IN THE COURT OF APPEALS OF IOWA

No. 3-468 / 12-1182
Filed August 21, 2013

DENNIS L. SMITH,
Plaintiff-Appellee,

vs.

IOWA STATE UNIVERSITY OF SCIENCE AND TECHNOLOGY and STATE OF IOWA,
Defendants-Appellants.

Appeal from the Iowa District Court for Story County, Kurt J. Stoebe, Judge.

Defendants appeal from the trial court's denial of their motion for new trial and motion for judgment notwithstanding the verdict. **AFFIRMED IN PART AND REVERSED IN PART.**

Thomas J. Miller, Attorney General, and Diane M. Stahle and Jordan G. Esbrook, Assistant Attorneys General, for appellants.

William W. Graham and Aimee R. Campbell of Graham, Ervanian & Cacciatore, L.L.P., Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Vaitheswaran and Tabor, JJ.

EISENHAUER, C.J.

The State and Iowa State University (collectively "ISU") appeal from the trial court's denial of their motion for judgment notwithstanding the verdict (JNOV) and for new trial after a jury returned a verdict in favor of Dennis Smith on his claim of intentional infliction of emotional distress and the trial court ruled in Smith's favor on his whistleblower claim. ISU contends the whistleblower claim fails because there was no protected conduct, no reprisal taken as a result of any report to a public official, and the damages are beyond the scope of relief allowed by the statute. ISU, in its appellate brief, contends the intentional-infliction-of-emotional-distress claim fails because ISU is immune from claims functionally equivalent to defamation and there was no outrageous conduct; however, at oral argument it contended this court and the trial court lacked subject matter jurisdiction because any injuries Smith may have suffered were work-related injuries subject to the exclusivity provisions of Iowa's Workers' Compensation Act.[1] After additional briefing on this issue, we conclude we have subject matter jurisdiction. We affirm in part and reverse in part.

I. Background Facts and Proceedings

Smith alleged a series of events from 2002 to 2008 surrounding his employment by ISU. Smith was hired in 2001 as a writer in the Engineering Communications and Marketing Department (ECM) of the College of Engineering at ISU. In 2002 his supervisor, Pamela Reinig, told Smith she would seek to have his job upgraded but did not do so. Beginning in 2005, Smith had some disagreements with Reinig, primarily concerning his job classification and

[1] *See* Iowa Code § 85.20 (2009).

supervisory duties because he discovered she had not requested his position be upgraded as she said she would. In 2006 Reinig hired Eric Dieterle as another writer in the ECM. In February 2007 Reinig told Smith his work and editing would be reviewed by Dieterle. On March 19, Smith met with Reinig about Dieterle supervising his work. Reinig considered Smith's behavior to be insubordinate, abusive, and threatening. On March 21, Reinig gave Smith a verbal reprimand as a result of the March 19 meeting.

In early 2007 Smith discovered what he thought was evidence the ECM was not properly billing an outside organization (CASE) for work performed. After discussing his concern with a colleague, Smith presented his concerns and the evidence to Mark Kushner, Dean of the College of Engineering on March 22 and requested confidentiality. Smith also met with the university ombudsman about his disagreements with Reinig. After Smith presented his concerns to Kushner, Kushner sought advice on the billing practices from Ellen Reints, the business manager of the college. On March 30, Kushner suggested he and Reints should meet with Reinig to give her "a heads up."

On April 9, Reinig sent a memo to Kushner outlining her planned reorganization of ECM, giving Dieterle more supervisory duties, and describing its effects on Smith. On April 12, Reinig notified Smith and Dieterle of the reorganization. Reinig also sent a message to a commander of the ISU police noting her reprimand of Smith and expressing her concern "about his potential to become violent." On April 13, Smith filed his first grievance.

Starting with the grievance filed April 13, 2007, and over the next two years, Smith pursued several grievances against Reinig and other administrators

with allegations of mistreatment, mismanagement, and financial misconduct. As part of the appeal process to ISU President Geoffroy in the first grievance in August 2007, Smith also made allegations of financial misconduct against Reinig. Geoffroy ordered an internal audit. The audit revealed an organization with ties to Reinig was not billed for work done by the ECM, and Reinig personally received over $58,000 from the organization for work done by the ECM, instead of depositing the payments in an ISU account. Reinig was put on administrative leave and resigned in March 2008 before she was terminated.

Starting in April 2007, Reinig falsely reported Smith to ISU police at least nine times, alleging Smith was a threat to safety and had a potential to become violent, and comparing Smith to the mass murderer at Virginia Tech. Dieterle and Kushner also were involved in reporting Smith as a threat to safety. Dieterle compared Smith to the Omaha mall shooter.

While contesting Smith's grievance concerning her failure to have his job classification raised, Reinig falsified Smith's employee reviews by lowering his performance rating, deleting a list of awards he had received, and deleting the language indicating she would seek reclassification of his position. Proof she falsified the records led to disciplinary action against her.

Kushner delayed the grievance process and summarily denied Smith's grievance. When Smith succeeded on appeal, Kushner ignored the directive to restore Smith's job duties for more than seven months. Kushner also did not comply with the decision to restore secure funding for Smith's position. Despite the problems Dieterle caused for Smith in January 2008, Kushner made Dieterle the interim supervisor to replace Reinig and in June 2008 made the appointment

permanent. Dieterle continued to reduce Smith's assignments throughout 2008 and 2009.

Dieterle orchestrated a reorganization of the ECM, including eliminating the ECM and its entire staff, creating a new unit, and writing new job descriptions. Dieterle added qualifications to the new job description that basically disqualified Smith for the position. A coworker, upon seeing the revised job description would prevent Smith from qualifying, asked Dieterle about it and concluded from Dieterle's response the description was written purposefully to exclude Smith. Notes from a meeting Dieterle attended several months before Smith's employment was terminated in the reorganization show Smith was not included in the list of those "who stay."

On April 16, 2009, Smith filed a claim with the State Appeal Board. On April 17, he filed suit against the board of regents, ISU, Reinig, Kushner, and Dieterle. The petition alleged Reinig, Kushner, and Dieterle (1) defamed Smith; (2) intentionally interfered with Smith's employment, business, and professional relationships; (3) intentionally inflicted emotional distress; (4) violated Iowa Code section 70A.28 (protecting whistleblowers); and (5) conspired with each other to engage in the wrongful conduct alleged in counts one through four. The petition also alleged the conduct of Reinig, Kushner, and Dieterle violated the terms of Smith's employment with ISU, thus constituting a breach of contract by the regents and ISU.

After no action was taken on his claim with the appeal board, Smith withdrew the claim and filed a second suit against the board of regents, ISU, Reinig, Kushner, and Dieterle. The petition alleged (1) intentional infliction of

emotional distress, (2) violation of Iowa Code section 70A.28, and (3) conspiracy to engage in the wrongful conduct. It also alleged ISU was vicariously liable for the acts of its employees.

The two suits were consolidated. After the State certified Kushner and Dieterle were acting within the scope of their employment, Smith dismissed the claims against them individually. *See* Iowa Code § 669.5. After a hearing on the scope-of-employment certification and the State's motion to dismiss, the court dismissed all claims against Kushner and Dieterle and substituted the State as a defendant. *See id.* The court also dismissed Smith's claims of defamation and intentional interference with contract rights against all defendants except Reinig.

The case was tried to a jury. However, the court determined the section 70A.28 (whistleblower) claim was equitable in nature and the court would determine damages, if any. After the close of evidence, Smith dismissed the defamation and intentional interference with contract rights claims against Reinig, and ISU agreed to defend her on the remaining claims as within her scope of employment. The court instructed the jury on intentional infliction of emotional distress and violation of the whistleblower statute and told the jury to decide liability on both claims, but damages on the emotional distress claim only.

The jury found ISU liable on both claims. It found damages in the amount of $500,000 for intentional infliction of emotional distress. The court found damages on the whistleblower claim in the amount of $784,027. The State and ISU filed a motion for JNOV and for new trial asserting (1) insufficient evidence to support the verdict on the intentional infliction of emotional distress claim, (2) immunity from claims functionally equivalent to defamation, (3) entitlement to

a directed verdict on the whistleblower claim, and (4) excessive damages awarded by the jury. The court denied the motions.

II. Scope and Standards of Review

We review a district court's decision to deny a motion for JNOV for errors at law. Iowa R. App. P. 6.907; *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010). In reviewing the court's decision, we must determine whether sufficient evidence existed to justify submitting the case to the jury. *Crookham v. Riley*, 584 N.W.2d 258, 265 (Iowa 1998). We view the evidence in the light most favorable to the nonmoving party. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010).

"We review the district court's denial of a motion for a new trial based on the claim a jury awarded excessive damages for an abuse of discretion." *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008) (citation and internal quotation marks omitted). A district court abuses its discretion if it rests its ruling on "clearly untenable or unreasonable grounds." *Lawson v. Kurtzhals*, 792 N.W.2d 251, 258 (Iowa 2010).

Our review of equitable matters is de novo. Iowa R. App. P. 6.907. We give weight to the findings of the district court, especially concerning the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

We review a district court's interpretation of a statute for correction of errors at law. *L.F. Noll, Inc. v. Eviglo*, 816 N.W.2d 391, 393 (Iowa 2012).

III. Subject Matter Jurisdiction

ISU contends the court lacks subject matter jurisdiction because the intentional-infliction-of-emotional-distress claim is covered by the Iowa Workers

Compensation Act (IWCA), characterizing the cause of action as one for mental injury arising out employment. ISU relies on *Dunlavey v. Economy Fire & Casualty Co.,* 526 N.W. 2d 845 (Iowa 1995). While *Dunlavey* recognized mental injuries may fall under the IWCA if caused by "unusual stress," 526 N.W.2d at 853, 857, it did not address the issue whether IWCA covers mental injuries arising from *intentional* wrongful conduct. We believe intentional wrongful conduct as alleged by Smith falls outside the IWCA and, therefore, we have subject matter jurisdiction. *See Slaymaker v. Archer-Daniels-Midland Co.*, 540 N.W.2d 459, 462 (Iowa Ct. App. 1995) (including emotional distress caused by *accident* in IWCA coverage); *see also Beard v. Flying J, Inc.*, 266 F.3d 792, 803 (8th Cir. 2001) (concluding Iowa courts have not "abandon[ed] the general rule that excludes intentional torts . . . from the exclusive jurisdiction of the workers' compensation system").

IV. Merits

A. Whistleblower Claim. ISU contends the whistleblower claim fails because there was no protected conduct, no reprisal taken as a result of any report to a public official, and the damages are beyond the scope of relief allowed by the statute.

Protected Conduct. Iowa Code section 70A.28(2) (2007) provides, in relevant part:

> A person shall not discharge an employee from or take or fail to take action regarding an employee's appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, a position in a state employment system administered by, or subject to approval of, a state agency as a reprisal for a failure by that employee to inform the person that the employee made a disclosure of information permitted by this

> section, or for a disclosure of any information by that employee to a member or employee of the general assembly, a disclosure of information to the office of citizens' aide, or a disclosure of information to any other public official or law enforcement agency if the employee reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

ISU contends the "disclosure" Smith made was only as part of the grievance procedure and related to work issues, not a "public concern." *See Worthington v. Kenkel*, 684 N.W.2d 228, 233 (Iowa 2004) (stating section 70A.28 is "not designed to do justice between the parties, but to prevent harm to the public policy [of protection from retaliation]"). ISU argues "it is logical that the activity reported must call into question a public concern and that the purpose of the report be for the good of the public rather than the reporter's personal gain." ISU asserts the only allegations of wrongdoing or misconduct Smith made to President Geoffroy concerned Reinig's actions (1) in delaying reclassifying Smith's position, (2) in restructuring his duties within the ECM, and (3) in reporting concerns about Smith becoming violent.

Smith testified he reported to Dean Kusher in March 2007 his concerns Reinig was not properly billing CASE for work done by ECM employees. He also reported those concerns to President Geoffroy's executive assistant, Tahira Hira, when meeting with her in August 2007 regarding his first grievance appeal. President Geoffroy's September 7 letter to Smith noted Smith's appeal "raised other important issues that do not fall within the scope of a grievance, such as hiring practices and use of funds."

The trial court determined President Geoffroy was a "public official." *See* Iowa Code § 70A.28(2). The information Smith reported about Reinig not billing CASE for work done by the ECM and Reinig violating hiring rules was information Smith reasonably believed evidenced a violation of law or rule, or mismanagement. *See id.* We conclude substantial evidence supports a finding Smith engaged in conduct protected by section 70A.28(2).

Causation. ISU contends no acts of reprisal occurred "as a result of" Smith's "appeal of his work related grievances." *See id.* § 70A.28(6) (providing for enforcement by administrative action if "the adverse employment action was taken *as a result of* the employee's disclosure" (emphasis added). Citing to tortious discharge cases, ISU argues for a causation standard requiring the employee's protected activity to be "*the* determinative factor in the employer's decision to take adverse action against the employee." *See DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13 (Iowa 2009). ISU also argues the employer must know of the employee's disclosure before there can be a causal link. *See Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993) ("[T]o establish a 'causal connection,' plaintiff must show that the individual who took adverse action against him knew of the employee's protected activity.").

The trial court "accept[ed] and adopt[ed] the jury's finding that ISU retaliated against Smith *for* his report." (Emphasis added.) However, in ruling on the retaliation issue, the court noted only a temporal relationship between Smith's report to President Geoffroy and the wrongful conduct: "after the report to President Geoffroy"; [a]fter Smith's report to President Geoffroy." The court found evidence of "a continuous pattern of wrongful conduct undertaken against

Smith . . . undertaken by several of Smith's superiors, including Reinig, Dieterle, and Kushner." Over several pages in its ruling, the court described many of what it viewed as retaliatory actions, comprising a summary of actions constituting "retaliation in violation of Iowa Code § 70A.28," including false statements, altered and less favorable working conditions, termination of employment, and failure to rehire.

We agree with the court there was a continuous pattern of wrongful conduct against Smith by Reinig, Dieterle, and Kushner. The wrongful conduct began as early as 2002 when Reinig told Smith she would seek to have his job upgraded to the next level to reflect the supervisory duties he was performing, but did not do so. In early 2007, once Smith prepared to grieve Reinig's actions, the campaign against him escalated. When Smith confidentially informed Kushner in March 2007 of his concerns about Reinig's actions in hiring Dieterle and in failing to bill CASE for work done by ECM staff, Kushner told Reinig. Reinig made false reports to the ISU police of Smith's violent tendencies. Kushner falsely indicated to ISU police several employees had complained Smith was threatening. Although these actions were wrongful and probably retaliatory, they bear no relation to Smith's report to President Geoffroy other than preceding it in time. The wrongful conduct continued after Smith's report to President Geoffroy. Smith has demonstrated Reinig, Kushner, and Dieterle separately and in various combinations acted against him over a period of more than two years. The fact Smith's report to President Geoffroy occurred during this period does not support an inference the wrongful conduct was "as a reprisal for" Smith's disclosure of Reinig's possible violation of the law and ISU's policies to Geoffroy,

especially since the "retaliation" began months before Smith's disclosure. We conclude Smith failed to prove a causal relationship between his disclosure to a public official and the conduct of Reinig, Dieterle, and Kushner. Without proof their conduct was "as a reprisal for" Smith's protected disclosure, Smith's claim under section 70A.28 fails. *See* Iowa Code § 70A.28(2) (prohibiting specified employment actions against an employee "as a reprisal for" the employee's disclosure of certain information to a "public official").

Damages. ISU contends the court erred in awarding monetary damages for the whistleblower claim because the statute provides only for equitable relief. Section 70A.28(5) provides liability "for affirmative relief including reinstatement, with or without back pay, or *any other equitable relief* the court deems appropriate, including attorney fees and costs." (Emphasis added.) Because we have determined Smith's whistleblower claim fails for lack of proof of causation, we need not address what damages are available under the statute.

B. Intentional Infliction of Emotional Distress. ISU contends this claim fails because the State is immune from claims functionally equivalent to defamation and because there was no "outrageous" conduct.

Immunity. Iowa Code section 669.14(4) lists certain claims to which the State is immune, such as "abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." ISU contends Smith's claim fails because, where the basis of the claim is the "functional equivalent of defamation . . . the State has not waived its sovereign immunity." *See Green v. Friend of Ct.*, 406 N.W.2d 433, 436 (Iowa 1987); *see also Hawkeye By-Products, Inc. v. State*, 419 N.W.2d 410, 411-12 (Iowa 1988) (finding the court "was correct in

concluding [claims of the type exempted by section 669.14(4)] will not lie against the sovereign").

The trial court concluded intentional infliction of emotional distress is not the functional equivalent of defamation because the elements of each cause of action are different and "Iowa courts allow for recovery under both causes of action." ISU contends this analysis is wrong because it does not look at the underlying conduct giving rise to the claim. ISU focuses on the false statements made concerning Smith, which would support a defamation claim. It also contends the harm to Smith was damage to his reputation as a truthful, reliable, or stable person—precisely the kind of harm giving rise to defamation claims.

The underlying conduct here is far broader than false statements, and includes false statements, altered and less favorable working conditions, termination of employment, and failure to rehire. The harm Smith suffered was more than damage to his reputation. He was lied to, ostracized, and isolated from coworkers. Changed and less-favorable working conditions added to his distress. We conclude the trial court correctly determined Smith's claim of intentional infliction of emotional distress was not the functional equivalent of a defamation claim.[2] Therefore, ISU had no sovereign immunity from the claim.

Outrageous Conduct. The tort of intentional infliction of emotional distress requires proof of four elements: (1) outrageous conduct by the defendants, (2) the defendants' intentional causing or reckless disregard of the probability of causing emotional distress, (3) severe or extreme emotional distress suffered by

[2] The difference between the elements of a defamation claim and the elements Smith had to prove also support this conclusion.

the plaintiff, and (4) actual and proximate causation of emotional distress by the defendants' outrageous conduct. *See Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996). ISU contends the conduct of Reinig, Dieterle, Kushner and others toward Smith was not extreme or outrageous. It argues the standard for outrageous conduct, "especially in employment cases" is extremely high. *See id.*

The trial court viewed the question as a fact issue for a jury[3] and concluded "a rational trier of fact could conclude that ISU's conduct was extreme and outrageous." The court defined "outrageous conduct" for the jury:

> Outrageous Conduct – Definition. The term "outrageous conduct" means conduct so extreme as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.
>
> Outrageous conduct does not extend to mere insults, indignities, threats, annoyances, petty oppressions, hurt feelings, bad manners or other trivialities which a reasonable person could be expected to endure. All persons must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are inconsiderate and unkind.

Jury Instruction No. 8; *see* Iowa Civil Jury Instruction 2000.2. In its ruling on ISU's motions for JNOV or new trial, the court considered and compared the conduct in *Vinson*; *Wambsgans v. Price*, 274 N.W.2d 362 (Iowa 1979); and *Blong v. Snyder*, 361 N.W.2d 312 (Iowa Ct. App. 1984), with the conduct of Reinig, Dieterle, and Kushner. The court rejected ISU's argument the finding of outrageous conduct in *Blong* should be ignored because it preceded the holding in *Vinson.* The court took into account the types of conduct, the time period

[3] The court cited *Blong v. Snyder*, 361 N.W.2d 312, 317 (Iowa Ct. App. 1984), as support. Other cases state it is "for the court to determine in the first instance, as a matter of law, whether the conduct complained about may reasonably be regarded as outrageous." *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 198 (Iowa 1985); *accord Vinson v. Lin-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984).

during which the conduct occurred, the retaliatory goal of the conduct directed at Smith, and the perpetrators' positions of authority over Smith in concluding the circumstances Smith faced were "more akin to Blong's 'mountain' than Vinson's 'molehill.'"[4]

The trial court's assessment is supported by substantial evidence. In *Blong*, the plaintiff was fired for "stealing" after filling out his time cards and manipulating the piecework information on them as directed by his supervisor. *See* 361 N.W.2d at 313. He filed a grievance, which eventually led to arbitration and a negotiated reinstatement with some back pay. *Id.* at 314. After his reinstatement, he suffered four months of verbal harassment from supervisors and was improperly given disciplinary notices for alleged failures in his work performance or failure to follow orders. *Id.* at 315. He was also accused of stealing, intentionally breaking his machine, intentionally producing inferior parts, and "playing with himself" in the restroom. *Id.* at 317. He was given additional work, but not the proper pattern or tools, then threatened and disciplined for failing to complete the additional work properly. *Id.* Following one disciplinary notice, he left the workplace and did not return to work "upon his doctor's orders." *Id.* at 315. He sued for intentional infliction of emotional distress. *Id.* at 313. Following a verdict for the plaintiff, the court granted the defendants' motion for JNOV after determining their conduct was not "outrageous." *Id.*

On appeal, this court noted our supreme court had not defined "outrageous conduct" in an employment context. *Id.* at 315. We considered how

[4] Adapted from the first sentence of Vinson, "This case demonstrates how mountains can be built from molehills." 360 N.W.2d at 111.

the term had been applied in other cases and jurisdictions, and also considered our supreme court's favorable citation of the Restatement (Second) of Torts section 46 comment (d) (1955)[5] in two cases. *Id.* at 316-17. In reversing the grant of JNOV, we concluded, "While any of the individual instances alone may be no more than insulting and humiliating, the jury could properly conclude that the whole of defendant's actions over the four-month period were a course of conduct 'exceeding all bounds usually tolerated by decent society.'" *Id.* at 317.

In the case before us, the trial court noted:

> Smith lost a $70,000 per year position at a prestigious university as a result of his supervisor's actions. Like Blong, he was the victim of an ongoing pattern of harassment by several supervisors. Blong's harassment was over a period of months. Smith's harassment was over a period of years. Smith was reported to law enforcement as dangerous, resulting in the convention of a crisis committee. Like Blong, he was given false job evaluations. He was denied pay increases. He fought through four grievance proceedings. He was the focus of plans for resignation and eventually termination.

For several years Smith endured the actions of Reinig, his supervisor; Dieterle, a coworker who became his supervisor; and Kushner, the dean of the college. He was falsely accused multiple times of being violent and a threat to others, resulting in a campus police investigation and threat assessment. Reinig falsified Smith's performance reviews and lied to him about seeking a promotion to recognize his supervisory duties. Reinig made false statements about Smith's marriage. Reinig and others plotted ways to get rid of Smith, whom they considered a "cancer," and they took steps to place his position in jeopardy.

[5] The description of outrageous conduct from the Restatement cited by our supreme court in two earlier cases is the same as the language it quoted in *Vinson*, which was filed shortly after *Blong. See Vinson*, 360 N.W.2d at 118.

Smith was ostracized and isolated from his coworkers. For a time, Reinig forced Smith to work from home. Then she moved him to an isolated office. In May 2007, soon after Reinig stepped up her campaign against Smith, the assistant dean of the college urged Dean Kushner to help Smith because it was clear to him Smith was a victim and was "wounded and deeply hurting." Instead of helping Smith, who had reported his concerns about Reinig to Kushner, Kushner supported Reinig and helped her try to get rid of Smith. When Reinig resigned before she could be fired, Kushner made Dieterle the interim supervisor of the ECM. Dieterle tried to damage Smith's reputation with clients and, with Reinig's help, took assignments and duties away from Smith. Once the ECM was eliminated in a reorganization and Smith's position was eliminated, Dieterle rewrote the job description and added desired qualifications designed to exclude Smith.

Viewing the evidence in the light most favorable to Smith, substantial evidence supports the trial court's conclusion "a rational trier of fact could conclude that ISU's conduct was extreme and outrageous."

Emotional Distress. ISU contends Smith did not suffer severe or extreme emotional distress. Smith contends ISU did not preserve error on this claim because it raised if for the first time in the motion for JNOV, but not in the motion for directed verdict during trial. *See Ragee v. Archbold Ladder Co.*, 471 N.W.2d 794, 798 (Iowa 1991) ("A motion for judgment notwithstanding the verdict must stand or fall on grounds urged in the movant's earlier motion for directed verdict.").

In its motion for directed verdict, ISU stated, "With respect to the claim for intentional infliction of emotional distress, we have filed a trial brief on that, and I would cite that to the Court." The brief contains a paragraph making this claim. We conclude ISU preserved error.

ISU points to evidence he voluntarily stopped seeing a psychologist in 2008 when he felt he no longer was benefitting. Smith did not see a doctor or take any medication. He did not seek any medical or counseling help after losing his job in 2010. ISU argues Smith's emotional distress "was no different in degree than that suffered by any employee in difficult circumstances." ISU contends demonstrating severe emotional distress usually requires evidence of some physical effect requiring medical care. *See, e.g.*, *Meyer v. Nottger*, 241 N.W.2d 911, 916 (Iowa 1973) (stress and emotional trauma caused a heart attack); *Northrup v. Miles Homes, Inc.*, 204 N.W.2d 850, 855 (Iowa 1973) (weight loss, medication for "nerves," abdominal cramps and pain, emergency room visit). It argues the description of Smith's condition as "really upset" and "wounded" resembles that of the unsuccessful plaintiffs in *Harsha v. State Savings Bank*, 346 N.W.2d 791, 801 (Iowa 1984) (plaintiff "wasn't as interested," was "downhearted," and "depressed"), and *Poulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981) (plaintiff "was very, very down," "was feeling super badly," and "felt that he lost everything").

Although severe emotional distress may have physical manifestations, they are not necessary to establish a prima facie case. *See Poulsen*, 30 N.W.2d at 297.

> Emotional distress 'includes all highly unpleasant mental reactions." Restatement (Second) of Torts § 46, Comment j [1965]. It is only when it is extreme or severe that it is compensable. *Id.* Our prior cases have not extensively discussed this element to decide when a prima facie case has been established. The distress does not have to manifest itself physically. *Meyer*, 241 N.W.2d at 918; Restatement (Second) of Torts § 46, Comment k. In some cases the outrageousness of the defendant's conduct may be enough evidence that the distress is severe. Restatement (Second) of Torts § 46, Comment j.

Smith asserts his own testimony, corroborated by several witnesses including ISU employees and defense witnesses, is evidence he experienced mental trauma over an extended period of time. The psychologist who treated Smith in 2007 and 2008 testified to Smith's emotional distress. Smith also suffered physical manifestations of his emotional distress. He lost weight, began abusing alcohol, suffered insomnia, became sick to his stomach, and was lightheaded. He also considered harming himself.

We conclude the trial court did not err in determining a rational jury could find Smith suffered severe emotional distress.

Excessive Damages. ISU contends the jury's award of damages is excessive and not supported by the evidence. ISU argues the award is "flagrantly excessive," especially when compared with damage awards in similar cases. Smith contends the damages were reasonable and supported by the evidence.

Our supreme court noted the federal district court "reviewed a host of cases addressing claims of excessiveness of emotional-distress damages in employment cases" in *Shepard v. Wapello County*, 303 F. Supp. 2d 1004, 1022-

23 (S.D. Iowa 2003). *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 772 (Iowa 2009).

> These cases reveal that the upper range of emotional-distress damages increases as the nature of the wrongful conduct involved becomes more egregious, and the emotional distress suffered becomes more severe and persistent. Even the length of the employment, compatibility of the worker in the employment, age and employment skills of the worker, and the span of time necessary to become reemployed impact the amount of emotional-distress damages.
>
> While a broad range of emotional-distress damages in all employment-termination cases may support awards of $200,000 and beyond, termination cases involving a single incident of wrongful-termination conduct producing the more common consequences of any involuntary loss of employment support a much lower range of damages.

Id. at 773.

The district court in the case before us noted the "strength of the evidence of ISU's intentional infliction of emotional distress" and "the overwhelming evidence of the injury that this conduct inflicted upon Smith." The court also observed the jury awarded only half of the amount of damages Smith claimed.

In concluding the district court did not abuse its discretion in refusing to reduce the jury's damage award, we also note Smith's compatibility in the employment, his skills, and his being near retirement age as factors supporting the jury's award. *See id.* "We must also accord weight to the fact the trial court, aided by seeing and hearing the witnesses, observing the jury and having before it all incidents of the trial, did not deem it appropriate to interfere." *Kautman v. Mar-Mac Cmty. Sch. Dist.*, 255 N.W.2d 146, 148 (Iowa 1977).

V. Conclusion

Without proof the actions taken against Smith were "as a reprisal for" Smith's protected disclosure, Smith's whistleblower claim under section 70A.28 fails. The trial court erred in not granting ISU's motion for JNOV on this claim. We reverse on this issue.

The trial court did not abuse its discretion in denying ISU's motions for new trial and JNOV on Smith's claim of intentional infliction of emotional distress, determining substantial evidence supported the jury's verdict. We affirm on this issue.

AFFIRMED IN PART AND REVERSED IN PART.