THE SUPREME COURT OF IOWA

Supreme Court No. 18-0567
Polk County No. LACL128372

LARRY R. HEDLUND, Plaintiff-Appellant

vs.

STATE OF IOWA, K. BRIAN LONDON, COMMISSIONER OF THE IOWA DEPARTMENT OF PUBLIC SAFETY, Individually, CHARIS M. PAULSON, DIRECTOR OF CRIMINAL INVESTIGATION Individually, GERARD F. MEYERS, ASSISTANT DIRECTOR DIVISION OF CRIMINAL INVESTIGATION, individually, and TERRY E. BRANSTAD, Individually,

Defendants-Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE DAVID MAY

PLAINTIFF-APPELLANT FINAL BRIEF

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court because it presents substantial questions of Iowa law and public policy regarding the application of Iowa's Whistleblower Statute, claims for Tortious Infliction of Emotional Distress, and the Iowa Civil Rights Act.

STATEMENT OF THE CASE

On August 8, 2013, Larry Hedlund ("Hedlund") filed a Petition in the Iowa District Court for Polk County against Defendants ("the State"). He filed his Fourth Amended Petition on September 29, 2017. On October 5, 2017, the State filed a Motion for Summary Judgment on all of Hedlund's claims. Oral argument was held on February 27, 2018. (APP.000066) On March 30, 2018, the district court, Honorable David May, issued an Order Granting Motion for Summary Judgment and dismissed Hedlund's case in its entirety including his whistleblower claim under Iowa Code §70A.28, his claim for defamation against Governor Branstad, for tortious infliction of emotional distress and for age discrimination under the Iowa Civil Right Act, Iowa Code chapter 216. A Notice of Appeal was filed on April 2, 2018.

STATEMENT OF FACTS

OVERVIEW

Hedlund worked in the Iowa Division of Criminal Investigation ("DCI") for 25 years as one of its top criminal investigators. Throughout his tenure, he received high marks in all of his annual reviews, received dozens of letters of commendation from the public and law enforcement officials from around the state, and had *never* been reprimanded verbally or otherwise.

When Brian London ("London") became the Commissioner that changed. London wreaked havoc in the DCI, as well as the entire Department of Public Safety. Older workers were routinely demoted, terminated, threatened, or retired. They were replaced by neophytes, who had little experience in the rough-and-tumble realm of policing, where robust and heated exchanges were the norm. Among those who rose to the top were Charis Paulson ("Paulson"), who became the director of the DCI's Major Crimes Unit, and her assistant director Gerard Meyers ("Meyers"). Both were incompetent.

When Hedlund disagreed with a plan to reorganize the DCI and asked to take his complaints up the chain of command, he landed in Paulson and Meyers' crosshairs. To silence him, they concocted a story claiming that he

was insubordinate, discourteous and a detriment to the department – claims never documented anywhere. Paulson and Meyers met with London, the Attorney General's office, and officers from internal affairs and human resources to share their "concerns" on April 25, 2013. The next day, Hedlund blew the whistle on Governor Branstad's speeding SUV, which was travelling on Highway 20 doing a "hard 90." Five days later, Hedlund was suspended. Hedlund's suspension and subsequent termination caused a public outcry and generated scores of media reports that he was fired for blowing the whistle on Branstad's speeding vehicle. The day after Hedlund's termination, Branstad held a news conference falsely claiming it was necessary to fire Hedlund for the "morale and safety of the department." There was *nothing* in the now infamous 500-page internal affairs report to support the assertion that Hedlund was a risk to anyone.

Five days after Branstad publicly vilified Hedlund, Paulson slipped another document into Hedlund's now closed internal affairs file. This time, the story was fantastical: Hedlund was suicidal and homicidal.

Hedlund's Stellar Career

In 1988, Hedlund was hired by DPS as a Trooper with the Iowa State Patrol. Although he was new to the patrol, he excelled at it. (APP.000651) A year later, Hedlund was promoted to the DCI as a Special Agent, where he

received numerous accolades for his work, including the prestigious 2008 Law Enforcement Victim Service Award given by the United States Attorneys' Offices in Iowa. (APP.000757) He received the award because his "kindness, compassion, and willingness to 'go beyond the call of duty' to assist victims of crime were extraordinary and serve as an outstanding example for all of law enforcement." (*Id*.)

Throughout his tenure as a Special Agent, Hedlund also received glowing annual reviews often exceeding expectations in every area measured. (APP.000744, APP.000750, APP.000771, APP.000782, APP.000792, APP.000798) During his last four years as a Special Agent, Hedlund not only exceeded expectations four years in a row but exceeded expectations in every single category from 2007 through 2010 except one in which he met expectations. (*Id*.)

In 2010, Hedlund was promoted to Special Agent in Charge ("SAC"). The DCI is a paramilitary operation, whose primary mission is to assist local law enforcement agencies solve crimes when specialized investigative skills and resources are needed such as murders, kidnappings, white collar and cyber-crimes. (APP.000637) DCI Commissioner London was at the top of the chain of command and was appointed by and reported to Gov. Branstad. (APP.000473) The Commissioner's Executive Officer, Steve Ponsetto, was

the second in the chain of command and oversaw the directors of the various divisions, including the DCI, the State Patrol, Gaming, Cyber-crimes, the Fire Marshal, and Narcotics Enforcement. (*Id*.) The directors had assistant directors and the assistant directors had SACs. (*Id*.)

The SACs in the DCI were to serve as the "voice" of their agents and advocated for what they needed to perform their jobs in the field. (APP. 000627 ¶ 11) Their first duty was to "act on all requests for investigative assistance without delay," such as more manpower, weapons, lodging and other resources. (APP.000481) For the first two years under then Director John Quinn, Hedlund excelled as an SAC and received glowing reviews. (APP.000804**;** APP. 000215 p. 23:4-21) That changed when London became Commissioner and Paulson and Meyers became Hedlund's supervisors.

London's Reign

In September 2012, then Gov. Branstad appointed London to serve as the DPS Commissioner. (APP.000549) London had a penchant for firing and demoting older, seasoned veterans and replacing them with younger, less knowledgeable people to fill the top spots in the DCI and throughout the DPS. (APP.000305 pp. 25:1-7; 39:13-25; 40:1-23; APP.000635 ¶ 4-8; APP.000242 pp. 70:17-25, 71:1-5) (APP.000219 pp. 35:25, 36:1-18) London was a "tyrant" and a "bully," who would "flare up" in meetings

raise his voice, point fingers, and pound the table. (APP.000306 pp. 63:5-11; APP.000410 pp. 11:3-9, 12:2-10)

On September 4, 2013, less than 11 months after London was hired, Gov. Branstad determined that DPS "needed a fresh start" and asked for London's resignation. (APP.000207 pp. 87:13-25, 88:1-6) At the termination meeting, Gov. Branstad expressed his displeasure with the "incident with the speeding" referring to Hedlund. (APP.000327 p. 106:9-25)

Zone 3

The DCI's Major Crime Unit ("MCU") was divided into four zones across the state. When Hedlund became an SAC for the MCU, he commanded Zone 3, a 29-county area that stretched 28,000 square miles north to the Minnesota border and approximately every county east of I-35 and north of Highway 20. (APP.000626 ¶ 3) Zone 3 included some of Iowa's larger cities, including Waterloo, Dubuque, Cedar Falls, Fort Dodge, and Mason City. Geographically, it was also the largest zone. (*Id*.) Eight Special Agents were based in Zone 3 and reported directly to Hedlund. The Zone 3 agents were well regarded and considered a highly productive team. (*Id*.)

During Hedlund's tenure as SAC, there were numerous violent crimes in Zone 3 particularly in the summer, fall and winter of 2012. Among other

things, two young female cousins were abducted in Evansdale in July 2012, stirring vast media attention and angst across the state. (APP.000236 p. 48:20-25) In the midst of this crime wave, London appointed Paulson to serve as the Director of the MCU. (APP.000485) Paulson then appointed her long-time friend, Meyers, to serve as the Assistant Director ("AD") (APP.000336-337 pp. 41:3-9, 62:24-25, 63:1-9)

Paulson was afraid to go up the chain of command and talk with her superiors about any potential issues broached by her subordinates. (APP. 000638 ¶5) Meyers was incompetent. Although Hedlund and the other SACs repeatedly complained to Paulson about Meyers, she was either unable or unwilling to force Meyers to do his job. (APP.000354 pp. 46:10-25, 47:1-25, 48:1-10; APP.000631 ¶2; APP.000366 pp. 110:10-25, 111:1-25; APP.000236-237 pp. 48:20-25, 49:13-25, 50:1-9, APP.000258 p. 135:13-25)

The February 13 Email

On February 6, 2013, Hedlund sent Meyers an email updating him on a criminal case involving a 20-month-old boy, whose body had been found in a creek. Hedlund explained that DNA recently collected from an inmate matched the DNA collected on the toddler's clothing. (APP.000422) *Six days later*, Meyers responded and asked for numerous pieces of information regarding the suspect. He stated he needed the information "as soon as

possible" and "no later than tonight." (*Id*. p. 421)(emphasis added) This was true even though about half the agents in Zone 3 were preparing to testify in a murder trial and Meyers easily could have obtained the information himself. (APP.000314 pp. 43:21-25, 44:1-4) Hedlund provided him with the requested information within hours. (APP.000419) He also sent Meyers an email to express his opinion that Meyers was micromanaging the field agents and he was putting an undue burden on them. (APP.000420) Hedlund then emailed his agents about the situation and shared his email to Meyers with them. (APP.000419)

February 15, 2013 Meeting

On February 15, 2013 Hedlund and Meyers met at headquarters in Des Moines. (APP.000339 p. 99:13-15). Meyers broached the February 13, 2013 email Hedlund sent to his agents and told him that "he did not disagree with a single word in that email, but he didn't like seeing it on paper." (APP. 000243 p. 74:11-13) Meyers repeatedly told Hedlund that because he was in the "twilight of his career," he did not want to have issues with him. (APP. 000350 pp. 333:24-25, 334:1-7, 334:25, 335:1-5; APP.000254 p. 118:1-13) Although Meyers claimed he gave Hedlund a "verbal counseling," there was *nothing* placed in Hedlund's personnel file. (APP.000644-APP.000960) The

meeting was not documented until May 28, 2013 when it was needed as justification for Hedlund's termination. (APP.000585)

The April 18 Conference Call

On April 18, 2013 Paulson, Meyers and the SACs held a conference call to discuss a plan to overhaul the MCU. The plan reduced the MCU from four zones to three. (APP.000626 ¶ 7) The redesign would cut the number of SACs and Special Agents in the field. (*Id*.) The only rationale Paulson gave for the drastic change was that it would be hard for her "to go to the Commissioner's office with a straight face and tell him that we are extremely busy and you look at our staff, our average cases per agent per year, you know, that's just not acceptable. You know I think our people can be doing more than they are." (APP.001056 p. 10; APP.000244 p. 79:15-21) The response to her statement was an audible "Wow" from one of the SACs. (APP.001056 p. 10)

The SACs were uniformly opposed to the plan. (APP.000355 p. 94:17-20) Each of them spoke candidly during the conference call about their opposition and their frustration that they had not been able to review the plan before the meeting. (APP.000361 pp. 51:18-25, 52:1-18) At the end of the April 18 phone conference, Paulson agreed to allow the SACs to study the proposal, discuss it with their agents, and discuss it again on April 23rd

during a quarterly SAC meeting. (APP.000360 pp. 45:21-25, 46:1-15) During the next few days, Hedlund and the other SACs discussed the proposal with each other and their agents.

The April 23, 2013 Meeting

On April 23, 2013 the SACs gathered at DMACC with Meyers and Paulson to discuss various items, including the plan to reduce the zones. The exchange was robust and the SACs made it clear that neither they nor their agents supported the plan. (APP.000626 ¶ 7; APP.000550) Among their concerns was that if the MCU was reduced to three zones, the zones would be much larger thereby increasing the time on the road and decreasing the time the agents spent at home and with their families potentially leading to agent burn-out. (APP.000362 pp. 54:18-25, 55:1-9; APP.000367 p. 120:7-18) It was a concern that all of the SACs shared. (*Id*. at 55:7-9)

SAC Bill Kietzman was the first to mention suicide in the context that reducing the zones from four to three could cause agent burn-out. (APP.000632 ¶ 6) Hedlund agreed and mentioned that a past colleague had killed himself and that stressed agents were more likely to commit suicide. (APP.000632 Aff. ¶ 6) Hedlund never said or did anything during that meeting that led Kietzman or the other SACs to believe he was a danger to

himself or others. (*Id*., APP.000363 p. 63:16-25; APP.000357 pp. 121:6-25,122:1-2; APP.000406 pp. 55:21-25, 56:1-4)

Eventually, the SACs agreed that if the four zones remained intact, each one of them would be responsible for one of the specialty areas that London was concerned with: financial crimes, cold cases, cybercrime and human trafficking. (APP.000248 p. 93:8-24) Hedlund volunteered for the cold case division. (APP.000247 p. 91:20-25, 92:1) Paulson told them she would take the proposal to the Commissioner and Meyers admonished them to start digging into their specialty areas quickly, stressing that he wanted immediate results. (*Id*. at 92:2-25, 93-95; APP.000530)

Hedlund's PSB Complaint Against Paulson

On April 17, 2013, Hedlund filed a complaint against Paulson with the PSB. (APP.000505) The PSB complaint alleged that Paulson distributed an inappropriate email to members of the Department and condoned the persistent misuse of physical fitness incentive days. (*Id*.) Paulson acknowledged receiving the PSB complaint on April 17, 2013. (APP. 000380 p. 153:12-16) The very next day, Paulson had the telephone conference call with Hedlund and the other SACs about changing the number of zones. She later falsely claimed Hedlund was rude and insubordinate during this conference call. (APP.000519) The in-person

meeting occurred a few days later on April 23, 2013. She falsely claimed that Hedlund behaved erratically and that she was concerned for her safety and that of the DPS leadership team. (APP.000521) On April 24, 2013, Paulson emailed Attorney General Jeff Peterzalek and Andrea Macy at DAS requesting a meeting because she had "a personnel issue with a member of my leadership team." (APP.000516 p. DPS000013)

On April 25, 2013, Paulson met with Meyers, Peterzalek, Macy, as well as Kyle Gorsh and Adam Buck with PSB. (APP.000532) Paulson claims that the topics of discussion at the meeting were "officer safety concerns as well as the increasingly insubordinate and disrespectful behavior of SAC Hedlund toward DPS leadership." (APP.000521; APP.000385 p. 207:22-25, 208:1-25) Meyers claimed that the gist of the meeting focused on the "great concern for Larry Hedlund's health and safety, as well as a few of us." (APP.000347 p. 225:1-25, 226:1-4) No one else recalled that either of them said anything during the meeting about Hedlund posing a risk to others. (APP.000326 p. 57:2-9; APP.000332 pp, 46:8-13, 47:1-7; APP.000224 pp. 40:7-25, 41:1-2)

Paulson's Initial PSB Complaint

The next day, Paulson filed an official complaint against Hedlund with the PSB. (APP.000519) Paulson claimed Hedlund had been

disrespectful and insubordinate during the April 18, 2013 conference call with the other SACs. She also claimed Hedlund "became extremely angry, yelled at me and spoke in an unprofessional and insubordinate manner." (*Id*. DPS 00006) Hedlund was so disrespectful Meyers claimed that Paulson had to reprimand Hedlund about it on the conference call. (APP.000976:533-545; APP000977:546-560**)** That was simply not true. Moreover, her complaint made no reference to Hedlund being suicidal or posing a threat to others. (APP.000519)

Hedlund taped the entire conference call. (APP.001047) His tone was no different than that of the other SACs. (*Id*.) He did not sound angry, did not yell and was not disrespectful. Furthermore, the four other SACs on the call uniformly testified that Hedlund was not rude, was not disrespectful, did not yell, and was not insubordinate. (APP.000361 pp. 50:20-25, 51-52, 104:7-18; APP.000403 16:11-25, 18:8-19; APP.000358 pp. 98:14-25, 99:1; APP.000632 ¶ ¶ 3-4) They also testified that Paulson did not admonish Hedlund, as Meyers claimed. (APP.000403 p. 17:13-17; APP.000356 p. 98:14-19; APP.000361 51:7-17) The tape and the SAC's testimony make it clear that Paulson's complaint was completely fabricated.

The April 25, 2013 "Vacation"

Hedlund took vacation on April 25 and April 26, 2013. (APP.000249 p. 98:20-25) He planned to drive to Cedar Rapids to see his niece's art display at Coe College on April 26th. (*Id*. at 99:3-8) But because he believed he needed to obtain immediate results on cold cases as Meyers had admonished, he called former DCI agent, J.D. Smith, to see if he would be available to meet with him to discuss cold cases the morning of April 26th. (APP.000642 ¶ 2; APP.000530; APP.000250 p. 101:4-6) Smith agreed to meet with him. (*Id*.)

Hedlund drove his state vehicle to Cedar Rapids during the afternoon of April 25th (APP.000250 p. 101:3-6; APP.000530) Late that afternoon, he called Smith to confirm their meeting. (APP.000250 p.103:1-25; 104:1-7; APP.000642 ¶3) Smith told him he could not meet with him after all because he had a meeting in Des Moines. (*Id*.) Smith suggested that Hedlund meet with Wade Kisner instead. (*Id*. ¶4) Hedlund then called former agent Kisner, one of the most experienced and successful investigators in the DCI history, to see if they could discuss cold cases. (APP.000530; APP.000250 p. 103:1-5; APP.000597)

The April 26, 2013 "Vacation"

Kisner and Hedlund met at a Burger King at 8:30 a.m. on April 26th to discuss cold cases for approximately two hours. (APP.000530; APP.000250 p. 103:1-12; APP.000597 p. DPS000245) Hedlund then attended his niece's art show at Coe College and left Cedar Rapids to return home. (APP.000250 103:1-5, 105:17-25) As he was driving, he returned a phone call to Paulson. (*Id*.) She said she wanted to meet with Hedlund that day and asked him if he was on vacation. He responded "yes and no" and offered to drive to Des Moines to meet with her. (APP.000386 p. 213:1-25) She declined and rescheduled the meeting for the following Monday. (APP.000251 p. 107:3-6; APP.000386 p. 213:1-25)

As Hedlund was driving down Highway 20, he spotted a black SUV doing a "hard ninety." (APP.000251 p. 107:10-20) He ran the license plate but could not determine who owned the vehicle. (APP.000436) He then called a dispatcher to inform her of the speeding vehicle. (*Id*.) Eventually, an Iowa State Trooper determined that another trooper was driving the SUV and that Gov. Branstad and Lt. Gov. Kim Reynolds were in the backseat. (APP.000437) The pursuing trooper did not issue a ticket. (*Id*.) When Hedlund returned to Fort Dodge that afternoon, he sent an email to Meyers noting that he was going to be in Des Moines on Monday April 29, 2013 to

meet with Paulson. (APP.000534) He also asked whether he needed "to document and report any contact or communications that I initiated or caused to occur involving the Honorable Terry Branstad?" (*Id*.) Meyers forwarded the email to Paulson on April 26th. She then forwarded it London and Ponsetto on April 27, 2013. (*Id*.) Paulson went to London's office either on Friday April 26 or Monday April 29 and informed him of the incident. (APP.000322 15:16-25, 16:1-23) London then met with Jeff Boeyink (Governor's Chief of Staff), Dave Roederer (Director, Department of Management) and Executive Officer Steve Ponsetto to brief them on the situation. (App. 000323 p. 18:14-25, 19-21)

April 29-30 2013

On the following Monday morning, Hedlund filed a complaint against himself for failing to stop and ticket the Governor's vehicle. (APP.000437) He also emailed Paulson about Meyers' continued inability to perform his job. (APP.000526) Later, he sent a third email to Meyers and Paulson explaining he was going to take a personal day off on Tuesday. (APP. 000564 pp. 565-566) The next morning, Meyers emailed Hedlund and demanded to know why he was taking a day off. (*Id*.) Hedlund explained he was taking a sick day because he was stressed and was trying to make a

doctor's appointment. (*Id*. at 564) His doctor later sent an excuse taking him off work from April 30 through May 6, 2013. (*Id*. at 567)

Hedlund is Taken out of Service

The next day, May 1, Hedlund was taken out of service pending a fitness-for-duty exam. (S.APP.000004) London and Paulson ordered Meyers and David Jobes, the Assistant Director of Field Operations, to take Hedlund out of service at his home. The two drove to the Fort Dodge post to meet ISP Acting Sergeant Wesley Niles. (APP.000309 17:20-25) Meyers and Jobes, who were wearing bulletproof vests, told Niles they weren't comfortable going to Hedlund's home but "were following orders from downtown." (*Id*. at 17:20-25; APP.000370 p. 7:21-25, 8:1) Niles was also uncomfortable because when DPS employees are placed on administrative leave, it's normally not done at their homes. (APP.000370 p. 8:15-25, 9:1-19) To complicate matters, it was clear when they arrived at Hedlund's house, Meyers and Hedlund had "some issues." (*Id*. at 19:2-12) That further concerned Niles: "Why would you send a hot poker into a stressful situation and fire it up even more? That makes no sense to me. And that's in retrospect." (*Id*. at 19:4-7)

When the trio arrived at Hedlund's home, Meyers knocked on the door, told Hedlund he was being placed on leave, and asked him to sign

some paperwork. (APP.000310 p. 32:3-8; APP.000588) Hedlund was asked to retrieve his equipment. (*Id*. at 33:13-21) He went inside and returned with his unloaded handgun and handed it to Meyers "in a perfectly safe manner." (*Id*. at 33:24-25; 34:1) He then retrieved his state-issued cell phone, car keys, and various other items, including his state-issued shotgun from the trunk of his car. (*Id*. at 34:5-8, 34:16-24) When the three left, Hedlund was at home alone with his private gun collection. (APP.000626 ¶ 8)

Niles believed going to Hedlund's house "placed four persons at risk." (APP.000374 33:16-18; APP.000602) Former Director Quinn agreed and said the situation "created unnecessary risks to all involved." (APP.000639 ¶11) The risks easily could have been avoided simply by asking Hedlund to come to the Fort Dodge post. (*Id*. ¶13) The "only purpose for sending AD Meyers to Hedlund's home was to provoke a negative reaction from Hedlund." (*Id*. ¶7)

Paulson Amends Her PSB Complaint

After Hedlund blew the whistle on the governor's speeding SUV, Paulson amended her complaint with the PSB and claimed Hedlund misused state property and failed in his "performance of duties." (APP.000568) No narrative was attached to the complaint to indicate what Hedlund had done wrong. (*Id*.) She later testified that Hedlund violated his "performance of

duties" because he either worked on a vacation day or didn't request the day off. (APP.000392 p. 309:4-25; 310:1-10) Ultimately, that charge was dropped. (*Id*.; APP.000571) She also claimed Hedlund used his state vehicle to travel to Cedar Rapids while he was on vacation. The charge was later founded even though Hedlund had met with Kisner to discuss cold cases.

The PSB Witch Hunt

From the start, the PSB "investigation" was little more than a "witch hunt." (APP.000371 p. 16:14-23) Two inexperienced investigators conducted the investigation and violated nearly every rule governing a fair and impartial investigation. (*Id*. at 15:5-8, 16:14-23, 22:3-13, 23:25, 24:1-3; APP.001016-001046; APP.000312 49:20:23; APP.000599) Kyle Gorsh ("Gorsh") was appointed bureau chief of PSB in September of October 2012. (APP.000222 9:7-16) The only job training he received was in May 2013, which was *after* Hedlund had been placed on administrative leave. (*Id*. 10:1-25, 11:1-6; APP.000603) Adam Buck ("Buck"), the assistant bureau chief, was assigned to the PSB in December 2012 (APP.000210 p. 7:19-22) His training consisted of two classes, which were "a very broad overview of the Internal Affairs' function." (APP.000211 12:1-25, 13:1-17; APP.000587)

Buck and Gorsh asked leading questions trying to implicate Hedlund in wrongdoing. (APP.000371 pp. 15:5-8; 16:21-23) For example, when the

two interviewed Niles about what transpired when Hedlund was taken out of service, Niles believed questions they were asking were "designed to harm Larry." (*Id*. 22:3-13) Niles also thought it was suspicious that the PSB wanted to interview him the day after Hedlund was taken out of service, but did not feel the same urgency to interview Meyers, who was not interviewed until May 29, 2013, or Jobes, who was never interviewed. (*Id*. 23:25, 24:1-3; APP.000312 49:20:23; APP.000599) Niles believed the entire investigation was nothing more than a "witch hunt." (APP.000371 16:14-23)

Furthermore, although new allegations surfaced during the investigation – namely that Hedlund had failed in his "performance of duties" and misused state property – Hedlund was not apprised of those new allegations until he was interviewed by the PSB. (APP.001017; APP. 001026) Under the circumstances, he was not given the opportunity to address the allegations and was left guessing about what he had done and to whom. (*Id*.) If Buck and Gorsh had investigated the allegations impartially they would have determined Paulson's complaint was unfounded. (APP. 001045) Instead they found: (1) Hedlund had used his state-issued vehicle when he was on vacation and/or worked on his vacation; (2) he was insubordinate when he emailed his agents on February 13, 2013 about the sweeping change proposed for the MCU and later emailed Krapfl about

Paulson; and (3) he was insubordinate during the April 18th conference call. These findings were contained in a 500-page report dated July 17, 2013. (APP.000961) None of their findings were true. (APP.000361 50:20-25, 51:1-21, 104:7-18; APP.000419-000424; APP.000353 p. 42:16-25, 43:1-24, 98:14-25, 99:1; 119:1-5; APP.000632 ¶ 5-6, APP.001048) Nevertheless, Hedlund was terminated that day. (APP.000466-000468)

Media Frenzy

During the investigation, news broke that Hedlund had been taken out of service after he blew the whistle on the Governor's speeding vehicle. The news was published on the front page of newspapers across the state and was widely broadcast on local TV channels in Iowa. The news coverage continued unabated throughout June and into July. And when Hedlund was terminated on July 17, 2013, the press went wild.

To compound matters, hundreds of people registered their complaints about the termination on the Governor's and DPS' websites. One person wrote: "DCI Director Paulson is a disgrace and needs to be terminated. How can public officials in Iowa behave as such?" (APP.001006) A memo written to Branstad stated: "I wanted to write and express my disappointment in the handling of the recent speeding incident…. As a supporter and host of yours in the Iowa City area, I would hope you would

reinstate Mr. Hedlund at once and maybe even offer him an apology." (APP. 001008)

After Hedlund was terminated on July 17th, Branstad met with Paulson, London, Executive Officer Ponsetto, and two of Branstad's long-time aides. Paulson reviewed the alleged claims against Hedlund and the timeline in which they occurred. (APP.000324 p. 22:21-25, 23:1-15) Branstad was also provided with a copy of the 500-page report. (APP.000206 pp. 44:20-25; 45:4) The next day Branstad held a press conference and stated that Hedlund had been terminated for the safety and the morale of the department. (APP.000609) However, there was nothing in the 500-page report that indicated Hedlund posed a threat to others. (APP.000961) Although Paulson claims she told the Governor that Hedlund posed a threat, no one else at the meeting recalled her saying that. (APP.000328 p. 125:1-14; APP.000400 p. 47:2-13; APP.000397 p. 123:8-15; APP.000205 p. 39:1-15; APP.001079 Nos. 2-5) In fact, London suggested Branstad or one of his aides simply "made it up." (APP.000328 p. 124:9-25, 125:1-14)

Paulson Provides Cover for Branstad and Herself

Five days after the press conference, Paulson emailed Gorsh an undated document to add to the 500-page report even though the investigation had been closed. (APP.001009-001011) The document claimed that on April 23rd during the DMACC meeting with the SACs, Hedlund mentioned suicide "at least four times." Because of his emails, phone calls, and meetings, as well as his mention of officer suicide, Paulson claimed she had become increasingly concerned for her own safety after the April 23rd SAC meeting at DMACC. (APP.000521)

In her two PSB complaints concerning Hedlund's alleged insubordination, Paulson did not express any concern for her personal safety. (APP.000518; APP.000563; APP.000568) When Paulson met with London, Buck, Meyers, the Attorney General's office and a human resource officer on April 25th, she never expressed any concern that Hedlund was homicidal (APP.000326 p. 57:2-9; APP.000332 pp, 46:8-13, 47:1-7; APP.000224 pp. 40:7-25, 41:1-2) She did not tell the Governor that Hedlund was homicidal and suicidal. (APP.000328 p. 125:1-14; APP.000400 p. 47:2-13; APP.000397 p. 123:8-15; APP.000224 p. 39:1-15; APP.001079 Nos. 2-5) Furthermore the SACs participating in the April 18th conference call and April 25th meeting adamantly disagreed with her perception, and testified

Hedlund was not insubordinate, homicidal or suicidal. (APP.000364 pp. 73:3-6, 105:21-25, 106:1-19; APP.000358 pp. 122:12-25, 123:1-15; APP. 000407 p. 59:18-21; APP.000632 ¶ ¶4-6)

BRIEF POINT I

HEDLUND CAN MAINTAIN HIS 70A ACTION REGARDLESS OF AVAILABLE ADMINISTRATIVE REMEDIES

PRESERVATION OF ERROR AND STANDARD OF REVIEW

Hedlund preserved error with regard to Brief Points I, II, and III by timely filing a Notice of Appeal from the district court's Ruling on Defendant's Motion for Summary Judgment.

This Court's review of a district court's grant of summary judgment is for correction of errors at law. Iowa R. App. P. 6.907; *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 840-41 (Iowa 2005). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3). The party making the motion for summary judgment has the burden to establish the non-existence of any genuine and material fact issue and that he is entitled to judgment as a matter of law. *Farm Bureau Mutual Insurance Co. v. Milney*, 424 N.W.2d 422, 423 (Iowa 1988); *Drainage District #119, Clay County v. Incorporated City of Spencer*, 268 N.W.2d 493, 499 (Iowa 1978). An issue of fact is "genuine" when the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Fees v. Mutual Fire and*

Automobile Insurance Co., 490 N.W.2d 55, 57 (Iowa 1992). An issue of fact is "material" when, considering the underlying law, its determination might affect the outcome of the lawsuit. *Id.*

In ruling on a summary judgment motion, the Court must examine the record in the light most favorable to the nonmoving party. *Sandbulte v. Farm Bureau Mutual Insurance Co.*, 343 N.W.2d 457, 464 (Iowa 1984). "A proper grant of summary judgment depends on the legal consequences flowing from the undisputed facts or from the facts viewed most favorably toward the resisting party." *Boles v. State Farm Fire and Casualty Co.*, 494 N.W.2d 656, 657 (Iowa 1992). The evidence of the nonmoving party is to be believed. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "Every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved." *Williams v. Davenport Communications Limited Partnership*, 438 N.W.2d 855, 856 (Iowa Ct. App. 1989).

ARGUMENT

Hedlund's wrongful discharge action under section 70A.28, Iowa's whistleblower statute, was dismissed by the district court. The district court found that Iowa Code section 80.15, which provides Hedlund an

administrative remedy for his discharge, was his exclusive remedy. Therefore, the lower court reasoned, Hedlund could not maintain his wrongful discharge claim under 70A.28. However, this Court's ruling in *Walsh v. Wahlert*, No. 17-0202, slip. op. (Iowa June 15, 2018) settles this issue in Hedlund's favor.

A. *Walsh v. Wahlert* Dictates that Hedlund can Bring a Claim Under 70A.28

In *Walsh v. Wahlert*, Walsh brought a wrongful discharge action under Iowa's whistleblower statute. Like this case, Walsh had an administrative remedy to appeal his termination. Walsh was a merit employee protected by Iowa Code Chapter 8A, and could appeal his termination through the Administrative Procedures Act, Chapter 17A.

This Court addressed was "whether Walsh's ability to bring a direct claim under Iowa Code section 70A.28 is precluded by the availability of an administrative remedy under Iowa Code section 8A.415." The Court, citing *Riley v. Boxa*, noted that an administrative exhaustion requirement "may arise if the available remedy is adequate and if the legislature, expressly or impliedly, intended the administrative remedy to be exclusive." It held that "nothing in Iowa Code chapter 8A expressly requires administrative exhaustion before a whistleblower launches a civil action under Iowa Code section 70A.28. Further, we do not believe such exhaustion can be implied

in light of the unequivocal legislative declaration that a whistleblower may bring a civil action to enforce Iowa Code section70A.28." *Id.* (internal citations omitted).

In this case, Hedlund's administrative remedy is found in Iowa Code section 80.15. As with Chapter 8A, nothing in section 80.15 expressly requires administrative exhaustion. *See* Iowa Code § 80.15 (2017). Section 80.15 states, in pertinent part:

> After the twelve months' service, a peace officer of the department, who was appointed after having passed the examinations, is not subject to dismissal, suspension, disciplinary demotion, or other disciplinary action resulting in the loss of pay unless charges have been filed with the department of inspections and appeals and a hearing held by the employment appeal board created by section 10A.601, *if requested by the peace officer*, at which the peace officer has an opportunity to present a defense to the charges.

Iowa Code § 80.15 (2017) (emphasis added). There is no language in section 80.15 mandating an employee to proceed to a hearing before the employment appeal board. Exhaustion is not expressly required. If anything, the language shows it is the officer's choice to pursue his or her administrative remedies. Furthermore, given the "unequivocal declaration that a whistleblower may bring a civil action to enforce Iowa Code section 70A.28[,]" an exhaustion requirement cannot be implied from section 80.15. *Walsh*, slip. op. at 14. This Court's decision in *Walsh* governs and the

district court's grant of summary judgment on Hedlund's 70A.28 claim should be reversed.

B. Section 70A.28 Allows For Recovery of Compensatory Damages, and Hedlund is Entitled to a Jury Trial

The District Court dismissed Hedlund's 70A.28 claim on exhaustion grounds and did not reach the issue of whether Hedlund is entitled to a jury trial or to recover compensatory damages. The parties did, however, brief and argue both questions extensively as part of the summary judgment proceedings. It would be in the interest of judicial economy for the Court to provide guidance to the lower court and the parties on remand. Based on the text of 70A.28(5) and this Court's precedent on statutory interpretation, Hedlund is entitled to a jury trial and to collect damages for emotional distress.

BRIEF POINT II

GENUINE ISSUES OF FACT EXIST THAT HEDLUND WAS THE VICTIM OF AGE DISCRIMINATION

ARGUMENT

A. McDonnell-Douglas Is A Relic of Days Gone-By And Should be Abandoned

The court below, like most trial courts, felt compelled to utilize the tri-partite burden shifting paradigm first devised by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This model for

analyzing discrimination cases is a throw-back to the days when there was no right to a jury trial under Title VII. *See* Kerry R. Lewis, *A Reexamination of the Constitutional Right to a Jury Trial under Title VII of the Civil Rights Act of 1964*, 26 TULSA L. J. 571 (1990). *McDonnell Douglas* was originally devised as a working roadmap for trial judges, sitting as ultimate finders-of-fact, to utilize in analyzing discrimination cases. The Civil Rights Act of 1991, however, granted plaintiffs in Title VII cases the right to trial by jury – giving plaintiff's the option to make juries the ultimate finders of fact. Similarly, plaintiffs bringing claims under the ICRA are entitled to a jury trial. *McElroy v. State*, 703 N.W. 2d 385, 395 (Iowa 2005). Hedlund's age discrimination claim will be decided by a jury, and therefore, the standard applied at summary judgment must take into account the standard that a jury – not a judge – must apply to the evidence.

This Court has neither fully embraced nor rejected the appropriateness of using the *McDonnell Douglas* test after *McElroy*. Accordingly, Hedlund is not asking this Court to reject years of well-established precedent or to radically change how ICRA claims are decided either at summary judgment or trial. Indeed, jettisoning *McDonnell Douglas* as an analytical tool will simplify the analysis of discrimination cases at the summary judgment stage. Instead of the unwieldy and confusing *McDonnell Douglas* tri-partite burden

shifting scheme, it is suggested that trial courts use a straightforward sufficiency of the evidence test to determine the ultimate question of whether discrimination was the motivating factor for the adverse employment action. This Court should have no reservations about affirmatively and definitively abandoning *McDonnell Douglas,* which other courts and legal scholars have uniformly found outdated, confusing and clunky.

Moreover, such a move is entirely consistent with recent precedent of this Court that the ICRA is to be applied differently and more broadly than federal law. *See Goodpaster v. Schwan's Home Serv. Inc*, 849 N.W.2d 1 (Iowa 2014), and *Pippen v. State*, 854 N.W.2d 1 (Iowa 2014). The statutory language of the ICRA is different than federal law in certain key ways. This includes the language that the ICRA "shall be construed broadly to effectuate its purposes." Iowa Code Sec. 216.18(1). The *Pippen* court held: "The bottom line is that the ICRA is a source of law independent of the Federal Civil Rights Act." *Id*. at 30. "Even where language in a state civil rights statute is parallel to the Federal Civil Rights Act, a state court is under no obligation to follow federal precedent." *Id*. at 28. *Pippen* simply continued the overall approach of the Court reflected in other key cases interpreting the ICRA. "Just as 'we are not bound by federal cases

construing a federal statute when we are called upon to construe our own Civil Rights Act,' *Loras Coll. v. Iowa Civil Rights Comm'n,* 285 N.W.2d 143, 147 (Iowa 1979), we are not bound by the language of federal statutes when interpreting language of the ICRA." *Goodpaster*, 849 N.W.2d at 9.

B. The McDonnell Douglas Framework Should Not Be Applied At Summary Judgment

1. *McDonnell Douglas* Contravenes Iowa R. Civ. P. 1.981

The *McDonnell Douglas* test is well-know and cited with zeal by nearly every defendant (including the State) in nearly every employment discrimination case. A court confronted with a summary judgment motion in a discrimination case is routinely urged by employers to utilize the following three-part test. First, the employee must establish a *prima facie* case of age discrimination case which generally requires evidence that: (1) he/she belongs in a protected class; (2) that he/she was qualified for his job; (3) that despite his/her qualifications he was terminated; and (4) that after his/her termination the employer hired or retained someone who was younger of comparable or lesser qualifications. *Wing v. Iowa Lutheran Hospital*, 426 N.W.2d 175, 177 (Iowa Ct. App. 1988). If the employee succeeds in establishing a prima facie case the burden of production shifts to the employer to articulate a "legitimate non-discriminatory reason" for the

adverse employment action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-507 (1993). Once this burden of production is satisfied the presumption of discrimination created by the *prima facie* case is effectively rebutted. *Id*. at 507. In the last and final step the employee carries the burden of proof to show that the employer's proffered legitimate non-discriminatory reason was pretextual.[1] *Id*. at 507-508.

The difficulty with applying the *McDonnell Douglas* at summary judgment is that its application contravenes Iowa's summary judgment standard. By requiring an employee to establish an inference of discrimination as part of the *prima facie* case he/she must meet two burdens of proof to survive summary judgment: first, when he/she has to establish the inference of discrimination as one of the three prongs of the *prima facie* case and, second, after the employer articulates (not proves) its nondiscriminatory reason the plaintiff must then prove that the reason is a pretext for discrimination. If a plaintiff has already established evidence from which a jury can infer discrimination from the fourth prong of the *prima facie* case than he/she has already established enough to go to the

[1] To prove pretext, the plaintiff must produce evidence of "such weaknesses, implausiblities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted nondiscriminatory reasons." *Morgan v. Hilti Inc*., 108 F.3d 1319, 1323 (10th Cir. 1997).

jury. Any version of *McDonnell Douglas* that requires a plaintiff to produce some unquantifiable amount of evidence as part of his/her *prima facie* case imposes a greater burden for surviving summary judgment than that required by this Court.

The U.S. Supreme Court already flatly rejected any requirement that plaintiff prove some extra indicia of discrimination in a *McDonnell Douglas* indirect evidence case. *Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133, 146-149 (2000). One legal scholar described this untenable position as follows:

> This is an almost farcical feature of the *McDonnell Douglas* minuet; it never requires the defendant to truly "defend." Instead it sets the case up for summary judgment by requiring the plaintiff to prove not only *a prima facie* case, but to effectively start over again by mounting evidence to attack an assertion—not a fact that will necessarily be proven at trial—that is the employer's mere articulation. Indeed, in order to grant summary judgment in favor of the employer, the court must effectively ignore the admonition to draw all inferences in the plaintiff's (nonmoving party's) favor.

Jeffrey A. Van Detta, *'Le Roi Est Mort; Vive Le Roi!': An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a 'Mixed Motives' Case*, 52 DRAKE L. REV. 71, 101 (2003).

The Tennessee Supreme Court rejected application of *McDonnell Douglas* in a common law retaliatory discharge claim utilizing similar

reasoning. *Gossett v. Tractor Supply Company, Inc.* 320 S.W.3d 776, 777 (Tenn. 2010) *superseded by statute as recognized in Weaver v. Diversicare Leasing Corp.*, 2014 WL 3734579 (Tenn. Ct. App. March 10, 2014). The Tennessee Court observed two glaring difficulties with application of *McDonnell Douglas* at the summary judgment stage. First, the employer's burden of production of evidence does not necessarily demonstrate that there is no genuine issue of fact:

> The *McDonnell Douglas* framework requires only that an employer offer evidence establishing a legitimate alternative to the reason for discharge alleged by the employee. . . A legitimate reason for discharge, however, is not always mutually exclusive of a discriminatory or retaliatory motive and thus does not preclude the possibility that a discriminatory or retaliatory motive played a role in the discharge decision.

Id. at 782 (citations omitted).

Second, *McDonnell Douglas* encourages compartmentalization of evidence causing courts at the summary judgment stage to overlook or discount evidence. The Tennessee Court explained this danger:

> When focusing solely on whether the employee showed a genuine issue of material fact regarding the employer's proffered reason, a court may overlook the employee's evidence establishing a prima facie case. This oversight causes a court to contravene our instruction that evidence must be construed in a light most favorable to the employee as the nonmoving party, . . . and can result in the improper grant of summary judgment.

Id. at 783 (citations omitted).

2. Criticism of *McDonnell Douglas* in the Federal Courts

The utility and viability of the *McDonnell Douglas* tripartite analysis has come under increasing critical scrutiny by courts, scholars and practitioners. *See* The Honorable Timothy M. Tymkovich, *The Problem With Pretext*, 85 DENV.U.L.REV. 503 (2008). *McDonnell Douglas* was initially seen as a "plaintiff-friendly opinion" designed to alleviate the evidentiary burdens on employment discrimination plaintiffs who generally lack direct evidence of discrimination. *Wells v. Colorado Department of Transportation*, 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz, J. concurring); *Grigsby v. Reynolds Metals Co*., 821 F.2d 590, 595 (11th Cir. 1987). However, the mechanical application of the *McDonnell Douglas* framework has been criticized because it encourages compartmentalization of evidence, makes artificial distinctions between direct and circumstantial evidence and ultimately creates confusion and distracts courts from "the ultimate question of discrimination *vel non*." *Wells*, 325 F.3d at 1221 (Hartz, J. concurring) (citing *United States Postal Service v. Aikens*, 460 U.S. 711, 714 (1983)).

i. The "Motivating Factor" Standard Should Apply at Summary Judgment

The jury in this case will be instructed that they must find in favor of Hedlund and against the State if age was a motivating factor in the decision to take adverse employment actions against Hedlund. *DeBoom v. Raining*

Rose, Inc., 772 N.W.2d 1, 12-14 (Iowa 2009). The jury will also be instructed that if Hedlund proves that the legitimate non-discriminatory reason(s) for the adverse action offered by the State are not the real reasons (pretext), they can find – from those facts alone – that age was a motivating factor. *Id*. at 9. The jury will **not** be told that the Hedlund must prove the elements of a prima facie case. The jury will **not** be told that if Hedlund proves the elements of a prima facie case, then the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse employment action. The jury will **not** be told that in order for Hedlund to prevail, he must rebut the employer's non-discriminatory reasons with proof of pretext. Because the jury will not be instructed to apply the *McDonnell Douglas* burden-shifting framework,[2] there is no logical reason for the court to use this standard at the summary judgment stage. *See*, *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 819-820 (Mo.2007) (refusing to utilize *McDonnell Douglas* at summary judgement for claim brought under the Missouri Human Rights Act.) (abrogated by statute).

This Court in *DeBoom* approved the Eighth Circuit Model Civil Jury Instruction 5.01 which provides:

[2] This Court in *Landals v. George A. Rolfes Co*, 454 N.W.2d 891, 893 (Iowa 1990) found: "However, the *McDonnell Douglas* framework is not well suited as a detailed jury instruction. *Grebin v. Sioux Falls Indep. School Dist.*, 779 F.2d 18, 20 (8th Cir. 1985). It 'add[s] little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalism to decide the ultimate question of discrimination.' *Id*. at 20-21 (quoting *Loeb v. Textron,* 600 F.2d 1003, 1016 (1st Cir.1979)."

To prove sex discrimination, Plaintiff must prove all of the following elements:

> 1. Defendants discharged Plaintiff; and
> 2. Plaintiff's sex was a motivating factor in their actions.
>
> If either of the above elements has not been proved by a preponderance of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim. You may find that plaintiff's sex was a motivating factor in defendant's decision if it has been proved by the preponderance of the evidence that defendants' stated reasons for its decisions are a pretext to hide sex discrimination.

DeBoom, 772 N.W.2d at 11-14, fn. 7.

Accordingly, at the summary judgment stage, there are only two relevant questions for the court to decide: (1) do genuine issues of material fact exist, considering all relevant evidence in a light most favorable to the plaintiff, that age was a motivating factor for the adverse employment action; and (2) has the employer demonstrated, through undisputed material facts, that the sole reason for the discharge is the asserted legitimate non-discriminatory reason(s) for the adverse employment action. In this case the State, as the moving party, has not satisfied its burden on both questions and therefore summary judgment is not appropriate and the case must be submitted to the jury.

C. Genuine Issues Of Material Fact Exist That Age Was A Motivating Factor For Hedlund's Discharge

1. Evidence of Pretext.

The trial court found that Hedlund presented evidence from which a jury could conclude that his termination was pretextual: "he [Hedlund] has presented evidence that the reasons given for his termination were not the real reasons for the termination." (APP.000186 p. 33) According to the trial court, Hedlund's showing of pretext related to his whistleblowing activities; lodging complaints about DPS leadership and reporting the Governor's speeding SUV. The court found this showing insufficient because it was not enough to show pretext of "any kind" and that he must show that the pretext was "to conceal age discrimination." (*Id*. at p. 34) This holding incorrectly assumes that only one motive can be at play in a termination case and disregards facts and circumstances that reflect age-related pretext and Meyers' age-related animus.

The lower court's holding is at odds with Iowa Civil Jury Instruction 3130.2 (2017) which defines "motivating factor" as follows:

> As used in Instruction No. ___, plaintiff's [insert applicable unlawful consideration]* was ***a*** "motivating factor" if that factor played a part in the defendant's later actions toward plaintiff. ***However, plaintiff's [insert applicable unlawful consideration]* need not have been the only reason for defendant's actions***. (emphasis added).

As set forth in the above jury instruction, Hedlund's burden is to prove that age was *a* motivating factor not *the* motivating factor. The jury instruction also correctly states that there can be more than one motive for defendant's conduct. The lower court essentially imposed a "but for" burden of proof making it logically inconsistent to assert that multiple motives were involved in a given employment decision. *See, Gross v. FBL Financial Services*, Inc. 557 U.S. 167 (2009)(imposing a but for standard in case under the federal Age Discrimination in Employment Act). This is not, and has never been, the standard for discrimination cases under the ICRA. *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 12-14 (Iowa 2009).

Courts in other jurisdictions have likewise found that adverse employment action can result from a combination of illegal motives. *Barefoot v. Sundale Nursing Home*, 457 S.E.2d 152, 168–69 (1995), *holding modified by Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 491 S.E.2d 1 (1996) (plaintiff could use three different motives to prove the same thing; intentional discrimination). *See also*, *Scrivener v. Clark Coll.*, 334 P.3d 541, 546 (2014) (" [a]n employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable.") *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 120 (2d Cir.1997) (plaintiff must

demonstrate that the allegedly "impermissible reason, even though not the only reason for an adverse employment decision. . ." (emphasis added) *City of Houston v. Proler*, 373 S.W.3d 748, 755 (Tex. App. 2012), aff'd in part, rev'd in part, 437 S.W.3d 529 (Tex. 2014)(Texas jury instruction like Iowa states that there may be more than one motivating factor for an employment decision); *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1333 (6th Cir. 1994) ("[Y]ou are instructed that the plaintiff need not show that age was the sole or exclusive factor in Carmike's personnel decision. There could have been more than one factor which motivated the defendant.")

The lower court already found that Hedlund "presented evidence that the reasons given for his termination were not the real reasons for the termination." (APP.000186 p. 33) One of the reasons given for Hedlund's termination was his alleged insubordination during a conference call on April 18, 2013 where both Paulson and Meyers were present. Hedlund presented substantial evidence from other SAC's on the call and an actual recording of the conference call that he was not rude, disrespectful, did not yell and was not insubordinate. (APP.000361 pp. 50:20-25, 51-52, 104:7-18; APP.000403-404 p. 16:11-25, 18:8-19; APP.000356 p. 98:14-25, 99:1; APP.000632 ¶ 3-4) Furthermore, Hedlund taped the entire conference call. (APP.001047) Nevertheless, Meyers, like Paulson, falsely claimed to the

PSB that Hedlund yelled and was rude and insubordinate during this conference call. (APP.000585-586**;** APP.000961; APP.000975-977; APP. 000342-343 pp. 167-172)

The false allegations concocted by Paulson and parroted by Meyers about the April 18, 2013 conference call became the catalyst for Hedlund's suspension and eventual termination. (APP.000518-000520; APP.000568; APP.000570; APP.000392-393 pp. 311:3-25, 312:1-25; 313:1-25; 314**)** The April 18th conference call in question occurred before Hedlund caught the Governor speeding. A jury could easily find that Meyers' conduct was motivated by Hedlund's complaints about him[3] and other DPS supervisors, but still find that Meyers' age-related comments along with other evidence of age-animus shows that age also played a role and influenced the outcome. Whether Meyers' conduct was motivated by whistleblowing or age, or some combination of both, is for the jury to determine.

2. Evidence of Age Animus by Gerard Meyers

i. Hedlund was in the "Twilight of His Career"

On February 15, 2013, Meyers called Hedlund to his office in Des Moines for a meeting. The predominant reason for the meeting was to make "a very firm and early emphasis that the manner in which he [Hedlund] was

[3] Hedlund filed a PSB complaint against Meyers on May 29, 2013. (APP.000488)

conducting and coordinating his E-mail communications was not acceptable." (APP. 000339 pp. 100:15-25, 101:1-25) A few months later, Meyers documented this meeting in a Memorandum and characterized the purpose of the meeting as "verbal counsel." (APP.000585) During this meeting, Meyers made two or three references to Hedlund being in the "twilight of his career." (APP. 000254 p. 118:1-13) Hedlund recalled that the comment was made "along the lines of he didn't want to have issues with me because I was in the twilight of my career." (*Id.*) Meyers admitted making the comment at least once during that meeting. (APP. 000350 pp. 333:24-25; 334:1-4) Later in February 2013, Meyers had a phone call with SAC Hedlund and SAC Kietzman where he asked them when they were going to retire. (APP. 000254 pp. 118:1-25; 119:1-25; 120:1-11)[4]

Courts have found that repeated inquiries about an employee's retirement plans can be evidence of age discrimination or harassment. *See, e.g. Guthrie v. J.C. Penney Co., Inc.*, 803 F.2d 202, 207-08 (5th Cir. 1986); *Greenberg v. Union Camp Corp.*, 48 F.3d 22, 28-29 (1st Cir. 1995) (repeated inquiries by employer about employee's retirement plans can give rise to a reasonable inference of anti-age bias); *Cox v. Dubuque Bank &*

[4] Hedlund testified that he and SAC Kietzman perceived that Paulson and Meyers were hoping that the older SAC's would leave so they could be replaced with others who wouldn't be as outspoken. (APP.000254 p. 119:4-14)

Trust Co., 163 F.3d 492, 497-98 (8th Cir. 1998) (sometimes retirement inquiries are so unnecessary and excessive as to constitute evidence of discriminatory harassment); *Strauch v. American Coll. of Surgeons*, 301 F. Supp. 2d 839, 847 (N.D. Ill. 2004) (while comments may not be "openly hostile towards older workers, many include 'code words' for age that could potentially reflect ageist sentiments"). Moreover, "while it is true that an employer's 'friendly' inquiries about retirement cannot usually support a finding of age discrimination . . . not all inquiries about retirement are 'friendly' and . . . repeated and unwelcome inquiries may certainly be relevant to a showing of age discrimination." *Leonard v. Twin Towers*, 6 Fed. Appx. 223, 230 (6th Cir. 2001) (finding that repeated inquiries about whether 68-year-old employee was going to retire could be sufficient to allow rational jury to find that employer harbored age-related bias against him).

Meyers' repeated retirement comments to Hedlund cannot be characterized as harmless watercooler talk, but a direct and specific reference to the fact that Hedlund was aging and his career was coming to an end. The lower court found that there was not a sufficient "nexus" between these comments and the July 2013 termination. (APP.000188 p. 35) However, the trial court's timeline is off. There was only 10 weeks (2/15/13 to 05/01/13)

between Meyers discriminatory statements and Hedlund being placed on administrative leave. Moreover, Meyers' comment was not simply made in passing or during an otherwise inconsequential meeting. It was made during a disciplinary meeting that the State would later use to prop up their decisions to suspend and terminate Hedlund. [5] Indeed, the Notice of Investigation given to Hedlund states that he violated a number of work rules beginning February 16, 2013; the day after the meeting with Meyers. (APP.000568) Paulson testified that Hedlund's allegedly unprofessional interactions with Meyers occurred over several months, but started with the February 15 meeting. (APP.000392-393 pp. 311:3-25; 312:1:25; 313:1-20)

The lower court improperly characterized Meyers comments as mere "stray remarks." This Court has wisely never adopted the so-called "stray remarks" excuse which, like *McDonnell Douglas*, is a legal construct whose time has come and gone. The concept was first introduced in Justice O'Connor's own stray remark in her concurring opinion in *Price Waterhouse*, 490 U.S. at 277. Justice O'Connor began her concurrence by describing the

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[5] On May 28, 2013 Meyers prepared a memorandum documenting his meeting with Hedlund on February 15, 2013. (APP. 000585) He prepared the memorandum at the request of the PSB. (APP. 000342 pp. 166:15-25; 167:1-8) Both the interview and the memorandum were incorporated into the 500-page report, which formed the basis for Hedlund's termination.

kind of evidence a plaintiff would need to shift the burden of proof on causation to the defendant in a mixed motive case. *Id.* If the plaintiff could offer "direct evidence" that her gender was a substantial factor in the employer's decision making, the burden of persuasion on causation should shift to the defendant. *Id.* at 276. After concluding that Ms. Hopkins had satisfied her burden, Justice O'Connor suggested that neither "stray remarks," nor "statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself" would be sufficient "to satisfy the plaintiff's [direct evidence] burden." *Id.* at 277 (emphasis added). In making this suggestion, Justice O'Connor was not talking about what kind of remarks are probative of discriminatory intent in general, but only about what remarks sufficed to meet the "direct evidence" requirement for burden shifting.

Moreover, the stray remarks theory is grounded in the faulty assumption that a discriminatory remark, not immediately connected to the decision-making process, is somehow not probative of the speaker's state of mind. It presupposes that the state of mind that motivated the remark magically disappears during the period between when the statements were made and when the adverse employment action was taken, or that a decision maker suddenly abandons their engrained and life-long discriminatory

attitudes when making employment decisions. *See generally*, Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587 (2000); Robert Brookins, *Mixed Motives, Title VII and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1 (1995); Ann c. McGinley, *¡Viva La Evolucion! Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415 (2000); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). The reality is that the decision to terminate an employee cannot be isolated from a decision maker's beliefs and attitudes about that employee's characteristics.

In *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130 (4th Cir. 1988) the court presciently remarked: "If a manager makes an ageist remark, it could well be a window on his soul, a reflection of his animus, or arguably, just a slip of the tongue somehow unrelated to his "true" feelings. . . The point is that the inference to be given the remark **should not be made by judges**, particularly judges who have not heard the entire story." (emphasis added).

Meyers' "twilight of your career" comments standing alone may not prove age discrimination, but they do create an inference of discrimination.

The curtain was momentarily pulled back revealing Meyers' unvarnished opinion about Hedlund and his diminishing role. As discussed in the next two sections, Meyers' unfavorable treatment of other older employees and the culture of favoritism toward youth promoted by the London administration should be taken in context with his comments to Hedlund.

ii. Treatment of Special Agents Thiele and Fiedler

After Hedlund's termination, the SAC position in Zone 4 became available. There were three, possibly four, Special Agents who sought the promotion: Ray Fiedler, Jim Thiele, Jon Turbett and Mike Krapfl. At the time, Ray Fiedler (DOB 11/26/1962) was 51 years old and had been with DPS for about 19 years; mostly as a special agent in Zone 4. Fiedler explained that the promotional process involved taking a pen-and-paper test (objective), being interviewed and being given a promotability score. (APP. 000216 pp. 56: 8-25, 57:1-20) Meyers gave Fiedler and Jim Thiele (DOB 10/31/1965) the bottom two promotability scores. (APP.000217 pp. 58:1-25, 59:1-22) When asked if his age had anything to do with the low score from Meyers, Fiedler replied "I'd like to think not." However, Fiedler had more years on the job and more experience than Mike Krapfl (DOB 08/31/1969) who ultimately received the promotion.

The testimony of Special Agent Jim Thiele regarding the promotion process was remarkably similar. Thiele did well on the written test and the interview, but was given a low promotability score by Meyers. (APP.000413 pp. 69:1-25; 70:1-24) Thiele, like Fiedler, had more years on the job and more experience than Krapfl. Thiele confronted Meyers and asked him if the reason he and Fiedler received the lowest scores was because the two were friends with Hedlund. Meyers denied that was the reason and refused to give Thiele an answer. (APP.000414 pp. 73:3-25; 74:1-25; 75:1-16)

The Court should take Meyers at his word. The unprecedented low scores he gave to Fiedler and Thiele had nothing to do with Hedlund. The fact that the two older agents who applied for the promotion were given the lowest promotability scores by Meyers creates an inference of discrimination. The subjective nature of the promotability score increases the likelihood that age was a factor that motivated Meyers decision making process. *See Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721, 726 (8th Cir. 1982) (the subjective nature of testing makes it susceptible to discriminatory abuse and therefore it should be closely scrutinized).

Meyers' age animus did not occur in a vacuum. London wanted younger executives in leadership positions he could easily intimidate,

manipulate and mold. (APP.000635 ¶ 4-5, 8) Those young executives included Gerard Meyers (40), Charis Paulson (45), Steve DeJoode (43) and Dave Garrison. (*Id*. ¶ 4-5) While promoting younger workers, London was systematically removing from service older, prominent and experienced leaders like ISP Colonel Hoye, ISP Major Tim Lienen and Director of Investigations Kevin Frampton. (*Id*. ¶ 4-6,8) At least two other DPS leaders retired during London's 11-month reign of terror. (APP.000306 p. 63:12-19) Colonel Hoye cogently summarized London's philosophy as "out with the old, in with the new…." (APP.000305 p. 40:20-22)

iii. Hedlund was Replaced By a Younger Employee

Mike Krapfl became the SAC in Zone 4 on July 4, 2014. (APP. 000316 p. 36:11-14) Krapfl was born 08/01/1969 and was therefore 45 years old when he received the promotion. Hedlund was 54 years old[6] at the time of termination. Evidence that a plaintiff's job duties were assumed by younger employees is evidence of age discrimination. *Waldron v. SL Indus., Inc*., 56 F.3d 491, 496-97 (3d Cir. 1995); *Gallo v. Prudential Residential Servs*., 22 F.3d 1219, 1226-28 (2d Cir. 1994); *Quaratino v. Tiffany & Co*., 71 F.3d 58 (2d Cir. 1995); *Austin v. Fuel Sys., LLC*, 379 F. Supp. 2d 884, 902 (W.D. Mich. 2004).

[6] Hedlund's date of birth is 08/19/1957.

In *Landals v. George A. Rofles Co.*, 454 N.W.2d 891, 893 (Iowa 1990), Landals' position was eliminated and his job duties were absorbed by two younger employees who had been with the company for less time. The Court found these two circumstances taken together "raised an inference of age discrimination." *Id*. at 895. The employer in *Landals* claimed that plaintiff's lay off was for a legitimate non-discriminatory reason; severe economic problems encountered by the company. The Court found that an economic downturn did occur, but "Landals was not part of the general layoff and the claim that he was discharged because of economic conditions was a pretext. The jury could draw an inference of age discrimination from Landals' proof that the reasons given were false." *Id*.

The lower court disregarded the evidence that Hedlund was replaced by a younger employee by imposing an unprecedented requirement that Hedlund show "that Meyers could have filled Hedlund's position with a candidate as old as Hedlund." (APP.000189 p. 36) This has never been a required showing and is contradicted by the record. A reasonable jury could easily find that Meyers effectively sabotaged the ability of the two older employees (Thiele and Fiedler) by giving them low promotability scores as part of his successful effort to position Krapfl for the promotion.

BRIEF POINT III

THE STATE'S TREATMENT OF HEDLUND WAS OUTRAGEOUS

In its Motion for Summary Judgment, the State claimed that: (1) Hedlund was unable to prove the "outrageousness" and "severity" prongs of his TIED claim; (2) Hedlund's TIED claim was preempted by Iowa Code Chapter 216; and (3) Sovereign immunity applied to shield the State from Hedlund's TIED claim, "to the extent that it is premised on defamation, misrepresentation, or deceit." *See* Defendants' Brief, p. 45–54. The district court dismissed Hedlund's TIED claim only on its finding that he had failed to demonstrate that the State's conduct was sufficiently "outrageous"—without further discussion of the other arguments. (APP.000176-182 pp. 23–29) Therefore, Hedlund's appeal addresses only the district court's analysis of the "outrageousness" prong of his TIED claim.

However, for the sake of judicial efficiency, Hedlund respectfully requests this Court to address the preemption and sovereign immunity claims in its opinion, as well the severity of his TIED claim. All three issues were fully briefed by the State and Hedlund during the summary judgment stage.

A. Elements of a Tortious Infliction of Emotional Distress Claim in Iowa.

The elements of a (TIED) claim are: (1) Outrageous conduct by the State; (2) The State intentionally caused or showed reckless disregard of the

probability of causing, emotional distress to Hedlund; (3) Hedlund suffered severe or extreme emotional distress; and (4) the State's outrageous conduct was the actual and proximate cause of Hedlund's emotional distress. *See* Order of 3/30/2018; *see also Barreca v. Nickolas*, 683 N.W.2d 111, 123 (Iowa 2004). For a TIED claim to stand, the conduct must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 198 (Iowa 1985). "[I]t is for the court to determine in the first instance, as a matter of law, whether the conduct complained of may reasonably be regarded as outrageous." *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 183 (Iowa 1991). However, "[w]here reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether . . . the conduct has been sufficiently extreme and outrageous to result in liability." *Smith v. Iowa State University of Science and Technology*, 851 N.W.2d 1, 26 (Iowa 2014), citing Restatement (Second) of Torts § 46, cmt. *h*, at 77 (1965).

B. The State's Conduct was Sufficiently Egregious to Satisfy the "Outrageousness" Prong of a TIED Claim

The district court found the State's conduct was not sufficiently outrageous because: (1) The State's actions were more akin to "bad boss" behavior outlined in *Vinson* than to "unremitting psychological warfare"

described in *Smith*; (2) Hedlund only endured the State's abusive treatment for a period of four months, rather than for "years"; and (3) The State was not trying to cover up criminal behavior, as in *Smith*, but rather was only seeking to cover its incompetence, which is typical "bad boss behavior." (APP.000176-182 pp. 23–29) In so finding, the district court failed to consider additional criteria set forth in this Court's precedent, minimized the maliciousness with which the State's actions were undertaken, totally ignored the effects of the State's abuse of Hedlund, and mischaracterized the cover up, which did in fact include criminal activity. Therefore, Hedlund urges this Court to overturn the district court on all three points.

C. The State's actions were not "typical bad boss behavior"

The district court outlined evidence it considered to determine the State's Defendants' conduct was not outrageous: misrepresenting Hedlund's behavior during the April 2013 SAC meetings; making false claims about Hedlund's mental fitness and threat risk; wrongfully and perhaps dangerously taking Hedlund out of service; going to Hedlund's home to retrieve his firearms, badge, and car; sending Hedlund to a psychological evaluation even though he was mentally fit; refusing to allow Hedlund to work despite the doctor's conclusions that he was fit; improperly manipulating the PSB investigation and report; and repeating "known falsehoods" about Hedlund's

threat potential to Branstad knowing full well that Branstad would publish them to the news media. (*Id*. p. 25–26)

First, it is difficult to discern how the trial court found as a matter of law that "typical bad boss" behavior includes an employer deliberately putting an employee's life in danger, which is what the State did when it went to Hedlund's home to place him on leave. Sergeant Niles believed going to Hedlund's house "placed four persons at risk." (APP.000374 33:16-18; APP.000602) Former Director Quinn agreed. (APP.000639 ¶11) It's equally baffling how, as a matter of law, it's typical for a "bad boss" to tell the Governor that an employee is a safety threat knowing it's a lie and knowing that the Governor will broadcast it statewide.

The district court likened the State's behavior in this case to the behavior discussed in *Vinson*. (APP.000154) In *Vinson*, the court determined that the defendant school district's behavior did not satisfy the "outrageousness" prong of a TIED claim after it harassed Vinson, a bus driver. *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108 (Iowa 1984) Vinson brought an action for intentional infliction of emotional distress after she was wrongfully discharged for failing to complete her timecards according to the district's instructions. *Id.* The district badgered and harassed Vinson by urging her to drive in an unsafe manner to complete her route quickly, by

accusing her of falsifying her timecards, and by discharging her for dishonesty—though the district knew that she had not been dishonest. *Id.*

D. The Facts in this Case are More Akin to *Smith* than they are to *Vinson.*

The facts in this case paint a much more sinister picture than Vinson's and are more akin to those outlined in *Smith v. Iowa State University of Science and Technology*, 851 N.W.2d 1 (Iowa 2014). Like Smith, Hedlund's life and career were utterly destroyed by the State's unrelenting campaign to get rid of him after he complained about incompetence and blew the whistle on Gov. Branstad's speeding vehicle. Hedlund's superiors sought to discredit him by lying about his behavior and falsely questioning his mental fitness. Smith's superior acted similarly and "tried to have him treated as a scary and mentally unstable outcast." *Smith*, 851 N.W.2d at 29. Furthermore, like Smith, Hedlund became a target after he complained about his superiors. *See Smith*, 851 N.W.2d at 4–18.

Hedlund also endured humiliations that Smith did not. Hedlund was sent for a psychological evaluation, but after being cleared was not permitted to return to work. After he was unlawfully terminated, Branstad told the press that Hedlund had been fired for the "safety and the morale" of the department – a blatant lie. Rather than simply firing him, the State attacked the stellar reputation that Hedlund had spent decades building. He was humiliated in

front of not only his coworkers and peers, but also his friends, family, and community.

E. Hedlund's Suffering at the State's Hands Caused Permanent Injury

In its analysis, the district court placed significant emphasis on how long the abuse occurred. (APP.000154) The court noted that "in *Smith*, the court found it important that the employee had been mistreated over a 'substantial period of time.'" (*Id*. p. 27) This court *did* find the long span of time during which the *Smith* plaintiff was abused by his boss to be particularly "striking" in that case. *Smith*, 851 N.W.2d at 29. However, there is no mandate in *Smith* that indicates that the period of abuse should be the only or even the most significant factor in determining whether a plaintiff can fulfill the "outrageousness" prong of a TIED claim. The court simply found that the period of time was one of the most "outrageous" factors in that record.

In fact, the district court admitted in a footnote that in one of the only other cases in which an appellate court determined that the "outrageousness" prong was satisfied in an employment case, *Blong v. Snyder*, the time period at issue in that case was similar to the time period at issue in this case. The district court noted:

> [t]his is not to say that "outrageous" behavior cannot happen over a period of months. That was the case in *Blong v. Snyder*, 361 N.W.2d 312, 317 (Iowa Ct. App. 1984). The Court believes,

> however, that the mistreatment described by Hedlund is more analogous to that in *Vinson*, as discussed above, than the extraordinary, "almost . . . daily" abuse described in *Blong*."

(*Id.*)

Whether the bad conduct occurs in a series of small acts, taken on a daily basis, or a series of larger, more destructive acts, spread out over weeks or months, the period of time is not necessarily determinative. Nor should it be.

After four years of abuse at ISU, Smith quit. After four months of abuse at the DCI, Hedlund was fired. Smith had a choice to remain in an abusive relationship. Hedlund did not. Given Hedlund's dogged determination to solve crimes and protect Iowans, he may have continued to soldier through the DCI's abuse for years. Hedlund did not have that option. To put the onus on employees to stay in an abusive relationship for a specific amount of time before they can seek legal redress would allow abusers to continue their abuse as long as they fired those employees within a certain time frame. That is not and must not be the law.

F. The State's Behavior Exceeded that of Typical "Bad Bosses."

In addition to the period of abuse, the district court determined that Hedlund's case should be dismissed because the State's mistreatment of him had not been undertaken as a means to cover up criminal behavior, but rather, as a means to cover up their professional "incompetency." (APP.000182 p.

29) The district court made this determination because in its view, "incompetency and bad reorganization plans are typical for 'bad bosses'" and "would not shock the average Iowa employee." *Id.* There are, no doubt, plenty of bad bosses. But this case is not about bad bosses or their typical behavior. It's about whether a jury would be shocked by the extent of the State's abusive behavior toward Hedlund regardless of whether it was motivated by a desire merely to "save face," and/or to avoid a traffic ticket, and/or to cripple an employee who blew the whistle on the governor's illegal activity and the DCI's incompetence.

As part of that cover-up, Paulson filed a false report with the PSB alleging Hedlund had been stalking her. Filing a false report with a policing agency is a crime. It is also a crime to retaliate against a whistleblower under Iowa Code 70A.28, which states that such retaliation constitutes a simple misdemeanor. Iowa Code 70.28(4) (2017). This court found the *Smith* defendant's attempt to cover up her own criminal behavior to be "striking." Paulson's pathetic attempt was equally striking. *See generally*, *Smith*, 851 N.W.2d at 26–30. In such cases, a jury should be allowed to determine whether the conduct is outrageous.

A jury easily could conclude Paulson's conduct was outrageous. Among other things, she claimed *after* Hedlund blew the whistle on the governor's

speeding vehicle that Hedlund was stalking her. **(**APP.000521**)** He wasn't and she knew he wasn't. That's certainly not what she complained about in previous meetings or in documents contained in Hedlund's personnel records and the PSB file. (APP.000519, APP.000568; APP.000325 48:14-18, 57:2-9; APP.000332 46:8-13, 46:8-13, 47:1-7; APP.000224 40:7-25, 41:1-2; APP. 000212 38:25, 39:1-13) Nevertheless, Paulson filed the fraudulent complaint with the DCI, the top law enforcement agency in the state, claiming she feared for her safety. (APP.000521**)** As she reported:

> I also became concerned for my own personal safety as well as the safety of other members of the DPS leadership team. These concerns caused me to be aware of my surroundings both at the office and at home.

(*Id.*)

Under the circumstances, not only was Paulson trying to provide cover for Gov. Branstad's defamatory statement about Hedlund but committed a crime herself by retaliating against Hedlund after he blew the whistle on Branstad's speeding; yet another crime.

1. Other Factors That Are Striking in *This* Record.

Hedlund is a man of integrity and a fierce advocate for crime victims. At his core, Hedlund is a cop. He worked tirelessly for 25 years and invested much of his life, time, and energy working. Much of his work involved murders, rapes, kidnappings and other disturbing crimes. His deep compassion

for the victims toughened his steely resolve to solve those crimes. When Meyers' incompetence compromised Hedlund's investigations, Paulson blocked Hedlund from going up the chain of command, which greatly impinged on many of the investigations Hedlund was overseeing, including the abduction and subsequent murder of the Evansdale cousins. That not only angered Hedlund, it anguished him.

When the Evansdale girls were abducted in July 2012, Hedlund tried to reach Meyers by phone and email to get approval for all of his agents, as well as agents from the other zones, to help work the case. Meyers did not respond. (APP.000236-237 pp. 48:20-25, 49:13-19) A few days later, a human leg was found in a lake. (*Id*. 49:17-25) Hedlund called and emailed Meyers to ask him to direct agents from one of the other zones to investigate. (*Id*. 50:1-4) Meyers did not respond until he realized a Director was on the scene. (*Id*. 50:5-9) Even when the bodies of the Evansdale girls were found, Meyers could not be reached. (*Id*. 48:20-25, 49:1-25, 50:1-9, APP.000258 pp. 135:11-25; APP.000526) Such indifference is outrageous.

The DCI work was not only a lifestyle, it was Hedlund's calling. His self-worth was tied to that work. Hedlund's superiors knew that and also knew that he could not fully recover from their attacks, which is why they covertly carried out their insidious campaign to destroy him to protect themselves and

provide cover for the governor's defamatory statement. Hedlund became depressed and anxious. His relationships with his family and friends became strained. Even his grandkids knew there was something wrong with Poppa Larry, whose face appeared on television screens throughout the state as his story unfolded. After he was fired, it took him two years to find another job in law enforcement and only then to return to his first job as a Fort Dodge police officer, a stunning fall for one of the state's top law enforcement officers.

Comparing *Blong* and *Smith* with this case is like comparing two sets of defendants who have used different tools to dismantle the careers and livelihoods of their respective employees. In *Smith* and *Blong*, the defendants used a chisel to chip away at the plaintiffs on a daily basis. In this case, the State used a sledge hammer to shatter Hedlund's career and name. Both defendants achieved the same goal.

2. Plaintiff Generated a Jury Question, and This Case Should Be Allowed To Proceed to Trial on the TIED Claim

Hedlund was financially, professionally, monetarily, and emotionally devastated by the State's deliberate and unremitting warfare. His ensuing grief, shame, and humiliation after being terminated was almost palpable. It was also inescapable: the barrage of news dominated media coverage for months in

Iowa and across the country. He couldn't even hide it from his aging mother, who saw him on TV and wanted to know what *he* had done.

Emotional distress is like pornography: You know it when you see it. The same can be said of intentionally inflicting that distress: Its viciousness is unmistakable. In a world that has grown more accustomed to bullying, if not comfortable with it, the State needs to be held accountable for its behavior and allow a jury the opportunity to make Hedlund whole again. Anything less would be a travesty of justice.

CONCLUSION

The trial court's summary judgment ruling dismissing Counts II, IV, and V of Hedlund's 4th Amended Petition—asserting causes of action of Wrongful Discharge in Violation of Iowa Code Chapter 70A, Tortious Infliction of Emotional Distress, and Age Discrimination in Violation of Iowa Code Chapter 216 respectively—should be reversed.

REQUEST FOR ORAL ARGUMENT

The Appellant hereby requests to be heard at oral argument.

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I certify that on **JANUARY 3, 2019** I electronically filed this Final Brief with the Clerk of Court using the ECF system, which sent notification of same to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. of App. P. 6.903(1)(g)(1) because this brief contains 13,464 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of issues and certificates).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 pt.

By: **/s/THOMAS J. DUFF**