IN THE SUPREME COURT OF IOWA

NO. 16-1333

MARLON MORMANN,

Plaintiff-Appellant,

vs.

IOWA WORKFORCE DEVELOPMENT,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
HONORABLE DOUGLAS F. STASKAL, JUDGE

APPELLEE IOWA WORKFORCE DEVELOPMENT'S FINAL BRIEF

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ROUTING STATEMENT

IWD concurs that the case should be routed to the Supreme Court because it involves certain substantial questions of enunciating or changing legal principles concerning the appropriate standard of review for motions to dismiss on jurisdictional and authority grounds. *See* Iowa R. App. P. 6.1101(2)(f).

STATEMENT OF THE CASE

The central and entirely undisputed fact of this case is that the Plaintiff-Appellant, Marlon Mormann ("Mormann") did not file a civil rights claim within 300 days after the alleged discriminatory or unfair practice occurred. As such, his claim "shall not be maintained" under Iowa law. Iowa Code § 216.15(13). The only possible path forward is if this court finds an agency can create an equitable exception to statutory requirements, and then only if Mormann can successfully show that his filing deadline should be tolled by reason "waiver, estoppel and equitable tolling" under Iowa Administrative Code r. 161-3.3 (2016).

Although this case does come before the Court on an interlocutory appeal from Iowa Workforce Development's pre-answer Motion to Dismiss, Mormann is incorrect in asserting that the relevant facts have not been developed or that the facts asserted in his Petition are taken as true.

Mormann's failure to assert a civil rights claim with the civil rights commission within 300 days is an issue of jurisdiction or authority.[1] As such, the Court may consider evidence it deems relevant to determine jurisdictional facts. *Tigges v. City of Ames*, 356 N.W.2d 503, 510-512 (Iowa 1984). Defendant-Appellee Iowa Workforce Development ("IWD") and Mormann both submitted evidence to the district court pertinent to the jurisdictional / authority question, which the court weighed, and if Mormann failed to develop the factual record as fully as he would have preferred that is not due to any lack of opportunity to do so.

In any event, the pertinent dispute is not over evidence but over an interpretation of law based on materially undisputed facts. Mormann argues that as a matter of law he should not be deemed to have been placed on inquiry notice of a possible claim for failure to hire because of age until he obtained a transcript of a deposition of former IWD Director Teresa Wahlert taken in an unrelated case which, he claims, proves he was discriminated

[1] As Judge Staskal noted, there is a distinction between jurisdiction and authority, but there is "no need to make the subject matter jurisdiction / authority distinction in this case because there is no claim that IWD waived its argument regarding the court's jurisdiction or authority to hear the case or is estopped from making that challenge," and "even if the question raised in this case goes only to the court's authority to hear it, the court must promptly determine the material facts and resolve the issue." (MTD Order, pp. 4-5; App. 62-63) (citing *Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989); *Ritz v. Wapello Cty Bd. of Supervisors*, 595 N.W.2d 786, 792 (Iowa 1999)).

against. Alternatively, he claims that IWD should be estopped from asserting a defense because IWD sent him a rejection letter encouraging him to re-apply for future positions, which he claims masked the "true" discriminatory motives. Judge Staskal found Mormann's legal arguments to be without merit and, based on the undisputed fact that the claim was untimely, dismissed the case. (MTD Order, pp. 7-9; App. 99-101). This Appeal followed the district court's dismissal of Mormann's failure to hire claim as untimely.[2]

STATEMENT OF THE FACTS

Most of the pertinent facts are set forth in Judge Staskal's Order. (MTD Order, pp. 1-3; App. 93-95), and there is no need to repeat them in great detail. The parties agree about the pertinent facts, including the timeline that Mr. Mormann worked for IWD, the fact he applied to an open position for Deputy Iowa Workers' Compensation Commissioner in January of 2014, the fact that he was informed he did not receive the job by a letter dated March 7, 2014, the fact the successful applicant was younger, and the fact he did not file his civil rights complaint until May 5, 2015. The

[2] As Mormann noted, the district court declined to dismiss a separate claim of constructive discharge. Since that claim is not a subject of this appeal, IWD will not respond to it here except to note that for context that IWD denies Mr. Mormann was constructively discharged or otherwise harassed or discriminated against in any way.

rejection letter, containing just over one paragraph of text, included pro forma language thanking Mormann for his interest in the position, stating it was a "difficult decision," and inviting Mr. Mormann to apply for future openings with the division. (Def's Motion to Dismiss ("MTD"), Ex. B; App. 43).

Mormann has admitted that "he was aware that a younger worker, Erin Pals, was hired in his place." (Pl's Resistance to Defendant's Motion to Dismiss ("Resistance"), p. 7; App. 84). Ms. Pals was the first choice of the IWD hiring committee, and the second choice candidate was Mr. Mormann. (Godfrey email to Wahlert, MTD, Ex. D ("Godfrey Email"), p. 1; App. 68). Mormann was recommended for the position "if Ms. Pals does not accept an offer of employment." (Godfrey Email, p. 2; App. 69). Mormann has alleged that Ms. Pals is "not as qualified as plaintiff," citing her comparative youth and the fact that he had previously worked in a Deputy Commissioner's role. (Resistance, pp. 5-7; App. 82-84).

In the deposition of Teresa Wahlert cited by Mormann, Ms. Wahlert noted that she did have some concerns with the committee's second-choice selection of Mormann on account of statements Mormann himself "had made to people and during his interview that he thought he was going to retire," and that "more of a conversation needed to be had" to clarify the

point. (Wahlert Deposition, p. 245; App. 27). As it happened, Ms. Pals accepted the position, rending Wahlert's concerns moot.

SUMMARY OF THE ARGUMENT

Since there is no dispute that Mormann failed to file his civil rights complaint within the 300 days of the non-hiring complained of as required by Iowa law, the only way he can prevail is to persuade the court to disregard the usual jurisdictional prerequisite based on a rule of the Iowa Civil Rights Commission that purports to create equitable exceptions to the 300-day filing requirements. *See* Iowa Code § 216.15(13) (stating a claim *shall not* be maintained unless filed with the civil rights commission within 300 days of the alleged discriminatory or unfair practice)(emphasis added); Iowa Administrative Code r. 161-3.3 (2016) (purporting to create equitable exceptions). The initial question before the Court is whether an agency has the power to create equitable exceptions to express statutory requirements. The answer is no.

Even if the answer was yes, Plaintiff's two equitable arguments are without merit. One, he asserts the time to file his civil rights complaint should be tolled until the date he obtained a copy of a deposition of former IWD Director Teresa Wahlert from an unrelated case in which she expressed some non-specific concerns about comments Mormann had made saying that

he intended to retire. Two, he asserts the State should be equitably estopped from asserting the jurisdictional prerequisite of timely filing with the civil rights commission because IWD made "false representations" when it sent him a one-paragraph pro forma rejection letter inviting him to apply for future openings. These arguments are not supported by the facts or the law.

Mormann was placed on inquiry notice, and the clock properly began to run, as soon as he received the rejection letter. As Judge Staskal correctly noted, the pertinent question under the discovery rule is not whether appellant knew every possible fact that might (or might not) support his claim, but whether he was "placed on inquiry notice" by "sufficient knowledge of facts that would put that person on notice of the existence of a problem or potential problem." (MTD Order, pp. 6-7; App. 75-76) (citing *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 736 (Iowa 2008)). The undisputed facts are that Mormann "knew no later than March 2014 that the position he had applied for had been awarded to 'a younger candidate with no prior experience in that role." (MTD Order, p. 7; Petition, ¶¶ 14-15; Resistance, pp. 2, 7; App. 99, 3, 79, 84). That is sufficient to meet any reasonable inquiry notice standard.

IWD said or did nothing to mislead Mr. Mormann such that equitable estoppel would be appropriate. They sent him a five-sentence rejection

letter that contained the standard niceties. (MTD, Ex. B; App. 43). Nothing in the letter was untrue. If this type of generic sendoff is sufficient to invoke equitable estoppel, then just about every rejection letter ever sent tolls claims the disappointed applicant might have; an absurd result. The Court should reject this argument.

ARGUMENT

I. THE IOWA CIVIL RIGHTS COMMISSION LACKS THE POWER TO CREATE AN EQUITABLE EXCEPTION TO APPLICABLE STATUTES

A. Statement on error preservation, scope of review, and standard of review

Although the Court did not rule on this ground, Defendant stated in its briefing below that: "Defendant does not concede that administrative rules can create an exception to a statutorily provided limitations period, and Plaintiff has cited no Iowa cases in which a court has actually applied waiver, estoppel, or equitable tolling to obtain jurisdiction over an untimely civil rights complaint." (Defendants' Reply in Support of Motion to Dismiss, p. 2 n. 1, App. 88). Accordingly, the issue was preserved for appeal.

Regarding scope and standard of review, IWD incorporates by reference its statement in Section II(A).

B. Administrative Rules Cannot Create an Exception to Statutory Prerequisites for Authority or Jurisdiction.

The Iowa Civil Rights Act does not have an equitable exception to its 300-day filing requirement. Instead, it states quite clearly that:

> Except as provided in section 614.8, a claim under this chapter shall not be maintained unless a complaint is filed with the commission within three hundred days after the alleged discriminatory or unfair practice occurred.

Iowa Code § 216.15(13). The exceptions provided in section 614.8 are for for minors and persons with mental illness, and do not apply in this case. There is no provision in the statute for equitable tolling or estoppel. Plaintiff relies on a provision of the Iowa Civil Rights Commission's rules that allows for "waiver, estoppel and equitable tolling." Iowa Administrative Code r. 161-3.3 (2016).

There is no basis in Iowa law for an agency to unilaterally create an equitable exception to a statute. "An agency shall have only the authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated or conferred upon the agency." *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004) (quoting Iowa Code § 17A.23). There is no evidence the legislature intended to vest the Iowa Civil Rights Commission with the authority to create exceptions to the statute's jurisdictional requirements,

but, even if there was, any interpretation of the unambiguous language above that somehow reads in an equitable exception would be irrational. *See id.* at 589-590 (describing the 2 part test whereby the court assesses first whether the agency was delegated with interpretive authority and, if so, whether the interpretation was rational). Accordingly, the Court should disregard the Iowa Civil Rights Commission's interpretation of Iowa Code Chapter 216. In doing, it is clear from the unambiguous statutory language that there is no equitable exception to the requirement to file within 300 days. The Court should apply the law as written.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT MORMANN'S TIME FOR FILING AN IOWA CIVIL RIGHTS COMPLAINT WAS NOT TOLLED BECAUSE MORMANN POSSESSED ALL THE INFORMATION NECESSARY TO PLACE HIM ON CONSTRUCTIVE NOTICE OF A POTENTIAL CLAIM.

A. Statement on error preservation, scope of review, and standard of review.

IWD does not deny that Mormann preserved error on the issues of tolling and estoppel to the extent of the arguments presented in his written resistance to the pre-answer motion to dismiss, or that the review is for correction of errors at law. Consistent with this Court's ruling on Appellee's Motion to Strike, Mormann did not preserve error as to arguments predicated on new evidentiary claims asserted in the Motion to Reconsider.

This should include Mormann's speculation that the Godfrey litigation and / or Theresa Wahlert prohibited people from discussing the hiring process with him, and that this somehow prevented him from discovering the alleged discrimination against him. There is no evidence in the record to support this speculation, and such argument was never made to the district court in Mormann's resistance to the motion to dismiss.[3]

As to the broader scope and standard of review, it should be noted at the outset that it doesn't really matter whether the Court applies a motion to dismiss for failure to state a claim standard, or the more searching standard applied to motions to dismiss on jurisdictional and authority grounds. The reason it does not matter is that all the pertinent facts—the date of non-hiring, the date the civil rights complaint was filed, the contents of the Wahlert deposition and the non-hire letter—are undisputed.

Even in a motion to dismiss for failure to state a claim, the court may consider "materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 931 (8th Cir. 2012). "The district court may take judicial notice of public

[3] In addition to failure to preserve error, an additional reason to disregard such claims is that they appear to be backhanded attempts to reintroduce assertions made in documents that both parties have been ordered not to reference.

records and may thus consider them on a motion to dismiss." *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003); *see also, King v. State*, 818 N.W.2d 1, 6 n.1 (Iowa 2012) (in ruling on a motion to dismiss, courts must ordinarily consider documents incorporated into the complaint by reference).

Mormann has not argued that the court cannot consider the jurisdictional facts he has admitted to and incorporated into his own arguments, nor would it be reasonable for him to do so. He expressly admitted his civil rights complaint was not filed within 300 days of the non-hiring, (Resistance, p. 2; App. 79). He has at no point argued that this fact is not in his petition. Thus, even if he attempted to do so now he has clearly waived the argument and failed to preserve error. The Wahlert deposition is specifically referenced in Mormann's petition. The contents of both the deposition and the no-hire letter have not only been admitted by Mormann, they are positively relied on by him as the basis for his arguments that the Court should toll the period for filing the civil rights complaint and / or estop IWD from asserting a defense. Thus, the Court should treat all the relevant jurisdictional facts as admitted and not subject to any factual dispute that would have to be resolved with evidence.

All that said, it should be noted that the motion to dismiss for failure to state a claim standard of review is not appropriate in this case. The issue here is not whether the factual allegations in Mormann's petition, if true, fail to state a claim. Rather, the issue is that Mormann undisputedly failed to complete a prerequisite for invoking the Court's authority and / or jurisdiction, namely filing a civil rights complaint within 300 days of the alleged incident.[4] While Mormann "is correct that, when reviewing rulings on motions to dismiss for failure to state a claim upon which relief can be granted, we are limited to the well-pleaded facts in the petition and we take those facts to be true . . . that standard does not apply to a review of dismissal rulings premised on jurisdictional issues. . . ." *Hotchkiss v. International Profit Associates, Inc.*, No. 09-1632, 2011 WL 1378926, at *1 (Iowa Ct. App. April 13, 2011); *see also Tigges v. City of Ames*, 356 N.W.2d

[4] The law appears somewhat unclear as to the applicable standard for review of a dismissal based on statute of limitations. *Compare Harrington v. State*, 659 N.W.2d 509, 521 (Iowa 2003) ("substantial evidence" is the "standard of review applicable to the statute-of-limitations issue") *with Clark v. Miller*, 503 N.W.2d 422, 424 (Iowa 1993) ("Our review is limited to the issues raised by, and the allegations contained in, the pleadings"). Regardless, though there are obvious similarities, the present case is not actually about a statute of limitations. Rather, it involves a requirement found within chapter 216 itself to file a timely civil rights complaint with the Iowa Civil Rights Commission as a jurisdictional prerequisite to having any claim under chapter 216. Thus, it is different than a case where a statute clearly authorizes an action but a separate statute of limitations imposes a procedural time limit on an entire class of claims.

503, 510 (Iowa 1984) (holding that "regardless of the vehicle used to raise the issue," the court must "utilize the most efficient methods at its disposal to determine the *true fact*; and decide the issue promptly") (emphasis added); *see also Percival v. Bankers Trust Co.*, 450 N.W.2d 860, 861 (Iowa 1990) (quoting *State ex rel. Miller v. International Energy Mgmt. Corp.*, 324 N.W.2d 707, 709-10 (Iowa 1982) (Noting, in the context of a jurisdictional challenge, "[t]he trial court's findings of fact have the effect of a jury verdict and are subject to challenge only if not supported by substantial evidence in the record; we are not bound, however, by the trial court's application of legal principles or its conclusions of law.").

As additional persuasive authority, federal courts have also consistently held that judges should decide jurisdictional facts on a motion to dismiss. *See Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993) (holding that a 12(b)(1) jurisdictional challenge, as distinguished from a 12(b)(6) motion to dismiss for failure to state a claim, can consist of *either* a facial attack on the complaint or an attack on the underlying facts asserted as the basis for jurisdiction within a complaint). In a motion to dismiss challenging the factual basis of jurisdiction, the plaintiff does not have the presumption of truthfulness and the court is free to consider matters outside the pleadings. *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) ("Jurisdictional

issues, whether they involve questions of law or of fact, are for the court to decide").

Judge Staskal's holding that "the court must promptly determine the material facts and resolve the issue" of jurisdiction or authority, is entirely consistent with best judicial practices and the law (MTD Order, pp. 4-5; App. 73-74). The alternative–requiring full-blown discovery of unrelated issues before courts can weigh the facts necessary to determine whether or not they have authority or jurisdiction to hear the claim in the first place–would be an enormous waste of judicial and party resources.

B. The Wahlert deposition proves Mr. Mormann's non-hiring was because another candidate was selected; not because of his age.

Mormann does not dispute that he failed to file a complaint with the civil rights commission within 300 days after his non-hiring as Deputy Worker's Compensation Commissioner occurred, but instead urges that the filing period be equitably tolled because he had no reason to suspect IWD had refused to hire him because of his age until, on March 18, 2015, he obtained a transcript of a deposition taken of former Iowa Workforce Development Director Teresa Wahlert in an unrelated matter. (Petition, ¶ 21; Civil Rights Complaint ("Complaint"), p. 5; App. 3, 12); *see* Iowa

Code section 216.6(1)(a) (stating it is a discriminatory practice to "refuse to hire" someone "because of the age" of the applicant).

This claim is curious as an initial matter since the Wahlert deposition actually proves that his non-hiring had nothing to do with his age. Ms. Wahlert indicated in her deposition that the selection committee recommended another person for the job and Mormann merely "came in second with the scoring process." (Wahlert Deposition, p. 244; App. 63). This is consistent with an e-mail from a member of the hiring committee to Ms. Wahlert recommending Mormann for the job only "if Ms. Pals does not accept an offer of employment." (Godfrey Email, p. 2; App. 69). Ms. Pals accepted the job, and thus any concerns about Mormann never became a live issue. As Ms. Wahlert put it, she had some concerns regarding:

> The statements that Marlon Mormann had made to people and during his interview that he thought he was going to retire. And so I was concerned that training and time would be invested and that perhaps more of a conversation needed to be had to be sure that that investment was appropriate for the long-term.
>
> [However . . .]
>
> Well, we never had to have that discussion. I was saying that I agreed with the first selection that Christopher selected for this particular position and I didn't necessarily agree with whoever came in second with the scoring process that's used for these positions. I believe Mr. Godfrey asked me what my issues were. And I said that it really wasn't important unless we got to the point where we wanted to offer the job for Marlin [sic]

> Mormann. So I never stated what my opinions were at the time.

(Wahlert Deposition, p. 244-245; App. 63-64). Thus, the Wahlert deposition actually tends to prove that age never entered into the decision, and even concerns relating to Mormann's own statements never ripened to action since the top candidate accepted the position.

Even if Wahlert had made inquiries into Mormann's retirement plans, that would not be proof of age discrimination. "[M]any courts have recognized that an employer may make reasonable inquiries into the retirement plans of its employees." *Cox v. Dubuque Bank & Trust Co.*, 163 F.3d 492, 497 (8th Cir. 1998) (string citation omitted). This is especially true where an employee has generated rumors about his own retirement and the employer is "entitled to inquire . . . whether the rumors were true." *Woythal v. Tex-Tenn Corp.*, 112 F.3d 243, 247 (6th Cir. 1997). "[W]hen the inquiries are reasonable given the circumstances, a plaintiff should not be able to rely on those inquiries to prove intentional discrimination." *Cox*, 163 F.3d at 497.

In any event, the Wahlert deposition proves conclusively that Mormann was not hired because another candidate was selected and not because of his age. It would thus be curious indeed if it were used as a basis to toll a claim of age discrimination.

C. The Wahlert deposition is not "vital information" such that deadlines should be tolled until Plaintiff obtained it.

Even if concerns about Mormann's own statements that he was going to retire were somehow construed as age discrimination, there is nothing about Wahlert's statement that should toll the filing deadline. Equitable tolling is appropriate only "when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on his claim." *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 836 (8th Cir. 2002) (quoting *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1327-28 (8th Cir. 1995)). "To determine whether a plaintiff in fact lacked vital information, a court should ask whether a reasonable person in the plaintiff's position would have been aware that he had been fired in *possible* violation of" the applicable civil rights law without such information. *Dring*, 58 F.3d at 1329 (quoting *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135-37 (7th Cir. 1994) (emphasis added)); *Buechel*, 745 N.W.2d at 736 (noting Iowa has adopted an inquiry notice based on "sufficient knowledge of the facts that would put that person on notice of the existence of a problem *or potential problem*) (emphasis added). As numerous courts have noted, "the qualification 'possible' is significant because 'if a plaintiff were entitled to have all the time he needed to be certain his rights had been violated, the statute of

limitations would never run." *Dring*, 58 F.3d at 1329 (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990)).

Thus, even if the Wahlert deposition were somehow regarded as additional, cumulative evidence of discrimination, it would not be deemed "vital" information sufficient to justify the extraordinary remedy of disregarding an express statutory 300-day filing requirement, unless plaintiff would have been unable to determine he had even a "possible" claim prior to seeing that deposition. *See id.* In other words, the deposition has to be not only evidence, but *the evidence*, the Rosetta Stone without which it was impossible for him to realize he had a claim. This is not the case. "To make a prima facie case under the *McDonnell Douglas* framework, [a plaintiff must] show that (1) she was a member of the protected group; (2) she was qualified to perform the job; (3) she suffered an adverse employment action; and (4) circumstances permit an inference of discrimination." *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1038 (8th Cir. 2010) (citation and internal quotation marks omitted); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973) (originally stating the standard); *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 638 (Iowa 1998) (noting that Iowa has adopted the *McDonnell Douglas* framework); *McQuistion v. City of Clinton*, 872 N.W.2d 817, 828 (Iowa 2015) (noting numerous contexts in

which Iowa courts have applied *McDonnell Douglas* to claims of discrimination under Iowa law).[5] Thus, so long as Mormann was aware of facts establishing a prima facie case he was aware of facts from which a reasonable person (to say nothing of a reasonable judge) should have realized he had a *possible* claim.

A circumstantial inference of discrimination may be drawn when Plaintiff can prove that a younger person got the job. *Beardon v. Int'l Paper Co.*, 529 F.3d 828, 832 (8th Cir. 2008); *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 895 (Iowa 1990). Plaintiff did not need reference to Ms. Wahlert's deposition statement to know that he is a member of a protected class, that he wasn't hired, that a younger person was hired, or his own alleged competence—all the elements of a prima facie case of age discrimination. Accordingly, he should reasonably have been aware that he had a "possible" claim prior to learning about the deposition statement. And again, the statement had no bearing on his selection whatsoever because Ms. Pals accepted the offer. The issue of hiring Mr. Mormann never arose.

[5] A discrimination claim may also be made based on "direct evidence," of discrimination, *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996), but Mormann has not argued at any point in these proceedings that this is the basis of his claim. In any event, it would not change the inquiry notice analysis since the relevant question is not whether the deposition gave him additional grounds for making a claim, but whether he was on notice of a *possible* claim prior to obtaining that deposition.

Accordingly, since the Wahlert deposition was not necessary to put Plaintiff on notice of a potential claim, and in fact tends to undermine any claim he might have, it should not be the basis for tolling the period of time to file a civil rights complaint.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT IOWA WORKFORCE DEVELOPMENT IS NOT BARRED FROM RAISING A JURISDICTIONAL DEFENSE BECAUSE MORMANN'S CLAIMS, EVEN IF TRUE, DO NOT DEMONSTRATE CONDUCT THAT WOULD JUSTIFY EQUITABLE ESTOPPEL.

A. Statement on error preservation, scope of review, and standard of review.

IWD incorporates by reference its statement in Section II(A).

B. IWD should not be precluded from asserting a valid jurisdictional defense merely because it sent out a pro forma rejection letter.

Mormann appears to argue that sending out a factually accurate pro forma rejection letter is an inequitable false representation sufficient to preclude even asserting an otherwise valid defense. This is not the case. As Mormann correctly noted, equitable estoppel requires showing all of the following:

> The defendant has made a false representation or has concealed material facts; (2) the plaintiff lacks knowledge of the true facts; (3) the defendant intended the plaintiff to act upon such representations; and (4) the plaintiff did in fact rely upon such representations to his prejudice.

Christy v. Miulli, 692 N.W.2d 694, 702 (Iowa 2005) (quoting *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 578-79 (Iowa 1990)). Moreover, "a party relying on the doctrine of fraudulent concealment must prove the defendant did some affirmative act to conceal the plaintiff's cause of action independent and subsequent to the liability-producing conduct." *Christy*, 692 N.W.2d at 702. Finally, "the plaintiff's reliance must be reasonable." *Id.*

Let's look at the first element. What affirmative concealment did IWD commit? The only evidence in the record, and the only claim preserved for review, is that Commissioner Godfrey sent a rejection letter the body of which fits on a quarter-page:

> I am writing to regretfully inform you that we have decided on an alternate candidate to fill the position of Deputy Workers' Compensation Commissioner. The decision was a difficult decision and as I mentioned before, you were one of the finalists for the position. You are clearly qualified for a Deputy Commissioner's position and I am certain that you would be a terrific addition to our staff. I encourage you to submit your application for future openings with the Division of Workers' Compensation, if you remain interested in our division.

(MTD, Ex. B; App. 43). Every sentence of this paragraph is accurate. They had decided on an alternate candidate, as the Wahlert deposition and e-mail record shows. (Wahlert Deposition, p. 244; Godfrey Email, p. 1; App. 63, 68). There is no reason to doubt the decision was difficult, and the record

establishes that Mormann was not only a finalist—but the second-place candidate. (Godfrey Email, p. 2; App. 69 (recommending Mormann if Pals refuses the offer, and stating "[t]he hiring team was presented with a very difficult choice in this process. . . .)). Mormann presumably does not deny his own qualifications. Nor is there any indication Godfrey is insincere in encouraging Mormann to apply for future positions, given his praise for Mormann in an email to Wahlert. (Godfrey Email, p. 2; App. 69). With no misrepresentations, the equitable estoppel claims fail on the very first element. There were no false representations in the letter.

Mormann appears to argue that IWD's affirmative act of material concealment is failing to include a statement in the rejection letter to the effect of "we refuse to hire you because of your age." As the district court rightly noted, "if the argument is accepted, the three hundred day limit would be meaningless" because "[n]o claimant would be bound to comply with the time limit unless and until their employer admitted unlawful discrimination." (Ruling, at 8; App. 100).

Mormann offers no evidence—none whatsoever—that IWD took any steps to conceal the "true" reason for not hiring him, that anyone misled him, or that anyone refused to talk to him about the reasons for his non-hiring. He asserts merely, in passive voice, that he "was told the job went to a more

qualified candidate." (Mormann's Proof Brief, at 3). He cites the rejection letter as his only evidence to support this assertion. The rejection letter does not state the job went a more qualified candidate. Even if such representation was later made, it was truthful. Commissioner Godfrey stated in an email to Director Wahlert "[t]he hiring committee has determined that the best-qualified candidate for the position of deputy workers' compensation commissioner is Erin Pals." (Godfrey Email, Ex. D, p. 1; App. 68). Since Mormann was not cc'd on that email there is no reason Godfrey would have lied about this fact in order to mislead Mormann.

Regardless, it is not as though Mormann was unfamiliar with the winning candidate, who he knows well enough to judge as "qualified for the position, not as qualified as plaintiff, but qualified." (Pl's Resistance to MTD, pp. 5-6; App. 82-83). Thus, we're dealing with a choice between two qualified candidates, where of necessity the selection committee had to make a somewhat subjective determination as to which one they deemed the most qualified. (See Godfrey Email, p. 1; App. 68 (noting Ms. Pals "is extremely well-qualified for the position . . ."). The fact he was not hired was enough to tell Mormann the committee deemed the other candidate more qualified. And, if he disagreed with that assessment, some conclusory statement by some unspecified person that the job went to a more qualified candidate

should not reasonably have tricked Mormann into changing his apparent belief that he is better than the woman who got the job. *See Christy*, 692 N.W.2d at 702 (holding reliance must be reasonable). Mormann has not shown that the unspecified person he supposedly talked to in passive voice was lying about Ms. Pals being more qualified, thus failing the first element of the estoppel test—that it was a false representation—but just as important he fails on the second element since he possessed knowledge of the true facts (or at least his belief) about his own qualifications. *See Christy*, 692 N.W.2d at 702 (reciting the elements).

Mormann has also presented no evidence or plausible argument for the third element, that IWD intended detrimental reliance, or the fourth element that he did in fact reasonably rely on IWD's representations. Other than a factually unsupported conspiracy theory that Ms. Wahlert secretly prevented him from learning the details of his non-hiring by instructing people not to talk about it (except, apparently, the unspecified person who talked to him in passive voice), Mormann points to nothing showing that IWD did anything manifesting an intent to somehow trick him into not seeing its supposedly discriminatory purpose.[6] Indeed, even if his theory

[6] And, again, this theory was never presented to the district court prior to issuing the MTD order and appears to be based on documents the Court has ordered excluded from the case.

that a Godfrey litigation "gag order" somehow prevented people from talking about his hiring—despite the fact that his hiring has nothing to do with the Godfrey case—that would if true only tend to show the agency was complying with a lawful order and not that IWD was doing it to prevent him from filing a civil rights complaint. And, in any event, it would not be reasonable to rely upon the mere fact that he couldn't get inside details about the hiring process, which is probably true for most job applicants, as a reason not to pursue a claim he should have known he *possibly* had for all the reasons discussed in section II (C) of this brief.

That brings us back to the letter as Mormann's sole supposed false representation, and even if the other elements were present (which they weren't) Mormann should not reasonably have relied upon what any reasonable person would understand as a positively-worded rejection letter. Employers, especially those who are familiar with the applicant, would typically thank the applicant, compliment them on their qualifications, and say something encouraging. The Court should take judicial notice of this common sense reality, which even members of the Court have likely practiced in the hiring (or non-hiring) of their own clerks. *See State v. Stevens*, 719 N.W.2d 547, 550 (Iowa 2006) ("Courts take judicial notice of facts within the common experience or knowledge of every person of

ordinary understanding and intelligence . . .") (citation omitted). In our cultural context, someone cannot reasonably take statements in a rejection letter or otherwise saying something nice and encouraging future applications as some sort of promise that they will get the job next time. It is certainly not reasonable to rely on such statements to forego pursuing any legal claims a person may otherwise believe themselves entitled to.

Mormann has failed to meet his burden of proving all the elements of equitable estoppel. He seeks an extraordinary remedy based on an extraordinary claim, that defendant knowingly lied to him to prevent him from realizing he had a claim. A party should not be able to call another party a liar with impunity and without a solid good faith basis, and they should certainly not be rewarded for doing so. The undisputed and only facts in the record are that IWD sent Mormann an unremarkable and truthful rejection letter. Applying the *Miulli* standard to these facts, not one of the four required elements have been met. *See Miulli*, 692 N.W.2d at 702 (reciting the standard). There is no equitable reason IWD should be prevented from asserting an otherwise valid defense.

CONCLUSION

It remains undisputed that Mormann did not file a civil rights claim within 300 days after the alleged discriminatory or unfair practice as

required by Iowa law. Because Mormann has failed to demonstrate that an equitable exception even exists, or that the narrow equitable exception provided in the administrative code for "waiver, estoppel and equitable" tolling applies under the undisputed facts of this case, Mormann's claim "shall not be maintained." Iowa Code § 216.15(13); Iowa Administrative Code r. 161-3.3 (2016). Accordingly, and for all the foregoing reasons, Iowa Workforce Development requests that the Court affirm Judge Staskal's decision dismissing Mormann's claim of failure to hire because of age.

REQUEST FOR ORAL ARGUMENT

Appellee, Iowa Workforce Development, requests that it 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) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font size and contains 6,271 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF SERVICE

I, David L.D. Faith, II, hereby certify that on the 1st day of June, 2017, I or a person acting on my behalf did serve Appellee Iowa Workforce Development's 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, David L.D. Faith, II, hereby certify that on the 1st day of June, 2017, I or a person acting on my behalf filed Appellee Iowa Workforce Development's Final Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

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