IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23-0300
Polk County No. LACL153187

ASHLEY LYNN KOESTER,

Plaintiff-Appellant,

vs.

EYERLY-BALL COMMUNITY MENTAL HEALTH SERVICES, REBECCA PARKER, and MONICA VAN HORN,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE SAMANTHA GRONEWALD, JUDGE

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case is appropriate for transfer to the Iowa Supreme Court because it presents substantial issues of first impression and presents substantial questions of enunciating or changing legal principles. *See* Iowa R. App. P. 6.1101 (2)(c) and (f).

STATEMENT OF THE CASE

Appellant-Plaintiff Ashley Lynn Koester initiated this action against Eyerly-Ball Community Mental Health Services, Rebecca Parker, and Monica Van Horn on June 2, 2022. Plaintiff filed an Amended Petition on September 28, 2022. Plaintiff's claims are for wrongful termination of her position at Eyerly-Ball in violation of public policy or, in the alternative, wrongful termination in violation of Iowa Code Chapter 91A.1, *et seq*. Her Amended Petition encompassed two counts: Count I - Wrongful Termination in Violation of Public Policy (Public Policy of Iowa Code § 91a And Public Policy) and, in the alternative, Count II – Wrongful Termination and Retaliation Under Iowa Code §91A, *et seq*.

Defendants filed a Motion to Dismiss the Amended Petition on October 5, 2022, alleging that Plaintiff failed to state a claim upon which relief can be granted. The Court granted Defendants' Motion to Dismiss on December 14, 2022. Plaintiff filed her Motion to Enlarge, Amend, and Reconsider on

December 15, 2022, and the Defendants resisted on December 27, 2022. The court denied Plaintiff's Motion to Enlarge, Amend, and Reconsider on January 24, 2023. Notice of Appeal was filed on February 22, 2023. (J.A. 192–194).

STATEMENT OF THE FACTS

Factual Background

Plaintiff Ashley Koester began her employment with Eyerly-Ball on July 22, 2019, working as an On Call Mobile Crisis Counselor. (J.A. 36) Defendant Rebecca Parker, Director of Human Resources offered Plaintiff her position with Eyerly-Ball on July 18, 2019. (J.A. 36) Defendant Van Horn was the Crisis Services Supervisor during Plaintiff's employment with Eyerly-Ball and was a supervisor of Plaintiff Koester. (J.A. 36)

Plaintiff's position was a PRN, non-exempt position, meaning she works on an intermittent basis when needed and is eligible to receive the overtime rate. (J.A. 36) Plaintiff's compensation for the position consisted of three different rates, which would reflect the Response rate, Administrative rate, and On-Call rate. (J.A. 36)

Plaintiff's duties at the Response rate consisted of driving to the crisis location, time spent dispatched on the call, time spent entering iCarol notes, and the drive back to the location prior to the crisis call. (J.A. 36)

While Plaintiff was at the Administrative rate, she would be paid for driving time to and from meetings, time spent in meetings and trainings, and time spent entering Cerner notes. (J.A. 37) When Plaintiff was on the On-Call rate, her hours were not considered by her employer hours worked for benefit eligibility or overtime purposes according to the UnityPoint Health - Eyerly-Ball Community Health Services. (J.A. 37) There were times Plaintiff did not get paid to drive to meetings and trainings. (J.A. 37)

Plaintiff first contacted the Department of Labor to ask if they should get paid for driving time to go to the office. (J.A. 37) Plaintiff contacted the Department of Labor a second time regarding overtime and was informed because her On-Call rate is so restrictive, the hours On-Call are considered hours worked and are eligible for overtime. (J.A. 63–64) (J.A. 37)

When Plaintiff was hired, she was told she could pick up as many shifts as she wanted that were open. (J.A. 37) Timekeeping is explained in the Employee Handbook. (J.A. 52). (J.A. 37) Plaintiff qualified as a non-exempt (hourly) employee. (J.A. 37) Eyerly-Ball used a software program through iCarol to accept shifts requested or picked up by employees. (J.A. 63, J.A. 37)

Plaintiff's shift requests were always approved when she picked up shifts through iCarol. (J.A. 37) The Supervisors at Eyerly-Ball were constantly encouraging all employees to pick up shifts. (J.A. 63, J.A. 37)

Every week a text would be sent out by either Defendant Van Horn or another supervisor Carrie Lair asking for shifts to be covered. (J.A. 84–5, J.A. 37)

If no one responded to the texts, head supervisor Krystina Engle would also send out a text. (J.A. 84–85, J.A. 38) Plaintiff was often asked to cover other employees' shifts as well. (J.A. 38) Each employee is responsible for documenting their time on a software program called Paylocity. (J.A. 38) For non-exempt employees, any hours worked other than those scheduled must be approved before it is performed. (J.A. 52, J.A. 63, J.A. 38)

In this way, Plaintiff followed said rules and the handbook. (J.A. 38) Overtime is explained in the Employee Handbook (J.A. 53, J.A. 38) All overtime work must be approved before it is performed. (J.A. 38) Overtime was agreed to be paid to all non-exempt (hourly) employees in accordance with federal and state wage and hour restrictions, and that overtime pay is based on actual hours worked. (J.A. 38) Through this, Plaintiff was promised overtime for her work hours. (J.A. 38)

Plaintiff's overtime work requests were always approved. (J.A. 38) Plaintiff was never informed she could not work any overtime hours. (J.A. 38) Plaintiff was a non-exempt employee, so she was to be paid overtime compensation in accordance with Federal and State wage and hour restriction laws. (J.A. 38) She was paid overtime compensation in connection with the

Overtime Provision in the employee handbook. (J.A. 53, J.A.38) Thereby she was promised and was owed overtime pursuant to an agreement between the parties. (J.A. 38)

Timekeeping was prescribed in the Employee Handbook. (J.A. 52, J.A. 39) Plaintiff was responsible for submitting her final, signed timesheet to her supervisor, Defendant Van Horn. (J.A. 39) Defendant Van Horn was responsible for reviewing timesheets for accuracy, signing them, and then submitting them to the Human Resources Department for processing. (J.A. 39)

If Defendant Van Horn found an error on Plaintiff's timesheet, she was responsible for reviewing the timesheet with Plaintiff and having Plaintiff acknowledge in writing any changes or corrections. (J.A. 39) Plaintiff always received her overtime pay for the hours she worked, which shows she was owed the overtime by agreement between the parties. (J.A. 39) However, it seemed Plaintiff's co-workers were not being paid overtime. (J.A. 39) Plaintiff first mentioned the overtime to a human resources employee who told Plaintiff she assumed her paychecks were correct and gave Plaintiff resources to look up the information. (J.A. 39) The human resources employee told Plaintiff that if an issue with overtime happened at their company, then

they would work to find out what the law is, but the employee would not be required to pay money back for their mistake. (J.A. 39)

Plaintiff discovered her co-workers were not getting paid overtime when she informed co-worker Jessica Cochran that she was receiving overtime. (J.A. 39) Plaintiff was discussing with Ms. Cochran the Holiday pay when Ms. Cochran told Plaintiff they did not get paid overtime for holidays, instead they were paid $10 an hour. (J.A. 39) During this discussion, Plaintiff discovered she was the only one receiving overtime pay. (J.A. 39)

Jessica Cochran was also a non-exempt employee and was not receiving overtime pay. (J.A. 40) Ms. Cochran then informed other employees of Eyerly-Ball that Plaintiff was receiving overtime pay and they were not. (J.A. 40) When the Defendants discovered Plaintiff was being paid overtime, they accused her of stealing from the company despite the facts that her shifts were accepted through iCarol, and her timesheets were approved by Defendant Van Horn. (J.A. 40) Plaintiff was owed the overtime by law and by agreement with the company and was paid it by Van Horn and the bookkeeper who approved it. (J.A. 40) Defendants claimed Plaintiff was stealing from the company. (J.A. 40) However, Plaintiff's shifts were requested, approved, and her timesheets approved by Defendant Van Horn. (J.A. 40)

On January 7, 2020, Plaintiff met with Defendant Van Horn, Defendant Parker, and Krystina Engle. (J.A. 40) Defendant Parker asked Plaintiff if she was aware she was being overpaid. (J.A. 40)

Plaintiff explained to Defendants that she informed Ms. Cochran she was receiving overtime and that is when she realized other employees were not being paid overtime. (J.A. 41) Plaintiff informed the Defendants she called the Department of Labor and they said because her On-Call rate is so restrictive, the hours on-call are considered hours worked and are eligible for overtime. (J.A. 41) This made the Defendants very defensive, irritated, and they acted personally offended. (J.A. 41)

Defendant Parker asked Plaintiff why she did not come to them about this issue when Plaintiff discovered it. (J.A. 41) Plaintiff informed the Defendants she was afraid she would be terminated if she brought it up. (J.A. 41) Defendant Parker then told Plaintiff they consider this to be stealing from the company and lacking integrity. (J.A. 41)

Defendant Parker then terminated Plaintiff for receiving overtime payments for which she was owed by law and by agreement with the company. (J.A. 41) After this meeting, co-worker Aislinn Heckman told Plaintiff an email went out to all the employees informing them Plaintiff no

longer worked for Defendants and also explaining that the employees do not get paid overtime. (J.A. 41)

The Defendants accused Plaintiff of stealing from the company even after Plaintiff's shifts were requested, approved, and her timesheets approved by Defendant Van Horn. (J.A. 44) The Defendants made statements that the Plaintiff stole money from the company and lacked integrity. (J.A. 44) The Defendants communicated those statements to individuals throughout the company and co-workers of Plaintiff and individuals outside the company. (J.A. 44)

The Defendants seemed to terminate Plaintiff for discussing her wages with her coworkers and giving them the idea for additional wages as well. (J.A. 41) Plaintiff was wrongfully terminated for receiving overtime payments in accordance with the Federal and State wage and hour restriction laws (J.A. 41) Plaintiff was wrongfully terminated after her overtime work requests were approved. (J.A. 41) Plaintiff was terminated after Defendants Van Horn and Parker slandered Plaintiff. (J.A. 41). All of the above facts were alleged in the Petition and constituted enough to provide notice to the Defendants of the events and type of the claim and the basis for which the Plaintiff alleged she was entitled to damages.

Claim Allegations

On January 7, 2020, the Defendants terminated Plaintiff. (J.A. 42) The Defendants terminated Plaintiff for pursuing her legal rights. (J.A. 42) Plaintiff alleges she was wrongfully terminated after her overtime work requests were approved. (J.A. 42)

Plaintiff Koester alleges she was wrongfully terminated partially for receiving overtime payments in accordance with State, wage, and hour restriction laws. (J.A. 42) Plaintiff's requests for overtime pay and her statements to Defendants about reasons for requesting overtime pay constituted a complaint that she should get overtime pay. (J.A. 42) Plaintiff alleged Defendants are subject to overtime requirements envisioned under Iowa Code §91A as explained in *Anthony v. State*, 632 N.W.2d 897, 902 (Iowa 2001) and therefore owed money to Plaintiff. (J.A. 42)

Plaintiff alleges she was also owed money, separately, by agreement with the company, under the terms of payment provided by the company. (J.A. 42) She requested payment of her money and then obtained that payment. (J.A. 42) However, the Defendants, despite paying the money, accused Plaintiff of stealing said money and terminated her. (J.A. 42) Plaintiff alleges this termination is in violation of public policy. (J.A. 42)

She alleged there existed a clearly defined and well-recognized public policy that protects the Plaintiff's activity of obtaining overtime and requesting the overtime pay, and discussing pay between herself and her fellow employees as well as a clearly defined and well-recognized public policy that protects the Plaintiff's activity of obtaining payment through agreement and requesting the pay and discussing pay between herself and her fellow employees. (J.A. 42–43) Plaintiff alleged in her Amended Petition that she engaged in those protected activities. (J.A. 42–43)

She alleged the public policy of Iowa Code §91A of providing overtime and wage protection to Plaintiff and others is undermined by the Plaintiff's discharge from employment, and the public policy of Iowa Code §91A of providing requested pay owed through agreement between the parties, money owed to Plaintiff and others, is undermined by the Plaintiff's discharge from employment (J.A. 43).

Plaintiff also alleges she engaged in other protected activities under well-known public policy as the evidence will demonstrate, and this conduct was the reason Plaintiff was terminated. (J.A. 43) She alleges the Defendants violated a clearly defined and well-recognized public policy of Iowa Code §91A, et seq. by terminating Plaintiff. *See Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998). (J.A. 43)

Plaintiff further alleges she was retaliated against and wrongfully terminated after her overtime requests were approved. (J.A. 44) Plaintiff alleged in her Amended Petition that she retaliated against and wrongfully terminated for receiving overtime payments in accordance with State, wage, and hour restriction laws. (J.A. 46)

Plaintiff's alleged in her Amended Petition that requests for overtime pay and her statements to Defendants about reasons for requesting overtime pay constituted a complaint that she should get overtime pay. (J.A. 46) Plaintiff Koester's Amended petition also alleges that requests for other payment and her statements to Defendants about reasons for requesting other payments, including through submitting her timesheet, constituted a request for payment and a complaint that she would need to get paid that money. (J.A. 46) Further she alleged that other actions of herself constituted a complaint as will be shown by the evidence. (J.A. 46)

Plaintiff requested her pay properly for overtime payments she was entitled to under law. (J.A. 46) Plaintiff requested her pay properly for all her pay that she was entitled to under Iowa Code §91A. (J.A. 46) The Defendants terminated Plaintiff in retaliation for pursuing her legal rights. (J.A. 46) Plaintiff was retaliated against and wrongfully terminated after her overtime work requests were approved. (J.A. 46) Plaintiff was retaliated against and

wrongfully terminated for receiving overtime payments in accordance with State, wage, and hour restriction laws. (J.A. 46)

The Plaintiff was also owed money, both overtime and wages, separately, by agreement with the company. (J.A. 47) She requested payment of her money and then obtained that payment. (J.A. 47) However, the Defendants, despite paying the money, accused Plaintiff of stealing said money and terminated her. (J.A. 47) This termination was in retaliation for Plaintiff requesting being paid for overtime and requesting her full wages. (J J.A. 47)

Plaintiff entered into a protected activity of obtaining overtime and requesting the overtime pay and discussing pay between herself and her fellow employees. (J.A. 47) Plaintiff entered into a protected activity of obtaining payment through agreement and requesting the pay and discussing pay between herself and her fellow employees. (J.A. 47) Plaintiff was discharged from employment. (J.A. 47) There exists a causal connection between the discharge and Plaintiff's protected actions. (J.A. 47)

Plaintiff alleged in her Amended Petition the Defendants directly declared that the reason Plaintiff was terminated was because of her request for wages and overtime and that she was provided the above wages and overtime. (J.A. 47) She alleged that the protected activity was both a but-for

and motivating factor cause of her termination and that causation would be shown in other ways as the evidence will show.

Plaintiff alleged that she engaged in a protected activity of requesting her payment and getting paid her payment under Iowa Code §91A., and this conduct was the reason the Plaintiff was terminated. (J.A. 48) Koester also, separately, engaged in a protected activity of requesting her overtime pursuant to the IWPCL, and getting paid her payment under Iowa Code §91A, and this conduct was also the reason the Plaintiff was terminated. (J.A. 48) Finally Koester alleged she engaged in other protected activities as the evidence will demonstrate, and this conduct was the reason Plaintiff was terminated. (J.A. 48)

Finally, she also alleged there was no overriding business justification for termination of Plaintiff. (J.A. 48) Plaintiff believes the Court to have erred in its ruling requiring a deprivation of wages to pursue under public policy and Iowa Code §91A when administrative code guiding the public policy requires only an exercise on Koester's behalf or rights afforded by the Act and asks it to reconsider.

ARGUMENT

ISSUE I: THE DISTRICT COURT ERRED AS A MATTER OF LAW IN GRANTING IN GRANTING THE MOTION TO DISMISS AS PLAINTIFF SATISFIED NOTICE PLEADING FOR ALL OF HER POTENTIAL CAUSES OF ACTION AND

THIS MATTER WAS MORE APPROPRIATE FOR SUMMARY JUDGMENT.

Preservation of Error

Plaintiff preserved this issue in resisting the Motion to Dismiss on October 18, 2022 (J.A. 112–114), and in moving to Reconsider the Order Dismissing Plaintiff's claims on December 15, 2022 (J.A. 164–165), and in the Notice of Appeal on February 22, 2023; (J.A. 192–194).

Standard of Review

The court reviews "both a motion to dismiss and a district court's statutory construction for correction of errors at law. *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 538 (Iowa 2022)." *Ronnfeldt v. Shelby Cnty. Chris A. Myrtue Mem'l Hosp.*, 984 N.W.2d 418, 421 (Iowa 2023). In reviewing the district court's rulings, the Court "'accept[s] all well-[pleaded] facts in the petition as true.' *Godfrey*, 898 N.W.2d at 847." *Venckus v. City of Iowa City*, 930 N.W.2d 792, 798 (Iowa 2019).

> Rulings on motions to dismiss do not depend on the district court's discretion. *Weber v. Madison*, 251 N.W.2d 523, 525 (Iowa 1977). Such rulings rest on legal grounds. *Id.* Accordingly, our review is for correction of errors at law. Iowa R. App. P. 4. The district court may grant a motion to dismiss only when the petition fails to state a claim on which any relief can be granted under any state of facts provable under the allegations. *Brumage v. Woodsmall*, 444 N.W.2d 68, 68–69 (Iowa 1989). In making this determination, the district court accepts as true the allegations in the petition and must construe those

> allegations in a light most favorable to the nonmoving party. *Id.*

D.M.H. by Hefel v. Thompson, 577 N.W.2d 643, 644 (Iowa 1998).

Argument

Plaintiff satisfied notice pleading in her Amended Petition. "Under notice pleading, **nearly every case will survive a motion to dismiss**. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994). The petition need not allege ultimate facts that support each element of the cause of action. *Id.*" *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004) (emphasis added) Plaintiff need not have alleged the facts that she mentions in the Petition, and even has the opportunity to amend such petition to conform to the facts.

"A 'petition need not allege ultimate facts that support each element of the cause of action[;]" however, a petition "must contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition." *Rees*, 682 N.W.2d at 79. The "fair notice" requirement is met if a petition **informs the defendant of the incident giving rise to the claim and of the claim's general nature**." *U.S. Bank v. Barbour*, 770 N.W.2d 350, 354 (Iowa 2009). (Emphasis added)

"When an employee is terminated for a reason that violates a well-established public policy, the employee has a remedy for damages. *See Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 559–60 (Iowa 1988)."

Teachout v. Forest City Cmty. Sch. Dist., 584 N.W.2d 296, 299 (Iowa 1998). The Defendants asserted and the district court granted a dismissal of claims that are still fully not fleshed out. This determination is more appropriate for summary judgment after facts have been obtained.

Based upon the Statement of the Facts, Plaintiff has given the Defendants fair notice of the incident giving rise to the claim, Plaintiff's termination, and the general nature of the claim, wrongful termination pursuant to public policy.

The elements of a public policy tort are "(1) existence of a clearly defined public policy that protects employee activity; (2) the public policy would be jeopardized by the discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason for the employee's discharge; and (4) there was no overriding business justification for the termination. *Id.*; *accord Fitzgerald*, 613 N.W.2d at 282 n. 2." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761 (Iowa 2009), *as amended on denial of reh'g* (Mar. 5, 2009). Plaintiff alleged all of the elements in her Amended Petition. (J.A. 36–41)

Plaintiff further alleged she engaged in protected activities under other well-known public policy as the evidence will demonstrate and the defendants violated well-recognized public policies as the evidence will demonstrate.

(J.A. 43). This allegation also encompasses any other public policy claims and arguments that might apply outside of the one listed in the claim. Plaintiff also asserts that other actions of Plaintiff constituted a complaint as to her wages as will be shown by the evidence. (J.A. 42).

This established, for purposes of notice pleading, that Plaintiff may have brought other actions not completely listed in the Petition that allowed her to make a complaint for overtime, and that she was terminated for such. Plaintiff is protected by public policy if any of these actions are the reason for Plaintiff being terminated, regardless of whether the money was paid. If not, then the order of the district court would allow a loophole in the public policy, allowing Defendants to pay money after a complaint and then terminate the person after they have paid them the money with no repercussions. *See also* (J.A. 42–43). Plaintiff also asserted a public policy exists that protects Plaintiff under these circumstances. (J.A. 42–43).

For instance, Iowa Administrative Code 875-36.4(91A) is administrative code provision that enacts Iowa Code §91A and goes through the administrative provisions of §91A. And, in fact under sections 875-36.4(91A) and 875-36.2(91A), employees are entitled to substantive and procedural rights, including their ability to exercise those rights. There is further a prohibition of being terminated for exercising those rights.

Ms. Koester was, in fact, exercising her right to overtime by requesting it through her timesheet, and then she was terminated for it. Iowa Code §91A provides this in a public policy through Iowa Code §91A.3 and even in wage disputes through Iowa Code §91A.7.

Further, administrative code provisions can also be the basis for public policy torts. *Jasper v. Nizam*, 764 N.W.2d 751, 763 (Iowa 2009), *as amended on denial of reh'g* (Mar. 5, 2009) And in this situation, 875-36.2(91A) and 875-36.4(91A) are also public policies that Plaintiff is entitled to pursue, as she labeled that there were other public policies that were violated, along with Iowa Code §91A. (J.A. 42–43, J.A. 44)

Plaintiff asserted other protective activities protected her, such as requesting overtime pursuant to the IWPCL and getting paid such money. (J.A. 43). This was not just limited to Iowa Code §91A. There was therefore fair notice of the claims. Therefore, Plaintiff's Petition satisfies notice pleading and this determination is more appropriate for summary judgment. Even if it were not, Plaintiff still satisfies notice pleading, a far less stringent standard than *Twombly.*

Should the facts show that Plaintiff was not terminated for requesting her overtime as alleged (J.A. 41–42), then a summary judgment against Plaintiff might be in order for that part of the claim, but at this stage, there is

no easy way to tell as "[i]n considering a motion to dismiss, the court considers all well-pleaded facts to be true." *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009). Indeed, the Court of Appeals case relied upon by the district court in its ruling was an appeal from a summary judgment *See Bjorseth v. Iowa Newspaper Ass'n*, 889 N.W.2d 700 (Table), 2016 WL 6902745 at *1 (Iowa Ct. App. 2016), lending credence that this is not yet ripe for a determination on the merits.

The district court also relied upon another summary judgment case, an interpretation of the public policy tort of Plaintiff by the Northern District of Iowa federal court. *See Morris v. Conagra Foods, Inc*., 435 F. Supp. 2d 887, 891 (N.D. Iowa 2005). When both persuasive but not binding cases relied upon by the Defendants in their motion to dismiss support a procedural posture of summary judgment, it indicates that this matter is not yet ripe for the court to pursue.

However, reliance on *Morris* in the context of the existence of Plaintiff's causes of action is misplaced. Iowa Courts "look to the federal courts' interpretations of similar constitutional and statutory language as persuasive authority, but we aren't bound by them. Iowa's courts have interpretive authority over Iowa's statutes. "Even where language in a state civil rights statute is parallel to the Federal Civil Rights Act," we have said,

"a state court is under no obligation to follow federal precedent." *Pippen v. State*, 854 N.W.2d 1, 28 (Iowa 2014). And particularly with statutes in which the text in the state and federal versions differs in critical ways, as here, federal court interpretations carry even less persuasive value." *Vroegh v. Iowa Dep't of Corr.*, 972 N.W.2d 686, 702 (Iowa 2022), *see also Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 9 (Iowa 2014).

Meanwhile, despite persuasive authority to the contrary, *Tullis v. Merrill* is still the binding decision on this matter: "We now hold that Iowa Code chapter 91A plainly articulates a public policy prohibiting the firing of an employee in response to a demand for wages due under an agreement with the employer." *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998). Even if the Appeals court were to find *Bjorseth* and *Morris* persuasive, dismissal is still inappropriate as facts remain alleged that Plaintiff was terminated for "request[ing] pay properly for overtime requests", and "her statements to Defendants about reasons for requesting overtime pay constituted a complaint". (J.A. 42). She also alleges that other actions of Plaintiff constituted a complaint as will be shown by the evidence. (J.A. 42).

Even if the facts came out separate from what Plaintiff alleges, there still remain fact questions based on Plaintiff's Amended Petition, and she satisfies notice pleading to state a claim. The district court erred as a matter

of law in granting the motion to dismiss. Plaintiff therefore requests that the district court's ruling be reversed and that the proceedings move to discovery as nearly every case will survive a motion to dismiss. *Rees*, 682 N.W.2d at 79.

ISSUE II: THE DISTRICT COURT'S ERRED AS A MATTER OF LAW IN FINDING PLAINTIFF COULD NOT PURSUE A CLAIM UNDER COUNT I - WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY (PUBLIC POLICY of IOWA CODE § 91A AND PUBLIC POLICY) IF SHE RECEIVED THE MONEY SHE REQUESTED, THEREBY MAKING NO DEPRIVATION OF WAGES.

Preservation of Error and Standard of Review

Plaintiff preserved this issue in resisting the Motion to Dismiss on October 18, 2022 (J.A. 114–118), and in moving to Reconsider the Order Dismissing Plaintiff's claims on December 15, 2022 (J.A. 165–168), and in the Notice of Appeal on February 22, 2023 (J.A. 192–194). The Standard of Review is the same as discussed under Issue I. Appellant incorporates that Standard of Review as if stated here.

Argument

As a preliminary matter, the Order has said Plaintiff did not make a demand for wages. (J.A. 159). Plaintiff disagrees. Plaintiff made a demand for wages by demanding overtime in her paysheets. (J.A. 38–39). This constitutes a demand for wages. *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198,

201 (Iowa 1997); *see also Tullis v. Merrill*, 584 N.W.2d 236, 239-240 (Iowa 1998).

There was a technical deprivation of wages. Koester was owed the wages immediately after she completed the work, not after some ostensible delay. And had Plaintiff not demanded overtime, she would not have been provided it. (J.A. 37, J.A. 40–41).

Further, deprivation is not required for this matter. Plaintiff demanded the overtime she was due. (J.A. 38). She was then paid the overtime wages. (J.A. 38–39, J.A. 40–41, J.A. 42). This overtime was approved by her supervisor. (J.A. 38–39, J.A. 40–41, J.A. 42). She then was fired for making the demand and being paid this overtime. (J.A. 40–41). The Defendants even claimed she was being overpaid and stealing from the company by doing so. (J/A. 40–41). Under the *Tullis* court ruling and the administrative procedures of Iowa Code Chapter 91A.1 *et seq*., Koester requesting for and obtaining her overtime was an exercise by Koester on her own behalf for rights "afforded by the act".

"General requirements. Iowa Code section 91A.10(5) provides in general that an employer shall not discharge or in any manner discriminate against any employee because the employee has: . . . 5. Exercised on the employee's behalf or on behalf of others any right afforded by the Act." Iowa

Admin. Code r. 875—36.4(91A); *see also Jasper v. H. Nizam, Inc*., 764 N.W.2d 751, 763 (Iowa 2009), *as amended on denial of reh'g* (Mar. 5, 2009) (Explaining *Tullis* relied "on an administrative regulation to find public policy from a statute"). Koester was entitled to overtime under the Act and under agreement with the employer and exercised that right. (J.A. 38–39). Therefore, she engaged in a protected activity under Iowa Code §91A.

Deprivation of those wages was not required for Koester to exercise her right under the act. Iowa Administrative Code 875-36.4(91A) is administrative code provision that enacts Iowa Code §91A and goes through the administrative provisions of §91A. Under both sections 875-36.4(91A) and 875-36.2(91A), employees are entitled to substantive and procedural rights, including their ability to exercise those rights. There is a prohibition of termination for exercising those rights. As stated above, administrative codes provisions can also be the basis for public policy torts *Jasper v. Nizam*, 764 N.W.2d 751 (Iowa 2009) And in this situation, 875-36.2(91A) and 875-36.4(91A) were also public policies that Plaintiff was entitled to pursue.

Further, Ms. Koester was, in fact, exercising her right to her overtime pay by requesting it through her timesheet, and then she was terminated for it. Iowa Code §91A provides this in a public policy through Iowa Code §91A.3 and even in wage disputes through Iowa Code §91A.7. Under *Tullis v.*

Merrill, it is uncontroverted when a demand for wages is due under an agreement with the employer that an employee cannot be dismissed for the demanding wages. "We now hold that Iowa Code chapter 91A plainly articulates a public policy prohibiting the firing of an employee in response to a demand for wages due under an agreement with the employer." *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998).

The *Tullis* court never made any sort of distinction that there had to have been some sort of initial deprivation. The Northern District of Iowa Federal Court made that distinction itself in *Morris*. However, *Morris* is inapplicable in this case as Plaintiff was paid wages that she requested and then was terminated for requesting those wages and being paid those wages.

The Northern District decided that it was going to interpret Iowa law differently and create an additional requirement not stated by the Iowa Supreme Court in *Tullis v. Merrill* nor the administrative code. The *Morris* court decided that an employee had to not be paid wages before they could pursue under §91A. The Northern District was not analyzing the *Tullis v. Merrill* specific holding made by the Iowa Supreme Court and its factual posture is distinguishable. Nothing in statute nor in binding Iowa case law says that there is a requirement for deprivation. And for good reason.

This creates a situation where an employer can pay overtime on a demand for overtime and then fire the demanding employee after paying them the overtime. As has occurred in this case. This is in contravention to the purpose of the public policy for which the Iowa legislature has acquiesced, to protect employees making a demand for their wages.

Similarly, *Bjorseth* is also inapplicable. In *Bjorseth* the Iowa Court of Appeals said Chapter 91A and the *Tullis* public policy tort are not a rule prohibiting employees' termination in response to wage disputes. However, that is in fact what Iowa Code §91A.7 and *Tullis* are. Iowa Code §91A.7 has the title of Wage Disputes. If someone could be fired because of a wage dispute, then that would take away the entire purpose of 91A. It would become an exception that swallows the rule and create the absurd result that exists in this matter.

The employees at Eyerly Ball, whether they are entitled to overtime, or not, have been told they will be fired for requesting overtime payments. They now must make a decision between whether they request overtime or do not receive overtime to which they are entitled. This becomes a silver bullet that can be used by employers to terminate those who they believe problematic about wages. It chills the reporting and requesting of overtime. The statutory

principles of the Iowa Wage Payment Collection Act are undermined if employees are discouraged from requesting their wages. *Jasper*, *Tullis*

The Iowa Supreme Court has analyzed another case where there was no deprivation of wages that supports Plaintiff's position. "Examples of courts granting judicial remedies for the discharge of at-will employees for reasons deemed to be contrary to public policy include the following: . . . *Wandry v. Bull's Eye Credit Union*, 384 N.W.2d 325, 330 (1986) (discharge of employee for refusing to reimburse employer for loss on forged check which had been cashed with approval of employee's supervisor)." *Springer v. Weeks & Leo Co*., 429 N.W.2d 558, 560 (Iowa 1988).

In *Wandry*, the Plaintiff pursued under wrongful termination after she cashed a forged check for a customer, approved by her supervisor, and refused to agree to deductions by the Employer under their wage laws to allow the Employer recovery of the forged money and was then terminated. Similarly, Koester was paid money she was due under 91A, approved by her supervisor, then was fired for doing so in contravention to Iowa Code §91A. The public policy tort does not require a deprivation nor a wage dispute to be effective.

The purpose of retaliation provision civil rights statutes "is to let employees feel free to express condemnation of discrimination" *Godfrey v. State*, 962 N.W.2d 84, 108 (Iowa 2021). This applies equally to public policy

torts. In the case of Plaintiff, she expressed condemnation of her perception of her not getting overtime.

While many public policy torts are a state law creation in response to retaliations of person pursing their statutory rights, federal courts with similar retaliation provisions interpret complaints "broadly to cover opposition to 'employment actions that are not unlawful, as long as the employee acted in a good faith, objectively reasonable belief that the practices were unlawful.' *Bonn v. City of Omaha*, 623 F.3d 587, 591 (8th Cir.2010) (quoting another source); *see also Barker v. Mo. Dep't of Corrs.*, 513 F.3d 831, 834 (8th Cir.2008)." *Pye v. Nu Aire, Inc.,* 641 F.3d 1011, 1020 (8th Cir. 2011); *see also Rumsey v. Woodgrain Millwork, Inc.*, 962 N.W.2d 9, 29 (Iowa 2021). Koester's complaints about not being paid overtime and requesting her overtime were protected activities. Koester lawfully opposed illegal activity or had a reasonably belief that she was doing so.

Plaintiff was due overtime under agreement and under §91A (J.A. 38–39). Plaintiff demanded the overtime she was due. (J.A. 38). She was then fired for doing so. (J.A. 4041). She stated a claim under notice pleading.

"Administrative regulations implementing chapter 91A address this situation, providing: The statutory principles of the [wage payment act] would be seriously undermined if employees were discouraged from lodging

complaints about wages with their employers. A complaint to the employer made in good faith would be related to the Act, and an employee would be protected against discharge or discrimination caused by the complaint to the employer. Iowa Admin. Code r. 347—36.6(2).” *Tullis v. Merrill*, 584 N.W.2d 236, 239–40 (Iowa 1998).

Plaintiff Koester alleges the policy by Defendants would have already chilled employee demands for overtime in the case of overtime requests by employees at Eyerly Ball (J.A. 40, J.A. 41). Despite being owed the overtime, the employees may not demand the pay they are owed after the veiled threat by their supervisors. This ruling has created an absurd result, where the employees are chilled from making good faith requests for overtime. This is against the public policy outlined in §91A.1, *et seq.*, *Tullis*, and the Iowa Administrative Code.

Further, dismissal is still inappropriate as facts remain alleged that Plaintiff was terminated for making “request[ing] pay properly for overtime requests”, and “her statements to Defendants about reasons for requesting overtime pay constituted a complaint”. (J.A. 42).

When Defendants confronted Plaintiff about her receipt of overtime and that she was not entitled to it, she said she believed she was entitled to it under law, which constitutes a “demand for wages due.” The Defendants then

said she was not entitled to it and terminated her for "stealing". The money may have been paid, but the reasoning for termination is her request for payments, which clearly falls into a "demand for wages due."

Other allegations by Plaintiff are presumed true as well. For instance, Plaintiff stated that there were times she did not get paid to drive to meetings and trainings (J.A. 37). She was asked to cover other people's shifts as well. (J.A. 38). She was afraid of being terminated if she brought it up. (J.A. 41). She also claimed that she was terminated for discussing wages with her coworkers and giving them the idea for additional wages as well. (J.A. 41).

She was wrongfully terminated after she requested overtime. (J.A. 41, J.A. 42). Defendants terminated her for pursuing that very right to overtime (J.A. 42). Koester alleges her requests for overtime pay and her statements to Defendants about reasons for requesting overtime pay constituted a complaint that she should get overtime pay (J.A. 42).

Moreover, the Iowa Supreme Court's clarification of the *Tullis* decision over the years clearly supports Plaintiff's position. *See Dorshkind v. Oak Park Place of Dubuque II, L.L.C.,* 835 N.W.2d 293, 301–302 (Iowa 2013) ("[T]he employer argued the public-policy exception only applied if the employee made the complaint to the labor commissioner under section 91A.10 . . . . In response to this claim, we held public policy prohibited Tullis's firing for

making a wage claim, and the internal complaint satisfied this public policy."); *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 281 (Iowa 2000); *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 229 (Iowa 2004); *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 765 (Iowa 2009), *as amended on denial of reh'g* (Mar. 5, 2009); *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 111 (Iowa 2011); *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 894 (Iowa 2015); *Ferguson v. Exide Techs., Inc.*, 936 N.W.2d 429, 434 (Iowa 2019).

This claim is about Koester demanding her wages from her employer per agreement and under her good faith belief of the law, and then their termination of her for requesting the wages and receiving the wages.

Iowa Code §91A.3(1) and *Tullis* have very similar language, "An employer shall pay all wages due its employees," and *Tullis*: "demand for wages due." Koester requested wages through her time sheet, including overtime, which would not have been given to her otherwise without her request through the time sheet.

The district court has enacted an order, and construed the *Bjorseth* case incorrectly, where it creates the result of ratifying the dismissal of Koester for her request and acceptance of the wages due. In essence, she does not get to demand wages due in her time sheet. She does not get to demand her properly

worked overtime, as she would be terminated for doing so. This is opposite of the intentions of Iowa Code §91A.3 and the public policy torts.

The district court erred as a matter of law in granting the motion to dismiss as to Count I. For the above reasons, Plaintiff requests that the district court's ruling be reversed and remanded back for further proceedings.

ISSUE III: THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING COUNT II – WRONGFUL TERMINATION AND RETALIATION UNDER IOWA CODE §91A et seq. WAS NOT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS.

Preservation of Error and Standard of Review

Plaintiff preserved this issue in resisting the Motion to Dismiss on October 18, 2022 (J.A. 125–127), and in moving to Reconsider the Order dismissing Plaintiff's claims on December 15, 2022 (J.A. 168–170), and in the Notice of Appeal on February 22, 2023; (J.A. 192–194). The Standard of Review is the same as discussed under Issue I. Appellant incorporates that Standard of Review as if stated here.

Argument

Plaintiff plead Count II – Wrongful Termination and Retaliation Under Iowa Code §91A, *et seq.*, in her Amended Petition, in the alternative, on the idea the wrongful termination based on public policy was not applicable in this matter. Plaintiff alleges that public policy torts are the applicable cause of

action due to *Ferguson v. Exide Techs., Inc*., 936 N.W.2d 429, 434 (Iowa 2019).

"We looked at the implementing administrative regulations, which stated "an employee would be protected against discharge or discrimination caused by the complaint to the employer." *Id.* at 239–40 (quoting Iowa Admin. Code r. 347—36.6(2)). We concluded the administrative remedy was not exclusive, and the public policy wrongful-termination claim was appropriate. *Id.*" *Ferguson v. Exide Techs., Inc*., 936 N.W.2d 429, 434 (Iowa 2019). The district court did not rule on whether it was applicable or not, and instead ruled that the cause of action was barred based on a two-year statute of limitations.

Iowa Code §91A.10 is not a comprehensive remedy for wrongful termination based on Iowa Code §91A.10, it merely states a person may file a complaint with the Commissioner and *Tullis* provides a cause of action based on this statute. Defendants made an argument in their Motion to Dismiss that alleged Plaintiff had a right to pursue under §91A.10, however, that right would be without remedy with a lack of private cause of action existing absent a public policy tort. *See Ferguson v. Exide Techs., Inc*., 936 N.W.2d 429, 434–435 (Iowa 2019) Indeed, the point of *Tullis* is to explain that the public policy tort exists because the administrative action listed in Iowa Code

§91A.10 is not comprehensive, and does not seem to show a civil enforcement, and therefore the public policy tort exists. *See Ferguson* 936 N.W.2d at 434.

Turning to the merits of the decision of the district court, Plaintiff's claim under Count II is within the statute of limitations. While it is true that Iowa Code §614.1(8) provides a two-year statute of limitations for wage claims, this case is not a wage claim. The Court ruled this as a wage claim however, it cannot easily show that this case is a wage claim and therefore they have not proven Iowa Code §91A.10 and public policy torts are not wrongful termination torts at heart.

"We believe a cause of action should exist for tortious interference with the contract of hire when the discharge serves to frustrate a well-recognized and defined public policy of the state." *Springer v. Weeks & Leo Co*., 429 N.W.2d 558, 560 (Iowa 1988). The Iowa Supreme Court has not actually weighed in on 91A.10 retaliation claims on this matter, and while wages are the overall theme and purpose of Iowa Code §91A.1, *et seq*., the heart of Iowa Code §91A.10, is in fact, retaliation and interference with employment. The district court erred by refusing to rely on "actual nature of the action." *Clark v. Figge*, 181 N.W.2d 211, 213 (Iowa 1970). The choice turns, not on the relief

requested, but on "the nature of the right sued upon." *Sandbulte*, 343 N.W.2d at 462." *Brown v. Liberty Mut. Ins. Co*., 513 N.W.2d 762, 764 (Iowa 1994).

Plaintiff is basing her cause of action on the termination itself, not her wages, not on a liability or penalty to pay wage, but the fact that the Defendants terminated her after she made complaint and claim for the money she was entitled.

The case relied upon by the district court does not address retaliation under Iowa Code 91A.10 and the issue as to whether a retaliation claim falls under 614.1(8) was not addressed. *See Waterman v. Nashua-Plainfield Cmty. Sch. Dist*., 446 F. Supp. 2d 1018, 1027 (N.D. Iowa 2006). However, the cause of action under 91A here is based on Koester's employment and termination, not the potential damage of wages.

Therefore, this falls within the purview of Iowa Code §614.1(4): "4. Unwritten contracts--injuries to property--fraud--other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsections 8 and 10." As the Eighth Circuit recognizes of the Iowa statutes, a five-year statute of limitations exists on wrongful discharge actions. *Vrban v. Deere & Co.,* 129 F.3d 1008, 1010–

11 (8th Cir. 1997). As retaliation and wrongful termination do not have periods listed, then Plaintiff's claim falls within the Iowa Code §614.1(4) five-year statute of limitations and her claims are timely as a matter of law.

As stated in the Eighth Circuit when analyzing a claim for wrongful termination that has wages as damages, the Eighth Circuit said:

> Deere alternatively argues that an action for wrongful discharge constitutes a claim for wages and thus, Iowa Code § 614.1(8), bars the claim. We disagree. Section 614.1(8) provides a two-year limitation period for actions "founded on claims for wages or for a liability or penalty for failure to pay wages." Vrban does not claim that Deere failed to pay him wages for services rendered. Rather, Vrban merely requests compensatory and punitive damages. The potential recovery of compensatory damages, including lost income, does not convert the foundation of Vrban's action to one for wages. *See Sandbulte*, 343 N.W.2d at 462 (stating "[i]t is the nature of the right sued upon and not the elements of relief requested that governs the selection of the appropriate statutory period"); *Venard v. Winter*, 524 N.W.2d 163, 165 (Iowa 1994) (the "determination turns on the nature of the right sued upon and not on the elements of relief sought for the claim").3 Deere does not cite any and we have not found any Iowa case law that supports its contention that the Iowa Supreme Court would characterize a wrongful discharge action as one founded on a claim for wages. Consequently, section 614.1(8) does not apply to this cause of action.
>
> Deere has not asserted that any other limitation period bars Vrban's action. Therefore, we find that the five-year limitation period contained in section 614.1(4) applies to Vrban's action.

Vrban v. Deere & Co., 129 F.3d 1008, 1010–11 (8th Cir. 1997); *see also Keen v. Mid-Continent Petroleum Corp*., 63 F. Supp. 120, 128 (N.D. Iowa 1945),

aff'd, 157 F.2d 310 (8th Cir. 1946). As explained in *Vrban* and *Brown*, Plaintiff's claim is on the retaliation and wrongful termination she suffered, not on the wages that she complained about.

Wages could be a damage that she is entitled to, but as explained in both cases, it is about the nature of the claim asserted, and here it is retaliation. As retaliation and wrongful termination do not have periods listed, then Plaintiff's claim falls within the Iowa Code §614.1(4) five-year statute of limitations and her claims are timely as a matter of law.

The district court similarly states that there can be no retaliation under Iowa Code §91A.10 if there was no deprivation of wages, and Plaintiff alleges this is incorrect for the same reasons as stated in Issue II. The district court errs in law in relying on that argument. For the same reasons as above, §91A.10 does not necessarily require a deprivation of wages, and even if it does, then the deprivation occurs when the person is not immediately paid and must request it from a timesheet. And as the damages are compensatory in nature and not necessarily wages, retaliation and wrongful discharge claims are based on the Iowa Code §614.1(4) five-year statute of limitations, and her claims are timely as a matter of law. The district court erred as a matter of law as to the statute of limitations. The Plaintiff asks the Court to reverse the

district court as to count II and remand the case back to district court for further processing.

CONCLUSION

The district court erred as a matter of law in granting the motion to dismiss. For the preceding reasons, the Plaintiff respectfully asks this Court to reverse the district court's rulings and remand for further proceedings.

REQUEST FOR ORAL ARGUMENT

Counsel for Plaintiff-Appellant Ashley Lynn Koester requests to be heard in oral argument.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 8,188 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

/s/ Bruce H. Stoltze, Jr.

CERTIFICATE OF SERVICE

I, Bruce H. Stoltze, Jr., member of the Bar of Iowa, hereby certify that on the 25th day of August, 2023, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a), this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/s/ Bruce H. Stoltze, Jr.

CERTIFICATE OF FILING

I hereby certify that on the 25th day of August, 2023, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a) this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/s/ Bruce H. Stoltze, Jr.

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Appellant's Final Brief and Request for Oral Argument was $0.00.

/s/ Bruce H. Stoltze, Jr.