IN THE SUPREME COURT OF IOWA

NO. 17-0202

JOSEPH WALSH,

Plaintiff - Appellant,

vs.

TERESA WAHLERT and
THE STATE OF IOWA,

Defendants - Appellees.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
HONORABLE MICHAEL D. HUPPERT, JUDGE

APPELLEES' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

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

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 section 70A.28.

On 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.

On January 8, 2016, Walsh also filed 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.

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 filed on February 6, 2017.

STATEMENT OF FACTS

From 2007 – 2010, Plaintiff served as Deputy Director of IWD. (App. 68; Depo. of Joseph Walsh ("Walsh Depo.") at 12:16-19; Def SJ App. 2). Governor Chet Culver appointed Plaintiff to that position. (App. 68; Walsh Depo. at 11:3-7). Effective January 7, 2011, Plaintiff became the Chief

Administrative Law Judge (ALJ 3) at IWD, a merit position under Iowa Code chapter 8A (not at will). (App. 4, 69; Petition ¶ 8; Walsh Depo. at 20:3-6; Def SJ App. 3). As Chief ALJ, he reported directly to Teresa Wahlert, the Director of IWD who was appointed to that position by Governor Terry Branstad effective January 15, 2011. (App. 27, 69-70; First Amend. Ans. ¶¶ 14, 15; Walsh Depo. at 20:18 – 21:2; Def SJ App. 3-4). Wahlert is no longer the Director of IWD. (App. 26; First Amend. Ans. ¶ 5).

On January 2, 2013, the Department of Administrative Services (DAS) sent a memorandum to Department Directors (with attachments) regarding implementing a change in the definition of "confidential employee." (App. 79-82; Def SJ App. 13-16). Plaintiff's position was identified by DAS as meeting the amended definition because of its management responsibilities. (App. 83; Def SJ App. 17). On April 5, 2013, Jon Nelson, the Human Resources Manager at IWD, delivered a letter to Plaintiff stating that DAS had amended the definition of "confidential employee" and that effective April 26, 2013, Plaintiff's position would no longer be covered by the merit system. (App. 27, 84; First Amend. Answer ¶ 16; Def SJ App. 18). Similar letters were delivered to other IWD employees. (App. 27; First Amend. Ans. ¶ 17). Plaintiff's letter stated that if he believed his position did not meet the

definition of confidential employee under Iowa Administrative Code r. 11-50.1, he could appeal the determination in accordance with Iowa Administrative Code ch. 11-61. (App. 84; Def SJ App. 18). Plaintiff did not appeal utilizing those procedures. Plaintiff met with Nelson, and a topic of the meeting was conformity with the law and U.S. Department of Labor (DOL) standards. Plaintiff later sent information regarding the topic to Nelson. (App. 27-28; First Amend. Ans. ¶ 18). Plaintiff alleges that he informed Nelson it was a violation of the Social Security Act and DOL guidance for a Chief ALJ to be classified as non-merit. (App. 157; Amend. Pet. ¶ 18).

Plaintiff alleges that on May 21, 2013, Nelson informed him for the first time that Plaintiff was no longer a merit employee. (App. 158; Amend. Pet. ¶ 25). Plaintiff also alleges that he contacted the DOL Regional Office in Chicago on or about May 22, 2013. (App. 158; Amend. Pet. ¶ 26). According to Plaintiff, a DOL official informed him that any ALJ, whether managerial or not, must be a merit employee. (App. 158; Amend. Pet. ¶ 28). Further, Plaintiff alleges that he opened an official "complaint" with the DOL. (App. 159; Amend. Pet. ¶ 29). Plaintiff alleges that he informed Wahlert he had contacted the DOL and informed her that she and DAS had

made a serious legal error. (App. 159; Amend. Pet. ¶ 30). Plaintiff later met with Wahlert and gave her information regarding federal regulations, and Wahlert told Plaintiff that he should talk to Ryan Lamb (General Counsel of DAS) about legal issues. (App. 28; First Amend. Ans. ¶¶ 31, 32). Plaintiff alleges that he spoke with Lamb, and that Lamb acknowledged 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. (App. 160; Amend. Pet. ¶¶ 41, 42).

On or about June 11, 2013, Wahlert and Nelson met with Plaintiff and gave him a new Position Description Questionnaire (PDQ) that did not include hearing contested cases. (App. 29; First Amend. Ans. ¶¶ 43, 44). Plaintiff alleges that on June 13, 2013, he sent two email complaints directed to the Office of Governor Terry Branstad, the DOL, and members of the IWD Board. (App. 161; Amend. Pet. ¶ 49). Plaintiff's email to the Office of Governor Branstad was sent to Chief of Staff Jeff Boeyink, not the Governor directly. (App. 85-86; Def SJ App. 19-20). Wahlert sent a letter to Plaintiff dated June 20, 2013, rescinding the letter dated April 5, 2013, thereby maintaining his status as a merit system employee. (App. 30, 87; First

Amend. Ans. ¶ 54; Def SJ App. 21). Plaintiff's change back to merit system status was effective June 7, 2013. (App. 88; Def SJ App 22).

Wahlert sent a letter to IWD employees on July 15, 2013, regarding IWD's budget shortfall and a projected reduction in staffing levels. (App. 89-90; Def SJ App. 23-24). Also on or about July 15, 2013, Plaintiff, along with numerous other IWD employees, received a "layoff letter." (App. 30, 91, 75, 76; First Amend. Ans. ¶ 55; Def SJ App. 25; Walsh Depo. at 91:21 – 92:2, 93:9-16). Layoff plans were submitted to DAS by IWD for review and approval. Besides Wahlert, Plaintiff's layoff plan was approved by four other individuals: the DAS-Human Resources Enterprise Chief Operating Officer (Michelle Minnehan), the DAS Director (Mike Carroll), the Department of Management Director (David Roederer), and the Governor's Office (Jeff Boeyink). (App. 92-93, 95-96; Def SJ App. 26-27, 29-30 (Depo. of Jon Nelson at 54:2 – 55:3)).

After his separation from employment, and in accordance with the merit system procedures provided in Iowa Code chapter 8A, Plaintiff filed a non-contract grievance and then an appeal to the PERB regarding his July 15, 2013 layoff. However, Walsh voluntarily withdrew/dismissed the appeal prior to the PERB hearing. (App. 77, 97-105; Def SJ App. 11, 31-39; Walsh

Depo. at 101:15 – 102:21). Walsh stated that he "would prefer to have the issues heard in the courts instead of the Public Employment Relations Board." (App. 104; Def SJ App. 38).

On January 16, 2014, Plaintiff accepted the position of Deputy Workers' Compensation Commissioner in the Division of Workers' Compensation within IWD. (App. 106; Def. SJ App. 40). Wahlert signed an authorization permitting Plaintiff to receive an advanced appointment rate, resulting in Plaintiff being paid at the highest pay rate for the position. (App. 78, 107-110; Def SJ App. 12, 41-44; Walsh Depo. at 105:17 – 106:7). Plaintiff also continues to serve as the Director of the State's Athletic Commission within the Division of Labor, as he has done since 2011. (App. 78; Def SJ App. 12; Walsh Depo. at 106:17 – 107:8).

ARGUMENT

I. IOWA CODE CHAPTER 8A PROVIDES PLAINTIFF'S EXCLUSIVE REMEDY, AND PLAINTIFF FAILED TO EXHAUST THAT REMEDY.

Standard of Review: The review of a district court decision granting summary judgment is for the correction of errors at law. *Suppliers, Inc. v. Hanson*, 876 N.W.2d 765, 772 (Iowa 2016).

Preservation of Error: The State does not assert Walsh failed to preserve error on his substantive appeal of the district court's dismissal of his whistleblower claim for failure to exhaust administrative remedies.

Argument: The Iowa Administrative Procedure Act (IAPA) is established in Iowa Code chapter 17A. The IAPA provides the exclusive means to challenge agency action if "the action or inaction in question . . . bear[s] a discernable relationship to the statutory mandate of the agency as evidenced by express or implied statutory authorizations." *Papadakis v. Iowa State University*, 574 N.W.2d 258, 260 (Iowa 1997) (Court held university employee employment dispute had to be resolved through administrative process and judicial review). Overall, if the action of the agency is "the very decision which the agency's mandate directed it to make, "any challenged action must be brought under the IAPA. *Jew v. University of Iowa*, 398 N.W.2d 861, 865 (Iowa 1987); *Genetzky v. Iowa State University*, 480 N.W.2d 858, 861 (Iowa 1992).

Iowa Code section 8A.412 unequivocally states, "The merit system *shall* apply to *all positions* in state government now existing or hereafter established." (emphasis added). Iowa Code chapter 8A also expressly requires a plan for resolving employee grievances and that chapter, and the

administrative rules implemented under that chapter, set forth a robust grievance process. *See* Iowa Code §§ 8A.413(19) and 8A.415. Well-established precedent required Walsh to challenge his separation from employment under the provisions of chapter 8A – which he did right up to the point he voluntarily abandoned that process.

Because Walsh abandoned his merit system grievance, he indisputably failed to exhaust that remedy. "The exhaustion of administrative remedies requirement is a rule of almost universal application. According to the rule, before a party can call upon the court to act, the party must have exhausted any remedy available before an administrative agency." *Iowa Coal Mining Co. v. Monroe Cnty.*, 555 N.W.2d 418, 431 (Iowa 1996) (citations omitted). The governing statute need not explicitly require exhaustion as an implicit requirement is sufficient. *Riley v. Boxa*, 542 N.W.2d 519, 521-23 (Iowa 1996) (deciding that use of "may" still implicitly required exhaustion); *see also Travelers Indem. Co. v. D.J. Franzen, Inc.*, 792 N.W.2d 242, 248-49 (Iowa 2010) (looking to intent of legislature in determining whether exhaustion is required (citation omitted)); *Keokuk Cnty. v. H.B.*, 593 N.W.2d 118, 123 (Iowa 1999) ("When an administrative remedy has been established by statute, our courts are generally not immediately available to litigants to

grant relief." (citation omitted)). "Two conditions must exist before the exhaustion requirement is imposed. First, an administrative remedy must exist for the claimed wrong. Second, a statute must expressly or implicitly require that remedy to be exhausted before resort to the courts." *Keokuk Cnty.*, 593 N.W.2d at 123 (citation and internal citations omitted). When a party fails to exhaust required administrative remedies, the court lacks authority to hear the case, and if properly raised, the court must dismiss the case. *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 326 (Iowa 2015) (citation omitted).

There can be no doubt that an administrative remedy exists for the wrong Walsh claims to have suffered. Not only is such a remedy expressly set forth in statute, Walsh actually initiated and pursued that process up to the point where he voluntarily withdrew from the process just before the statutorily provided hearing before PERB. As of the date of his layoff it is undisputed Walsh was a merit-covered employee. In fact, Walsh does a fine job of succinctly summarizing his merit status in his opening brief by stating,

> 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).

That exhaustion of the process provided for in chapter 8A is required is beyond any serious debate. The State merit system is established in Iowa Code chapter 8A. Iowa Code section 8A.411 states:

> 1. The general purpose of this subchapter is to establish for the state of Iowa a system of human resource administration based on merit principles and scientific methods to govern the appointment, compensation, promotion, welfare, development, transfer, layoff, removal, and discipline of its civil employees, and other incidents of state employment.
>
> 2. It is also the purpose of this subchapter to promote the coordination of personnel rules and policies with collective bargaining agreements negotiated under chapter 20.
>
> 3. All appointments and promotions to positions covered by the state merit system shall be made solely on the basis of merit and fitness, to be ascertained by examinations or other appropriate screening methods, except as otherwise specified in this subchapter.
>
> 4. Provisions of this subchapter pertaining to qualifications, examination, certification, probation, and just cause apply only to employees covered by the merit system.

(emphasis added). Iowa Code section 8A.413 further requires the Department of Administrative Services to, "adopt rules for the administration of this subchapter pursuant to *Chapter 17A*." (emphasis added). In addition,

Iowa Code section 8A.413(15) requires that a rule be implemented specifically

> For establishing in cooperation with the appointing authorities a performance management system for all employees in the executive branch, excluding employees of the state board of regents, which shall be considered in determining salary increases; as a factor in promotions; as a factor in determining the order of layoffs and in reinstatement; as a factor in demotions, discharges, and transfers; and for the regular evaluation, at least annually, of the qualifications and performance of those employees.

(emphasis added). Further yet, Iowa Code section 8A.413(19) expressly mandates the "establishment of a uniform plan for resolving employee grievances and complaints." Finally, Iowa Code section 8A.415 establishes a robust process for resolving employee grievances. This process allows an employee to appeal agency personnel decisions to the public employment relations board (PERB). Iowa Code section 8A.415(2)(b) expressly states, "decisions by the public employment relations board constitute final agency action."

Beyond the statutory mandates noted above, even more directly on point and dispositive of the exclusivity / exhaustion issue raised in this case is section 8A.417(4), which expressly provides protection for employees who engage in "whistleblowing" activities.

> 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 merit system administered by, or subject to approval of, the director 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 any information by that employee to a member or employee of the general assembly, or for 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. This subsection does not apply if the disclosure of the information is prohibited by statute.

Even a cursory review of section 8A.417(4) demonstrates it is virtually identical to Iowa Code section 70A.28(2), (3).

Here, Plaintiff had a comprehensive administrative remedy to challenge his layoff (and the other alleged retaliatory actions) by filing a grievance followed by an appeal with PERB. *See* Iowa Code § 8A.415; Iowa Admin. Code r. 11–61.1, 61.2. Plaintiff actually filed a non-contract grievance under section 8A.415(2) and then an appeal to PERB regarding his layoff, all in accordance with chapter 8A. He then voluntarily

withdrew/dismissed the appeal just prior to the PERB hearing. (App. 77, 97-105; Def SJ App. 11, 31-39; Walsh Depo. at 101:15 – 102:21). In dismissing his pending action before PERB, Walsh stated that he "would prefer to have the issues heard in the courts instead of the Public Employment Relations Board." (App. 104; Def SJ App. 38). Because Plaintiff failed to exhaust his available administrative remedies, in fact voluntarily and expressly failing to do so, the Court lacks authority to hear the case. *See Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 692 (1993) ("When resolution of a controversy has been delegated to PERB, the district court has no original authority to declare the rights of parties or the applicability of any statute or rule."); *Ghost Player*, 860 N.W.2d at 330-31 (district court without authority to hear case where administrative remedies not exhausted); Iowa Code § 8A.415; Iowa Admin. Code r. 11–61.2(8) ("All remedies provided in rule 11–61.2(8A) must be exhausted pursuant to Iowa Code section 17A.19, subsection 1, prior to petition for judicial review."); *see also Allen v. S.C. Alcoholic Beverage Control Comm'n*, 467 S.E.2d 450, 451, 453 (S.C. Ct. App. 1996) (per curiam) (affirming grant of summary judgment because plaintiff failed to exhaust his administrative remedies prior to bringing cause

of action under South Carolina's Whistleblower Act, where plaintiff voluntarily withdrew his grievance).

The District Court's determination that Walsh must exhaust his remedies under chapter 8A is also completely consistent with established principals as determined by Iowa courts. For instance, the Iowa Supreme Court has determined that employees covered by the State's civil service statutes must use those remedies exclusively and cannot pursue other types of claims for an alleged wrongful discharge. *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996) ("Where the legislature has provided a comprehensive scheme for dealing with a specific kind of dispute, the statutory remedy is generally exclusive").

In his brief Walsh makes, contrary to the express language of chapter 8A, the claim that "no adequate remedy exists for the claimed wrong." (Appellant's Brief at p. 16). In fact, other than perhaps payment of attorney fees, the remedies under the merit system are even broader than those contained in Iowa Code section 70A.28. Iowa Code section 8A.415(2)(b) provides not only for reinstatement, back pay and benefits like section 70A.28, but also allows PERB to award "other appropriate remedies." It is well established that "an administrative remedy is not inadequate so as to

authorize judicial intervention before exhaustion of the remedy simply because it may create some hardship or does not give one everything he or she wants." *Riley v. Boxa*, 542 N.W.2d 519, 521 (Iowa 1996). The administrative remedy provided under chapter 8A is clearly adequate under the law.

Walsh also claims that there is no language requiring exhaustion in section 70A.28. While this may be true, that fact does nothing to excuse his failure to exhaust administrative remedies. Iowa Code section 17A.19 states, "[e]xcept as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party . . . may seek judicial review of such agency action." There is no language in section 70A.28 that would remove that code section from the provisions of 17A and, to the contrary, chapter 8A is clear that the provisions of the IAPA apply to this employment dispute and, it bears noting again, the very process Walsh himself initiated and pursued until voluntarily withdrawing from that administrative process. *See Polk Cnty. v. Iowa State Appeal Bd.*, 330 N.W.2d 267 (Iowa 1983) (in absence of language expressly exempting Board decision from chapter 17A, decisions of board subject to judicial review); *Salsbury Labs v. Iowa Dep't of*

Envtl. Quality, 276 N.W.2d 830 (Iowa 1979) ("exclusive means of review" language of section 17A.19 preempts challenge to agency action through common law writs of certiorari, declaratory judgment or injunction).

Further, Walsh's arguments that there is no exhaustion requirement in section 70A.28 completely ignores the fact that language virtually identical to that contained in section 70A.28 is set forth in section 8A.417, and without doubt chapter 8A applies to this employment dispute and requires exhaustion. It is especially significant that section 70A.28 even cross references section 8A.417. Clearly the legislature was well aware of what it was doing with respect to both statutes, and certainly the legislature did not intend for section 70A.28 to supersede chapter 8A or make section 8A.417 superfluous.

Finally, Walsh argues that the use of the word "may' in section 8A.415(2)(a)-(b) allowing that an aggrieved employee "may" file an appeal of their adverse employment action makes exhaustion of that remedy permissive. That is incorrect. Even a case Plaintiff relies upon establishes the fallacy of this proposition. *See Riley v.Boxa*, 542 N.W.2d 519, 522 (Iowa 1996). In *Riley* the Supreme Court stated, "[t]he use of the word 'may' does not warrant a conclusion that the legislature intended to allow judicial relief before the exhaustion of the administrative remedy. We have held that other

statutes which also use the term 'may' have nevertheless required the administrative remedy be exhausted before resort to the courts." *Id.* (*other citations omitted).* In fact, in a case similar factually and legally to the present case the Iowa Court of Appeals upheld a motion for summary judgment dismissing an employee's claims who had failed to exhaust the statutory remedies provided in Iowa Code section 80.15. *Wright v. State*, 885 N.W.2d 220 (Table) (Iowa Ct. App. June, 15, 2016) (Department of Public Safety Employee covered under Iowa Code section 80.15 must pursue and exhaust those remedies).

The district court was correct in dismissing Walsh's case due to Walsh's voluntary decision to abandon the requisite administrative process, thereby failing to exhaust those required administrative remedies.

II. THE DISTRICT COURT PROPERLY DISMISSED COUNT VIII (WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY) OF PLAINTIFF'S THIRD AMENDED PETITION.

Standard of Review: The review of a district court decision granting summary judgment is for the correction of errors at law. *Suppliers, Inc. v. Hanson*, 876 N.W.2d 765, 772 (Iowa 2016).

Preservation of Error: The State does not assert Walsh failed to preserve error on his substantive appeal of the district court's dismissal of his wrongful termination in violation of public policy claim.

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

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

employer/employee relationship," namely: "(1) discharges in violation of public policy, (2) discharges in violations of employee handbooks which constitute a unilateral contract, and (3) discharges in violation of a covenant of good faith and fair dealing." *Id.* at 280-81 (citations omitted). Iowa only adopted the first two exceptions. *Id.* at 281.

With respect to the exception relevant to this appeal, this Court "adopted a narrow public-policy exception to the general rule of at-will employment," which "limits an employer's discretion to discharge an at-will employee when the discharge would undermine a clearly defined and well-recognized public policy of the state." *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109 (Iowa 2011). The *Berry* case is particularly instructive when the Court states, "an **at-will employee** has a cause of action for wrongful discharge" and "[t]o prevail on an intentional tort of wrongful discharge . . . an **at-will employee** must establish the necessary elements." (emphasis added). *Id*. In explaining the scope of this tort the Supreme Court could have used such terms as "all employees" or "any employee" or even "an employee" if it intended to cover all employees, even statutorily protected, for cause employees. However, the Supreme Court has consistently limited the scope of this tort to at-will employees. *See also*

Dorshkind v. Oak Park Place of Dubuque II, L.L.C., 835 N.W.2d 293, 300 (Iowa 2013) (observing the tort is a "public-policy exception to the general rule of at-will employment"); *Theisen v. Covenant Medical Center, Inc.*, 636 N.W.2d 74, 79 (Iowa 2001) (holding the tort can be used to "defeat the presumption of at-will employment"); *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 352 (Iowa 1989) (noting the Court recognized the common law claim to protect an employee at-will who "is terminated for reasons contrary to public policy"). *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 220 (Iowa 1996) (recognizing a discharge that violates a well-recognized and defined public policy as a "narrow exception" to the at-will employment doctrine).

In *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 282 (Iowa 1995), the Court recalled that the wrongful termination tort was created based on a "perceived need to protect employees from the harshness of the at-will doctrine . . . ." To this point, the wrongful discharge claim simply "exists as a narrow exception to the general at-will rule," *Ballalatak v. All Iowa Agriculture Ass'n*, 781 N.W.2d 272, 275 (Iowa 2010), to "limit[] an employer's discretion to discharge an at-will employee . . . ." *Jones v. University of Iowa*, 836 N.W.2d 127, 143-44 (Iowa 2013). Need for this judicially created cause of action was "derived from

the inequity of the bargaining position in a typical at-will employer-employee relationship, and the inability of employees to otherwise obtain protection." *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 684 (Iowa 2001). *But see Ackerman v. State*, 2017 WL 1735630 (Iowa Ct. App. May 3, 2017) (individual employed under collective bargaining agreement not prevented from pleading tort of wrongful discharge).

Undisputedly, Walsh is not an at-will employee. (App. 156; Amend. Pet. ¶ 10). Instead, Walsh's employment is governed under the terms of Iowa Code chapter 8A (Merit System). (App. 156; Amend. Pet. ¶ 8). Notwithstanding the protections he possesses under the Merit System, Walsh argues he is among the class of employees Iowa's limited exception to the at-will employment doctrine is intended to protect.

With the exception of *Conaway v Webster City Prods.* Co, 431 N.W.2d 795 (Iowa 1988) and *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410 (Iowa 1995), cases, which for reasons set forth below simply do not address the issue currently before the Court, Walsh fails to cite to even one Iowa appellate decision applying the wrongful discharge tort to an employee who was not at will. The reason is simple; employees covered under the statutorily mandated merit system have remedies not available to

at-will employees: the ability to pursue robust make whole remedies to challenge a variety of adverse employment actions, including expressly claims of retaliation for whistleblowing.

Simply put, implicit in the Court's wrongful discharge jurisprudence is the principle that the tort is solely available for at-will employees. Such a determination would be entirely consistent with decades of decisions from the Iowa Supreme Court. For instance, this Court has previously held persons under contract (*i.e.*, independent contractors) and persons with a continued expectation of public employment (*i.e.*, civil service employees) cannot bring the tort. *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681 (Iowa 2001), and *Van Baale v. City of Des Moines*, 550 N.W.2d 153 (Iowa 1996). Because Walsh is not an at-will employee, the district court's Ruling should be affirmed.

As discussed above, the only foreign case addressing wrongful discharge under Iowa law concluded the wrongful discharge tort is not available to employees employed under a contract. *Hagen v. Siouxland Obstetrics and Gynecology, P.C.*, 799 F.3d 922, 930-31 (8th Cir. 2015). The employee in *Hagen* was employed under a contract for employment that only permitted the employer to terminate under certain circumstances. *Id.* at 924.

The employer terminated, and the employee brought suit contending the termination was based on the employee engaging in conduct protected by Iowa public policy. *Id.* at 925-26. The employer argued that the employee could not assert a wrongful termination claim under Iowa law because the employee was not an at-will employee. *Id.* at 926-27.

After reviewing Iowa jurisprudence, the Eighth Circuit Court of Appeals[1] noted the "wrongful discharge/public policy tort under Iowa law is a narrow, well-recognized exception to the at-will doctrine." *Id.* at 929. Quoting from *Dorshkind,* the Court noted the "exception is narrowly circumscribed to only those policies clearly defined and well-recognized *to protect those with a compelling need for protection from wrongful discharge*." *Id.* (quoting *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d at 303). If an employee is employed under a contract

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

that prohibits termination absent just cause, the *Hagen* Court reasoned there is not a compelling need to protect such an employee from discharge. *Id.* at 930. Under such circumstances, the *Hagen* Court opined, this Court would conclude the wrongful discharge tort is unavailable given the employee may challenge her or his termination under the contract. *Id.* at 930-31.

As noted by Plaintiff, the two federal district court decisions from the Northern District of Iowa cited by Walsh in support of his argument that his wrongful discharge claim should be viable have been overruled by the afore-cited Eighth Circuit decision in *Hagen.* The Eighth Circuit in *Hagen* did a very thorough analysis of decades of Iowa Supreme Court authority in that decision and should not be completely ignored as Walsh appears to claim.

In his efforts to support his legal theories Walsh also misapplies *Conaway v. Webster City Prods. Co.*, 431 N.W.2d 795 (Iowa 1988) and *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410 (Iowa 1995). In *Conaway,* this Court explicitly identified the question on appeal as "[t]he Preemption Issue," and this Court's analysis and conclusion is based on preemption. *Conaway v. Webster City Prods. Co.*, 431 N.W.2d at 797-800. Similarly, as pertinent to this matter, the issue in Sanford was decided on the basis of preemption. *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d at

414. More importantly, if this Court had recognized the validity of a wrongful-discharge cause of action by statutorily protected or contract covered employees, presumably, this Court would have acknowledged so by providing the answer in response to the certified question in *Hagen v. Siouxland Obstetrics and Gynecology, P.C.*, 2014 WL 1884478, at *1. Similarly the Eighth Circuit certainly would have acknowledged such a significant holding, if it existed, in its decision in *Hagen.*

With respect to cases proffered by Walsh from other jurisdictions, he primarily relies on the Missouri case of *Keveney v Missouri Military Academy*, 304 S.W.3d 98 (Mo. 2010). It must be noted from the outset that the Eighth Circuit in *Hagen*, based on *Iowa law*, expressly declined to follow *Keveney*. *Hagen* 799 F.3d at 928-929. Certainly, as recognized in *Hagen*, other states are divided over whether to limit the tort of wrongful discharge to at-will employees. *Id. (*citations omitted). However, the State's position and the district court's decision in this case are based upon decades of *Iowa* law.

The problems with attempting to shoehorn a case like *Keveney* and the other foreign cases cited by Walsh into the facts and legal framework of this case are many. First, the Iowa Supreme Court has already expressly

excluded certain categories of employees from being able to bring a claim for wrongful discharge. *See Harvey v, Care Initiatives, Inc.*, 634 N.W.2d 681 (Iowa 2001) (precluding independent contractors from bringing cause of action); *Van Baale v. City of Des* Moines, 550 N.W.2d 153 (Iowa 1996) (civil service statute covered employees cannot bring claim for wrongful discharge). The *Van Baale* case is directly on point from a legal and analytical standpoint. The fact that some other states may make the wrongful discharge tort available to all employees does not in any way take away from the Iowa Supreme Court's decisions and rationale to limit the availability of the tort to those who need such protection.

Second, because of robust statutory protections afforded to him, Walsh is clearly not in the category of employees "with a compelling need for protection from wrongful discharge." *Dorshkind*, 835 N.W.2d at 303. It is to protect such persons with no protection against wrongful discharge which forms the very foundation of this tort. There is simply no legal or factual justification to expand this tort to include persons in Mr. Walsh's situation. An argument also fully supported by the undisputed fact he is still employed by the same agency that he complains wrongfully terminated him.

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

Finally, other than possibly emotional distress damages there is nothing more that Walsh can gain in a tort case than he could if he had pursued the remedies he initiated under chapter 8A. In fact, with the ability to be reinstated and being eligible under section 8A.415 for all "other appropriate remedies," it is likely his remedies under the merit system are broader than what would be available through any wrongful discharge claim.

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

CONCLUSION

Based on the authority, argument, and analysis contained herein, Appellees respectfully request this Court affirm the district court's Ruling and order dismissing Plaintiff's Amended Petition

REQUEST FOR ORAL ARGUMENT

Appellees request that they be heard at the time of final submission of this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-face requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font in 14-point and contains 5,850 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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PROOF OF SERVICE

I, Jeffrey C. Peterzalek, hereby certify that on the 31st day of July, 2017, I or a person acting on my behalf did serve Appellees' Final Brief and Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, Jeffrey C. Peterzalek, hereby certify that on the 31st day of July, 2017, I or a person acting on my behalf filed Appellee's Final Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

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