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IN THE SUPREME COURT OF IOWA

Supreme Court No. 17-0202

JOSEPH WALSH,

Plaintiff-Appellant,

Vs,

TERESA WAHLERT AND THE STATE OF IOWA,

Defendants-Appellees.

APPEAL FROM THE POLK COUNTY DISTRICT COURT
Hon. Michael D. Huppert

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

MICHAEL J CARROLL– AT0001311
MEGAN FLYNN --AT0010000
COPPOLA, McCONVILLE, COPPOLA, CARROLL, HOCKENBERG & SCALISE, P.C.
2100 Westown Parkway, Suite 210
West Des Moines, Iowa 50265
Phone: 515/453-1055: Fax: 515/453-1059
Emails: michael@csmclaw.com
megan@csmclaw.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF FILING

I, the undersigned attorney, hereby certify that I have filed electronically pursuant to Iowa Rule 16.1201 et. seq. this Appellant's Brief and Request for Oral Argument with the Clerk of the Supreme Court, Appellate Court's Building, 1111 E. Court Street, Des Moines, Iowa, on the 1st day of August, 2017.

__/s/ Megan Flynn___________________________

MICHAEL J. CARROLL – AT0001311
MEGAN FLYNN – AT0010000
COPPOLA, McCONVILLE, COPPOLA,
CARROLL, HOCKENBERG & SCALISE, P.C.
2100 Westown Parkway, Suite 210
West Des Moines, Iowa 50265
Phone: 515-453-1055; Fax: 515-453-1059
Email : michael@csmclaw.com
megan@csmclaw.com

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify, that on the 1st day of August, 2017 I served the attached Appellant's Brief and Request for Oral Argument by Electronically filing with the Clerk of the Supreme Court for service to opposing parties pursuant to Iowa Rule 16.1201 et. seq. to the following persons:

Jeffrey C. Peterzalek
Susan J. Hemminger
Molly M. Weber
Assistant Attorney Generals

ATTORNEYS FOR THE DEFENDANTS-APPELLEES

___/s/ Megan Flynn_________
MICHAEL J. CARROLL - AT0001311
MEGAN FLYNN – AT0010000
COPPOLA, McCONVILLE, COPPOLA,
CARROLL, HOCKENBERG & SCALISE, P.C.
2100 Westown Parkway, Suite 210
West Des Moines, Iowa 50265
Phone: 515-453-1055; Fax: 515-453-1059
Email: michael@csmclaw.com
megan@csmclaw.com
ATTORNEYS FOR APPELLANTS

COST CERTIFICATE

The undersigned hereby certifies that the cost of printing this Appellant's Brief is $0.00.

___/s/ Megan Flynn___________

ROUTING STATEMENT PURSUANT TO I. R. APP. 6.1101

Under the provisions of Iowa Rule of Appellate Procedure 6.1101(2)(c), Appellant respectfully represents that this case be retained by the Iowa Supreme Court because it presents two substantial issues of first impression.

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STATEMENT OF ISSUES
PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN HOLDING THAT WALSH, A MERIT SYSTEM EMPLOYEE, WAS REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO FILING A WHISTLEBLOWER CLAIM PURSUANT TO IOWA CODE § 70A.28

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STATUTES AND RULES

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II. THE DISTRICT COURT ERRED IN HOLDING THAT THE CLAIM OF WRONGFUL DISHARGE IN VIOLATION OF PUBLIC POLICY IS NOT AVAILABLE TO MERIT SYSTEM EMPLOYEES

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STATEMENT OF THE CASE

Nature of the Case

This is an action at law, filed in Polk County, Iowa alleging that Defendants violated Iowa's state-employee whistleblower protection statute, Iowa Code Section 70A.28, and alleging that Defendants terminated Walsh in violation of the public policy of the State of Iowa.

Course of Proceedings

Plaintiff filed his Petition on April 3, 2014 alleging violation of Iowa Code § 70A.28.

On or about December 11, 2015, Defendants filed a motion for summary judgment and alternative motion to dismiss and strike in district court seeking dismissal of Walsh's claims against them. Walsh filed a resistance on January 11, 2016.

Walsh also filed, on January 8, 2016, a motion to amend his Petition to allege a count for wrongful discharge in violation of public policy.

On January 13, 2016, the case was stayed, pursuant to an order of the district court, based on the fact that a case was pending in the Iowa Supreme Court that was related to and could affect determination of Walsh's wrongful discharge in violation of public policy claim.

On June 3, 2016, the parties filed a joint motion to lift the stay and set

deadlines.

On September 23, 2016, Defendants filed a supplemental motion for summary judgment and alternative motion to dismiss and strike.

On October 21, 2016, Walsh filed a supplemental resistance to the supplemental motion for summary judgment and alternative motion to dismiss and strike.

A hearing on the motion for summary judgment and alternative motion to dismiss and strike was held on November 18, 2016.

On January 11, 2017, the Court entered its ruling on the motion for summary judgment, ruling in favor of the defendants, and dismissing Walsh's claims.

Notice of Appeal was timely filed on February 6, 2017.

Statement of Facts

Walsh became the Chief ALJ for IWD in January 2011 just before Defendant Wahlert became the Executive Director of the agency. (Walsh Dep. 20:3-20:22, APP. 230). Wahlert's position was political (she served at the pleasure of the Governor) while Walsh was a "merit system" employee. *See* Iowa Code Section 8A.411 *et seq.* (2017); *see also* Walsh Aff. ¶ 5, APP. 314.

Walsh understood his obligation to the agency and the Director was to protect Wahlert from interference while providing her with legitimate advice and information she needed to run the agency. Walsh advised Wahlert her role was to

propose legislation and engage in rulemaking, not to direct ALJ decision-making through policy. As Wahlert's efforts intensified, Walsh became a forceful buffer and stumbling block to her efforts to exert improper authority over the ALJs and the administrative judicial process.

The primary function of the Chief ALJ at the time Walsh held that position was to manage the Unemployment Insurance Appeals Bureau, which consists of approximately 12 administrative law judges and support staff as well as, perhaps most importantly, hearing and deciding important unemployment cases. (Walsh Dep. 22:24-23:24, APP. 231).

As a merit employee, unlike his job as Deputy Director, Walsh was protected by laws governing employee status and rights and therefore was not "at-will." In other words, Walsh could only lose his job pursuant to certain specific enumerated and codified criteria and could not be terminated for no reason as he could if he were a political appointee. *See, e.g.*, Iowa Code § 8A.413(18) (2017).

The Chief ALJ has historically served as a buffer between the Director of IWD, a political appointee, and the administrative law judges (ALJs), all of whom are merit employees who have no political role and merely apply factual scenarios to the law.

On April 5, 2013, Jon Nelson, the Human Resources Manager at IWD, delivered a letter to Walsh announcing Wahlert's intent to change the Chief ALJ

position from merit to a political, non-merit (at-will) position. (April 5, 2013 Letter, APP. 215). During the same time frame, Wahlert issued similar letters to several other IWD employees whose positions were funded with federal U.S. Department of Labor (hereafter "DOL") funds. (Walsh Dep. 49:16-50:17, APP. 238, Walsh Dep. 52:23-54:4, APP. 238-39). This was, according to Walsh's understanding, part of a broader Branstad Administration effort to reclassify State employees from protected merit positions into political, at-will positions.

Walsh met with Nelson telling Nelson specifically that it was a violation of the Social Security Act and U.S. Department of Labor (U.S. DOL) guidance for a Chief ALJ to be classified as non-merit. Walsh provided documentation supporting that claim. Nelson reviewed information provided by Walsh and agreed there was a problem with the move to change his position from merit to at-will. (Walsh Dep. 51:11-52:5, APP. 238).

During the meeting Nelson promised to have the information reviewed by the Department of Administrative Services (hereafter "DAS"), the human resources arm of the state government, and, in the meantime, agreed to place the letter on "hold" while it was under review. The determination to make the position at-will was appealable but based upon Nelson's assurance that the matter was under review and "on hold," Walsh did not file an appeal of the decision. (Walsh Dep. 51:18-56:4, APP. 238-39). Nelson assured Walsh that his status would not

change without his knowledge. (Walsh Aff. ¶¶ 11-15, APP. 315). Walsh was on vacation and out of the office from April 9, 2013, until April 21, 2013, a day after the appeal deadline would have run had the matter not been placed on "hold." (*Id.*)

On April 26, 2013, Walsh followed up with Nelson via email confirming the determination had been placed on hold. Nelson did not respond immediately. Between April 26, 2013, and May 21, 2013, Nelson informed Walsh several times that DAS was still reviewing the matter. (Walsh Dep. 54:18-55:15, APP. 239).

On May 21, 2013, Nelson informed Walsh for the first time that Walsh was no longer a merit employee. (Walsh Dep. 55:18-56:4, APP. 239; Walsh Aff. ¶16, APP. 315). Nelson stated that the new status had become effective while Walsh was on vacation. (Walsh Aff. ¶ 16, APP. 315). Walsh had previously contacted DOL Regional Office in Chicago, specifically Elizabeth Schloesser (Schloesser), the DOL Liaison for Walsh. (Walsh Dep. 59:7-59:24, APP. 240; Walsh Dep. 63:6-64:16, APP. 241). Schloesser had informed Walsh that any administrative law judge, whether managerial or not, must be a merit employee. (Walsh Dep. 60:3-60:9, APP. 240).

Walsh informed Wahlert that he had contacted DOL and that she and DAS had made a serious legal error. (Walsh Aff. ¶¶ 19-20, APP. 316). Walsh then met with Wahlert explained the error in detail along with the potential federal DOL consequences. (Walsh Dep. 57:20-58:2, APP. 240).

Wahlert stated "I'm not a lawyer. I leave that up to the lawyers, and they said it was fine" and directed Walsh to contact Ryan Lamb, general counsel for DAS. (Walsh Dep. 57:20-58:7, APP. 240).

Walsh contacted Lamb and arranged to meet on May 31, 2013. On May 31, 2013, Lamb acknowledged he had no legal authority for his determination other than what Walsh had originally provided to Nelson. In that meeting, Lamb stated that he relied on the fact that Wahlert had informed Lamb that Walsh did not spend much time deciding cases and his position was "mostly managerial." Walsh explained to Lamb that, in fact, he spent a significant amount of time deciding cases, a fact which Wahlert knew or should have known. Walsh further explained the legal authorities provided, as well as Schloesser's explanation to Walsh on May 22, 2013. (Walsh Dep. 64:17-66:17, APP. 241-42). Walsh also explained the policy reasons why it would be a bad decision for the Chief ALJ to be political/non-merit. Lamb stated he agreed on the policy argument. (*Id.*; Walsh Aff. ¶ 25, APP. 316). He further stated it was not his legal decision; rather it was Wahlert's policy decision. (Walsh Aff. ¶¶ 23-24, APP. 316). This directly contradicted what Wahlert had informed Walsh about how/why the reclassification decision had been made. (Walsh Aff. ¶ 20, APP. 316). Lamb agreed to contact DOL to get further information and reassess the legality of the decision. (Walsh Dep. 69:5-69:13, APP. 243).

Lamb spoke with Walsh by phone on or before June 11, 2013 during which Lamb acknowledged that it was not legal and/or allowable under federal DOL guidelines to make the Chief ALJ non-merit so long as the position heard cases. (Walsh Aff. ¶ 26, APP. 316; Walsh Dep. 69:21-70:3, APP. 243). On or about June 11, 2013, Wahlert called Walsh into her office, along with Nelson, and provided him with a new Position Description Questionnaire (PDQ), essentially a new job description. (Walsh Aff. ¶ 27, APP. 316; *Compare* old PDQ APP. 215-19, *with* new PDQ, APP. 220-25). The new PDQ assigned Walsh, as Chief ALJ to cease hearing cases. (New PDQ, APP. 220-25).

Wahlert asked Walsh to review the new PDQ, go home, think about it and get back to her with any input. (Walsh Dep. 72:9-72:20, APP. 243). Walsh agreed to review the PDQ and get back to her. (*Id.*). Walsh attempted to meet with Wahlert the following day but she was unavailable. (Walsh Dep. 74:16-75:5, APP. 244). Walsh emailed Wahlert on June 12, 2013 and expressed his continued discomfort with the proposed job duty change. (*Id.*)

Wahlert responded with an angry email directing Walsh to either sign the new PDQ or not but that it was now in effect. Walsh was in the middle of deciding and writing several cases at that time. Walsh emailed back that it was impossible for him to begin working under the new PDQ while in the midst of deciding multiple cases.

In a follow up email Wahlert backed down and acknowledged Walsh could complete the cases. (APP. 210-11). On June 13, 2013,Walsh emailed complaints directed to Office of Governor Terry Branstad, the DOL, and members of the IWD Board. (June 13, 2013 E-mail, DEF. APP. 19-20). In the email, Walsh exposed IWD's legal and ethical violations to the recipients. (Walsh Aff. ¶ 28; June 13, 2013 E-mail, APP. 85-86). Walsh followed up with a second e-mail, also exposing IWD's legal and ethical violations, that was addressed separately and only to the DOL. (June 17, 2013 E-mail to DOL, APP. 209). Walsh then followed up with Senator Dotzler and Representative Running-Marquardt regarding his complaints. (Walsh 83:11-83:21, APP. 246).

As Chief ALJ, Walsh was responsible for the Appeals Bureau's budget. In the most recent budget estimates prior to Walsh's separation, the Appeals Bureau was under budget for Fiscal Year 2013 (July 1, 2012 to June 30, 2013) and approximately $250,000 under budget for Fiscal Year 2014. Neither Wahlert, nor any person in the Financial Management Bureau had ever informed Walsh of any budget issue because there was no budget issue in the Appeals Bureau. (Walsh Aff. ¶ 33, APP. 317).

On June 20, 2013, Wahlert provided Walsh with a letter rescinding her efforts to make his position political/non-merit. (June 20, 2013 Letter, APP. 87). On or about July 15, 2013, Walsh received a "layoff letter" and was walked out of

the IWD office accompanied by an escort. (July 15, 2013 "layoff letter," APP. 091; Walsh Dep. 92:21-92:23, APP. 248). He was not allowed to clean out his office or say goodbye to staff.

The layoff plan sent to DAS characterized the layoff as a reduction in force due to budget shortfall. This was untrue as Walsh's bureau was under budget. (Walsh Aff. ¶ 33, APP. 317).

In the wake of his termination Walsh attempted to mitigate his damages by becoming reemployed with the state. During that time Wahlert attempted to interfere with Walsh's efforts to become employed at the Division of Workers' Compensation urging the Workers' Compensation Commissioner not to hire Walsh through outplacement because he had filed complaints against her with a State agency. (Walsh Aff. 37, APP. 318). Additionally, while Wahlert and the State have attempted to spin Walsh's layoff being budget–related, rather than simply adhering to that simple narrative, in the wake of the filing of the Petition in this matter, Wahlert authorized an unprecedented attack on Walsh through the media. (APP. 198; 267-304).

ARGUMENT

Scope of Review.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3).

An issue of fact is "genuine" when the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Fees v. Mutual Fire and Automobile Insurance Co.,* 490 N.W.2d 55, 57 (Iowa 1992). An issue of fact is "material" when, considering the underlying law, its determination might affect the outcome of the lawsuit. *Id*.

On appeal, this Court reviews a district court's ruling on a motion to for summary judgment for correction of errors at law. *See* Iowa R. App. P. 6.907 (2016); *see also Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 181, 185 (Iowa 2007).

Analysis

I. THE DISTRICT COURT ERRED IN HOLDING THAT WALSH, A MERIT SYSTEM EMPLOYEE, WAS REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO FILING A WHISTLEBLOWER CLAIM PURSUANT TO IOWA CODE § 70A.28

The district court held that Plaintiff failed to exhaust his administrative remedies with respect to his Iowa Code § 70A.28 whistleblower claim. That claim relied upon Iowa Code § 70A.28(2), which provides as follows:

> A person shall not discharge an employee from or take or fail to take action regarding an employee's appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, a position in a state employment system administered by, or subject to approval of, a state agency as a reprisal for a failure by that employee to inform the person that the employee made a disclosure of information permitted by this section, or for a disclosure of information to the office of ombudsman, or a disclosure of information to any other public official or law enforcement agency if the employee reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety. However, an employee may be required to inform the person that the employee made a disclosure of information permitted by this section if the employee represented that the disclosure was the official position of the employee's immediate supervisor or employer.

Iowa Code § 70A.28(2).

The language of the same whistleblower statute provides a private right of action for state employees, and enables them to bring a civil action. It also provides an administrative remedy for non-merit-system employees:

> 5. Subsection 2 ***may be*** enforced through a civil action.

> a. A person who violates subsection 2 is liable to an aggrieved employee for affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs.
>
> b. When a person commits, is committing, or proposes to commit an act in violation of subsection 2, an injunction may be granted through an action in district court to prohibit the person from continuing such acts. The action for injunctive relief may be brought by an aggrieved employee or the attorney general.
>
> 6. Subsection 2 may also be enforced by an employee through an administrative action pursuant to the requirements of this subsection if the employee is not a merit system employee or an employee covered by a collective bargaining agreement . . .

Iowa Code 70A.28(5)-(6). Despite the clear language of the whistleblower statute providing a private right of action, the district court nevertheless found that exhaustion under another chapter of the Code—chapter 8A—was required:

> This court finds Iowa Code chapter 8A provides an adequate administrative remedy for the claimed wrong. Iowa Code section 8A.417(4) expressly provides protection for merit system employees who engage in whistleblowing activities—the same activities identified in Iowa Code section 70A.28(2) that Plaintiff alleges resulted in his termination. Iowa Code section 8A.415 outlines the administrative process available to an aggrieved merit system employee. A merit system employee who is discharged may, following a grievance procedure, file an appeal with the PERB. Iowa Code § 8A.415(2)(a-b). If the board finds the action taken was for 'political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the [PERB] may provide other appropriate remedies.' Iowa Code § 8A.415(b). The grievance and appeal procedure outline [sic] in Iowa Code section

> 8A.415 provide an adequate remedy for Plaintiff to challenge his termination.

(*See* District Court Ruling, at 5). Walsh disagrees with this ruling and believes it has misinterpreted the intent of the legislature. The plain language of Iowa Code § 70A.28 makes the employee's civil action and administrative remedy alternative and does not set forth any exhaustion requirement.

A. When Exhaustion Is Required

Plaintiff has located no Iowa case that addresses whether a § 70A.28 Plaintiff, and specifically one who is a "merit system" employee must exhaust any administrative remedies prior to filing a whistleblower claim under that statute. Further, no exhaustion requirement is manifest from the face of that statute alone. Therefore, Plaintiff relies on the general standards governing when such exhaustion requirements arise.

As set forth by this Court:

> Two conditions must be met before we apply the doctrine: an adequate administrative remedy must exist for the claimed wrong, and the governing statutes must expressly or impliedly require the remedy to be exhausted before allowing judicial review . . . An exception to the doctrine 'is applied when the administrative remedy is inadequate or its pursuit would be fruitless.'

Riley v. Boxa, 542 N.W.2d 519, 520 (Iowa 1996). Further, the Court recognized "We have stated that the exhaustion of administrative remedies doctrine does not apply if, by the terms and implications of the statutes authorizing an administrative

remedy, 'such remedy is permissive only or not exclusive of the judicial remedy, warranting the conclusion that the legislature intended to permit resort to the courts even though the administrative remedy has not been exhausted.' *Id.*, 542 N.W.2d at 522 (quoting *Charles Gabus Ford, Inc. v. Iowa State Highway Comm'n*, 224 N.W.2d 639, 647 (Iowa 1974)).

B. No Adequate Administrative Remedy Exists for the Claimed Wrong

First, it is important to consider the Iowa Code § 70A.28(6) makes clear that Walsh had no administrative remedy available for the claimed wrong under that code section, and in fact Defendants admit that Walsh was not permitted to maintain that claim before PERB. (Defendants' Br., at 10) ("A merit-covered employee cannot go to PERB via Iowa Code § 70A.28(6)."). Therefore, if an administrative exhaustion requirement exists, it is not found within Iowa Code § 70A.28.

As the district court held, however, there is an administrative remedy present within Iowa Code Chapter 8A. The question then arises as to whether this remedy is adequate. It is not. Under the 8A remedy, the employee is limited to the following relief: "the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies." Iowa Code § 8A.415(2)(b). Under the civil action remedy

available in Chapter 70A, the employee may recover back pay, and equitable relief including attorney fees and costs. Iowa Code § 70A.28(5)(a).

Further, even that remedy could be considered adequate § 70A.28 expressly disavows any exhaustion requirement.

C. The Legislature Did Not Intend to Require Exhaustion for § 70A.28 Claims

First, the language of § 70.A.28 not only does not expressly support any exhaustion requirement, but is in fact directly contrary to the imposition of an exhaustion requirement. It provides in relevant part:

> 5. Subsection 2 ***may be*** enforced through a civil action.
>
> a. A person who violates subsection 2 is liable to an aggrieved employee for affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs.
>
> b. When a person commits, is committing, or proposes to commit an act in violation of subsection 2, an injunction may be granted through an action in district court to prohibit the person from continuing such acts. The action for injunctive relief may be brought by an aggrieved employee or the attorney general.
>
> 6. Subsection 2 ***may also be*** enforced by an employee through an administrative action pursuant to the requirements of this subsection if the employee is not a merit system employee or an employee covered by a collective bargaining agreement . . .

Iowa Code 70A.28(5)-(6) (emphasis added).

As seen from the quoted sections, the statute employs permissive, alternative language—"*may be* enforced through a civil action"—and—"*may also be* enforced . . . through an administrative action," and nowhere does the statute require any exhaustion of any administrative remedies. While subdivision 6 provides that the right "may also be enforced by an employee through an administrative action pursuant to the requirements of this subsection if the employee is not a merit system employee or an employee covered by a collective bargaining agreement," thus exempting Walsh from that subdivision's purview, the previous subdivision regarding civil actions has no such limitation and in no way prevents merit system employees or collective bargaining agreement employees from filing a civil action and in no way requires or mentions prior exhaustion of the whistleblower provision found within Chapter 8A.417. These alternative remedies allow the aggrieved employee to choose his forum. In *Riley*, the Court recognized "We have stated that the exhaustion of administrative remedies doctrine does not apply if, by the terms and implications of the statutes authorizing an administrative remedy, 'such remedy is permissive only or not exclusive of the judicial remedy, warranting the conclusion that the legislature intended to permit resort to the courts even though the administrative remedy has not been exhausted.' *Riley*, 542 N.W.2d at 522 (quoting *Charles Gabus Ford, Inc. v. Iowa State Highway Comm'n*, 224 N.W.2d 639, 647 (Iowa 1974)).

Further, the legislative history shows that the intent of the legislature was first and foremost to create and retain a civil action remedy for whistleblowers, and second, to add available administrative remedies. The civil action remedy found within § 70A.28 was added in 1989 through 89 Acts, ch 124, § 2. At the time it was added, there was no provision made for any administrative remedies for either merit or non-merit employees (and admittedly, Chapter 8A regarding merit system employees did not exist at that time). In 2003, the Department of Administrative Services was established, and the sections governing merit system employees were added to the code, including the 8A.415 grievance and discipline provisions and the 8A.417 whistleblower provision. *See* 2003 Acts, ch 145, § 286. However, Iowa Code § 70A.28 was not amended and allowed state employees to bring civil actions. In 2006, the legislature added, through 2006 Acts, ch 1153, § 14, an administrative remedy for non-merit employees, employing the "may also be" language found within current subdivision 6 of § 70A.28. Throughout this process, and while it seemed the legislature considered removing the civil action altogether, *see, e.g.* Senate File 2410 of the 81st General Assembly, the civil action remedy within § 70A.28 remained the same. Taking into account this history, and reviewing Iowa Code § 8A.415(2)(a)-(b), which only employs the permissive "may" there is reason to conclude that no exhaustion is required of either merit or

non-merit employees, though both have permissive administrative remedies. Iowa Code § 8A.415(2)(a)-(b) provides:

> a. A merit system employee, except an employee covered by a collective bargaining agreement, who is discharged, suspended, demoted, or otherwise receives a reduction in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.
>
> b. **If not satisfied, the employee <u>may</u>, within thirty calendar days following the director's response, file an appeal with the public employment relations board.** The employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedures Act, chapter 17A. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies. Decisions by the public employment relations board constitute final agency action. However, if the employee is an administrative law judge appointed or employed by the public employment relations board, the employee's appeal shall be heard by an administrative law judge employed by the administrative hearings division of the department of inspections and appeals in accordance with the provisions of section 10A.801, whose decision shall constitute final agency action.

Iowa Code § 8A.415(2) (emphasis added).

Further, the policy behind the whistleblower statute would not be served by requiring only merit system employees (not other employees) to exhaust administrative remedies prior to filing lawsuit in district court. In *Worthington v. Kenkel*, the Iowa Supreme Court considered the whistleblower statute and the policy behind it. The question in that case was whether an aggrieved employee's right to participate in an administrative hearing process was an adequate legal remedy that precluded the imposition of injunctive relief in a district court action brought pursuant to § 70A.28. In holding that the legislature intended offer such relief regardless of any adequate legal remedy, the Court held as follows:

> Our legislature has enacted a statute that forbids retaliation or reprisal against a state employee who discloses information the employee reasonably believes 'evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.' Iowa Code § 70A.28(2). This provision is part of a comprehensive chapter of the Code dealing with public employees, and is known as a whistle-blower statute. See id. §§ 70A.1-.38; *see also Hill v. Iowa Dep't of Employment Serves*., 442 N.W.2d 128, 131 (Iowa 1989) (discussing Iowa Code section 70A.29, which also protects whistle-blowing). This whistle-blower statute makes a violation of its prohibitions a criminal offense, and also creates a civil remedy. Iowa Code § 70A.28(4), (5).
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> * * *
>
> It is clear the overall scheme of the statute establishes a public policy against retaliatory discharge of public employees and considers the violation of the policy to be a public harm. Although the statute uses the word "may" when authorizing injunctive relief, the statute is not designed to weigh the equities and do justice between the parties, but to prevent harm to the public policy. The injunctive relief expresses

> the importance of the policy by serving to enforce the law and to stop government officials and other persons from violating the law. Additionally, the statute authorizes a government agent to pursue the injunction along with the aggrieved person. This reveals an umbrella of protection from retaliatory discharge for all state workers and prohibits actions by those who exercise governmental authority from undermining this public policy and from stifling whistle-blowers in the work place. We think the design of the statute evidences an intent by our legislature to forego the equitable requirement that there be no adequate legal remedy. Our legislature has identified conduct it has determined is not in the public interest and should not take place in our government. In making this determination, our legislature has already balanced the equities and deemed an injunction to be an appropriate response to stop the illegal activity. Consequently, it would be improper to require a preliminary showing of no adequate legal remedy.

Worthington v. Kenkel, 684 N.W.2d 228, 230 (Iowa 2004). The Worthington court concluded that despite the statute's use of "may" to authorize injunctive relief, "the design of the statute evidences an intent by our legislature to forego the equitable requirement that there be no adequate legal remedy." Similarly, and with the legislature's use of "may" and "may also" in subdivisions (5) and (6) of § 70A.28, an intent by the legislature showed its intent to prevent reprisals to whistleblowers protecting the public interest by authorizing, without any administrative exhaustion required, a civil action.

Thus, Iowa Code § 70A.28, the statute pursuant to which Walsh brought his whistleblower claim, disavows the administrative exhaustion requirement the district court found applicable.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE CLAIM OF WRONGFUL DISHARGE IN VIOLATION OF PUBLIC POLICY IS NOT AVAILABLE TO MERIT SYSTEM EMPLOYEES

The district court held that the wrongful discharge in violation of public policy claim was unavailable to Walsh because he was not an "at will" employee. However, the district court acknowledged the absence of Iowa Supreme Court authority on the issue:

> Here, the parties agree Plaintiff was a merit system employee at the time of his termination. Plaintiff directs the court to decisions from other states that discuss whether the alleged tort should be limited to at-will employees. While the Iowa Supreme Court has not explicitly addressed the issue of whether a merit system employee may file a claim alleging wrongful discharge in violation of public policy, **the decisions of the Iowa Supreme Court clearly indicate wrongful discharge in violation of public policy is a limited exception to the at-will doctrine.** Furthermore, Plaintiff, as a merit system employee, had certain statutory protections available to him that indicate there is not a compelling need to apply the exception to Plaintiff. See Iowa Code § 8A.417(4). Because Plaintiff is a merit system employee, and not an at-will employee, this court finds Plaintiff cannot file a claim under the public policy exception to the at-will doctrine. This finding makes it unnecessary to address the exclusive remedy and exhaustion arguments presented to the court. Defendants' motion for summary judgment on Plaintiff's wrongful discharge in violation of public policy claim is granted.

(District Court Ruling, at 7) (emphasis added).

A. Iowa Law Supports Allowing Merit System Employees to Bring Claims of Wrongful Discharge in Violation of Public Policy

This Court has not yet had the opportunity to decide the issue of whether the tort of wrongful discharge in violation of public policy is limited to at-will

employees or whether it may be extended to employees whom have other arrangements, including contract employees, collective bargaining employees, and merit system employees. However, federal courts within the state of Iowa have attempted to predict how this Court would rule, as has the Eighth Circuit Court of Appeals, and with varying outcomes.

In *Vails v. United Cmty. Health Ctr., Inc.*, the United States District Court for the Northern District of Iowa (Strand, J.) anticipated this Court would allow contract employees to bring claims of wrongful discharge in violation of public policy. In so holding, that Court relied on prior precedent of this Court that had considered, in depth, wrongful discharge claims made by collective bargaining employees without noting or otherwise resolving those cases, as the Court easily could have done, on the plaintiffs' lack of at-will status, if such status would have prevented a wrongful discharge claim. *See Vails v. United Cmt. Health Ctr., Inc.*, 2012 U.S. Dist. LEXIS 172, at *24 (N.D. Iowa Dec. 5, 2012) (citing *Conaway v. Webster City Prods. Co.*, 431 N.W.2d 795 (Iowa 1988); *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410 (Iowa 1995)). This decision was then supplemented and expounded by another decision of the Northern District certifying certain questions to this Court.[1] *See Hagen v. Siouxland Obstetrics and Gynecology, P.C.*,

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[1] This Court declined to answer the certified questions because it could not agree on the answer to the first certified question in that case, which was not the question presented here. 2014 Iowa Sup. LEXIS 48 (May 9, 2014).

964 F. Supp.2d 951, 970-71 (N.D. Iowa 2013) (overruled by 799 F.3d 922 (8th Cir. 2015). In one passage the Court discussed the purpose of the wrongful discharge claim as follows:

> . . . [T]he purpose behind the wrongful discharge tort is best served by applying the tort to both contractual and at-will employees. Iowa's wrongful discharge claim enforces 'the common conscience and common sense of our state in matters of public health, safety, morals, and general welfare.' *Jasper*, 764 N.W.2d at 761 (citing *Truax v. Ellett*, 234 Iowa 1217, 15 N.W2d 361, 367 (Iowa 1944)). Whether an employer's choice to fire an employee violates Iowa's 'common conscience' is completely independent of whether the fired employee was at-will or contractual. The firing in either case harms 'the entire community'—i.e., the public—which has an interest in discouraging employers from firing employees in violation of Iowa's public policy.

Hagen, 964 F. Supp.2d at 971 (Bennett, J.). While the Court's holding in *Hagen* that a contract employee could pursue a wrongful discharge claim was ultimately overruled by the Eighth Circuit Court of Appeals, the Eighth Circuit's decision failed to address in any level of detail the arguments and authorities the Northern District had presented, instead satisfying itself with general language from Iowa Supreme Court cases referring to the wrongful discharge claim as an exception to the at-will doctrine, as the district court did in this case.

Walsh believes the two Iowa judges who decided *Vails* and *Hagen* have the better of the argument. Moreover, to the extent that Walsh was not even a contract employee, but instead a merit system employee, there was no bargaining for of exchanged promises whereby he could have insisted that his employer adhere to

the public policy of the state of Iowa, even if such a concept did not seem totally obtuse in the first instance. Instead, Walsh's status was statutory. This also counsels in favor of allowing Walsh to pursue a wrongful discharge in violation of public policy claim.

B. Persuasive Authority Also Supports Walsh's Public Policy Claim

Other jurisdictions have likewise held that the tort of wrongful discharge is not limited to at-will employees. In *Keveney v. Missouri Military Academy*, 304 S.W.3d 98 (Mo. 2010), the Missouri Supreme Court reversed its previous holdings limiting retaliatory discharge claims to at-will employees. The Court found three compelling reasons for allowing contract employees to pursue an action for wrongful discharge in violation of public policy. *Id*. at 102.

First, limiting the wrongful discharge cause of action to at-will employees fails to recognize the distinct underlying purpose of the wrongful discharge cause of action, which is premised on a conflict between the conditions of employment and constitutional, statutory, or regulatory provisions that are applicable irrespective of the terms of contractual employment. *Id*. In making that distinction, the Missouri Court held that a discharge is not "wrongful" because it violates the contractual terms of employment. A discharge is "wrongful" because it is based on the employer's attempt to condition employment on the violation of a public policy expressed in the constitution, a statute or regulation. *Id*.

Second, an employee discharged in violation of an employment contract can recover the amount of income he or she would have earned absent the breach, less any income earned in the interim. But if an employee is discharged for refusing to violate a public policy requirement, a breach of contract action fails to vindicate the violated public interest or to provide a deterrent against future violations. When an employer's actions violate not only the employment contract but also clear and substantial public policy, the "employer is liable for two breaches, one in contract and one in tort." *Id*. at 103 (internal citations omitted).

Finally, the court in *Keveney* held that it was inconsistent to allow an at-will employee to pursue an action for wrongful discharge while denying a contract employee the same right. Allowing an at-will employee to pursue an action for wrongful discharge "illogically grants at-will employees greater protection from these tortious terminations due to an erroneous presumption that the contractual employee does not need such protection." *Id*. (internal citations omitted). Allowing contract employees to pursue a claim for wrongful discharge places at-will and contract employees on the same footing while encouraging employers to refrain from coercing employees into a dilemma of choosing between their livelihoods and reporting serious misconduct in the workplace.

In addition to Missouri, courts in Washington, Utah, California, Maryland and Illinois have found contract employees may bring such suits because the tort's

purpose is to protect the public's interest, not just the employees' interests. In *Smith*, the Washington Supreme Court noted that "[t]he tort of wrongful discharge is not designed to protect an employee's purely private interest in his or her continued employment; rather, the tort operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Smith*, 991 P.2d at 1140. That Court held:

> Extending the tort of wrongful discharge to *all* employees advances the underlying purpose of the tort by prohibiting *any* employer from frustrating the important public policies of this state. Further, allowing employees—whether terminable at-will or for cause—to sue for wrongful discharge in violation of public policy acknowledges the fundamental distinction between an action in tort and one based in contract.

Id. at 1143 (emphasis supplied).

Similarly, the Utah Supreme Court in *Retherford v. AT & T Communications of Mt. States, Inc*., 844 P.2d 949, 960 (Utah 1992) found that sound public policy "compel[s] the conclusion that the tort of wrongful discharge in violation of public policy should be available to all employees, regardless of their contractual status." The California Court of Appeals in *Koehrer v. Superior Court*, 226 Cal. Rptr. 820, 826 (1986) likewise held: "[T]here is no logical basis to distinguish in cases of wrongful termination for reasons violative of fundamental principles of public policy between situations in which the employee is an at-will employee and in which the employee has a contract for a specified term. The tort is independent of

the term of employment." In *Ewing v. Koppers Co.*, Inc., 537 A.2d 1173, 1175 (Md. Ct. App. 1988), the Maryland Court of Appeals found that the public policy component of the tort is significant and it would "be illogical to deny the contract employee access to the courts equal to that afforded the at will employee." Finally, the Illinois Supreme Court focused on the different remedies available: "It would be unreasonable to immunize from punitive damages[2] an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a nonunion employee. The public policy against retaliatory discharges applies with equal force to both situations." *Midgett v. Sackett-Chicago, Inc*., 105 Ill.2d 143, 473 N.E.2d 1280, 124 (Ill. 1984).

In this case, Walsh was forced to choose between upholding his constitutional obligation to uphold and obey both state and federal laws or to look the other way when his boss was acting in a way inconsistent with those laws. When he chose the former he lost his job. Iowa law supports providing him with a common law claim to challenge this conduct.

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[2] Walsh acknowledges that punitive damages are not available against the State of Iowa. However, he can recover emotional distress damages under the public policy wrongful discharge claim. *See, Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 769 (Iowa 2009) (legal remedies available include economic losses as well as emotional harm). In contrast, Walsh's remedy under 8A is limited to reinstatement.

IV. CONCLUSION

This Court should find error as set out above and reverse the actions of the District Court, reinstating the case for proceedings and trial on the merits of this case.

Respectfully submitted,

__/s/ Michael J. Carroll______________________
MICHAEL J. CARROLL – AT0001311
MEGAN FLYNN – AT0010000
COPPOLA, McCONVILLE, COPPOLA,
CARROLL, HOCKENBERG & SCALISE, P.C.
2100 Westown Parkway, Suite 210
West Des Moines, Iowa 50265
Telephone: (515) 453-1055:
Fax: (515) 453-1059
Emails: michael@csmclaw.com;
romcconville@csmclaw.com
ATTORNEYS FOR THE APPELLANTS

REQUEST FOR ORAL ARGUMENT

Come now the Appellants, by and through the undersigned attorney and Request that they have oral argument pursuant to Iowa Appellate Rule 6.903(2)(i).

Respectfully submitted,

/s/ Megan Flynn
MICHAEL J. CARROLL – AT0001311
MEGAN FLYNN – AT0010000
COPPOLA, McCONVILLE, COPPOLA,
CARROLL, HOCKENBERG & SCALISE, P.C.
2100 Westown Parkway, Suite 210
West Des Moines, Iowa 50265
Telephone: (515) 453-1055:
Fax: (515) 453-1059
Emails: Michael@csmclaw.com;
romcconville@csmclaw.com
ATTORNEYS FOR THE APPELLANTS

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME REQUIREMENTS, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirements of Iowa R. App. P. 6.903(1)(g) because it contains 6,810 words, excluding the parts of the brief exempted by Iowa Rules of Appellate Procedure 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa Rules of Appellate Procedure 6.903(1)(e) and the typestyle requirements of Iowa Rules of Appellate Procedure 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, size 14 type.

/s/ Megan Flynn

MICHAEL J. CARROLL
MEGAN FLYNN – AT0010000
COPPOLA, McCONVILLE, COPPOLA, CARROLL, HOCKENBERG& SCALISE, P.C.
2100 Westown Parkway, Suite 210
West Des Moines, Iowa 50265
Phone: 515-453-1055; Fax: 515-453-1059
ATTORNEYS FOR APPELLANTS