 (stating "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"); *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d at 683 (stating an "at-will employee has a cause of action in tort for wrongful termination of employment when discharged by an employer in violation of public policy").

With the exception of the *Conaway* case, which, for reasons set forth below simply does not address the issue currently before the Court, Ackerman fails to cite to even one Iowa appellate decision applying the wrongful discharge tort to a contract-covered employee. A simple sampling of Iowa appellate decisions regarding the tort of wrongful discharge reveals the discussion is limited to at-will employees. *See e.g., Dorshkind v. Oak Park Place of Dubuque II, L.L.C.,* 835 N.W.2d at 296 (plaintiff was an at-will employee); *Berry v. Liberty Holdings, Inc.,* 803 N.W.2d at 108 (same); *Jasper v. H. Nizam, Inc.,* 764 N.W.2d at 758 (same); *Theisen v. Covenant Medical Center, Inc.*, 636 N.W.2d at 78 (same); *Niblo v. Parr Mrg., Inc.*, 445 N.W.2d 351, 352 (Iowa 1989) (same). The reason is simple; employees covered under a contract have remedies not available to at-will employees: the ability to not only negotiate the circumstances under which a termination may occur, but also, to pursue remedies to enforce all expressed and/or implied terms of the contract. *See e.g., Harvey v. Care Initiatives, Inc.*, 634 N.W.2d at 683 (refusing to extend the wrongful discharge tort to independent contractors because, in part, independent contractors possess contractual remedies and as such, the Court found "no compelling need, as [it] did for at-will employees, to support a wrongful termination tort")

Simply put, implicit in the Court's wrongful discharge jurisprudence is the principle that the tort is solely available for at-will employees. Because Ackerman is not an at-will employee, the district court's Ruling should be affirmed.

3. Conaway does not Support Ackerman's Position.

In her Brief, Ackerman relies extensively on this Court's decision in *Conaway v. Webster City Prods. Co.*, 431 N.W.2d 795, 800 (Iowa 1988) – a case that was filed approximately two months following this Court's recognition of wrongful termination as an exception to the at-will employment doctrine in *Springer v. Weeks and Leo Co., Inc.*, 429 N.W.2d 558 (Iowa 1988). Ackerman argues *Conaway* stands for the proposition that the wrongful discharge tort may be raised by employees covered under a CBA. *See* Appellant's Brief at pp. 19-21.

Conaway simply does not address the issue presented in this appeal. In *Conaway*, neither the district court nor the Iowa Supreme Court decided the issue of whether only at-will employees may raise the tort of wrongful discharge in violation of public policy. Rather, the only issue and the only holding of the *Conaway* decision was that the wrongful discharge tort was not preempted by Section 301 of the federal Labor Management Relations

Act (29 U.S.C. § 185(a)).[4] *Conaway v. Webster City Prods. Co.*, 431 N.W.2d at 799.

Ackerman reads *Conaway* incorrectly, asserting the Court "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." Appellant's Brief at p. 20. What the *Conaway* Court actually held is that federal law did not preempt state district courts from considering a wrongful termination tort claim, not that such a claim actually existed. *See Conaway v. Webster City Prods. Co.*, 431 N.W.2d at 799 (holding that consideration of the claim is not preempted by section 301 of the LMRA). As such, *Conaway* provides no guidance on the issue presented in this appeal.

4. Foreign Adjudicatory Law Supports the District Court's Ruling.

Although reliance on foreign adjudicatory law and secondary sources is unnecessary given the Iowa Supreme Court decisions establishing that the wrongful discharge tort is limited to at-will employees, even if this Court

[4] Of course, the LMRA has no applicability whatsoever over Ackerman and the CBA that governs her employment. *See* 29 U.S.C. § 152(2); *Norton v. Adair County*, 441 N.W.2d 347, 351 (Iowa 1989). The CBA covering Ackerman's employment with the State is governed by Iowa Code chapter 20.

deems it appropriate to review foreign cases and legal treatise, such authority provides no support to Ackerman's position.

In her Brief, Ackerman cites to a Restatement comment, as well as the foreign adjudicatory decisions included therein, for the proposition that employees covered by a CBA may still pursue a claim for wrongful discharge in violation of public policy. Appellant's Brief at pp. 24-27. However, a full review of the Restatement and included comments establishes the issue is not nearly as clear cut as Ackerman asserts.

> Restatement of the Law, Employment Law § 5.01 provides:
>
> > An employer that discharges an employee because the employee engages in activity protected by a well-established public policy . . . is subject to liability in tort for wrongful discharge in violation of public policy, unless the statute or other law forming the basis of the applicable public policy precludes tort liability or otherwise makes judicial recognition of the tort claim inappropriate.

The Reporter's Notes to comment "g" recognizes that some courts exclude "employees covered by just-cause provisions of collective bargaining agreements or individual contracts" from raising a wrongful termination claim because the tort is "unnecessary to protect these employees." *Id.* at Reporter's Notes, cmt. "g." Conversely, other courts (such as the decisions cited by Ackerman), allow the wrongful discharge claim to be brought by

contract covered employees on the basis that the contract "gives less protection against violations of public policy." *Id.*

In this case, however, the protections afforded under the CBA provide identical protections as the public policy that serves as the basis for Ackerman's wrongful termination claim. Ackerman contends her wrongful termination claim is premised on her providing evidence of "a violation of law or rule, management, a gross abuse of funds, and/or an abuse of authority." (App. p. 14, ¶ 81; Third Amend. Pet. p. 14, ¶ 81). This is identical to the protections afforded under Article II, section 10 of the CBA, which precludes the State from taking reprisal action against a covered employee for providing:

> evidence of a violation of law or rule, mismanagement, a gross abuse of funds, [and] and abuse of authority . . . .

https://das.iowa.gov/sites/default/files/hr/documents/union_contracts/AFSCME_contract.2015-17.pdf (last accessed on September 19, 2016). Thus, the basis identified by the Restatement as a reason for allowing the wrongful discharge claim to be brought by a CBA-covered employee simply does not exist in this situation.

Even beyond the above, read as a whole, section 5.01 of the Restatement and its comments actually supports the State's contention that a

wrongful termination claim should not exist for Ackerman. For example, in the Reporter's Notes to comment "e," the Restatement provides: "[w]rongful-discharge claims in the civil-service context are often barred in view of the comprehensive procedural and substantive nature of the statutory scheme." Regardless of whether a state employee's rights are protected under the State Merit System, *see* Iowa Code chapter 8A, subchapter IV, part 2, or under a CBA authorized under Iowa Code chapter 20, or both, the Restatement suggests such statutory schemes "often bar" wrongful discharge claims to employees employed under such systems.

Furthermore, the Restatement provides that when a public policy statute provides a remedy, "[c]ourts generally find statutory remedies exclusive and decline to create supplementary common-law claims when the applicable statutory scheme has created a right not previously recognized in common law." Restatement of the Law, *Employment Law* § 5.01, Reporter's Notes, cmt. "e." The "clear trend among courts" as set forth by the Restatement, "is to declare that an employee has no common-law wrongful discharge claim if statutory remedies are adequate." *Id.* In determining whether statutory remedies are adequate, the Restatement provides that perhaps the "most important factor is whether the statutory remedy provides the injured employee a private cause of action." *Id.* On this point and as

repeatedly noted above, Ackerman bases her wrongful discharge claim on an alleged violation of Iowa Code section 70A.28, which, by its express terms, provides that it may be "enforced through civil action" or though the state merit system or chapter 20 authorized CBA. Iowa Code section 70A.28(5) & (6). *See also* App. p. 9, Count I; Third Amend. Pet. p. 9, Count I (Ackerman's first named cause of action is brought under Iowa Code section 70A.28)

Thus, contrary to Ackerman's suggestion, the Restatement and foreign adjudicatory cited therein do not support her contention that an employee in her position should be permitted to bring a wrongful discharge claim. Furthermore, the only foreign case addressing wrongful discharge under Iowa law concluded the wrongful discharge tort is not available to employees employed under a contract. *Hagen v. Siouxland Obstetrics and Gynecology, P.C.*, 799 F.3d 922, 930-31 (8th Cir. 2015). The employee in H*agen* was employed under a contract for employment that only permitted the employer to terminate under certain circumstances. *Id.* at 924. The employer terminated and the employee brought suit, contending the termination was based on the employee engaging in conduct protected by Iowa public policy. *Id.* at 925-26. The employer argued that the employee could not assert a wrongful termination claim

under Iowa law because the employee was not an at-will employee. *Id.* at 926-27.

After reviewing Iowa jurisprudence, the Eighth Circuit Court of Appeals[5] noted the "wrongful discharge/public policy tort under Iowa law is a narrow, well-recognized exception to the at-will doctrine." *Id.* at 929. Quoting from *Dorshkind*, the Court noted the "exception is narrowly circumscribed to only those policies clearly defined and well-recognized *to protect those with a compelling need for protection from wrongful discharge*." *Id.* (quoting *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d at 303). If an employee is employed under a contract that prohibits termination absent just cause, the *Hagen* Court reasoned there is not a compelling need to protect such an employee from discharge. *Id.* at 930. Under such circumstances, the *Hagen* Court opined, this Court would conclude the wrongful discharge tort is unavailable given the employee may challenge her or his termination under the contract. *Id.* at 930-31

[5] The district court certified a number of questions to the Iowa Supreme Court, including: "[d]oes Iowa law allow a contractual employee to bring a claim for wrongful discharge in violation of Iowa public policy, or is the tort available only to at-will employees." *Hagen v. Siouxland Obstetrics and Gynecology, P.C.*, 799 F.3d at 927 (citing *Hagen v. Siouxland Obstetrics and Gynecology, P.C.*, 964 F. Supp. 2d 951 (N.D. Iowa 2013)). The Iowa Supreme Court did not answer the question. *Hagen v. Siouxland Obstetrics and Gynecology, P.C.*, No. 13-1372, 2014 WL 1884478, at *1 (Iowa May 9, 2014).

In sum and as set forth above, examination of foreign decisions and secondary sources is unnecessary given the decisions from Iowa's highest court establishing that wrongful discharge is limited to at-will employees; however, even if such material is reviewed, the sources provide no support to Ackerman's position.

CONCLUSION

Based on the authority, argument, and analysis contained herein, Appellees respectfully request this Court affirm the district court's January 26, 2016 Ruling and order dismissing Count VIII of Plaintiff's Third Amended Petition.

NONORAL SUBMISSION

The undersigned believes this matter may be properly submitted based on the parties' briefs. In the event this matter is set for argument, the undersigned requests to be heard.

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