IN THE SUPREME COURT OF IOWA

No. 22-0239

JIM NAHAS,

Plaintiff-Appellee,

v.

POLK COUNTY, IOWA, TOM HOCKENSMITH (individually and in his official capacity), ANGELA CONNOLLY (individually and in her official capacity), STEVE VAN OORT (individually and in his official capacity), ROBERT BROWNELL (individually and in his official capacity), and JOHN NORRIS (individually and in his official capacity),

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DALLAS COUNTY CASE NO. LACV043294
THE HONORABLE BRAD MCCALL, PRESIDING

APPELLANTS' FINAL BRIEF

JOHN P. SARCONE
Polk County Attorney

MEGHAN L. GAVIN
Assistant Polk County Attorney
Polk County Administration Bldg.
111 Court Ave., Suite 340
Des Moines, Iowa 50309

P: (515) 286-2285
F: (515) 286-3314
Meghan.Gavin@polkcountyiowa.gov

ATTORNEY FOR DEFENDANTS-
APPELLANTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes and Regulations:

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the County Defendants are Entitled to Dismissal with Prejudice Due to Plaintiff's Failure to Plead and Set Forth Claims Which were "Clearly Established at the Time of the Alleged Deprivation" Under Iowa Code section 670.4A.

AUTHORITIES

Iowa Individual Health Ben. Reinsurance Ass'n v. State Univ. of Iowa, 876 N.W.2d 800 (Iowa 2016)

S.F. 342, 89th Gen. Assembly (2021)

Iowa Code § 670.4A(1), (2)

Hrbek v. State, 958 N.W.2d 779 (Iowa 2020)

Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990)

Iowa Code § 670.4(c)

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

Iowa Code § 17A.19(10)

II. Whether the Plaintiff Fails to Set Forth a State Upon Which Relief Can be Granted Even Under the More Permissive Pleading Requirements of Iowa Rule of Civil Procedure 1.421.

AUTHORITIES

Ostrem v. Prideco Secure Fund, LP, 841 N.W.2d 882 (Iowa 2014)

Bierman v. Weier, 826 N.W.2d 436 (Iowa 2013)

2021 Iowa Acts ch. 2, § 50

Iowa Code § 22.7(11)

Fitzgerald v. Salisbury Chem., Inc., 613 N.W.2d 275 (Iowa 2000)

Jasper v. H. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009)

Rivera v. Woodward Res. Ctr., 865 N.W.2d 887 (Iowa 2015)

Dorshkind v. Oak Park Place of Dubuque II, L.L.C., 835 N.W.2d 293 (Iowa 2013)

Teachout v. Forest City Cmty. Sch. Dist., 584 N.W.2d 296 (Iowa 1998)

Tullis v. Merrill, 584 N.W.2d 236 (Iowa 1998)

Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994)

Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988)

Davis v. Horton, 661 N.W.2d 533 (Iowa 2003)

Berry v. Liberty Holdings, Inc., 803 N.W.2d 106 (Iowa 2011)

Duncan v. Ford Motor Credit Co., LLC, No. 19-1821, 2021 WL 616183 (Iowa App. Ct. Feb. 17, 2021)

State v. Crone, 545 N.W.2d 267 (Iowa 1996)

Iowa Code § 66.3(5)

Wright v. Brooke Group, Ltd., 652 N.W.2d 159 (Iowa 2002)

Basic Chems, Inc, 251 N.W.2d 220 (Iowa 1977)

Iowa Code § 670.2(1)

Hedlund v. State, 930 N.W.2d 707 (Iowa 2019)

Kingway Cathedral v. Iowa Dep't of Transp., 711 N.W.2d 6 (Iowa 2006)

Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W. 108 (Iowa 1984)

Wilson v. Cintas Corp. No. 2, No. 08-0698, 2008 WL 5235514 (Iowa Ct. App. Dec. 17, 2008)

Cheek v. ABC Beverage Mfrs., Inc., No. 05-1962, 2006 WL 2560890 (Iowa Ct. App. Sept. 7, 2006)

Van Balle v. City of Des Moines, 550 N.W.2d 153, 156–57 (Iowa 1996)

Godfrey v. State, 898 N.W2d 844 (Iowa 2017).

Gillians v. Vianco-Small, 15 A.3d 1200 (Conn. App. Ct. 2011)

Starks v. City of Fayette, 911 So.2d 1030 (Miss. Ct. App. 2005)

Meminger v. Ohio State Univ., 102. N.E.3d 642 (Ohio Ct. App. 2017)

Creditwatch, Inc. v. Jackson, 157 S.W.3d 814, 817 (Texas 2005)

Iowa Civil Rights Comm'n v. City of Des Moines, 313 N.W.2d 491 (Iowa 1981)

Iowa Code § 22.10

Iowa Code § 22.8

Iowa Code § 22.7

Iowa Code § 22.8(4)(*d*)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court as it presents both issues of first impression and issues of broad public importance requiring prompt and ultimate determination by the high court. Iowa R. Civ. P. 6.1101(2)(c), (d). In 2021, the Iowa General Assembly passed Senate File 342, commonly known as the "Back the Blue Bill," codifying qualified immunity for public officers and officials for the first time and setting forth specific pleading requirements for claims under chapter 669 and 670. Iowa Code § 670.4A. In the following year, district courts throughout the state have struggled with the proper interpretation and application of the new law, resulting in a myriad of conflicting results from dismissal with prejudice to an outright refusal to apply the new law.

This case presents a unique fact pattern in the sea of qualified immunity claims working their way to the Court. While the conduct at issue in the Amended Petition predated the passage of the new law, the Petition was filed *after* June 2021. Additionally, the Plaintiff voluntarily amended his

Petition prior to the County seeking dismissal under the new law. Resolution of this case requires the Court to determine whether the County Defendants are entitled to qualified immunity for a wrongful-discharge claim based on a public policy not previously recognized by this Court and for civil liability for *releasing* a public document pursuant to the Open Records Act. This case thus presents a unique vehicle for this Court to adjudicate the many nuances of statutory qualified immunity.

STATEMENT OF THE CASE

Jim Nahas, a former Polk County Human Resources Director, filed a seven-count Amended Petition at Law and Jury Demand challenging his at-will termination and the release of a public record documenting the reasons and rationale for his termination pursuant to a public records request. Mr. Nahas seeks an array of damages against Polk County, Polk County Administrator John Norris, and four of the five members of the Polk County Board of Supervisors.

The County Defendants appeal the denial of their Motion to Dismiss for failure to set forth causes of action which violate "clearly established law" and failure to sufficiently plead his claims under Iowa Code section 670.4A, requiring dismissal with prejudice. The County Defendants additionally appeal denial of their Motion to Dismiss for failure to set forth a justiciable claim under Iowa Rule of Civil Procedure 1.421.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Jim Nahas was hired to serve as Polk County Director of Human Resources in 2014.[1] (Amended Petition ¶ 14; App. 8). In June 2020, Polk County Administrator Mark Wandro announced his resignation. (Amended Petition ¶ 47; App. 12). A nationwide search was thereafter conducted. Four finalists for the position emerged, including John Norris, who had formerly served as chief of staff for Governor Tom Vilsack, and Frank Marasco, Chief Administrative Officer of the Polk County Sheriff's Office. The Polk County Board of Supervisors voted—without recorded objection—to approve an employment contract with John Norris for the County Administrator position on November 3, 2020. *See*

---

[1] As this case is at the nascent pleading stage, the facts presented to the Court are those included in the Amended Petition. The County Defendants dispute most of the factual recitation and the inflammatory and unnecessary language included therein. Nevertheless, the County Defendants recognize the state of the record and the presumption that all facts set forth in the Amended Petition are presumed to be true for purposes of evaluating its Motion to Dismiss. *See Kingway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 8 (Iowa 2006) ("A motion to dismiss admits the well-pleaded facts in the petition, but not the conclusions.").

https://www.polkcountyiowa.gov/umbraco/Api/BoardMinutesAttachmentsApi/GetAttachment?meetingId=1821&attachmentType=Minutes (last accessed June 22, 2022).

During the selection of the county administrator, Supervisor McCoy asked to meet with Mr. Nahas and Mr. Marasco. (Amended Petition ¶ 51; App. 12). On October 6, the trio met in a conference room within the Board of Supervisor's suite and adjacent to staff offices. (Amended Petition ¶ 51; App. 12). Following the meeting, a County employee[2] reported that vulgar and threatening comments were made during the meeting. The employee believed that the comments were directed at them and expressed fear of retaliation and for their personal safety. (Amended Petition ¶ 56–57; App. 13).

In response to the employee's complaint, Polk County conducted an internal investigation. (Amended Petition ¶ 62; App. 14). Mr. Nahas was interviewed on two separate

[2] While Mr. Nahas publically named *some* employees in this Amended Petition, the County, in keeping with its practice, will not refer to employees who file harassment complaints by name unless necessary.

occasions during the investigation into the employee's complaint. The County determined that Mr. Nahas gave inconsistent and conflicting statements during his interviews. (Amended Petition ¶ 88; App. 17). On November 24, 2020, the Plaintiff was placed on paid administrative leave while his conduct during the investigation of the Board complaint could itself be investigated. (Amended Petition ¶ 91; App. 18).

While on administrative leave, Mr. Nahas was interviewed for a third time, with his legal counsel present, about *his* conduct during the internal investigation. (Amended Petition ¶ 96; App. 18). In late December 2020, Mr. Norris informed Mr. Nahas that he had until January 5th to resign or he would be terminated. (Amended Petition ¶ 138; App. 24). The Plaintiff's counsel was further informed at that time, as required by law, that the County would be required to release, upon request, public records that documented the reasons and rationale for Mr. Nahas's termination or resignation in lieu of termination. (Amended Petition ¶ 140; App. 24). *See also* Iowa Code § 22.15 (requiring written notification prior to

termination or resignation in lieu of termination that the information may become public record).

Mr. Nahas did not respond to Mr. Norris's demand, and thus was terminated on January 5, 2021, by Mr. Norris. (Amended Petition ¶¶ 142, 148; App. 24). On the day prior to his scheduled termination, Mr. Nahas submitted a formal complaint complaining of a litany of alleged abuses throughout his employment at the County. (Amended Petition ¶ 141, App. 24).

On September 27, 2021, Mr. Nahas filed a five-count Petition challenging his termination and the surrounding circumstances. He named the County, Mr. Norris, and all Polk County Supervisors except Matt McCoy. The County accepted service the following week. Prior to the County's responsive deadline, Mr. Nahas filed a First Amended and Substituted Petition, adding two additional counts. In this Amended Petition, the Plaintiff set forth claims for (1) libel per se; (2) wrongful termination in violation of Iowa public policy; (3) extortion; (4) civil conspiracy; (5) intentional infliction of emotional distress; (6) violation of Iowa Code chapter 21; and

(7) violation of Iowa Code chapter 22. (Amended Petition; App. 6).

The County Defendants filed a two-fold Motion to Dismiss.[3] (Motion to Dismiss; App. 40). First, the County Defendants sought dismissal under the new qualified immunity provisions of Iowa Code 670.4A for failure to plead and set forth claims that were "clearly established" at the time of occurrence. (Motion to Dismiss, App. 43). Second, the County sought dismissal of all counts except the libel per se claim for failure to state forth a claim upon which relief can be granted. For example, the County asserts that no recognized public policy contravened Plaintiff's termination and no cause of action exists under Iowa's Open Records Act for the *release* of the public record. (Motion to Dismiss, App. 46, 55).

The Plaintiff resisted and sought to amend his Petition for a second time to add the "magic words" required by the statute. Following hearing, the district court denied the

[3] Prior to the County Defendants' responsive pleading, Mr. McCoy attempted to intervene in this suit. That motion has never been ruled upon and is not at issue in this appeal.

motion to dismiss, with minor exceptions clarifying the permissive remedies for violations of chapters 21 and 22, and granting Plaintiff's second motion to amend. The Court rejected the motion to dismiss on qualified immunity grounds finding that the new statute did not apply to Mr. Nahas's suit as the conduct at issue predated the passage of the law. (Ruling–Motion to Amend and Motion to Dismiss at 6; App. 228). The Court then rejected the County's pleading claim, determining the Plaintiff "minimally" met his requirements. (Ruling–Motion to Amend and Motion to Dismiss at 10; App. 232).

The County Defendants sought an appeal as a matter of right under Iowa Code section 670.4A for the denial of qualified immunity and sought interlocutory review of the remaining issues raised in its motion to dismiss. Plaintiff sought dismissal of the appeal. This Court granted the County's Application for Interlocutory Review and allowed the consolidated appeal to move forward.

Additional facts will be set forth below as necessary.

ARGUMENT

I. The County Defendants are Entitled to Dismissal with Prejudice Due to Plaintiff's Failure to Plead and Set Forth Claims Which were "Clearly Established at the Time of the Alleged Deprivation" Under Iowa Code section 670.4A.

A. Error Preservation & Standard of Review. This Court reviews a district court's ruling on a motion to dismiss for correction of errors at law. *Iowa Individual Health Ben. Reinsurance Ass'n v. State Univ. of Iowa*, 876 N.W.2d 800, 804 (Iowa 2016). Error was preserved in filing the Motion to Dismiss and in the Resistance to Motion to Amend Petition. (Motion to Dismiss; App. 40).

B. The District Court Incorrectly Determined that Application of Iowa Code section 670.4A(3)'s Pleading Requirements Would Be Retroactive. At common law, Polk County, and its officers and employees, were immune from suit under the doctrine of sovereign immunity. The Iowa General Assembly, in its discretion, partially abrogated immunity by adopting the State Tort Claims Act for suits against the state and its officers and employees and the Municipal Tort Claims Act for suit against a municipality and

its officers and employees. The Acts set the parameters and limitations on lawsuits against governmental entities. Even if a petition does not explicitly mention either Act, the Plaintiff's ability to bring suit resounds in these chapters.

In 2021, the Iowa General Assembly made significant changes to the liability of government officials. In Senate File 342, commonly known as the Back the Blue Bill, the legislature amended Iowa's Municipal Tort Claims Act, Iowa Code chapter 670, to codify qualified immunity for the first time. A similar provision was added to the State Tort Claims Act.[4] The new section provides:

> 1. Notwithstanding any other provision of law, an employee or officer subject to a claim brought under this chapter shall not be liable for monetary damages if any of the following apply:
>
> *a.* The right, privilege, or immunity secured by law was not clearly established at the time of the alleged deprivation, or at the time of the alleged deprivation the state of the law was not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law.

---

[4] Interpretation of the qualified immunity provisions in Iowa Code chapter 669 are at issue in *Carver-Kimm v. Reynolds et al.*, No. 22-0005, currently pending before the Court.

> *b*. A court of competent jurisdiction has issued a final decision on the merits holding, without reversal, vacatur, or preemption, that the specific conduct alleged to be unlawful was consistent with the law.
>
> 2. A municipality shall not be liable for any claim brought under this chapter where the employee or officer was determined to be protected by qualified immunity under subsection 1.
>
> 3. A plaintiff who brings a claim under this chapter alleging a violation of the law must state with particularity the circumstances constituting the violation and that the law was clearly established at the time of the alleged violation. Failure to plead a plausible violation or failure to plead that the law was clearly established at the time of the alleged violation shall result in dismissal with prejudice.
>
> 4. Any decision by the district court denying qualified immunity shall be immediately appealable.

S.F. 342, 89th Gen. Assembly (2021).

These amendments have both procedural and substantive effects. First, section 670.4A sets forth specific pleading requirements for claims against a municipal officer. Iowa Code section 670.4A(3) now requires Plaintiff to plead with particularity the circumstances constituting a violation *and* to plead a "clearly established," justiciable claim. The substantive effect of the new amendment is to provide

statutory immunity to municipal employees and officers, and to the municipality itself, for all claims alleging a deprivation of a right "not clearly established" or based on a law not "sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law." Iowa Code § 670.4A(1), (2). The district court refused to apply the new pleading requirements and the substantive immunity to the case at hand.

Contrary to the district court's conclusion, the County Defendants are not seeking the retroactive application of the law. It is undisputed that the original petition in this matter was filed in September 2021 and the amendment in October 2021—almost four months *after* passage of the amendment. The explicit language in SF342 sets forth that the Act is "immediately effective." Therefore, the new pleading requirements were effective June 17, 2021—prior to the initiation of this lawsuit. This Court addressed a similar issue in *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2020). In *Hrbek*, this Court noted that the first step in determining whether a statute is being applied retroactively is the "specific conduct"

being regulated. *Id.* at 782. The conduct being regulated is the "action of legal consequence." *Id.* If the regulated conduct occurred before the statute's effective date, application of the statute is retroactive. *Id.* If the regulated conduct occurred after the statute's effective date, application of the statute is prospective. *Id.*

The regulated conduct at issue in section 670.4A(3) is the *plaintiff's* conduct in "bring[ing] a claim." The statute makes no mention of the conduct of municipal employees or officers. As the Plaintiff's conduct in bringing his claim and drafting his pleading occurred after June 17, 2021, the County Defendants are seeking a *prospective* application of the new statute. The date of Mr. Nahas's termination is immaterial to this question. This is the same conclusion as reached in *Hrbek*.

Hrbek sought postconviction relief for a conviction that predated a new statute. *Hrbek*, 958 N.W.2d at 783. The wrong complained of in *Hrbek* thus occurred before the statute. The statute, however, did not regulate Hrbek's conviction. Instead, the statute regulated when a pro se litigant could file a claim for postconviction relief. Like *Hrbek*,

section 670.4A(3) regulated Mr. Nahas's actions in bringing the claim—not the termination.

The error in using the termination date as the "act of legal consequence" here is that nothing in section 670.4A alters the law of at-will employment in Iowa. Nothing in section 670.4A makes Mr. Nahas's termination lawful or unlawful. Nothing in section 670.4A governs the public policy implications of his termination. Instead, section 670.4A(3) governs what Mr. Nahas is required to plead in a petition. The district court incorrectly determined that Iowa Code section 670.4A(3) did not set forth the pleading requirements in effect on the date Mr. Nahas filed his Petition.

Even reading the Amended Petition in the light most favorable to the Plaintiff, it does not meet the pleading requirements of section 670.4A(3). Nothing in the Petition or the Amended Petition indicates the Plaintiff was even aware of the new law when the drafting the Petition. No effort was made to comply with the statute. Contrary to the Plaintiff's dismissive arguments before the district court and attempts at compliance in his Second Amended Petition, the issue is not

merely the inclusion of the magic words "clearly established." It is not enough for Plaintiff to assert that the claim was "clearly established," the claim actually is required to have been clearly established.

Asserting a claim that is "clearly established" is not a simple matter of asserting that the alleged tort is clearly established. Of course, the common law torts of wrongful termination, extortion, and libel are recognized in Iowa law. The operative question is whether the *claims* advanced by Mr. Nahas are clearly established. Plainly they are not, as will be further explored below. For example, it is clearly established in Iowa law that an at-will employee cannot be terminated for filing a worker's compensation claim. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 685 (Iowa 1990). It has not been clearly established that an at-will employee cannot be terminated for the myriad of reasons set forth in paragraph 168 of the Amended Petition, including conducting an exit interview.

Likewise, it is clearly established that a governmental official violates the Open Records Act by refusing to release a

public record upon request. It has not, however, been clearly established that the *release* of a public record can violate the Open Records Act. Likewise, it has not been clearly established that governmental officials can commit extortion by fulfilling their statutory duty to inform an employee that a public record documenting the reasons and rationale thereto could be released upon a public records request. In fact, to the contrary, the legislature has recognized such actions, when done in the exercise of due care or as part of performing a discretionary function or duty, should be entitled to qualified immunity. *See* Iowa Code § 670.4(*c*). It has not been clearly established that libel per se applies to the release of a public record documenting the reasons and rationale for a termination as required by law.

The language adopted by the legislature in section 670.4A mirrors the standards adopted by the United States Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Court explained the rationale for creating this hurdle to suing public officials. Subjecting public officials to tenuous litigation "distract[s] [] officials from their

governmental duties, inhibit[s] [] discretionary action, and deter[s] [] able people from public service." *Id.* at 816. Subjecting public officials to tenuous lawsuits, moreover, in no way encourages public officials to follow the law. Public officials cannot follow or be constrained by law that does not clearly exist or for which they cannot clearly be apprised.

Tenuous lawsuits "can be particularly disruptive of effective government." *Id.* at 817. It is quite rational, therefore, for the legislature to establish additional procedural hurdles for subjecting public officials to suit. This is especially true, where the legislature, in its discretion, can invoke or waive sovereign immunity. Simply put, the legislature has determined that new case law cannot be created at the expense of public officials and the functioning of government.

The Plaintiff's failure to meet the pleading requirements is fatal to his suit. Iowa Code section 670.4A(3) unambiguously states, "Failure to plead a plausible violation or failure to plead that the law was clearly established at the time of the alleged violation shall result in dismissal with prejudice." While the Plaintiff has called this remedy—

mandatory dismissal with prejudice draconian—it is not without precedent in Iowa law. The Iowa Administrative Procedures Act sets forth specific pleading requirements for setting forth judicial review petition. Iowa Code § 17A.19(10). Failure to comply with these requirements may deprive the district court of jurisdiction to hear the appeal.

Plaintiff's failure to meet the requirements in Iowa Code section 670.4A mandates dismissal of the above-captioned Amended Petition with prejudice. The district court erroneously determined that the Plaintiff should be given a second opportunity to amend his Petition and erroneous determined inserting "clearly established" was legally sufficient.

II. The Plaintiff Fails to State a Claim Upon Which Relief Can be Granted Even Under the More Permissive Pleading Requirements of Iowa Rule of Civil Procedure 1.421.

As discussed above, the County Defendants assert this suit is subject to and does not meet the enhanced pleading requirements of a claim under Iowa Code section 670.4A(3). Even under the more permissible standards of Iowa Rule of

Civil Procedure 1.421, Plaintiff fails to set forth a justiciable claim, warranting dismissal with prejudice.

A. Error Preservation & Standard of Review. This Court reviews "a district court's decision on a motion to dismiss for failure to state a claim for correction of errors at law." *Ostrem v. Prideco Secure Fund, LP*, 841 N.W.2d 882, 891 (Iowa 2014). The County Defendants preserved error on these claims. (Motion to Dismiss, Ruling–Motion to Amend and Motion to Dismiss; App. 40, 223).

B. Libel Per Se Cannot Lie Where the County Defendants Were Legally Required to Release the Public Record at Issue. In his first count, Mr. Nahas asserts that the County Defendants committed libel per se when they released a false and defamatory termination letter. In *Bierman v. Weier*, 826 N.W.2d 436 (Iowa 2013), this Court examined where the claim of liber per se can lie. This Court held, "[L]ibel per se is available only when a private figure plaintiff sues a nonmedia defendant for certain kinds of defamatory statements that do not concern a matter of public importance." *Id.* at 448.

In 2017, the Iowa General Assembly amended the Open Records Act, Iowa Code chapter 22. 2017 Iowa Acts ch. 2, § 50. For the first time, the legislature required government entities to release the fact that a public employee had been terminated or resigned in lieu of termination and required the government entity to release public records setting forth the reasons and rationale for the termination or resignation in lieu of termination. Iowa Code § 22.7(11). Under the facts and circumstances of this case, a claim for libel per se cannot lie. The legislature has determined that such information is of public importance.

The County Defendants believe this to be a matter of first impression. The 2017 law puts public employers in an untenable position. A governmental entity must comply with the requirements of the Open Records Act. A governmental entity would violate, the spirit of the law, if not the letter, if the governmental entity fails to record and release its reasons and rationale for the termination. Conversely, by complying with the recording and releasing requirements, a governmental entity could be opening itself up for a libel claim. Few

terminated employees are likely to agree with their former employer on the reasons and rationale for their termination.

It was not the legislature's intention to create a libel per se claim every time a public employee is terminated or resigns in lieu of termination. By determining that such actions and their justification were public records, the legislature thus determined the information was of public importance. No claim for libel per se can lie under these circumstances.

C. Plaintiff Has Not As a Matter of Law Set Forth the Public Policy Contravening His Termination. Iowa is an at-will employment state. *Fitzgerald v. Salisbury Chem., Inc.*, 613 N.W.2d 275, 280 (Iowa 2000). Iowa courts, however, have long recognized a public policy exception to that doctrine. *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761 (Iowa 2009). At-will employees in Iowa, like Mr. Nahas, may bring a wrongful discharge claim "when the reasons for the discharge contravene public policy." *Id.* The Iowa Supreme Court has found a public policy exception to the employment at-will doctrine for complaining about suspected patient abuse, *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887 (Iowa 2015);

reporting code violations at an assisted living facility, *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 303–06 (Iowa 2013); reporting violations of the administrative rule for the ratio of teachers to children in daycare centers, *Jasper*, 764 N.W.2d at 766–67; refusing to commit or suborn perjury, *Fitzgerald*, 613 N.W.2d at 286–88; reporting child abuse, *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 300–01 (Iowa 1998), complaining that insurance benefits were not being paid, *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998), or for pursuing unemployment benefits, *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994).

To set forth a wrongful discharge in violation of public policy claim, the employee must show (1) the existence of a clearly-defined public policy that protects an employee activity, (2) that they suffered an adverse employment action, and (3) that engaging in the protected activity was the determining factor in taking the adverse employment action. *Rivera*, 865 N.W.2d at 887 (detailing the evolution of the factors for bringing a wrongful discharge claim). The public policy supporting a wrongful discharge claim must be well-

recognized and clearly articulated. As the Court has observed, "These two concepts partially express the important notion that the policy identified must deal with a public interest so that the discharge from employment violates a fundamental, well-recognized interest that serves to protect the public, not individual interests." *Jasper*, 764 N.W.2d at 765.

While "public policy" is often an elusive concept, the Iowa Supreme Court has recognized various sources for public policy. Statutes have long been a source of public policy, supporting a cause of action. *See, e.g.*, *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994); *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988).

Mr. Nahas sets forth numerous claims of "protected activities" which he asserts lead to his termination. In paragraph 168 of his Amended Petition, he asserts the following are clearly established "protected activities":

> a. Serving as an investigator in separate complaints involving misappropriation of public resources, funds, and a hostile work environment, a specifically protected activity as stated in the County's anti-harassment policy and the public policy of the State of Iowa;

b. Appearing as a witness in the investigation of a complaint involving allegation against assert against [*sic*] a public official, a specifically protected activity as stated in the County's anti-harassment policy and the public policy of the State of Iowa;

c. Developing a working relationship and [*sic*] with an openly gay co-worker as part of his duties as human resources director for Polk County, a specifically protected activity as stated in the County's anti-harassment policy and the public policy of the State of Iowa;

d. Accurately reporting compensation of public employees, an activity that is both protected and required by the public policy of the State of Iowa;

e. Conducting an exit interview in his role as Human Resources Director at the direction of a Supervisor regarding the hostile work environment permeating to [*sic*] the Supervisor's Office;

f. As specifically claimed by Defendants in their termination letter, engaging in investigatory activity related to credible threats of a hostile work environment, including claims against [employee] who initiated this matter again Nahas and McCoy.[5]

In these subparagraphs, Mr. Nahas refers to "the public policy of the State of Iowa," but fails to identify what policy or

[5] This suggestion is both factually inaccurate and offensive. The employee made a complaint of sexual harassment, hostile work environment. Mr. Nahas's attempt to turn this employee into the perpetrator is utterly transparent.

identify a single source of this statewide policy. To that end, Plaintiff fails to cite a single statute, administrative rule, or case as the source of this amorphous policy. Mr. Nahas's sole source of a public policy is the County's anti-harassment policy. The Iowa Supreme Court, however, ruled almost two decades ago that an employee handbook could not serve as the basis for a wrongful discharge tort. *Davis v. Horton*, 661 N.W.2d 533, 536 (Iowa 2003).

Instead of articulating a "clearly established" public policy contravening his termination, the Plaintiff seemingly argues he was engaged in "generalized concepts of socially desirable conduct," so he could not be terminated. *Jasper*, 764 N.W.2d at 762. Such nebulous claims cannot serve as the basis to deviate from common law. In *Jasper*, the Court recognized four general categories of public policy supporting a wrongful discharge claim: (1) exercising a statutory right or privilege, (2) refusing to commit an unlawful act, (3) performing a statutory obligation, and (4) reporting a statutory violation. *Jasper*, 764 N.W.2d at 762. None of Mr. Nahas's claims fall within these categories. "Stated another way, the

source from which an employee seeks to drive a public policy 'must affect a public interest so that the tort advances general social policies, not . . . individual interests.' " *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 110 (Iowa 2011) (quoting *Jasper*, 764, N.W.2d at 766).

In rejecting the County Defendants' Motion to Dismiss, the district court failed to identify a specific public policy and failed to examine which, if any, of these six alleged theories were rooted in clearly established public policy. Instead, the district court very generously interpreted Mr. Nahas as asserting a public policy of good governance and resisting committing perjury.

There are a couple of problems with the district court's conclusion. First, Mr. Nahas never claimed that he was under oath or threatened to be under oath during an internal County investigation. Mr. Nahas, therefore, is claiming he was terminated for not *lying*. He has not claimed that he was terminated for refusing to commit perjury. This is not a matter of semantics. One is a crime, and thus obviously contrary to public policy, and one is just not.

Second, the vast majority of the conduct Mr. Nahas asserts led to his termination played no part in the reasons and rationale for his termination and, by his own admission, occurred years prior to the events in question. (Amended Petition ¶¶ 15, 17, 24; App. 8). Mr. Nahas never complained of any of this "consistent harassment" or retaliation until *after* Mr. Norris gave him the opportunity to resign in lieu of termination. (Amended Petition ¶¶ 138, 141; 24). In any event, these alleged "protected activities" are part or should have been part of his routine duties as Director of Human Resources. For instance, Mr. Nahas alleges investigating employee misconduct and conducting exit interviews led to his termination. Is Mr. Nahas suggesting that his routine activities were protected, thereby permanently preventing his termination? Or the termination of any human resources employee? That is not what the public policy exception to at-will employment was designed to protect. This is the obvious danger to the theory Mr. Nahas advances. A danger wholly ignored by the district court.

Mr. Nahas's Amended Petition simply assumes there is public policy prohibiting his termination. *Berry*, 803 N.W.2d at 106 (affirming district court grant of a motion to dismiss for failure to articulate public policy exemption to employment at-will). Wrongful discharge in violation of public policy is the exception, not the rule. It was never intended to be a fallback claim for every at-will employee. Otherwise, at-will employment would cease to exist. Mr. Nahas's claim for wrongful discharge in Count II should be dismissed with prejudice, or alternatively, his alleged theories of recovery narrowed.[6]

D. Plaintiff Has Failed to Set Forth a Claim for Civil Extortion Because the County Sought Nothing of Value From Him. Iowa Code section 711.4(1) defines the crime of extortion, for which this Court has recognized a civil counterpart. *See Duncan v. Ford Motor Credit Co., LLC*, No. 19-1821, 2021 WL 616183 *3 (Iowa App. Ct. Feb. 17, 2021)

[6] Plaintiff has no entitlement to attorneys' fees even assuming this wrongful termination claim is allowed to proceed.

(setting forth the elements of civil extortion: (1) one or more of the defendants, with the purpose of obtaining for themselves or another, anything of value, threatened to wrongfully injure [] another, (2) the threat was communicated to and directed toward plaintiff, (3) the defendants' actions were the proximate cause of plaintiff's damages; and (4) the amount of damages."). Even reading the Amended Petition in the light most favorable to the Plaintiff, he does not assert the County Defendants sought "anything of value" from him.

The Iowa Supreme Court thoroughly examined the meaning of "something of value" in *State v. Crone*, 545 N.W.2d 267 (Iowa 1996). While the Court concluded that "value" meant something more than mere pecuniary value it still required something of "worth, utility, or importance" *to the person making the threat. Id.* at 272–73. The Supervisors gained nothing of "value" by asking Mr. Nahas to tell the truth. Even assuming what Mr. Nahas claims is true, the Supervisors gained nothing of "value" by asking Mr. Nahas to lie.

The district court erroneously agreed with Mr. Nahas that the Supervisors potentially sought "intangible political value, including the attempted removal of a political rival in [Supervisor] McCoy." (Ruling on Motion to Amend–Motion to Dismiss at 11; App. 233). While entirely spurious, this claim is also nonsensical. All of the actions alleged in the Amended Petition occurred in a confidential personnel investigation. This matter was not publicized until after Mr. Nahas's termination and largely through publication of this lawsuit. How would the Supervisors gain political advantage in a *confidential* matter?

While the district court is certainly correct that after the 1976 statutory amendment the "something of value" need not be monetary, it still has to be s*omething*. What political advantage, intangible or otherwise, could the Supervisors gain? Putting aside the abject embarrassment of this litigation and the continued publication of internal strife at the County, what could they gain? Removal and impeachment of public officials are governed by Iowa law. The Supervisors lacked the

authority to remove Supervisor McCoy even if the employee's complaint was found. Iowa Code § 66.3(5).

To the extent Mr. Nahas claims the Supervisors sought some advantage at the ballot box against Supervisor McCoy, this Court should take judicial notice that this speculative claim has been proven wrong. Supervisor McCoy ran unopposed in the Democratic primary and, as of the writing of this brief, is running unopposed in the general election. Such a nebulous and speculative "political advantage" cannot as a matter of law amount to something of value for purposes of Iowa Code section 711.4(1). Count III must be dismissed.

E. Civil Conspiracy is Not a Separate Cause of Action and Inapplicable to Claims under the Municipal Tort Claims Act. In Count IV of the Amended Petition, Mr. Nahas sets forth a claim for civil conspiracy. Civil conspiracy is "a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful." *Wright v. Brooke Group, Ltd.*, 652 N.W.2d 159, 171 (Iowa 2002) (quoting *Basic Chems, Inc. v. Benson*, 251 N.W.2d 220, 232 (Iowa 1977)). The

underlying wrongful acts give rise to a claim, not a conspiracy claim itself. *Basic Chems, Inc*, 251 N.W.2d at 233. "Civil conspiracy is merely a method to impose vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert." *Wright v. Brooke Group, Ltd.*, 652 N.W.2d at 172.

Civil conspiracy is a common law method of making codefendants viable for the wrongful conduct of others, and not an independent tort. Civil conspiracy, respondeat superior, and the like have all been deviated from in the Municipal Tort Claims Act. Iowa Code section 670.4A sets forth who or what is liable for the conduct of public employees and officials. In this case, assuming a viable claim exists, the County is liable. Iowa Code § 670.2(1). Count IV must be dismissed as civil conspiracy has no application to the above-captioned lawsuit.

F. Plaintiff Has Failed As a Matter of Law to Allege Conduct So Outrageous to State a Claim for Intentional Infliction of Emotional Distress. To successfully set forth a claim for intentional infliction of emotional distress, Mr. Nahas

must allege, "(1) outrageous conduct by the defendant; (2) the defendant intentionally caused, or recklessly disregarded the probability of causing, the emotional distress; (3) plaintiff suffered severe or extreme emotional distress; and (4) the defendant's outrageous conduct was the actual and proximate cause of the emotional distress." *Hedlund v. State*, 930 N.W.2d 707, 723–24 (Iowa 2019) (quoting *Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 26 (Iowa 2014)).

"[I]t is for the court to determine in the first instance, as a matter of law, whether the conduct complained of may reasonably be regarded as outrageous." *Id.* (*quoting Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 183 (Iowa 1991)). "The standard of outrageous conduct "is not easily met, ..." *Id.* (quoting *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 157 (Iowa 1996)). "Outrageous conduct 'must be extremely egregious; mere insults, bad manners, or hurt feelings are insufficient.' " *Id.* "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a

civilized community." *Id.* at 724 (quoting *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 198 (Iowa 1985)).

The district court erroneously concluded that Mr. Nahas met this high bar. The district court noted that the Plaintiff alleged the Defendants "engaged in outrageous conduct . . . beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community," so the court must presume this is true. (Ruling on Motion to Amend–Motion to Dismiss at 13; App. 235). While district courts are required to presume all factual allegations in a petition are true for evaluating the legal sufficiency of a claim, the district court is not bound by a legal conclusion. *Kingway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 8 (Iowa 2006) ("A motion to dismiss admits the well-pleaded facts in the petition, but not the conclusions."). The purported language cited by the district court is a legal conclusion—not a factual assertion.

Under the district court's analysis as long as a plaintiff can correctly parrot the elements of an intentional infliction of emotional distress claim, they have met their initial burden.

That is incorrect and contrary to this Court's precedent. Intentional infliction of emotional distress is an *exceptional* tort. It was not intended to be tacked onto every run-of-the-mill employment matter. *See Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W. 108 (Iowa 1984) (rejecting intentional infliction claim in employment case despite allegation of deliberate campaign to badger and harass employee); *see also Wilson v. Cintas Corp. No. 2*, No. 08-0698, 2008 WL 5235514 (Iowa Ct. App. Dec. 17, 2008) (rejecting claim despite allegations of repeated harassment, name calling, and use of profanities); *Cheek v. ABC Beverage Mfrs., Inc.*, No. 05-1962, 2006 WL 2560890 (Iowa Ct. App. Sept. 7, 2006) (rejecting claim despite allegation employer maliciously filed a police report and cooperated with investigation); *Van Balle v. City of Des Moines*, 550 N.W.2d 153, 156–57 (Iowa 1996) (rejecting claim despite allegation employer induced plaintiff to plead guilty to a crime), *abrogated on other grounds by Godfrey v. State*, 898 N.W2d 844 (Iowa 2017).

Intentional infliction of emotional distress is a common law remedy reserved for society's most egregious conduct. It

was intended to allow plaintiffs a vehicle of recovery where no other remedy existed. This is not the case here. Mr. Nahas's claim of intentional infliction of emotional distress is entirely derivative of his other claims. A close examination of paragraph 199 reveals that Plaintiff is alleging the County committed intentionally inflicted emotional distress by attempting to extort him, terminating him, libeling him, and violating Iowa's sunshine laws. Mr. Nahas has already brought a cause of action for each of those claims. Committing another tort is not per se intentional infliction of emotional distress. This is especially true where "outrageousness" is not an element of any of the underlying torts. To meet his burden, Mr. Nahas must allege something more.

None of the Plaintiff's factually inaccurate allegations amount to outrageous conduct. The County's decision to terminate him, author a letter documenting the reasons and rationale for his termination, and then release that letter upon receipt of a public records request is not outrageous conduct. Nor does it become outrageous as a matter of law because Mr.

Nahas disagrees with the County's reasons and rationale for his termination. Allowing Mr. Nahas to proceed with this claim, would allow this exceptional tort to be a routine claim in every employment action against a government entity.

Of course, the allegations surrounding his termination and the circumstances thereto are outrageous to Mr. Nahas. They are not, however, outrageous as a matter of law to allow him to proceed with an intentional infliction of emotional distress claim. *See Gillians v. Vianco-Small*, 15 A.3d 1200, 1203–04 (Conn. App. Ct. 2011) (noting that a concerted effort to attempt to remove an employee and an improper motivation for termination do not give rise to intentional infliction claim); *Starks v. City of Fayette*, 911 So.2d 1030 (Miss. Ct. App. 2005) (" 'Recognition of a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment over a period of time.' ") (citation omitted); *Meminger v. Ohio State Univ.*, 102. N.E.3d 642, 646–47 (Ohio Ct. App. 2017) (rejecting claim of intentional infliction of distress in employment context despite allegations of

threats and violent behavior noting outrageousness is not equivalent to tortious conduct, malicious conduct, or even criminal conduct); *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 817 (Texas 2005) (holding that intentional infliction of emotional distress claims will not lie in most employment suits). Count V must be dismissed.

G. Plaintiff Failed to Set Forth a Violation of the Open Meetings Act Because Iowa Law Does Not Require a Public Meeting for the Termination of a County Employee.

Mr. Nahas asserts that the County violated the Open Meeting Act, Iowa Code chapter 21, as there is no record of a Board of Supervisors meeting or records of a Board vote on his termination. This Count is premised on the erroneous assumption that "[e]mployment decisions of the magnitude as those described above [his termination], cannot legally be made absent some type of public meeting taking place pursuant to the procedures contained in Iowa Code chapter 21." (Amended Petition ¶ 208; App. 36). Plaintiff cites no law supporting this erroneous assumption. Mr. Nahas, as a former Director of Human Resources, should be aware that

Polk County employees are terminated routinely without Board consideration or vote. There is nothing in the law or unique about Mr. Nahas's employment which required him to be terminated by the Polk County Board of Supervisors, at a public meeting, with a recorded, public vote.

Plaintiff appears to have an elevated and incorrect view of his position at the County. Mr. Nahas served as a department director. There are seven departments directly under the Board's purview. Three additional directors or chairs are supervised by the Polk County Board of Supervisors. None of these individuals directly report to the Board. Mr. Nahas reported directly to the Polk County Administrator, a fact he readily admits in his Amended Petition. (Amended Petition ¶ 148; App. 25). The Polk County Administrator was Mr. Nahas's supervisor—he approved Mr. Nahas's raises, evaluations, conditions of employment, etc. By sheer proximity of workspace, Mr. Nahas may have enjoyed more direct contact with the Board of Supervisors than other department directors. That does not mean, however, that Board action was required to terminate him. Such an action

is not required anywhere in Iowa Code chapter 21, any Polk County Employee Manual, or even Board custom. Nor does Mr. Nahas allege as much in his Amended Petition.

By his own admission, Mr. Nahas has no actual evidence or reasonable suspicion that a violation of chapter 21 occurred. Mr. Nahas's termination letter was signed by the County Administrator. (Amended Petition ¶ 148; App. 25). He does not allege he was present at any "meetings" or improper discussion of Board members about his termination. Instead, Plaintiff presumes such acts must have occurred and then works backward to create a claim. Once the foundation of this house of cards claim is removed, the entire claim collapses. Count VI must be dismissed.

H. No Cause of Action Exists Under Iowa's Open Records Act for the Release of a Public Record. Plaintiff asserts a claim for violation of Iowa's Open Records Act, Iowa Code chapter 22, for the release of the public record documenting the reasons and rationale for his termination and the alleged failure to provide the former Human Resources Director notification that the reasons and rationale for his

termination may become a public record. The problem for the Plaintiff is that no private cause of action exists under the Open Records Acts for the *release* of records. Nor does a private cause of action for monetary damages exist for the failure to advise an employee that the reasons and rationale for their termination may be released pursuant to a public records request.

Indisputably, the purpose of the Open Records Act is to give the public access to governmental records. *See Iowa Civil Rights Comm'n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981) (holding that the purpose of Iowa's Open Records Act is to "open the doors of government to public scrutiny-to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act."). To further that purpose, the Act specifically creates a private cause of action to enforce the Act and order the release of records. Iowa Code § 22.10. The Act further creates a cause of action to enjoin the release of records. *Id.* § 22.8. The Act, however, does not explicitly or implicitly create a

private cause of action for monetary damages for the release of public records.

In fact, the converse is true—chapter 22 explicitly gives the custodian of a record the discretion to release a public record even if that record is deemed confidential under Iowa Code section 22.7. The prefatory language to section 22.7 states, "The following public records shall be kept confidential, unless ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information." *Id.* § 22.7. Under the plain language of this section, the lawful custodian of the record *may* release the record. *See id.* § 22.8(4)(*d*) (allowing for a good faith delay for the custodian to determine whether to permit examination of a *confidential* record). Even if Mr. Nahas's termination letter was confidential, which it explicitly is not under Iowa Code section 22.7(11), the County still could have chosen to release it. Nothing in chapter 22 prohibits the release of a confidential record. Subjecting a records custodian to suit for using their discretion to release a confidential public record would clearly frustrate the entire purpose of the Open Records Act.

None of this is to say that the County is immune from liability for the release of any record within its possession. Of course, if the County released medical records, trade secrets, or a host of other records made confidential under state or federal law, it could be subject to monetary damages. That remedy, however, is not found under the Open Records Act. Plaintiff acknowledges this by bringing separate civil actions for the release of the public record documenting the reasons and rationale for his termination—libel and intentional infliction of emotional distress. If Mr. Nahas is entitled to redress, these claims are his avenues of recovery—not chapter 22. Count VII must be dismissed for failure to state a claim.

CONCLUSION

For the reasons expressed above, the Polk County Defendants respectfully urge this Court to reverse the district court, grant the County's motion to dismiss, and grant any and all other relief it deems appropriate.

REQUEST FOR ORAL ARGUMENT

Defendants-Appellants respectfully request to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief complies with the type-volume limitation, typeface, and the type-style requirements of Iowa Rule of Appellate Procedure 6.903. This Proof Brief was prepared in Microsoft Word using Bookman Old Style font, size 14. The number of words is 8146, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

Date: August 18, 2022

/s/*Meghan L. Gavin*

MEGHAN L. GAVIN
Assistant Polk County Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2022, I electronically filed the foregoing document with the Clerk of Court using the electronic filing system which will send notification of such filing to the following:

Nicholas J. Mauro
Carney & Appleby Law Firm
400 Homestead Building
303 Locust Street
Des Moines, IA 50309

Michael Carroll
Coppola, McConville, Carroll, Hockenberg & Flynn, P.C.
2100 Westown Parkway, Suite 210
West Des Moines, IA 50265

/s/*Meghan L. Gavin*
Meghan L. Gavin