IN THE SUPREME COURT OF IOWA

No. 18-1600

DEBORAH FERGUSON,

Plaintiff-Appellee,

vs.

EXIDE TECHNOLOGIES, INC., AND FRED GILBERT

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT OF DELAWARE COUNTY
THE HONORABLE MICHAEL SHUBATT
CASE NO LACV008271

FINAL BRIEF OF APPELLANTS EXIDE TECHNOLOGIES, INC. AND FRED GILBERT

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Authorities:

Iowa Code 730.5

Wallace v. Des Moines Independent Sch. Dist. Bd. Of Dirs., 867 N.W.2d 44 (Iowa 2015)

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*Eddy v. Casey's General Store, Inc.,*485 N.W.2d 633 (Iowa 633*)*

2. Whether the district court erred in awarding substantial attorneys' fees and expenses to Plaintiff, whose claims were tried to a jury in a three-day trial, where the only the fee-shifting claim was an admitted violation of section 730.5, which is to be tried to the court.

Authorities:

Boyle v. Alum-Line, Inc., 773 N.W.2d 829 (Iowa 2009)

Landals v. George A. Rolfes Co., 454 N.W. 2d 891 (Iowa 1990)

Gabelmann v. NFO, Inc., 606 N.W.2d 339 (Iowa 2000)

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Smith v. Iowa State Uni. of Science and Technology, 885 N.W. 2d 620 (Iowa 2016)

Iowa Code 730.5

Branstad v. State ex rel. Nat. Res. Comm'n, 871 N.W.2d 291 (Iowa 2015)

Bethards v. Shivvers, Inc., 335 N.W.2d 39 (Iowa 1984)

ROUTING STATEMENT

Defendant submits this case should be retained by the Iowa Supreme Court as it presents a substantial issue of first impression.

STATEMENT OF THE CASE

This case involves an appeal of the district court's failure to grant judgment to Defendants[1] on Plaintiff's claim for wrongful discharge in violation of public policy, and the court's determination that Plaintiff was entitled to substantial attorneys' fees and expenses on her statutory claim for a violation of Iowa's drug testing statute. On February 24, 2017, Plaintiff Deborah Ferguson ("Plaintiff"), a former employee of Defendant Exide Technologies, Inc., brought a two-count lawsuit against Defendants alleging: (1) a statutory claim under Iowa Code section 730.5 for violation of Iowa's drug testing statute; and (2) a common law claim for wrongful discharge in violation of public policy. (App. 32-34) Defendants filed a timely Answer denying Plaintiff's claims.[2] (App. 36-39)

On October 27, 2017, Defendant filed a motion for summary judgment on Plaintiff's common law claim for wrongful discharge. (App.

[1] Fred Gilbert and Brenda Saunders were named as individual defendants in addition to Exide Technologies, Inc. Plaintiff dismissed Ms. Saunders on February 28, 2018.

[2] On August 18, 2017, Defendants amended their Answer to admit that the drug test required of Plaintiff was in violation of Iowa Code section 730.5. (App. 42 [Amended Answer of Defendants, ¶ 35])

44-45) Plaintiff resisted the motion (App. 54-55), and filed her own motion for summary judgment on the wrongful discharge claim on November 10, 2017. On January 17, 2018, the district court, Judge George Stigler, entered an Order denying Defendants' motion and instead finding that Plaintiff was entitled to summary judgment on the wrongful discharge claim. (App. 86-89)

The case proceeded to trial on March 7, 2018. On March 9, 2018, the jury returned a verdict in favor of Plaintiff on the wrongful discharge claim, awarding $45,606.40 in lost wages and benefits, and $12,000 for past mental pain and suffering. On March 9, 2018, the court entered an Order for Judgment in the amount of $57,606.40 on Count II (the wrongful discharge claim).[3] (App. 90-91)

On April 5, 2018, Plaintiff filed a Motion for Attorneys' Fees and Expenses (App. 94-213), which Defendants resisted. (App. 258-260) On July 20, 2018, the court issued an Order granting judgment on Count I which included an award of $35,000 in attorneys' fees and $4,500 in

[3] The parties had stipulated that the verdict for back pay should be reduced by $3,887.74. Accordingly, on March 15, 2018, the district court entered an Amended Order for judgment in the amount of $53,718.66. Additionally, the court stated it would issue a separate ruling on the additional issues in count I (the statutory claim) and set a briefing schedule, stating the time period for filing post-trial motions and an appeal would not commence until the court had ruled on count I. (App. 90 [Judgment as to Count II, ¶ 4])

litigation expenses. (App. 308-313) On August 2, 2018, Defendants filed two motions: (1) a Motion to Enlarge or Amend Findings on August 2, 2018 challenging to the court's award of attorneys' fees and expenses (App. 317-342); and (2) a Motion for Judgment Notwithstanding the Verdict on Count II. (App. 314-316) On September 5, 2018, the court entered an Order denying Defendants' Motions. (App. 343-344)

On September 11, 2018, Defendants filed this Notice of Appeal. (App. 343-344)

STATEMENT OF FACTS

Plaintiff Deborah Ferguson was hired by Exide in 2012 as a laborer. (App. 30 [Petition, ¶ 7]) Her job duties included unloading charged batteries and loading them onto pallets. (App. 31 [Id., ¶ 8]) In October 2016 she told her supervisor her arms were bothering her, and a first report of injury was completed. (App. 60, Plaintiff's Statement of Additional Material Facts in Resistance to Motion for Summary Judgment, ¶ 9, 12]) Exide arranged for Plaintiff to have therapy to alleviate the symptoms, but the pain persisted. (App. 60 [Id., ¶ 13-15]) Accordingly, Exide's plant nurse, Brenda Saunders, made an appointment with Exide's workers' compensation physician. (App. 61 [Id., ¶ 16]) The physician diagnosed Plaintiff with tendonitis of the elbows; he prescribed medication and

recommended physical therapy. (App. 61 [Id., ¶ 18-19]) As a result, Ms. Saunders instructed the physician's nurse to require a drug and alcohol test. (App 61 [Id., ¶ 20]) Ms. Saunders and Fred Gilbert, Exide's Human Resources Manager, believed a post-accident substance abuse test was warranted because Plaintiff saw a physician for her work-related injury. (App. 355, 358, 388-389 [Tr. Vol. I., pp. 40, 43; Vol. III, pp. 37-38]) Plaintiff refused the test and was terminated pursuant to Exide's substance abuse policy. (App. 358 [Tr. Vol. I, p. 43])

ARGUMENT

I. THE DISTRICT COURT IN DENYING EXIDE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S WRONGFUL DISCHARGE CLAIM BECAUSE THE EXCLUSIVE REMEDY FOR A VIOLATION OF SECTION 730.5 IS CONTAINED WITHIN THE STATUTE.

A. Standard of Review and Preservation of Error.

The district court granted Plaintiff's motion for summary judgment on the wrongful discharge claim (Count II) thereby denying Defendants' summary judgment motion on the issue. (App. 86-89) The court's review of a district court decision granting or denying a motion for summary judgment is for correction of errors of law. *Wallace v. Des Moines Independent Sch. Dist. Bd. of Dirs.,* 867 N.W.2d 44, 51 (Iowa 2015). The court entered a ruling (not judgment) on the summary judgment issue on

January 17, 2018. Judgment was entered on March 9, 2018, and the court stated the "time for filing post-trial motions as to either Count I or II shall not commence, nor shall any appeal period, until the Court has ruled on Count I . . ." (App. 90 [Judgment as to Count II, ¶ 4) On July 20, 2018, the court entered judgment on Count I, thereby commencing the time period for post-trial motions. (App. 308-313) On August 2, 2018, Defendants filed a motion for judgment notwithstanding the verdict on Count II (App. 314-316), which the court denied on September 5, 2018. (App. 343-344) Defendants filed a timely appeal on September 11, 2018. (App. 345-346)

B. The Trial Court Erred in Failing to Grant Summary Judgment to Defendants on Plaintiff's Wrongful Discharge Claim.

The parties agree Plaintiff was discharged because she refused to submit to an impermissible drug test requested by Defendants.[4] The question presented to this Court is whether Iowa law permits a common law tort claim for wrongful discharge in violation of public policy as an

[4] Under Iowa Code section 730.5(8)(f), an employer may require an employee to undergo a reasonable suspicion drug or alcohol test "in investigating accidents in the workplace in which the accident resulted in an injury to a person . . ." Defendants mistakenly believed that Plaintiff's need for medical attention due to arm soreness from her cumulative trauma injury was sufficient to justify a "post-accident" drug test. In *Skipton v. S&J Tube, Inc.,* 822 N.W.2d 122 (Iowa App. 2012), the Iowa court of appeals held a cumulative trauma injury was not an "accident" that would justify a post-accident drug test.

additional avenue for compensation beyond the express statutory remedy contained in Iowa Code section 730.5(15). Defendants respectfully suggest it does not. Count I of Plaintiff's petition sought relief under Iowa Code 730.5(15) for the improper drug test. (App. 32-33 [Petition, pp. 3-4]) Count II of the petition -- wrongful discharge in violation of public policy -- relied entirely upon the same facts as count I, except that Plaintiff sought tort damages including emotional distress and punitive damages. (App. 34 [Id., p. 5) *See Jasper v. H. Nizam, Inc.,* 764 N.W.2d 751, 769, 773 (Iowa 2009) (setting forth remedies for public policy discharge). Section 730.5, on the other hand, does not allow for such damages. Rather, in Section 730.5(15), the legislature adopted a precise statutory remedy for a violation of the statute:

> 15. Civil Remedies. This section may be enforced through a civil action.
>
> a. A person who violates this section or who aids in the violation of this section, is liable to an aggrieved employee for affirmative relief *including reinstatement or hiring, with or without backpay, or any other equitable relief as the court deems appropriate including attorney fees and court costs.* (Emphasis added)

Plaintiff should not be permitted to sidestep the specific statutory remedy prescribed by Section 730.5(15) by pursuing a parallel common law claim based on a violation of that same statute. That is, because the statute expressly prescribes the remedy for a violation of the statute, a parallel tort

claim based on the public policy embodied by the statute is unavailable. The tort claim is preempted by the statute.[5]

In *Borschel v. City of Perry,* 512 N.W.2d 565, 567-68 (Iowa 1994), the Iowa Supreme Court considered whether a police officer who was discharged because he was charged with but not convicted of a crime could assert a claim for wrongful discharge in violation of public policy. The court first discussed the notion that Iowa courts have, as an exception to employment at will, recognized a cause of action for discharge in violation of public policy when the employee's termination "is in retaliation for performing an important and socially desirable act, exercising a statutory right, or refusing to commit an unlawful act." *Id.* at 567. The *Borschel* court stated:

> The public policy exception is based on the theory that the law should not allow employees to be fired for reasons that violate public policy. Such policies may be expressed in the constitution and the statutes of the state. To be actionable, the discharge must be in violation of a clearly expressed public policy. *Springer v. Weeks & Leo,* 429 N.W.2d 558, 560 (Iowa 1988).

Id. at 567. The court explained that "[t]he legislature may explicitly prohibit the discharge of an employee who acts in accordance with a

[5] As explained by the court in *Thompto v. Coborn's Inc.,* 871 F.Supp. 1086 (N.D. Iowa 1994), the notion of "preemption" of the common law claim of retaliatory discharge is the same as saying that the statute (which serves as the basis for the wrongful discharge claim) provides the "exclusive remedy" for such claims. *Id.* at 1121, n.4.

statutory right or duty." *Id.* By way of example, the court cited Iowa Code chapter 216, which expressly prohibits discharging an individual on the basis of age, race, creed, color, sex, national origin, religion, or disability, and which also provides remedies for violation of the statute. Because chapter 216 provides a statutory remedy for a violation, it "preempts an employee's claim that the discharge was in violation of public policy when the claim is premised on discriminatory acts." *Id.* (citing *Hamilton v. First Baptist Elderly Hous. Found.,* 436 N.W.2d 336, 441-42 (Iowa 1989)).

Likewise, in *Northrup v. Farmland Industries, Inc.,* 372 N.W.2d 193 (Iowa 1985), the court held that Plaintiff's claims against his former employer for wrongful discharge in violation of public policy and intentional infliction of emotional distress, which were based on his alcoholism and participation in an alcohol treatment program, were precluded because "[w]e believe that any remedies to which Northrup may be entitled would lie solely under chapter 601A[6] and his independent common-law action cannot be recognized." *Id.* at 197. The court set forth the language in Iowa Code section 601A.16(1) which provides:

> A person claiming to be aggrieved by an unfair or discriminatory practice *must* initially seek an administrative relief by filing a complaint with the commission . . . A complainant *after the proper*

[6] Chapter 601A was the predecessor to Iowa Code Chapter 216.

> *filing of a complaint with the commission,* may subsequently commence an action for relief in the district court. . .

Id. at 197. The court stated "[i]t is clear from a reading of section 601A.16(1) that the procedure under the civil rights act is exclusive, and a claimant asserting a discriminatory practice must pursue the remedy provided by the act." *Id.* Accordingly, while the Iowa Civil Rights Act does not expressly state the statutory remedy is exclusive, the court held a common law claim for wrongful discharge was not proper.

Additionally, in *Channon v. United Parcel Service, Inc.,* 629 N.W.2d 835 (Iowa 2001), the court held that the Iowa Civil Rights Act provides the "exclusive remedy for particular conduct prohibited by the statute," and that Plaintiff's common law claim of intentional infliction of emotional distress was preempted by the Act. *Id.* at 857-58. The court stated:

> Preemption occurs unless the claims are separate and independent, and therefore incidental, causes of action. *Greenland v. Fairton Corp.,* 500 N.W.2d 36, 38 (Iowa 1993) If, under the facts of the case, success on the non-ICRA claims requires proof of discrimination, such claims are not separate and independent.

Id. See also Van Baale v. City of Des Moines, 550 N.W.2d 153, 155 (Iowa 1996) ("When a statute grants a new right and creates a corresponding liability unknown at common law, and at the same time points to a specific method for enforcement of the new right, this method must be pursued exclusively.").

Here, Plaintiff's claim of wrongful discharge is not "separate and independent" from the statutory claim under section 730.5. In order to prevail on a claim of wrongful discharge, an employee must prove the existence of a well-recognized public policy that protects the employee's activity and that the conduct (i.e., engaging in protected activity) was the reason for the employee's discharge. *Dorshkind v. Oak Park Place,* 835 N.W.2d 293 (Iowa 2013) (citing *Berry v. Liberty Holdings, Inc.,* 803 N.W.2d 106, 109 (Iowa 2011)). Here, the public policy that serves as the basis for Plaintiff's wrongful discharge claim is the refusal to take an unauthorized drug test under section 730.5. (App. 34 [Petition, ¶ 46]) But section 730.5(15) prescribes the express remedy for a violation of section 730.5. As such, there is nothing "separate and independent" about her common law wrongful discharge claim. Because section 730.5(15) contains a comprehensive scheme that prescribes what remedies are available to an employee who has been subjected to an unlawful drug test, the remedy is exclusive. *See Borschel,* 512 N.W.2d at 567-68 (common law wrongful discharge claim will not lie if statute suppling the policy also provides for remedy).

In *Muller v. Hotsy Corp.,* 917 F.Supp. 1389 (N.D. Iowa 1996), Plaintiff alleged he was discharged because he pursued short-term

disability benefits. He sought recovery against his employer under ERISA and also alleged wrongful discharge in violation of public policy. The court held that "because the ERISA statute provides Muller with a remedy, his claim that he was wrongfully discharged in violation of public policy is not allowed under Iowa law." *Id.* at 1421 (citing *Borschel,* 512 N.W.2d at 567-68) ("wrongful discharge action will not stand if the statute supplying the policy also provides for a remedy.")) *See also Lucht v. Encompass Corp.,* 491 F.Supp.2d 856, 866 (N.D. Iowa 2007) (claim for wrongful discharge not available because FMLA provides exclusive remedy for an employee whose employer interferes with her right to take leave).

In denying Exide's motion for summary judgment, the district court cited *George v. Zinser Co.,* 762 N.W.2d 865 (Iowa 2009). In *Zinser,* the Plaintiff sued for wrongful discharge after he was fired for complaining about unsafe working conditions, claiming that IOSHA created a public policy exception to at will employment. The statute at issue in *Zinser* was Iowa Code section 88.9(3) which states that "a person shall not discharge or in any manner discriminate against an employee because the employee has filed a complaint . . . under this chapter." Section 88.9(3) does not allow an aggrieved employee to pursue a lawsuit in court; rather, it states that "[a]n employee who believes that the employee has been discharged or

otherwise discriminated against . . . may, within thirty days after the violation occurs, file a complaint with the commissioner alleging discrimination." Section 88.9(3)(2)(b) further states that if the commissioner believes a violation has occurred, the commissioner may bring an action in district court, and the court may order relief including reinstatement with back pay. Zinser pursued the administrative remedy, but his claim was denied. He then filed a lawsuit in district court alleging retaliatory discharge. The court stated "[t]he fact that the statute creates an *administrative remedy* does not indicate such a remedy is exclusive." *Id.* at 872 (emphasis added). The court distinguished Iowa Code section 216.16(1) which states a person claiming to be aggrieved by a discriminatory practice under the Iowa Civil Rights Act "must" initially seek administrative relief, with the permissive language of section 88.9(3) which states an employee "*may* . . . file a complaint with the commissioner." *Id.*

Another situation where the Iowa Supreme Court found a wrongful discharge claim to be viable is *Tullis v. Merrill,* 584 N.W.2d 236, 239 (Iowa 1998). There, the court held that Iowa Code Chapter 91A "plainly articulates a public policy prohibiting the firing of an employee in response to a demand for wages dues under an agreement with the employer."

Section 91A.10(5) expressly prohibits the discharge of or discrimination against an employee who has filed a written complaint *with the commissioner of the division of labor*, and further provides that the commissioner may bring an action in the appropriate district court against a person who engages in such discharge or discrimination. Unlike section 730.5(15), however, Iowa Code section 91A.10(5) does not confer a private right of action on the aggrieved employee in district court. Rather, that section specifically states that an employee who is discharged in retaliation for filing a complaint "may file a complaint *with the commissioner* alleging discharge or discrimination within thirty days after such violation occurs." Additionally, in *Tullis* the employee did not file a written complaint with the division of labor; instead, he was fired after he complained *to his employer* that deductions were being improperly withheld from his paychecks. *Id.* at 238. Nothing in Chapter 91A proscribed such conduct or provided a remedy. In short, unlike the instant case, the statute at issue in *Tullis* did not address the wrong for which the Plaintiff was seeking redress.

The critical distinction between *Tullis* and *Zinser* and the instant case is that Iowa Code section 730.5(15) does not prescribe an administrative

remedy; rather, it provides a private right of action to an aggrieved employee in district court and sets forth the specific judicial remedy.

Here, Plaintiff's claim for wrongful discharge is based on the very same conduct as her claim for violation of section 730.5. It is not separate and independent from the statutory claim. As such, section 730.5 provides the exclusive remedy. There is no need to recognize a common law action for wrongful discharge when a statutory remedy already exists that protects society's interests. The Iowa legislature expressly identified the public policy at issue (section 730.5) and chose a specific (albeit limited, in that common law damages are not available) remedy to protect that public policy. This remedy may have reflected competing interests that are best handled by the legislature and not the courts. *See Marcus v. Young,* 538 N.W.2d 285, 289 (Iowa 1995) (legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned."); *Eddy v. Casey's General Store, Inc.,* 485 N.W.2d 633 (Iowa 1992) (Court held section 123.92 provides exclusive remedy against licensees and permittees and stated, "for this court to formulate its own particular version of a common law negligence claim, despite the specific scheme provided by the dramshop act, would be to judicially repeal the act.") (citations omitted).

II. THE COURT ERRED IN AWARDING ATTORNEYS' FEES AND EXPENSES.

A. Standard of Review and Preservation of Error.

This Court reviews the trial court's award of attorney fees for an abuse of discretion. *Boyle v. Alum-Line, Inc.,* 773 N.W.2d 829, 832 (Iowa 2009) (citing *Landals v. George A. Rolfes Co*., 454 N.W.2d 891, 897 (Iowa 1990)). Reversal is warranted when the trial court rests the award on grounds that are "clearly unreasonable or untenable." *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342 (Iowa 2000). The applicant for the fee bears the burden to prove "both that the services were reasonably necessary and that the charges were reasonable in amount." *Landals*, 454 N.W.2d at 897. This requires the claimant to submit detailed affidavits which itemize their fee claims. *Boyle*, 773 N.W.2d at 832 (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975) and *Dutcher v. Randall Foods,* 546 N.W.2d 889, 896 (Iowa 1996)). Plaintiff filed a Motion for Attorneys' Fees and Expenses on April 5, 2018 (App. 94-213) which Defendants resisted. (App. 258-260) On July 20, 2018 the court entered an Order awarding attorneys' fees of $35,000 and litigation expenses of $4,500. (App. 310-312) On August 2, 2018, Defendants filed a Motion to Enlarge or Amend Findings concerning the court's award of fees and expenses. (App. 317-342) On September 5, 2018 the court denied

Defendants' motion. (App. 343-344) On September 11, 2018 Defendants filed a timely appeal. (App. 345-346)

B. The Court's Award Includes Fees and Expenses That Are Not Related to Or Necessary For Pursuit of the Statutory Claim.

Plaintiff's Amended Motion for Attorneys' Fees and Expenses sought attorneys' (and legal assistant) fees of $69,233.95 and litigation expenses of $5,648.04. (App. 283-307) The court awarded attorneys' fees of $35,000 and litigation expenses of $4,500. (App. 310-312)

In doing so the court properly cited the case of *Smith v. Iowa State Univ. of Science and Technology,* 885 N.W.2d 620 (Iowa 2016) for the proposition that the court must "utilize a two-step approach whereby it (1) attempts to reduce the fee claim by those fees attributable to the claim for which no fee recovery is available and 2) considers the reasonableness of the fees in light of the ultimate result." (App. 310 [Judgment as to Count I, p. 3) The court found that Plaintiff's attorneys "clearly spent significant time developing aspects of the case that had nothing to do with the statutory claim" for which attorneys' fees are allowed. (App. 310 [Id.]) The court specifically mentioned the time spent developing Plaintiff's claim for common law damages (emotional distress), and also the additional time required by a jury trial. (App. 310 [Id.]) Additionally, the court stated that "time spent on preparing for jury selection, drafting jury

instructions and preparing objections to jury instructions" had "nothing to do with Plaintiff's statutory claim." (App. 310 [Id.]) Nevertheless, the court awarded $35,000 in attorneys' fees, stating:

> Iowa Code § 730.5 allows an employee to recover attorney fees and expenses if the employee can establish that his or her employer violated the statute. Plaintiff seeks $75,991.99 in attorney fees and expenses. Defendants argue that the amount sought is excessive, given that Plaintiff is not entitled to fees for efforts expended on Plaintiff's public policy (common law) claim. . .
>
> Plaintiff's attorneys clearly spent significant time developing aspects of the case that had nothing to do with the statutory claim. Time had to be spent with Plaintiff and other witnesses developing testimony regarding Plaintiff's common law damages. They spent time engaged in discovery on those claims. Trial was made longer by the fact that Plaintiff testified on these issues and called witnesses whose testimony was unrelated to the statutory claim. Further, the fact that Plaintiff requested a jury trial clearly lengthened the amount of time that was spent in trial, as the parties spent the better part of a day in jury selection, and a significant amount of time arguing instructions to the court.
>
> It is impossible for the Court to assess Plaintiff's claimed legal fees in an exacting mathematical fashion, as the entries on the fee report (Exhibit 1A to Plaintiff's Amended Motion for Attorney Fees and Expenses) are block entries for each attorney by date. The Court can, however, make several general observations, in addition to those set forth above.
>
> The fee report contains numerous entries that refer to time spent on preparing for jury selection, drafting jury instructions and preparing objections to jury instructions. Obviously, these services had nothing to do with Plaintiff's statutory claim. As previously noted, the fact that this was a jury trial as opposed to a bench trial clearly extended the amount of time Plaintiff's attorneys spent in court. The Court does not point this out as a criticism, but as a basis for its conclusion that the fee report overstates the amount of recoverable

> fees – i.e., the attorney fees that were reasonably and necessarily required to obtain the statutory relief Plaintiff sought. . .
>
> The Court has the same difficulty assessing the legal expenses as it did the legal fees; it is difficult to judge them with as much precision as the Court would like. In general, the Court does not believe the expenses claimed by Plaintiff warrant as much of an adjustment, as the overall legal fees. . .

(App. 310-312 [Id., pp. 3-5])

Although the court generally discussed the factors that warranted a reduction in fees and expenses (e.g., the fact this was a jury case, and the statutory claim does not permit a jury trial), the court failed to address the specific fee and expense entries pointed out by Defendants that would have resulted in a much more substantial reduction. (App. 322-339 [Exhibit A to Defendants' Motion to Enlarge or Amend Findings])[7] Rather than tackling those issues head on, the court merely denied Defendants' post-trial motion "[f]or the reasons stated in the resistances as well as the reasons stated in the rulings to which Defendants' post-trial motions pertain." (App. 343-344) For example:

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[7] Plaintiff's Fee Report includes a total of $70,640.95 of "billed time." (App. 287-304 [Exhibit 1A to Plaintiff's Amended Motion for Attorney Fees and Expenses]) Defendants' Exhibit A has proposed reductions of $48,367.20. (App. 322-339 [Exhibit A to Defendants' Motion to Enlarge or Amend Findings]) The proposed reductions did not include any work related to work and correspondence in connection with settlement negotiations, even though part of that work clearly related to the public policy claim.

- All time relating to the summary judgment motions and hearing. This work was wholly unrelated to the statutory claim or unnecessary to pursuit of the same, since Defendants admitted liability for the drug testing violation and a summary judgment motion was therefore unnecessary.
- Trial preparation and trial. Defendants suggested fee reductions that permitted sufficient time for trial preparation and a one-day trial (which would have been sufficient for a bench trial of the statutory claim), but highlighted the remaining time entries relating to trial preparation and trial, which was far more time consuming and complicated due to the public policy claim and the attendant jury trial.

In short, the amount of attorneys' fees that were "reasonable and necessary" to prosecute the statutory claim should not exceed $22,273 as suggested by Defendants. The court erred in awarding $35,000. *See Boyle,* 773 N.W.2d at 832-33 (""[t]he *applicant* bears the burden" of demonstrating reasonableness of the request and the court "must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete

case.") The district court failed to consider several important specific factors that would have substantially reduced the fee award.

The court also erred in not reducing the claimed litigation expenses below $4,500 (Plaintiff had sought expenses of $5,648.04). The court acknowledged that "[s]ome adjustment is warranted however; as a non-exclusive example, Plaintiff's attorneys each had at least one extra day of lodging and meals given the fact that this was a jury trial as opposed to a bench trial." (App. 312 [Judgment as to Count I, p. 5]) Defendants highlighted multiple specific expenses that were unrelated to the statutory claim. (App. 340-342 [Exhibit B to Defendants' Motion to Enlarge or Amend Findings])[8] However, the court failed to address these specific expenses, instead stating generally that "many of those expenses would have been incurred even if there had only been a trial on the statutory

[8] The total expenses that would not have been incurred in prosecution of the statutory claim are at least $3,789.11. (App. 340-342 [Id.]) Deducting that amount from the claimed expenses would leave a total of $1,858.93. Most of these expenses were incurred for mileage, meals, and hotel expenses associated with the summary judgment hearing and trial; additionally, there were substantial Westlaw charges totaling $930; photocopies of $109.05; medical records of $350.30; and investigator services of $210. Notably, the investigator's services relate to an interview of a person, "McMahon," and an attempt to reach "Kenny Higgins." Neither of these individuals was called as a witness; indeed, no witness at trial so much as mentioned either of their names.

claim." (App. 312 [Judgment as to Count I, p. 5) A close look at the expenses identified by Defendants shows this simply is not the case.[9]

In short, the court's award of attorneys' fees and expenses was excessive and erroneous. Plaintiff could have pursued only the statutory claim (a claim for which Defendants admitted liability on August 18, 2017, seven months before trial), but chose instead to broaden the entire scope of the lawsuit by "bootstrapping" the violation of Iowa's drug testing statute into a separate claim for public policy discharge. She did so because a public policy claim entitles a party to a jury trial, and permits recovery of emotional distress damages and punitive damages. She did so knowing full well that a public policy discharge claim is a common law claim for which attorneys' fees are not recoverable. *See Branstad v. State ex rel. Nat. Res.. Comm'n,* 871 N.W.2d 291, 294 (Iowa 2015); *Bethards v. Shivvers, Inc.,* 355 N.W.2d 39, 47 (Iowa 1984) (attorneys fees generally not recoverable in the absence of a statute or a contractual provision that permits their

[9] The court noted that "much of the Westlaw research has already been adjusted in the expense report." (App. 312 [Judgment as to Count I, p. 5) However, as pointed out by Defendants in their Resistance to the attorney fee application, *none* of the summary judgment work (or expenses associated with the same) should be assessed against Defendants because Defendants conceded liability on the drug testing claim. (App. 259, 268-269 [Resistance to Plaintiff's Motion for Attorneys' Fees and Expenses, ¶ 7; Brief in Support of Resistance to Plaintiff's Motion for Attorneys' Fees and Expenses, pp. 8-9])

recovery). The public policy claim is separate and distinct from the drug testing claim, and the substantial additional attorneys' fees and litigation expenses incurred in pursuit of that claim are not recoverable.

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court reverse the district court's entry of judgment on Count II (the wrongful discharge claim) and remand to the district court for an entry of judgment in their favor. Defendants further request the Court reverse the district court's award of attorneys' fees and expenses and remand to the district court for further reduction.

REQUEST FOR ORAL ARGUMENT

Appellants request the opportunity for oral argument.

By: _____
Thomas D. Wolle, AT0008564

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on January 29, 2019, I electronically filed the forgoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

By: _____
Thomas D. Wolle

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the typeface and type-volume requirements of Iowa Rule of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-Point Times New Roman and contains 5680 words, excluding the parts of the brief exempted by Iowa R. App. P.6.903(1)(g)(1).

By: _____
Thomas D. Wolle