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 REPLY

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 or person acting on his behalf, hereby certify that I have filed electronically pursuant to Iowa Rule 16.1201 et. seq. this Appellant's Reply 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 Reply by Electronically filing with the Clerk of the Supreme Court for service to opposing parties pursuant to Iowa Rule 16.1201 et. seq.

/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 Reply is $0.00.

___/s/ Megan Flynn_____

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INTRODUCTION

Defendants neglected, in their 37-page brief, to discuss and analyze an opinion issued by the Court of Appeals in the time between the filing of Plaintiff's opening brief and the filing of their brief. This on-point intervening opinion was not favorable for Defendants. It held that a collective-bargaining employee (a former ALJ within Iowa Workforce Development (IWD)) could maintain a claim for wrongful discharge in violation of public policy, even though she was not an at-will employee.

Defendants make only a "But see" reference to this opinion, even though as parties to that case, they are more than aware of it. *See Ackerman v. State of Iowa, Iowa Workforce Development, Teresa Wahlert, Teresa Hillary, and Devon Lewis*, Court of Appeals Case No. 16-0287, opinion dated May 3, 2017 (Tabor, J.). Further, the Court of Appeals analyzed and disagreed with many of the same exact arguments and authorities the Defendants cite in this case. While Plaintiff acknowledges *Ackerman* is not controlling, it nevertheless advanced the discussion and warrants consideration. Notably, the State has requested further review of the adverse opinion in *Ackerman*.

With respect to the Defendants' arguments regarding exhaustion of administrative remedies, Defendants glibly repeat a common refrain:

Plaintiff voluntarily dismissed his appeal before the Public Employment Relations Board (PERB), a fact Plaintiff does not contest, without meaningfully addressing the language of Iowa Code §70A.28 providing plaintiff with the right to file a civil action regardless. Nor do Defendants address the legislative history of raised by Plaintiff. Finally, Defendants give short shrift to the inadequacy of the remedy contained within Chapter 8A and its lack of any reference to emotional distress damages and fee-shifting and also cite inapposite authority, *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996), a case which has nothing to do with the exhaustion question.

III. DEFENDANTS IGNORE THE PLAIN LANGUAGE OF IOWA CODE § 70A.28 AND ITS HISTORY

Apart from their common refrain, Defendants provide little to address Plaintiff's arguments that the whistleblower statute applicable to state employees provides alternative remedies and does not require merit system employees to exhaust any analogous rights found in Chapter 8A.

They fail, for example, to address the plain language of the statute or to cite any case law addressing similar permissive "may also" language that would support requiring exhaustion of the administrative remedy:

> 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).

In *George v. D.W. Zinser Co.*, this Court relied on similar permissive language to hold that an employee who had been terminated after making complaints to OSHA regarding his employer was not required to exhaust his administrative remedy for wrongful termination before bringing a common law wrongful termination claim and also held that the administrative claim was not exclusive. *George v. D.W. Zinser Co.*, 762 N.W.2d 865, 871 (Iowa 2009). That case was decided after *Riley v. Boxa*, a case Defendants rely on to argue that the legislature's use of "may" can still require exhaustion, and the Code provisions at issue in *George* are more similar to those in the present matter than to those at issue in *Riley v. Boxa*.

Further, Defendants fail to address the legislative history cited by Plaintiff in his opening brief that shows that the civil action existed first, administrative remedies were added, and even though the Senate considered creating an exclusive administrative remedy for both merit and non-merit employees and abrogating the civil action entirely, the legislature instead added subsection 6, allowing non-merit employees an alternative administrative remedy at a time when merit employees already had one, and leaving the civil action, in existence since 1989, intact.

Next, while arguing that "the legislature did not intend for section 70A.28 to supersede chapter 8A or make section 8A.417 superfluous," the Defendants fail to recognize that it was 70A.28 that was enacted first, and it is Defendants that attempt to make 70A.28(2) superfluous. Plaintiff's position does not render any portion of the code superfluous – a merit-system employee can choose to pursue a claim pursuant to Iowa Code § 70A.28 or pursuant to Iowa Code Section 8A.417. However, if Defendants' interpretation of the statutes is believed, 70A.28(2) is rendered superfluous as all state employees would be required to file administrative claims, which claims would be subject to judicial review pursuant to Chapter 17A, not 70A.28. The Defendants do not attempt to explain away this conundrum.

Moreover, the *Van Baale* case cited by Defendants does not address exhaustion but instead addresses whether the common law tort claims in that case were preempted by the civil service statutes and remedies provided therein. The plaintiff in that case had fully exhausted his administrative remedies and the claims and statutes at issue in that case are dissimilar to those alleged in this case. *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996). *Van Baale* is unhelpful.

Finally, while Defendants are quick to acknowledge that damages for emotional distress and fee-shifting are not explicitly authorized by the administrative remedy they contend is adequate, attempting to downplay the importance of those remedies in this case, both emotional distress damages and fee-shifting are integral components of Plaintiff's claims, especially since he mitigated his lost-wage damages. The fee-shifting remedy is a fundamental one that affects Plaintiff's access to the judicial system and offers protection to Plaintiff and to the public in encouraging lawyers to vindicate the civil rights and causes of state-employed whistleblowers such as Plaintiff.

Thus, the plain language of Iowa Code § 70A.28, the legislative history, the lack of any adequate administrative remedy, and the public policy supporting civil lawsuits for whistleblower claims support Plaintiff's

filing of a lawsuit and do not impose on him the requirement to exhaust any administrative remedy.

IV. DEFENDANTS IGNORE *ACKERMAN*, THE COURT OF APPEALS OPINION THAT REFUTES EACH OF THEIR ARGUMENTS AGAINST ALLOWING A WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY CLAIM IN THIS CASE

Recently, the Iowa Court of Appeals refuted each of the arguments presented by Defendants as reasons for supporting the district court's dismissal of the wrongful termination claim in this case when considering whether a collective-bargaining employee could maintain a cause of action for wrongful termination in violation of public policy. *Ackerman v. State*, 2017 Iowa App. LEXIS 425 (Iowa Court of Appeals May 3, 2017).

In *Ackerman*, the Court of Appeals considered, on interlocutory appeal, whether dismissal of plaintiff Susan Ackerman's wrongful termination claim, on the basis that she was a collective-bargaining employee, was legal error. *Id.* at *1. Ackerman was a 15-year ALJ within IWD who alleged she was terminated after testifying at a hearing before the Iowa Senate Government Oversight Committee about "pressure put on the ALJs . . . to render decisions in favor of employers." *Id.* at * 2. After considering the Defendants' arguments, which mirror the arguments made in this case, the Court determined that Ackerman was not precluded from

bringing a claim for wrongful termination in violation of public policy despite her non-at-will employment status, and reversed and remanded to the district court. *Id.* at *14-*15.

Similar to their unsuccessful arguments in *Ackerman*, and citing federal persuasive authority, Defendants argue that the wrongful termination claim alleged in this case is a "narrow public policy exception to the general rule of at-will employment." The Court of Appeals in *Ackerman* held:

> The State asserts the federal circuit court correctly forecast that our supreme court would not recognize a wrongful-discharge tort for contract employees because the exception for at-will employees 'was narrowly circumscribed to only those policies clearly defined and well-recognized to protect those with a compelling need from wrongful discharge.' *See Hagen IV*, 799 F.3d at 929 (quoting *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293,303 (Iowa 2013) (emphasis added)). We are not convinced the passage italicized by the circuit court supports its conclusion that a contract employee could not sue for wrongful discharge in violation of public policy. Our supreme court's circumscription has involved the type of public policies that qualify for protection, not the type of employees protected.

Ackerman, 2017 Iowa App. LEXIS 425 at *13-*14. The Court in *Ackerman* continued:

> The *Dorshkind* language does not signal the Iowa Supreme Court's intent to ration tort-law remedies to at-will employees because they have a more 'compelling need for protection from wrongful discharge' than the need of contract employees for protection against being fired in violation of public policy.

Id. at *14.

The Court then went on to compare the facts of the federal circuit court opinion which predicted this court would not recognized the wrongful termination claim for contract employees and acknowledged that collective-bargaining employees, who receive rights based on a majority vote within the collective bargaining unit, have even less opportunity to negotiate or protect themselves from violations of public policy than contract employees. Similarly, state merit-system employees are governed by a system of rights enacted by the legislature and are not able to select and negotiate those rights with their employer. Of contract employees, collective-bargaining employees, and merit-system employees, merit-system employees have the least amount of input into the rights they are afforded and, if anything, have the best argument for having available to them the wrongful termination tort claim.

Defendants also claim there are "decades of decisions from the Iowa Supreme Court" which they contend support their position, while citing only one distinguishable case governing independent contractors, *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681 (Iowa 2001), and the *Van Baale* case, which did not involve a claim for wrongful termination in violation of public policy. *See Ackerman*, 2017 Iowa App. LEXIS 425 at *14 n.7 (distinguishing *Harvey*); *see also Van Baale*, 550 N.W.2d at 155

(enumerating the plaintiff's claims as breach of oral contract, promissory estoppel, negligence, denial of equal protection, and intentional infliction of emotional distress and not discussing any public policy at issue in that case).

Defendants also discount the importance of two of this Court's opinions cited by Plaintiff, arguing that both were decided on the basis of preemption and not whether the wrongful termination claim could be applied to collective-bargaining or other non-at-will employees. (Defendants' Br., at 34) (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)). Plaintiff disagrees that these decisions are unimportant. In its introductory paragraph, the *Conaway* Court presented the case as follows:

> In *Springer v. Weeks & Leo Co.*, we recognized a common law tort action for retaliatory discharge based on the filing of a workers' compensation claim by an at-will employee . . . We said such conduct by an employer 'offends against a clearly articulated public policy of this state.' *Id.* We are now called upon to decide whether an employee covered by a collective-bargaining agreement providing a contractual remedy for discharge without just cause may maintain such an action. The district court, predicting our decision in Springer, held that the action is preempted by section 301 of the federal Labor Management Relations Act (LMRA). See 29 U.S.C. § 185(a). We disagree. Accordingly, we reverse and remand.

Conaway, 431 N.W.2d at 796.

In considering the preemption question, the Court in *Conaway* was required to consider the elements of the wrongful termination claim, and

whether they were inextricably intertwined with the collective bargaining rights at issue. Nowhere in its analysis did the Court ever question whether such rights could be maintained by the collective-bargaining-employee-plaintiffs, instead concluding, in its holding, that: "The plaintiffs' actions are recognizable state tort claims." *Id.* at 800. Thus, while *Conaway* is arguably not dispositive because no party argued the public policy claim unavailable to the collective bargaining employees, the Court's holding strongly suggests the wrongful termination claim exists regardless of at-will status.

Similarly, the *Sanford* Court was aware of the plaintiff's collective-bargaining status in that matter, and nevertheless affirmed his recovery, at trial, of damages for wrongful termination in violation of public policy. *Sanford*, 534 N.W.2d at 412-414. The court even described the tort as follows: "Sanford's retaliatory discharge claim rests on our holdings that public policy is violated when an employee, *even an employee at-will*, is discharged as a result of seeking worker's compensation benefits." *Id.* at 412 (emphasis added); *see also Ackerman*, 2017 Iowa App. LEXIS 425 at *15 (agreeing that *Conaway* and *Sanford* support allowing collective bargaining employees to bring a claim for wrongful termination). Further, the cited passage from *Sanford* refutes the string cite of cases that the State cites as evidence that this Court has limited the tort to at-will employees.

Of the string cite, the Court of Appeals in *Ackerman* held:

> The State's reasoning is flawed. To assume because Jasper and its ilk hold at-will employees may sue for wrongful termination in violation of public policy then employees who do not work at will may not sue for wrongful termination in violation of public policy 'is to commit the fallacy of the inverse (otherwise known as denying the antecedent); the incorrect assumption that if P implies Q, then not-P implies not-Q.'

Id. at *12.

Based on all of the foregoing, Plaintiff argues this court has already recognized the existence of the wrongful termination claim in the context of non-at-will employees, and that extending that tort to cover merit-system employees is supported by Iowa law, including not only prior precedent of this Court, but also the recent *Ackerman* opinion.

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;
megan@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 2,364 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