IN THE SUPREME COURT OF IOWA

NO. 18-0567

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 DIVISION OF CRIMINAL INVESTIGATION, Individually; GERARD MEYERS, ASSISTANT DIRECTOR DIVISION OF CRIMINAL INVESTIGATION, Individually; and TERRY E. BRANSTAD, Individually,

Defendants - Appellees.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
HONORABLE DAVID MAY, JUDGE

APPELLEES' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

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

STATEMENT OF THE CASE

Nature of the Case: This is an action involving both equitable claims under Iowa's whistleblower statute (Iowa Code section 70A.28) and an action at law alleging Defendants' actions with respect to Plaintiff's employment were violative of Iowa Code section 70A.28, Iowa Code chapter 216, as well as alleging a claim for intentional infliction of emotional distress.

Course of Proceedings and Disposition:

On November 14, 2014, Hedlund filed his Third Amended Petition. After an interlocutory appeal filed by Hedlund was dismissed by this Court, the Defendants filed their Answer and Affirmative Defenses on April 20, 2016. On October 5, 2017, Defendants filed their Motion for Summary Judgment as to all remaining counts asserted in the Third Amended Petition. Hedlund resisted the motion for summary judgment, and oral arguments were held before the district court on February 27, 2018. On March 30,

2018, the district court granted the Defendants' Motion for Summary Judgment and dismissed the case in its entirety. Hedlund filed a Notice of Appeal on April 2, 2018.

STATEMENT OF FACTS

In 1988 Hedlund began his employment with the Iowa Department of Public Safety (DPS) as a State Patrol Trooper. In 1989, he was assigned to the Division of Criminal Investigation (DCI), and in 2010 was promoted to Special Agent in Charge (SAC). (Third Am. Petition pp. 9-10, Defs' S.J. Appendix pp. 11-12; App. 12–13).

In September 2012 Brian London was appointed as the Commissioner for the DPS. (London Depo. p. 182, Defs' S.J. App. p. 97; App. 329). Thereafter, in November 2012 London appointed Charis Paulson, an Assistant Director with the DCI, as the Director of the DCI. Paulson was the first woman to hold that position. (Paulson Depo. pp. 14:11-25—15:2, Defs' S.J. App. pp. 116-117; App. 377). In January 2013, Gerard Meyers, a SAC within DCI, was promoted to Assistant Director for Field Operations of the DCI and became Hedlund's direct supervisor. (Ruling p. 3, 38; App. 155, 191).

On February 13, 2013, Hedlund sent an e-mail critical of Meyers to others within DCI, including Hedlund's subordinate agents. (Hedlund Depo. Ex. 6, Defs' S.J. App. p. 134; App. 419). Upon learning of the e-mail, Meyers called Hedlund in for a meeting on February 15. (Meyers Depo. pp. 99:11—101:25, Defs' S.J. App. pp. 104-106; App. 339). Before the meeting Hedlund, apparently recognizing the seriousness of his behavior, authored a note to the agents he supervised indicating he had been terminated from the DCI. (Hedlund Depo. Ex. 7, Hedlund Depo. pp. 68:5—70:11, Defs' S.J. App. pp. 60-61, 140-141; App. 425–26; 241–42). Meyers counseled Hedlund to stop sending such e-mails, but was not terminated or even disciplined at this time. (Hedlund Depo. p. 72:12-17, Defs' S.J. App. 61; App. 242). As a result, Hedlund never distributed the note. (*Id.)*

The counseling session was unsuccessful at curbing Hedlund's behavior. After the meeting, Hedlund continued sending e-mails critical of upper management within DPS and DCI to his subordinates and others. (Hedlund Depo. Exs. 8, 9, 10, 11, Defs' S.J. App. pp. 142-148; App. 427–33). Then, during a telephone conference on April 18, Hedlund acted in a fashion that his superiors within DCI interpreted as insubordinate. (Paulson Depo. Ex. 49, Defs' S.J. App. 191; App. 518–20). Additionally, during a

meeting of SACs with DCI upper management on April 23, Hedlund was agitated and spoke several times of officer suicide. (Paulson Depo. Ex. 50, Paulson Depo. p. 301:6-10, Meyers Depo. pp. 82:23—84:18, Saur Depo. pp. 23:10—24:10; Defs' S.J. App. pp. 101-103, 126, 130, 194; App. 521, 390, 338, 405). On April 25, Hedlund sent out yet another e-mail to his subordinates criticizing DPS management. (Hedlund Depo. Ex. 9, Defs' S.J. App. p. 143; App. 428).

During this time, Hedlund also filed numerous complaints with Andrea Macy, an employee of the Department of Administrative Services (DAS). (Third Am. Petition ¶ 13(c)(i)-(v), Hedlund Depo. Ex. 17, Pl's Int. Answer No. 15, Defs' S.J. App. pp. 12, 170; App. 14–15, 456–58). These "complaints" alleged Meyers used profanity and aggression toward another director at DPS, Meyers told agents to ignore ISU campus parking tickets, Paulson instructed him not to interview a witness in June 2012, Paulson sent an inappropriate email in August 2012, and complaints about London's management style. (Third Am. Petition ¶ 13(c)(i)-(v), Defs' S.J. App. p. 12; App. 14–15).

In April 2013, Hedlund requested and received approval to take off April 26 to attend his niece's art show in Cedar Rapids. (Hedlund Depo. pp.

98:19—99:8, Defs' S.J. App. p. 68; App. 249). Hedlund drove a state vehicle to Cedar Rapids to attend the show on April 25. (Hedlund Depo. pp. 99:23—100:4, Hedlund Depo. Ex. 18, Defs' S.J. App. pp. 68, 180; App. 249, 466–68). He stayed in a hotel that he paid for himself, not at the State's expense like if he had been there on business. (Hedlund Depo. p. 100:5-10, Defs' S.J. App. 68; App. 249). The next morning, Hedlund contacted a retired officer to discuss cold cases. (Hedlund Depo. pp. 106:20-24, 105:2-9, Defs' S.J. App. p. 70; App. 251). Hedlund arranged the meeting after arriving in Cedar Rapids. (Hedlund Depo. p. 104:20-24, Defs' S.J. App. p. 69; App. 250). While a cold case unit had been discussed during strategic planning meetings, Hedlund knew he had not yet been assigned the cold case unit at that time. (Hedlund Depo. pp. 91:20—92:1, Defs' S.J. App. p. 66; App. 247).

On the morning of April 26, Director Paulson, unaware Hedlund was on an approved vacation day, called and texted Hedlund numerous times attempting to meet with him and confront him regarding his behavior. (Paulson Depo. Ex. 70, Hedlund Depo. pp. 105:10—106:21, Defs' S.J. App. pp. 70, 195; App. 563, 251). Paulson also filed a complaint with DPS's Professional Standards Bureau (PSB) regarding Hedlund's escalating

conduct.[1] Hedlund did not respond to Paulson's texts or voicemails for several hours. (Paulson Depo. Ex. 70, Defs' S.J. App. p. 195; App. 563). When Hedlund finally called Paulson back around noon, she asked if he was working. Hedlund ambiguously answered "yes and no" and that he put in for a vacation day. (Paulson Depo. Ex. 70, Hedlund Depo. pp. 105:17—106:21, Defs' S.J. App. pp. 70, 195; App. 563; 251). Paulson, believing Hedlund was on an approved vacation day, did not require him to come to Des Moines immediately but rather requested he do so on the following Monday, April 29. (Paulson Depo. Ex. 70, Defs' S.J. App. p. 195; App. 563). Hedlund only claimed one hour of vacation on April 26. (Hedlund Timesheet, Defs' S.J. App. p. 200; App. 1086).

On April 29, Hedlund authored a lengthy e-mail titled, "a complaint against myself." (Hedlund Depo. p. 113:9-22, Hedlund Depo. Ex. 16, Defs' S.J. App. pp. 72, 151; App. 253, 437). The complaint concerned an incident that occurred on April 26, where Hedlund witnessed a black SUV speeding on Highway 20. (Hedlund Depo. Ex. 16, Defs' S.J. App. p. 151; App. 437). After observing the speeding vehicle, Hedlund contacted the State Patrol and

[1] The complaint was filed April 26, 2013. (Paulson Depo. Ex. 49, Defs' S.J. App. p. 191; App. 518–20).

a trooper (Matt Eimers) was sent to intercept the reported vehicle. (*Id.*). Upon catching up to the vehicle, the trooper determined that the vehicle was an official state vehicle being driven by another trooper (Steve Lawrence) and was transporting the Governor and Lieutenant Governor. (*Id.*). The vehicle was not stopped, and no citations were issued at that time. (*Id.*). Hedlund's complaint against himself detailed the incident and stated, "[a]s the ranking sworn peace officer involved in this incident and as a Supervisor with the Department of Public Safety, I should have insisted that the vehicle be stopped." (Hedlund Depo. Ex. 16, Defs' S.J. App. p. 152; App. 438). Late that afternoon, Hedlund emailed his subordinates that he was taking some personal time off. (Paulson Depo. Ex. 71, Defs' S.J. App. p. 196; App. 564–67). Hedlund then obtained a doctor's note excusing him from work from April 30 through May 6. (*Id.*).

On May 1, based upon Hedlund's escalating behavior and repeated mention of officer suicide in a meeting, Hedlund was placed on administrative leave with pay. Because Hedlund was off work at that time, Hedlund was given the administrative leave notice at his home. (Third Am. Petition ¶ 38, Paulson Depo. pp. 196:7—201:21, Defs' S.J. App. pp. 18, 119-121; App. 19, 382–83). The notice of investigation contained numerous

allegations, including that Hedlund was disrespectful and insubordinate, he operated a state vehicle on leave status, he later took leave without approval, and engaged in conduct that impaired the department's operations. (Third Am. Petition ¶¶ 40–41, Defs' S.J. App. p. 19; App. 20). He was also ordered to a fitness for duty evaluation. (*Id.*).

Hedlund reported for a fitness for duty evaluation on May 16. (Hedlund Depo. Ex. 23, Defs' S.J. App. p. 187; Supp. App. 4–6). Dr. Phillip Ascheman performed the fitness for duty evaluation and found Hedlund fit for duty. (*Id.*). However, Dr. Ascheman indicated that Hedlund's suspicious and rigid personality traits would likely continue to interfere with his ability to interact appropriately, and he would likely continue to challenge his supervisors. (*Id.*). Dr. Ascheman ruled out the cause as mental health issue or stress response and opined that this was volitional behavior and should be managed as a disciplinary issue. (*Id.*).

On July 17, upon completion of the PSB investigation, Hedlund was given a notice of termination signed by Paulson. (Hedlund Depo. Ex. 18, Defs' S.J. App. p. 180; App. 466–68). Hedlund was found in violation of several rules, including unbecoming or prohibited conduct, courteous behavior, and use of state property. (*Id.*). The reasons set forth for the

decision to terminate Hedlund's employment included:

> You communicated negative and disrespectful messages about the direction of the Division of Criminal Investigation and members of the DPS/DCI leadership team with your subordinate employees including, but not limited to comments like the following:
>
> "Her [Director Paulson] position on this issue shows a glaring and fundamental lack of understanding and appreciation of what the Agents do in the field."
>
> ". . . they are making plans to go backwards about 20 years with reports, in my opinion."
>
> "if it [agents typing their own reports] continues it will only bolster the apparent plan to go that way 100% which to me is totally mindboggling."
>
> "I can't imagine that there is any perception in the chain of command as to the extent of bewilderment at some of the decisions being made, questions being asked, and the direction we appear to be headed."
>
> These actions, in and of themselves, warrant termination.
>
> You also addressed the DCI Director in a disrespectful tone during a conference call involving DCI leadership staff.
>
> You drove your state government vehicle to Cedar Rapids on the evening of April 25, 2013 for no work-related purpose. You then scheduled an impromptu meeting in Cedar Rapids on the morning of April 26, 2013, a previously approved vacation day. The purpose of the meeting was to discuss cold case research, a project to which you were not assigned. You then attended a previously scheduled personal event before returning home to Fort Dodge that afternoon.

> You were deceptive about your work status on April 26, 2013 during a phone conversation with the DCI Director, informing her that you were on vacation. You later provided inconsistent accounts of that phone conversation during a subsequent administrative investigation.

(*Id.*).

The notice of termination also included notice of his right to appeal the decision in accordance with Iowa Code section 80.15. (*Id.*). Iowa Code section 80.15 provides that a peace officer is not subject to dismissal or disciplinary action resulting in the loss of pay until after a hearing is held by the Employment Appeal Board (EAB), if disciplinary action is challenged by the officer, where the officer has an opportunity to present a defense to the charges. The standard for appeal under section 80.15 is whether the disciplinary action is supported by good cause. *Hicok v. Iowa Emp't Appeal Bd.*, No. 11-0379, 2011 WL 5391652, at *4 (Iowa Ct. App. Nov. 9, 2011).

On July 18, Governor Branstad held a press conference wherein he discussed several matters, including Hedlund's notice of termination and answered press questions. (3/23/17 Ruling p. 2, Defs' S.J. App. p. 30; App. 52). In response to a press question, Governor Branstad stated, "They [the Department] felt for the morale and for the safety and well-being of the Department, this was action that was necessary," and opined that "he

believed the action was 'a fair and just decision.'" (*Id.*).

On August 13, Hedlund filed an appeal, pursuant to section 80.15, with the EAB challenging the notice of termination. (Hedlund Depo. Ex. 19, Defs' S.J. App. p. 183; App. 469). However, prior to the scheduled hearing, Hedlund dismissed his appeal. (Hedlund Depo. Exs. 20, 21, Defs' S.J. App. pp. 184-185; App. 470–71). Based on Hedlund's dismissal of his section 80.15 appeal, DPS notified Hedlund he would be terminated on January 30, 2014. (Hedlund Depo. Ex. 22, Defs' S.J. App. p. 186; App. 472). However, one day prior to his termination, Hedlund elected to retire from the department.[2] (Hedlund Depo. Ex. 3, Defs' S.J. App. p. 131; App. 416).

On January 29, 2014, Hedlund applied to the Peace Officer Retirement System (PORS) for retirement benefits. (*Id.*). On February 17, the PORS Board approved Hedlund's application and he began receiving monthly retirement benefits, which continues today. (Hedlund Depo. Ex. 4, Defs' S.J. App. p. 132; App. 417). Upon his retirement Hedlund was also able to use his banked sick leave to pay for state health insurance benefits.

[2] The Iowa Supreme Court recognized Hedlund's retirement and dismissal of his appeal to EAB in *Hedlund v. State*, 875 N.W.2d 720 (Iowa 2016) ("Hedlund retired from DPS and on January 21, 2014, dismissed his appeal before the EAB.").

(Hedlund Depo. pp. 43:6—44:3, Defs' S.J. App. p. 54; App. 235). Hedlund received full pay and benefits while his appeal was pending. (Hedlund Depo. pp. 36:23—37:2, Defs' S.J. App. pp. 52-53; App. 233–34). In May 2015, Hedlund began working for the Fort Dodge Police Department where he continues to work today as a patrolman within the detective bureau of the FDPD. (Hedlund Depo. p. 26:1-25, Defs' S.J. App. p. 50; App. 231).

Hedlund filed a civil rights complaint on January 27, 2014, against DPS and Meyers, alleging age discrimination. (ICRC Complaint p. 1, Defs' S.J. App. p. 5; App. 6). He did not file a claim against Paulson or London. (ICRC Complaint pp. 2-3, Defs' S.J. App. pp. 6-7; App. 7–8). He claimed the adverse employment action as "disciplined/suspended" and "terminated," but did not check the "forced to quit/retire" or "harassment" boxes as the basis for his complaint. (ICRC Complaint p. 1, Defs' S.J. App. p. 5; App. 6). The narrative makes no mention of any fact that could be construed as asserting a forced retirement claim or harassment claim. (ICRC Complaint p. 5, Defs' S.J. App. p. 9; App. 10).

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DISMISSING HEDLUND'S WHISTLEBLOWER CLAIM.

Standard of Review: Grants of summary judgment are reviewed for correction of errors at law. *Walsh v. Wahlert*, 913 N.W.2d 517, 521 (Iowa 2018).

Preservation of Error: The State agrees Hedlund has preserved error on the issues appealed.

In its motion for summary judgment, the State raised several independent grounds for dismissing Hedlund's whistleblower claim. (Defs' S.J. Brief pp. 13-26). The district court granted the State's motion based on one such ground, the exclusivity of chapter 17A, but did not consider the others. (Ruling pp. 11-19; App. 164–71). "A successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected in trial court." *Johnston Equip. Corp. of Iowa v. Indus. Indem.*, 489 N.W.2d 13 (Iowa 1992). Additionally, the court can "affirm the summary judgment ruling on a proper ground urged below but not relied upon by the district court." *Kern v. Palmer Coll. of Chiro.*, 757 N.W.2d 651, 662 (Iowa 2008). Accordingly, the State has preserved, and will discuss, each of the distinct and mandatory grounds for dismissing Hedlund's whistleblower claim.

Argument:

A. Chapter 17A is the Exclusive Means for Hedlund to Seek Judicial Review of the Adverse Agency Action.

The district court correctly concluded Hedlund cannot bring an action in district court under section 70A.28 because chapter 17A provides the exclusive means of seeking review of the adverse agency action.

1. Hedlund's termination was an agency action, and *Kerr* requires courts to enforce the exclusivity of Chapter 17A's judicial review provisions.

When an individual is aggrieved by an agency action, "the judicial review provisions of [Chapter 17A] shall be the *exclusive* means by which [that party] may seek judicial review of such agency action." Iowa Code § 17A.19 (2018) (emphasis added). The *only* exception to this unambiguous exclusivity provision is when a statute "expressly provide[s] otherwise by . . . referring to [Chapter 17A] by name." *Id.*

There are three general categories of agency actions: rulemaking, contested cases, and other agency actions. *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 327 (Iowa 2015). A contested case is one "in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Code § 17A.2(5). Disciplinary actions against peace

officers are governed by Iowa Code section 80.15, which instructs that peace officers like Hedlund are "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 the officer is afforded the opportunity for a hearing before the EAB. *Id.* § 80.15. The EAB's decision is final, and if the officer is dissatisfied with the result, the officer has "the right of judicial review in accordance with the terms of the Iowa administrative procedure Act, chapter 17A." *Id.* Thus, Hedlund's notice of termination and his subsequent invocation of section 80.15 was a contested case proceeding, and section 17A.19 governs any subsequent judicial review. *See also Jew v. Univ. of Iowa*, 398 N.W.2d 861, 864 (Iowa 1987) ("Where a contested case procedure . . . has been undertaken and has run its course to conclusion, it is almost axiomatic that any further challenge to the action taken or confirmed by the final agency decision may only be asserted by proper petition for judicial review under section 17A.19.").

Moreover, the Iowa Supreme Court has explained that the Iowa Administrative Procedure Act (IAPA) is the *exclusive* means of challenging an agency action if "the action or inaction in question … bear[s] a

discernable relationship to the statutory mandate of the agency as evidenced by express or implied statutory authorizations." *Papadakis v. Iowa State Univ.*, 574 N.W.2d 258, 260 (Iowa 1997). In *Papadakis*, the court held that a university employee's employment dispute "must be resolved through the administrative and judicial review procedures of" chapter 17A. *Id.* at 258. The court concluded that personnel matters "ha[d] been relegated to an administrative process by section 19A.3(4)," and the "cessation of [the employee's] salary and benefits" was an "agency action that trigger[ed] the applicability of section 17A.19." *Id.* at 260–61. Just as in *Papadakis*, officer discipline has been relegated to an administrative process by section 80.15, Hedlund's notice of termination was an agency action that bears a discernable relationship to the statutory mandate of the DPS, and chapter 17A is therefore Hedlund's sole means of challenging his notice of termination.

In *Kerr v. Iowa Public Service Co.*, the Iowa Supreme Court addressed the identical issue of whether plaintiffs could seek an independent statutory remedy in district court instead of pursuing judicial review proceedings under chapter 17A. 274 N.W.2d 283, 284 (Iowa 1979). In *Kerr*, the Iowa Commerce Commission (ICC) granted the Iowa Public

Service Company (IPS) a franchise with right of eminent domain to construct an electric transmission line, which involved condemning an easement across the Kerrs' property. *Id.* The Kerrs objected to the easement during the ICC hearing, but the agency nevertheless approved IPS's franchise, including the easement. *Id.*

The statute governing the utility board's franchise decisions expressly entitled individuals "aggrieved by the action of the utilities board" to avail themselves of "the rehearing procedures provided in section 476.12," or to seek "[j]udicial review of the actions … in accordance with the terms of the Iowa administrative procedure Act, chapter 17A." *Id.*; *see* Iowa Code § 478.32 (1977). Rather than pursue the provided administrative remedies, the Kerrs brought an action in district court seeking a temporary and permanent injunction under a separate statutory provision, section 476A.14(2). *Id.* The court dismissed the claim, holding the Kerrs "failed to utilize the judicial review procedures of the IAPA." *Id.* at 286.

The court based its decision on a plain language reading of section 17A.19. First, the court found that "granting IPS a franchise constituted 'agency action.' " *Id.* Because the Kerrs' claim was "seek[ing] review of the Commission order, the exclusivity of the IAPA judicial review

provisions can not be disregarded." *Id.* at 287. Second, applying section 17A.19, the court considered whether the statute granting the remedy sought – section 476A.14(2) – expressly provided for an additional remedy by referring to chapter 17A by name. *Id.* "Although Chapter 476A was enacted after section 17A.19(1)," the court found "no express exemptive language in section 476A.14 referring to the IAPA." *Id.* at 287–88. Therefore, because the Kerrs were seeking judicial review of an agency action, and the separate statutory remedy sought did not expressly refer to chapter 17A by name, the court dismissed their claim. *Id.* at 288.

Here, Hedlund presents an identical claim. Hedlund received a notice of termination, which is an agency action, and Hedlund initiated a contested case proceeding in accordance with section 80.15. Moreover, peace officer employment disputes have been committed to the administrative process by section 80.15, and the initiation of an action to terminate Hedlund's employment bears a discernable relationship with the statutory mandate of the DPS. *See Papadakis*, 574 N.W.2d at 260. Because Hedlund is an individual aggrieved by an agency action, "the exclusivity of the IAPA judicial review provisions can not be disregarded." *Kerr*, 274 N.W.2d at 287.

Section 80.15 expressly provides aggrieved officers the opportunity to appeal to the EAB, as well as judicial review of the Board's decision in district court in accordance with the IAPA. Iowa Code § 80.15 (2018). Section 17A.19 *only* permits an aggrieved employee to seek additional remedies in district court when another statute, which refers to chapter 17A by name, grants that authority. *Id.* § 17A.19. The whistleblowing statute, despite being enacted after 17A.19, *see* 1984 Iowa Acts ch. 1219, § 4, does not provide that its remedies are in addition to the remedies provided in chapter 17A. *See* Iowa Code § 70A.28(5). Accordingly, under section 17A.19 and *Kerr*, Hedlund's statutory whistleblower claim must be dismissed, and the district court did not err in granting summary judgment.

2. *Walsh* did not overturn *Kerr* or *Papadakis*, and is grounded in the specific context of the merit system and the legislative intent behind Chapter 8A.

This past term, the Iowa Supreme Court considered the related, yet distinct issue of whether a merit system employee, Walsh, was required to exhaust his administrative remedies prior to bringing an action under section 70A.28. *Walsh*, 913 N.W.2d at 524. The court made no preliminary finding about whether an agency action was in fact being challenged, and instead explained the case "turn[ed] on whether the legislature intended the

provisions of Iowa Code section 8A.15 to preempt the civil cause of action established by the legislature in Iowa Code section 70A.28." *Id.*

The court surveyed the legislative history of the interplay between chapter 8A and section 70A.28 and noted that, following the implementation of the merit system statute, the legislature amended 70A.28 to give nonmerit employees access to PERB review akin to merit counterparts. *Id.* Ultimately, the court found that the legislature intended for both "merit and nonmerit whistleblowers" to have the choice between "bring[ing] a civil action directly under Iowa Code section 70A.28(5) [and] pursu[ing] an administrative remedy with the PERB." *Id.*

The *Walsh* opinion makes no mention of other types of state employees who have different statutory and administrative protections, including employees covered by collective bargaining agreements or peace officers covered by section 80.15. On appeal, Plaintiff attempts to extend *Walsh* beyond its crucial context, which is specific to the merit system and the legislature's intent to harmonize access to PERB review.

Here, with respect to the narrow class of employees governed by section 80.15, the legislature clearly did not intend to create a choice of remedies. Upon notice of potential termination, peace officers like Hedlund

do not have a choice between PERB review and a direct civil action. Instead, officers *cannot* be disciplined unless charges have been filed with the Department of Inspection and Appeals and, if requested by the officer, a hearing is held before the EAB and the officer has an opportunity to present a defense to the charges. *See* Iowa Code § 80.15. The legislature took the significant step to require DPS, as an employer, to pursue employee discipline solely through the administrative process. Permitting employees to simply opt out would undermine that deliberate choice.

Moreover, peace officers, unlike merit system employees, receive full pay and benefits throughout the administrative process. *Id.* Ensuring that officers receive uninterrupted benefits throughout the disciplinary proceedings signals the legislature's clear intent to use the administrative process, rather than judicial intervention, to prevent officers from suffering damages due to an erroneous or unjust disciplinary action.

Additionally, *Walsh* briefly discusses section 17A.19, but does not mention *Kerr* or *Papadakis*, nor does it disturb their principles. At first glance, *Walsh* appears to blur the line between exclusionary provisions, which instruct whether judicial review under the IAPA is the *sole avenue of redress* for a party adversely affected by an agency action, and the

administrative exhaustion doctrine, which considers whether a party must *complete the administrative appeal process* prior to seeking judicial review of an agency's decision. *See, e.g.*, *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 833–36 (Iowa 1979) (considering first whether the IAPA was the exclusive means of seeking judicial review of the challenged agency action, and after concluding it was, next construed the plaintiff's petition as one for judicial review and considered whether the plaintiff exhausted administrative remedies prior to seeking judicial review).

However, *Walsh* made no preliminary finding about whether an agency action was in fact being challenged, which is necessary to trigger 17A.19's exclusivity mandate. As well, the brief discussion of 17A.19 in *Walsh* favorably references a case that affirms *Kerr* and its plain language application of section 17A.19. *See Walsh*, 913 N.W.2d at 525 (citing *Salsbury Labs.*, 276 N.W.2d at 835).

In *Salsbury Laboratories*, the Iowa Supreme Court discussed 17A.19's exclusivity provision and the legislative intent behind it. *Id.* at 834. The court noted that chapter 17A was drafted in the image of the Model State Administrative Procedure Act. *Id.* However, the legislature departed from the Model Act and inserted the "exclusive means" language in

the judicial review provision. *Id.* at 835. "Had the legislature intended to permit review by means other than those provided in section 17A.19, it could have used the Model Act language or its equivalent. Its declination must be given effect." *Id.*

Additionally, an express purpose of the IAPA is "to simplify the process of judicial review." *Id.* The IAPA "provided one form of judicial review and made it an appellate process." *Id.* The legislature's goal of simplification would not be achieved "if the provisions of section 17A.19 could be discarded at will in favor of certiorari, declaratory judgment, or injunction." *Id.* Thus, the court held section 17A.19 means what it says, and "[a] person or party aggrieved or adversely affected by agency action must utilize the provisions of section 17A.19 in seeking judicial review of that action." *Id.*

Walsh did not disturb the long-standing interpretation of section 17A.19 that an individual aggrieved by an agency action may *only* seek relief through the procedures in chapter 17A. *Kerr*, 274 N.W.2d at 287. Nor did it overturn the settled principle that agency actions "bear[ing] a discernable relationship to the statutory mandate of the agency" may *only* be remedied through chapter 17A. *Papadakis*, 574 N.W.2d at 260. Nor did it

strike from section 17A.19 the express, unambiguous mandate that a statute must refer to chapter 17A by name to grant an additional remedy beyond judicial review under the IAPA. Instead, *Walsh* is firmly rooted in the legislative intent behind chapter 8A, and the legislature's goal to give merit system employees a choice of remedies.

Here, the legislature, through chapter 80, created a comprehensive administrative scheme to protect certain peace officers from erroneous discipline. The legislature provided officers full salary and benefits throughout administrative proceedings to protect officers from arbitrary or unjust discipline. Accordingly, like in *Papadakis*, personnel matters have been committed to the administrative process by section 80.15. As in *Kerr*, Hedlund is aggrieved by an agency action, but did not fully pursue the administrative appeal process and instead sought a separate statutory remedy in district court. Because 17A.19 instructs that administrative proceedings and subsequent judicial review is Hedlund's *exclusive* remedy, and section 70A.28 does not expressly reference chapter 17A by name, the district court did not err and Hedlund's claim must be dismissed for want of jurisdiction. *See Kerr*, 274 N.W.2d at 287 ("[F]ailure to satisfy the requirements of section 17A.19 [is] a jurisdictional defect.").

B. Hedlund's Conduct Is Not Covered Under Section 70A.28.

Even if the Court finds that, despite *Kerr* and section 17A.19's explicit directives, Hedlund's statutory claim may proceed, summary judgment is proper because Hedlund cannot succeed on a claim under section 70A.28. After being warned about his inappropriate and insubordinate behavior for forwarding an email critical of his supervisor to his subordinates, Hedlund embarked on a campaign of filing a multitude of complaints relating to any rumor, innuendo, or petty incident relating to DPS personnel across divisions, culminating in a complaint against himself. Hedlund now attempts to parlay his interest in complaining into a whistleblower claim under Iowa Code section 70A.28.

Hedlund's whistleblowing claim is fashioned from three general events: (1) complaints filed with PSB about Meyers and Paulson, (2) complaints filed with DAS against Meyers and Paulson, and (3) a complaint filed against himself. However, his claim must fail, as the issues Hedlund complained of do not rise to the level of being actionable, he did not complain to an authority that is approved under section 70A.28, and whistleblowing on yourself is not protected under the whistleblowing statute.

1. Hedlund's complaints do not rise to the level of whistleblowing.

As our Court of Appeals has noted, Iowa's whistleblower statute was never intended to be a "chronic complainer act," and "voicing one's subjective disagreement with the actions of one's supervisor is not whistleblowing." *Carter v. Lee Cty.*, No. 13-1196, 2015 WL 161833, at *9 (Iowa Ct. App. Jan. 14, 2015) (first quoting *Blackburn v. United Parcel Serv., Inc.*, 3 F. Supp. 2d 504, 517 (D.N.J. 1998)). In May 2013, Hedlund filed several complaints with DAS regarding incidents in which he had no personal knowledge or involvement. Whistleblowing protection "cannot be invoked by employees to primarily protect their proprietary interests, exact revenge on an employer, or for personal gain." *Dahl v. Combined Ins. Co.*, 621 N.W.2d 163, 167 (S.D. 2001) (quotation omitted).

Further, Hedlund's PSB complaints about an immature email from Paulson, Meyers's delay in returning phone calls and emails, and Meyers's judgment about how to handle university-issued parking tickets are merely subjective disagreements with his supervisors' decisions. Such gripes are outside the scope of the whistleblower statute, which was not designed to protect "chronic complainer[s]." *Carter*, 2015 WL 161833, at *9. Accordingly, Hedlund's subjective criticisms of Meyers and Paulson are not

whistleblowing and cannot constitute a section 70A.28 claim.

2. Hedlund's complaints were not made to a public official.

The subjective and inactionable nature of Hedlund's complaints aside, Hedlund's claim suffers from another infirmity. Except for the complaint against himself, Hedlund did not make protected complaints to a "public official" or "law enforcement agency" as those terms are defined in section 70A.28. Hedlund acknowledges he lodged complaints with Andrea Macy, a DAS employee. Ms. Macy's position as a DAS personnel officer is not created by the constitution or legislature, no portion of the State's sovereign powers are delegated to her, her duties are not defined by legislative act, and her duties cannot be performed without control from superiors. *See Hegeman v. Kelch*, 666 N.W.2d 531, 535–37 (Iowa 2003). Because Ms. Macy does not meet a single requirement to be considered a public official, and there is no allegation she is a law enforcement official, Hedlund's complaints made to Ms. Macy of DAS simply do not fall within the protections of chapter 70A.

3. Hedlund's complaint against himself is not actionable under chapter 70.

On April 29, 2013, Hedlund sent an email asking Commissioner London to "[p]lease accept this as a complaint against myself: SAC Larry

Hedlund." (Hedlund Depo. Ex. 16, Defs' S.J. App. p. 151; App. 437). He also emailed the trooper who declined to pull over the speeding vehicle stating the trooper "did nothing wrong," and that Hedlund took "full responsibility for the outcome." (Hedlund Depo. Ex. 14, Defs' S.J. App. p. 150; App. 435). Hedlund therefore filed a complaint solely against himself. However, in a last-ditch effort to state a claim for whistleblowing, Hedlund now attempts to revise the history that he himself memorialized.

Common sense dictates that an employee engaging in misconduct who reports her own wrongdoing is not automatically granted immunity from punishment and a cause of action against her employer if she is subsequently disciplined. Conferring immunity against repercussion for misconduct on ostensibly all self-reporting employees would impermissibly turn the whistleblower statute's shield into a sword.

Our Court of Appeals has noted the Eighth Circuit's acknowledgement that whistleblower protections do "not protect an employee who 'blew the whistle on his own misconduct in an effort to acquire the WPA's protection.'" *Hackman v. New Hampton Mun. Light Plant*, No. 14-1544, 2015 WL 5965197, at *4 (Iowa Ct. App. Oct. 14, 2015) (citing *Watson v. Dep't of Justice*, 64 F.3d 1524, 1527 n.3 (8th Cir. 1995)

(finding an employee "is not protected from discharge for his own hypothetical wrongdoing or disclosure of the same.")).

Here, Hedlund unequivocally acknowledges that the complaint he filed with DPS relating to the vehicle that was transporting the Governor was a complaint against himself. Indeed, because the whistleblowing statute requires a modicum of knowledge underlying the complaint, and Hedlund had absolutely no knowledge of whether Governor Branstad had any influence over the speed of the car, or if he was even awake in the vehicle, Hedlund's complaint could *only* be against himself. Hedlund had an obligation to enforce highway traffic laws and, through the complaint against himself, sought to "take full responsibility for the incident being initiated." Hedlund's attempt to dress the complaint against himself in whistleblower's clothes falls far short of raising a disputed fact issue capable of defeating summary judgment.

C. Section 70A.28 Does Not Protect Actions Taken in the Course of Normal Job Duties.

As yet another additional ground for affirming summary judgment, Hedlund's whistleblower claim fails because there was no protected activity under the whistleblowing statute—all of Hedlund's actions were taken in the course of his normal job duties.

Iowa's whistleblower statute is virtually identical to the federal Whistleblower Protection Act of 1989 ("WPA"), *see* 5 U.S.C. § 2302(b)(8) (1994). As a result, federal decisions interpreting the WPA provide persuasive guidance to this court in interpreting Iowa's whistleblower statute. See *Carter*, 2015 WL 161833, at *9 n.3 (stating prior federal case law may be persuasive when interpreting Iowa's whistleblower statute).

Federal courts interpreting the WPA have held that disclosures of violations of law that occur in the normal course of an employee's job duties (or were reported to the wrongdoers themselves) were not protected "disclosures" under the federal whistleblower statute. *See Willis v. Dep't of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (holding plaintiff could not seek protection of whistleblower statute for "disclosures" of noncompliance of farms, since plaintiff's job duties included reporting noncompliance), *superseded in part by statute*, 5 U.S.C. § 2302(f)(2) (2012). In *Huffman v. Office of Personnel Management*, the court distinguished between three different situations: (1) where an employee has, as part of his normal duties, been assigned the task of investigating and reporting wrongdoing by government employees and, in fact, reports that wrongdoing through normal channels; (2) where an employee with such assigned investigatory

responsibilities reports the wrongdoing outside of normal channels; and (3) where the employee is obligated to report the wrongdoing, but such a report is not part of the employee's normal duties or the employee has not been assigned those duties. 263 F.3d 1341, 1352–54 (Fed. Cir. 2001), *superseded in part by statute*, 5 U.S.C. § 2302(f)(2). The *Huffman* court held that the first scenario is not protected by the WPA, but the latter two are. *Id.*

In 2012, Congress amended the statute, *see* 5 U.S.C. § 2302(f)(2), and courts interpreted the amendment to overrule portions of *Willis* and *Huffman*. However, Iowa's whistleblower statute has not been similarly amended, and pre-amendment federal decisions therefore remain persuasive authority for Iowa courts. *See Manahl v. State*, No. LACL131497, 2015 WL 13122452, at *5 (Iowa Dist. Ct. June 8, 2015) ("Iowa has included no such amendment to its Whistleblower Protection Statute. . . . Therefore, this court looks to the pre-amendment interpretations of the Federal Whistleblower Act as persuasive in addressing the motion before the court.").[3]

[3]The Court of Appeals recently affirmed the dismissal of the whistleblower claim. *See Manahl v. State*, No. 16-2154, 2017 WL 4317318, at *9 (Iowa Ct. App. Sept. 27, 2017).

Here, Hedlund testified that he believes his complaints were part of his job duties. In fact, he testified he was duty bound to file the complaints, including the one against himself, as a part of his duties as a law enforcement officer. Summary judgment should be affirmed on this issue because Hedlund's alleged disclosures are not protected activity under the Iowa whistleblower statute.

D. Section 70A.28 Only Contemplates Equitable Relief, and Hedlund's Jury Demand and Requests for Non-Equitable Relief Should Be Stricken.

Should the court decide to reverse the district court's grant of summary judgment on Hedlund's whistleblower claim, his demand for jury trial and requests for non-equitable relief must be stricken.

1. Hedlund has no right to a jury trial under section 70A.28(5).

"[T]he right to a jury trial preserved by the Iowa Constitution, article I, section 9, is the right that existed at common law." *Iowa Nat'l Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724, 728 (Iowa 1981). The Iowa Supreme Court has "recognized that there is no right to a jury trial generally in cases brought in equity." *Weltzin v. Nail*, 618 N.W.2d 293, 298 (Iowa 2000). Clearly, the present whistleblowing action did not exist at common law, as the court has observed a separate common law theory for retaliatory

discharge. *See Walsh*, 913 N.W.2d at 526. The issue, then, is whether a whistleblower action under section 70A.28(5) is equitable in nature.

When determining whether an action is legal or equitable in nature, the court considers "the pleadings, the relief sought, and the nature of the case." *Carstens v. Cent. Nat'l Bank & Trust Co.*, 461 N.W.2d 331, 333 (Iowa 1990). Section 70A.28(5) grants "affirmative relief, including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including fees and costs." Iowa Code § 70A.28(5)(*a*). Significantly, the legislature declined to include "actual damages," despite authorizing such damages for claims under the Iowa Civil Rights Act (ICRA). *See id.* § 216.15(*a*)(8). The court has interpreted "actual damages" under the ICRA to generate a right to a jury trial. *McElroy v. State*, 703 N.W.2d 385, 394 (Iowa 2005). If the legislature had intended to allow actual damages in a section 70.28(5) action, it would have so stated. Moreover, the Iowa Supreme Court has previously described section 70A.28(5)'s remedies as including "reinstatement of the discharged employee or other *equitable* relief, as well as attorney fees and costs." *Worthington v. Kenkel*, 864 N.W.2d 228, 230–31 (Iowa 2004) (emphasis added).

Recently, an Iowa district court concluded that section 70A.28(5) does not require a right to a jury trial. *See Walsh v. Wahlert*, Polk Cty. Dist. Ct. No. LACL130006 (Order, Aug. 31, 2018). The court noted, "The equitable nature of the remedy available under § 70A.28(5) is also borne out in the choice of factfinder designated by the legislature." *Id.* The court emphasized the legislature selected the "court" to determine the relief, and such a designation is "consistent with the well-settled rule that cases brought in equity are tried to the court without a jury." *Id.* Judge Huppert concluded that allowing a jury trial "with this legislative gloss would render this phrase superfluous." *Id.*

As well, the Iowa Court of Appeals has interpreted an analogous provision, section 70A.29, to be equitable in nature. *See Zwanziger v. O'Brien*, No. 11-1548, 2012 WL 4513836, at *1 (Iowa Ct. App. Oct. 3, 2012) (unpublished). Given these well-reasoned decisions and the legislature's deliberate omission of "actual damages," an action under 70A.28(5) is best understood as equitable in nature and Hedlund's jury demand must be stricken.

2. Hedlund is not entitled to non-equitable relief.

Relatedly, should summary judgment be reversed for Hedlund's

whistleblower claim, his requests for non-equitable relief must be stricken. The remedial language of section 70A.28(5)(*a*) does not authorize non-equitable relief, and as discussed above, the legislature was aware and capable of providing litigants with actual damages. Indeed, when section 70A.28's civil remedies were added in 1989, the ICRA already provided for "actual damages," and the court had already interpreted that remedy to include emotional distress. *See Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 383 (Iowa 1986) (explaining "emotional distress is generally a compensable injury, and the language of the statute allows actual damages which are synonymous with compensatory damages"). If the legislature had wanted successful litigants to receive compensatory damages, it would have so provided.[4] The

[4]A survey of similar whistleblowing statutes in other states reveals that when other state legislatures intend to authorize non-equitable relief, they do so expressly and specifically. *See, e.g.*, Ala. Code § 36-26A-5 (authorizing damages); Ariz. Rev. Stat. § 38-532D (authorizing "general and specific damages"); Cal. Gov't Code § 12653 (authorizing "all relief necessary to make that employee . . . whole" including compensation for special damages and punitive damages); Colo. Rev. Stat. § 24-50.5-105 (authorizing "damages . . . and . . . such other relief as [the court] deems appropriate); Del. Code tit. 19, § 1704 (authorizing "actual damages"); Ga. Code § 45-1-4(e)(2) (authorizing "other compensatory damages allowable at law"); Haw. Rev. Stat. § 378-63 (authorizing "actual damages"); Idaho Code § 6-2106 (authorizing "other remuneration"); 740 Ill. Comp. Stat. 174/30 (authorizing damages); La. Rev. Stat. § 23:967 (authorizing damages); Mich.

legislature's declination must be afforded weight.

Beyond the legislative context of section 70A.28(5)(*a*), the plain language of the provision instructs only equitable remedies are available. The comma placements in the provision dictate that "other equitable relief" modifies the phrase "affirmative relief." Reinstatement is an equitable remedy, and the provision authorizes the *court* to determine whether *other* equitable remedies are also appropriate. Moreover, the use of the word "other" necessarily implies that the "affirmative relief" previously authorized is equitable relief. If "affirmative relief" contemplated non-equitable relief, the word "other" would serve no purpose in the statute. "In interpreting a statute, each term is to be given effect, and we 'will not read a statute so that any provision will be rendered superfluous.' " *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 520 (Iowa 2012) (quoting *Thoms v. Iowa*

Comp. Laws § 15.364 (authorizing "actual damages"); Minn. Stat. § 181.935 (authorizing "any and all damages recoverable at law"); Miss. Code § 25-9-175 (authorizing damages); Mo. Rev. Stat. § 105.055(7)(4) (authorizing "actual damages"); N.J. Stat. § 34:19-5 (authorizing "[a]ll remedies available in common law tort actions"); N.C. Gen. Stat. § 126-86 (authorizing damages); 28 R.I. Gen. Laws § 28-50-4(a) (authorizing "actual damages"); S.C. Code § 8-27-30(A) (authorizing "actual damages not to exceed fifteen thousand dollars" in a nonjury civil action); Tenn. Code § 50-1-304(c)(1) (authorizing "any other damages"); Texas Gov't Code § 554.003(a) (authorizing "actual damages"); Utah Code § 67-21-4(1)(a) (authorizing damages); W. Va. Code § 6C-1-4(a) (authorizing damages).

Pub. Employees' Ret. Sys., 715 N.W.2d 7, 15 (Iowa 2006)). Because the legislature did not provide for actual damages despite doing so in other provisions, and the plain language of the statute reveals that "affirmative relief" is equitable relief, Hedlund's requests for non-equitable relief must be stricken.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON HEDLUND'S AGE DISCRIMINATION CLAIM.

Standard of Review: Grants of summary judgment are reviewed for correction of errors at law. *Walsh v. Wahlert*, 913 N.W.2d 517, 521 (Iowa 2018).

Preservation of Error: For the same reasons discussed above, the State does not contest that error is preserved and will discuss each of the independent grounds that require affirming the grant of summary judgment.

Argument:

A. Hedlund Was Not Terminated.

The District Court granted the Defendants' motion for summary judgment on Hedlund's age discrimination claim, determining Hedlund had not presented evidence from which a reasonable jury could infer age discrimination. (Ruling p. 38; App. 191). The District Court also found that

while Hedlund had a right to appeal (in fact did appeal) his termination, that a jury could still find that he had been terminated. (Ruling p. 31; App. 184). However, this determination is contrary to section 80.15 and the undisputed facts of this case.

It is undisputed that on July 17, 2013, Hedlund received notice of the Department's intent to terminate him. Pursuant to that notice and Iowa Code section 80.15, Hedlund appealed that decision. Section 80.15 requires that the officer receive full salary and benefits until the culmination of the EAB appeal. It is further undisputed that Hedlund abandoned his appeal under section 80.15 and, on January 29, 2014, prior to any termination taking affect, retired under chapter 97A, the Peace Officers' Retirement System.

It is further undisputed that Hedlund received all pay and benefits he was entitled to up until the time he chose to retire. This Court acknowledged Hedlund retired from Employment with the DPS in *Hedlund v. State*, 875 N.W.2d 720, 723 (Iowa 2016). Hedlund has not claimed of forced retirement or constructive discharge. (ICRC Complaint p. 1, Defs' S.J. App. p. 5; App. 6). To the extent that Hedlund's claim relies upon termination as the adverse employment action, Defendants are entitled to summary judgment.

B. Hedlund Failed to Exhaust His Administrative Remedies for Forced Retirement, Disparate Impact, or Harassment.

In his Third Amended Petition Hedlund claims he was subject to age discrimination. (Third Am. Petition, Count VI; App. 27–28). To pursue his discrimination claims Hedlund must first exhaust his administrative remedies. *McElroy*, 703 N.W.2d at 390–91 (holding plaintiff failed to exhaust administrative remedies on retaliation claim when she failed to check box and narrative did not mention retaliation). To exhaust administrative remedies under the ICRA, a party must first file a timely administrative complaint with the Commission and then obtain a right-to-sue letter. Iowa Code § 216.16. Hedlund filed his civil rights complaint on January 27, 2014. (ICRC Complaint p. 1, Defs' S.J. App. p. 5; App. 6). He claimed the adverse employment action as "disciplined/suspended" and "terminated." (*Id.*). Exhaustion of administrative remedies requires "a claimant to give notice of *all* claims in the initial administrative complaint." *McElroy*, 703 N.W.2d at 390 (emphasis added).

Importantly, Hedlund only filed a civil rights claim against the DPS and Meyers, his direct supervisor. (ICRC Complaint pp. 2-3, Defs' S.J. App. pp. 6-7; App. 7–8). He did not file a claim against Paulson or London claiming they discriminated against him. (*Id.*). The undisputed evidence

shows Paulson made the decision to serve Hedlund with a notice of termination and London approved that decision. (Paulson Depo. p. 329:15-20, Defs' S.J. App. p. 127; App. 394). Meyers was not involved in any way with the decision to terminate Hedlund but was asked for his input. (Meyers Depo. pp. 325:10-326:24, Defs' S.J. App. p. 113; App. 349). To the extent that any of Hedlund's claims rely upon actions of Paulson or London, those claims have also not been preserved.

As discussed above, Hedlund retired. Hedlund did not check the "forced to quit/retire" or "harassment" boxes as the basis for his civil rights complaint. (ICRC Complaint p. 1, Defs' S.J. App. p.1; App. 6). The narrative in his ICRA complaint mentions no fact that could be construed as asserting a forced retirement claim or a harassment claim. (ICRC Complaint p. 5, Defs' S.J. App. p. 9; App. 10). And, he never amended his complaint to include these additional allegations. Hedlund failed to exhaust his administrative remedies on any issue alleging forced retirement or harassment. Summary judgment is warranted on this basis alone.

C. *McDonnell Douglas* is a Valid and Longstanding Analytical Tool for Courts to Employ on Summary Judgment.

Hedlund conducts a pained analysis of the history of the *McDonnell Douglas* burden-shifting analysis and argues that this Court should not

"adopt" it as the standard. His argument, however, completely ignores that: (1) Hedlund's age discrimination claim did not fail because the District Court used the *McDonnell Douglas* analytical framework; (2) it is the framework adopted and applied by Iowa courts for decades; (3) there is no case that supports his claim the Iowa Supreme Court has abandoned it. It is also noteworthy that Hedlund's "authority" in support of abandoning the *McDonnell Douglas* framework consists of a few older law review articles, inapposite cases and cases where the *McDonnell Douglas* framework was utilized by the court.

It is well established in Iowa that the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework applies at summary judgment, and this Court should not disregard and abandon the established standard. *See McQuistion v. City of Clinton*, 872 N.W.2d 817, 828 (Iowa 2015) ("We have also adopted the framework when indirect evidence is used to infer discrimination…"); *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 564 (Iowa 2015) (recognizing that courts analyze unlawful discrimination claims under the *McDonnell Douglas* framework to determine whether adverse action was "because of" membership in a protected class and that, even under the framework, "plaintiff still ha[s] the ultimate burden of proving

unlawful discrimination was 'the real reason'"); *Jones v. Univ. of Iowa,* 836 N.W.2d 127, 146–48 (Iowa 2013) (affirming grant of summary judgment on an employment discrimination claim); *Casey's General Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519–20 (Iowa 2003) (applying the *McDonnell Douglas* burden shifting analysis to a disability discrimination claim under chapter 216).

In *McQuistion*, the court explained, "Our legislature has impliedly indicated approval of the use of the *McDonnell Douglas* test to address employment policies that potentially discriminate against pregnant employees by mirroring the language used in the analytical approach applied in that case." 872 N.W.2d at 828. Indeed, the court found "[t]he burden-shifting analysis based on "prima facie" discrimination was entrenched in the law by the time the statute was enacted," and cited several decisions applying the *McDonnell Douglas* framework to race and religious discrimination claims under the ICRA. *Id.* In *Jones*, the court found it unnecessary to resolve whether the plaintiff had made out a prima facie case of discrimination, because defendant Mason produced a legitimate non-discriminatory reason for the plaintiff's termination. 836 N.W.2d at 148.

Hedlund's argument, in essence, is that juries are not given a *McDonnell Douglas* instruction, so courts should also be precluded from using the framework in summary judgment analysis. Such an assertion ignores the purpose of this analytical framework, and the framework for analyzing summary judgments in general, which is for the court to determine if sufficient evidence of intentional discrimination exists to allow the case to go to a jury. The test, in a discrimination case analyzed under *McDonnell Douglas,* is "like any other ultimate question of fact: either the evidence is sufficient to support a finding that the fact has been proven, or it is not." *Rothmeier v. Inv. Advisors, Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996).

In this case, the District Court found Hedlund did not present evidence from which a reasonable jury could infer that age "must have actually played a role in [the employer's decision making] process and had a determinative influence on the outcome." (Ruling p. 38; App. 191). It is Hedlund's lack of any evidence linking any adverse action to age discrimination that caused the dismissal of that claim – not the *McDonnell Douglas* analytical framework. In the absence of contrary binding authority, the cases cited herein and the facts in this particular case illustrate the viability of *McDonnell Douglas* as a framework for a court to use on summary

judgment.

D. Summary Judgment is Appropriate Due to the Complete Lack of Evidence that Age was Involved in Any Decision Relating to Hedlund.

Defendants have a legitimate, nondiscriminatory reason for the adverse employment action. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996). "Although the defendant need not establish this by a preponderance of the evidence, he must clearly set forth some legitimate nondiscriminatory basis for his action." *Id.* The employer's requirement "is a burden of production, not persuasion, and no credibility assessment is involved." *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005).

Hedlund cannot meet his burden to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Hitt v. Harsco Corp.*, 356 F.3d 920, 924 (8th Cir. 2004).

Defendants had legitimate nondiscriminatory reasons for disciplining Hedlund. Hedlund communicated "negative and disrespectful messages about the direction of the Division of Criminal Investigation and members of DPS/DCI leadership team with [his] subordinate employees." (Hedlund Depo. Exs. 8–11, 18; Defs' S.J. App. pp. 142–48, 180; App. 427–33). And,

Hedlund drove a state vehicle to Cedar Rapids for non-work related purposes on April 25, 2013, and was then deceptive about his work status when questioned on the issue. (Paulson Depo. Ex. 70, Defs' S.J. App. p. 195; Hedlund Depo. pp. 98:19-100:4, Defs' S.J. App. p. 68; Hedlund Depo. Ex. 18, Defs' S.J. App. pp. 180-182; App. 563, 249, 466–68).

Simply put, the notice of termination was imposed after Hedlund failed to satisfactorily perform the functions of his job, which is a non-discriminatory, legitimate reason for the implementation of the notice of termination. *See Naylor v. Georgia-Pac. Corp.*, 875 F. Supp. 564, 576 (N.D. Iowa 1995) (holding "a violation of a company rule can constitute a legitimate, non-discriminatory reason for decision to terminate an employee"); *see also Jones*, 836 N.W.2d at 148 (finding it was unnecessary to examine whether a plaintiff had established a prima facie case of discrimination where employer offers a legitimate, non-discriminatory reason for employment action, shifting burden to plaintiff to show proffered reasons were pretextual).

To survive summary judgment, an employee must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

Hitt, 356 F.3d at 924. And, merely discrediting the defendants' proffered reason for the adverse employment action is not enough. *Id.* at 898. Hedlund must "prove that the proffered reason was a pretext for age discrimination." *Id.* "[T]he plaintiff's age must have 'actually played a role in [the employer's decision making] process and had a determinative influence on the outcome.'" *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 141, 120 S. Ct. 2097, 2105 (2000) (quoting *Hazen Paper Co. v. Biggens*, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993)). Hedlund must show that Defendants' reasons were false and that age discrimination was the real reason for his notice of termination. *See Tusing v. Des Moines Indep. Cmty. Sch. Dist.*, 639 F.3d 507, 516 (8th Cir. 2011).

Plaintiffs may show pretext by showing the proffered reason has no basis in fact. *Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 727 (8th Cir. 2001). Hedlund has offered no evidence showing that the State's proffered reasons are false. Hedlund clearly sent the emails to his subordinates that discredited and disparaged his supervisor and the director of DCI. (Hedlund Depo. Exs. 6, 8, 9, 10, Defs' S.J. App. pp. 134-139, 142-145; App. 419–24, 427–32). Hedlund requested and received approval to take off April 26, 2013 to attend his niece's art show in Cedar Rapids. (Hedlund Depo. pp.

98:19—99:8, Defs' S.J. App. p. 68; App. 249). Hedlund drove his state vehicle to Cedar Rapids on April 25, 2013. (Hedlund Depo. pp. 99:23—100:4, Hedlund Depo. Ex. 18 p.2, Defs' S.J. App. pp. 68, 180; App. 249, 467). He paid for the hotel himself – it was not at the State's expense. (Hedlund Depo. p. 100:5-10, Defs' S. J. App. p. 68; App. 249). On the morning of April 26, 2013, Hedlund reached out to a retired officer to discuss cold cases. (Hedlund Depo. pp. 106:20-24, 105:2-9, Defs' S.J. App. p. 70; App. 251). The meeting was not set up until after Hedlund arrived in Cedar Rapids. (Hedlund Depo. p. 104:20-24; Defs' S.J. App. p. 69; App. 250). Hedlund knew he had not yet been assigned the cold case unit at that time. (Hedlund Depo. pp. 91:20—92:1, Defs' S.J. App. p. 66; App. 247). The nondiscriminatory reasons for the notice of termination undisputedly have a basis in fact.

Hedlund first attempts to rely on two remarks made by Meyers, his direct supervisor, to carry his burden that the proffered reasons for action taken against him were pretextual. Hedlund asserts that on February 15, 2013, Meyers made reference to Hedlund being in the "twilight of his career." (Hedlund Depo. pp. 117:22—118:7, Defs' S.J. App. p. 73; App. 254). Hedlund explained, "My recollection is [Meyers] made a comment

along the lines of he didn't want to have issues with me because I was in the twilight of my career." (Hedlund Depo. p. 118:8-13, Defs' S.J. App. p. 73; App. 254). Second, Hedlund claims Meyers asked him when he was planning to retire during a strategic planning meeting in February 2013. (*Id.*). Neither comment evidences discriminatory animus. Further, Hedlund has presented no evidence linking the two statements and the notice of termination.

Hedlund argues this Court should treat Meyers' comment, made many months before Paulson decided to issue Hedlund a notice of termination, that Hedlund was in the "twilight of his career" as evidence of discrimination. However, Hedlund has not and cannot cite a single case supporting such a huge leap in evidentiary inferences. "'[S]tray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process' do not constitute direct evidence of discrimination." *Aulick v. Skybridge Americas, Inc.*, 860 F.3d 613, 620 (8th Cir. 2017) (*quoting Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 933 (8th Cir. 2006)). And, "[d]irect evidence does not include statements by decisionmakers that are facially and contextually neutral." *Id.*

The cases are clear, stray remarks are not evidence of age discrimination. And, the comment Hedlund relies upon is, at most, a stray remark. The comment has no negative connotation. Hedlund admitted that Meyers intended to convey that he did not want to have any issues with Hedlund because he "was in the twilight of [his] career." (Hedlund Depo. p. 118:12; App. 254). Recognizing that an individual is working toward the end of a career is not in any way negative or discriminatory, it is just a fact, especially in this context, as officers are forced to retire at 65. *See* Iowa Code § 80.36. The statement evidences no hostility or age-related animus. Further, while Meyers counseled Hedlund on behavior expectations, the conversation was completely unrelated to Hedlund's misconduct that was discovered months later. "We have never regarded a non-derogatory reference such as 'kids' made outside the decision-making process at issue, to constitute substantial evidence of age-related animus." *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 427 (8th Cir. 1999).

Further, comparing cases Hedlund cites to Meyers' comments shows Hedlund's claims fall far short of any reasonable analytical threshold. *See Greenberg v. Union Camp Corp.*, 48 F.3d 22, 28 (1st Cir. 1995) (finding single inquiry insufficient and employers may inquire into retirement plans);

Cox v. Dubuque Bank & Trust Co., 163 F.3d 492, 497–98 (8th Cir. 1998) (finding employer's inquiries about retirement not evidence of age discrimination); *Leonard v. Twin Towers*, 6 Fed. Apx. 223, 229 (6th Cir. 2001) (finding isolated and ambiguous statements too abstract, irrelevant and prejudicial to support finding of age discrimination).

Hedlund next attempts to create an inference of discrimination by pointing to the treatment of other employees. First, Hedlund alleges two older employees, Thiele and Fiedler, were overlooked to fil his position after retirement. This unsupported speculation is insufficient. Hedlund admits that the employees did not believe age had anything to do with the alleged low promotability scores. (Pl's MSJ Resistance Brief, p. 122). Neither Thiele nor Fiedler believed their age had anything to do with them not being promoted. (Thiele Depo. p. 73, Fiedler Depo. p. 60; App. 414). Thiele did not even apply for the SAC position. (Thiele Depo, p. 68:10-12; App. 413).

Next, Hedlund points to a younger person filling the SAC position. First, while the person who replaced Hedlund after Hedlund's retirement was younger – he was not young. At the time Michael Krapfl was promoted, he was approximately 45 years old with 25 years of law enforcement experience. (Krapfl Depo. pp. 4, 6; App. 315). Finally,

> Evidence that a younger person replaced the plaintiff or was treated more leniently for similar misconduct, while sufficient at the *prima facie* stage, is insufficient to establish pretext, because it has insufficient probative value to persuade a reasonable jury that the plaintiff was discriminated against because of his or her age and not treated adversely for a legitimate reason.

Andrew v. Hamilton Cty. Pub. Hosp., No. 17-3053, 2018 WL 4169094, *10 (N.D. Iowa Aug. 30 2018).

Hedlund also argues, contrary to the undisputed facts, that London "was systematically removing" older employees and names, as examples, Patrick Hoye, Tim Leinen and Kevin Frampton. Each of those persons had reached full retirement age under the Peace Officer Retirement System and retired. In fact, upon retirement, Hoye simply moved across the hall and took up his duties as the head of the Governor's Traffic Safety Bureau, where he remains to this day. (Hoye Depo. p. 4; App. 304). Hedlund has failed to produce any evidence that age motivated DPS's actions.

In a recent case involving a claim of age discrimination under the federal ADEA and the ICRA, Judge Bennett of the United States District Court for the Northern District of Iowa succinctly summarized the analytical process leading to, as here, the dismissal of an age discrimination claim on summary judgment under the ICRA:

As the Eighth Circuit Court of Appeals explained, in a decision involving claims of age discrimination in violation of both the ADEA and the ICRA,

> Both statutes provide a right of action for an employee who is terminated "because of" his age. 29 U.S.C. § 623(a)(1); Iowa Code § 216.6(1)(a). The statutes require slightly different showings of causation, *compare Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178, 129 S. Ct. 2343 (2009) (ADEA plaintiff must show that age discrimination was a "but for" cause of his termination) *with DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13 (Iowa 2009) (ICRA plaintiff need only show that age discrimination was a "motivating factor").

Ridout v. JBS USA, L.L.C., 716 F.3d 1079, 1083 (8th Cir. 2013). Although the causation standards differ, "under either the ADEA or ICRA, courts apply the familiar *McDonnell Douglas* test." *Id.* Thus, under either statute, at the final stage of the burden-shifting analysis, which is at issue here, if the employer meets its burden to articulate a legitimate nondiscriminatory reason for its actions, "the presumption of discrimination dissolves and the burden returns to the plaintiff to demonstrate that the proffered reason is a mere pretext for age discrimination." *Id.*

When deciding whether an age discriminatory animus was the real reason for an employer's decision, "courts may not second-guess employers' business decisions and employers are free to make employment decisions so long as they do not discriminate unlawfully." *Robinson v. American Red Cross*, 753 F.3d 749, 754 (8th Cir. 2014). Thus, "to defeat summary judgment, the employee must present affirmative evidence, not simply contend that a jury might disbelieve the employer's evidence." *Haggenmiller v. ABM Parking Servs., Inc.*, 837 F.3d 879, 886 (8th Cir. 2016); *Wagner v. Gallup, Inc.*, 788 F.3d 877, 888 (8th Cir. 2015) ("A party's unsupported self-serving allegation that her employer's decision was based on [age discrimination] does

> not establish a genuine issue of material fact."). To meet his or her evidentiary burden, "a plaintiff may show that the employer's explanation is unworthy of credence because it has no basis in fact or may show pretext by persuading the court that a prohibited reason more likely motivated the employer." *Aulick v. Skybridge Americas, Inc.*, 860 F.3d 613, 621 (8th Cir. 2017).
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> As the Eighth Circuit Court of Appeals has explained, where, as here, an employee was terminated for specific misconduct, "the critical inquiry is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge." *Blackwell v. Alliant Techsystems, Inc.*, 822 F.3d 431, 436 (8th Cir. 2016). Where the employer has corroboration for a claim of misconduct, and apparently believes in good faith that the employee engaged in the misconduct, "there is no genuine factual dispute as to 'whether the employer acted based on an intent to discriminate rather than on a good-faith belief that the employee committed misconduct justifying termination." *Id.* . . . .
>
> Similarly, … "employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination," but "this is true only if these factors, although usually correlated, are wholly independent from age." *Hilde v. City of Eveleth*, 777 F.3d 998, 1006 (8th Cir. 2015). On the other hand, "pretext can also be demonstrated by showing that . . . the employer deviated from policies." *Sieden v. Chipotle Mexican Grill, Inc.*, 846 F.3d 1013, 1017 (8th Cir. 2017). There must, however, be evidence to support an allegation of failure to follow ordinary disciplinary procedures, not merely conclusory arguments, to generate a genuine issue of material fact on pretext.

Andrew, 2018 WL 4169094 at *9–10 (cleaned up).

To be fair to all involved in discrimination claims, courts must continue to recognize, as with the analogous federal statutes, that antidiscrimination "statutes do not prohibit employment decisions based upon poor job performance, erroneous evaluations, personal conflicts between employees, or even unsound business practices." *Haigh v. Gelita USA, Inc.*, 632 F.3d 464, 471 (8th Cir. 2011) (quoting *Hill*, 123 F.3d at 1120). Hedlund cannot meet his burden to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination." *Hitt*, 356 F.3d at 924. Accordingly, the district court's summary judgment ruling on Hedlund's age discrimination claim must be affirmed.

III. THE DISTRICT COURT DID NOT ERR IN DISMISSING HEDLUND'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM.

Standard of Review: Grants of summary judgment are reviewed for correction of errors at law. *Walsh v. Wahlert*, 913 N.W.2d 517, 521 (Iowa 2018).

Preservation of Error: For the reasons discussed above, the State does not contest that error is preserved and will discuss each of the independent grounds that require affirming the grant of summary judgment.

Argument:

A. Hedlund Cannot Establish the Elements of His Intentional Infliction of Emotional Distress Claim.

The district court correctly concluded Hedlund's intentional infliction of emotional distress ("IIED") claim fails because the State's actions were not outrageous as a matter of law. Hedlund's claims further fail because he cannot show that he suffered severe or extreme emotional distress, or that the State's conduct intentionally or recklessly caused his emotional distress.

1. The District Court correctly determined that the State's conduct was not outrageous as a matter of law.

Hedlund cannot maintain his IIED claim. Under Iowa law, a plaintiff bringing an IIED claim must establish four elements: (1) outrageous conduct by the defendants; (2) the defendants' intentionally causing, or recklessly disregard the probability of causing, the emotional distress; (3) plaintiff suffering severe or extreme emotional distress; and (4) the defendants' outrageous conduct was the actual and proximate cause of the emotional distress. *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (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). "For conduct to be outrageous, it 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.'" *Id.* (quoting Restatement (Second) of Torts § 46, cmt. D (1965)). Moreover, "[t]he outrageousness element requires *substantial evidence* of extreme conduct." *Vinson*, 360 N.W.2d at 118 (emphasis added). "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Id.* (quoting Restatement (Second) of Torts § 46 cmt. d).

The Iowa Supreme Court has explained that the "outrageous conduct" element "is not easily met, especially in employment cases." *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996), abrogated on other grounds, *Godfrey v. State*, 898 N.W.2d 844, 844 (Iowa 2017); *see also Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 636 (Iowa 1990) ("When evaluating claims of outrageous conduct arising out of employer-employee relationships, we have required a reasonable level of tolerance. Every unkind and inconsiderate act cannot be compensable.").

Here, even viewing the evidence in the light most favorable to Hedlund, the alleged conduct was not outrageous as a matter of law. Even if Defendants Paulson, Meyers and/or London (1) suspended Hedlund under false pretenses by "knowingly and intentionally" misrepresenting his conduct and making "false and exaggerated" accusations concerning his mental fitness and stability, (2) chose to take Hedlund out of service by sending Defendant Meyers, AD Dave Jobes and Trooper Wes Niles to his "home to retrieve his handgun, shotgun, badge, car and other belongings,"[5] (3) sent Hedlund for a psychological evaluation even though they knew he was mentally fit, ignored the doctor's conclusion that he was fit for duty and refused to allow him to return to work, and (4) repeated "known falsehoods" to Defendant Branstad concerning Hedlund's mental status, their unsubstantiated personal fears and the supposed danger to "public safety" posed by his continued employment "knowing that [Branstad] would publish them to the news media" is not *substantial evidence* of extreme conduct. *See generally Vinson*, 360 N.W.2d at 119 (finding insufficient evidence of

[5] Paradoxically, Hedlund argues that taking him out of service at his home was outrageous because it placed his life and the lives of Meyers, Jobes and Niles in danger, even though he claims repeatedly that statements that he was a danger to himself or others were false.

outrageousness where employer engaged in "a deliberate campaign to badger and harass plaintiff" for questioning internal policies, and taking many adverse employment actions in bad faith); *Cutler*, 473 N.W.2d at 181 (finding insufficient evidence where employer intentionally delayed decision permitting plaintiff to return to work, ultimately resulting in plaintiff's suicide); *Engstrom v. State*, 461 N.W.2d 309, 320 (Iowa 1990) (negligent failure to search for plaintiffs' adopted daughter's natural father before placing her in plaintiffs' home, and telling adoptive parents the father was dead without verifying his death, were not outrageous); *see also Chester v. Northwest Iowa Youth Emergency Servs. Ctr.*, 869 F. Supp. 700, 710 (N.D. Iowa 1994) ("In Iowa, the law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it." (internal citation and quotation omitted)).

The cases cited by Hedlund are inapposite. In *Smith v. Iowa State Univ.*, the court found defendant's actions constituted outrageous conduct—though "the issue [was] a close one"—primarily because the plaintiff's supervisor "engaged in unremitting psychological warfare against [the plaintiff] over a substantial period of time [and] tried to have him treated as a scary and mentally unstable outcast … all [ ] to cover up what basically

amounted to her theft from [Iowa State University]." 851 N.W.2d 1, 29 (Iowa 2014). Based on the "special circumstances" present in *Smith*, the court found there was sufficient evidence of outrageous conduct to submit the claim to the jury. *Id.*

In the present case, however, Hedlund's allegations do not amount to *substantial evidence* of outrageous conduct. *See Vinson*, 360 N.W.2d at 118; *Van Baale*, 550 N.W.2d at 156; *Vaughn*, 459 N.W.2d at 636. *Chester*, 869 F. Supp. At 710. The State's conduct was not "outrageous" as a matter of law and this Court should affirm the district court's grant of summary judgment.

2. Hedlund cannot show sufficient evidence of severe or extreme emotional distress to support his IIED claim.

Hedlund, moreover, does not have sufficient evidence of severe emotional distress. Hedlund's emotional distress, feeling humiliated and discredited, mental anguish, and damage to his reputation is insufficient as a matter of law. *See Millington v. Kuba*, 532 N.W.2d 787, 794 (Iowa 1995) (finding headaches, insomnia, loss of appetite and fits of rage insufficient to show required proof of severity); *Poulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981) (finding evidence that plaintiff "was very, very down, feeling super badly, and felt that he lost everything" is insufficient); *see also*

Barreca v. Nickolas, 683 N.W.2d 111, 115 (Iowa 2004) (finding suffering "a great deal of humiliation, embarrassment, stress, and loss of sleep" is insufficient).

Finally, in addition to elements one and three, Hedlund cannot establish the second or fourth elements. Hedlund cannot present any evidence, other than his conjecture, that Defendants intentionally or in reckless disregard caused his alleged emotional distress, and that Defendants' alleged outrageous conduct was the actual and proximate cause of the alleged emotional distress.

Accordingly, because Hedlund cannot satisfy the elements of his claim as a matter of law, this Court should affirm the district court's grant summary judgment on Hedlund's IIED claim.

B. Defendants are Immune from Hedlund's IIED Claim to the Extent it is Premised on Defamation, Misrepresentation, or Deceit.

Absent a waiver of immunity, this Court lacks subject matter jurisdiction to resolve disputes between Plaintiff and the Defendants. The State of Iowa, through the Iowa Tort Claims Act (ITCA), waived sovereign immunity for only certain "claims" as defined in the Act. Iowa Code § 669.2(3). The ITCA, however, specifically lists exceptions to this

sovereign immunity waiver, including claims premised on defamation, misrepresentation, or deceit. *See* Iowa Code § 669.14(4); *see also Jones*, 836 N.W.2d at 142 (holding defamation claims against state and its employees were barred by the ITCA).

Hedlund's IIED claim is brought "against the individual Defendants under and pursuant to the laws of the State of Iowa and not as a claim under the Iowa State Tort Claims Act, Iowa Code chapter 669." (Third Am. Petition ¶ 72; App. 25). Hedlund further alleges the named Defendants were acting in their individual capacities and outside the scope of their office or employment. (Third Am. Petition ¶ 73; App. 25). Without doubt, if the individuals named in this claim were acting within the scope of their employment this cause of action, to the extent any part of the claim is based on alleged defamation, it is subject to summary dismissal. *See* Iowa Code § 669.14(4); *Jones*, 836 N.W.2d at 141–42; *Minor v. State*, 819 N.W.2d 383, 406 (Iowa 2012) (finding state retains immunity if claim is the "functional equivalent" of a claim excepted under section 669.14(4)); *Genetzky v. Iowa State Univ.*, 480 N.W.2d 858, 861 (Iowa 1992) (claim for defamation of character barred).

The individual Defendants were acting within the scope of their

employment at all relevant times to this suit. The allegations asserting defamation relating to the IIED claim are:

1. Govenor Branstad made statements at a press conference that Hedlund claims were defamatory (the same actions complained of in Hedlund's defamation claim). (Third Am. Petition ¶ 78; App. 26);

2. London, DCI Director Paulson and A.D. Meyers conveyed the information to Branstad upon which the alleged defamatory statements are based. (Third Am. Petition ¶ 79; App. 26).

Summary judgment on scope of employment and resultant sovereign immunity is clear. There are undisputed facts that Defendants Branstad, London, Paulson, and Meyers were acting within the scope of their employment. Only the governor can give a gubernatorial press conference. The Commissioner for the DPS, the Director of the Division of Criminal Investigation and an Assistant Director of that division reporting to the Governor would indisputably be acting within the scope of their respective employment duties. In fact, Plaintiff has not even alleged that reporting to the Governor is outside the scope of employment for these persons.

Under the ITCA, an individual is deemed to have been acting within the scope of the employee's office or employment when the employee is "acting in the employee's line of duty as an employee of the state." Iowa Code § 669.2(1). Further, the Iowa Supreme Court has indicated that the

common law analysis for determining scope of employment can be instructive. *Jones*, 836 N.W.2d at 143. In *Godar v. Edwards*, the court explained:

> For an act to be within the scope of employment the conduct complained of must be of the same general nature as that authorized or incidental to the conduct authorized. Thus, an act is deemed to be within the scope of one's employment where such act is necessary to accomplish the purpose of the employment and is intended for such purpose. The question, therefore, is whether the employee's conduct is so unlike that authorized that it is substantially different.

588 N.W.2d 701, 705–06 (Iowa 1999).

As a matter of law this Court must determine that the named individual Defendants were acting within the scope of their respective offices or employment. *See Godfrey*, 847 N.W.2d at 586. Other than baldly asserting that the individual Defendants were acting outside the scope of their employment, Hedlund has not produced any evidence supporting the unusual proposition that a gubernatorial appointee and his subordinates reporting to the Governor is outside their scope of employment.

More significantly, Plaintiff expressly pleads that the individual defendants were at all times acting pursuant to their employment. (Third Am. Petition ¶¶ 4–7; App. 12). More specifically, Hedlund alleges the following specific facts:

> 46. On July 18 Governor Branstad held a press conference where he called Hedlund's termination "fair and just" and necessary for the "morale and safety and the well-being of the department." This statement is false and defamatory per se.
>
> 47. On information and belief, the statement that Hedlund's termination was necessitated for "safety" reasons was from information conveyed directly or indirectly to the Governor from Commissioner London, Director Paulson and AD Meyers.

(Third Am. Petition ¶¶ 46–47; App. 21–21). Based on the undisputed facts, the court must find that each Defendant was acting within the scope of their employment.

The Iowa Supreme Court has approved the use of summary judgment to resolve the issue of scope of employment, where, as here, there are no legitimate disputed issues of material fact. *Godfrey*, 847 N.W.2d at 586. Once the court determines state employees are acting within the scope of their employment, chapter 669 is fully applicable. *Id.*

Accordingly, Defendants are immune from the IIED claim to the extent that it is premised on alleged defamation or misinformation. The Iowa Supreme Court has "made clear that if a claim is the functional equivalent of a section 669.14 exception to the ITCA, the State has not

waived its sovereign immunity." *Smith*, 851 N.W.2d at 20–21. Here, Hedlund claims that Defendants disseminated "false, defamatory statements" about his termination which caused him emotional distress. (Third Am. Petition, pp. 77-80, Defs' S.J. App. p. 25; App. 26).

Hedlund relies on *Smith* to argue his IIED claim, premised on defamation, should not be dismissed. However, reliance on *Smith* is misplaced, as it supports the summary dismissal of his claim. In *Smith*, the court found that if the basis for the IIED claim would not exist but for a claim exempted under section 669.14(4), immunity applies, and the claim should be dismissed. 851 N.W.2d at 21. Further, if the actions that constitute defamation are essential to the claim for IIED, then the claim falls within the "functional equivalent" framework requiring dismissal of that claim. *Id.* at 22.

Here, paragraphs 77, 78 and 80 of the Third Amended Petition are the sole basis for the IIED claims against Branstad. Those paragraphs contain identical allegations to those asserted in Hedlund's defamation claim against Branstad. Additionally, allegations, in paragraph 79 of the Third Amended Petition directly relate to allegations that London, Paulson and Meyers provided the information to Branstad that Plaintiff claims were defamatory.

The very allegation Plaintiff sets forth to support his claim of IIED is based *entirely* on claims related to defamation. Because Hedlund's IIED claim is derived entirely from defamation, his claim must be dismissed and the court should affirm the grant of summary judgment.

CONCLUSION

Based on the authority, argument and analysis contained herein, Appellees respectfully request this Court affirm the district court's order granting Defendants' Motion for Summary Judgment.

REQUEST FOR ORAL ARGUMENT

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

CERTIFICATE OF COMPLIANCE

This brief complies with the type-face requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font in 14-point and contains 13,811 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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PROOF OF SERVICE

I, Jeffrey C. Peterzalek hereby certify that on the 3rd day of January, 2019, I or a person acting on my behalf did serve Appellees' Final Brief and Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, Jeffrey C. Peterzalek, hereby certify that on the 3rd day of January, 2019, I or a person acting on my behalf filed Appellees' Final Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

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