STATE JUDICIAL NOMINATION COMMISSION AND OFFICE OF THE GOVERNOR JOINT JUDICIAL APPLICATION

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. **State your full name.**

   David Noel May

2. **State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**

   Judge, Iowa Court of Appeals (statewide)

3. **State your date of birth (to determine statutory eligibility).**

   May 23, 1971

4. **State your current city and county of residence.**

   Polk City, Polk County

(Adopted May 5, 2021)

PROFESSIONAL AND EDUCATIONAL HISTORY

5. **List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.**

Schools	Attended	Degree
Drake University Law School	05/95 to 05/98	J.D.
University of Oklahoma Health Sciences Center	01/94 to 05/95	M.P.H.
University of Missouri - Columbia	08/89 to 05/90; 08/90 to 05/91; 08/92 to 05/93; 08/93 to 12/93	B.A.
Northeast Missouri State University (now renamed as Truman State University) I elected to finish my degree at the University of Missouri.	05/90 to 08/90; 05/91 to 05/92	None

6. **Describe in reverse chronological order all of your work experience since graduating from college, including:**
   a. **Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.**
   b. **Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.**

Employer	Positions and dates	Supervisor or knowledgeable colleague
Iowa Judicial Branch, 1111 E. Court Avenue, Des Moines, IA 50319	Judge, Iowa Court of Appeals, 2019-present	Chief Judge Tom Bower

		Judge Sharon Soorholtz Greer (colleague)
Iowa Judicial Branch, Polk County Courthouse, 500 Mulberry Street, Des Moines, IA 50309	District Judge, 2016-2019	Senior Judge Karen Romano (mentor)
Bradshaw, Fowler, Proctor, & Fairgrave, P.C. (referred to here as "the Bradshaw law firm" or "Bradshaw"), Des Moines, Iowa, 801 Grand Avenue, Suite 3700, Des Moines, Iowa 50309	Vice President, early 2016 Secretary-Treasurer, 2015 Compensation Committee, 2015 Chair, Recruiting Committee, 2005-15 Shareholder, 2005-16 Associate, 2001-04	David J.W. Proctor
Drake University, 2507 University Ave., Des Moines, IA 50311	Adjunct Instructor, 2006-7	James Dodd
Hawkins & Norris, P.C., 2501 Grand Avenue, Des Moines, IA 50312	Associate, 1998-2001 Clerk, 1997-98	Glenn L. Norris
Iowa Academy of Trial Lawyers, 312 6th Ave., Suite 1200, Des Moines, IA 50309	Clerk, 1996-98	David L. Brown
Independent LifeStyle Assoc., Inc., 1210 Main Street, Panora, IA	Clerk, 1995-96	Not available
Self-employed in Tulsa, OK	Biostatistics tutor, Fall 1994	None
Kaplan Educational Resources, Tulsa, OK	Clerical staff and teacher for LSAT prep course, 1994-95	Not available

Area Health Education Center, 312 S. Elson Street, Kirksville, MO 63501	Administrative Intern, Summer 1994	Not available
Blackeyed Pea, Tulsa, OK	Waiter, early 1994	Not available

Please note: In fall 2008, I received compensation from the Bureau of Alcohol, Tobacco, Firearms & Explosives for assistance with ATF's Special Agent Basic Training Program at the Federal Law Enforcement Training Center, 1131 Chapel Crossing Road, Brunswick, GA 31524. I was classified as a contract instructor rather than an employee.

7. **List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.**

I was admitted by Iowa in September 1998. I remain in good standing.

I was admitted by Minnesota in November 2000. I did not practice law in Minnesota; accordingly, I maintained inactive status, which relieved me of Minnesota's special CLE requirements. On a few occasions, I allowed my membership to lapse for short periods through non-payment of annual dues. My records show this occurred in 2001, 2006, 2009, and 2012. In 2016, I terminated my membership because I was leaving private practice to become a judge. I was in good standing at the time.

I was admitted by Nebraska in October 2014. In 2016, I terminated my membership because I was leaving private practice. I was in good standing at the time.

8. **Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:**
    a. **A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.**
    b. **The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.**
    c. **The approximate percentage of your practice that involved litigation in court or other tribunals.**
    d. **The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.**

e. **The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.**

f. **The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.**

I explain my legal experience by describing four periods:

1. Hawkins & Norris, P.C.

From 1998 until June 2001, I was employed by the Hawkins & Norris law firm.

My practice was focused on civil litigation (99%), although I did represent one criminal defendant. About 80% of my practice involved representing grain producers in Hedge-to-Arrive ("HTA") contract disputes. About 10% of my practice involved representing individuals in personal injury cases, including products liability cases. About 10% of my practice involved representing small entities in business litigation.

2. Bradshaw law firm

From June 2001 until February 2016, I was employed by the Bradshaw law firm. During this period, my practice was divided between civil litigation (about 50%) and insurance coverage work (about 50%).

About 80% of my insurance coverage work involved matters in which arson or other fraud was suspected. The remainder (20%) involved technical questions of policy interpretation.

About 40% of my litigation work involved representing insurance companies in first-party cases, that is, cases against insureds. The remainder of my litigation work (about 60%) involved representing individuals and businesses in a variety of other disputes. This work often involved specialized areas such as class actions, intellectual property, bankruptcy fraud, consumer fraud, and construction defects.

Please note: In response to questions 8e and 8f, I offer the following information concerning my trials and appeals as a private practice attorney:

- Over the past ten years (2012-present), I have spent approximately six years as a judge (2016-present) and approximately four years in private practice. During that four-year period of private practice (2012-2015), I

was sole counsel for two jury trials and associate counsel on one more. I participated in approximately five appeals. I was sole counsel on one of those appeals, chief counsel on another, and associate counsel on the rest.

- In addition, during my prior years in private practice (1998-2012), I was co-chief counsel on one jury trial and associate counsel on at least three more. I was sole counsel on approximately ten non-jury trials. I was chief counsel on one more. I participated in approximately twenty-two appeals. I was chief counsel for eight of those appeals and associate counsel on the rest.

3. District Judge

From February 2016 to May 2019, I served as a District Judge. My time was spent approximately as follows:

- 25% on family law matters;
- 40% on other civil matters, including postconviction relief cases and administrative appeals;
- 35% on criminal matters.

I presided over sixteen jury trials, scores of bench trials, and hundreds of other hearings.

4. Judge – Iowa Court of Appeals

Since May 2019, I have served as a Judge on the Iowa Court of Appeals. My time has been spent approximately as follows:

- 15% on family law appeals;
- 25% on juvenile appeals, including terminations of parental rights;
- 30% on other civil appeals, including postconviction relief cases;
- 30% on criminal appeals.

I have authored approximately 300 opinions and voted on hundreds more.

9. **Describe your pro bono work over at least the past 10 years, including:**
   a. **Approximate number of pro bono cases you've handled.**
   b. **Average number of hours of pro bono service per year.**
   c. **Types of pro bono cases.**

While in private practice, I assisted individuals with ten or more pro bono matters. On average, I spent about five hours per year on these matters. Here are some examples:

- Helping a self-represented plaintiff obtain proper service in her case against the Commissioner of Social Security;

- Representing a defendant in a criminal domestic abuse case;

- Helping a self-represented plaintiff obtain service in her employment discrimination case;

- Representing a prisoner in a section 1983 case, as discussed further in response to question 12;

- Representing a friend of a friend in a marital dissolution;

- Representing a defendant in an OWI case;

- Providing legal guidance and other assistance to teenage children.

10. If you have ever held judicial office or served in a quasi-judicial position:

a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.

From 2016 to 2019, I served as a District Judge on the Iowa District Court, a court of general jurisdiction. I was nominated by the District 5C Judicial Nominating Commission. I was appointed by Governor Terry Branstad.

Since May 2019, I have served as a Judge on the Iowa Court of Appeals, a court of appellate jurisdiction. I was nominated by the State Judicial Nominating Commission. I was appointed by Governor Kim Reynolds.

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

1. On July 21, 2016, I entered an order in Polk County case EQCE080139 entitled *State of Iowa ex. rel., Thomas J. Miller, Attorney General of Iowa v. Awakened, Inc. et al.* I have provided a copy. I did not find a West citation for this order.

   On September 27, 2017, the Iowa Court of Appeals issued an opinion affirming in part, reversing in part, and remanding. I have provided a copy. Its West citation is 2017 WL 4317295.

2. On December 20, 2017, I entered an order in Polk County case FECR290646 entitled *State of Iowa v. Khamfay Lovan*. I have provided a copy. I did not find a West citation for this order.

On February 12, 2018, the Iowa Supreme Court entered an order reversing in part. I have provided a copy. I did not find a West citation for this order.

3. On March 30, 2018, I entered an order in Polk County case LACL128372 entitled *Larry R. Hedlund v. State of Iowa et al.* I have provided a copy. Its West citation is 2018 WL 6721912.

On June 28, 2019, the Iowa Supreme Court entered an opinion affirming in part, reversing in part, and remanding. I have provided a copy. Its West citation is 930 N.W.2d 707.

4. On June 29, 2018, I entered an order in Polk County case LACL137598 entitled *Jeramy Hollingshead v. Michael Dean Erickson, et al.* I have provided a copy. I did not find a West citation for this order.

On May 15, 2019, the Iowa Court of Appeals issued an opinion affirming. I have provided a copy. Its West citation is 2019 WL 2144754.

On January 17, 2020, the Iowa Supreme Court issued an opinion reversing and remanding. I have provided a copy. Its West citation is 937 N.W.2d 616.

5. On February 4, 2019, I entered an order in Polk County case CVCV056628 entitled *Shawn Shelton v. The Trust created by the Joint Trust Agreement of Larry E. Shelton and Katherine Shelton, et al.* I have provided a copy. Its West citation is 2019 WL 13149681.

On February 19, 2020, the Iowa Court of Appeals issued an opinion reversing and remanding. I have provided a copy. Its West citation is 2020 WL 824152.

Please note: I have interpreted question 10.b as asking about reversals of my decisions as an individual judge. Those are listed above. In the interest of clarity, I would add that some of the majority opinions that I have authored for the Iowa Court of Appeals have been vacated in part or whole by the Iowa Supreme Court. Here is a list of those cases with links for both courts' opinions:

No Boundry, LLC v. Hoosman, No. 19-0431, 2020 WL 110308 (Iowa Ct. App. Jan. 9, 2020)
https://www.iowacourts.gov/courtcases/8386/embed/CourtAppealsOpinion
No Boundry, LLC v. Hoosman, 953 N.W.2d 696 (Iowa 2021)
https://www.iowacourts.gov/courtcases/8386/embed/SupremeCourtOpinion

State v. Boothby, No. 19-0454, 2020 WL 1879578 (Iowa Ct. App. Apr. 15, 2020)
https://www.iowacourts.gov/courtcases/9368/embed/CourtAppealsOpinion
State v. Boothby, 951 N.W.2d 859 (Iowa 2020)
https://www.iowacourts.gov/courtcases/9368/embed/SupremeCourtOpinion

State v. Dessinger, No.18-2116, 2020 WL 2487899 (Iowa Ct. App. May 13, 2020)
https://www.iowacourts.gov/courtcases/8935/embed/CourtAppealsOpinion
State v. Dessinger, 958 N.W.2d 590 (Iowa 2021)
https://www.iowacourts.gov/courtcases/8935/embed/SupremeCourtOpinion

Matter of Est. of Glaser, No. 19-0008, 2020 WL 4200830 (Iowa Ct. App. Jul. 22, 2020)
https://www.iowacourts.gov/courtcases/8673/embed/CourtAppealsOpinion
Matter of Est. of Glaser, 959 N.W.2d 379 (Iowa 2021)
https://www.iowacourts.gov/courtcases/8673/embed/SupremeCourtOpinion

State v. Wilson, No. 20-0371, 2021 WL 1017132 (Iowa Ct. App. Mar. 17, 2021)
State v. Wilson, 968 N.W.2d 903 (Iowa 2022)
(Copies attached in response to question 10.c)

Guardianship of L.Y., No. 20-1034, 2021 WL 2137682 (Iowa Ct. App. May 26, 2021)
https://www.iowacourts.gov/courtcases/12947/embed/CourtAppealsOpinion
Guardianship of L.Y., 968 N.W.2d 882 (Iowa 2022)
https://www.iowacourts.gov/courtcases/12947/embed/SupremeCourtOpinion

State v. Davis, No. 20-0156, 2021 WL 3395104 (Iowa Ct. App. Aug. 4, 2021)
https://www.iowacourts.gov/courtcases/13370/embed/CourtAppealsOpinion
State v. Davis, 971 N.W.2d 546 (Iowa 2022)
https://www.iowacourts.gov/courtcases/13370/embed/SupremeCourtOpinion

In re *L.B.*, No. 21-0569, 2021 WL 3897447 (Iowa Ct. App. Sep. 1, 2021)
https://www.iowacourts.gov/courtcases/13444/embed/CourtAppealsOpinion
In re *L.B.*, 970 N.W.2d 311 (Iowa 2022)
https://www.iowacourts.gov/courtcases/13444/embed/SupremeCourtOpinion

State v. Mathis, No. 20-0464, 2021 WL 5106072 (Iowa Ct. App. Nov. 3, 2021)
https://www.iowacourts.gov/courtcases/13953/embed/CourtAppealsOpinion
State v. Mathis, 971 N.W.2d 514 (Iowa 2022)
https://www.iowacourts.gov/courtcases/13953/embed/SupremeCourtOpinion

Please let me know if you would like me to provide additional opinions or information.

c. **List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.**

Subject to the qualifications discussed below, I do not believe my orders and opinions have reached the level of constitutional significance anticipated by this question. None of my orders or opinions has declared a statute or regulation to be unconstitutional. I have not authored any published orders or opinions on constitutional issues.

I would add three qualifications. First, in an opinion that I authored in 2021, a panel of the Iowa Court of Appeals addressed certain Fourth Amendment issues. The Iowa Supreme Court granted further review and, ultimately, issued a published opinion entitled *State v. Wilson*, 968 N.W.2d 903 (Iowa 2022). The opinion that I authored is *State v. Wilson*, No. 20-0371, 2021 WL 1017132 (Iowa Ct. App. Mar. 17, 2021). I have attached copies of both opinions.

Second, in an opinion that I authored in 2020, a panel of the Iowa Court of Appeals recognized a constitutional exception to Iowa Rule of Evidence 5.606(b), which generally protects jurors from being called to testify about their deliberations. The opinion is *State v. Spates*, No.19-0749, 2020 WL 6156739 (Iowa Ct. App. Oct. 21, 2020). I have attached a copy.

Finally, when I served as a District Judge, I wrote many orders that involved constitutional issues. For example, I have ruled on many suppression motions that involved search and seizure issues. I have also resolved a number of postconviction relief cases that involved the right to effective counsel. I have also addressed constitutional arguments in other contexts such as a prisoners' rights case, a bond review hearing, a dispute over the application of a sentencing enhancement, a dispute concerning due process in administrative proceedings, and motions to dismiss for lack of personal jurisdiction. Similarly, as a judge on the Iowa Court of Appeals, I regularly address constitutional issues in a variety of areas, including postconviction relief cases, criminal cases, and juvenile cases. Please let me know if you would like me to provide any additional orders or opinions.

11. **If you have been subject to the reporting requirements of Court Rule 22.10:**

a. **State the number of times you have failed to file timely rule 22.10 reports.** 3

b. **State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:**
   i. **120 days.**
      None
   ii. **180 days.**
      None
   iii. **240 days.**
      None
   iv. **One year.**
      None

12. **Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:**
    a. **Title of the case and venue,**
    b. **A brief summary of the substance of each matter,**
    c. **A succinct statement of what you believe to be the significance of it,**
    d. **The name of the party you represented, if applicable,**
    e. **The nature of your participation in the case,**
    f. **Dates of your involvement,**
    g. **The outcome of the case,**
    h. **Name(s) and address(es) [city, state] of co-counsel (if any),**
    i. **Name(s) of counsel for opposing parties in the case, and**
    j. **Name of the judge before whom you tried the case, if applicable.**

Significant legal matter #1:

American Family Mut. Ins. Co. vs Robert Miell, United States District Court for the Northern District of Iowa (04-cv-00142); In re *Miell*, United States Bankruptcy Court for the Northern District of Iowa (09-1500, 09-09074).

Some additional relevant citations:

Am. Family Mut. Ins. Co. v. Meill, 2006 WL 2859623 (N.D. Iowa Oct. 4, 2006)
Am. Family Mut. Ins. Co. v. Miell, 2008 WL 746604 (N.D. Iowa Mar. 19, 2008)
Am. Family Mut. Ins. Co. v. Miell, 2008 WL 2641273 (N.D. Iowa Jul. 1, 2008)
Am. Family Mut. Ins. Co. v. Miell, 569 F. Supp. 2d 841 (N.D. Iowa 2008)
Am. Family Mut. Ins. Co. v. Miell, 2008 WL 2773713 (N.D. Iowa Jul. 16, 2008)
In re Miell, 419 B.R. 357 (Bankr. N.D. Iowa 2009)

Summary and outcome: Mr. Robert K. Miell was a landlord in Cedar Rapids. He owned approximately 700 rental properties. Following a May 2001 storm, Mr. Miell made claims for hail damage on his insurer, American Family Mutual Insurance Company. In support of his claims, Mr. Miell submitted proof of repairs such as contractor invoices and checks written to contractors. In

reliance on Mr. Miell's documents, American Family paid him for approximately 145 roof repairs or replacements. In 2004, however, American Family learned it had been duped: Mr. Miell had submitted false documentation. His roofs had not been repaired or replaced. Mr. Miell had received several hundred thousand dollars to which he was not entitled.

American Family asked our firm to bring suit against Mr. Miell. After extensive investigation, discovery, and motion practice, we tried the case to a jury in January 2008. After six days of evidence and argument, the jury returned a verdict in favor of American Family. Based on the jury's verdict, the Court entered judgment against Mr. Miell for $1,565,096.74. This included $1,017,332.30 for punitive damages.

Mr. Miell chose not to pay the judgment. We then pursued collections efforts, which included substantial participation in Mr. Miell's bankruptcy. By the end of 2011, we had collected over $1.5 million for American Family.

Significance: I do not know of another Iowa case in which an insurance company has been awarded significant punitive damages against a policy holder. Of course, the facts of Mr. Miell's case were very unusual. Still, the verdict reaffirmed my faith in the jury system. It showed that Iowa jurors are willing to reach fair and appropriate results no matter who the parties are.

My participation: I spent hundreds of hours on this case between 2004 and 2011. My efforts included investigation; discovery; pre-trial motion practice; trial preparation; actual trial of the matter; post-trial motion practice; settlement efforts; collection efforts; and participation in the bankruptcy, including pursuit of an adversary proceeding.

At the 2008 trial in Cedar Rapids, I was "co-lead" counsel. I conducted voir dire, the opening statement, the examination of most witnesses, and the closing arguments. I also argued the legal issues, such as jury instructions and evidentiary issues.

Co-counsel: My co-counsel was Mr. David J.W. Proctor. He is a shareholder with the Bradshaw law firm.

Counsel for other parties: Mr. Miell was represented by a series of lawyers. Through trial, he was represented by Mr. Peter C. Riley, 4040 First Avenue NE, Cedar Rapids, IA 52402-3140. For purposes of post-trial motions and appeal, Mr. Miell was represented by Mr. Webb L. Wassmer, 5330 Winslow Road, Marion, Iowa 52303. During the bankruptcy, Mr. Miell was represented by Mr. Jerry Wanek, who is now deceased.

Please note also that, at the trial court level, Mr. Miell pursued a claim against his insurance agent. The agent was represented by Mr. Patrick L. Woodward, P.O. Box 2746, Davenport, IA 52809.

Judges involved: The case was tried before United States Magistrate Judge Jon Stuart Scoles. The bankruptcy matters were heard by United States Bankruptcy Judge Paul J. Kilberg.

Significant legal matter #2:

Mercy Billing Class Action Litigation: *Hay et al. v. Catholic Health Initiatives et al.*, Polk County LACL096101; *Miller et al. v. Mercy Hospital Medical Center et al.*, Polk County LACL096903.

Summary and outcome: This litigation involved the intersection of health insurance coverage, personal injury tort law, and the Iowa Hospital Lien statute.

Historically, many health insurers refused to pay Mercy Hospital for care provided to insured patients if the care arose from an accident caused by a negligent third-party. Instead, health insurers insisted that Mercy pursue a hospital lien against the patient's eventual recovery from the third-party. Accordingly, in such cases, Mercy had traditionally pursued hospital liens in the amount of its full charges. Mercy believed this practice was consistent with insurers' expectations as well as conventions within the health services industry.

In 2004, however, this practice was challenged in two class action lawsuits. Although the suits advanced different legal theories, they shared a central argument: Even if a patient's insurer refuses to pay, Mercy should not seek payment of its full *charges* from the patient's tort recovery. Instead, Mercy should pursue a lesser amount based upon the discount agreement contained in Mercy's "provider agreement" with the patient's health insurer.

After extensive litigation, including a summary judgment ruling, Mercy and the plaintiffs' lawyers sought to resolve their disputes through settlement. The goals of the settlement were two-fold: (1) provide compensation to patients who had been overcharged in the past, and (2) establish an agreeable protocol for future cases. These goals were achieved through a lengthy process that included extensive negotiations on terms and conditions, preparation of a detailed settlement agreement, establishment of a "settlement class" by the Court, issuance of court-ordered notice to class members, briefing and hearings regarding the fairness of the settlement, final approval of the settlement by the Court, and distribution of payments to class members.

Significance: This litigation was significant for Mercy and the plaintiff bar because it resolved a long-standing "bone of contention" in a mutually-agreeable fashion.

It was significant for me personally because it provided a great learning opportunity concerning the settlement of class actions—a rather complex and specialized area of the law. I enjoyed the opportunity to learn the process "from scratch," and to implement that knowledge in a productive manner.

Counsel for Mercy: Several lawyers from the Bradshaw law firm were involved at various points. Mr. John Cortesio and I served as "co-lead" counsel for Mercy through most of the process. I spent several hundred hours on this matter between 2004 and 2008.

Counsel for other parties: In the *Hay* case, the plaintiffs were represented by Mr. George LaMarca and his colleagues, 1820 NW 118th St #200, Des Moines, IA 50325.

In the *Miller* case, the plaintiffs were represented by Mr. Joe Gunderson, 321 East Walnut Street, Suite 300, P.O. Box 6010, Des Moines, IA 50309; as well as Mr. William G. Brewer and Mr. Frank Steinbach, III, Westown Business Center I, 1701 - 48th Street, Suite 100, West Des Moines, IA 50266-6723.

Please note that, in the *Hay* case, Central Iowa Hospital Corporation was a co-defendant. It was represented by Mr. Steven Scharnberg and Mr. Thomas J. Joensen. Mr. Scharnberg's address is 699 Walnut Street, 1900 Hub Tower, Des Moines, IA 50309. Mr. Joensen's address is 801 Grand Avenue, 33rd Floor, Des Moines, IA 50309.

Judge involved: Although several judges were involved at different phases, District Judge Eliza Ovrom had the most significant involvement. She ruled on the summary judgment motions in the *Hay* case. She also approved the class-action settlement.

Significant legal matter #3:

Irvin Johnson v. Chris Brown et al., United States District Court for the Southern District of Iowa (04-cv-00583).

Summary: Mr. Irvin Johnson was a prisoner at the correctional facility at Fort Madison, IA. In 2004, he filed a self-represented (pro se) complaint in the United States District Court for the Southern District of Iowa. Mr. Johnson alleged that a guard had thrown food at him, that Mr. Johnson had complained about the food incident, and that the guard retaliated by physically abusing Mr. Johnson. Moreover, Mr. Johnson alleged, staff had refused to photograph bruises that the guard had caused. Through these and other actions, Mr. Johnson alleged, the staff had violated his constitutional rights.

After several months of litigation, the Court entered an order for appointment of pro bono counsel for Mr. Johnson. I accepted the appointment.

Nature of participation, dates of involvement, judges involved, and outcome: I represented Mr. Johnson from June 2005 through November 2006. My representation included writing approximately twenty letters to Mr. Johnson, holding several phone conversations with him, taking depositions in the Fort Madison facility, and trying the case in the Fort Madison facility. We tried his case before United States Magistrate Judge Celeste F. Bremer. Following trial, Judge Bremer filed a report in which she recommended dismissal of Mr. Johnson's complaint. Ultimately, United States District Judge James E. Gritzner adopted Judge Bremer's recommendation. Mr. Johnson's case was dismissed. He elected not to appeal.

Significance: Although Mr. Johnson ultimately lost his case, he was extremely grateful for our representation. I found his appreciation very gratifying.

Moreover, my work with Mr. Johnson changed my perspective on our corrections system. It opened my eyes to challenges faced both by corrections staff and by prisoners. It also reinforced the importance of our judicial system as a safeguard against violation of constitutional rights.

Other counsel: Ms. Karin Stramel (now Johnson), who was then an associate at the Bradshaw law firm, assisted me with the case. The defendants were represented by Mr. William A. Hill with the Iowa Department of Justice, Office of the Attorney General, Hoover State Office Building, 1305 E. Walnut Street, Des Moines, IA 50319.

13. **Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.**

As explained in my response to question 8, my non-litigation legal experience involved helping insurers to resolve coverage issues. This experience helps me understand insurance issues in the cases that come before the court. I also think my experience with insurance fraud helps me evaluate the credibility of evidence.

14. **If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.**

District Judge (held)
Polk County, Iowa
February 2016-May 2019

Judge, Iowa Court of Appeals (held)
Iowa
May 2019-present

In addition, in 2019 and 2020, I applied to serve as a Justice on the Iowa Supreme Court.

15. **If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):**
    a. **Name of business / organization.**
    b. **Your title.**
    c. **Your duties.**
    d. **Dates of involvement.**

Name of business / organization	Your title	Your duties	Dates (From -- To)
United Methodist Church, Polk City, Iowa	Committee Chair, Boy Scout Troop 89	The Troop Committee has two main responsibilities: (1) supporting the Scoutmaster; and (2) handling troop administration.	2021-present
Iowa Judges Association	Iowa Court of Appeals representative	I am a voting member on the IJA Board. I represent IJA members from the Iowa Court of Appeals.	2019-present

16. **List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.**

Organizations	Committees / Offices	Dates
Iowa State Bar Association	None	1998-present
Polk County Bar Association	None	1998-present
Iowa Association of Trial Lawyers	None	1999-2000 (?)
C. Edwin Moore Inn of Court	None	2000-03 (??), 2012(?) -present
Iowa Defense Counsel Association	None	2001-16
American Bar Association	None	2002-16 (??)
Defense Research Institute	None	2002-08

Iowa Board of Law Examiners	Temporary examiner for the bar examination	2004-10
Eighth Circuit Bar Association	None	2004-12
Nebraska State Bar Association	None	2014-16
Lincoln Inne of Court	None	2015-present
Iowa Judges Association	District 5 representative, 2016-19 Education committee co-chair, 2017-19 Iowa Court of Appeals representative, 2019-present	2016-present
Iowa State Bar Foundation (Fellow)	None	2019-present
Iowa Supreme Court Committee on Judicial Technology	Co-chair, 2021-present	2019-present
Drake Law School Board of Counselors	None	2020-present
Iowa Rules of Appellate Procedure Review Task Force	Co-chair, 2020-present	2020-present

Please note: I have also been involved in various working groups as part of my administrative responsibilities on the Iowa Court of Appeals. For example, I am currently part of a group charged with reviewing the Court's internal operating procedures.

17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.

Organizations	Offices	Dates of affiliation
First United Methodist Church, Kirksville, MO	None	From childhood until 2002
St. James Lutheran Church, Johnston, IA	Mutual Ministry Committee, 2004-06 Treasurer, 2007-09 President, 2009-10 Council member, 2012	2002-2012
International Association of Arson Investigators – Iowa Chapter	Director of Prosecution, 2011-14	2002-16
International Association of Arson Investigators	None	2005-13
International Association of Special Investigation Units – Iowa-Nebraska Chapter	Honorary counsel, 2008-16	2008-16
International Defensive Pistol Association	None	2008-9
Metro Area Fire Investigation Taskforce (Please note: MAFIT is an interagency task force. In general, its members are employed by Des Moines area fire and law enforcement agencies. I was one of three privately-employed members.)	None	2008-16
International Association of Special Investigation Units	None	2010-14 (??)

Association of Certified Fraud Investigators (Associate)	None	2011
National Fire Protection Association	None	2011
Martial Artists for Children and Community	Secretary, 2011-12 Vice President, 2013-14	2011-14
Polk City United Methodist Church	Cub Scout Pack 89, Den Co-leader, 2012-13 Member of Pastor/Staff-Parish Relations Committee (P/SPRC), 2013-15, 2019-20 Chair of P/SPRC, 2014-15 Boy Scout Troop 89, Adult Volunteer, 2015-16 Boy Scout Troop 89, Asst. Scoutmaster, 2017-18 Boy Scout Troop 89, Committee Member, 2020 Boy Scout Troop 89, Committee Chair, 2019, 2021-present	2012-21
National Association of Fire Investigators	None	2013-16
New Pioneer Gun Club	Board Member, 2021-22	2020-present

Lutheran Church of Hope	None	2021-present
National Skeet Shooting Association	None	2021-present

Please note also:

- As suggested above, the Polk City Methodist Church is currently the chartering organization for Cub Scout Pack 89. From approximately 2013 to 2015, however, its chartering organization was American Legion Post 232. During that period, I served as a Den Leader and then Pack Committee Chair.

- I continue to receive correspondence from the University of Missouri, University of Oklahoma Health Sciences Center, and the Delta Chi national fraternity. Although I am not actively involved in their alumni organizations, I believe they count me among their members.

- During some years, I have paid dues to the National Rifle Association. I believe it has been between seven and twelve years since I last paid dues.

- During some years, I have paid dues to wildlife groups such as Pheasants Forever, the National Wild Turkey Federation, and a dove hunters' group. I believe it has been between seven and twelve years since I last paid dues to any such group.

18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.

1. Majority opinion in *Fishel v. Redenbaugh*, 939 N.W.2d 660 (Iowa Ct. App. 2019). This opinion provides a sample of my work interpreting a statute in a case of first impression. I have provided a copy.

2. Iowa District Court order entitled "Order on Motion to Dismiss" in *Roy Karon et al. v. James Mitchell et al.*, LACL140490, Jun. 13, 2018. This order provides a sample of my work addressing contract issues. I have provided a copy. I found no West citation for this order.

   Please note: On January 10, 2020, the Iowa Supreme Court issued an opinion affirming my order. It is publicly available at:

https://www.iowacourts.gov/courtcases/7965/embed/SupremeCourtOpinion

3. Dissenting opinion in *In re Marriage of Mann*, No. 18-1910, 2019 WL 5792673 (Iowa Ct. App. Nov. 6, 2019). This opinion provides a sample of my work writing separately as an appellate judge. I have provided the full Iowa Court of Appeals opinion, which includes both the majority's opinion (pages 1-10) and my dissent (pages 11-18).

   Please note: On May 1, 2020, the Iowa Supreme Court issued an opinion affirming the Iowa District Court and reversing in part and affirming in part the Iowa Court of Appeals. It is publicly available at: https://www.iowacourts.gov/courtcases/6765/embed/SupremeCourtOpinion

19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.

N/A

OTHER INFORMATION

20. If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.

N/A

21. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

N/A

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

Publisher and primary author, *Red Flags Fraud Blog* (2010-11). Please note: I did not retain records of any specific blog posts. All posts related to the investigation of arson, insurance fraud, or both.
Author, *Electronic Signatures and Application Fraud*, IA-NE IASIU NEWS (2008)

Author, *Iowa Court of Appeals' decision could signal a significant change in Iowa's 'innocent coinsured' doctrine*, Bradshaw Ezine (March/April 2004)
Author, *Iowa Supreme Court clarifies the effect of form releases*, Bradshaw Ezine (November 2003)
Co-author of the Torts chapter in the *Iowa Legal Research Guide*, William S. Hein & Company (2003)
Author, Pioneer*'s Paradox: Appellate Rule 4(a)(5) and the Rule Against Excusing Ignorance of Law*, 48 DRAKE L. REV. 677 (2000)
Research assistant for Lex Hawkins & Glenn Norris, *Trial Handbook* (Iowa Academy of Trial Lawyers 1999)
Co-author, *Hedge to Arrive Contracts and the Commodity Exchange Act: A Textual Alternative*, 47 DRAKE L. REV. 319 (1999)
Author, *Inhouse Defenders of Insureds: Some Ethical Considerations*, 46 DRAKE L. REV. 881 (1998) (note)
In summer 1996, I wrote an article about birds. It was published in CityView, a Des Moines news magazine.
In spring 1992, I wrote at least one article in the *Metho-News*, a publication of the First United Methodist Church in Kirksville, MO. I have access to one example, which was written under the heading "Intern's Corner."
During the 1988-89 school year, I was enrolled in a journalism class at the Kirksville (MO) High School. I wrote several news articles and editorials. Some of them were published in our in-school edition, in the local Kirksville Daily Express newspaper, or in both. I do not have records or recollection of all of them. I know that one of them was an editorial entitled *Medicaid: The Rise and Fall of Our 'Great Society.'* I believe it was published in our May 1989 in-school edition. I also recall that one of my news articles was published in Fall 1988. It discussed injuries on the cross-country team.
During the 1987-88 school year, I was enrolled in the Missouri History class at the Kirksville (MO) High School. This class was responsible for publishing a magazine called *The Chariton Collector*. I wrote an article entitled *Sperry's Own Dr. Kennedy*; it appeared in our Spring 1988 edition. I co-authored an article entitled *From Riches to Rags*; it appeared in our Winter 1987 edition.

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

Title or Topic	Group	Date
Untitled discussion on law school, practicing law, and judicial service	Evidence class at Drake Law School	04/2022
Untitled panel discussion on the judicial clerkship experience	Open forum for Drake Law School students	02/2022
Untitled discussion on law school, practicing law, and judicial service	Civil procedure class at Drake Law School	02/2022
Panel discussion about the Iowa Court of Appeals	Iowa Defense Counsel Association	09/2021
Panel discussion about the Iowa Court of Appeals	Iowa Academy of Trial Lawyers	02/2021
Public interview for Iowa Supreme Court applicants	State Judicial Nominating Commission	03/2020
Public interview for Iowa Supreme Court applicants	State Judicial Nominating Commission	01/2020
Untitled discussion on choosing law school, practicing law, and judicial service	Iowa State University Pre-law group	12/2019
Untitled investiture speech	Iowa Court of Appeals	06/2019
Drug Court	Iowa Association of Criminal Defense Lawyers	04/2019

Public interview for Iowa Court of Appeals applicants	State Judicial Nominating Commission	03/2019
Specialty Courts	Polk County Bar Association	01/2019
Courtroom testimony	Des Moines Fire Department	01/2019
Best Practices in State and Federal Court: What Can We Learn from Each Other? (This was a panel presentation with Iowa District Judge Paul Scott and U.S. District Judge Rebecca Goodgame Ebinger.)	Polk County Bar Association	03/2018
The Judicial Application Process	Iowa State Bar Association	11/2017
Untitled speech for baccalaureate ceremony	North Polk High School	05/2017
A View from the Bench	Polk County Bar Association	04/2017
As Judges See it: Top Mistakes Attorneys Make In Civil Litigation	National Business Institute	12/2016
Untitled investiture speech	Iowa District Court for Polk County	04/2016
Tips for Tough EUOs ("EUO" refers to the "examinations under oath" used in insurance investigations.)	Iowa-Nebraska Chapter – International Association of Special Investigation Units	03/2015

Civil Litigation for Fire Investigators	Iowa Chapter - International Association of Arson Investigators	09/2014
Arson for Prosecutors – Insurance Fraud	Bureau of Alcohol, Tobacco, Firearms, and Explosives	07(??)/2014
Iowa Code Chapter 100A	Iowa Chapter - International Association of Arson Investigators	09/2013
Law in Review: Update of Statutes and Case Law (This dealt with legal issues impacting insurance fraud investigations.)	Iowa-Nebraska Chapter – International Association of Special Investigation Units	04/2013
Bankruptcy: Not Just A Motive (This dealt with the use of bankruptcy filings in insurance fraud investigations.)	Iowa-Nebraska Chapter – International Association of Special Investigation Units	05/2011
Information You Should Know About Bankruptcy	Iowa-Nebraska Chapter – International Association of Special Investigation Units	01/2010
Tips for Tough EUOs	Iowa-Nebraska Chapter – International Association of Special Investigation Units	04/2009

Insurance Issues and Bad Faith	Iowa Defense Counsel Association	04/2009
Fire Investigation School – Insurance Fraud – Arson from the Insurance Company's Perspective This presentation is taught by a team of lawyers from the Bradshaw law firm. Since my appointment to the bench, my portion of the presentation has focused on courtroom testimony and decorum. I also assist with teaching about Iowa Code chapter 100A.	Iowa State Fire Marshal - Fire Service Training Bureau	Annually from Spring 2006 through Spring 2022 (although I may have been absent one or more years)

Please note: I have also given a few short presentations on legal topics as part of my membership in the Lincoln Inne of Court and the C. Edwin Moore Inn of Court. Also, on a variety of occasions, I have made public comments as part of my involvement with the Boy Scouts (Troop 89, Polk City, IA); the Cub Scouts (Pack 89, Polk City, IA); the Polk City United Methodist Church; and the St. James Lutheran Church (Johnston, IA).

24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

Social media application name	Account name or other identifying information
Facebook	Dave May. Previously, I have used David May, D Avid M Ay, and Sugar Ray May (named after our dog)
Instagram	Dave May
LinkedIn	David May
VSCO	Dave12282846
Yonder	@davemay

25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

Recognition	By:	Date
In the *2020 Judicial Performance Review*, ninety-three percent of responding attorneys voted in favor of my retention.	Iowa State Bar Association	10/2020
In the *2018 Judicial Performance Review*, ninety-seven percent of responding attorneys voted in favor of my retention.	Iowa State Bar Association	10/2018
Award "For Outstanding Contribution to the Detection, Investigation, and Prosecution of Insurance Fraud"	Iowa Insurance Division	04/2010
Order of the Coif honorary society	Drake chapter of the Order of the Coif	10/1998
"High Honors" designation for my law degree	Drake University Law School	05/1998
Chosen to serve on the Drake University Law Review	Drake University Law School	Associate Editor (1997-98); Staff (1996-97)
CALI Excellence for the Future Awards for the following classes: • Civil Procedure I • Employment Discrimination • Consumer Protection • Labor Law I	The Center for Computer Assisted Legal Instruction	Undated. Received between 1996 and 1998.
Corpus Juris Secundum Award for Scholastic Excellence in Civil Procedure	West Publishing Corporation	1995-96

Delta Omega honorary public health society	University of Oklahoma chapter	04/1996
Graduate Student Association Award for Outstanding Academic Achievement	University of Oklahoma Graduate Student Association	12/1995

26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

Name	Relationship	Telephone number
U.S. District Judge Rebecca Goodgame Ebinger	Judicial colleague. Additionally, during private practice, I had a jury trial before Judge Ebinger.	515-323-2855
Iowa Court of Appeals Judge Sharon Soorholtz Greer	Judicial colleague. I also knew Judge Greer when we were both in private practice. Also, she had one case before me when I was a District Judge.	515-348-4925
Iowa District Judge Samantha Gronewald	Judicial colleague. Also, during private practice, we represented adverse parties in an insurance dispute.	515-286-2170
Iowa District Judge William P. Kelly	Judicial colleague.	515-286-2169
Iowa Supreme Court Justice Edward M. Mansfield	Judicial colleague. In addition, during private practice, we represented adverse parties in multiple matters. We have also taught CLE courses together.	515-348-4700

Iowa Supreme Court Justice Christopher McDonald	Judicial colleague.	515-348-4700
Senior Judge Karen A. Romano	Judicial colleague. Judge Romano was my mentor when I served as a District Judge.	515-979-4639
Iowa Supreme Court Justice Thomas D. Waterman	Judicial colleague. Also, during private practice, Justice Waterman served as a mediator for the Mercy Billing Class Action Litigation, which I described in response to question 12.	515-348-4700

27. Explain why you are seeking this judicial position.

Humans have always had disputes. The key question is how those disputes will be resolved. Will they be resolved through violence and deception, or will they be handled in a civilized manner, through a trusted system of justice?

In the United States—and particularly in Iowa—we enjoy a strong, respected judicial system. It allows for the just and peaceful resolution of disputes in accordance with the rule of law. It is one of the reasons we enjoy so much freedom, stability, prosperity, and safety.

But our courts cannot remain strong without strong judges and justices. This means that qualified candidates must be willing to take on the responsibility of judging. This is why I applied for my prior role as a District Judge. It is also why I applied for my current role on the Iowa Court of Appeals. And it is also why I am now applying for the Iowa Supreme Court. In short, I hope to serve our community by adding to the strength of our judicial system.

28. Explain how your appointment would enhance the court.

The Iowa Supreme Court plays an integral role in our constitutional system. It is charged with administering a court system that serves all 99 counties. Through its opinions, the Court answers some of our most challenging legal questions. Often, those opinions have far-reaching consequences for the lives of Iowans.

I believe I can make a substantial contribution to the Court's work. Here are five reasons why:

1. **Legal writing** is one of my favorite kinds of work. I am especially drawn to legal issues that are novel, complex, or both. And I enjoy the challenge and

responsibility of writing opinions that provide both (1) justice for the current parties and (2) useful guidance for future cases.

2. I have had an interesting mix of **life experiences**. I grew up in a medium-sized town in rural northeast Missouri. There are no other lawyers in my family. I am a regular person—but I have received extraordinary blessings. Throughout my life, family and friends have loved and supported me. I had the great fortune to work at two successful law firms. I had the honor of serving a wide range of clients, including major corporations, high school students, family farmers, and many others. Then I had the privilege of serving on the Iowa District Court. While there, I presided over sixteen jury trials; dozens of family law trials; scores of felony guilty pleas; scores of felony sentencings; dozens of suppression hearings; and countless other civil, criminal, and family law hearings. I now have the honor of serving on the Iowa Court of Appeals, where I have authored about three hundred opinions and I have voted on hundreds more.

3. I enjoy **working with others** to solve challenging problems in a thoughtful and timely manner. I enjoyed serving on the three-person committee that manages the Bradshaw law firm. I enjoyed serving as Treasurer and then President of St. James Lutheran Church. I have enjoyed working with my wife to raise our two children, who are now young adults. And I enjoy working with my fellow judges—and our invaluable staff—both to decide cases and to address administrative issues.

4. I am committed to **collegiality**. Our courts perform best when our judges provide support and camaraderie to one another.

5. I am equally committed to **independent thinking**. If I disagree with my colleagues about how we should decide a case, I am glad to share my point of view. Often, we can work together to find a solution on which we all can agree. When appropriate, though, I am glad to write a separate opinion.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

If chosen to serve, I promise I will do my best to support "the Constitution of the United States," to support "the Constitution of the State of Iowa," and to "administer justice according to the law" equally to all persons. *See* Iowa Code § 63.6.

Thank you for your consideration.

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed: ______________________ Date: 5/14/________, 2022

Printed name: David May

(Adopted May 5, 2021)

Attachments

Documents responsive to Question 10(b) (reversals)

My order in *State v. Awakened*......33

Court of Appeals opinion in *State v. Awakened*......39

My order in *State v. Lovan*......42

Supreme Court order in *State v. Lovan*......51

My order in *Hedlund v. State*......54

Supreme Court opinion in *Hedlund v. State*......94

My order in *Hollingshead*......139

Court of Appeals opinion in *Hollingshead*......143

Supreme Court opinion in *Hollingshead*......150

My order in *Shelton*......162

Court of Appeals opinion in *Shelton*......170

Documents responsive to Question 10(c) (significant constitutional opinions)

Court of Appeals opinion in *State v. Wilson*......179

Supreme Court opinion in *State v. Wilson*......189

Court of Appeals opinion in *State v. Spates*......203

Documents responsive to Question 18 (writing samples)

Majority opinion in *Fishel v. Redenbaugh*......223

Order in *Karon et al. v. Mitchell et al*......231

Dissenting opinion in In re *Marriage of Mann*......249

Please note: To provide context, I have also included the majority opinion from In re *Marriage of Mann* as pages 239 through 248. To be clear, though, those pages were written by another judge; they are not my work product.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA Applicant, v. AWAKENED, INC. (dba "East West Massage School" and "East-West School of Integrative Healing Arts") JOSHUA WEBER and HEATHER WEBER Respondents.	**EQCE080139** **ORDER GRANTING STATE'S APPLICATION TO ENFORCE ATTORNEY GENERAL'S CONSUMER FRAUD ACT SUBPOENA**

On June 6, 2016, the State of Iowa ex rel. Attorney General of Iowa ("Attorney General") filed an "Application to Enforce Attorney General's Consumer Fraud Act Subpoena." A hearing on the application was held on July 6, 2016. The Attorney General was represented by Mr. Max Miller. Respondents were represented by Ms. Judith O'Donohue.

Factual background. Based on the present record, the facts appear as follows:

1. Awakened, Inc. dba "East-West Massage School" or "East-West School of Integrative Healing Arts" ("East-West") and formerly dba "Eastwind Massage Therapy School" is a for-profit Iowa corporation that conducts business from 2711 Muscatine Ave., Iowa City, IA 52240.

2. East-West provides massage therapy instruction to consumers seeking training required to obtain massage therapy licenses.

3. Heather Weber and Joshua Weber own and operate East-West and are, respectively, the President and Registered Agent of Awakened, Inc. (Awakened, Inc., Joshua Weber, and Heather Weber are sometimes referred to herein collectively as the "Respondents.")

4. On October 22, 2015, a former student of East-West ("Student") filed a complaint with the Iowa Attorney General's Office alleging, *inter alia*, that East-West misled the Student by advertising on its website that it is "an

Award Winning School" that is "fully accredited" with the State of Iowa, the Iowa Massage Board, and the National Certification Board for Therapeutic Massage & Bodywork ("NCBTMB").

5. The Student's complaint (with personal information redacted) is appended as Attachment 1 to the Attorney General's Application.

6. The Student alleged East-West's advertising to be misleading because the award referenced on the website was for female entrepreneurship of a prior owner, not massage therapy education, and neither the State nor NCBTMB provides accreditation for massage schools.

7. The Student also alleged he or she remained with the school because the Student Handbook informed students that tuition is non-refundable, a potential violation of Iowa Code § 714.23.

8. The Student attended the school from September 2014 to July 2015 and paid $7,745 for his or her attendance.

9. After receiving the complaint from the Student, the Attorney General forwarded the complaint to Joshua Weber and requested information regarding the Student's attendance at East-West. Joshua Weber informed the Attorney General on November 17, 2015 that East-West had removed mention of "Award Winning" and "accredited" from its website. Joshua Weber also provided the Attorney General with documents related to the Student's attendance including, among other documents, the Student's transcript and enrollment agreement, and a School Catalogue and Student Handbook.

10. After reviewing the provided materials, it appeared (and still appears) to the Attorney General that the Respondents have engaged in, are engaging in, or are about to engage in one or more practices enforceable as violations of the Consumer Fraud Act, and that it is in the public interest to investigate such matters. It also appeared (and still appears) from a review of the School Catalogue and Student Handbook that Respondents have engaged in consumer credit conduct in violation of Iowa Code § 537, the Iowa Consumer Credit Code.

11. Therefore, in order to further investigate the conduct, the Attorney General issued Subpoena No. 2498 on March 18, 2016, under the authority of the Consumer Fraud Act, Iowa Code § 714.16 (3) & (4). A copy of that subpoena is appended as Attachment 2 to the Attorney General's application.

12. The subpoena sought five categories of information and documents for the time frame January 1, 2014 through the present. The five categories were:

1) Identify all former and current East-West students who attended at any point during the relevant period, including name, last known address, e-mail address, telephone number, first and last date of attendance, and whether the student graduated.

2) Copies of all documents concerning the enrollment of any student, including but not limited to, applications, signed enrollment contracts, completed during the relevant period.

3) All versions of a student handbook used during the relevant period.

4) Copies of all documents in student financial files including consumer credit documentation (e.g. payment plans), loan documents, and student ledger cards reflecting all charges to and payments form student.

5) Identify the company's legal name, any former names, all places of business, the date of the incorporation or formation, place of incorporation or formation, and identify the principals or officers, directors, and any person that has an ownership or equity interest of at least five percent.

13. Currently, it appears there has been compliance with categories 1, 3, and 5.

14. At the hearing, there was some disagreement as to whether there has been compliance with category 2. Regardless, the Court does not believe there is a controversy as to whether Respondents are required to comply with category 2. (Transcript, p. 18, lines 13-14)).

15. However, Respondents object to category 4 on two grounds: (a.) Respondents suggest the subpoena is not within the Attorney General's powers; and (b.) Respondents suggest there is a right of privacy which applies to student records.

Legal conclusions. In light of the facts outlined above, the Court concludes as follows:

1. The subpoena is enforceable if it is "(1) within the statutory authority of the agency, (2) reasonably specific, (3) not unduly burdensome and (4) reasonably relevant to the matters under investigation." *State ex rel. Miller v. Publishers Clearing House, Inc.*, 633 N.W.2d 732, 736 (Iowa 2001).

2. As to element (1), Respondents claim that massage therapy schools have immunity from the Attorney General's consumer fraud enforcement powers. But the Court concludes massage therapy instruction is a "service" covered by the statutory definition of "merchandise" in Iowa Code § 714.16(1)(i). Accordingly, the Court further concludes the subpoena is within the statutory authority of the Attorney General.

3. As to element (2), the Court concludes the subpoena is reasonably specific. This issue is apparently undisputed.

4. As to element (3), the Court concludes the subpoena is not unreasonably burdensome. The Court sees no basis on which Respondents could claim unreasonable burden. However, under this rubric, the Court will address the claim by Respondents that there is a right to privacy on the part of the student.

   This alleged right, Respondents claim, prevents Respondents from complying with the subpoena without first notifying students. The Court has found no authority to support that position. Additionally, as the Attorney General points out, Iowa Code section 22.7 requires the Attorney General keep confidential the records at issue. This addresses any issues of confidentiality. *State ex rel. Miller v. dotNow.com, Inc.*, 2006 WL 468313 (Iowa Ct. App. 2006).

5. As to element (4), the Court concludes the requested financial information is reasonably relevant to an investigation by the Attorney General to determine whether, inter alia, Respondents are defrauding students.

   Additionally, Court expressly rejects Respondents' contention that the scope of the Attorney General's investigation must be limited to the letter of the initial student complaint. Section 714.16(3) establishes that subpoenas can be issued based upon a practice that violates 714.16, a suspicion of such violation, or even just the Attorney General's belief that it is "the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any such practice." This scope is far broader than any one piece of evidence—including any single complaint by a particular consumer.

6. The Court concludes, therefore, that the subpoena is enforceable.

7. Iowa Code section 714.16(6) states:

   "*6. If a person fails or refuses to file a statement or report, or obey any subpoena issued by the attorney general, the attorney general may, after notice, apply to the Polk county district court or the district court for the county in which the person resides or is located and, after hearing, request an order:*

   a. Granting injunctive relief, restraining the sale or advertisement of any merchandise by such persons.

   b. Dissolving a corporation created by or under the laws of this state or revoking or suspending the certificate of authority to do business in this state of a foreign corporation or revoking or suspending any other licenses, permits, or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice.

   c. Granting such other relief as may be required until the person files the statement or report, or obeys the subpoena."

Here, it is undisputed that Respondents have failed to comply with the Attorney General's subpoena. Therefore, appropriate relief will be granted.

8. Iowa Code section 714.16(11) states: "*In an action brought under this section, the attorney general is entitled to recover costs of the court action and any investigation which may have been conducted, including reasonable attorneys' fees, for the use of this state.*" The present action is brought pursuant to 714.16, specifically subsection 6. Accordingly, costs and attorney fees will be awarded. However, in light of Respondents' partial compliance, the amounts awarded will be reduced.

IT IS HEREBY ORDERED AS FOLLOWS:

1. **Order for compliance:** Respondents shall fully comply with the subpoena within fourteen (14) days of the date of this Order.

2. **Injunction under section 714.16(6):** Beginning on **August 5, 2016**, and continuing until further order of this Court, Respondents shall be prohibited from the sale or advertising of any merchandise in the State of Iowa. This includes, without limitation, providing any massage therapy instruction.

Provided, however, that once Respondents have fully complied with the subpoena, they may make application to the Court for an order removing this injunction. If appropriate, Respondents may mark such application as an "emergency" filing. Arrangements for a hearing shall be made with the Court's judicial assistant, Rachael Lund, at 515-286-3167.

3. **Contempt.** Respondents are hereby placed on notice that failure to comply with this Order may be construed as contempt under Iowa Code section 665.2, and may subject Respondents to fines and/or confinement.

4. **Attorney fees.** Pursuant to Iowa Code section 714.16(11), the Court awards attorney fees of $2,500 and investigative costs of $500 in favor of the Attorney General and against Respondents jointly and severally.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
EQCE080139	STATE OF IOWA VS AWAKENED INC, ET AL

So Ordered

David May, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2016-07-21 18:44:29 page 6 of 6

908 N.W.2d 883 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

STATE of Iowa EX REL., Thomas J. MILLER, Attorney General of Iowa, Applicant-Appellee,
v.
AWAKENED, INC., Joshua Weber, and Heather Weber, Respondents-Appellants.

No. 16-1365
|
Filed September 27, 2017

Appeal from the Iowa District Court for Polk County, David N. May, Judge.

Awakened, Inc. and its owners, Joshua Weber and Heather Weber, appeal a district court order granting the State's application to enforce a consumer fraud subpoena, awarding the State investigation costs and attorney fees, and enjoining the operation of a private massage school. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Attorneys and Law Firms

Judith M. O'Donohoe of Elwood, O'Donohoe, Braun, & White, L.L.P., Charles City, for appellants.

Thomas J. Miller, Attorney General, and Max M. Miller, Assistant Attorney General, for appellee.

Heard by Vogel, P.J., and Potterfield and Mullins, JJ.

Opinion

MULLINS, Judge.

*1 Awakened, Inc., doing business as East West Massage School, a private massage-therapy school, and its owners, Joshua Weber and Heather Weber (collectively referred to as "East West"), appeal a district court order granting the State's application to enforce a consumer fraud subpoena, awarding the State investigation costs and attorney fees, and enjoining the operation of the school. East West argues the district court erred in (1) awarding the State investigation costs and attorney fees because the proceeding to enforce the subpoena was not an action for an actual violation of the Consumer Fraud Act (CFA) and (2) enjoining the school's operation because it was simply concerned about student privacy and the injunction was not necessary to obtain compliance. [1]

I. Background Facts and Proceedings

East West provides massage-therapy instruction to individuals seeking to obtain a massage-therapy license in the State of Iowa. *See* Iowa Code § 152C.5 (2015) (prohibiting unlicensed individuals from practicing massage therapy). In October 2015, the Iowa Attorney General's Office received a complaint from a former East West student alleging, among other things, the school engaged in "deceitful advertising" on its website and the school's student handbook informed students all tuition was non-refundable, potential violations of Iowa law. *See id.* §§ 714.16(2)(a), 714.23. The Attorney General's Office forwarded the complaint to Mr. Weber, who submitted a response on East West's behalf. In March 2016, the Attorney General issued a subpoena pursuant to the CFA, Iowa Code section 714.16, requesting that East West provide documentation reflecting the following: (1) identification of all students who attended the school during a certain timeframe; (2) documentation concerning the enrollment of any such student, including but not limited to enrollment applications and contracts; (3) copies of all student handbooks in effect during a certain timeframe; (4) all documents in student financial files including payment plans, loan documents, and ledger cards reflecting all charges to and payments from students; and (5) information relating to the business and its owners. Ultimately, East West declined to comply with two of the State's requests, and the State filed an application to enforce the subpoena and requested the district court to, among other things, enforce the subpoena as it relates to request numbers two and four concerning enrollment and financial information of students; enjoin the school from advertising and providing further services to consumers; and award the State investigation costs and attorney fees for its efforts. *See id.* § 714.16(6), (11). In its application, the State noted its suspicion that East West engaged in, was engaging in, or was about to engage in violations of the CFA and the Iowa Consumer Credit Code (CCC), found in Iowa Code chapter 537 and in order to further investigate the conduct, it issued the subpoena under the authority of the CFA. The State subsequently filed an affidavit of attorney fees and investigation costs, forwarding a total claim of $12,150.

*2 Following a hearing, the district court entered a written order requiring East West's compliance with the subpoena within fourteen days, enjoining the school from advertising or providing services to consumers thereafter until full

compliance, and awarding attorney fees and investigation costs to the State in the amount of $3000.[2] East West moved for a stay of the payment of fees and the injunction pending appeal. The court granted the motion to stay, and East West appealed.

II. Award of Attorney Fees and Investigation Costs

East West argues the district court erred in awarding the State investigation costs and attorney fees because the proceeding to enforce the subpoena was not an action for an actual violation of the CFA. *See id.* § 714.16(11). The State argues the subpoena-enforcement action was "an action brought under" the CFA and, as such, an award of fees and costs was mandatory. Because our analysis primarily turns on statutory interpretation, our review is for legal error. *See DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 289 (Iowa 2017).

The CFA provides: "In an *action* brought under this section, the attorney general is entitled to recover costs of the court action and any investigation which may have been conducted, including reasonable attorneys' fees, for the use of this state." Iowa Code § 714.16(11) (emphasis added). Such an award of costs and fees is mandatory as "an element of the State's recovery in a *successful* consumer fraud *action*." *State ex rel. Miller v. Fiberlite Int'l, Inc.*, 476 N.W.2d 46, 48 (Iowa 1991) (emphasis added). The issue before us, one of first impression, is whether the State's filing of an application to enforce a subpoena under section 714.16(6) amounts to an "action" under section 714.16(11), thus allowing an award of attorney fees and investigation costs when the State is successful in enforcement.

The State argues an application to enforce a subpoena is an independent "action" under the CFA and, as such, an independent award of costs and fees is mandatory. Iowa Code section 714.16(6) governs applications to enforce a subpoena while section 714.16(7) concerns "actions" relating to violations of the CFA. The two are distinct. An award of costs and fees is only appropriate "in a *successful* consumer fraud *action*." *Id.* (emphasis added); *accord* Iowa Code § 714.16(11). The statute does not identify an application to enforce a subpoena as an "action." What is more, section 714.16(6) specifically provides the remedies the State is allowed to seek in such an application to enforce a subpoena —an award of attorney fees and investigation costs is not one of these remedies.

The State next relies on the following language from an Iowa Supreme Court case to support its assertion that attorney fees and investigation costs are awardable in relation to an application to enforce a consumer fraud subpoena: "[T]he attorney general, in seeking to recover reasonable attorney fees and investigation costs under [the CFA], is *entitled to wait* until the merits of the claim have been resolved before presenting evidence of reasonable attorney fees and investigative costs incurred in pursuing the case." *Fiberlite*, 476 N.W.2d at 47 (emphasis added). According to the State, the "entitled to wait" language means it does not have to wait for a successful completion of a consumer fraud action in order to pursue an award of investigation costs and attorney fees.

*3 The State has taken the *Fiberlite* language upon which it relies out of context, and the procedural status of the case is clearly distinguishable. In *Fiberlite*, the State applied for an award of investigations costs and attorney fees "at the end of trial," after the district court concluded the defendants had engaged in violations of the CFA. *Id.* "The district court denied the request because the State failed to present any proof of fees during the trial." *Id.* On appeal, our supreme court implied that the State could have submitted evidence of fees and costs in its case-in-chief, but it was "entitled to wait" until after a trial on the merits is actually completed "before presenting evidence of reasonable attorney fees and investigative costs incurred in pursuing the case." *Id.* There is nothing in *Fiberlite* that supports the State's argument that attorney fees and costs can be recovered in a pretrial proceeding, nor that there could be recovery when no action has been commenced alleging a CFA violation has occurred.

Based on our review of the statute and *Fiberlite*, we conclude a subpoena enforcement proceeding is not an independent "action" under the CFA. As such, the award of investigation costs and attorney fees was not permissible at this stage of the attorney general's investigation. We reverse the award provision of the district court order and remand for the entry of a corrected order.

III. Injunction

East West argues the district court abused its discretion in enjoining the school's operation because it was simply concerned about student privacy and the injunction was not necessary to obtain compliance.[3] "Generally, our standard of review for the issuance of injunctions is de novo." *Max 100 L.C. v. Iowa Realty Co., Inc.*, 621 N.W2d 178, 180 (Iowa

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2001). "Yet, the decision to issue or refuse 'a temporary injunction rests largely [within] the sound discretion of the trial court.' " *Id.* (alteration in original) (quoting *Kent Prods., Inc. v. Hoegh*, 61 N.W.2d 711, 714 (Iowa 1953)). Thus, we review the district court's imposition of the injunction in this case for an abuse of discretion. *See id.*; *State ex rel. Miller v. Publishers Clearing House, Inc.*, 633 N.W.2d 732, 736 (Iowa 2001). Temporary injunctions may be imposed "[i]n any case specially authorized by statute." Iowa R. Civ. P. 1.1502(3). East West does not challenge the district court's statutory authority to impose an injunction. *See* Iowa Code § 714.16(6)(a). Instead it argues "there is no indication that an injunction was necessary to obtain compliance from the school," and only "a court order clarifying the situation" was required.

The district court ordered East West to be in full compliance with the subpoena within fourteen days of its order. The injunction would only become effective if, after the fourteen days, East West failed to comply with the subpoena and the court order. The record reveals East West resisted providing enrollment and financial records pertaining to its students throughout its exchanges with the State. The conditional injunction was an appropriate method of compelling East West to comply with the subpoena, and the court generously allowed East West a grace period to turn over the documents. We find no abuse of discretion in the district court's imposition of the conditional injunction.

IV. Conclusion

We conclude the district court did not abuse its discretion in imposing a conditional injunction. However, because we conclude the award of attorney fees and investigation costs was premature, we reverse the same and remand for the entry of a corrected order.

***4 AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

All Citations

908 N.W.2d 883 (Table), 2017 WL 4317295

Footnotes

1 East West also initially argued on appeal that the district court erred in enforcing the subpoena because the requested records were entitled to a privacy protection absent special notice to its students and some of the records requested were unrelated to any act of consumer fraud under the CFA. East West conceded at oral arguments, however, that the district court's enforcement of the subpoena was appropriate. We therefore consider this issue moot and do not consider it on appeal. *See, e.g., Baker v. City of Iowa City*, 750 N.W.2d 93, 97 (Iowa 2008).

2 Due to East West's partial compliance with the subpoena, the court did not award the State the full amount requested.

3 East West argues this issue is now moot, stating "the school complied with the subpoena," and "the records have been turned over." Although the injunction was stayed pending appeal, there is no indication in the record that East West has applied to the district court for a lift of the injunction, as was required by the initial order imposing the injunction. East West additionally conceded at oral arguments that the injunction is merely stayed pending appeal and has not been lifted. Because the district court has not lifted the injunction, this issue is not moot.

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA, Plaintiff, vs. KHAMFAY LOVAN Defendant.	FECR290646 ORDER ON MOTION FOR RESUBMISSION OF EXHIBITS

Summary

Defendant is pursuing an appeal. Defendant's appellate attorney has filed a motion before this Court. The motion asks that this Court require the Polk County Attorney's Office to file the following items with the Clerk of Court:

(1.) A video recording (hereinafter, the "suppression video") that was admitted during a suppression hearing on April 28, 2016; and

(2.) Numerous other exhibits (hereinafter, the "mistrial exhibits") that were released following an October 2016 mistrial.

As to the suppression video, the Court has entered a separate order granting relief. The parties have agreed to use a substitute

exhibit. The Court has given effect to that agreement.

As to the mistrial exhibits, however, no such agreement has been reached. Moreover, after evaluating the law and the facts, the Court does not believe relief is appropriate. Therefore, as to the mistrial exhibits, Defendant's motion is denied.

Factual background

1. In October 2015, Defendant was arrested on charges relating to drugs and a firearm.

2. In December 2016, Defendant was charged in a six-count trial information.

3. In March 2016, Defendant filed a motion to suppress.

4. On April 28, 2016, Defendant's motion was heard.

5. On May 12, 2016, the Court entered an order denying the motion to suppress.

6. On October 3, 2016, the Court commenced a jury trial.

7. On October 6, 2016, the Court declared a mistrial.

8. Also on October 6, 2016, the Court entered an order that stated as follows:

> NOW on the 6th day of October 2016[,] the Jury having deliberated and unable to reach verdicts on all of the Counts alleged [, the Court] declares a mistrial upon the

> motion of the Defendant. The Jury sent several notes to the Court during their deliberations. The notes, especially the last note from the Jury, leads to the conclusion that further inquiry by the Court would not be appropriate and that it would only cause more confusion and is not in the best interests of justice.
> The parties shall appear for a status conference on October 19, 2016 at 10:00 a.m. in Courtroom 207, the Polk County Courthouse.
> Bond will continue as set.
> The exhibits received by the Court are hereby ordered released to the Polk County Attorney's Office.
>
> (underline added)

9. Trial was rescheduled for May 8, 2017. Rather than proceed with a jury trial, however, the parties agreed to a trial on the minutes of testimony. Based on those minutes, the Court adjudged Defendant guilty of two offenses: (1.) possession of methamphetamine with intent to deliver, a Class "B" felony under Iowa Code section 124.401(1)(b)(7); and (2.) possession of a firearm as a convicted felon, a Class "D" felony under Iowa Code section 724.26. Defendant was sentenced to an indeterminate term of incarceration not to exceed thirty (30) years.

10. The same day, Defendant filed a notice of appeal. Defendant appeals the Court's judgment of May 8, 2017, and "all adverse rulings therein."

Discussion

As explained above, the fighting issue is whether this Court should order the Polk County Attorney to file the mistrial exhibits. The Court concludes that it should not. This conclusion is supported by three grounds:

1. The parties have not cited, and the Court has not found, any appellate decision that requires a prosecutor to submit exhibits that were previously released following a mistrial. (Transcript of October 31, 2017, p. 9).

The Appellate Defender has provided relevant filings from other district court cases. (*See* "Notice of Persuasive Authority," filed November 12, 2017). In those cases, though, all of the lawyers were in agreement. Here, the State's trial counsel—the Polk County Attorney—has strenuously resisted. The State's appellate counsel has not appeared.

2. The Appellate Defender relies on Rule 6.807, which states in pertinent part: "If anything material to either party is omitted from the record *by error or accident*...the district court...may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted." Iowa R.

App. P. 6.807 (emphasis added). For present purposes, the "record" means "exhibits *filed* in the district court." Iowa R. App. P. 6.801 (emphasis added).

The big question, then, is *why* the mistrial exhibits were never "filed" with the district court clerk? *Id.* Did that occur because of an "error or accident"? If so, Rule 6.807 could apply.

But that is not what happened. On October 6, 2016, this Court expressly ordered that the mistrial exhibits "are hereby released to the Polk County Attorney's Office." The Court's language was clear. The Court expressed a conscious choice that the mistrial exhibits should be released, not filed. Nothing suggests that decision resulted from "error or accident," *see* Rule 6.807, or was otherwise "inadvertent[]," *see State v. Martin*, 2017 WL 2465790 (Iowa Ct. App. 2017). Therefore, Rule 6.807 cannot apply.

3. In the interest of judicial efficiency, however, the Court has assumed *arguendo* that Rule 6.807 could apply here. Even so, this Court still has discretion to grant or deny the requested relief. *See* Iowa R. App. P. 6.807 (stating the district court "may" act); *IronPlanet, Inc. v. Ritchie Bros. Auctioneers (Am.)*, 2014 WL 7343212 (Iowa Ct. App. 2014) (recognizing discretion of district court).

In exercising that discretion, the Court has considered the concerns already discussed above. (*See* items 1. and 2., above). The Court has also considered the nature of the "trial on the minutes" procedure, through which Defendant's guilt was established on the basis of *written* minutes of testimony. That procedure provided benefits to Defendant as well as the State. For example, the State was relieved of responsibility to produce any physical evidence. That benefit would be diminished if the State were forced to produce the mistrial exhibits now.

Additionally, consistent with the language of Rule 6.807, the Court has considered whether the mistrial exhibits are "material." To date, it has not been shown that the mistrial exhibits could make a difference in Defendant's appeal. Therefore, it has not been shown that the exhibits are "material."

It appears that, as a practical matter, Defendant's appeal will most likely center on the May 2016 suppression ruling. *See, e.g., State v. Simmons*, 714 N.W.2d 264, 271 (Iowa 2006) (noting use of the trial on the minutes procedure "in order to preserve Simmons' right to appeal the suppression ruling"). It does not appear that the

mistrial exhibits had an impact on the suppression ruling. The suppression ruling *predated* the October 2016 mistrial.

It is true that Defendant has appealed all adverse rulings. However, it has not been shown that the mistrial exhibits had an impact on *any* adverse ruling. As one example, it does not appear that the mistrial was an adverse ruling.

The Court acknowledges the Appellate Defender's concern that the mistrial exhibits could be relevant to a future PCR case. So far as this Court can tell, however, the purpose of Rule 6.807 is to facilitate *the present appeal*, not a theoretical future PCR. *Compare* Iowa Code § 822.7 (noting that all "rules and statutes applicable in civil proceedings including pretrial *and discovery procedures* are available to the parties" in a PCR, emphasis added).

Conclusion

For the reasons explained, the Appellate Defender's motion is **granted in part** and **denied in part**, as follows:

1. The motion is **granted** as to the suppression video. Relief is further described in a separate order entered yesterday.

2. The motion is **denied** as to the mistrial exhibits.

Note: The Clerk shall submit a copy of this Order to the Clerk of Court for the Iowa Supreme Court.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
FECR290646	STATE VS KHAMFAY FAY LOVAN

So Ordered

David May, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2017-12-20 19:19:44 page 9 of 9

E-FILED 2018 FEB 12 4:54 PM POLK - CLERK OF DISTRICT COURT

ELECTRONICALLY FILED FEB 12, 2018 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

No. 17–0729

Polk County No. FECR290646

ORDER

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KHAMFAY LOVAN,
Defendant-Appellant.

This matter comes before the court, Wiggins, Waterman, and Mansfield, JJ., upon the defendant's "Motion for Order Directing the District [Court] to Comply with Iowa Rule 6.807." The State has filed a response and the defendant has filed a reply. This court shall treat the defendant's motion as a motion for summary reversal and the motion is granted.

That portion of the district court's December 20, 2017, order which denied the defendant's motion for the resubmission of the mistrial exhibits is reversed. Within 14 days of the date of this order, the Polk County Attorney's Office shall file with the clerk of the district court all 25 of its exhibits that were admitted during the jury trial held October 4-6, 2016. Appellate deadlines shall remain stayed until the Polk County Attorney's Office has filed the exhibits.

Copies to:

Joseph Crisp

Martha Lucey

Clerk of District Court for Polk County

Kevin Cmelik

State of Iowa Courts

Case Number	**Case Title**
17-0729	State v. Lovan

So Ordered

David S. Wiggins
Justice

Electronically signed on 2018-02-12 16:36:51

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LARRY R. HEDLUND, Plaintiff, vs. STATE OF IOWA; K. BRIAN LONDON; CHARIS M. PAULSON; GERARD F. MEYERS; and TERRY E. BRANSTAD, Defendants.	LACL128372 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case concerns the July 2013 termination of Plaintiff Larry Hedlund. Prior to his termination, Hedlund was a Special Agent in Charge with the Iowa Division of Criminal Investigation.

In this litigation, Hedlund has alleged five claims:

(1.) wrongful discharge in violation of public policy;

(2.) wrongful discharge in violation of the "whistleblower" provisions of Iowa Code Chapter 70A;

(3.) defamation;

(4.) intentional infliction of emotional distress; and

(5.) age discrimination in violation of Iowa Code Chapter 216.

On September 15, 2014, this Court (Hon. Dennis J. Stovall) entered an order dismissing Hedlund's claim for wrongful discharge in violation of public policy.

On October 5, 2017, Defendants filed the present motion for summary judgment. Defendants request dismissal of Hedlund's remaining claims.

The Court has considered the parties' filings as well as their arguments at the February 27, 2018 hearing. Ultimately, the Court concludes Defendants' motion should be granted. Accordingly, Hedlund's remaining claims will be dismissed.

BACKGROUND

The Court has not attempted to catalog all of the parties' many allegations. Rather, the following pages provide a general factual background.

On July 1, 1988, Hedlund began his employment in the Iowa Department of Public Safety ("DPS"). He began as a State Trooper with the Iowa State Patrol, a division of the DPS. On June 1, 1989, Hedlund became a Special Agent with the Division of Criminal Investigation ("DCI"), which is another division of the DPS. On July 10, 2010, Hedlund was promoted to Special Agent in Charge ("SAC") within the DCI's Major Crimes Unit, or "MCU."

In September 2012, Brian London became the Commissioner of the DPS. Shortly thereafter, in November 2012, London appointed Charis Paulson as Director of the DCI. Paulson, in turn, promoted Gerard Meyers to Assistant Director for Field Operations of the DCI. Thus, Meyers became Hedlund's direct supervisor.

On February 13, 2013, Hedlund circulated an e-mail to members of the DCI, including his own subordinates. The e-mail was critical of Meyers. Two days later, on February 15, 2013, Meyers met with Hedlund. They discussed, among other things, the

February 13, 2013 e-mail. During their February 15, 2013 meeting, Meyers told Hedlund he did not want to "have issues with" him because he was "in the twilight of his career."

In a separate meeting in February 2013, Meyers referred to "retirement" during a meeting with Hedlund.

In March and April 2013, Hedlund filed various administrative complaints against Meyers, Paulson, and London. Hedlund alleged that Meyers used profanity and aggression toward another director at DPS (Jim Saunders). Hedlund also claimed Meyers had told agents they could ignore parking tickets issued by Iowa State University. Hedlund alleged Paulson had instructed Hedlund not to interview certain witnesses. Hedlund also alleged that Paulson had sent an inappropriate e-mail. Hedlund also claimed Paulson condoned the misuse of physical fitness incentive days. Hedlund complained about London's management style. In addition to these formal complaints, Hedlund also circulated e-mails that were critical of his superiors.

On April 18, 2013, Paulson, Hedlund and other SACs participated in a telephone conference regarding a planned reorganization of the MCU. On April 23, 2013, DCI upper

management held a follow-up meeting with the SACs. The SACs expressed substantial reservations regarding the planned reorganization. Hedlund spoke about the problem of officer stress and suicide. The parties dispute whether Hedlund was disrespectful or agitated during the April meetings.

Hedlund requested and received approval to take vacation on April 26, 2013, to attend his niece's art show in Cedar Rapids. On April 25, 2013, Hedlund drove a state vehicle to Cedar Rapids. Hedlund spent the night in Cedar Rapids. On the morning of April 26, 2013, Hedlund contacted retired officer Wade Kisner to discuss cold cases. Hedlund asserts he did so because he had been assigned the task of investigating cold cases during one of the SAC meetings earlier that month. The parties dispute this point. In any event, Hedlund also attended his niece's art show.

That same morning, Director Paulson tried to contact Hedlund via cell and text in order to set up a meeting. Hedlund did not immediately respond. That morning, Paulson filed a complaint with the Professional Standards Bureau ("PSB") concerning Hedlund's conduct during the April 13, 2013 conference call.

During the afternoon of April 26, 2013, Hedlund responded to Paulson's calls. Paulson asked Hedlund if he was working. Hedlund responded, "yes and no," and that he was on an approved vacation day. Paulson requested that Hedlund meet him in Des Moines on Monday, April 29, 2013.

Later on April 26, 2013, Hedlund observed a black SUV speeding on Highway 20. Hedlund contacted the State Patrol. Iowa State Trooper Matt Eimers intercepted the SUV based on the information Hedlund had provided. Upon overtaking the SUV, Eimers determined that another trooper (Steve Lawrence) was driving the SUV, and that the Governor and Lieutenant Governor were passengers. Eimers did not stop the SUV, and there was no citation issued.

On April 29, 2013, Hedlund distributed a lengthy e-mail entitled "a complaint against myself." The e-mail discussed the April 26 incident concerning the Governor's SUV. The e-mail noted that, "[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." The e-mail also blamed the Governor for the SUV's high rate of speed.

Later that day, Hedlund e-mailed his subordinates that he was taking some personal time off. Hedlund's doctor provided a note excusing Hedlund from work from April 30, 2013 to May 6, 2013.

On May 1, 2013, Hedlund was placed on administrative leave with pay. That day, a notice of investigation was delivered to Hedlund. It alleged Hedlund engaged in various misconduct during April 2013.

The notice was delivered to Hedlund at his home. Hedlund was also relieved of his service weapons and badge.

Hedlund claims it was improper, even dangerous, to deliver the notice to him at his home. It is undisputed, however, that there was no rule or policy that prohibited delivering the notice to his home.

On May 14, 2013, Hedlund was ordered to attend a fitness-for-duty evaluation. On May 16, 2013, Hedlund reported for the evaluation. The doctor in charge of the assessment declared Hedlund fit for duty at that time.

On June 19, 2013, PSB investigators interviewed Hedlund. On July 17, 2013, PSB issued a report of their investigation of

Hedlund. It spanned 500 pages. It suggested that Hedlund had engaged in multiple acts of insubordination.

On July 17, 2013, Hedlund received a notice of termination. It was signed by DCI director Charis Paulson. The notice alleged that Hedlund had engaged in unbecoming or prohibited conduct, violated the courteous behavior rule, and improperly used state property. The notice also explained that Hedlund had a right to appeal the termination decision in accordance with Iowa Code section 80.15.

On July 18, 2013, Governor Branstad held a press conference. Governor Branstad addressed several topics, including the investigation of Hedlund. In response to a question by the press, Governor Branstad stated: "I can just say that [the Department of Public Safety] felt for the morale and for the safety and well-being of the Department, [Hedlund's termination] was necessary."

Hedlund alleges that, on July 22, 2013, Paulson improperly supplemented the PSB report with unfounded concerns about Hedlund's threat potential.

On August 13, 2013, Hedlund filed an appeal of his termination pursuant to Iowa Code section 80.15. Consistent with

the language of section 80.15, Hedlund's appeal would have been heard by the Employment Appeal Board (EAB). Hedlund received full pay and benefits while waiting for the EAB to complete its process. Hedlund dismissed his appeal prior to hearing.

After Hedlund dismissed his appeal before the EAB, Hedlund received a new notice stating his termination date would be January 30, 2014.

On January 27, 2014, Hedlund filed a complaint with the Iowa Civil Rights Commission. In it, Hedlund alleged age discrimination. Hedlund claimed he had been discriminated against by Meyers and the Department of Public Safety. He did not claim discrimination by London or Paulson. Hedlund claimed he had suffered two adverse employment actions: being "disciplined/suspended," and being "terminated." Hedlund did not claim he had been "forced to quit/retire" or "harass[ed]."

Two days later, on January 29, 2014, Hedlund filed an application with the Peace Officer Retirement System (PORS) for retirement benefits. The application went into effect February 17, 2014.

Hedlund now works for the Fort Dodge Police Department.

Additional facts are discussed in the sections that follow.

STANDARD

Summary judgment is appropriate when the file shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3). The Court "examine[s] the record in the light most favorable to the nonmoving party and [draws] all legitimate inferences the evidence bears in order to establish the existence of questions of fact." *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 140 (Iowa 2013).

ANALYSIS

Hedlund's Third Amended Petition contains five counts. It appears undisputed that, in light of Judge Stovall's September 15, 2014 order, Hedlund cannot pursue Count I, which alleged wrongful discharge in violation of public policy. The question before this Court, then, is whether Hedlund's four remaining counts can survive summary judgment. The Court addresses each count in turn.

I. Whistleblower Claim (Count II).

In Count II of the Third Amended Petition, Hedlund claims he is entitled to recover under the "whistleblower" provisions of Iowa Code section 70A.28. Subsection 70A.28(2) provides that a "person shall not discharge an employee" as a reprisal for disclosing specified categories of information to a "public official or law enforcement agency." Hedlund claims Defendants violated this provision when they "suspended and later discharged" him as retaliation for reporting misconduct by his superiors. (Third Amended Petition, ¶¶ 55-57). Therefore, Hedlund contends he can pursue "a civil action" to recover "affirmative relief...including attorney fees and costs" pursuant to section 70A.28(5)(a).

Defendants assert that Hedlund's whistleblower claim fails for several reasons. Defendants' chief argument is that section 80.15 offers the exclusive method for certain DPS employees—including Hedlund—to seek redress for a suspension or discharge. They further claim that Hedlund did not exhaust the remedies available under section 80.15. Therefore, Defendants argue, Hedlund can pursue no redress.

Hedlund concedes he did not exhaust the remedies available under section 80.15. Hedlund denies that those are his *exclusive* remedies. He contends that, notwithstanding section 80.15, section 70A.28 provides him with an alternative path to recovery.

The parties have not cited, and the Court has not found, any appellate decision that squarely resolves this dispute. Initially, *Worthington* appeared promising because it addressed both section 80.15 and section 70A.28. *Worthington v. Kenkel*, 684 N.W.2d 228, 230 (Iowa 2004). However, on closer inspection, it appears that the defendants in *Worthington* did not argue that the employee was *wholly* precluded from pursuing *any* claims under section 70A.28. *See id. at* 230. Instead, the *Worthington* defendants argued that, because section 80.15 provided the employee with an "adequate remedy at law," she "had not suffered an injury requiring <u>injunctive relief</u>" under section 70A.28(5)(<u>b</u>). *Id.* at 231 (underline added). Consequently, the *Worthington* court did not answer the question presented here, namely, whether section 80.15 is a complete bar to Hedlund's suit, through which he hopes to recover damages under section 70A.28(5)(a). (*See also* Defendants' reply brief, p. 8 ("The

issue of exhaustion was not in any way addressed in the *Worthington* case.")).

Based on general principles of Iowa law, however, this Court reasons as follows: "Where the legislature has provided a comprehensive scheme for dealing with a specified kind of dispute, the statutory remedy provided is generally exclusive." *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996), abrogated on other grounds by *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017). Section 80.15 meets this description. *Wright*, 2016 WL 3272248 (Iowa Ct. App. 2016) (noting 80.15 is a "special rule" governing the discipline and dismissal of certain DPS employees). For a narrow class of DPS employees that includes Hedlund, section 80.15 governs *all* disputes over *any* "dismissal, suspension, disciplinary demotion, or other disciplinary action resulting in the loss of pay." Indeed, as the *Wright* court described in some detail, section 80.15 provides a comprehensive scheme for addressing those disputes, including a hearing before the Employment Appeal Board and judicial review under Chapter 17A. *See generally Wright*, 2016 WL 3272248.

Moreover, section 80.15's remedies are not inadequate. *Wright*, 2016 WL 3272248. Hedlund complains he was wrongfully suspended and discharged from his job. Section 80.15 provides a matching remedy: reinstatement. Moreover, under section 80.15, "an aggrieved peace officer receives his or her normal pay" until the administrative process is complete. (Plaintiff's brief, p. 43). These remedies are at least adequate. *Parks v. Iowa State Patrol*, 2006 WL 928872 (Iowa Ct. App. 2006) (reinstatement with or without back pay was adequate remedy for claimed wrong of termination). They are adequate even though they do not include the money damages Hedlund desires. *Hedlund v. State*, 875 N.W.2d 720, 727 (Iowa 2016) ("By its terms, Iowa Code section 80.15 does not provide damage remedies."); *see also Riley v. Boxa*, 542 N.W.2d 519, 521 (Iowa 1996) (noting parties cannot avoid the administrative process "simply by pleading damages").

It appears, therefore, that section 80.15 was Hedlund's "exclusive remedy" for his discharge or suspension. *Van Baale*, 550 N.W.2d at 156. Hedlund maintains, however, that because section 70A.15 expressly authorizes "a civil action" to seek affirmative relief as determined by the "court," the present litigation is authorized.

As explained above, however, it appears Hedlund's remedy must come through the administrative process under section 80.15. As a general rule, section 17A.19 provides "the exclusive means" to obtain "judicial review" following such an administrative process. It appears, therefore, that section 17A.19 provides Hedlund's only path to court.

As the State properly notes, however, section 17A.19's judicial review provisions are not exclusive when "expressly provided otherwise by another statute referring to [Chapter 17A] by name." Section 70A.15 does not meet this requirement. Section 70A.15 does not "expressly" state that its remedies are "in addition to those provided by section 17A.19." *Compare* Iowa Code §§ 21.6, 22.10(10). Nor does section 70A.15 otherwise "expressly" bypass or otherwise limit the exclusivity of Chapter 17A. Therefore, section 17A.19 provides the "exclusive means" for Hedlund to seek "judicial review."

This conclusion finds strong support in *Kerr v. Iowa Pub. Serv. Co.*, 274 N.W.2d 283, 284 (Iowa 1979). There, the plaintiffs were aggrieved by a decision by the Iowa Commerce Commission. *Id.* at 284. The plaintiffs chose not to seek judicial review pursuant to

Iowa Code Chapter 17A. *Id.* Instead, plaintiffs sought an injunction in district court. *Id.* at 277. The defendant argued that the court lacked jurisdiction because plaintiffs had "fail[ed] to comply with" Chapter 17A's judicial review provisions. 274 N.W.2d at 286. The district court agreed and dismissed the case. *Id.*

On appeal, plaintiffs argued that their suit was authorized by section 476A.14(2). It expressly provided for the "district court" to "have exclusive jurisdiction" to grant certain "restraining orders and temporary or permanent injunctive relief." Iowa Code § 476A.14(2) (1977).

The Supreme Court disagreed. Justice McGivern, writing for a unanimous court, observed that section 476A.14's "provision for injunctive relief is ineffective to override" Chapter 17A:

> The judicial review provision of [Chapter 17A] stated that it is the exclusive remedy unless "expressly provided otherwise by another statute referring to this Chapter by name." [Iowa Code §] 17A.19. Although Chapter 476A was enacted after [§] 17A.19(1), we find no express exemptive language in [§] 476A.14 referring to [Chapter 17A].
>
> *Kerr v. Iowa Pub. Serv. Co.*, 274 N.W.2d 283, 287–88 (Iowa 1979)

Accordingly, the *Kerr* court affirmed the district court's dismissal.

So it is here. Just as section 476A.12(2) expressly authorizes a lawsuit in "district court," section 70A.28 expressly authorizes a "civil action" in "court." However, neither section 476A.12(2) nor section 70A.15 includes any "express exemptive language referring to" Chapter 17A. *Kerr*, 274 N.W.2d at 287–88. Therefore, just as the *Kerr* plaintiffs could not pursue their lawsuit under section 476A.12(2), Hedlund cannot pursue his "civil action" under section 70A.28.

The Court has considered Hedlund's argument that, when a cause of action "bears scant relation to the agency's statutory mandate or supposed area of expertise," an aggrieved party is not required to exhaust administrative remedies. *Hornby v. State*, 559 N.W.2d 23, 25 (Iowa 1997) (quoting *Jew v. University of Iowa*, 398 N.W.2d 861, 864 (Iowa 1987)). This principle does not apply here. Hedlund claims that he was wrongfully suspended and discharged from his employment. Under the plain language of section 80.15, Hedlund's "dismissal" and "suspension" fall squarely within the mandate of "the employment appeal board created by section

10A.601." Moreover, "suspensions" or "dismissals" from *employment* fit squarely within the *Employment* Appeal Board's area of expertise.

Finally, the Court has also considered Hedlund's argument that specific statutory provisions govern over general ones. (Plaintiff's brief, pp. 49-51). This approach is helpful when the Court is asked to compare (1.) a broad, generic statute, such as Chapter 17A, that applies to a vast variety of circumstances, with (2.) a narrow, fact-specific statute that "only deals with" a specific set of circumstances. *City of Des Moines v. City Dev. Bd. of State*, 633 N.W.2d 305, 312 (Iowa 2001). That was the situation in *City of Des Moines* and *Maghee. See id.* (comparing section 368, which deals with city development proceedings, with Chapter 17A); *Maghee v. State*, 773 N.W.2d 228, 240 (Iowa 2009) (chapter 822, which deals with PCR actions, governed because it was "more specific" than Chapter 17A).

Unlike in those cases, the present case does not require comparison of one narrow statute against one generic statute, such as Chapter 17A. Rather, in this case, the Court must compare *two* fact-specific provisions, section 80.15 and section 70A.27(5). Each

has its own aspects of narrowness and breadth. For example, while section 70A.27(5) purports to apply to *all* public employees, the relevant provisions of section 80.15 only apply to a minute subset of public employees, namely, Department of Public Safety "police officers" who (1.) have more than "twelve months' service"; (2.) were appointed "after having passed the examinations"; and (3.) are not subject to a "collective bargaining agreement which provides otherwise." Regardless, neither provision approaches the broad reach of Chapter 17A. Therefore, *Maghee* and *City of Des Moines* are distinguishable.

Defendants are entitled to summary judgment as to Count II of the Third Amended Petition.

II. Defamation (Count III)

In Count III of the Third Amended Petition, Hedlund charged all of the individual defendants with defamation. On page 64 (footnote 17) of his resistance brief, however, Hedlund dismissed his defamation claims against London, Paulson and Meyers. The remaining question, then, is whether Hedlund can pursue a defamation claim against Branstad.

The case against Branstad concerns a July 18, 2013 press conference. A video recording of the conference is part of the summary judgment record. It is labeled "Governor's Press Conference 7/18/13."

The video depicts Governor Branstad addressing unseen members of the press. In his opening remarks, Governor Branstad addressed several topics, namely: (1.) the Department of Public Safety's investigation concerning Mr. Hedlund; (2.) the Iowa Attorney General's involvement in that investigation; (3.) an investigation of another state trooper inside the Governor's safety detail; (4.) plans to ensure that, going forward, the Governor's safety detail would obey all traffic laws; (5.) plans for the Department of Transportation to review the large number of unidentified official license plates in Iowa; and (6.) plans for a review of traffic cameras, also known as "speed" cameras. Branstad then took questions concerning these issues.

About eleven minutes into the conference, a member of the press asked a question about the relationship between Mr. Hedlund's employment issues and any "morale issues" at "the Department of Public Safety." Branstad responded by stating:

"Well, I can't go into the details of this. Uh, I can just say that they felt for the morale and for the safety and well-being of the Department, this was action that was necessary."

The above-quoted response is the sole basis of Hedlund's defamation claim. Indeed, on page 68 of his resistance brief, Hedlund states: "Although Hedlund takes issue with everything Branstad said about him at the press conference, his defamation action focuses solely on the statement that he was terminated for the "safety" of the department." For ease of reference, this statement is hereinafter referred to as "the termination statement."

Defendants argue that Hedlund's defamation claim is precluded by the doctrine of absolute privilege. The Court agrees. There is an absolute privilege against liability for statements made "in the discharge of a duty under express authority of law, by or to heads of executive departments of the state." *Ryan v. Wilson*, 231 Iowa 33, 300 N.W. 707, 713 (1941). As Governor of the State of Iowa, Branstad was the very highest state executive. The termination statement concerned official activities of the Department of Public Safety, an executive department which Branstad oversaw in his role as Governor. Moreover, the

termination statement was made to a member of the press regarding "matters of a general interest to the public," namely, the termination of Mr. Hedlund by the Department of Public Safety. *Id.* Such statements fall squarely within the Governor's lawful duties. Therefore, the absolute privilege applies.

As a result, Hedlund's defamation claim cannot prevail. This is true even if, as Hedlund asserts, Branstad was motivated by an interest in "slay[ing] a political liability" that could interfere with his "re-election campaign." (Plaintiff's brief, p. 78). When the absolute privilege applies, the Court does not inquire into the speaker's motivations. *Ryan*, 300 N.W. at 715 ("The motive underlying the discharge of an official duty is not material.").

The Court has not ignored Hedlund's argument that even governors should not be "given carte blanche" to defame individuals. (Plaintiff's brief, p. 7). Indeed, "absolute immunity represents a severe restriction of the right of the individual to be secure in his reputation." *Blair v. Walker*, 64 Ill. 2d 1, 6, 349 N.E.2d 385, 387 (1976). "The restriction is justified," however, by the public's need for our "officials of government" to be "free to exercise their duties without fear of potential liability." *Id.* A

contrary rule "would seriously cripple the proper and effective administration of public affairs as intrusted [sic] to the executive branch of the government." *Ryan*, 300 N.W. at 715 (quoting *Spalding v. William F. Vilas, Postmaster General*, 161 U.S. 483 (1896)). As one particular, it would deter governors from holding press conferences, which provide the public with valuable "knowledge of the facts and conduct of" our government's business. *Blair*, 349 N.E.2d at 387.

Defendants are entitled to summary judgment as to Count III of the Third Amended Petition.

III. Intentional Infliction of Emotional Distress (Count IV)

In Count IV of the Third Amended Petition, Hedlund charges the tort of intentional infliction of emotional distress. The elements of the tort are:

(1) Outrageous conduct by the defendant;

(2) The defendant's intentional causing, or reckless disregard of the probability of causing emotional distress;

(3) Plaintiff suffering severe or extreme emotional distress; and

(4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct."

Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W.2d 108, 118 (Iowa 1984).

"Our cases have established very stringent requirements for proving the elements of this tort, particularly with respect to the element of outrageous conduct." *Kirk v. Farm & City Ins. Co.*, 457 N.W.2d 906, 911 (Iowa 1990). To qualify as outrageous, it is not "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." *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 198 (Iowa 1985). The conduct "must be 'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.* It is for the court to determine in the first instance whether the relevant conduct may reasonably be regarded as outrageous. *Vinson,* 360 N.W.2d at 118.

To the credit of Hedlund and his lawyers, Hedlund admits that the "outrageousness" standard "is not easy to meet in employment cases." (Plaintiff's brief, p. 80). Indeed, our Supreme Court has "often found that conduct by employers and coworkers did not rise to the level of outrageous conduct." *Smith*, 851 N.W.2d at 26 (Iowa 2014).

In the present case, the Court has considered Hedlund's evidence of allegedly "outrageous" conduct, including but not limited to the evidence set forth in Hedlund's relevant interrogatory answer. (Defendant's appx., pp. 174-75). Hedlund charges defendants with, *inter alia*, misrepresenting Hedlund's behavior during the April 2013 SAC meetings; making false claims about Hedlund's mental fitness and threat risk; wrongfully taking Hedlund out of service on May 1, 2013; wrongfully—and perhaps dangerously—going to Hedlund's home to retrieve his firearms, badge and car; sending Hedlund to a psychological evaluation even though defendants allegedly knew he was mentally fit; refusing to allow Hedlund to work despite the doctor's conclusions that he was fit; improperly manipulating the PSB investigation and report; and repeating "known falsehoods" about Hedlund's threat potential to

Branstad while knowing Brandstad would publish them to the news media in July 2013.

These alleged behaviors parallel the bad behaviors described in *Vinson*:

> There, after the plaintiff questioned her employer's seniority policy and expressed concern over pay issues, she was singled out by the defendants for special scrutiny and became the target of a "campaign of harassment." *Id.* The campaign included delaying the plaintiff's start time, subjecting her to a time study that did not allow her the same amount of slack time as other employees, instructing her to inaccurately complete time records, accusing her of falsifying time records, denying her request to have her issues taken to the school board, discharging her on grounds of dishonesty, and reporting the incident to a prospective employer **despite knowing the plaintiff had not acted dishonestly** and **knowing** it would negatively affect her chances of acquiring new employment. *Id.* Though [our Supreme Court] indicated a jury could have found the "defendants engaged in **a deliberate campaign to badger and harass plaintiff**" and that the "defendants' actions were **petty and wrong, even malicious**," [our Supreme Court] concluded the trier of fact could not "reasonably conclude that the conduct went beyond all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community."
>
> *Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 27 (Iowa 2014) (discussing *Vinson,* 360 N.W.2d 108; emphasis added).

Viewed in the light most favorable, the behavior alleged by Hedlund is comparable with the "petty," "wrong," "malicious,"

dishonest, "deliberate campaign to harass and badger" described in *Vinson*. Yet, in the Court's view, the behavior here is not substantially worse than the terrible misconduct described in *Vinson*. Therefore, as in *Vinson*, "submission of the claim for intentional infliction of emotional distress" would constitute "reversible error." *Vinson*, 360 N.W.2d at 121.

Hedlund contends this case is more like *Smith* than *Vinson*. *See generally Smith*, 851 N.W.2d at 29. Indeed, some of the evidence here matches some of the facts in *Smith*. For example, one of the supervisors in *Smith* "tried to have" the victim employee "treated as a scary and mentally unstable outcast." *Id.* Hedlund presents similar evidence here.

There are important differences, though. Although Hedlund presents evidence of several bad acts by his superiors, he has not shown an extended "barrage" of misdeeds that is comparable to the "*unremitting* psychological warfare" described in *Smith*. *Id.* (emphasis added). Moreover, in *Smith*, the Court found it important that the employee had been mistreated over a "substantial period of time." As Hedlund correctly observes, the *Smith* plaintiff left his employment "after **years** of harassment and mistreatment."

(Plaintiff's brief, p. 82 (emphasis added)). The present case, however, does not involve "years" of mistreatment. Hedlund became dissatisfied around September 2012, when London was appointed. However, Hedlund's claims of "outrageous" behavior are focused on a three- or four-month period between April 18, 2013, when the "cockamamie" restructuring plan was discussed via teleconference, and late July 2013, when Branstad spoke at the press conference, and Paulson allegedly supplemented the DPS report with unfounded concerns about Hedlund's threat potential. (Third Amended Petition, Count IV; Interrogatory answer (Defendant's appx., pp. 174-75); Brief, pp. 25, 79-88). Thus, the timeframe here matches more closely with *Vinson*, in which the abusive behavior occurred primarily during the three-month period between October 1980 and December 1980, although one especially bad act—a misrepresentation to a prospective employer—occurred sometime in 1981. *Vinson*, 360 N.W.2d at 112–14.[1]

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[1]. This is not to say that "outrageous" behavior cannot happen over a period of months. That was the case in *Blong v. Snyder*, 361 N.W.2d 312, 317 (Iowa Ct. App. 1984). The Court believes, however, that the mistreatment described by Hedlund is more analogous to that in *Vinson*, as discussed above, than the extraordinary, "almost..daily" abuse described in *Blong*.

Note also that, in *Smith*, our Supreme Court found it important that the employee's mistreatment had been motivated by an effort to cover up "what basically amounted to [a supervisor's] theft" from Iowa State University. *Smith*, 851 N.W.2d at 29. Here, however, Hedlund claims the defendants were trying to cover up their own "incompetency," including their "cockamamie scheme" for reorganization. (Plaintiff's brief, p. 83). Incompetency and bad reorganization plans are typical for "bad bosses." They would not shock the average Iowa employee. They are not comparable with the criminal behavior discussed in *Smith*.

In short, this case does not present the kind of "special circumstances" described in *Smith*. Rather, when viewed in the light most favorable to Hedlund, this case involves the sort of "petty," "wrong," "malicious," dishonest, "deliberate campaign to harass and badger" described in *Vinson*. This case does not, however, meet Iowa's "very stringent requirements" for "the element of outrageous conduct." *Kirk*, 457 N.W.2d at 911.

Defendants are entitled to summary judgment as to Count IV.

IV. Age discrimination (Count "VI")

The final count of the Third Amended Petition charges age discrimination under Iowa Code Chapter 216. Defendants claim summary judgment is appropriate for three reasons: (1.) Hedlund was not really terminated on July 17, 2013, because, under Iowa Code section 80.15, he could appeal from the termination; (2.) Hedlund failed to exhaust administrative remedies as to any adverse employment actions other than termination, e.g., being forced to retire; and (3.) even if Hedlund was terminated, his evidence is insufficient to show that he was terminated because of his age.

The first two issues (1. and 2.) concern the question of whether Hedlund can show an "adverse employment action," a requirement of any discrimination case. On its face, the July 17, 2003 notice (Exhibit 18) was a termination notice. It detailed several actions by Hedlund which, in the words of the notice, "warrant[] discharge." It went on to specifically state: "Effective July 17, 2013, *your employment with the Iowa Department of Public Safety is terminated.*" (emphasis added)

While Hedlund had a right to "appeal" his termination under Chapter 80.15, a jury could still believe he had been "terminated," as the July 17, 2013 notice said. Certainly a jury could find that the termination notice was an "adverse employment action" for purposes of Iowa discrimination law. Therefore, the nature of the notice does not provide a basis for summary judgment.

We turn, then, to the broader inquiry of whether Hedlund can "establish he was a victim of age discrimination." *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996). The parties disagree as to what framework the Court should use to evaluate this issue. Hedlund offers a thorough critique of the *McDonnell Douglas* approach. Under current Iowa law, however, *McDonnell Douglas* appears to be the governing standard. In *Wyngarden*, Judge Bower explained:

> Under the *McDonnell Douglas* indirect evidence, burden-shifting analytical framework, a plaintiff "must first establish a prima facie case of age discrimination." Once a plaintiff establishes a prima facie case of age discrimination, "the burden of production shifts to [the defendants] to articulate a legitimate, nondiscriminatory reason for any adverse employment action against" the plaintiff. If defendants meet this burden, Wyngarden "must then present evidence sufficient to raise a question of material fact as to whether [the defendants'] proffered reason was pretextual and to create a reasonable

> inference that age was a determinative factor in the adverse employment decision." [The plaintiff] maintains, "at all times, the ultimate burden of proof and persuasion" that the defendants discriminated against him.

Wyngarden, 2014 WL 4230192 (citations omitted).

"A plaintiff establishes a prima facie case of age discrimination by showing three elements: (1.) plaintiff is a member of a protected class, (2.) plaintiff performed his work satisfactorily, and (3.) plaintiff suffered an adverse employment action." *Id.* Hedlund can establish each of these three elements. It is undisputed that Hedlund is a member of a protected class based on age. (Defendants' brief, p. 62). Moreover, as explained above, Hedlund suffered an "adverse employment action" when the State terminated him—or, at the very least, began the termination process—through the July 17, 2013 termination notice. Finally, although the State certainly disagrees, Hedlund has presented evidence that he performed his work satisfactorily. (*See* evidence discussed in Plaintiff's Brief, pp. 1-23).

The next step, then, is to determine whether the State has "articulate[d] a legitimate, nondiscriminatory reason for any adverse employment action against" the plaintiff. *Wyngarden*, 2014 WL

4230192. This requirement is clearly met through the July 17, 2013 notice of termination, and the reasons it explained.

This leads to the final step of the *McDonnell Douglass* analysis, in which the 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.'" *Grutz v. U.S. Bank Nat. Ass'n*, 2005 WL 291592 (Iowa Ct. App. 2005).

For purposes of this analysis, the Court assumes that Hedlund has presented evidence from which a jury could conclude that the termination notice was "pretextual." Put differently, he has presented evidence that the reasons given for the termination were not the real reasons for the termination. On page 28 of his brief, Hedlund summarizes his evidence as follows:

> Hedlund contends that the State's motivation for terminating was not the gravity of [Hedlund's] alleged [mis]conduct, *but the fact that he lodged previous complaints about DPS leadership and later pulled the Governor over for speeding and caused a ruckus by bringing it to the attention of his superiors.*
>
> (Brief, p. 28 (italics added)).

It is significant that, at least in the statement quoted above, Hedlund contends that his behavior—not his age—was the real

motivation for his termination. This highlights the *dual* burdens imposed by *McDonnell Douglass.* Hedlund cannot establish age discrimination merely by a showing pretext *of any kind.* Rather, he must show pretext *to conceal age discrimination.* As Judge Vaitheswaran has explained:

> 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**.'" "The showing of pretext necessary to survive summary judgment 'requires more than merely discrediting [the employer's] proffered reason for the adverse employment decision. [The employee] **must also prove** that the proffered reason was a pretext **for age discrimination**.'"
>
> *Grutz,* 2005 WL 291592 (citations omitted; emphasis added).

Hedlund's real burden, then, is to show that his age "must have 'actually played a role in [the employer's decision making] process and had a determinative influence on the outcome.'" *Id.*

In addressing that burden, Hedlund makes four points. All four points focus primarily on Meyers. This is appropriate because Meyers was Hedlund's supervisor. Moreover, although the notice of Hedlund's termination was signed by Paulson, Meyers had input into the decision to fire Hedlund. Finally, as the State points out, in

Hedlund's "Iowa Civil Rights Commission Complaint Form," Hedlund only named Meyers as an individual who "discriminated" against him. London and Paulson were not named. (Plaintiff's appendix, p. 7).

For his first complaint about Meyers, Hedlund contends that Meyers made remarks concerning Hedlund's "retirement," as well as the "twilight of [Hedlund's] career," in February 2013. The Court agrees with the State, however, that these comments lack a sufficient "nexus" with the July 2013 termination decision. "Stray remarks," made "outside the decision-making process at issue," do not "constitute substantial evidence of age-related animus." *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 427 (8th Cir. 1999); *cf. Merritt v. Iowa Dep't Of Transp.*, 2004 WL 434143 (Iowa Ct. App. 2004) (citing *Walton;* noting "none of the statements or other evidence is sufficiently linked to the challenged employment decision to support an inference that the decision was more likely than not motivated by gender discrimination").

Indeed, it is common for workers of all ages to discuss the progressions of their careers, including retirement. As a general rule, such comments are not "discriminatory or suspicious."

Ranowsky v. Nat'l R.R. Passenger Corp., 244 F. Supp. 3d 138, 145 (D.D.C. 2017).

Hedlund also points to evidence that Meyers filled Hedlund's position with a younger person, Krapfl. Although there may have been either "three or four" candidates for the position, Hedlund has provided the Court with data concerning three of them. (Plaintiff's brief, p. 122). They were Fielder, who was born in 1962; Thiele, who was born in 1965; and Krapfl, who was born in 1969.[2] All three were younger than Hedlund, who was born in 1957. It has not been shown, therefore, that Meyers could have filled Hedlund's position with a candidate as old as Hedlund.

Hedlund also points to evidence that, following their written tests and interviews, Meyers gave the lowest promotability scores to the oldest candidates, Fielder and Thiele. As the State points out, however, neither Fielder nor Thiele believed that they were victims of age discrimination. Indeed, it appears Thiele did not even apply for Hedlund's position. (Plaintiff's appx. 1430). In any event, Hedlund does not point to evidence that could allow the jury to

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2. On page 122 of Plaintiff's brief, Jon Turbett is also listed as a possible candidate. However, his age is not stated.

evaluate the actual reasons for various candidates' promotability scores, e.g., the candidates' specific scores on the objective, pen-and-paper tests; details regarding the candidates' interviews; or any other criteria used, or that should have been used, in determining the promotability scores.

Finally, Hedlund claims he was "terminated for allegedly violating three rules while younger employees committed the same infractions sometimes on multiple occasions and received a comparative slap on the wrist." (Plaintiff's brief, p. 125). Put differently, Hedlund claims he was treated worse than younger but "similarly situated" employees.

"Our test to determine whether individuals are similarly situated requires 'that the other employees be similarly situated in all relevant respects before the plaintiff can introduce evidence comparing [himself] to other employees.'" *Wyngarden,* 2014 WL 4230192. "To be similarly situated, the comparable employees must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances." *Id.*

Hedlund claims he was treated worse than the following "younger employees": Gerard Meyers (08/24/1973), K.H. (02/04/1963), T.L. (06/30/1964), and R.R. (06/17/1966). (Plaintiff's brief, p. 125). As the State correctly argues, however, none of these employees meets the "similarly situated" test described in *Wyngarden*. Hedlund was supervised by Gerard Meyers, Assistant Director for Field Operations of the Division of Criminal Investigation. Obviously, Meyers did not supervise himself. Meyers did not supervise K.H., who worked for the Iowa State Patrol. (Plaintiff's brief, pp. 35-37). Nor did Meyers supervise T.L., who worked for the Iowa State Patrol. (Plaintiff's brief, pp. 39-40). Nor did Meyers supervise R.R., who was State Fire Marshall (Plaintiff's brief, pp. 40-41).

In summary, Hedlund has not presented 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.'" *Grutz*, 2005 WL 291592. Therefore, summary judgment is appropriate as to Hedlund's claim of age discrimination.

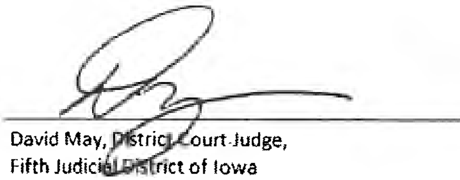
CONCLUSION

It is hereby ORDERED that Defendants' motion is GRANTED. This case is hereby DISMISSED. Costs are assessed in favor of Defendants and against Plaintiff.

State of Iowa Courts

Type:	OTHER ORDER
Case Number	**Case Title**
LACL128372	LARRY HEDLUND VS STATE OF IOWA ET AL

So Ordered



David May, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2018-03-30 10:16:07 page 40 of 40

occurred without the pretextual investigative motivation.

In any event, I would not make the necessary factual determination on appeal. That is the job of the district court. Because the district court did not make a factual determination of whether the stop would have occurred in any event, I would vacate the order denying the motion to suppress and remand the case to the district court for further proceedings.

V. Conclusion.

For the above reasons, I would vacate the order denying suppression and remand the case to the district court for further proceedings.

Wiggins, J., joins this dissent.

Larry R. HEDLUND, Appellant,

v.

STATE of Iowa; K. Brian London, Commissioner of the Iowa Department of Public Safety, Individually; Charis M. Paulson, Director of Criminal Investigation, Individually; Gerard F. Meyers, Assistant Director Division of Criminal Investigation, Individually; and Terry E. Branstad, Individually, Appellees.

No. 18-0567

Supreme Court of Iowa.

Filed June 28, 2019

Background: Employee, who was special agent in charge at the Iowa Department of Criminal Investigation (DCI), brought wrongful discharge and whistleblower claims. The District Court, Polk County, David May, J., entered summary judgment for employer, and employee appealed.

Holdings: The Supreme Court, Christensen, J., held that:

(1) civil action provision in whistleblower statute creates an independent cause of action in the alternative to administrative remedies;

(2) statute, providing framework for discipline and dismissal of peace officers within Department of Public Safety (DPS), was not the exclusive means for special agent to seek remedy;

(3) whether special agent made disclosures to the proper entities and whether agent's disclosures could reasonably evidence a violation of law precluded grant of summary judgment to DCI on agent's whistleblower claim;

(4) the affirmative relief under civil action provision of whistleblower statute is equitable relief;

(5) DCI articulated legitimate, nondiscriminatory reasons for termination of special agent;

(6) supervisor's isolated remark, making reference to special agent as being in the twilight of his career, and supervisor's inquiring as to when agent would retire were insufficient to support inference of age discrimination under Iowa Civil Rights Act (ICRA);

(7) fact that supervisor filled position of DCI special agent with younger employee did not show that DCI's reasons for agent's termination were pretextual;

(8) record did not support inference of age discrimination based on the promotability scores of the oldest candidates;

(9) DPS's arrival at house of special agent to place him on administrative leave did not rise to level of outrageous conduct, as required for agent's intention-

al infliction of emotional distress claim; and

(10) Governor's comment did not provide basis for agent's claim for intentional infliction of emotional distress.

Affirmed in part, reversed in part, and remanded.

Appel, J., concurred in part and dissented in part and filed opinion in which Cady, C.J., and Wiggins, J., joined.

1. Public Employment ⚷434

Civil action provision in whistleblower statute creates an independent cause of action in the alternative to administrative remedies under Administrative Procedure Act (APA). Iowa Code Ann. § 70A.28(2,5); Iowa Code Ann. § 17A.1 et seq.

2. Appeal and Error ⚷3557

Appellate courts review district court's grant of summary judgment for correction of errors at law.

3. Appeal and Error ⚷3951

Appellate courts view the summary judgment record in light most favorable to the nonmoving party.

4. Judgment ⚷185(2)

On summary judgment, court must consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record.

5. Judgment ⚷185(6)

Even if the facts are undisputed, summary judgment is not proper if reasonable minds can draw different inferences from them and thereby reach different conclusions.

6. Appeal and Error ⚷3557

Appellate court's review of trial court's grant of summary judgment is limited to whether a genuine issue of material fact exists and whether the trial court correctly applied the law.

7. Public Employment ⚷434
States ⚷53

Statute, providing the framework for discipline and dismissal of peace officers within Department of Public Safety (DPS), was not the exclusive means for special agent in charge at the Department of Criminal Investigation (DCI) to seek remedy, and instead, he could seek judicial review of DPS action through civil action provision in whistleblower statute. Iowa Code Ann. §§ 70A.28(5), 80.15.

8. Public Employment ⚷434

Because legislature expressly created civil action section in whistleblower statute as an independent statutory cause of action, a challenge to agency action under the Administrative Procedure Act (APA) is not the exclusive means of obtaining judicial review. Iowa Code Ann. § 70A.28(5); Iowa Code Ann. § 17A.1 et seq.

9. Judgment ⚷181(21)

Material issues of fact as to whether special agent in charge at Department of Criminal Investigation (DCI) made disclosures to the proper entities and whether agent's disclosures could reasonably evidence a violation of law or abuse of authority precluded grant of summary judgment to DCI on agent's whistleblower claim. Iowa Code Ann. § 70A.28(2).

10. Public Employment ⚷286
States ⚷53

Commissioner of Department of Public Safety (DPS) qualifies as a law enforcement agency under the whistleblower statute. Iowa Code Ann. § 70A.28(2); Iowa Code Ann. § 80.1, 80.2, 80.9.

11. Jury ⚷13(1)

Generally, there is no right to a jury trial for cases brought in equity.

12. Jury ⇨13(1)

Trial ⇨3(6)

Law issues are for jury, and equity issues are for the court.

13. Action ⇨22

To determine if a proceeding is legal or equitable, courts look to the pleadings, the relief sought, and nature of the case.

14. Statutes ⇨1161

Under the doctrine of last preceding antecedent, qualifying words and phrases in statute refer only to the immediately preceding antecedent, unless a contrary legislative intent appears.

15. Public Employment ⇨631

The affirmative relief under civil action provision of whistleblower statute is equitable relief; phrase "any other equitable relief" necessarily implies the "affirmative relief" authorized is equitable, for purposes of civil action provision, stating that person who violates whistleblower statute is liable to aggrieved employee for affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate. Iowa Code Ann. § 70A.28(5)(a).

16. Civil Rights ⇨1003, 1004

Iowa Civil Rights Act (ICRA) is a general proscription against discrimination, and courts look to the corresponding federal statutes to help establish the framework to analyze claims and otherwise apply ICRA. Iowa Code Ann. § 216.6(1)(a).

17. Courts ⇨97(5)

Decisions of federal courts interpreting Title VII are not binding upon state courts in interpreting similar provisions in Iowa Civil Rights Act (ICRA). Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Iowa Code Ann. § 216.6(1)(a).

18. Civil Rights ⇨1749

To warrant submission to jury of his age discrimination claim under Iowa Civil Rights Act (ICRA), employee must first establish he was a victim of age discrimination, and this may be accomplished by direct or indirect evidence. Iowa Code Ann. § 216.6(1)(a).

19. Civil Rights ⇨1743

Direct evidence shows specific link between the alleged discriminatory animus and the challenged decision.

20. Civil Rights ⇨1744

Under *McDonnell Douglas* burden-shifting framework, employee must carry the initial burden of establishing a prima facie case of age discrimination under Iowa Civil Rights Act (ICRA). Iowa Code Ann. § 216.6(1)(a).

21. Civil Rights ⇨1744

Once employee establishes prima facie case of age discrimination under Iowa Civil Rights Act (ICRA), burden shifts to employer to articulate some legitimate, nondiscriminatory reason for its employment action, and finally, the burden returns to employee to demonstrate that the proffered reason is a mere pretext for age discrimination. Iowa Code Ann. § 216.6(1)(a).

22. Civil Rights ⇨1744

If employer offers a legitimate nondiscriminatory reason for adverse employment action, employee, bringing employment discrimination claim under Iowa Civil Rights Act (ICRA), must show the employer's reason is pretextual and that unlawful discrimination is the real reason for the adverse action. Iowa Code Ann. § 216.6(1)(a).

23. Civil Rights ⚬=1207

Department of Criminal Investigation (DCI) articulated legitimate, nondiscriminatory reasons for termination of special agent in charge, who was 55 years old and had brought age discrimination claim under Iowa Civil Rights Act (ICRA), and these reasons included: agent's communicating negative and disrespectful messages about DCI and members of its leadership team with his subordinate employees; agent drove state vehicle for nonwork related purposes and was deceptive about his work status when questioned; and he violated multiple DCI departmental rules and regulations. Iowa Code Ann. § 216.6(1)(a).

24. Civil Rights ⚬=1744

Under Iowa Civil Rights Act (ICRA), employee retains the ultimate burden of producing evidence from which reasonable jury can conclude that employer's proffered reasons for employee's termination are pretextual and that unlawful discrimination is the real reason for the termination. Iowa Code Ann. § 216.6(1)(a).

25. Civil Rights ⚬=1205, 1744

Employers may make reasonable inquiries into employee's retirement plan, and such inquiries do not support inference of age discrimination under Iowa Civil Rights Act (ICRA). Iowa Code Ann. § 216.6(1)(a).

26. Civil Rights ⚬=1744

Supervisor's isolated remark, making reference to Department of Criminal Investigation (DCI) special agent in charge as being in the twilight of his career, and supervisor's inquiring as to when agent, who was 55 years old, was planning to retire, were insufficient to support inference of age discrimination under Iowa Civil Rights Act (ICRA); agent was approaching, if he had not already attained, the permissible statutory retirement age for Department of Public Safety (DPS) officers, record revealed reasonableness of supervisor's remarks as well as the remoteness in time, in that remarks occurred five months prior to adverse employment action of which agent complained, and supervisor's remarks did not show animus toward age. Iowa Code Ann. §§ 97A.6(1)(a), 216.6(1)(a).

27. Civil Rights ⚬=1744

Isolated remarks are not sufficient, on their own, to show age discrimination in employment under Iowa Civil Rights Act (ICRA). Iowa Code Ann. § 216.6(1)(a).

28. Civil Rights ⚬=1744

Under Iowa Civil Rights Act (ICRA), to infer discriminatory feelings influenced decision makers, courts look to the relevant time in regard to the adverse employment action complained of. Iowa Code Ann. § 216.6(1)(a).

29. Civil Rights ⚬=1744

Remarks which are remote in time do not support a finding of pretext for intentional age discrimination in employment under Iowa Civil Rights Act (ICRA). Iowa Code Ann. § 216.6(1)(a).

30. Civil Rights ⚬=1744

Generally, evidence that a younger person replaced the plaintiff's position is insufficient to create a reasonable inference of age discrimination under Iowa Civil Rights Act (ICRA). Iowa Code Ann. § 216.6(1)(a).

31. Civil Rights ⚬=1209

Fact that supervisor filled position of Department of Criminal Investigation (DCI) special agent in charge, who was 55 years old, with a somewhat younger employee, who was 45 years old, did not show that DCI's reasons for agent's termination were pretext for age discrimination under Iowa Civil Rights Act (ICRA); promotion

of younger employee to agent's position did not cast doubt on DCI's contention that agent was terminated for violating DCI departmental rules and regulations. Iowa Code Ann. § 216.6(1)(a).

32. Civil Rights ⚬=1135

Under Iowa Civil Rights Act (ICRA), subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse. Iowa Code Ann. § 216.6(1)(a).

33. Civil Rights ⚬=1744

Record did not support inference of age discrimination based on the promotability scores of the oldest candidates for purposes of age discrimination claim brought under Iowa Civil Rights Act (ICRA) by Department of Criminal Investigation (DCI) special agent in charge, who was 55 years old; record did not show that supervisor made promotional decision based on age, and older employees, who received the bottom two promotability scores, did not believe age had anything to do with the promotion. Iowa Code Ann. § 216.6(1)(a).

34. Damages ⚬=57.21

To succeed on claim for intentional infliction of emotional distress, plaintiff must demonstrate four elements: (1) outrageous conduct by the defendant; (2) defendant intentionally caused, or recklessly disregarded the probability of causing, emotional distress; (3) plaintiff suffered severe or extreme emotional distress; and (4) defendant's outrageous conduct was the actual and proximate cause of the emotional distress.

35. Damages ⚬=57.22

Plaintiff must establish a prima facie case for the outrageous conduct element of claim for intentional infliction of emotional distress.

36. Damages ⚬=208(6)

For emotional distress cases, it 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.

37. Damages ⚬=57.22, 57.51

Standard of outrageous conduct, as required for claim for intentional infliction of emotional distress, is not easily met, especially in employment cases.

38. Damages ⚬=57.22

Generally, outrageous conduct element of claim for intentional infliction of emotional distress is met when recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "outrageous."

39. Damages ⚬=57.51

Every unkind and inconsiderate act in the employment context cannot be compensable pursuant to claim for intentional infliction of emotional distress.

40. Damages ⚬=57.58

Department of Public Safety's (DPS) arrival at house of Department of Criminal Investigation (DCI) special agent in charge to place him on administrative leave did not rise to the level of outrageous conduct, as required for agent's intentional infliction of emotional distress claim; it was typical practice for DPS to place individual on administrative leave pending fitness-for-duty evaluation, agent's supervisor was concerned for his own safety, as well as agent's personal safety, and it was determined that most appropriate action was administrative leave pending fitness-for-duty evaluation.

41. Damages ⚬=57.58

In response to press question about relationship between employment issues of

Department of Criminal Investigation (DCI) special agent in charge and any morale issues at Department of Public Safety (DPS), Governor's comment at press conference, stating that DPS felt for the morale and for safety and well-being of DPS that termination of agent was necessary, was not substantial evidence of conduct 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, and thus, Governor's comment did not provide basis for agent's claim for intentional infliction of emotional distress.

42. Damages ⚷57.58

Conduct that Department of Criminal Investigation (DCI) special agent in charge endured was not comparable to unremitting psychological warfare over a substantial period of time so as to constitute outrageous conduct, as required for agent's claim for intentional infliction of emotional distress; jury could find certain aspects of employer's actions as petty, wrong, or even malicious, but this would not lead an average member of the community to arouse resentment against employer and to exclaim "outrageous."

Appeal from the Iowa District Court for Polk County, David May, Judge.

Plaintiff appeals summary judgment dismissing all claims in an employment case. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Thomas J. Duff and Elizabeth Flansburg of Duff Law Firm, P.L.C., West Des Moines, and Roxanne Barton Conlin of Roxanne Conlin & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Jeffrey C. Peterzalek and William Pearson, Assistant Attorneys General, for appellees.

CHRISTENSEN, Justice.

Plaintiff seeks review of a district court order granting summary judgment to the defendants on all claims in an employment case. On appeal, plaintiff raises three issues. He argues the district court erred when it determined judicial review following the administrative process was the exclusive means to seek redress for alleged retaliation against a whistleblower. Next, he argues the district court erred by denying his age discrimination claim. Lastly, the plaintiff challenges the district court's finding of no "outrageous" conduct sufficient to support his tort of intentional infliction of emotional distress.

[1] We must first decide whether plaintiff's direct civil action under Iowa Code section 70A.28(5) (2014), the whistleblower statute, is precluded by the availability of an administrative remedy. Relying on this court's decision in *Walsh v. Wahlert*, 913 N.W.2d 517 (2018), we conclude section 70A.28(5) expressly creates an independent cause of action in the alternative to administrative remedies under Iowa Code chapter 17A. Therefore, we reverse summary judgment as to that issue. For plaintiff's claim of age discrimination under the Iowa Civil Rights Act, we affirm the district court's determination that plaintiff failed to present sufficient evidence from which a reasonable jury could infer age discrimination was the real reason for his termination. We also affirm summary judgment on plaintiff's intentional infliction of emotional distress claim. None of the defendants' conduct was sufficiently egregious to satisfy the "outrageousness" prong.

I. Background Facts and Proceedings.

In 1988, Larry Hedlund began a career with the Iowa Department of Public Safety

(DPS) as a trooper in the Iowa State Patrol. In 1989, he became a special agent for the Iowa Department of Criminal Investigation (DCI), and in 2010, was promoted to special agent in charge (SAC).

In October 2012, Brian London became commissioner of DPS. London then appointed Assistant Director Charis Paulson as the director of DCI. In January 2013, SAC Gerard Meyers was promoted to assistant director for field operations of DCI and became Hedlund's direct supervisor. About a month later, Hedlund composed and circulated an email critical of Meyers. Members of DCI, including Hedlund's subordinate agents, received the email. The following day, Meyers set up a meeting with Hedlund to discuss, among other things, the email. During that meeting, Hedlund was not disciplined although Meyers advised him to stop circulating critical emails. Meyers also told Hedlund he did not want to have issues with him since he was in the "twilight of his career." However, Hedlund continued sending emails critical of upper management within DPS and DCI.

On April 17, 2013, Hedlund filed a complaint with the Professional Standards Bureau (PSB) against Paulson. The complaint alleged that on August 28, 2012, Paulson distributed an email to members of DPS in violation of department policy. Hedlund also alleged Paulson condoned the persistent misuse of physical fitness incentive days. Similarly, on May 29, 2013, Hedlund filed a complaint with PSB against Meyers. The complaint alleged Meyers condoned the misuse of physical fitness incentive days and encouraged personnel to ignore parking citations.

On April 18, 2013, Paulson, Meyers, and the SACs held a conference call to discuss strategic planning regarding the Field Operations Bureau of DCI. Paulson indicated "Hedlund became extremely angry, yelled at [him] and spoke in an unprofessional and insubordinate manner." The strategic planning was again discussed during an in-person meeting on April 23, 2013. The SACs expressed resistance to the proposed reduction of zones and agents. The issue of agent burn-out and suicide arose. Hedlund agreed with the stress-related issues and mentioned a past colleague committed suicide. Paulson reported Hedlund mentioned suicide four times. On April 25, Hedlund sent another email to his subordinates critical of DPS management.

Hedlund requested and received approval for vacation on April 26 to attend his niece's art show in Cedar Rapids. The evening before, he drove his state vehicle from Fort Dodge to Cedar Rapids where he spent the night. The next morning, Hedlund contacted Wade Kisner, a retired DCI agent, to discuss cold cases, and they met for a few hours. That same day, Paulson filed a complaint with PSB against Hedlund. Paulson claimed Hedlund had been disrespectful and insubordinate during the April 18 conference call. Unaware of Hedlund's approved vacation day, Paulson attempted to contact Hedlund on April 26. Paulson called and texted Hedlund numerous times. Paulson indicated this was an attempt to set up a meeting regarding Hedlund's conduct. When asked if he was working, Hedlund responded "yes and no."[1] Paulson rescheduled the meeting to Monday April 29[2] because of Hedlund's approved vacation day.

1. Hedlund only claimed one hour of vacation on April 26.

2. Paulson contacted Hedlund on the morning of April 29 to reschedule their meeting. The record does not indicate whether the rescheduled meeting occurred.

Hedlund departed from Cedar Rapids on the afternoon of April 26. On his way to Fort Dodge, he spotted a black SUV doing a "hard ninety." Hedlund contacted the Iowa State Patrol. Trooper Matt Eimers intercepted the speeding SUV but determined it was an official state vehicle under the operation of another Iowa State Patrol trooper for the purpose of transporting the Governor of Iowa. The SUV was not stopped and no citation was issued.

On April 29, Hedlund sent Paulson a lengthy email regarding Meyers's inability to perform his job. A half-hour later, Hedlund sent another email to Paulson and Meyers designated "a complaint against myself." This email detailed the Governor's SUV incident. Hedlund summarized his failure to issue a citation to a speeding vehicle.

> I take full responsibility for the incident being initiated and as such will accept the responsibility of ensuring that the appropriate actions are taken to address this incident. As 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.

That same evening, Hedlund sent a third email to Paulson, Meyers, and his subordinates. The email indicated Hedlund needed personal time for the remainder of the day as well as April 30. In response, Meyers noted Hedlund was not on approved leave status. On April 30, Hedlund sent Paulson and Meyers an email that explained his leave request was a sick day. Hedlund's email stated, "I consider it a sick day due to the stress that I am experiencing over the issues currently going on in the DCI/DPS." Hedlund subsequently provided a doctor's letter excusing him from work April 30 through May 6.

On May 1, Hedlund was placed on administrative leave with pay and provided a notice of investigation. The notice alleged Hedlund engaged in various acts of misconduct during the previous month. That day, the PSB notice of investigation was delivered to Hedlund's home by Meyers, Assistant Director of Field Operations David Jobes, and Sergeant Wes Niles. Hedlund was relieved of his state-issued phone, car keys, service weapon, and various other items. On May 14, Hedlund was ordered to attend a fitness-for-duty evaluation. Hedlund was declared fit for duty at that time.

PSB investigators interviewed Hedlund on June 19. On July 17, PSB issued a 500-page report of its investigation. It found Hedlund engaged in multiple acts of insubordination. That same day, Paulson terminated Hedlund. The termination alleged Hedlund engaged in unbecoming or prohibited conduct, violated the courteous behavior rule, and improperly used state property. The termination also included a notice of right to appeal in accordance with Iowa Code section 80.15.[3]

On July 18, Governor Branstad held a press conference. Governor Branstad addressed several matters, including Hedlund's termination. In response to a press question about the relationship between Hedlund's employment issues and any "morale issues" at DPS, Governor Branstad stated, "They [DPS] felt for the morale and for the safety and well-being of the Department, this was action that was necessary." When asked if the termination was required, Governor Branstad responded he believed the action was "a fair and just decision."

3. Hedlund continued to receive full salary and benefits until the conclusion of the appeal. *See* Iowa Code § 80.15.

On August 8, Hedlund filed a petition in district court and alleged wrongful discharge in violation of public policy and violation of Iowa Code chapter 70A.[4] On August 13, Hedlund filed an appeal with the Employment Appeal Board (EAB) pursuant to Iowa Code section 80.15. On January 16, 2014, Hedlund voluntarily dismissed his EAB appeal prior to the evidentiary hearing. EAB granted the dismissal on January 22. Pursuant to this dismissal, DPS notified Hedlund his termination would be effective January 30.

On January 23, Hedlund filed a complaint with the Iowa Civil Rights Commission. Hedlund indicated he was discriminated against based on his age. Hedlund indicated he suffered two adverse actions—"disciplined/suspended" and "terminated." He did not claim he had been "forced to quit/retire" or "harass[ed]." The complaint named DPS and Meyers as the actors.

On January 29, one day before his termination would have become effective, Hedlund filed an application with the Peace Officers' Retirement System (PORS) for retirement benefits. The PORS Board approved Hedlund's application effective February 17. By retiring, Hedlund preserved $94,000 worth of his sick leave balance.

Defendants filed a motion to dismiss Hedlund's district court claims. The district court granted the motion with regard to Hedlund's claim of wrongful discharge in violation of public policy. Hedlund filed a motion to amend the district court's dismissal ruling. The district court denied his motion to amend. Hedlund then filed an application for interlocutory review with this court. On February 26, 2016, we dismissed his appeal. *Hedlund v. State*, 875 N.W.2d 720 (Iowa 2016). On October 5, 2017, defendants filed a motion for summary judgment on all remaining claims. The district court granted the motion and dismissed Hedlund's entire case. Hedlund appealed the district court's ruling; we retained the appeal.

II. Standard of Review.

[2–6] We review a district court's grant of summary judgment for correction of errors at law. *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017). Summary judgment is appropriate only when the record shows no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). We view the summary judgment record in a light most favorable to the nonmoving party. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001) (en banc). "The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record." *Id.* at 717–18. "Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions." *Banwart v. 50th St. Sports, L.L.C.*, 910 N.W.2d 540, 544–45 (Iowa 2018) (quoting *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005) (per curiam)). Therefore, our review is "limited to whether a genuine issue of material fact exists and whether the district court correctly applied the law." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008).

III. Analysis.

Hedlund raises three issues. First, Hedlund argues the district court erred in

4. Hedlund subsequently amended his petition to include the claims of intentional infliction of emotional distress and age discrimination.

granting summary judgment on his section 70A.28 whistleblower claim. Second, Hedlund claims the district court erred in denying his age discrimination claim. Lastly, Hedlund contends the district court erred in granting summary judgment on the outrageousness prong of his claim for intentional infliction of emotional distress.

A. Whistleblower.

1. *Civil action.* The issue before us concerns the availability of remedies under two distinct Iowa Code provisions. Iowa Code section 70A.28 [5] and Iowa Code section 80.15 each address adverse employment action against state employees. Hedlund seeks the remedy of section 70A.28, commonly known as Iowa's whistleblower statute. *See* Iowa Code § 70A.28. We must decide whether Hedlund's direct civil action is precluded by the availability of section 80.15.

Last term this court decided *Walsh,* 913 N.W.2d 517. We addressed the statutory framework of Iowa's whistleblower statute and parsed the "151-word linguistic jungle" to reveal the relevant portion,

> A person shall not discharge an employee .. as a reprisal ... for a disclosure of any information by that employee to a member or employee of the general assembly ... 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 ....

Walsh, 913 N.W.2d at 521 (quoting Iowa Code § 70A.28(2)). Walsh—and now Hedlund—relied on language in the whistleblower statute allowing the provisions of section 70A.28(2) to "be enforced through a civil action." *Id.* at 521, 524 (quoting Iowa Code § 70A.28(5)).

A potential alternative to section 70A.28(5)'s civil action is found in Iowa Code section 80.15. It provides the statutory framework for discipline and dismissal of peace officers within DPS. The relevant portion states,

> After the twelve months' service, a peace officer of the department ... is not subject to dismissal, suspension, disciplinary demotion, or other disciplinary action resulting in the loss of pay unless charges have been filed with the department of inspections and appeals and a hearing held by the employment appeal board ... if requested by the peace officer, at which the peace office has an opportunity to present a defense to the charges. The decision of the appeal board is final, subject to the right of judicial review in accordance with the terms of the Iowa administrative procedure Act, chapter 17A.

Iowa Code § 80.15. Hedlund fits squarely within this definition. It is the defendants' position that section 80.15, and therefore the administrative remedy under chapter 17A, is the exclusive means to seek judicial review. We disagree. Our holding in *Walsh* is controlling. *See Walsh,* 913 N.W.2d at 525.

[7, 8] Section 80.15 is not the exclusive means for Hedlund to seek remedy. Iowa Code section 70A.28(5) "expressly creates an independent cause of action in the alternative to administrative remedies under Iowa Code chapter 17A." *Id.* We have previously emphasized "section 70A.28 established 'a public policy against retaliatory discharge of public employees and considers the violation of the policy to be a public harm.'" *Id.* at 524 (quoting *Worthington v. Kenkel,* 684 N.W.2d 228, 231,

5. Amended in 2019, Iowa Code section 70A.28(5)(*a*) now includes "civil damages in an amount not to exceed three times the annual wages and benefits received by the aggrieved employee prior to the violation of subsection 2."

233 (Iowa 2004) (allowing section 80.15 employee to seek injunctive relief under section 70A.28(5)(*b*))). Because the legislature expressly created section 70A.28(5) as an independent statutory cause of action, a challenge to agency action under the administrative procedure act is not the exclusive means of obtaining judicial review. *See id.* at 525. Hedlund may seek judicial review of DPS action through 70A.28(5)'s civil action. "To hold otherwise would eliminate a choice of remedies that the legislature expressly created." *Id.* The district court erred in granting summary judgment against Hedlund's 70A.28 claim.

[9] 2. *Conduct covered by section 70A.28.* The district court granted defendants' summary judgment before reaching the merits of Hedlund's section 70A.28 whistleblower claim. It is defendants' position summary judgment remains appropriate because Hedlund did not satisfy the statutory requirements of his claim. To engender the whistleblower's statutory remedy, Hedlund must disclose information to a "public official or law enforcement agency" and reasonably believe "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." Iowa Code § 70A.28(2). Hedlund asserts reasonable minds could draw different inferences and reach different conclusions with respect to whom the disclosures of information were made and whether the information evidences a type of wrongdoing. When viewing the evidence in the light most favorable to Hedlund and drawing all legitimate inferences therefrom, we agree summary judgment is not appropriate.

[10] The parties do not dispute Hedlund made three separate disclosures. The first two disclosures were complaints Hedlund filed with PSB. The third disclosure was Hedlund's April 29 email to Paulson and Meyers. Defendants articulate such disclosures were not made to a qualifying public official or law enforcement agency. Hedlund indicates that PSB, as part of DPS, is a proper law enforcement agency, and that the April 29 email to Paulson and Meyers was directed to London, the commissioner of DPS. At minimum, we determine the commissioner of DPS qualifies as a law enforcement agency under the whistleblower statute. *See* Iowa Code §§ 80.1, .2, .9 (creating DPS and establishing "[i]t shall be the duty of the department to prevent crime, to detect and apprehend criminals, and to enforce such other laws as are hereinafter specified"). Therefore, Hedlund has shown reasonable minds could differ as to whether he made disclosures to the proper entities.

Defendants also contend that Hedlund is nothing more than a "chronic complainer" and that his disclosures are not whistleblowing. *See Blackburn v. United Parcel Serv. Inc.*, 3 F. Supp. 2d 504, 517 (D.N.J. 1998). But when affording Hedlund every legitimate inference, summary judgment is improper as to whether the information evidences a type of wrongdoing. Hedlund's PSB complaints concerned, among other things, his supervisors' condoned misuse of agent time off and the encouragement to ignore lawfully issued parking citations. Further, Hedlund's April 29 email recounted "the [well-known] dangers of traveling at a high rate of speed" and how the speeding state vehicle "can quickly put others at risk." This information is not some trivial matter or a subjective disagreement with the actions of a supervisor; the disclosures could reasonably evidence "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." Iowa Code § 70A.28(2); *see also Fraternal Order of Police, Lodge 1 v. City of Camden,*

842 F.3d 231, 241 (3d Cir. 2016) (disagreeing with defendant's view that police officers were "chronic complainers" and "squeaky wheels"). Hedlund has again demonstrated reasonable minds could reach different conclusions on whether his disclosure of information evidences the statutory requirements of Iowa Code section 70A.28(2).

3. *Recovery under section 70A.28.* Upon remand, Hedlund asserts he is entitled to a jury trial and damages for emotional distress. Although the district court did not reach the stated issues, the parties extensively addressed each issue during the summary judgment proceeding. We address the issues in tandem.

[11–15] Generally, there is no right to a jury trial for cases brought in equity. *Weltzin v. Nail*, 618 N.W.2d 293, 296 (Iowa 2000) (en banc). "[L]aw issues are for the jury and equity issues are for the court." *Westco Agronomy Co. v. Wollesen*, 909 N.W.2d 212, 225 (Iowa 2017). To determine a proceeding as legal or equitable, we look to the pleadings, relief sought, and nature of the case. *Carstens v. Cent. Nat'l Bank & Tr. Co. of Des Moines*, 461 N.W.2d 331, 333 (Iowa 1990) ("The fact that an action seeks monetary relief does not necessarily define the action as one at law."). Hedlund's petition seeks relief pursuant to subsection 5(*a*) of the whistleblower statute. This states,

> A person who violates subsection 2 is liable to an aggrieved employee for affirmative relief including reinstatement, with or without back pay, or *any other equitable relief* the court deems appropriate, including attorney fees and costs.

Iowa Code § 70A.28(5)(*a*) (emphasis added). "Under the doctrine of last preceding antecedent, qualifying words and phrases refer only to the immediately preceding antecedent, unless a contrary legislative intent appears." *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 376, 380 (Iowa 2000) (en banc). When we look to the language of section 70A.28(5)(*a*), "any other equitable relief" necessarily implies the "affirmative relief" authorized is equitable. Iowa Code § 70A.28(5)(*a*); *see Fjords N., Inc. v. Hahn*, 710 N.W.2d 731, 737–38 (Iowa 2006). We also look to the intent of our legislature. *Fjords*, 710 N.W.2d at 738. We note relief under the Iowa Civil Rights Act provides for actual damages. *See* Iowa Code § 216.15(9)(*a*)(8) ("Payment to the complainant of damages for an injury caused by the discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees."). If the legislature intended to permit actual damages under the relief of section 70A.28(5)(*a*), it would have so provided. *See Shumate v. Drake Univ.*, 846 N.W.2d 503, 516 (Iowa 2014) (holding that the legislature's "express inclusion" of recovery rights in one provision but not another indicates the omission was intentional). Therefore, the affirmative relief under section 70A.28(5)(*a*) is equitable relief.

B. Age Discrimination. At the summary judgment stage, the district court determined Hedlund did not present sufficient 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." Hedlund both challenges the district court's use of the *McDonnell Douglas* analytical framework at the summary judgment stage and asserts genuine issues of fact exist that he was a victim of age discrimination.

[16, 17] Hedlund charges age discrimination in violation of his rights under chapter 216 of the Iowa Civil Rights Act (ICRA). The ICRA states, in pertinent part,

> It shall be an unfair or discriminatory practice for any … [p]erson to … discharge any employee, or to otherwise discriminate in employment against any … employee because of … age …, unless based upon the nature of the occupation.

Iowa Code § 216.6(1)(*a*). This is a general proscription against discrimination and we "look[ ] to the corresponding federal statutes to help establish the framework to analyze claims and otherwise apply our statute." *Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003). Similarly, in *DeBoom v. Raining Rose, Inc.*, we acknowledged, "Because the Iowa Civil Rights Act was modeled after Title VII of the United States Civil Rights Act, we turn to federal law for guidance in evaluating the Iowa Civil Rights Act."[6] 772 N.W.2d 1, 10 (Iowa 2009).

[18, 19] To warrant submission of his age discrimination claim to the jury, Hedlund must first establish he was a victim of age discrimination. *See Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996). This may be accomplished by direct or indirect evidence. *King v. United States*, 553 F.3d 1156, 1160 (8th Cir. 2009) ("A plaintiff may establish her claim of intentional age discrimination through either direct evidence or indirect evidence."). Hedlund has offered no direct evidence of discriminatory intent;[7] therefore, he must rely on indirect evidence of discriminatory motive. *See Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005) (invoking the *McDonnell Douglas* framework at summary judgment when plaintiff offered no direct evidence of discriminatory intent under the ICRA); *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 893 (Iowa 1990) ("The *McDonnell Douglas* framework cannot be applied where the plaintiff uses the direct method of proof of discrimination.").

The parties disagree as to the appropriate analytical framework the district court should employ at the summary judgment stage. Hedlund asserts the *McDonnell Douglas* burden-shifting framework should be abandoned for summary judgment purposes. Defendants contend *McDonnell Douglas* remains the appropriate analytical framework at summary judgment. *See, e.g., McQuistion v. City of Clinton*, 872 N.W.2d 817, 828–29 (Iowa 2015) (applying the *McDonnell Douglas* framework at summary judgment when indirect evidence is used to infer discrimination under the ICRA); *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 147–48 (Iowa 2013) (affirming grant of summary judgment under the *McDonnell Douglas* framework for race and gender discrimination claim under Title VII); *Smidt*, 695 N.W.2d at 14 (invoking *McDonnell Douglas* framework because plaintiff offered no direct evidence of discriminatory intent).[8] We do not need to decide this issue because, either way, we conclude that Hedlund has failed to raise a genuine issue of material fact.

6. Although we have consistently applied federal guidance when interpreting the ICRA, "the decisions of federal courts interpreting Title VII are not binding upon us in interpreting similar provisions in the ICRA." *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 678 (Iowa 2004).

7. Direct evidence "show[s] a specific link between the alleged discriminatory animus and the challenged decision." *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (quoting *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997)).

8. In *Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 272 (Iowa 2019), where an age discrimination case went to trial, we held that "we no longer rely on the *McDonnell Douglas* burden-shifting analysis and determin[ing]-factor standard when instructing the jury." We did not disturb our prior law as it applies to summary judgment.

[20–22] Under the familiar *McDonnell Douglas* burden-shifting framework, Hedlund must carry the initial burden of establishing a prima facie case of age discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for its employment action. *Id.* Finally, the burden returns to Hedlund to "demonstrate that the proffered reason is a mere pretext for age discrimination." *Rideout v. JBS USA, LLC*, 716 F.3d 1079, 1083 (8th Cir. 2013). In other words, "[i]f the employer offers a legitimate nondiscriminatory reason, the plaintiff must show the employer's reason was pretextual and that unlawful discrimination was the real reason for the termination." *Deboom*, 772 N.W.2d at 6–7 (quoting *Smidt*, 695 N.W.2d at 15); *see* Iowa Code § 216.6(1)(*a*) (It is discriminatory practice for any person "to discharge any employee . . . *because of the age*." (Emphasis added.)); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 120 S. Ct. 2097, 2105, 147 L.Ed.2d 105 (2000) ("That is, the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.' " (alterations in original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706, 123 L.Ed.2d 338 (1993))).

[23, 24] Under *McDonnell Douglas*, we can assume that Hedlund made out a prima facie case. Regardless, defendants have produced legitimate nondiscriminatory reasons for Hedlund's termination. Hedlund communicated "negative and disrespectful messages" about DCI and members of its leadership team with his subordinate employees. Further, Hedlund drove a state vehicle to Cedar Rapids for nonwork related purposes and was deceptive about his work status when questioned. Simply put, defendants contend Hedlund was served notice of his termination after he violated multiple DCI departmental rules and regulations.[9] These are legitimate, nondiscriminatory reasons for defendants' actions. Hedlund now retains the ultimate burden of producing evidence from which a reasonable jury could conclude the defendants' proffered reasons were pretextual "and that unlawful discrimination was the real reason for the termination." *Smidt*, 695 N.W.2d at 15.

[25, 26] To rebut the legitimate nondiscriminatory reasons, Hedlund relies on remarks made by Meyers. Hedlund first contends Meyers in a February 2013 meeting with Hedlund made reference to Hedlund being in the "twilight of his career." Hedlund next contends that Meyers later inquired in a conference call in February 2013 as to when Hedlund and other SAC were planning to retire. The district court concluded such remarks were insufficient to support an inference of age discrimination, and we agree. Employers may make reasonable inquiries into an employee's retirement plan. *See Cox v. Dubuque Bank & Tr. Co.*, 163 F.3d 492, 497 (8th Cir. 1998) ("[M]any courts have recognized that an employer may make reasonable inquiries into the retirement plans of its employees."); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 818 (5th Cir. 1993) (A new supervisor may make "reasonable inquiries about the ages of the members of his work force and their known plans for the future—facts on which to gauge the anticipated longevity of his crew."); *Colosi v. Electri-Flex Co.*, 965 F.2d 500, 502 (7th Cir. 1992) ("[A] company has a legitimate interest in learning its

9. We note the notice of termination indicates Hedlund engaged in unbecoming or prohibited conduct, violated the courteous behavior rule, and improperly used state property.

employees' plans for the future, and it would be absurd to deter such inquiries by treating them as evidence of unlawful conduct."). In fact, Hedlund was approaching, if he had not already attained, the permissible statutory retirement age for DPS officers. *See* Iowa Code § 97A.6(1)(*a*) (authorizing retirement with full benefits at fifty-five years of age and twenty-two years of service). At this point, a DPS officer—having dedicated the better part of his or her career to the state's vital public safety mission—may have incentive to retire from DPS and potentially pursue alternative employment.

[27–29] Moreover, isolated remarks, such as "twilight of his career," are not sufficient on their own to show age discrimination. *Forman v. Small*, 271 F.3d 285, 293–94 (D.C. Cir. 2001) (remarks referring to plaintiff as "over the hill" and in the "twilight of his career" insufficient to rebut defendant's nondiscriminatory reason for denying plaintiff a promotion). To infer such discriminatory feelings influenced decision makers, we look to "the relevant time in regard to the adverse employment action complained of." *Id.*; *see Hunt v. City of Markham*, 219 F.3d 649, 652 (7th Cir. 2000) (It is possible to infer decision makers were influenced by discriminatory feelings "when the decision makers themselves, or those who provide input into the decision, express such feelings (1) around the time of, and (2) in reference to, the adverse employment action complained of."). The remarks alone do not infer that the decision to terminate Hedlund was influenced by discriminatory feelings. The record reveals the reasonableness of Meyers's remarks as well as the remoteness in time. These remarks occurred five months prior to the adverse employment action of which Hedlund complains. Hedlund testified in his deposition as follows:

> Q. We've talked a little bit about that meeting, I believe, but in the course of that meeting, you indicate that "AD Meyers stated two or three times during the course of that meeting that Hedlund was in the, quote, twilight of his career, end quote." A. He made reference to me being in the twilight of my career, yes.
>
> Q. Can you put that in context? What were you folks discussing when he made those comments? A. My recollection is he 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. That's the best context I can recall it in.
>
> Q. Other than that meeting on February 15, 2013, did Gerard Meyers use those words "twilight of your career" in any other conversations? A. No, not that I recall.
>
> Q. Has Charis Paulson ever used such terms as "twilight of your career" in any conversation she's had with you? A. No.

Meyers similarly explained in his deposition:

> Q. On the meeting that you had on February 15, 2013 ... did you make the comment to Hedlund that he was in the twilight of his career? A. Yes, I did.
>
> Q. Did you make that comment to him more than once? A. I believe it was just once.
>
> Q. Did you make any—did you ever discuss with Hedlund when he was going to retire? A. Yes. I believe when I mentioned the twilight of his career, I was referring to his longevity and the ability that he had to rather than work cases, mentor personnel within his assigned region.
>
> As for the retirement question that you asked, it's my recollection that at some point during this departmental strategic planning effort ... each bureau AD was directed to inquire with any personnel of senior status to deter-

> mine what their plans may be since we have a very young division and we were struggling to maintain the necessary institutional knowledge and experience.

Remarks of this kind "are remote in time and do not support a finding of pretext for intentional age discrimination." *See Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 427–28 (8th Cir. 1999) (affirming summary judgment because plaintiff failed to present sufficient evidence of pretext under *McDonnell Douglas* with remarks that occurred two years earlier). Taken in a light most favorable to Hedlund, Meyers's remarks occurred five months prior to Hedlund's notice of termination and are insufficient to establish pretext of age animus. *See Ortiz-Rivera v. Astra Zeneca LP*, 363 F. App'x 45, 48 (1st Cir. 2010) ("[M]ere generalized 'stray remarks' ... normally are not probative of pretext absent some discernable evidentiary basis for assessing their temporal and contextual relevance." (quoting *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 36 (1st Cir. 2001))).

[30, 31] Hedlund also attempts to show defendants' asserted reasons for his termination were pretextual by demonstrating Meyers filled Hedlund's position with a somewhat younger employee. Michael Krapfl, a forty-five year old with twenty-five years of law enforcement experience, was promoted into Hedlund's position; Hedlund was fifty-five years old with twenty-five years of law enforcement experience at the time of his termination. Hedlund cites *Landals* for the proposition that a sufficient inference of discrimination may be drawn when a plaintiff's position is eliminated and a younger employee assumes those responsibilities. 454 N.W.2d at 895. But *Landals* is an example of specific circumstances allowing for an inference of age discrimination.[10] Generally, evidence that a younger person replaced the plaintiff's position is insufficient to create a reasonable inference of age discrimination. *See Tusing v. Des Moines Indep. Cmty. Sch. Dist.*, 639 F.3d 507, 520 (8th Cir. 2011) ("This fact, in isolation, is insufficient to create a reasonable inference of age discrimination."); *Carraher v. Target Corp.*, 503 F.3d 714, 719 (8th Cir. 2007) ("Although [plaintiff] was replaced by someone substantially younger than him, in this case 28 years younger, we have previously held that this fact ... possesses 'insufficient probative value to persuade a reasonable jury that [plaintiff] was discriminated against.'" (quoting *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 346 (8th Cir. 1996))). Hedlund does not provide sufficient evidence, beyond indicating an employee, younger by ten years, filled his position, to support that defendants' proffered reasons were mere pretext. The promotion of Krapfl does not cast doubt on defendant's contention that Hedlund was terminated for violating DCI departmental rules and regulations. *Cf. Waldron v. SL Indus., Inc.*, 56 F.3d 491, 496–97 (3d Cir. 1995) (holding when employer "split [plaintiff's] job, fired him, offered one-half of his former job to a younger person while the other half remained unadvertised, and then recombined the jobs and placed the younger employee in the recombined post" it cast sufficient doubt on plaintiff's dis-

10. In *Landals*, the plaintiff was required to undergo a physical examination or face discharge after he complained of chest pains, the company president specifically ordered plaintiff's lay off a month prior, and plaintiff was terminated without any reason. 454 N.W.2d at 895. Furthermore, the fifty-two-year-old plaintiff, who had been with the company for approximately twenty-five years, was "an extremely competent and dedicated employee." *Id.* His duties were assumed by a twenty-five-year-old employee, who had been with the company for six months, and a thirty-six-year-old employee, "who had been with the company for approximately one year." *Id.*

charge as part of the company reorganization).

[32, 33] The promotion of Krapfl also leads Hedlund to assert Meyers would give the lowest promotability scores to the oldest candidates. The summary judgment record indicates four special agents have sought promotion. Yet Hedlund only provided data for three of them: Ray Fiedler, born in 1962; Jim Thiele, born in 1965; and Michael Krapfl, born in 1969.[11] The promotional process includes a written test, interview, and a promotability score. Hedlund argues Fiedler and Thiele, the oldest of the three, received the bottom two promotability scores. Although "subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse," *Royal v. Mo. Highway & Transp. Comm'n*, 655 F.2d 159, 164 (8th Cir. 1981), Hedlund has not provided any evidence showing Meyers made the promotional decision based on age. The summary judgment record indicates neither Thiele nor Fiedler believe age had anything to do with the promotion. Fiedler's written test score was "probably middle of the pack," and he admitted, "[T]here have been other guys my age promoted." In fact, Thiele did not even apply for Hedlund's vacant position but has taken the written test every year since 2007. There is no evidence sufficient to support an inference of age discrimination based on the promotability scores of the oldest candidates.

Drawing all inferences in Hedlund's favor, Hedlund has failed to present sufficient evidence from which a reasonable jury could infer that defendants' legitimate, nondiscriminatory reason for termination was pretextual and that age discrimination was the real reason for his termination. Our rule governing summary judgment indicates Hedlund "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5). Even with the formulated assistance of the *McDonnell Douglas* framework, Hedlund has not moved beyond generalities. *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 808 (Iowa 2019) ("Summary judgment is not a dress rehearsal or practice run; 'it is the put up or shut up moment in a lawsuit ....' " (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005))).

For similar reasons, we find that there is insufficient evidence to withstand summary judgment outside of the *McDonnell Douglas* framework. Meyers's comments related to retirement rather than age. They did not show animus toward age. The comments came several months before the termination decision, with many events intervening before that decision, including Hedlund's trip to Cedar Rapids and the report on the Governor's vehicle doing a "hard ninety." This is not enough to allow a reasonable jury to infer that defendants attempted to terminate Hedlund "because of" age.

C. Intentional Infliction of Emotional Distress. In his final argument, Hedlund asserts the individual defendants' conduct was sufficiently egregious to satisfy the outrageousness prong of his intentional infliction of emotional distress claim. For the following reasons, we disagree.

[34–36] To succeed on this claim, Hedlund must demonstrate four elements:

> (1) outrageous conduct by the defendant; (2) the defendant intentionally caused, or recklessly disregarded the probability of causing, the emotional distress; (3) plaintiff suffered severe or extreme emotional distress; and (4) the defen-

11. Hedlund was born in 1957.

> dant's outrageous conduct was the actual and proximate cause of the emotional distress.

Smith v. Iowa State Univ. of Sci. & Tech., 851 N.W.2d 1, 26 (Iowa 2014) (quoting *Barreca v. Nickolas*, 683 N.W.2d 111, 123–24 (Iowa 2004)). Hedlund must establish a prima facie case for the outrageous conduct element. *Id.* For emotional distress cases, "it 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) (quoting *M.H. by and through Callahan v. State*, 385 N.W.2d 533, 540 (Iowa 1986)). Here, the district court determined Hedlund's evidence was insufficient to rise to the level of outrageous conduct.

[37, 38] The standard of outrageous conduct "is not easily met, especially in employment cases." *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 157 (Iowa 1996), *abrogated on other grounds by Godfrey v. State*, 898 N.W.2d 844, 864, 872 (Iowa 2017). We have said the outrageous conduct "must be extremely egregious; mere insults, bad manners, or hurt feelings are insufficient." *Id.* at 156.

> Liability has been found only where the conduct has been so outrageous in character, and 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.
>
> Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 198 (Iowa 1985) (en banc) (quoting Restatement (Second) of Torts § 46 cmt. d, at 73 (Am. Law Inst. 1965)). We require substantial evidence of extreme conduct. *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984).

[39] "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." *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 636 (Iowa 1990) (en banc) (citation omitted). "Despite our caselaw that indicates an employer 'has a duty to refrain from abusive behavior toward employees,' we have often found that conduct by employers and coworkers did not rise to the level of outrageous conduct." *Smith*, 851 N.W.2d at 26 (quoting *Vinson*, 360 N.W.2d at 118); *see, e.g.*, *Fuller v. Local Union No. 106, United Bhd. of Carpenters*, 567 N.W.2d 419, 421, 423 (Iowa 1997) (determining "in no way could the conduct alleged here qualify" as outrageous conduct after fellow union members filed a false police report of plaintiff's intoxicated driving that led to union's violation of plaintiff's contractual rights); *Van Baale*, 550 N.W.2d at 155, 157 (holding police officer's termination did not amount to outrageous conduct after his supervisor recanted the "guarantee" to continued employment if he entered guilty and nolo contendere pleas on a domestic abuse charge instead of proceeding to trial as initially planned); *Reihmann v. Foerstner*, 375 N.W.2d 677, 681 (Iowa 1985) (agreeing the record did not contain substantial evidence of outrageous conduct when supervisor used his influence to move plaintiff's office to a different city).

In *Vinson*, we determined an employer's eight-step "campaign of harassment" was not conduct sufficient to "[rise] to the level of extremity essential to support a finding of outrageousness." 360 N.W.2d at 119. After questioning the school district's se-

niority policy, the plaintiff was singled out for "special scrutiny." *Id.* The campaign included accusing the plaintiff of falsifying time records, discharging her on the ground of dishonesty, and reporting the incident to a prospective employer despite "knowing the report would be so received and harm plaintiff's chance of being employed, and knowing that plaintiff had not acted dishonestly." *Id.* We determined a jury could find the actions as "petty and wrong, even malicious," but we did not believe "the conduct went beyond all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community." *Id.*

We have held certain conduct sufficiently outrageous. That was the special circumstances of *Smith*, 851 N.W.2d at 28–29. There, the case "presente[d] the confluence of several factors" that "exceeded a 'deliberate campaign to badger and harass' Smith and crossed the line into outrageous conduct." *Id.* at 28 (quoting *Vinson*, 360 N.W.2d at 119). "The conduct included, but also went beyond, typical bad boss behavior such as discrimination in pay, isolation of the employee, removal of the employee from work assignments, misrepresentations about promotions, and even falsification of records." *Id.* at 29. Although "the issue [was] a close one," *Smith* involved a striking, "unremitting psychological warfare . . . over a substantial period of time." *Id.* at 28–29. Smith's supervisor treated him as a mentally unstable outcast in order to cover up what amounted to her theft from the university. *Id.* at 29.

[40] Hedlund positions his case as distinct from "typical bad boss behavior" and more akin to an "unrelenting campaign" to destroy his life and career. Specifically, Hedlund focuses on two behaviors. He first claims defendants deliberately endangered lives when DPS arrived at his house to place him on administrative leave. Based on our review of the summary judgment record, we agree with the district court's conclusion that this behavior did not rise to the level of outrageous conduct. It is typical practice for DPS to place an individual on administrative leave pending a fitness-for-duty evaluation. The record indicates Paulson met with a representative from PSB, the department of administrative services, and the attorney general's office to discuss appropriate actions regarding Hedlund's escalating behavior. Paulson and Meyers were concerned for their own safety as well as Hedlund's personal safety. It was determined, therefore, the most appropriate action was administrative leave pending a fitness-for-duty evaluation. Notably, Hedlund was placed on leave without incident.

[41] Hedlund also alleges his supervisors repeated known falsehoods, regarding his threat to public safety, to Governor Branstad knowing the Governor would broadcast the falsehoods statewide. According to Hedlund, this led to his humiliation in front of coworkers, peers, and the community. We are not persuaded. Even when viewed in the light most favorable to Hedlund, this case is most similar to *Vinson's* deliberate campaign to badger and harass. The comment by the Governor stating, "[DPS] felt for the morale and for the safety and well-being of the Department, this was action that was necessary," is not substantial evidence of conduct "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." *Vinson*, 360 N.W.2d at 118 (quoting *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 801 (Iowa 1984)).

[42] In addition, we do not believe the conduct Hedlund endured is comparable to unremitting psychological warfare over a substantial period of time. *See Smith*, 851

N.W.2d at 29 ("[T]he conduct included, but also went beyond, typical bad boss behavior .... What is striking ... [was the] unremitting psychological warfare against Smith over a substantial period of time."). A jury could find certain aspects of the defendants' actions as petty, wrong, or even malicious. But this would not lead an average member of the community to arouse resentment against the defendants and to exclaim, "Outrageous!"

The district court determined the individual defendants were entitled to summary judgment on this issue. We find no error with this conclusion.

IV. Conclusion.

For the aforementioned reasons, the judgment of the district court is affirmed in part and reversed in part. Specifically, we affirm the district court's grant of summary judgment with regard to Hedlund's claims of age discrimination and intentional infliction of emotional distress. We reverse the district court's grant of summary judgment with regard to Hedlund's whistleblower claim. We remand to the district court for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All justices concur except Appel, J., and Cady, C.J., and Wiggins, J., who concur in part and dissent in part.

APPEL, Justice (concurring in part and dissenting in part).

I. Introduction.

I concur in part and dissent in part. I concur in the majority's conclusion that a whistleblower claim is available to Hedlund under *Walsh v. Wahlert*, 913 N.W.2d 517 (Iowa 2018). I also concur that the district court properly dismissed Hedlund's intentional infliction of emotional distress claim.

I write on two issues. First, I dissent from the affirmance of summary judgment on Hedlund's civil rights claim. Second, I agree with the majority's result on the remedial questions regarding Iowa Code section 70A.28(5)(*a*) (2014) but offer a different analysis.

II. Iowa Civil Rights Act Claim.

The majority finesses the question of whether the test announced by the United States Supreme Court in *McDonnell Douglas* applies to motions for summary judgment under the Iowa Civil Rights Act (ICRA). I would answer the question head on.

In my view, we should expressly make clear there is no place for the *McDonnell Douglas* test at the summary judgment stage for ICRA mixed-motive cases. The proper test is the "a motivating factor" test. That is the standard at trial. It would certainly be odd, to say the least, to apply a standard at summary judgment that is different than the standard at trial. In my view, deciding not to apply *McDonnell Douglas* at the summary judgment stage in an action under the ICRA is an easy call and there is no reason to allow any marginal uncertainty to exist on the issue.

Further, whatever standard we apply, our role is to act as judges, not jurors. We do not weigh evidence on summary judgment, and all inferences from the evidence are to be made *in favor* of the nonmoving party. I do not understand, for instance, how the majority can conclude that a supervisor's comments about Hedlund being in the twilight of his career and inquiries about his retirement plans in the context of a personnel discussion did not relate to age without making an inference *against* Hedlund, the nonmoving party. In my view, the majority crosses the line and usurps the jury function by making infer-

ences adverse to the nonmoving party and by weighing the evidence in order to affirm the granting of the defendants' motion for summary judgment in this case.

A. The Proper Standard at Summary Judgment on an Age Discrimination Claim. In evaluating the age discrimination claim at trial and at summary judgment, the proper test under the ICRA is not the *McDonnell Douglas* burden-shifting/determinative-factor test. Instead, the proper test under Iowa law is the a-motivating-factor test.

1. *United States Supreme Court precedent.* In *McDonnell Douglas Corp. v. Green*, the United States Supreme Court announced a framework for evaluating evidence in discrimination claims under Title VII. 411 U.S. 792, 802–05, 93 S. Ct. 1817, 1824–26, 36 L.Ed.2d 668 (1973). According to the framework in *McDonnell Douglas*, when the plaintiff alleges she was rejected for a position because of unlawful discrimination, the plaintiff must first show that she was a member of a protected class, was qualified for the position, and was rejected for the position and that the employer sought other candidates of the plaintiff's qualifications. *See id.* at 802, 93 S. Ct. at 1824. The burden of production then shifts to the employer to show a nondiscriminatory reason for its employment action. *Id.* Once the employer articulates a legitimate business reason, the plaintiff is required to show the reason for the decision was pretextual. *Id.* at 804–05, 93 S. Ct. at 1825–26.

From the outset, *McDonnell Douglas* was flawed. It presumed that there was only a single reason for the challenged decision. *See, e.g., Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 119 (2d Cir. 1997) (acknowledging distinction between single-motive and mixed-motive cases). In fact, that is rarely the case. What happens when there are several reasons for a decision, one of which is unlawful? The plaintiff might not prove that all the reasons advanced by the employer were pretextual, but illegal discrimination might have been a motivating factor in the adverse employment action.

The Supreme Court considered the mixed-motive question in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232, 109 S. Ct. 1775, 1781, 104 L.Ed.2d 268 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. §§ 2000e–2(m), 2000e–5(g)(2)(B) (2012)). Under *Price Waterhouse*, the plaintiff has the initial burden of proving that discriminatory animus "played a motivating part in an employment decision." *Id.* at 244, 109 S. Ct. at 1787. Once that burden is met, the employer "may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the protected characteristic] to play such a role." *Id.* at 244–45, 109 S. Ct. at 1787–88 (footnote omitted).

In the controlling concurring opinion, Justice O'Connor indicated that the burden would shift to an employer in a mixed-motive case where the plaintiff "show[s] by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Id.* at 276, 109 S. Ct. at 1804 (O'Connor, J., concurring in the judgment). In cases involving entangled multiple motives, she explained, tort law sometimes shifts the burden of proof on the causation issue to defendants because not doing so would demand "the impossible" from plaintiffs. *Id.* at 263–64, 109 S. Ct. at 1797–98 (quoting Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 Stan. L. Rev. 60, 67 (1956)). Justice O'Connor noted that, similarly, plaintiffs in Title VII cases are unable to untangle the threads of multiple causation. *Id.* at 273, 109 S. Ct. at 1802–03.

At this point, Congress intervened. The Civil Rights Act of 1991 codified the a-motivating-factor standard and provided that liability is established if a plaintiff proves that a protected characteristic "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e–2(m). The legislation also changed the import of the same-decision defense that the *Price Waterhouse* Court announced. *Id.* § 2000e–5(g)(2)(B).

The approach to Title VII claims developed in *Price Waterhouse* and modified in the Civil Rights Act of 1991 is commonly known as the mixed-motive approach. This is because it recognizes that an employer may have had *both* an impermissible motive and a permissible motive for an employment decision. This is a contrast with the pretext or single-motive approach stemming from *McDonnell Douglas.*

In the wake of congressional action, the question arose whether Justice O'Connor's requirement in *Price Waterhouse* of direct evidence to trigger the a-motivating-factor test had continued vitality. The Supreme Court addressed the issue in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–101, 123 S. Ct. 2148, 2153–55, 156 L.Ed.2d 84 (2003). In *Desert Palace,* the Supreme Court rejected the distinction between direct and indirect evidence. *Id.* at 99–100, 123 S. Ct. at 2154. It concluded that in order to obtain a mixed-motive jury instruction, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that '[a protected characteristic] was a motivating factor for any employment practice.' " *Id.* at 101, 123 S. Ct. at 2155 (quoting 42 U.S.C. § 2000e–2(m)). *Desert Palace* did not expressly rule that *McDonnell Douglas* was no longer applicable at summary judgment in a mixed-motive case, but because it obliterated the distinction between direct and indirect evidence embraced in *Price Waterhouse,* it logically follows that the a-motivating-factor test now applies in all mixed-motive cases.

2. *Federal precedent since* Desert Palace. Since *Desert Palace,* the federal circuit courts have addressed the question of the proper test for Title VII claims in the context of a motion for summary judgment. The federal circuits employ four different approaches to summary judgment on mixed-motive claims like Hedlund's. Application of *McDonnell Douglas* at summary judgment is not consistent with the approach taken under federal law in all but one of the circuits.

The United States Courts of Appeals for the Sixth and Eleventh Circuits have adopted a two-pronged test for summary judgment on a mixed-motive discrimination claim. Their test utilizes the a-motivating-factor standard.

> [T]o survive a defendant's motion for summary judgment, a Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) "race, color, religion, sex, or national origin was *a* motivating factor" for the defendant's adverse employment action.

White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008) (quoting 42 U.S.C. § 2000e–2(m) (2000)); *accord Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1232–33 (11th Cir. 2016). "We ... hold[ ] that the *McDonnell Douglas/Burdine* burden-shifting framework does *not* apply to the summary judgment analysis of Title VII mixed-motive claims." *White*, 533 F.3d at 400.

The Sixth and Eleventh Circuits explain that applying *McDonnell Douglas* at summary judgment makes little sense in the

context of mixed-motive claims. *McDonnell Douglas* was designed, the *White* court notes, to deal with single-motive cases, i.e., cases in which the plaintiff argues that the only motive for the adverse employment action was discriminatory. *Id.* at 400–01. In single-motive cases,

> narrowing of the actual reasons for the adverse employment action is necessary to determine whether there is sufficient evidence to proceed to trial ... because the plaintiff in such a case must prove that the defendant's discriminatory animus, and not some legitimate business concern, was the ultimate reason for the adverse employment action.

Id. at 401. But in mixed-motive cases, a plaintiff need not rebut all potential "legitimate motivations of the defendant as long as the plaintiff can demonstrate that an illegitimate discriminatory animus factored into the defendant's decision to take the adverse employment action." *Id.* The Eleventh Circuit puts a fine point on the matter:

> [I]f an employee cannot rebut her employer's proffered reasons for an adverse action but offers evidence demonstrating that the employer also relied on a forbidden consideration, she will not meet her burden [under *McDonnell Douglas*]. Yet, this is the exact type of employee that the mixed-motive theory of discrimination is designed to protect. In light of this clear incongruity between the *McDonnell Douglas* framework and mixed-motive claims, it is improper to use that framework to evaluate such [mixed-motive] claims at summary judgment.

Quigg, 814 F.3d at 1238 (citation omitted).

A second group of federal circuits—the First, Fourth, Seventh, Ninth, and D.C. Circuits—"do not require the use of the *McDonnell Douglas* framework in mixed-motive cases involving circumstantial evidence." *Id.* at 1239 & n.8 (collecting cases). In the Fourth Circuit, "[a] plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impressible factor such as race motivated the employer's adverse employment decision." *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005). The same rule applies in the other four circuits. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004); *Hillstrom v. Best W. TLC Hotel*, 354 F.3d 27, 31 (1st Cir. 2003); *see Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860–62 (7th Cir. 2007); *Fogg v. Gonzales*, 492 F.3d 447, 451 & n.* (D.C. Cir. 2007).

A third group of federal circuits—the Second, Third, Fifth, and Tenth—while employing a modified form of *McDonnell Douglas*, permit a plaintiff to survive summary judgment on a mixed-motive claim if a protected characteristic was a motivating factor in the adverse employment decision. *See Quigg*, 814 F.3d at 1238–39 (collecting cases). In the Fifth Circuit, a Title VII plaintiff asserting a mixed-motive claim can survive summary judgment where there is a genuine dispute "that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic." *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (quoting *Rishel v. Nationwide Mut. Ins.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)). In the Second Circuit, summary judgment is not appropriate where "[t]here is sufficient evidence in the record to permit a reasonable jury to conclude that the [employment decision] was based, at least in part, upon a[n impermissible] motive." *Holcomb v. Iona Coll.*, 521 F.3d 130, 144 (2d Cir. 2008). "[A] plaintiff who ... claims that the employer acted with mixed mo-

tives is not *required* to prove that the employer's stated reason was a pretext." *Id.* at 141–42. In the Tenth Circuit, a framework derived from *Price Waterhouse*, rather than *McDonnell Douglas*, governs mixed-motive claims. *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1224–26 (10th Cir. 2008); *see Quigg*, 814 F.3d at 1239. In the Third Circuit, *McDonnell Douglas*

> does not apply in a mixed-motive case in the way it does in a pretext case because the issue in a mixed-motive case is not whether discrimination played the dispositive role but merely whether it played "a motivating part" in an employment decision.

Makky v. Chertoff, 541 F.3d 205, 214 (3d Cir. 2008).

Finally, "the Eighth Circuit is alone in holding that ... the *McDonnell Douglas* approach must be applied in the present context [of summary judgment on a mixed-motive claim of discrimination]." *Quigg*, 814 F.3d at 1239; *see Griffith v. City of Des Moines*, 387 F.3d 733, 735–36 (8th Cir. 2004).

I do not agree with the notion that federal law should do anything more in our resolution of claims under the ICRA than offer reasoning that we might or might not find persuasive. Here, I find the overwhelming weight of federal authority persuasive on the point that *McDonnell Douglas* is not appropriate as the test for summary judgment on mixed-motive claims because it was not designed for such claims. It is illogical to apply a standard designed for determining whether there was only one motivation for an employment action to claims where the plaintiff need only show that an impermissible motivation was among the motivations for the action.

3. *Other state precedent.* Other states have also recognized that the *McDonnell Douglas* framework is inappropriate for resolving claims at summary judgment.

In *Gossett v. Tractor Supply Co.*, the Tennessee Supreme Court rejected application of *McDonnell Douglas* at summary judgment on mixed-motive claims. 320 S.W.3d 777, 781–82 (Tenn. 2010), *superseded by statute*, 2011 Tenn. Pub. Acts ch. 461, § 2 (codified as amended at Tenn. Code Ann. § 50-1-304(g) (West, Westlaw through 2019 First Reg. Sess. of the 111th Tenn. Gen. Assemb.)), *as recognized in Williams v. City of Burns*, 465 S.W.3d 96, 112 n.15 (Tenn. 2015). The *Gossett* court explained that "the *McDonnell Douglas* framework does not necessarily demonstrate that there is no genuine issue of material fact" because, while that framework only requires a defendant to proffer a legitimate alternative for the discharge, "[a] legitimate reason for discharge ... is not always mutually exclusive of a discriminatory or retaliatory motive and thus does not preclude the possibility that a discriminatory or retaliatory motive played a role in the discharge decision." *Id.* at 782. "Furthermore," the *Gossett* court recognized, "evidence showing a legitimate reason for discharge can satisfy the requirements of the *McDonnell Douglas* framework without tending to disprove any factual allegation by the employee." *Id.* Additionally, the *Gossett* court acknowledged that "the shifting burdens of the *McDonnell Douglas* framework obfuscate the trial court's summary judgment analysis" because, "[i]nstead of demonstrating the absence of any genuine issue of material fact, the framework focuses on the 'sensitive and difficult' factual question of whether an employer's decision to discharge an employee was discriminatory or retaliatory." *Id.* at 783 (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)). After *Gossett*, the

Tennessee legislature incorporated language into Tennessee statutes that we do not have in the Iowa Code, namely, that the trial standard for proving discrimination follows *McDonnell Douglas*. *See* 2011 Tenn. Pub. Acts ch. 461, § 1 (codified at Tenn. Code Ann. § 4-21-311(e) (West, Westlaw through 2019 First Reg. Sess. of the 111th Tenn. Gen. Assemb.)); *id.* § 2.

In Oregon and North Dakota, the *McDonnell Douglas* framework is inapplicable at summary judgment and a defendant cannot obtain summary judgment merely by pointing to a legitimate reason for the employment action. *Heng v. Rotech Med. Corp.*, 688 N.W.2d 389, 401 (N.D. 2004); *Williams v. Freightliner, LLC*, 196 Or.App. 83, 100 P.3d 1117, 1121–23 (2004); *Lansford v. Georgetown Manor, Inc.*, 192 Or.App. 261, 84 P.3d 1105, 1115, *modified on other grounds on reh'g*, 193 Or.App. 59, 88 P.3d 305, 305 (2004). In North Dakota, "[t]he burden-shifting rule of *McDonnell Douglas* . . . has little or no application at the summary judgment stage" because

> [b]y presenting a prima facie case of retaliatory discharge, the employee has created a genuine issue of material fact on the question of why she was fired, and the employer's alleged nonretaliatory reasons for the termination merely go to that question of fact.

Heng, 688 N.W.2d at 401. "[T]he employer's presentation of evidence of a legitimate, nonretaliatory reason for its action merely creates an issue of fact, not a basis for summary judgment dismissal of the employee's claim." *Id.* Similarly, in Oregon, "after a plaintiff has presented evidence of discrimination, evidence of an employer's nondiscriminatory motive in terminating an employee will not support summary judgment." *Freightliner, LLC*, 100 P.3d at 1123.

Likewise, in *Brady v. Cumberland County*, the Maine Supreme Judicial Court held the *McDonnell Douglas* burden-shifting framework inapposite to a mixed-motive claim for whistleblower retaliation. 126 A.3d 1145, 1154 (Me. 2015). "[I]n a summary judgment motion in a [whistleblower protection act] retaliation case," the *Brady* court explained, "it is unnecessary to shift the burden of production pursuant to *McDonnell Douglas* once the plaintiff . . . has presented the requisite evidence that the adverse employment action was motivated at least in part by retaliatory intent." *Id.* "[I]f the employee presents evidence of a causal connection between protected activity and adverse employment action, then the employee has created a record sufficient to defeat an employer's motion for summary judgment." *Id.* at 1157. "[T]he employer's evidence of a lawful reason for the adverse employment action . . . merely creates a dispute of material fact and precludes the court from granting summary judgment to the employee." *Id.*

The view that *McDonnell Douglas* has no continued vitality is not universally embraced by state courts. A number of them, with little or no analysis, have continued to apply *McDonnell Douglas* even after *Desert Palace*. *See, e.g.*, *Serri v. Santa Clara Univ.*, 226 Cal.App.4th 830, 172 Cal. Rptr. 3d 732, 758 (2014); *Scrivener v. Clark Coll.*, 181 Wash.2d 439, 334 P.3d 541, 545–46 (2014) (en banc).

4. *Iowa precedent.* In Iowa, we have evaluated civil rights claims at the summary judgment stage under both the *McDonnell Douglas* and the a-motivating-factor standards. The applicable standard has been driven by the framework applied by the parties.[12] For instance, in *Smidt v.*

12. The majority states that "Hedlund asserts the *McDonnell Douglas* burden-shifting framework should be abandoned for summary judgment purposes" and "[d]efendants

Porter, the plaintiff invoked *McDonnell Douglas*. 695 N.W.2d 9, 14 (Iowa 2005). And "[n]either party challenge[d] the viability of the *McDonnell Douglas* framework after *Desert Palace*." *Id.* at 14 n.1. Similarly, in *Jones v. University of Iowa*, the plaintiff "advanc[ed] the *McDonnell Douglas* framework for intentional discrimination." 836 N.W.2d 127, 147 (Iowa 2013) (footnote omitted). So if *Smidt* and *Jones* stand for anything relevant here, it is that we will apply the standard invoked by the plaintiff.

In *McQuistion v. City of Clinton*, we did adopt a version of *McDonnell Douglas*, but the case turned on statutory interpretation of a different provision than the one at issue in this case. 872 N.W.2d 817, 828 (Iowa 2015). In *McQuistion*, the plaintiff brought a pregnancy discrimination claim under Iowa Code section 216.6(2), the provision the legislature enacted to specifically address pregnancy discrimination. *Id.* at 821, 825. We found a similarity in the statutory language with the *McDonnell Douglas* framework and decided that the legislature intended *McDonnell Douglas* to apply under that statutory provision. *Id.* at 828. The language upon which we relied in *McQuistion* is wholly absent from the provision under which Hedlund brings his claim. *Compare* Iowa Code § 216.6(1)(*a*) (age discrimination), *with id.* § 216.6(2) (pregnancy discrimination). Thus, the holding in *McQuistion* has nothing to do with Hedlund's claim.

Finally, the *Landals v. George A. Rolfes Co.* case came before us after a jury verdict. 454 N.W.2d 891, 892 (Iowa 1990). We reviewed the denial of the employer's motions for new trial and judgment notwithstanding the verdict. *Id.* The instructions in *Landals* were not challenged on appeal, and we considered only the sufficiency of the evidence at trial based upon the instructions given. *Id.* We said, "When a case is fully tried on the merits, 'we focus our attention on the ultimate question presented and not on the adequacy of a party's showing at any particular stage of the analysis.'" *Id.* at 893 (quoting *Smith v. Goodyear Tire & Rubber Co.*, 895 F.2d 467, 471 (8th Cir. 1990)). Thus, *Landals* had nothing to do with the proper standard on summary judgment.

On the other hand, in *Nelson v. James H. Knight DDS, P.C.*, the plaintiff claimed that because gender was "a motivating factor" in her discharge from employment, the district court erred in granting summary judgment for the defense. 834 N.W.2d 64, 67 (Iowa 2013). In our analysis, we stated, "Generally, an employer engages in unlawful sex discrimination when the employer takes adverse employment action against an employee and sex is a motivating factor in the employer's decision." *Id.* Later in the opinion, we referred to the a-motivating-factor test in our analysis of the plaintiff's claim that summary judgment was improperly granted. *Id.* at 71. There is no mention at all of *McDonnell Douglas* in this summary judgment case under the ICRA.

While our summary judgment cases may not uniformly reject the application of *McDonnell Douglas* under the ICRA, when a defendant seeks summary judg-

contend *McDonnell Douglas* remains the appropriate analytical framework at summary judgment." But there is nothing to abandon or remain. The cases cited by the defendants, as discussed herein, establish nothing more than the proposition that we have applied the framework advanced by the plaintiff. *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 147–48 (Iowa 2013); *Smidt v. Porter*, 695 N.W.2d 9, 14 & n.1 (Iowa 2005); *see also Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 67 (Iowa 2013) (applying the a-motivating-factor standard at summary judgment). The majority does not contest that point, and its characterization of the parties' arguments does not change our precedent.

ment in a mixed-motive case, we have removed the underpinnings of such a rule. First, we have long and repeatedly held that there is no difference in Iowa law between direct and circumstantial evidence. *See, e.g., State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017); *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008); *Walls v. Jacob North Printing Co.*, 618 N.W.2d 282, 285 (Iowa 2000) (en banc); *Schermer v. Muller*, 380 N.W.2d 684, 687 (Iowa 1986); *Beck v. Fleener*, 376 N.W.2d 594, 597 (Iowa 1985) (en banc); *State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979) (en banc). Thus, we long ago crossed the *Desert Palace* bridge rejecting the distinction between direct and indirect evidence.

Further, in Iowa, the causation standard at trial is "a motivating factor," which is, in substance, the test under *Price Waterhouse*, 490 U.S. at 244, 109 S. Ct. at 1787 (plurality opinion). *See Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 272 (Iowa 2019) (reaffirming adoption of *Price Waterhouse* a-motivating-factor standard for employment discrimination claims under the ICRA); *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13–14 (Iowa 2009) (adopting the a-motivating-factor standard for status-based discrimination-in-employment claims under the ICRA).[13]

As we clarified in *Hawkins*, there is no burden-shifting component inherent in the legal test for an employment discrimination claim under the ICRA. 929 N.W.2d at 272. This is because, under Iowa law, all defenses must be pled and proved. Iowa R. Civ. P. 1.421(1); *see Price Waterhouse*, 490 U.S. at 244–45, 109 S. Ct. at 1787–88 (holding employer can avoid finding of liability only by proving the same-decision defense); *Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 884–85 (9th Cir. 2003) (characterizing same-decision defense as an affirmative defense); *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 627–28 (Iowa 2017) (majority opinion of Appel, J., which was joined by Chief Justice Cady, and Justices Wiggins and Hecht) (same).

13. We apply the *Price Waterhouse* a-motivating-factor test in ICRA employment discrimination cases regardless of the particular protected characteristic at issue. Thus, for example, we would apply the a-motivating-factor test to a race- or sex-discrimination-in-employment case as well as to an age-discrimination-in-employment case. This is inconsistent with federal law, which does not apply the a-motivating-factor test to age-discrimination-in-employment or retaliation-in-employment cases. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352, 133 S. Ct. 2517, 2528, 186 L.Ed.2d 503 (2013) (applying different standard in federal retaliation-in-employment cases); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176, 129 S. Ct. 2343, 2350, 174 L.Ed.2d 119 (2009) (applying different standard in federal age-discrimination-in-employment cases). Our application of the a-motivating-factor test differs from federal law because Iowa prohibits age discrimination in employment in the same statutory provision as it prohibits employment discrimination based on protected traits such as race or sex, unlike the federal statutes. *Compare* 29 U.S.C. § 623(a) (2012) (prohibiting age discrimination in employment), *and* 42 U.S.C. § 2000e–2(a) (prohibiting discrimination in employment because of "race, color, religion, sex, or national origin"), *with* Iowa Code § 216.6(1) (prohibiting discrimination in employment because of, *inter alia*, age, race, or sex). Additionally, our provisions prohibiting status-based and retaliation-based discrimination use the same language, unlike the federal statutes. *Compare* 42 U.S.C. § 2000e–2(a) (status-based discrimination), *and id.* § 2000e–3(a) (retaliation), *with* Iowa Code § 216.6(1) (status-based discrimination), *and id.* § 216.11(2) (retaliation).

One exception to our general practice is pregnancy-discrimination-in-employment cases. *See McQuistion*, 872 N.W.2d at 828. But as discussed above, this exception is due to the different language in the ICRA's pregnancy-discrimination-in-employment provision. *Id.*

Further, nothing in the ICRA imposes a burden-shifting framework, unlike the Federal Civil Rights Act, which codified such a framework. *See* 42 U.S.C. § 2000e–5(g)(2) (2012); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 349, 133 S. Ct. 2517, 2526, 186 L.Ed.2d 503 (2013) (acknowledging codification of burden-shifting framework).

Thus, to establish employment discrimination under the ICRA at trial, the plaintiff must prove by a preponderance of the evidence that he or she was subjected to an adverse employment action because of his or her protected characteristic. *See Hawkins*, 929 N.W.2d at 272. However, the plaintiff cannot recover damages for the employer's violation of the ICRA if the employer successfully pleads and proves the same-decision affirmative defense. *Id.*

Having established the a-motivating-factor test as the proper trial standard, it follows that the same standard should apply in a motion for summary judgment on the same claim. At the summary judgment stage of the proceeding, we do not weed out claims by inventing a new, different standard than that which would be applicable at trial. *See, e.g., Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 830 (Iowa 2007) (noting that summary judgment must be decided by reference to the evidentiary standard at trial); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996) (same); *Hike v. Hall*, 427 N.W.2d 158, 159 (Iowa 1988) (same); *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988) (en banc) (same); *Kapadia v. Preferred Risk Mut. Ins.*, 418 N.W.2d 848, 849–50 (Iowa 1988) (same); *Behr v. Meredith Corp.*, 414 N.W.2d 339, 341 (Iowa 1987) (same) (en banc). The proper inquiry is "whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party." *Bitner*, 549 N.W.2d at 300; *accord Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005) (per curiam). Where the record taken as a whole could lead a rational tier of fact to find for the nonmoving party, there is a genuine issue for trial. *Clinkscales*, 697 N.W.2d at 841; *Bitner*, 549 N.W.2d at 300. The United States Supreme Court explains,

> Whether a jury could reasonably find for either party . . . cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254–55, 106 S. Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

Thus, the substantive evidentiary standard for whether a jury verdict can be sustained must be the same standard at the motion for summary judgment stage of a proceeding. The only reason for a higher or different standard at the summary judgment stage would be to weed out claims that a rational jury could find meritorious. There is no basis for showing such distrust of juries or hostility toward civil rights actions and empowering judges to prevent potentially meritorious claims from going to trial. *See, e.g., Clinkscales*, 697 N.W.2d at 841 ("Mere skepticism of a plaintiff's claim is not a sufficient reason to prevent a jury from hearing the merits of a case."). Indeed, imposing a higher or different standard at summary judgment than would be applied at trial raises severe issues regarding the right to a jury trial under the State and Federal Constitutions.

Consequently, the analysis on a defendant-employer's motion for summary judgment on the plaintiff's age-discrimination-in-employment claim under the ICRA focuses on whether there is a genuine issue of material fact that the plaintiff's age was a motivating factor in the adverse employment action. This summary judgment analysis does not, as the district court in this case thought, involve any burden shifting that requires the employer to articulate a legitimate, nondiscriminatory reason for the decision or the plaintiff to then "present evidence sufficient to raise a question of material fact as to whether [the defendants'] proffered reason was pretextual and to create a reasonable inference that [the protected characteristic] was a determining factor in the adverse employment action."

Ordinarily, "[i]f we find an incorrect legal standard was applied, we remand for new findings and application of the correct standard." *State v. Robinson*, 506 N.W.2d 769, 770–71 (Iowa 1993); *see Papillon v. Jones*, 892 N.W.2d 763, 773 (Iowa 2017). But in light of the majority's affirmance of summary judgment, I proceed to consider the merits of whether the defendants were entitled to summary judgment on Hedlund's age discrimination claim under the proper framework.

C. Discussion of Summary Judgment. I begin with a brief review of the generally applicable rules related to motions for summary judgment.

"To obtain summary judgment, 'the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law.'" *K & W Elec., Inc. v. State*, 712 N.W.2d 107, 112 (Iowa 2006) (quoting *Griglione v. Martin*, 525 N.W.2d 810, 813 (Iowa 1994), *overruled on other grounds by Winger v. CM Holdings, L.L.C.*, 881 N.W.2d 433, 448 (Iowa 2016)). The burden of showing undisputed facts entitling the moving party to summary judgment rests with the moving party. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011).

A court examining the propriety of summary judgment must "view the entire record in the light most favorable to the nonmoving party." *Bass v. J.C. Penney Co.*, 880 N.W.2d 751, 755 (Iowa 2016). The court must also indulge "on behalf of the nonmoving party every legitimate inference reasonably deduced from the record," *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 20 (Iowa 2012) (quoting *Van Fossen v. MidAm. Energy Co.*, 777 N.W.2d 689, 692 (Iowa 2009)), "in an effort to ascertain the existence of a fact question," *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000) (en banc). "Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions." *Banwart v. 50th St. Sports, L.L.C.*, 910 N.W.2d 540, 544–45 (Iowa 2018) (quoting *Clinkscales*, 697 N.W.2d at 841).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are functions for the jury, not a judge ruling on a summary judgment motion. *Carr v. Bankers Tr. Co.*, 546 N.W.2d 901, 905 (Iowa 1996) (quoting *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513). In ruling "[o]n a motion for summary judgment, the court does not weigh the evidence. Instead, the court inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party." *Bitner*, 549 N.W.2d at 300; *accord Clinkscales*, 697 N.W.2d at 841.

Further, discrimination cases often involve questions of intent and causation. Both these elements are traditionally not amenable to summary judgment. *Thomp-*

son v. Kaczinski, 774 N.W.2d 829, 836 (Iowa 2009) (causation); *Hoefer v. Wis. Educ. Ass'n Ins. Tr.*, 470 N.W.2d 336, 338 (Iowa 1991) (en banc) (motive and intent). *See generally Sherwood v. Nissen*, 179 N.W.2d 336, 339 (Iowa 1970) ("Some ultimate facts lend themselves more readily to categorical proof than others. A plaintiff suing on a note is usually in a considerably different position than a plaintiff suing for negligence."). Thus,

> [a]s a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment. This is because "the ultimate question is one that can only be resolved through a searching inquiry—one that is most appropriately conducted by a factfinder, upon a full record."

Chuang v. Univ. of Calif. Davis, Bd. of Trs., 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996)).

Following the applicable rules of not making credibility determinations, not weighing the evidence, and drawing all legitimate inferences in favor of the nonmoving party, I conclude there is a genuine issue of material fact that Hedlund's age was a motivating factor in his discharge. "A motivating factor is one that helped compel the decision," *Haskenhoff*, 897 N.W.2d at 602 (Cady, C.J., concurring in part and dissenting in part), or that "played a part" or "a role" in the employer's decision, *e.g.*, *Boyd v. Ill. State Police*, 384 F.3d 888, 895 (7th Cir. 2004) (approving "played a part or a role" language); Model Civil Jury Instructions for the District Courts of the Eighth Circuit 5.21, 5.40 (2018); *see DeBoom*, 772 N.W.2d at 13 (approving "played a part" language); *see also Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101 (8th Cir. 1988) ("[A]n employer violates Title VII whenever an unlawful motive has *played some part* in an adverse employment decision, even when the employer was also motivated by lawful considerations which would have dictated the same decision." (Emphasis added.)), *abrogated on other grounds by Price Waterhouse*, 490 U.S. at 241–42, 109 S. Ct. at 1786, *as recognized in Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 424–25 (8th Cir. 2017). It is a factor that "moves" or "pushes" the defendant toward the challenged decision. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 241, 109 S. Ct. at 1786 (providing illustration of "[s]uppose two physical forces act upon and *move* an object" (emphasis added)); *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1006 (7th Cir. 2005) ("A motivating factor is a factor that weighs in the defendant's decision to take the action complained of—in other words, it is a consideration present to his mind that favors, that *pushes* him toward, the action." (Emphasis added.)). It has also been defined as a factor the employer "relied upon" in reaching the decision. *Price Waterhouse*, 490 U.S. at 241–42, 109 S. Ct. at 1786.

But, importantly, a motivating factor is not necessarily *the* reason for the decision.[14] *DeBoom*, 772 N.W.2d at 13 (noting plaintiff in a discrimination case need only demonstrate that "his or her status as a member of a protected class was *a* [not *the*] determining factor in the decision to terminate employment"); *accord Price Waterhouse*, 490 U.S. at 250, 109 S. Ct. at 1790 ("In saying that gender played a motivating part in an employment decision,

14. The majority "affirm[s] the district court's determination that plaintiff failed to present sufficient evidence from which a reasonable jury could infer age discrimination was the real reason for his termination." But this misunderstands Hedlund's claim, which, as he explains, seeks "to prove that age was *a* motivating factor not *the* motivating factor."

we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, *one of those reasons* would be that the applicant or employee was a woman." (Emphasis added.)); *Hasan*, 400 F.3d at 1006 ("[A motivating factor] is a, not necessarily the, reason that [the employer] takes the action."); *Boyd*, 384 F.3d at 895 ("[T]here is a difference between a motivating factor, and a single factor that is the precipitating force (one definition of catalyst) for an action."). Furthermore, "[i]ts precise weight in [the employer's] decision is not important." *Haskenhoff*, 897 N.W.2d at 602 (quoting *Hasan*, 400 F.3d at 1006).

Hedlund offered evidence that comments arguably related to his age were made by a manager prior to his ultimate termination. First, he stated that Meyers, his direct supervisor, made two or three references to Hedlund being "in the twilight of his career" during a February 15, 2013 meeting. The purpose of that meeting was to provide Hedlund with verbal counseling regarding his email communication, specifically with respect to Hedlund's February 12, 2013 email to Meyers wherein he voiced his concerns with some of Meyers's management tactics. Thus, Hedlund's proximity to retirement from the department of public safety (DPS) was irrelevant.[15] Later that month, Meyers conducted a phone call with Hedlund and another employee and repeatedly asked them when they were going to retire. These comments were made by Meyers, Hedlund's immediate supervisor, not some coemployee. *Cf. Santiago-Ramos v. Centennial P.R. Wireless Co.*, 217 F.3d 46, 55 (1st Cir. 2000) ("Typically, statements made by 'one who neither makes nor influences [a] challenged personnel decision are not probative in an employment discrimination case.'" (Alteration in original.) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990))). And the remarks were part of the ongoing investigatory and disciplinary process that led to Hedlund's termination in July of 2013. *See, e.g., Leonard v. Twin Towers*, 6 F. App'x 223, 230 (6th Cir. 2001) ("[W]e must carefully examine the nature of the inquiries and the context in which that inquiry was made.").

The district court characterized Meyers's comments as "stray comments."[16]

15. The defendants contend that Meyers made the comments in the context of trying to explain to Hedlund that "he [Meyers] didn't want to have issues with [Hedlund] because [Hedlund] was in the twilight of [his] career" and, therefore, the comments' context demonstrates they were neutral. But that is not the standard for an age-discrimination-in-employment case in Iowa. The standard is whether we can legitimately infer that the comments about an employee being in the twilight of his or her career indicate age was a motivating factor in the discharge decision.

Here, Meyers indicated Hedlund's age and proximity to retirement were part of his decision on how to handle any perceived issues with Hedlund's email communication. In essence, Meyers admits that age played a role in his decision as Hedlund's supervisor. If age played a role in at least one of Meyers's supervisory decisions, even though age was an otherwise irrelevant factor for such a decision, then it is reasonable to infer age played an improper role in other supervisory actions taken by Meyers. *See Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497, 1498–99, 1500–01 (11th Cir. 1991) (finding remark by supervisor to plaintiff that he had "been around too long and [was] too old and [was] making too much money" *immediately after a corrective interview* was circumstantial evidence of age discrimination).

16. The "stray comments" or "stray remarks doctrine" arose from Justice O'Connor's concurring opinion in *Price Waterhouse*. *See generally, e.g., Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319, 333–38 (D. Mass. 2011); 1 Merrick T. Rossein, *Employment Discrimination Law and Litigation* § 2:16.10 (2018), Westlaw EMPLL; Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doc-*

There are a number of problems with this conclusory label. The remarks here were made by a manager during the process that ultimately led to Hedlund's termination. *Cf. Price Waterhouse*, 490 U.S. at 277, 109 S. Ct. at 1804–05 (O'Connor, J., concurring in the judgment) (noting stray comments are those made by nondecisionmakers or "by decisionmakers unrelated to the decisional process itself"). The comments were not watercooler talk or lunch room chatter with coemployees who had a friendly interest in Hedlund's plans. Nor were they made for a legitimate business purpose, such as planning for the future. *See, e.g., Killingsworth v. State Farm Mut. Auto. Ins.*, 254 F. App'x 634, 637 (9th Cir. 2007) (finding, based on the facts of the particular case, that the employer's inquiries into its employees' retirement plans were part of a legitimate business interest in planning for its own future). The comments were made as part of a management process directly related to Hedlund's job and were made by the manager who participated in the termination decision. *See Underwood v. Monroe Mfg., L.L.C.*, 434 F. Supp. 2d 680, 689 (S.D. Iowa 2006) ("The speaker [of the comments or inquiries] should have a sufficient connection to the decisionmaking process."). Although the ultimate decision to terminate was made by Paulson, Meyers had input on the decision. *See, e.g., Hunt v. City of Markham*, 219 F.3d 649, 652–53 (7th Cir. 2000) (noting when those who have input into the adverse employment decision express discriminatory feelings around the relevant time of the decision, "then it may be possible to infer that the decision makers were influenced by those feelings in making their decision").

The federal caselaw indicates that "repeated," "unnecessary," or "excessive" inquiries into an employee's retirement plans may be relevant to an age discrimination claim. *See, e.g., Cox v. Dubuque Bank & Tr. Co.*, 163 F.3d 492, 498 (8th Cir. 1998) ("unnecessary" and "excessive"); *Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 208 (5th Cir. 1986) ("repeated" and "unnecessary"). At least one case posits that

> [i]f a manager makes an ageist remark, it could well be a window on his soul, a reflection of his animus, or arguably, just a slip of the tongue .... The inference to be given the remark should not be made by judges, particularly judges who have not heard the entire story.

Diaz v. Jiten Hotel Mgmt., Inc., 762 F. Supp. 2d 319, 323 (D. Mass. 2011); *accord Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 132–33 (3d Cir. 1997) (acknowledging a corporate executive's stray comment can be probative of informal

trine in Employment Discrimination Law, 77 Mo. L. Rev. 149, 149–73 (2012) [hereinafter Stone]. In her *Price Waterhouse* concurrence, Justice O'Connor noted that "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" cannot constitute direct evidence of discrimination for purposes of a mixed-motive analysis. *Price Waterhouse*, 490 U.S. at 277, 109 S. Ct. at 1804–05 (O'Connor, J., concurring in the judgment).

However, the continued validity, scope, and breadth of the doctrine has been widely criticized. *See, e.g., Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir. 2000) ("[T]he 'stray remark' jurisprudence is itself inconsistent with the deference appellate courts traditionally allow juries regarding their view of the evidence presented and so should be narrowly cabined." (quoting *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 n.4 (5th Cir. 2000))); *Diaz*, 762 F. Supp. 2d at 333–34 (noting the doctrine "began as a debate about what comprised 'direct evidence' in mixed-motive cases (a test no longer required even in mixed motive cases)"); Stone, 77 Mo. L. Rev. at 152. And the Supreme Court itself has declined to apply the doctrine in an overly broad or strict sense. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 152–54, 120 S. Ct. 2097, 2111–12, 147 L.Ed.2d 105 (2000).

managerial attitudes, which may be circumstantial evidence of discrimination); *cf. Price Waterhouse*, 490 U.S. at 251, 109 S. Ct. at 1791 (plurality opinion) ("[S]tereotyped remarks can certainly be *evidence* that gender played a part [in the employer's decision]."); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1133 (4th Cir. 1988) (noting the use of racially offensive slurs in the employment context is relevant to whether "a particular decision was made with racial animus").

Here, there were comments from which age discrimination can reasonably be inferred. *See Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717–18 (Iowa 2001) (en banc) ("In ruling on a summary judgment motion, . . . [t]he court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record."). Comments that an employee is in the twilight of his or her career have been found to support an age discrimination claim. *Forman v. Small*, 271 F.3d 285, 293 (D.C. Cir. 2001); *Theil v. West Mifflin Borough*, No. 2:05-cv-1516, 2007 WL 1087773, at *2 (W.D. Pa. Apr. 9, 2007) (characterizing statements that the plaintiff was "in the twilight of [his] career" as "textbook evidence of direct discrimination under *Price Waterhouse*" (emphasis omitted)); *see Jelinek v. Abbott Labs.*, 164 Ohio App.3d 607, 843 N.E.2d 807, 814, 817–18 (2005) (suggesting a statement that the fifty-three-year-old employee was in "twilight of his career" in a job evaluation could be evidence of age discrimination). And inquiry regarding retirement obviously has potential relevance for an age discrimination claim. *See, e.g.*, *Leonard*, 6 F. App'x at 230 ("[W]e recognize that not all inquiries about retirement are 'friendly' and that repeated and unwelcome inquiries may certainly be relevant to a showing of age discrimination. . . . '[T]he courts must carefully evaluate factors affecting the statement's probative value, such as the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action[.]' " (First and third alterations in original.) (quoting *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 357 (6th Cir. 1998))).

Hedlund presented other evidence of age discrimination. He was fifty-four at the time of termination while his successor was forty-five. This nine-year age difference is circumstantially probative of age discrimination. *See, e.g.*, *Smith v. City of Allentown*, 589 F.3d 684, 689 (3d Cir. 2009). Under the Federal Age Discrimination in Employment Act (ADEA), one element of an age discrimination claim is "that the plaintiff was ultimately replaced by another employee who was sufficiently younger." *Id.*; *cf. Faulkner v. Douglas County*, 906 F.3d 728, 734 (8th Cir. 2018) (stating an element of a Federal ADEA claim is that "substantially younger, similarly situated employees were treated more favorably"). The federal courts have stated, "[T]o satisfy the sufficiently younger standard, 'there is no particular age difference that must be shown.' " *Monaco v. Am. Gen. Assurance Co.*, 359 F.3d 296, 307 (3d Cir. 2004) (quoting *Showalter v. Univ. of Pittsburgh Med. Ctr.*, 190 F.3d 231, 236 (3d Cir. 1999)). Thus, courts have held that four-, five-, eight-, nine-, ten-, fourteen-, and sixteen-year age differences satisfied the sufficiently younger standard. *E.g.*, *Showalter*, 190 F.3d at 236 (eight- and sixteen-year age difference); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 729–30 (3d Cir. 1995) (temporary replacement was over ten years younger and permanent replacement was four years younger); *Douglas v. Anderson*, 656 F.2d 528, 533 (9th Cir. 1981) (five-year age difference); *Cridland v. Kmart Corp.*, 929 F. Supp. 2d

377, 385 (E.D. Pa. 2013) (nine- and fourteen-year age differences); *see O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312–13, 116 S. Ct. 1307, 1310, 134 L.Ed.2d 433 (1996) (suggesting replacement would be sufficiently younger if there was a sixteen-year age difference). Although there is no requirement that the plaintiff was replaced by someone sufficiently younger under the ICRA, the federal standard and caselaw suggest age discrepancy between the plaintiff and his or her replacement is indicative of age discrimination.

Finally, Hedlund claims that in the selection of his successor, there was evidence of age discrimination. The person ultimately hired was forty-five years in age while other applicants were somewhat older. Hedlund offered evidence suggesting that the older applicants were scored and considered less favorably than the younger applicants. *See Forman*, 271 F.3d at 292 (noting evidence that people under a certain age had a higher rate of promotion than those over a certain age was relevant to an age discrimination claim); *Guthrie*, 803 F.2d at 208 (finding the scoring discrepancies between the plaintiff and younger employees for the same problems was probative of discrimination); *cf. Faulkner*, 906 F.3d at 734 (stating an element of a Federal ADEA claim is that "substantially younger, similarly situated employees were treated more favorably"). Considered in isolation, this evidence would have limited probative value; however, when considered in context with Hedlund's other circumstantial evidence of age discrimination, this correlation has greater probative value. *Cf. Leonard*, 6 F. App'x at 230 ("[W]e do not view each discriminatory remark in isolation, but are mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus." (quoting *Ercegovich*, 154 F.3d at 356)).

Yet, on balance, we should trust juries to sort out factual disputes. *See, e.g., Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010) (per curiam) (denying summary judgment where a reasonable juror could accept that the employer made the "discriminatory-sounding remarks" and "[t]he resolution of th[e] case depend[ed] on whose account of the pertinent conversations a jury would credit"); *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 795 (3d Cir. 2000) ("Where a reasonable inference can be drawn that an employee's [engagement in a protected activity] was at least one factor considered by an employer in deciding whether to take action against the employee, the question of whether the [engagement in the protected activity] was a motivating factor in that determination is best left to the jury."); *Heiat v. E. Mont. Coll.*, 275 Mont. 322, 912 P.2d 787, 792 (1996) (plurality opinion) ("The District Court determined that although Nafisseh had established a prima facie case of sex discrimination, EMC had established a legitimate nondiscriminatory reason for the salary disparity between Abbas and Nafisseh. The District Court determined that the differences in the salaries were based on factors other than sex. However, in making this determination, the District Court adjudicated the disputed issue of material fact as to the reason for the differences in the salaries.... [T]his factual determination of motive or intent is precisely the reason that summary judgment is generally inappropriate in discrimination cases. Where different ultimate inferences may be drawn from the evidence presented by the parties, the case is not one for summary judgment.").

In my view, there is enough here—the hiring of a younger person, the correlation evidence of less favorable consideration the older the applicant, and comments by a person in the decisionmaking loop—to

survive summary judgment. *See Ryder*, 128 F.3d at 133 (noting it is for the factfinder to decide how much weight should be given to a corporate executive's stray comment as circumstantial evidence of age discrimination); *Guthrie*, 803 F.2d at 208 (deferring to the jury's credibility determinations of testimony evidence).[17]

In employment discrimination cases, I think it is important that appellate judges not act as superjurors. *See generally* Sandra F. Sperino & Suja A. Thomas, *Unequal: How America's Courts Undermine Discrimination Law* at 19–23 (2017). There is rarely documentary evidence or other blatant evidence available showing intentional discrimination. As a result, a number of courts have called for an added measure of "rigor," "caution," or "special caution" in ruling on summary judgment in discrimination cases. *See Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994); *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 370–71 (7th Cir. 1992); *Hayes v. Shalala*, 902 F. Supp. 259, 263 (D.D.C. 1995) ("Summary judgment in discrimination cases

17. Further, even under the *McDonnell Douglas* standard, I would find Hedlund's age discrimination claim survives summary judgment. Under the *McDonnell Douglas* framework, the plaintiff must first establish a prima facie case of discrimination. *Reeves*, 530 U.S. at 142, 120 S. Ct. at 2106. Thus, Hedlund must show (1) he was a member of a class protected by the ICRA (i.e., an employee who cannot be discriminated against in his employment because of his age), (2) he was otherwise qualified for his position, and (3) his termination occurred under circumstances giving rise to an inference of discrimination. *See* Iowa Code § 216.6(1); *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 741 n.1 (Iowa 2003) (identifying three basic elements of a prima facie case of discrimination in employment); *Smidt*, 695 N.W.2d at 14 (identifying three prima facie case elements for pregnancy discrimination in employment under the ICRA); *cf. Reeves*, 530 U.S. at 142, 120 S. Ct. at 2106 (identifying similar prima facie case elements for a claim under the Federal ADEA). Hedlund met this initial, minimal burden of production. *See Reeves*, 530 U.S. at 142, 120 S. Ct. at 2106 (indicating the *McDonnell Douglas* standard is a test for the burden of production, not the burden of persuasion); *Smidt*, 695 N.W.2d at 14–15 (noting the prima facie case showing is a "minimal requirement").

Under *McDonnell Douglas*, the burden of production then shifts to the defendants to provide evidence showing Hedlund was terminated for a legitimate, nondiscriminatory reason. *See Reeves*, 530 U.S. at 142, 120 S. Ct. at 2106; *Smidt*, 695 N.W.2d at 15. "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves*, 530 U.S. at 142, 120 S. Ct. at 2106 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 2748, 125 L.Ed.2d 407 (1993)). The defendants met this burden by offering evidence that Hedlund was terminated because of his poor performance and demeanor.

Finally, under *McDonnell Douglas*, the burden shifts back to Hedlund to "show the employer's reason was pretextual and that unlawful discrimination was the real reason for the termination." *Smidt*, 695 N.W.2d at 15; *see Reeves*, 530 U.S. at 142–43, 120 S. Ct. at 2106. At this point, "[t]he question, after all, is simply whether [Hedlund] has introduced sufficient admissible evidence from which a rational trier of fact could find [the defendants'] alleged reasons for [his] termination were false, and intentional discrimination was the real reason." *Smidt*, 695 N.W.2d at 15. I believe a rational trier of fact could find the defendants proffered reasons were pretextual based on the same circumstantial evidence that supports a finding that Hedlund's age was a motivating factor in the defendants' decision: Meyers's irrelevant and unnecessary comments on Hedlund being in the twilight of his career and inquiries into when Hedlund was planning to retire, the nine-year age difference between Hedlund and his successor, and the correlation of less favorable consideration of the older applicants for Hedlund's position. *See Desert Palace*, 539 U.S. at 98–102, 123 S. Ct. at 2153–55 (stating direct evidence of discrimination is not required and explaining why). Therefore, even under the *McDonnell Douglas* standard, I would conclude Hedlund has met his burden of production to survive summary judgment.

must be approached with special caution and the Court 'must be extra-careful to view all the evidence in the light most favorable' to plaintiff." (quoting *Ross v. Runyon*, 859 F. Supp. 15, 22 (D.D.C. 1994))).

Yet, as has been repeatedly noted in the literature, courts often are very aggressive in granting summary judgment in civil rights cases. Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. Cal. L. Rev. 791, 846 (2002) ("Courts often judge harassment incorrectly, granting summary judgment or judgment as a matter of law in questionable cases given what social science tells about people's perceptions of harassment."); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 255–56 (1993) (concluding too many courts "weigh evidence, draw inferences in favor of the defendant when it moves for summary judgment, assess witness credibility and require plaintiffs to prove their cases at the summary judgment stage"); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705, 775–76 (2007) (noting the challenge of keeping summary judgment within proper bounds in gender discrimination cases); Suja A. Thomas, *Summary Judgment and the Reasonable Jury Standard: A Proxy for a Judge's Own View of the Sufficiency of the Evidence?*, 97 Judicature 222, 227 (2014) ("[J]udges may fall prey to their own opinions of evidence upon motions for summary judgment ...."). The refusal of courts to allow civil rights cases to proceed to trial has so frustrated one Iowa jurist with four decades of experience that he has called for the abolition of motions for summary judgment altogether. Mark W. Bennett, Essay, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y. L. Sch. L. Rev. 685, 715–16 (2012–2013).

We should approach summary judgment in this case, and in every case, with great caution. We should carefully examine the facts and ask ourselves with self-critical rigor and discipline the following: Have we refused to engage in credibility determinations? Have we refused to weigh the evidence? Have we given every legitimate inference of the meaning of evidence to the nonmoving party? And then we must apply the evidence against the relatively low a-motivating-factor standard. Applying these principles in this case, I believe that the defendants' motion for summary judgment should have been denied.

D. Defendants' Check-the-Box Argument. The defendants also argue they are entitled to summary judgment on Hedlund's age discrimination claim because Hedlund failed to exhaust his administrative remedies. Specifically, they contend Hedlund did not give notice of all of his civil rights claims in his Iowa Civil Rights Commission (ICRC) complaint because, on the complaint form, he checked the boxes for "Disciplined/Suspended" and "Terminated" but not the box for "Forced to Quit/Retire." Because the majority concludes Hedlund did not present sufficient evidence to survive summary judgment, it does not need to address this argument. However, I write to identify the fallacies of the defendants' claim.

On July 17, 2013, Hedlund received a document with the heading "TERMINATION." The document cited various rule violations and concluded, "Effective July 17, 2013, your employment with the

Iowa Department of Public Safety is terminated." The document further stated, "You may appeal this action in accordance with Iowa Code Section 80.15."

Iowa Code section 80.15 provides a peace officer with an opportunity, at the peace officer's request, for a hearing before the Employment Appeal Board (EAB). The statute states that the peace officer "is not subject to dismissal" during the pendency of the appeal.

After receiving the document entitled TERMINATION, Hedlund filed an appeal with the EAB pursuant to section 80.15. Prior to the scheduled hearing, however, Hedlund dismissed the appeal. DPS then notified Hedlund that "the effective date of your termination from employment with the Department of Public Safety will be Thursday, January 30, 2014." One day prior to the new effective date of his termination, Hedlund elected to retire from the department in order to be able to use his banked sick leave to pay for state health insurance benefits.

Even if it would have been more accurate to check the "Forced to Quit/Retire" box on the civil rights form, the civil rights commission was informed that Hedlund claimed he was discriminated against in employment because of his age. Further, the respondent-employer knew exactly what the process was leading up to Hedlund's departure. This was not a case where the employee hid the ball and later tried to resurrect a claim that was never presented to the commission in the first place and deprived the employer of an opportunity to defend. *Cf. McElroy v. State*, 703 N.W.2d 385, 390–91 (Iowa 2005) (finding the plaintiff did not exhaust her administrative remedies on her retaliation claim because (1) on her ICRC complaint form, she checked only the box labeled "sex" but not the box labeled "retaliation" and she did not describe any acts of retaliation in her complaint's narrative, and (2) the ICRC specifically noted the only issue was the alleged sex discrimination in employment).

Also compelling is the fact that Iowa Code chapter 216 does not distinguish between age-discrimination-in-employment claims that are based on being "[f]orced to [q]uit/[r]etire" and ones that are based on being "[t]erminated." *See* Iowa Code § 216.6(1)(*a*); *see also Haskenhoff*, 897 N.W.2d at 603 ("A constructive *discharge* occurs 'when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.' " (Emphasis added.) (quoting *Van Meter Indus. v. Mason City Human Rights Comm'n*, 675 N.W.2d 503, 511 (Iowa 2004))). Indeed, section 216.6(1)(*a*) does not use the terms *terminate, force to quit*, or *force to retire*. Rather, section 216.6(1)(*a*) makes it unlawful to "*discharge* any employee" or to "*otherwise discriminate* in employment against ... any employee because of [the employee's] age." Comparatively, the ICRC complaint form does not have a box to check for being "discharge[d]," which could reasonably mean being terminated, forced to quit, forced to resign, laid-off, among other possible actions listed on the ICRC complaint form.

Moreover, the substantive elements of an age-discrimination-in-employment claim are no different if the claim derives from termination or being forced to retire. Hedlund must still prove (1) he is a member of a particular protected class—age, (2) he was qualified to do his job, and (3) he suffered an adverse employment decision because of his particular protected characteristic—age. *See, e.g., Deeds v. City of Marion*, 914 N.W.2d 330, 339 (Iowa 2018) (setting out same three elements as basis for a discrimination-in-employment case based on disability); *DeBoom*, 772 N.W.2d

at 6–7, 13–14 (setting out elements of pregnancy-discrimination-in-employment claim under the ICRA similarly and adopting *Price Waterhouse*'s a-motivating-factor standard for causation); *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538–39 (Iowa 1996) (identifying similar elements for a Federal ADEA claim using the *Price Waterhouse* standard for causation). Whether the adverse employment action was being terminated or being forced to quit, the alleged end result is Hedlund was "discharge[d]" from his employment because of his age, which is ultimately all that section 216.6(1)(*a*) requires.[18]

We have acknowledged that "[a] plaintiff will be deemed to have exhausted administrative remedies as to allegations contained in a judicial complaint that are like or reasonably related to the substance of charges timely brought before [the administrative agency]." *McElroy*, 703 N.W.2d at 390 (alterations in original) (quoting *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994)); *see Huri v. Office of the Chief Judge of the Circuit Ct. of Cook Cty.*, 804 F.3d 826, 831–32 (7th Cir. 2015) ("[T]he relevant claim and the EEOC charge must, at a minimum, describe the same conduct and implicate the same individuals."). Hedlund's allegation that he was discharged from or otherwise discriminated against in his employment because of his age that is contained in his judicial complaint is reasonably related to his ICRC complaint allegations that he was disciplined, suspended, and terminated in his employment because of his age. *See, e.g., Batson v. Salvation Army*, 897 F.3d 1320, 1327 (11th Cir. 2018) ("[T]his Court ... has noted that judicial claims are allowed if they amplify, clarify, or more clearly focus the allegations in the EEOC complaint, but has cautioned that allegations of new acts of discrimination are inappropriate." (Second alteration in original.) (quoting *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279–80 (11th Cir. 2004) (per curiam))). Additionally, Hedlund was terminated from his employment with the DPS only one time—on July 17, 2013; the *effective date* of that termination is all that changed.[19] Thus, the letter informing Hedlund his termination would become effective on January 30, 2014, was merely a continuation of the adverse employment action Hedlund cited in his ICRC complaint—the decision to terminate him in July 2013.

It is also important to remember that civil rights complaints are often filed by lay persons and the civil rights process is designed to provide an avenue for unrepresented persons to obtain relief. *See Mor-*

18. Further, Hedlund's situation is distinguishable from a situation where an ICRC complainant checked a box on the complaint form identifying one type of discriminatory employment conduct (discrimination based on her sex), did not check the box for a separate type of discriminatory conduct (retaliatory discrimination), and at trial, tried to pursue a claim based on the "unchecked" type of discriminatory conduct. *See McElroy*, 703 N.W.2d at 390–91.

19. Hedlund received only one notice of termination, which was dated July 17, 2013. In that notice, under the heading "Action To Be Taken," it said, "Your actions and deportment represent behavior that is unacceptable and warrants discharge." It then continued, "Effective July 17, 2013, your employment with the Iowa Department of Public Safety is terminated."

In contrast, after Hedlund dismissed his appeal to the EAB, he did not receive another official document or communication informing him he was now being terminated. Instead, he received a letter that said, "Pursuant to [your] dismissal [of your EAB appeal] and Iowa Code section 80.15, your *effective date of termination* from employment with the Department of Public Safety will be Thursday, January 30th, 2014." (Emphasis added.).

mann v. Iowa Workforce Dev., 913 N.W.2d 554, 568–69 (Iowa 2018); *see also Williams v. Tarrant Cty. Coll. Dist.*, 717 F. App'x 440, 445 (5th Cir. 2018) (per curiam) ("Because administrative charges are 'rarely drawn by an attorney', 'the only absolutely essential element of a timely charge of discrimination is the allegation of fact contained therein.' " (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463, 467 (5th Cir. 1970))); *Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359, 362 (6th Cir. 2010) (noting EEOC charges are usually filed by aggrieved employees, not attorneys, so those complaints should be construed liberally). Thus, our exhaustion rules relating to civil rights complaints and the process should not be interpreted or applied in a highly technical manner. *Mormann*, 913 N.W.2d at 570; *McElroy*, 703 N.W.2d at 390 ("[T]he administrative complaint must be construed liberally to further the remedial purposes of the civil rights laws.").

The defendants' check-the-box argument is highly technical and would defeat the purposes of Iowa Code chapter 216. *See Gregory*, 355 F.3d at 1280 (holding the plaintiff exhausted administrative remedies even though she failed to check the retaliation box on the EEOC complaint because the EEOC investigation "would have reasonably uncovered any evidence of retaliation"); *Tarrant Cty. Coll. Dist.*, 717 F. App'x at 445 ("[O]ur court does not require a 'plaintiff [to] check a certain box or recite a specific incantation to exhaust' and will not 'cut off' [a party's rights] merely because [s]he fails to articulate correctly the legal conclusion emanating from h[er] factual allegations.' " (Alterations in original.) (first quoting *Pacheco v. Mineta*, 448 F.3d 783, 792 (5th Cir. 2006); and then quoting *Sanchez*, 431 F.2d at 462)); *Spengler v. Worthington Cylinders*, 615 F.3d 481, 490 (6th Cir. 2010) (holding the plaintiff exhausted administrative remedies on his retaliation claim even though he did not check the "Retaliation" box on the EEOC charge because he "clearly set[ ] forth a retaliation claim in the narrative of the EEOC charge such that both the defendant and the EEOC were on notice of [his] retaliation claim"); *Kristufek v. Hussmann Foodservice Co., Toastmaster Div.*, 985 F.2d 364, 368 (7th Cir. 1993) (stating simple technicalities such as "[w]hat boxes, for instance, are checked on the EEOC form do not necessarily control the scope of the subsequent civil complaint"); *Noreuil v. Peabody Coal Co.*, 96 F.3d 254, 259 (7th Cir. 1996) (noting when claims are related and intertwined, strict and technical application of forms is inappropriate); *Sw. Convenience Stores, LLC v. Mora*, 560 S.W.3d 392, 401 (Tex. App. 2018) ("[Plaintiff's] claims may include those stated in her charge and factually related claims that could reasonably be expected to fall within the agency's investigation of the claims stated in the charge."); *cf. Mormann*, 913 N.W.2d at 569 ("Strict and highly technical enforcement of filing limitations [in civil rights complaints] is inconsistent with the statutory purpose of providing a remedial avenue for unrepresented claimants.").

On the other hand, it is perfectly appropriate to rely on a check-the-box rationale when there is otherwise no reasonable notice to the respondent and the civil rights agency of a particular charge. *See, e.g., Hamzah v. Woodman's Food Mkt., Inc.*, 693 F. App'x 455, 458 (7th Cir. 2017) (finding failure to exhaust when the plaintiff claiming sexual orientation discrimination checked boxes for discrimination on the basis of race, retaliation, and age, but not for sex, and did not include any factual allegations related to sexual orientation in his narrative); *Johnson v. Pointe Coupee Parish Police Jury*, 261 F. App'x 668, 670 (5th Cir. 2008) (per curiam) (finding failure

to exhaust on age discrimination claim when the plaintiff checked only the box for race discrimination, did not mention age discrimination in the EEOC charge narrative, or amend the EEOC charge to include age discrimination); *Ramon v. AT&T Broadband*, 195 F. App'x 860, 866 (11th Cir. 2006) (per curiam) (finding failure to exhaust on retaliation and hostile work environment claims when neither "could have reasonably been expected to grow [out] of the allegations made ... in [the] EEOC charge"); *Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1098 (D.C. Cir. 1997) ("[A]llowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge." (quoting *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 127 (7th Cir. 1989))); *McElroy*, 703 N.W.2d at 390–91 (holding the plaintiff failed to exhaust her administrative remedies on her retaliation claim when she did not check the retaliation box on the complaint form, describe any retaliatory acts in her narrative, or provide the civil rights commission with any indication there was a retaliation issue); *Sw. Convenience Stores*, 560 S.W.3d at 401 ("A vague or circumscribed EEOC charge cannot satisfy the exhaustion requirement for claims it does not fairly embrace."). However, this is not such a hide the ball case because Hedlund's judicial age discrimination claim is related to and can be reasonably expected to grow out of the factual allegations made in support of his age discrimination charge in the ICRC complaint.

Because this is not a hide the ball type of case, because age discrimination was clearly identified as the type of illegality alleged, and because claims of termination and constructive discharge are related and intertwined, the defendants' check-the-box rationale lacks merit.

III. Remedial Issues Under Iowa Code Section 70A.28(5).

This case involves remedial issues under Iowa Code section 70A.28(5). The first issue is whether Hedlund is entitled to a jury trial. The second issue is whether he is entitled to seek an award of emotional distress damages.

Iowa Code section 70A.28(5)(*a*) provides that a person who discharges an employee in violation of the statute

> [i]s liable to an aggrieved employee for affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs.

I first consider whether Hedlund is entitled to a jury trial. We have recognized that, generally, there is no right to a jury trial in equity cases. *Weltzin v. Nail*, 618 N.W.2d 293, 296 (Iowa 2000) (en banc). Thus, we must begin by determining whether Hedlund's section 70A.28(5)(*a*) claim is equitable or legal in nature.

"The legal or equitable nature of the proceeding is to be determined by the pleadings, the relief sought, and the nature of the case." *Carstens v. Cent. Nat'l Bank & Tr. Co. of Des Moines*, 461 N.W.2d 331, 333 (Iowa 1990). However, the fact that an action is commenced at law or in equity does not necessarily entitle or deprive a party of the right to a jury trial on the issues ordinarily triable to a jury. *Id.* Similarly, the mere fact that the relief sought is a legal remedy does not necessarily classify the action as a legal one. *Id.* Rather, we must "look at the essential nature of the cause of action" in addition to the pleadings and remedy. *Id.* Further, because the claim at issue here is a statutory

one, we must also consider the statute's language.

Hedlund's case was commenced and docketed as an action at law. Notably, section 70A.28 does not specify whether the civil enforcement action in section 70A.28(5)(*a*) is a legal or equitable proceeding.

Hedlund also sought both legal and equitable relief. The ordinary rule, of course, is that legal remedies are to be determined by the jury while equitable remedies are determined by the court. *See, e.g.*, *Westco Agronomy Co. v. Wollesen*, 909 N.W.2d 212, 225 (Iowa 2017); *Weltzin*, 618 N.W.2d at 296 (Iowa 2000); 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 1.2, at 11 (2d ed. 1993) [hereinafter *Dobbs Law of Remedies*]; 47 Am. Jur. 2d *Jury* §§ 27, 28, Westlaw (database updated May 2019).

The statute expressly allows for "affirmative relief including reinstatement, with or without back pay," or any other appropriate equitable relief. Iowa Code § 70A.28(5)(*a*). This is an unusual statutory phrase. "Affirmative relief" is not usually considered presumptively legal or equitable; rather, it is context dependent. *See, e.g.*, *Affirmative relief*, *Black's Law Dictionary* (10th ed. 2014) (defining *affirmative relief* as "[t]he relief sought by a defendant by raising a counterclaim or cross-claim that could have been maintained independently of the plaintiff's action"). Nevertheless, the term often corresponds with equitable forms of relief. *See, e.g.*, *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 587–89 (Iowa 2004) (relying on equity principles to allow affirmative relief in the form of recovering attorney fees paid under an illegal contingent fee contract); *Opperman v. M. & I. Dehy, Inc.*, 644 N.W.2d 1, 7 (Iowa 2002) (characterizing as affirmative relief the cancelation of a real property mortgage and an award of attorney fees); *Allison v. Hess*, 28 Iowa 388, 390–91 (1869) (holding, in an equity action, the plaintiffs were not entitled to affirmative relief in the form of an injunction against the prosecution of a separate civil action by the defendant or a declaration that the real property lease at issue in the separate action was null and void); *Relief*, *Black's Law Dictionary* (placing *affirmative relief* under the third definition of *relief*, which is "[t]he redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court"). Use of the term *affirmative relief* suggests a section 70A.28(5)(*a*) action is an equitable one.

Also telling are the types of remedies expressly included in the affirmative relief available under section 70A.28(5)(*a*). Affirmative relief under the statute includes "reinstatement ... or any *other* equitable relief." Iowa Code § 70A.28(5)(*a*) (emphasis added). Reinstatement, itself, is ordinarily an equitable remedy. *E.g.*, *Sayger v. Riceland Foods, Inc.*, 735 F.3d 1025, 1034–35 (8th Cir. 2013); 1 *Dobbs Law of Remedies* § 2.1(2), at 59–60 (noting reinstatement is a form of specific performance, which is a type of injunctive relief, which is a type of equitable remedy); 2 *Civil Actions Against State and Local Government: Its Divisions, Agencies and Officers* § 14:16 (2d ed.), Westlaw STATCIVAC (database updated Feb. 2019) [hereinafter *Civil Actions*]. And the "any other equitable relief" language in section 70A.28(5)(*a*) indicates reinstatement is an equitable remedy for purposes of section 70A.28(5)(*a*). Section 70A.28(5)(*a*)'s express listing of only equitable remedies as types of affirmative relief suggests a section 70A.28(5)(*a*) claim is an equitable one.

However, it is not absolutely clear that section 70A.28(5)(*a*) limits affirmative relief to only equitable relief. First, nothing in the statute explicitly defines affirmative relief as equitable relief.

Second, section 70A.28(5)(*a*) provides that affirmative relief *includes* certain remedies, but the listed remedies do not appear to be an exhaustive list. This suggests affirmative relief could also include legal remedies. Section 70A.28(5)(*a*)'s explicit allowance of backpay, at first glance, seems to support that suggestion. Backpay has been repeatedly regarded as a legal remedy in a variety of employment law contexts. *See EEOC v. Baltimore County*, 904 F.3d 330, 332 (4th Cir. 2018) (per curiam) ("[B]ack pay is a mandatory, legal remedy under the [Fair Labor Standards Act] ...."), *cert. denied*, — U.S. —, 139 S. Ct. 2714, —, — L.Ed.2d — (2019); *Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 441 (1st Cir. 1989) ("[T]he determination of back pay as a factor of compensatory damages involves the substance of a common-law right to a trial by jury."); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1142 (8th Cir.) ("[T]he remedy of backpay in [42 U.S.C.] § 1981 cases is more appropriately characterized as a compensatory, legal damage."), *vacated in part on other grounds and amended on reh'g by* 657 F.2d 962, 965 (8th Cir. 1981) (en banc); *Pons v. Lorillard*, 549 F.2d 950, 954 (4th Cir. 1977) ("[W]e believe that a monetary award for back wages is a traditional legal remedy and that the computation of such an award would not be beyond the practical capabilities of a jury."), *aff'd on other grounds*, 434 U.S. 575, 585, 98 S. Ct. 866, 872, 55 L.Ed.2d 40 (1978). There is, however, at least a contrary view. *Broadnax v. City of New Haven*, 415 F.3d 265, 271 (2d Cir. 2005) (treating backpay, when a form of a lost wages award, as an equitable remedy in Title VII cases); *cf. Great-W. Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 218 n.4, 122 S. Ct. 708, 717 n.4, 151 L.Ed.2d 635 (2002) (noting Congress treated backpay under Title VII, 42 U.S.C. § 2000e–5(g)(1), which has substantially similar language to Iowa Code section 70A.28(5)(*a*), as equitable "only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief"). *See generally* 2 *Civil Actions* § 14:19 (stating that there is some disagreement whether backpay is a legal or equitable remedy). While not determinative, I note that in at least three recent Iowa cases, awards of backpay have been determined by juries. *See Hawkins*, 929 N.W.2d at 264–65 (noting the jury awarded backpay on ICRA claims for age and disability discrimination); *Lee v. State*, 815 N.W.2d 731, 735 (Iowa 2012) (noting the jury awarded backpay under the Family Medical Leave Act and the district court ordered reinstatement, frontpay, and attorney fees); *Vaughan*, 542 N.W.2d at 538 (noting the jury awarded backpay under the Federal ADEA).

Here, however, the award of backpay in the statute appears to be linked to the equitable remedy of reinstatement. *Cf. Great-W. Life & Annuity Ins.*, 534 U.S. at 218 n.4, 122 S. Ct. at 717 n.4. When reinstatement is ordered by the court, backpay may or may not be awarded. How would a jury decide this question? It would seem odd to have the court determine whether or not reinstatement is appropriate but then allow the jury to decide the amount of backpay arising from the reinstatement.

Further, if the court sitting in equity determines that reinstatement is not appropriate, can the employee receive backpay as "other equitable relief"? Iowa Code § 70A.28(5)(*a*). It would also seem odd for a statute to allow backpay only if the court elects to reinstate the employee but deny it where reinstatement was thought to be impractical or undesirable. In other words, if we were to characterize backpay in the context of this statute as legal relief, it would become unavailable under the statute if reinstatement is not granted.[20]

Moreover, frontpay serves as an alternative "other equitable relief" to reinstatement, and it is often awarded in addition to backpay. *See, e.g., Van Meter Indus.*, 675 N.W.2d at 513–15 & n.5 (calculating both frontpay and backpay in employment discrimination case); 2 *Dobbs Law of Remedies* § 6.10(4), at 205, 213–15 ("[Under federal statutes that are substantially similar to section 70A.28(5)(*a*), w]hen reinstatement is permitted under the statute, but denied for reasons peculiar to the individual claim, 'front pay' or an award for future lost pay may be given in lieu of reinstatement . . . When reinstatement is not a suitable remedy on the facts, a money remedy for future economic losses must be constructed if possible."). As there is no usual, corresponding "other equitable relief" alternative to backpay, it makes sense for backpay to be treated as equitable under the statute and available regardless of whether the employee is reinstated or, alternatively, awarded frontpay.

So the question is how to interpret this statute in a way that is coherent. As a general matter, I think backpay, which seems to be a type of damages, is ordinarily a legal remedy. But we must be sensitive to the statutory environment in which the term has been planted. In the case of this statute, I believe that backpay is available whether or not reinstatement occurs. For purposes of this statute, and this statute only, I conclude that the remedy of backpay should be treated as an equitable remedy.

Even so, there are practical reasons that the legislature expressly enumerated certain equitable remedies but not legal remedies in section 70A.28(5)(*a*). First, it must be remembered that section 70A.28 is applicable in the employment law context. A section 70A.28(5)(*a*) action to enforce the dictates of section 70A.28(2), which prohibit, in part, discharging an employee for engaging in a protected activity, is akin to the tort action of wrongful discharge in violation of public policy. *See, e.g.*, Restatement of Employment Law § 7.07, at 375 (Am. Law Inst. 2015); 2 *Dobbs Law of Remedies* § 6.10(3), at 201. But in the employment law context, there is a traditional rule against the remedy of specific performance, especially in the form of reinstatement. *See* Restatement of Employment Law § 9.04 & cmts. *b–c*, at 523–24; 2 *Dobbs Law of Remedies* § 6.10(2), at 198; 3 *id.* § 12.21(4), at 489; *see also Lee v. State*, 844 N.W.2d 668, 671 (Iowa 2014) (noting concern regarding the propriety of reinstatement in an employment context); Restatement (Second) of Contracts § 367(1), at 192 (Am. Law Inst. 1981). *See generally* Restatement of Employment Law § 9.04 cmt. *b*, at 523–24 (providing rationale for rule against specific performance); Restatement (Second) of Contracts § 367 cmt. *a*, at 192 (same); 3 *Dobbs Law of Remedies* § 12.21(4), at 489–93 (same). Thus, if the legislature wanted reinstatement to be an available remedy for a wrongful discharge under section 70A.28(2), it needed to specifically state as much, which it did in section 70A.28(5)(*a*).

20. Such a result would be troubling especially in light of the fact that reinstatement is disfavored as a remedy in the employment context. *See* Restatement of Employment Law § 9.04 & cmts. *b–c*, at 523–24 (Am. Law Inst. 2015); 2 *Dobbs Law of Remedies* § 6.10(2), at 198; 3 *id.* § 12.21(4), at 489; *see also Lee v. State*, 844 N.W.2d 668, 671 (Iowa 2014) (noting concern regarding the propriety of reinstatement in an employment context); Restatement (Second) of Contracts § 367(1), at 192 (Am. Law Inst. 1981). *See generally* Restatement of Employment Law § 9.04 cmt. *b*, at 523–24 (providing rationale for rule against specific performance); Restatement (Second) of Contracts § 367 cmt. *a*, at 192 (same); 3 *Dobbs Law of Remedies* § 12.21(4), at 489–93 (same).

Second, a similar rationale explains the express enumeration of the equitable remedies of attorney fees and costs in section 70A.28(5)(*a*). Under the American rule, ordinarily each party is responsible for its own attorney fees and costs. *De Stefano v. Apts. Downtown, Inc.*, 879 N.W.2d 155, 168 (Iowa 2016). There is an exception to that rule, however, where a statute expressly authorizes an award of attorney fees. *See Lee v. State*, 906 N.W.2d 186, 197 (Iowa 2018). Thus, if the legislature wanted to ensure persons harmed by a violation of section 70A.28(2) were able to recover attorney fees and costs in a section 70A.28(5)(*a*) action, it needed to so state. It did so in section 70A.28(5)(*a*).

Third, the legislature's express inclusion of the "any other equitable relief" language in section 70A.28(5)(*a*), likewise, is necessary in light of the specific relief listed in section 70A.28(5)(*b*), which provides,

> When a person commits, is committing, or proposes to commit an act in violation of subsection 2, an injunction may be granted through an action in district court to prohibit the person from continuing such acts. The action for injunctive relief may be brought by an aggrieved employee or the attorney general.

As an injunction is a form of equitable relief, relief from a discharge in violation of subsection (2) pursuant to subsection (5)(*b*) can be only equitable relief. Therefore, if the legislature wanted subsection (5)(*a*) to allow for equitable relief, generally, or specific kinds of equitable relief, it needed to say so. It did this by expressly including specific kinds of equitable relief and equitable relief generally as types of affirmative relief available under subsection (5)(*a*).

In sum, these practical explanations for the language used in section 70A.28(5)(*a*) suggest affirmative relief under section 70A.28(5)(*a*) can include equitable and legal remedies. Nevertheless, the remedy sought or available is not the sole factor we must consider; we must also consider the essential nature of the action. *See Weltzin*, 618 N.W.2d at 297 ("[I]t is the nature of the cause of action, *i.e.*, where the case is properly docketed, that is the deciding factor."); *Carstens*, 461 N.W.2d at 333 ("We look at the essential nature of the cause of action, rather than solely at the remedy, to determine if a party is entitled to a jury trial.").

The essential nature of Hedlund's section 70A.28(5)(*a*) claim is analogous to a wrongful discharge in violation of public policy claim.[21] *See, e.g.*, 2 *Dobbs Law of Remedies* § 6.10(3), at 201 (treating causes of action that arise from the violation of statutes prohibiting retaliatory discharge for whistleblowing as equivalent to common law wrongful discharge in violation of public policy claims); *see also Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 762 (Iowa 2009). In *Jasper*, we acknowledged that "our wrongful-discharge cases that have found a violation of public policy can generally be aligned into four categories of statutorily protected activities," which include "exercising a statutory right or privilege," such as the right to file a workers' compensation claim or pursue unemploy-

21. Under Iowa law, the elements of a wrongful discharge in violation of public policy tort are

> (1) existence of a clearly defined public policy that protects employee activity; (2) the public policy would be jeopardized by the discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason for the employee's discharge; and (4) there was no overriding business justification for the termination.

Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 761 (Iowa 2009).

ment benefits, and reporting the employer's illegal or publically harmful activities. 764 N.W.2d at 762; *see* Vanessa F. Kuhlmann-Macro, Note, *Blowing the Whistle on the Employment At-Will Doctrine*, 41 Drake L. Rev. 339, 341–42 (1992), cited by *Jasper*, 764 N.W.2d at 762.

A state employee has an implied statutory right to whistleblow within the parameters of section 70A.28(2). Thus, if the employee exercises that right and is discharged as a result, which constitutes a violation of section 70A.28(2), the employer's violation likely gives rise to a wrongful discharge in violation of public policy tort action.

Accordingly, so long as a section 70A.28(5)(*a*) claim does not preempt or otherwise preclude such a wrongful discharge in violation of public policy claim, the relief afforded by and the nature of a section 70A.28(5)(*a*) proceeding should be interpreted as being equitable. As nothing in the Iowa Code or our caselaw indicates the relief afforded in section 70A.28(5) preempts relief from other common law avenues of redress, I conclude Hedlund's section 70A.28(5)(*a*) claim is equitable in nature. *But cf.* Restatement of Employment Law § 5.01 & cmt. *e* & illust. 3, at 188, 190–92 (noting some states have found the remedies of reinstatement and backpay in their whistleblower statutes to be completely preemptive). Therefore, Hedlund is not entitled to a jury trial on his section 70A.28(5)(*a*) claim.

I now turn to the question of emotional distress damages. The statute does not specifically state that damages for emotional distress may be recovered. Yet, the statute allows for affirmative relief. However, as indicated above, the nature of a section 70A.28(5)(*a*) proceeding should be interpreted as being equitable. Thus, I conclude that the statute authorizes only equitable relief. Emotional distress damages are not equitable relief, and under my approach, they are not available under the statute.

IV. Conclusion.

For the above reasons, I concur in the majority's conclusion that Hedlund is not entitled to a jury trial or emotional distress damages on his section 70A.28(5)(*a*) whistleblower claim. I respectfully dissent from the dismissal of the age discrimination claim in this case.

Cady, C.J., and Wiggins, J., join this concurrence in part and dissent in part.

Julio BONILLA, Appellant,

v.

IOWA BOARD OF PAROLE, Appellee.

No. 18-0477

Supreme Court of Iowa.

Filed June 28, 2019

Background: Inmate, who was sentenced to life with the possibility of parole for a kidnapping that occurred when he was 16 years old, petitioned for judicial review of Parole Board's actions, seeking declaration that Board's practices and regulations were unconstitutional. After denying Board's motion to dismiss, the District Court, Polk County, Douglas F. Staskal, J., denied inmate's petition on the merits. Inmate appealed.

Holdings: The Supreme Court, Appel, J., held that:

(1) inmate showed prejudice, as required to potentially obtain relief;

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JERAMY HOLLINGSHEAD, Plaintiff, v. MICHAEL DEAN ERICKSON, TERRY DEAN ERICKSON, SHANE ALLEN WESSEL, CHARLES WESSEL, and DC MISFITS, LLC, Defendants.	Case No. LACL137598 ORDER GRANTING DC MISFITS, LLC'S MOTION FOR SUMMARY JUDGMENT

Plaintiff claims he was injured at a bar called "Misfits." Plaintiff alleges Defendant DC Misfits, LLC is liable under Iowa Code sections 123.92-94, our "dram shop" law.

DC Misfits, LLC has filed a motion for summary judgment. It contends Plaintiff did not provide the written notice required by section 123.93. Specifically, DC Misfits, LLC argues Plaintiff's notice was deficient because it did not name DC Misfits, LLC. Instead, it named a different entity called "Leonard LLC dba Misfits." (Defendant's Exhibit A).

Plaintiff concedes that his notice did not name DC Misfits, LLC. But Plaintiff argues, *inter alia*, that his notice:

(1.) identified the bar ("Misfits") where he was injured;

(2.) stated the date of his injury;

(3.) described the cause of his injury, namely, an assault by drunken patrons;

(4.) stated Plaintiff's intention to bring a dram shop action; and

(5.) was sent to Founders Insurance Company, who was the dram shop carrier for DC Misfits, LLC.

Therefore, Plaintiff argues, his notice substantially complied with section 123.93.

The Court disagrees. In *Lang*, the Iowa Supreme Court said that the "name" of the defendant licensee (in that case, Lang) is among the "information" that must be provided—the "*essential*" information—"in order" for a written communication to "qualify as a [section] 123.93 notice." *Arnold v. Lang*, 259 N.W.2d 749, 752 (Iowa 1977) (italics added).

Here, it is undisputed that Plaintiff's notice did not mention DC Misfits, LLC. Therefore, under *Lang*, Plaintiff's notice did not satisfy the requirements of section 123.93. As a result, Plaintiff's dram shop claim fails as a matter of law. *See, e.g., Grovijohn v.*

Virjon, Inc., 643 N.W.2d 200, 204 (Iowa 2002) (affirming grant of summary judgment where plaintiff failed to provide notice as required by section 123.93).

Defendant DC Misfits, LLC's motion for summary judgment is **GRANTED**. Plaintiff's claims against DC Misfits, LLC are **DISMISSED**.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACL137598	JERAMY HOLLINGSHEAD VS MICHAEL DEAN ERICKSON ET AL

So Ordered

David May, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2018-06-29 13:11:59 page 4 of 4

IN THE COURT OF APPEALS OF IOWA

No. 18-1225
Filed May 15, 2019

JERAMY HOLLINGSHEAD,
Plaintiff-Appellant,

vs.

DC MISFITS, LLC,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, David May, Judge.

A plaintiff appeals the summary dismissal of his dramshop claim. **AFFIRMED.**

Robert B. Garver, West Des Moines, for appellant.

Thomas Henderson and Nick J. Gral of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ. May, J., takes no part.

BOWER, Judge.

Jeramy Hollingshead appeals the summary-judgment order dismissing his dramshop claim against DC Misfits LLC.

In December 2015, Hollingshead alleges he received personal injuries due to the intoxication of several individuals while at a bar called Misfits. On June 8, 2016, Hollingshead mailed notice to Founders Insurance indicating he intended to pursue a dramshop action against Leonard LLC. On July 8, Founders responded to Hollingshead, informing him the policy for Leonard LLC had been cancelled effective February 1, 2015, and sending him a copy of the notice of cancellation. Hollingshead did not amend the notice to Founders Insurance to inform the company DC Misfits was the insured party subject to the lawsuit. Nor did Hollingshead provide notice directly to DC Misfits that he intended to pursue a dramshop action against them.

In April 2017, Hollingshead filed suit bringing one claim against the individuals alleged to be involved with vicarious liability against DC Misfits, and a dramshop claim against DC Misfits for selling and serving alcohol to the individuals.[1] Hollingshead did not attach to the petition a notice of intention to bring the action. DC Misfits moved for summary judgment based on Hollingshead's failure to comply with statutory notice requirements for his dramshop claim within the time frame established by the legislature.

Iowa's Dramshop Act, Iowa Code chapter 123 (2015), creates a cause of action previously unknown in common law, establishing civil liability for persons

[1] Hollingshead did not attach a copy of the notice to his petition to establish the statutory jurisdictional prerequisite had been met.

injured in person or property by an intoxicated person against the entity selling and serving alcohol to the intoxicated person. Our legislature may require compliance with certain conditions before a plaintiff may assert a dramshop claim. *See Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 203 (Iowa 2002); *Arnold v. Lang*, 259 N.W.2d 749, 751–52 (Iowa 1977). Iowa Code section 123.93 creates a jurisdictional prerequisite to a plaintiff's dramshop claim requiring proper notice of the intent to bring a dramshop claim. Section 123.93 provides requirements for such notice:

> Within six months of the occurrence of an injury, the injured person shall give written notice to the licensee or permittee or such licensee's or permittee's insurance carrier of the person's intention to bring an action under this section, indicating the time, place and circumstances causing the injury.

Substantial compliance with section 123.93's notice requirements will suffice. *See Arnold*, 259 N.W.2d at 752.

Summary judgment is proper when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). Appellate review is "limited to whether a genuine issue of material fact exists and whether the district court correctly applied the law." *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017) (quoting *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008)).

Hollingshead's notice of his intent to bring a dramshop claim failed to substantially comply with section 123.93. Among other things, section 123.93 specifically requires notice be provided by "the injured person" to the "licensee or permittee or such licensee's or permittee's insurance carrier." In *Arnold*, our supreme court held it was "essential" for the notice to contain the licensee or

permittee's name. *See Arnold*, 259 N.W.2d at 752. In *Berte v. Bode*, 692 N.W.2d 368, 370–71 (Iowa 2005), the court held a notice listing Berte as "guardian and conservator" of a minor child was insufficient to serve as notice of claim for Berte individually to sustain a dramshop claim—indicating proper identification of the parties to the suit is a requirement of the notice. As we have previously noted, "notice on behalf of one party cannot constitute notice on behalf of another party." *Veach v. Prairie Meadows Racetrack & Casino, Inc.*, No. 06-0366, 2006 WL 3801735, at *4 (Iowa Ct. App. Dec. 28, 2006). Thus, the notice must specify the plaintiff in the potential suit and properly identify the "licensee or permittee" subject to the suit.

Here, Hollingshead's notice made no mention of DC Misfits, the licensee at issue. Instead it referred to "Leonard LLC dba Misfits." The two are distinct entities with separate insurance policies which just happened to be with the same carrier. Leonard LLC was dissolved August 10, 2015, several months before the date of the alleged injury. Without reference to the intended defendant, DC Misfits, Hollingshead's notice was "fatally deficient as to content," and he did not satisfy a condition precedent to a dramshop action.[2] *See Arnold*, 259 N.W.2d at 752.

As a result, we conclude the district court properly granted summary judgment dismissing Hollingshead's dramshop claim against DC Misfits LLC.

AFFIRMED.

Mullins, J., concurs; Doyle, P.J., dissents.

[2] For place of injury, the notice only stated "Misfits"—it did not provide an address or even specify the city where Misfits is located.

[5]

DOYLE, Presiding Judge (dissenting).

I respectfully dissent. I would reverse the district court's grant of summary judgment in favor of defendant DC Misfits, LLC.

Iowa's dramshop statute was enacted to give a right of action to innocent victims harmed by persons who are overserved alcoholic beverages by licensees and permittees. *Banwart v. 50th Street Sports, L.L.C.*, 910 N.W.2d 540, 545 (Iowa 2018). The underlying purpose of the statute is to place a hand of restraint on licensees and permittees, i.e., to discourage the selling of excess liquor. *Id.* To further that purpose, the dramshop statute is construed liberally. *Id.*

The statute contains a claim notice provision that provides, in relevant part:

> Within six months of the occurrence of an injury, the injured person shall give written notice to the licensee or permittee or such licensee's or permittee's insurance carrier of the person's intention to bring an action under this section, indicating the time, place and circumstances causing the injury

Iowa Code § 123.93 (2015). Substantial compliance with the notice provisions of section 123.93 is sufficient. *Arnold v. Lang*, 259 N.W.2d 749, 752 (Iowa 1977).

Here, plaintiff's attorney timely sent a section 123.93 notice to Founders Insurance Company. The notice references "Leonard LLC dba Misfits" as the insured. The body of the notice states in relevant part:

> Notice is hereby given pursuant to Iowa Code Sec. 123.93 (2015) of the. Intention of the undersigned to bring an action under Sec. 123.92 on behalf of Jeramy Hollingshead who was injured on or about December 12, 2015, at Misfits. Mr. Hollingshead was assaulted by an individual(s) at Misfits who had become intoxicated at the aforementioned bar.

Later, plaintiff filed his dram shop suit against the assailants and DC Misfits, LLC. DC Misfits, LLC filed a motion for summary judgment claiming plaintiff's section

123.93 notice was fatally defective because it named Leonard LLC d/b/a Misfits instead of DC Misfits, LLC, the legal owner of Misfits bar at the time of the incident. An unreported hearing was held. The plaintiff conceded that his notice did not name DC Misfits, LLC, but argued his notice substantially complied with section 123.93. The district court disagreed. The court concluded that because the notice did not mention DC Misfits, LLC, the notice did not satisfy the requirements of section 123.93. Specifically, the court held,

> In *Lang,* the Iowa Supreme Court said that the "name" of the defendant licensee (in that case, Lang) is among the "information" that must be provided—the "*essential*" information—"in order" for a written communication to "qualify as a [section] 123.93 notice." *Arnold v. Lang,* 259 N.W.2d 749, 752 (Iowa 1977) (italics added). Here, it is undisputed that Plaintiff's notice did not mention DC Misfits, LLC. Therefore, under *Lang,* Plaintiff's notice did not satisfy the requirements of section 123.93. As a result, Plaintiff's dram shop claim fails as a matter of law.

(Citation omitted.) In my opinion, the district court reads *Arnold* too narrowly.

Arnold's dram shop notice was defective in numerous ways; it was sent to the wrong party, was fatally defective as to content, and was not timely given. *Arnold*, 259 N.W.2d at 752. As to its content, it made no reference to the place or circumstances under which Arnold suffered his injuries. *Id.* "Neither [did] it mention Lang's name nor express any intention of Arnold to bring a dram shop action against Lang." *Id.* The court opined, "All such information was essential in order to qualify as a section 123.93 notice." *Id.* (citing *Harrop v. Keller*, 253 N.W.2d 588, 592 (Iowa 1977)). Notably, *Harrop* holds:

> There are *only three matters required* for inclusion in the notice by § 123.93. The notice must indicate the *time, place, and circumstances causing the injury*."

Harrop, 253 N.W.2d at 593 (emphasis added). This mirrors the statutory language.

To be sure, the *Arnold* court noted the notice did not mention Lang's name and stated "such information was essential" in order to qualify a notice under section 123.93. *Arnold*, 259 N.W.2d at 752. Nevertheless, I do not believe *Arnold* adds any requisite matters to the notice beyond what is required by statute. Joseph H. Lang operated a tavern doing business as Joe Lang's Tap. *Id.* at 749-50. The opinion does not say, but presumably Lang was the licensee or permittee. A reference to Lang's name could be to Lang himself; or to the name of the tavern; or to Lang in his capacity as operator of the tavern, or to Lang in his capacity as the licensee or permittee. In suggesting Lang's name was essential to a valid notice, the *Arnold* court did not indicate in what context his name was required. I do not read *Arnold* as requiring a section 123.93 notice to name the licensee or permittee, and it would not be proper to do so. If the legislature wanted to require the notice to name the licensee or permittee, it would have so provided in its legislation.

Here, the notice sets out all the pertinent statutory requisites: plaintiff's intention to bring a dramshop action and references to the date, place and circumstances causing the injury. Although the notice's reference to "Leonard LLC dba Misfits," the former operator of the bar, as the insured, is in error, I do not believe it deems the notice to be fatally deficient as to content. I would reverse the district court's grant of summary judgment.

IN THE SUPREME COURT OF IOWA

No. 18–1225

Filed January 17, 2020

JERAMY HOLLINGSHEAD,

Appellant,

vs.

DC MISFITS, LLC

Appellee.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Polk County, David N. May, Judge.

Plaintiff seeks further review of a court of appeals decision affirming a district court's dismissal of his dramshop claim for failure to comply with the notice requirements under Iowa Code section 123.93 (2015). **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT REVERSED AND CASE REMANDED.**

Robert B. Garver, West Des Moines, for appellant.

Thomas Henderson and Nick J. Gral (until withdrawal) of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

WIGGINS, Chief Justice.

An injured party brought a dramshop action against a bar. The bar moved for summary judgment on the ground that the notice given to the bar or its insurance carrier did not comply with Iowa Code section 123.93 (2015). The district court granted the bar's motion. The injured party appealed. We transferred the appeal to the court of appeals. The court of appeals affirmed the district court's order granting the motion. The injured party applied for further review, which we granted. On further review we find the notice given substantially complied with section 123.93. Therefore, we vacate the decision of the court of appeals, reverse the judgment of the district court, and remand the case to the district court for further proceedings.

I. Background Facts and Proceedings.

On December 12, 2015, Jeramy Hollingshead claims he was injured during an incident at Misfits, a bar in Des Moines. On June 8, 2016, Hollingshead's counsel sent notice pursuant to section 123.93 via certified mail to Founders Insurance Company. The letter named the holder of the liquor license as "Leonard LLC DBA Misfits." The notice given by Jeramy Hollingshead stated,

> Notice is hereby given pursuant to Iowa Code Sec. 123.93 (2015) of the intention of the undersigned to bring an action under Sec. 123.92 on behalf of Jeramy Hollingshead who was injured on or about December 12, 2015, at Misfits. Mr. Hollingshead was assaulted by an individual(s) at Misfits who had become intoxicated at the aforementioned bar. Please direct all further communication and correspondence through my office.

The record establishes the holder of the liquor license was DC Misfits, LLC not Leonard LLC DBA Misfits. Leonard LLC DBA Misfits was the holder of the liquor license prior to DC Misfits, LLC. Although the

name of the liquor license holder in the notice was incorrect, the bar operated under the name Misfits.

Plaintiff's statement of undisputed facts states Founders Insurance Company provided the dramshop insurance to Misfits from 2014 through 2017, regardless of what entity held the liquor license. There is nothing in the record contradicting this claim. The alleged problem with the notice was that it named Leonard LLC DBA Misfits as the liquor license holder not DC Misfits, LLC.

Founders responded to the notice given by Hollingshead as follows:

> Founders issued a policy to Leonard LLC DBA Misfits under policy number ELIA101341 for a policy period 2/1/15 to 2/1/16. The policy carries Liquor Liability coverage. **Please note the policy was canceled effective 2/1/15.** Attached for your review is the Notice of Cancellation.
>
> The date of loss referenced above falls outside of our policy period. Therefore, there is no coverage under the Founders policy for this incident.
>
> If there are any questions regarding this letter, please feel free to contact the undersigned at your convenience.

Founder's did not deny it was the insured for the bar known as Misfits.

In April 2017, Hollingshead filed the petition at issue in this case. In his petition, Hollingshead asserted a dramshop claim against DC Misfits, LLC. DC Misfits moved for summary judgment. In its motion, DC Misfits contended Hollingshead did not provide DC Misfits with statutory notice of his intent to pursue a dramshop claim against Misfits.

The summary judgment record showed Leonard LLC, the entity Hollingshead identified as the insured owner in his notice to Founders, was formed in January 2014 and was administratively dissolved in 2015. Leonard LLC was organized by Daniel Leonard. Leonard LLC was not the owner or operator of Misfits at the time of the alleged injury. DC Misfits was formed in 2015. Ricky Folkerts was the owner and operator of

DC Misfits. DC Misfits became the owner and operator of Misfits in early 2015 and was the owner and operator of the bar at the time of the alleged injury in December 2015. Leonard LLC and DC Misfits were separate legal entities without any apparent relation.

Based on this record, the district court granted DC Misfits' motion for summary judgment and dismissed Hollingshead's petition. A divided court of appeals affirmed the dismissal, and we granted further review.

II. Scope and Standards of Review.

The standard of review for summary judgment is correction of errors of law. *Skadburg v. Gately*, 911 N.W.2d 786, 791 (Iowa 2018). The party requesting summary judgment "has the burden of showing the absence of a genuine issue of material fact." *Id.* We review the facts in the record "in the light most favorable to the nonmoving party" and "draw every legitimate inference in favor of the nonmoving party." *Id.*

III. Analysis.

The general assembly created Iowa's dramshop liability by statute. Iowa Code § 123.92. One of the statutory conditions prerequisite to pursuing such an action is section 123.93. *Arnold v. Lang*, 259 N.W.2d 749, 750–51 (Iowa 1977). The Code provides,

> Within six months of the occurrence of an injury, the injured person shall give written notice to the licensee or permittee or such licensee's or permittee's *insurance carrier* of the person's intention to bring an action under this section, indicating the time, place and circumstances causing the injury.

Iowa Code § 123.93 (emphasis added).

We have stated the purpose of this provision is to give the insurance carrier and/or the licensee notice of the time, place, and circumstances of the injury so that the licensee can investigate the facts of the claim while the facts are still fresh. *Arnold*, 259 N.W.2d at 751. We only require

substantial compliance with the notice provision. *Id.* at 752. Moreover, when "a question is raised as to whether a [section] 123.93 claim notice has been given a jury issue is ordinarily engendered." *Id.* at 753.

In *Arnold*, we held the notice did not substantially comply with section 123.93 because it did not make reference to "the place or circumstances under which plaintiff suffered his alleged injuries" or "express any intention by Arnold to bring a dramshop action against [the licensee]." *Id.* at 752. There, we held this information was essential in order for a notice to substantially comply with section 123.93. *Id.*

In contrast, the notice given by Hollingshead gave notice to the correct insurance carrier. The notice made reference to the place, time, and circumstances under which Hollingshead suffered his alleged injuries and expressed his intent to bring an action. Although it misnamed the owner of the bar, it did name the bar as Misfits.

Despite the notice misidentifying the liquor license holder, the notice gave Founders Insurance Company ample notification that the claim was against the bar known as Misfits, no matter who owned it. It also gave Founders Insurance Company notice of the time, place, and circumstances of the injury so that Founders could investigate the facts of the claim while the facts were still fresh.

Accordingly, we find Hollingshead's notice substantially complied with the requirements of section 123.93. For these reasons, we conclude the district court erred in granting DC Misfits' motion for summary judgment.

IV. Disposition.

We vacate the decision of the court of appeals, reverse the judgment of the district court, and remand the case to the district court for further

proceedings because Hollingshead's notice substantially complied with the requirements of section 123.93.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT REVERSED AND CASE REMANDED.

All justices concur except McDonald, J., who dissents.

McDONALD, Justice (dissenting).

"Many states have passed legislation known as dramshop acts. These statutes are designed to give parties injured by an intoxicated person a right of action against the persons who sold and served the intoxicating liquors." *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 202 (Iowa 2002). "A distinguishing feature of the Iowa dram shop act is that it created liability where none existed at common law." *Id.* at 203. Because the cause of action is statutory, "the legislature may affix the conditions under which it is to be enforced." *Id.*

One of the statutory conditions prerequisite to pursuing such an action is for the injured party to provide notice of his or her intent to bring an action under the statute. *See* Iowa Code § 123.93 (2015); *Grovijohn*, 643 N.W.2d at 202. An injured party must, "[w]ithin six months of the occurrence of an injury, . . . give written notice to the licensee or permittee or such licensee's or permittee's insurance carrier of the person's intention to bring an action under this section." Iowa Code § 123.93. The notice must contain information "indicating the time, place and circumstances causing the injury." *Id.* In *Arnold v. Lang*, this court held the notice must also identify by name the licensee against whom the action would be brought. *See* 259 N.W.2d 749, 752 (Iowa 1977) ("Noticeably, this communication makes no reference to the place or circumstances under which plaintiff suffered his alleged injuries. Neither does it mention [the licensee's] name nor express any intention by Arnold to bring a dram shop action against [the licensee]. All such information was essential in order to qualify as a [section] 123.93 notice.").

Given *Arnold*'s holding that the name of the licensee must be included in the statutory notice, I conclude the district court did not err in

granting DC Misfits, LLC's motion for summary judgment. Hollingshead served notice on Founders Insurance Company for an insured named Leonard LLC. In response, Founders notified Hollingshead it had no coverage in force for Leonard LLC and invited Hollingshead to contact Founders for additional information. There is nothing in the record showing Hollingshead contacted Founders or otherwise served notice of his intent to sue DC Misfits, LLC. Under *Arnold*, the notice was legally deficient. Hollingshead's claim is thus barred, and the district court was correct in granting DC Misfits, LLC's motion for summary judgment. *See Grovijohn*, 643 N.W.2d at 204 ("When a statute supplies a specific notice requirement as a condition precedent to suit, any claims under that statute are barred when notice has not been timely given."); *Arnold*, 259 N.W.2d at 751–52 ("A lapse of a statutory period operates, therefore to extinguish the right altogether." (quoting *Boyle v. Burt*, 179 N.W.2d 513, 515 (Iowa 1970))).

The majority opinion's conclusion that Hollingshead substantially complied in this case because he provided notice that his "claim was against the bar known as Misfits" is not sound. This conclusion is unsound in two respects. First, it contradicts the law of business associations. A claim must be asserted against a legal person subject to suit. The "bar known as Misfits" is not a legal person subject to suit. In contrast, DC Misfits, LLC is a legal person subject to suit. *See* Iowa Code § 4.1(20) (" '[*P*]*erson*' means . . . limited liability company . . . or any other legal entity."); *id.* § 489.104(1) ("A limited liability company is an entity distinct from its members."); 5 Matthew G. Doré, *Iowa Practice Series:™ Business Organizations* § 13:5, at 321 (2018–2019 ed.) ("A limited liability company is thus a legal person that can own property and conduct business apart from its members."). Hollingshead's legal claim in this case

is against DC Misfits, LLC. Hollingshead never provided notice to DC Misfits, LLC. Instead, Hollingshead provided notice to Leonard LLC. Hollingshead never identified DC Misfits, LLC as the person he intended to sue. Instead, he identified Leonard LLC as the person he intended to sue. The majority's conclusion that Hollingshead's provision of notice to Party A of his intent to sue Party A is legally sufficient to provide Party B of his intent to sue Party B simply ignores that the entities are separate and distinct legal persons.

The majority opinion's conclusion also renders part of the dramshop statute superfluous. The Code allows for an injured party to pursue a cause of action against a "licensee or permittee." Iowa Code § 123.92(1)(*a*). To pursue such an action, the injured party must provide notice to the licensee or permittee or the licensee's or permittee's insurance carrier and specifically identify by name the licensee or permittee in the notice provided. *See id.* § 123.93; *Arnold*, 259 N.W.2d at 752. Because the identification of the correct legal entity and the provision of notice to the correct legal entity is prerequisite to suit, the dramshop statute provides an injured party an extension of the limitations period if the injured party is unable "to discover the name of the licensee, permittee, or person causing the injury or until such time as . . . such person has had a reasonable time to discover the name of the licensee [or] permittee." Iowa Code § 123.93. The statutory language providing for an extension of time for an injured party to determine the name of the licensee or permittee is rendered superfluous under the majority opinion because the injured party does not need to identify the licensee or permittee in any notice as a prerequisite to suit.

The majority opinion is also contrary to the most relevant persuasive authority. The Michigan Court of Appeals resolved the same issue in *Ray*

v. Taft, 336 N.W.2d 469 (Mich. Ct. App. 1983). In that case, the plaintiff filed a dramshop action against Albert and Dennis Taft doing business as the Squire Pub. *See id.* at 470. The Tafts had acquired the liquor license for the Squire Pub after the accident giving rise to the suit. *See id.* Subsequently, the plaintiff filed an amended complaint naming Harold Pukoff doing business as the Squire Pub as an additional defendant in the suit. *See id.* Pukoff successfully moved for judgment on the ground he was not served notice of the dramshop action within the statute of limitations. *See id.* at 472. The court of appeals affirmed the dismissal, rejecting the plaintiff's argument that notice of his suit against the Squire Pub was sufficient to provide notice to Pukoff:

> In the case at bar, plaintiff erroneously assumes that the true defendant was the Squire Pub and thus reasons that he served it in the wrong name, *i.e.*, defendants Taft instead of defendant Pukoff. However, the *place* in which the liquor is sold, given or furnished is not the defendant. Rather, M.C.L. § 436.22(5), M.S.A. § 18.993(5) provides that the *person* who sells, gives or furnishes the liquor is the true defendant in a dramshop action. Because defendant Pukoff was the true defendant, the trial court did not encounter a misnomer situation. Pukoff was not named as a defendant until after the expiration of the period of limitation, and he was not served in either his right name or a wrong name until after the expiration of the statutory period of limitation.

Id. Similarly, our statute authorizes suit against a licensee or permittee provided the injured party provides timely notice to the licensee or permittee. *See* Iowa Code §§ 123.92–.93. As in *Ray*, the statute does not authorize suit against a place upon the provision of notice to the place. The majority opinion errs in concluding otherwise.

If this were a misnomer case in which the plaintiff provided notice to the right party but used the wrong legal name, then I would agree with the majority that the notice substantially complied with the statute. *See,*

e.g., *Gray v. Steele*, 264 N.W.2d 752, 752–53 (Iowa 1978) (holding notice was sufficient where the defendant was identified as "Lance Crammer" but his true name was "Lance Kramer"); *Martin v. Cent. Iowa Ry.*, 59 Iowa 411, 413, 13 N.W. 424, 424–25 (1882) ("Does the misnomer invalidate the notice? We think not. . . . It cannot be doubted that the name 'Iowa Central Railroad Company,' the name used in the notice, is synonymous with the true name of the corporation, viz., 'The Central Iowa Railway Company.' "); *Thomas v. Desney*, 57 Iowa 58, 60–62, 10 N.W. 315, 316–17 (1881) (discussing the misnomer rule with respect to notice). But this is not a case of mistaken name. Instead, this is a case of mistaken identity, where the plaintiff identified the wrong person and served notice on the wrong person. Under the circumstances, the action is barred. *See Smith v. Baule*, 260 N.W.2d 850, 854 (Iowa 1977) ("The record before us reveals plaintiffs simply made a mistake in identity of the railroad they intended to sue. It was nonexistent and of course valid service could not be made on it. . . . This is not a case of correction of a misnomer but rather the substitution of a new party after the statute of limitations had run."); *see also Hansberger v. Smith*, 142 A.3d 679, 692 (Md. Ct. Spec. App. 2016) ("Here, Hansberger was not correcting a misnomer of a defendant who already had notice of the suit. Instead, he sought to add several new defendants—parties that, with due diligence, he could have included in his original complaint."); *Franklin v. Winn Dixie Raleigh, Inc.*, 450 S.E.2d 24, 28 (N.C. Ct. App. 1994) ("Rather, Winn Dixie Stores, Inc. was the correct name of the wrong corporate party defendant, a substantive mistake which is fatal to this action. Quite simply, plaintiffs sued the wrong corporation.").

The majority opinion negates the requirement that an injured party name the licensee or permittee in any notice and effectively overrules

Arnold. While the majority may disagree with *Arnold*'s interpretation and construction of the dramshop statute, the case says what it says. It says the injured party's notice must include the name of the licensee or permittee as essential information. *See Arnold*, 259 N.W.2d at 752. *Arnold* has been controlling precedent for forty-three years. The legislature has acquiesced to the interpretation. *See Ackelson v. Manley Toy Direct*, LLC, 832 N.W.2d 678, 688 (Iowa 2013) ("When many years pass following such a case without a legislative response, we assume the legislature has acquiesced in our interpretation."). I see no compelling reason to change course now.

For these reasons, I respectfully dissent.

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

Shawn Shelton Plaintiff, v. The Trust created by the Joint Trust Agreement of Larry E. Shelton and Katherine Shelton, Mary Joleen Pavelka, Ann Jetora Mueller fka Jetora Ann Muella, and Jan Marie Gwinn Defendants.	CVCV056628 **ORDER ON MOTION FOR SUMMARY JUDGMENT**

On July 12, 2018, Plaintiff commenced this case by filing a "Petition for Declaratory Judgment and Accounting," hereinafter the "Petition." The Petition alleges:

- In 1999, a trust was created by Larry and Katherine Shelton.
- "Under the terms of the Trust, after the death of the first settlor, the remaining settlor would have a life use and other benefits within the Trust for their lifetime and thereafter, the assets of the Trust were to be distributed to a remainder beneficiary."
- Prior to his death, Larry Shelton allegedly told Plaintiff that he was the sole beneficiary.

- Larry Shelton died on or about May 13, 2016.
- Katherine Shelton died on June 15, 2017.
- On July 12, 2017, an "Affidavit of Mailing Initial Notice to Beneficiaries of Non Court Supervised Trust" was filed in Lucas County District Court.
- The Notice declared that the beneficiaries of the Trust are Mary Joleen Pavelka, Jetora Ann Muella, and Jan Marie Gwinn. Hereinafter, they are referred to as Mary, Jetora, and Jan.
- According to the Petition, Mary, Jetora, and Jan were made beneficiaries and successor co-trustees through a Second Amendment to the Trust, hereinafter referred to as "the Second Amdendment." The Second Amendment was executed by Larry and Katherine Shelton in 2007.
- According to the Petition, however, the Second Amendment contains several irregularities. Indeed, Plaintiff alleges "the 2nd Amendment is either an outright fabrication and forgery and/or otherwise legally ineffective and void in its attempt to name" Mary, Jetora, and Jan "as beneficiaries of the Trust."

The Petition concludes by requesting the following relief:

WHEREFORE, Plaintiff prays the court declare the rights, status and other legal relations arising from the ***Joint Trust Agreement of Larry E. Shelton and Katherine Shelton*** as follows:

a. That the Court determine whether or not the **SECOND AMENDMENT TO TRUST AGREEMENT OF LARRY E. SHELTON AND KATHERINE SHELTON is a valid** and properly executed amendment and of any legal affect.

b. In the event the Court determines the **SECOND AMENDMENT TO TRUST AGREEMENT OF LARRY E. SHELTON AND KATHERINE SHELTON** is invalid and of no legal effect Plaintiff prays the Court determine Plaintiff's status as a beneficiary to the ***Joint Trust Agreement of Larry E. Shelton and Katherine Shelton.***

c. In the event the Court determines Plaintiff is a beneficiary to the ***Joint Trust Agreement of Larry E. Shelton and Katherine Shelton*** then Plaintiff prays that the Court order Defendants Mary Joleen Pavelka, Jetora Ann Mueller and Jan Marie Gwinn to provide an accounting of the assets and other properties that were in existence in the ***Trust*** as of the date of Katherine Shelton's death as well as and accounting of any and all disposition, disbursement, sale or other transfer of ***Trust*** assets from and after Katherine Shelton's death to present.

d. In the event the Court determines Plaintiff is a beneficiary to the ***Joint Trust Agreement of Larry E. Shelton and Katherine Shelton*** then Plaintiff prays that the court name an alternate trustee to protect, preserve and administer the assets of the ***Trust.***

On November 5, 2018, Mary, Jetora, and Jan filed a motion for summary judgment. They raise two arguments. First, they contend the Petition was untimely. Second, and alternatively, they claim Plaintiff is not a beneficiary of the trust; therefore, he is not entitled to demand an accounting. The Court addresses these arguments in turn.

I. Statute of Limitations.

The parties disagree strongly as to what statute of limitation applies to this case. According to Mary, Jetora, and Jan, this case is governed by the second sentence of Iowa Code section 633A.3108. It states that "a proceeding to contest the validity of a trust must be brought no later than one year following the death of the settlor." Here, the settlors were Larry and Katherine. Larry died in 2016, and Katherine died on June 15, 2017. Therefore, the Petition had to be filed no later than June 15, 2018, a year after Katherine's death. In actuality, the Petition was filed on July 12, 2018. Therefore, they contend, the Petition was untimely.

Plaintiff disagrees. He argues section 633A.3108 does not apply because he is not "contest[ing] the validity of a trust." Plaintiff also relies on *Kerber*, in which the Court of Appeals applied a five-year limitation to a similar case. *Kerber v. Eischeid*, 2016 WL 1696929 (Iowa Ct. App. 2016) (citing Iowa Code section 614.1(4)).

The Court is not convinced that *Kerber* is "on point." In *Kerber*, the Court of Appeals only determined that the five-year limitation period applied to a specific tort claim, namely, an "action for breach of fiduciary duty." Here, Plaintiff has not pled any tort claims. Although Plaintiff suggests that

someone may have engaged in "fabrication and forgery," he does not specify who.

Even if *Kerber* does not govern, though, it is still not clear that section 633A.3108 does. The meaning of our statutes depends on the words chosen by the legislature. Iowa Const. art. III, § 1. According to its plain words, section 633A.3108 can only apply if Plaintiff is "contest[ing] the validity of a trust." But it is not clear that Plaintiff is contesting the "validity" of the 1999 "trust" under which he hopes to recover. Instead, it appears Plaintiff is only questioning a subsequent *amendment*, specifically, the Second Amendment. And the Court sees no reason to think that, if the Second Amendment were proven to be invalid, then the entire trust would become invalid. The parties have not cited, and the Court has not found, any authority suggesting it would.

So, on the current record, the Court cannot conclude that section 633A.3108 applies. Therefore, summary judgment cannot be granted on that basis.

II. Accounting

Mary, Jetora, and Jan also argue that, because Plaintiff is not a beneficiary, he cannot be entitled to demand an accounting. Plaintiff responds that his status as a beneficiary cannot be determined without first

resolving his concerns about the Second Amendment to the Trust.

The Court disagrees. The current record reveals the following:

- Under the original 1999 trust documents (Exhibit 2), Plaintiff was a beneficiary.
- There were two subsequent amendments to the trust. The first of those amendments (Exhibit 3) removed Plaintiff as a beneficiary on October 12, 2007. It is hereinafter referred to as the "First Amendment."
- The Second Amendment—of which Plaintiff complains in his Petition—was dated November 5, 2007. It does not mention Plaintiff. (Exhibit 4).

Because the First Amendment removed Plaintiff as a beneficiary, it simply does not matter whether or not the Second Amendment was valid or not. Either way, he is not a beneficiary. Therefore, he is not entitled to demand an accounting.

Plaintiff responds that he should be given an opportunity to perform discovery regarding the validity of the First Amendment. He suggests that, if the original version of the First Amendment were produced, a hand-writing expert might cast doubt on its validity. So far as the Court can determine, however, no hand-writing expert has testified in support of

Plaintiff's theory. The record does not contain any Rule 1.981(6) affidavits. Therefore, the Court declines to adopt Plaintiff's theory. *See Matter of Estate of Wilson*, 2018 WL 739248 (Iowa Ct. App. 2018); *Good v. Tyson Foods, Inc.*, 756 N.W.2d 42, 46 (Iowa Ct. App. 2008); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 301 (Iowa 1996).

CONCLUSION

For the reasons explained, the Court concludes that Mary, Jetora, and Jan's motion for summary judgment should be, and hereby is, GRANTED in part and DENIED in part, as follows:

1. The motion is DENIED insofar as it requests dismissal of the entire case based on the statute of limitations.

2. The motion is GRANTED insofar as it requests dismissal of Plaintiff's demand for an accounting.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV056628	SHAWN SHELTON VS LARRY E AND KATHERINE SHELTON

So Ordered

David May, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2019-02-04 16:58:25 page 8 of 8

IN THE COURT OF APPEALS OF IOWA

No. 19-0260
Filed February 19, 2020

SHAWN SHELTON,
Plaintiff-Appellee,

vs.

THE TRUST CREATED BY THE JOINT TRUST AGREEMENT OF LARRY E. SHELTON and KATHERINE SHELTON, MARY JOLEEN PAVELKA, ANN JETORA MUELLER f/k/a JETORA ANN MUELLER, and JAN MARIE GWINN,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, David May, Judge.

Defendant beneficiaries, individually and in their capacity as co-trustees of their parents' trust, appeal the district court's ruling denying their motion for summary judgment against their plaintiff brother, Shawn Shelton. **REVERSED AND REMANDED WITH INSTRUCTIONS**

Drew J. Gentsch of Whitfield & Eddy, P.L.C., Des Moines, for appellant.

Shawn P. Shelton, Ft. Madison, pro se appellee.

Considered by Doyle, P.J., and Tabor and Schumacher, JJ. May, J., takes no part.

DOYLE, Presiding Judge.

Defendant beneficiaries, individually and in their capacity as co-trustees of their parents' trust, appeal the district court's ruling denying their motion for summary judgment against their plaintiff brother, Shawn Shelton. They contend the district court erred in denying their motion for summary judgment because Shawn's claim is time-barred and should have been dismissed. Because we agree, we reverse the district court's summary judgment ruling and remand to the district court for entry of summary judgment for the Defendants.

I. Background Facts and Proceedings.

In 1991, Shawn Shelton was convicted of first-degree murder and sentenced to life in prison. *See Shelton v. State*, No. 08-1962, 2011 WL 441932, at *2 (Iowa Ct. App. Feb. 9, 2011). In 1999, Shawn's parents, Larry and Katherine, executed an agreement that established a joint trust as part of their estate planning. The trust identified Larry and Katherine's five children—including Shawn. The trust provided that, after Larry and Katherine's deaths, the trust's assets were to be divided into five equal shares, with all the children but Shawn receiving one-fifth of the trust's assets. The remaining one-fifth portion was to be divided in half, with fifty percent to be distributed to Shawn's child and the remaining fifty percent to be held in trust for Shawn "until he is released from prison or is no longer incarcerated." Shawn's father passed away in 2016, and his mother passed a year later on June 15, 2017.

On July 12, 2018, Shawn petitioned for declaratory judgment and accounting against his parents' trust and his three sisters, Mary Pavelka, Ann Mueller, and Jan Gwinn. Shawn acknowledged an affidavit had been filed in

district court on or about July 12, 2017, affirming an "Initial Notice to Beneficiaries of Non Court Supervised Trust" had been mailed to Shawn's three sisters. The notice letter, dated June 28, 2017, stated it was being provided to "each qualified beneficiary" of Larry and Katherine's joint trust agreement "dated October 29, 1999, in order to comply with the notice provisions of the Iowa Trust Code [section] 633A.4213" (2017). The notice reflected Shawn's sisters had previously been provided with a copy of their parents' 1999 trust agreement "and also the Second Amendment to the Trust Agreement of November 5, 2007." The notice then explained that the trust's remaining assets would be distributed to Shawn's sisters "[u]nder the above trust provisions."

The first trust amendment stated it was made October 12, 2007, and purported to amend three articles of Larry and Katherine's 1999 trust. Among other things, the amendment changed the trust's beneficiaries—removing Shawn and his son from the trust, as well as Shawn's brother. It also changed the distribution of the trust's assets from five equal shares to four shares, with two shares allocated to one sister and the other two sisters receiving one share each. The signatures of Larry and Katherine as trustees appear on the amendment, but they are difficult to make out because of the poor quality of the photocopy in our electronic record.

The second trust amendment, dated November 5, 2007, purported to be Larry and Katherine's second amendment to their trust agreement. The second amendment consists of four pages, including an affidavit. The amendment makes several changes to the prior trust and revokes altogether "the unnumbered Amendment . . . dated October 12, 2007." In the second amendment, the trust's

provisions relating to the residual beneficiaries and the distribution of the assets to them was deleted and a new paragraph was substituted. Like the first amendment, Shawn, Shawn's son, and Shawn's brother were not named as beneficiaries in the second amendment. Instead of four shares, the second amendment divided the trust assets into three equal shares, with one share each going to each one of Shawn's sisters.

In his declaratory-judgment petition, Shawn alleged the second amendment to his parents' trust was "either an outright fabrication and forgery and/or is otherwise legally ineffective and void in its attempt to name [his sisters] as beneficiaries of the Trust." Shawn requested the district court determine whether the second amendment was valid. If the court found it was valid, Shawn asked the court to determine "his status as a beneficiary," among other things.

In November 2018, Shawn's sisters, individually and in the capacity as co-trustees of their parents' trust (collectively the Defendants), moved for summary judgment asking the court to dismiss Shawn's petition with prejudice. They asserted Shawn's petition was not timely filed under Iowa Code section 633A.3108, which requires proceedings "to contest the validity of a trust . . . be brought no later than one year following the death of the settlor." Because Shawn filed his suit July 12, 2018, more than one year after his mother's death, the Defendants asked the court to enter summary judgment as a matter of law finding Shawn's filing untimely and dismissing his petition.

Shawn's argument in response was twofold. First, he argued the five-year statute of limitations in section 614.1(4) was the applicable statute of limitations, not section 633A.3108. Second, he maintained he "was not properly served with

[5]

legal notice of the same as contemplated by Iowa Rule of Civil Procedure 13 which is intended to put an incarcerated person on equal footing with other civil litigants not under the impediment of incarceration."

Following a hearing, the district court entered its ruling denying the Defendants motion for summary judgment. The court reasoned:

> The court is not convinced that *Kerber* [*v. Eischeid*, No. 15-1249, 2016 WL 1696929, *1 (Iowa Ct. App. Apr. 27, 2016) (applying section 614.1(4) in a similar case)] is "on point." In *Kerber,* the court of appeals only determined that the five-year limitation period applied to a specific tort claim, namely, an "action for breach of fiduciary duty." Here, [Shawn] has not pled any tort claims. Although [Shawn] suggests that *someone* may have engaged in "fabrication and forgery," he does not specify who.
>
> Even if *Kerber* does not govern, though, it is still not clear that section 633A.3108 does. The meaning of our statutes depends on the words chosen by the legislature. Iowa Const. art. III, § 1. According to its plain words, section 633A.3108 can only apply if [Shawn] is "contest[ing] the validity of a trust." But it is not clear that [Shawn] is contesting the "validity" of the 1999 "trust" under which he hopes to recover. Instead, it appears [Shawn] is only questioning a subsequent *amendment,* specifically, the Second Amendment. And the court sees no reason to think that, if the Second Amendment were proven to be invalid, then the entire trust would become invalid. The parties have not cited, and the court has not found, any authority suggesting it would.
>
> So, on the current record, the court cannot conclude that section 633A.3108 applies. Therefore, summary judgment cannot be granted on that basis.

The court did not address the notice issue raised by Shawn.

The Defendants then filed a notice of appeal, which the Iowa Supreme Court determined should be treated as an application for interlocutory appeal. The court granted the Defendants' application and transferred the matter to this court for disposition.

II. Standard of Review.

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). Our review is for correction of errors at law. *See Konrardy v. Vincent Angerer Tr., Dated March 27, 1998*, 925 N.W.2d 620, 623 (Iowa 2019). The record is viewed in the light most favorable to the nonmoving party, granting to that party all legitimate inferences supported by the record. *See Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 230 (Iowa 2018). If the issue only pertains to the legal consequences of undisputed facts, summary judgment is appropriate. *See id.* "Even if facts are undisputed, summary judgment is not proper if reasonable minds could draw from them different inferences and reach different conclusions." *Walker Shoe Store v. Howard's Hobby Shop*, 327 N.W.2d 725, 728 (Iowa 1982).

III. Discussion.

On appeal, the Defendants contend the district court should have found section 633A.3108 was the applicable statute of limitations and granted their motion for summary judgment. Shawn asserts the court correctly applied section 614.1(4)'s statute of limitations because section 633A.3108 "is not applicable to the claim of interference with a bequest." We disagree.

Iowa Code chapter 633A contains the Iowa Trust Code. *See* Iowa Code § 633A.1101. "As a general proposition, Iowa's 'trust code applies to all trusts within the scope of this trust code, regardless of whether the trust was created before, on, or after July 1, 2000, except as otherwise stated in [the] trust code.'" *In*

re Tr. No. T-1 of Trimble, 826 N.W.2d 474, 483 n.4 (Iowa 2013) (quoting Iowa Code § 633A.1106(1)). Under the trust code, a "trust" is defined as "an express trust, charitable or noncharitable, *with additions thereto*, wherever and however created, including a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust." Iowa Code § 633A.1102(18) (emphasis added). Though there are some exceptions to that definition in the paragraphs that follow, none apply. *See id.* § 633A.1102(18)(a)-(m).

It is true Shawn's petition does not make any reference to the probate court. But that matters not. Here, his declaratory-judgment petition asks the court to determine the validity of an amendment to a trust. Section 633A.1102(18) includes in its definition of "trusts" any additions, however created. Even assuming for the sake of argument the amendments were not valid, the matter would still center upon Shawn's parents' original 1999 trust agreement and the first October 2007 amendment. Chapter 633A applies.

The period of limitation for bringing a claim is generally set by the legislature. *See Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 448 (Iowa 2008); *see also Schulte v. Wageman*, 465 N.W.2d 285, 287 (Iowa 1991). "Statutes of limitation establish a reasonable period of time for plaintiffs to file their claims. This limitation period essentially exists to ensure a defendant will receive timely notice of a potential claim so that the defendant will be protected from the multitude of problems that can occur when defending stale claims." *Estate of Kuhns v. Marco*, 620 N.W.2d 488, 491 (Iowa 2000). Stated another way, these statutes "serve to provide an adequate time for a diligent plaintiff to bring a cause of action, as well

as to punish those parties who sit on their rights." Romualdo P. Eclavea et al., 51 Am. Jur. 2d *Limitation of Actions* § 5 (2020) (internal footnotes omitted).

Section 633A.3108 of the trust code relates to limitations on the contest of revocable trusts:

> Unless previously barred by adjudication, consent, or other limitation, if notice is published or given as provided in section 633A.3110 *within one year* of the settlor's death, a proceeding to contest the validity of a revocable trust must be brought within the period specified in that notice. If notice is *not published or given within that period*, a proceeding to contest the validity of a trust must be brought *no later than one year following the death of the settlor*.

(Emphasis added.)

Here, the first sentence of section 633A.3108 only applies when "notice is published or given as provided in section 633A.3110 within one year of the settlor's death." *Id.* § 633A.3108. The Defendants do not claim to have provided notice "within one year of the settlor's death." Instead, they argue the last sentence of section 633A.3108 sets forth the applicable period, limiting the time to bring a claim to contest a trust's validity to one year. We agree.[1]

It is not disputed that the Defendants did not provide notice within the time set forth in section 633A.3108. So under section 633A.3108, Shawn had one year following his mother's death to contest the amendment he now claims is not valid. *See id.* § 633A.3108. This time frame makes sense—the passing of the settlor is

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[1] The district court did not address the notice issue raised by Shawn, and Shawn did not file a rule 1.902(4) motion to ask the court to rule on the issue. As the prevailing party, Shawn could raise on appeal his notice claim to save the district court's ruling denying the Defendants summary judgment. *See Moyer v. City of Des Moines*, 505 N.W.2d 191, 193 (Iowa 1993) ("A successful party, without appealing, may attempt to save a judgment on appeal based on grounds urged in the district court but not considered by that court."). But for the reasons explained, his notice claim lacks merit.

generally known by the settlor's beneficiaries. A period of one year balances the need for expedience with adequate time for a plaintiff to sue. Although Shawn is in prison, he had a year to bring his claims after his mother died. He did not. As a result, his claim is barred under Iowa Code section 633A.3108.

IV. Conclusion.

Because Shawn failed to bring his action within one year of his mother's death, his claim is barred under Iowa Code section 633A.3108. The district court erred in denying the Defendants' motion for summary judgment on this issue. So we reverse the district court's summary judgment ruling and remand to the district court for entry of summary judgment for the Defendants.

REVERSED AND REMANDED WITH INSTRUCTIONS.

IN THE COURT OF APPEALS OF IOWA

No. 20-0371
Filed March 17, 2021

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDNA JEAN WILSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, District Associate Judge.

Edna Wilson appeals following her convictions for interference with official acts and possession of cocaine, second offense. **AFFIRMED.**

Martha J. Lucey, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Richard Bennett, Assistant Attorney General, for appellee.

Considered by Mullins, P.J., and May and Schumacher, JJ.

MAY, Judge.

Edna Wilson appeals her convictions for interference with official acts, in violation of Iowa Code section 719.1 (2019), and possession of cocaine, second offense, in violation of section 124.401(5). She claims the district court erred in denying her motion to suppress after the police illegally entered her home. We affirm.

I. Background Facts and Proceedings

On July 5, 2019, Ames police were dispatched to an apartment building for a noise complaint. Officer Jamie Miller was the first to respond. He proceeded to the second floor. He could hear loud noise emitting from one of the apartments. Officer Miller knocked on the door. A woman partially opened the door but remained inside the apartment. Officer Miller asked the woman, later identified as Wilson, for her name. Wilson provided the name Ebony. Officer Miller then asked if Wilson had any identification. Wilson responded she did not.

Officer Miller continued to ask Wilson for her full name and identification. The conversation turned argumentative. Loud noises continued to emit from inside the apartment. Officer Adam McPherson arrived to assist Officer Miller.

A few minutes after the encounter started, Wilson attempted to shut the door on Officer Miller. Officer Miller "put [his] left hand up on to the doorway to keep it from shutting, and then [he] put [his] foot . . . into basically the threshold jam area to prevent it from shutting." His foot was "approximately six inches forward next to the bottom of the door." He again requested Wilson's name. After glancing at Officer Miller's name badge, Wilson provided the name Destiny Millers.

By this point, the officers believed Wilson was not being truthful about her identity. Officer Miller advised Wilson "that providing false information in this situation is something that could lead to her arrest." The officers contacted dispatch but were unable to verify the information Wilson had given them. After checking the apartment's utilities account, Officer McPherson asked Wilson if her name was Edna Wilson. Wilson confirmed that was her real name.

Officer Miller then advised Wilson that she was under arrest and stepped over the threshold of the apartment. Officer Miller attempted to secure one of Wilson's arms. Wilson resisted. Officer McPherson then stepped into the apartment. Officer McPherson attempted to secure Wilson's other arm. Wilson continued to physically resist the officers. Officer Miller received a cut to his left forearm and several red marks resembling scratch marks. After a brief struggle, the officers secured Wilson in handcuffs.

During the tussle, Officer McPherson observed Wilson throw a glass vial on the floor. The officers then observed a white powder in and near the glass vial that Wilson had thrown. The powder later tested positive for cocaine. They also observed marijuana on a table located near the front door.

Officer McPherson requested additional officers. Officer Miller, Officer McPherson, and Wilson stayed near the front door of the apartment while waiting for other officers to respond. Once other officers arrived to secure the apartment, Officer Miller transported Wilson to the police department.

Officer McPherson obtained a search warrant for any controlled substances that may be located within Wilson's apartment. He seized cocaine, marijuana, and paraphernalia.

The State charged Wilson with (1) interference with official acts causing bodily injury, a serious misdemeanor, in violation of section 719.1(1)(a) and (c); (2) possession of marijuana, second offense, a serious misdemeanor, in violation of section 124.401(5); and (3) possession of cocaine, second offense, an aggravated misdemeanor, in violation of section 124.401(5).

Wilson filed a motion to suppress the drugs found in her apartment. She claimed officers violated her privacy rights by entering her home without a warrant and then used information gained by their illegal entry to obtain a search warrant. After a hearing on the matter, the district court denied her motion.

The State amended Wilson's charges to include only: (1) interference with official acts, a simple misdemeanor, in violation of section 719.1(1)(a) and (2) possession of cocaine, second offense, an aggravated misdemeanor, in violation of section 124.401(5). Wilson proceeded to a bench trial on the stipulated minutes of testimony. The court found her guilty of both crimes. Wilson appeals.

II. Standard of Review

Wilson claims the district court should have granted her motion to suppress based on the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. So our review is de novo. *See State v. Coffman*, 914 N.W.2d 240, 244 (Iowa 2018). We make "an independent evaluation of the totality of the circumstances." *Id.* (citation omitted). And we evaluate this case "in light of its unique circumstances." *Id.* (citation omitted).

III. Analysis

As Wilson points out, the Fourth Amendment is "substantially identical" to section 8. Here are their texts:

Fourth Amendment of the United States Constitution	**Article 1, section 8 of the Iowa Constitution**
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.	The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

We recognize, of course, that our supreme court has authority to "follow an independent approach" when interpreting our state constitution. *State v. Brown*, 890 N.W.2d 315, 322 (Iowa 2017) (citation omitted). As Wilson notes, though, "[g]iven the similar wording of the Fourth Amendment and Iowa's search and seizure clause, these provisions have generally been considered to be 'identical in scope, import, and purpose.'" *See State v. Beckett*, 532 N.W.2d 751, 755 (Iowa 1995). And while Wilson cites both constitutions, her appellate brief focuses on Fourth Amendment jurisprudence; it does not propose an "independent state constitutional standard." *See State v. Lowe*, 812 N.W.2d 554, 566 (Iowa 2012) (citation omitted). The State's brief follows Wilson's lead and focuses on the Fourth Amendment. We do the same.

Here we consider the first clause of the Fourth Amendment, sometimes called the "Reasonableness Clause." *See, e.g.*, *Michigan v. E.P.A.*, 576 U.S. 743, 755 (2015). It protects "the people" against "unreasonable" intrusions into their "persons, houses, papers, and effects." U.S. Const. amend. IV.

"But when it comes to the Fourth Amendment, the home is first among equals." *Florida. v. Jardines*, 569 U.S. 1, 6 (2013). "At the Amendment's 'very core' stands 'the right of [the people] to retreat into [their] own home[s] and there

be free from unreasonable governmental intrusion.'" *Id.* (citation omitted). "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972).

And so courts "usually require" that intrusions into a home "be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be)." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). Our supreme court has said warrantless intrusions into homes are "presumptively unreasonable" and "will not be sanctioned, 'subject only to a few specifically established and well-delineated exceptions.'" *State v. Reinier*, 628 N.W.2d 460, 464 (Iowa 2001) (citations omitted); *see Payton v. New York*, 445 U.S. 573, 590 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

With this background in mind, we consider the parties' positions. Wilson argues Officer Miller violated the Fourth Amendment when he "conducted a warrantless entry into Wilson's home" by placing "his hand on the door and his foot in the doorway to prevent Wilson from closing the door as he spoke with her." And Wilson claims this "intrusion into her home was not justified by any exception to the warrant requirement." So, in Wilson's view, "[a]ll evidence obtained from the warrantless entry must be suppressed, including all evidence obtained from the subsequent search warrant derived from the illegal entry."

The State disagrees. For starters, the State offers several reasons to believe there was no Fourth Amendment violation. For example, the State contends Wilson's "act of opening her door and standing in the threshold, in response to [Officer Miller]'s knock, placed her in a public place" and, therefore, outside the Fourth Amendment's special protections for the home. *See United States v. Santana*, 427 U.S. 38, 42 (1976) (holding that defendant, standing on the threshold of one's dwelling, was in a "public" place and, therefore, "was not in an area where she had any expectation of privacy"). Because Wilson was in a public place, the State argues, police officers were free to arrest her "for an offense committed or attempted in their presence," including disorderly conduct (the noise emitting from her apartment) and providing false identification information (her fake names). *See* Iowa Code § 804.7(1); *see also United States v. Watson*, 423 U.S. 411, 423–24 (1976) (holding warrantless public arrests on probable cause do not violate the Fourth Amendment). These violations permitted the officers' minimal entry into Wilson's apartment to complete the arrest. *See State v. Legg*, 633 N.W.2d 763, 773 (Iowa 2001) (holding an officer who had probable cause to arrest defendant for a serious misdemeanor committed in a public place could enter defendant's garage to complete the arrest). And so, in the State's view, there was no constitutional violation.

As a fallback, the State contends that—even if the Fourth Amendment was violated—the exclusionary rule does not apply and, therefore, suppression was not required. We agree.

The "exclusionary rule" is the principle that courts should generally suppress evidence "discovered as a result of illegal government activity," such as an

unauthorized home invasion. *State v. McGrane*, 733 N.W.2d 671, 680 (Iowa 2007). This rule may also prevent the "introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search." *Id.* (citation omitted). We sometimes call this the "fruit of the poisonous tree" doctrine. *Id.* (citation omitted).

The exclusionary rule advances important goals by deterring "lawless police conduct" and protecting "the integrity of the judicial system." *Id.* at 681. But it also "generates 'substantial social costs,' which sometimes include setting the guilty free and the dangerous at large." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (citation omitted). And so our courts recognize "several exceptions to the rule." *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016); *see also Hudson*, 547 U.S. at 593–626 (describing independent source, inevitable discovery, and attenuation exceptions).

One of them is called the "new-crime exception." *See State v. Pranschke*, No 16-1104, 2017 WL 2461556, at *5 (Iowa Ct. App. June 7, 2017) (collecting cases); *see also* 6 Wayne R. LaFave, *Search & Seizure* § 11.4(j) (6th ed. Sept. 2020). Our supreme court adopted a version of the new-crime exception in *State v. Dawdy*, 533 N.W.2d 551, 555–56 (Iowa 1995). *See Pranschke*, 2017 WL 2461556, at *6 (noting "[t]he Iowa Supreme Court has expressly approved and adopted the Eighth Circuit's acceptance of what is essentially the new-crime exception"). The court explained in *Dawdy*:

> Even though an initial arrest is unlawful, a defendant has no right to resist the arrest. If the defendant does so, probable cause exists for a second arrest for resisting. A search incident to the

second arrest is lawful. *United States v. Bailey*, 691 F.2d 1009, 1016–18 (11th Cir. 1982) (even assuming initial arrest of defendant was unlawful, defendant had no right to flee and to strike agent in effort to escape attempts to recapture him, and thus probable cause existed for second arrest for resisting arrest, and search of defendant incident to the second arrest was lawful).

Strong policy reasons underlie this rule. As *Bailey* notes,

> [a] contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct. . . . [E]xtending the fruit [of the poisonous tree] doctrine to immunize a defendant from arrest for *new* crimes gives a defendant an intolerable *carte blanche* to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This result is too far reaching and too high a price for society to pay in order to deter police misconduct.

533 N.W.2d at 555 (first three alterations in original); *see United States v. Dawdy*, 46 F.3d 1427, 1430–31 (8th Cir. 1995), *cert. denied*, 516 U.S. 872 (1995)); *see also Smith v. State*, 542 N.W.2d 567, 569 (Iowa 1996) ("For example, one may be guilty of the crime of resisting arrest even if the initial arrest is illegal.").

We believe the new-crime exception applies here. We assume without deciding that the Fourth Amendment was violated when Officers Miller and McPherson entered Wilson's home and arrested her. But when Wilson *resisted* arrest, she created probable cause that she was committing a new crime. *See* Iowa Code § 804.12 ("A person is not authorized to use force to resist an arrest, either of the person's self, or another which the person knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if the person believes that the arrest is unlawful or the arrest is in fact unlawful."). This provided officers with lawful grounds to arrest Wilson inside her apartment. So there were no grounds to suppress narcotics

evidence discovered incident to the arrest. *See Dawdy*, 533 N.W.2d at 555; *see also Pranschke*, 2017 WL 2461556, at *6.

IV. Conclusion

The district court correctly denied Wilson's motion to suppress. So we affirm Wilson's convictions.

AFFIRMED.

968 N.W.2d 903
Supreme Court of Iowa.

STATE of Iowa, Appellee,
v.
Edna Jean WILSON, Appellant.

No. 20-0371
|
Submitted October 20, 2021
|
Filed January 14, 2022
|
Amended January 19, 2022

Synopsis
Background: Following denial of defendant's motion to suppress vial of cocaine obtained with search warrant that was issued after police officers made warrantless entry into her apartment to arrest her for a misdemeanor charge, defendant was convicted after bench trial in the District Court, Story County, Steven P. Van Marel, J., of possession of cocaine and interference with official acts by resisting arrest. Defendant appealed. Case was transferred to the Court of Appeals. The Court of Appeals, 2021 WL 1017132, affirmed. Defendant sought further review, which was granted.

Holdings: The Supreme Court, Appel, J., held that:

[1] defendant did not surrender her expectation of privacy in her apartment beyond what police officer could see through partially opened front door;

[2] officers acted unreasonably, within meaning of state constitutional prohibition against unreasonable searches and seizures, when they committed trespass on defendant's apartment;

[3] probable cause that defendant committed misdemeanor did not justify warrantless entry pursuant to exigent-circumstances exception to warrant requirement;

[4] sufficient evidence supported conviction for interference with official acts; and

[5] as matter of apparent first impression, new crime exception to exclusionary rule did not apply to vial of cocaine.

Court of Appeals decision vacated; District Court judgment affirmed in part, reversed in part, and remanded.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (20)

[1] **Criminal Law** Review De Novo

When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, the standard of appellate review is de novo.

[2] **Criminal Law** Evidence wrongfully obtained

Criminal Law Illegally obtained evidence

When reviewing a denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, the court examines the whole record and makes an independent evaluation of the totality of the circumstances.

[3] **Criminal Law** Illegally obtained evidence

When reviewing a denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, each case must be evaluated in light of its unique circumstances.

[4] **Arrest** Officers and Assistants, Arrest Without Warrant

In seeking to sustain an exception to the arrest warrant requirement, the State bears the burden of proof. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8.

[5] **Searches and Seizures** Persons, Places and Things Protected

Police intrusion into the home without a warrant implicates the very core of the Fourth

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Amendment to the United States Constitution and the Iowa Constitution. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8.

[6] Searches and Seizures — Persons, Places and Things Protected

Physical entry of the home without a warrant is the chief evil against which the Fourth Amendment is directed. U.S. Const. Amend. 4.

[7] Searches and Seizures — Persons, Places and Things Protected

Freedom in one's own dwelling is the archetype of the privacy protection secured by the Fourth Amendment. U.S. Const. Amend. 4.

[8] Searches and Seizures — Persons, Places and Things Protected

At the very core of the Fourth Amendment stands the right of a resident to retreat into one's own home and there be free from unreasonable governmental intrusion. U.S. Const. Amend. 4.

[9] Searches and Seizures — Persons, Places and Things Protected

Any physical invasion of the structure of the home, by even a fraction of an inch, without a warrant is too much. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8.

[10] Searches and Seizures — Expectation of privacy

Whether a person has a legitimate expectation of privacy in the premises searched without a warrant is decided on a case-by-case basis. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8.

[11] Arrest — Exigent circumstances

Exigent circumstances supporting warrantless entry into a home to make an arrest include a risk of serious injury, a threat to officer safety, and a likelihood of destruction of evidence. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8.

[12] Arrest — Legality of officers' presence, search, or other conduct

Arrest — Probable Cause; Offense in Officer's Presence

Under the new crime exception to the warrant requirement, a defendant has no right to resist an arrest, even though the initial arrest is unlawful, and if the defendant does so, probable cause exists for a second arrest for resisting, such that a search incident to the second arrest is lawful. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8.

[13] Arrest — Arrest Without Arrest Warrant

Arrestee did not surrender her expectation of privacy in her apartment protected by the federal and state constitutional prohibitions against unreasonable searches and seizures beyond what police officer could see through partially opened front door, and thus, police officers were not permitted to enter her apartment without warrant to effect custodial arrest for misdemeanor; arrestee opened front door only as necessary to respond to police officer's knock while investigating noise complaint, she did not expose herself or her apartment to public in plain view, and she sought to close door, as she was entitled to do, after unproductive exchange with police officer. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8.

[14] Arrest — Arrest Without Arrest Warrant

Police officers acted unreasonably, within meaning of state constitutional prohibition against unreasonable searches and seizures, when they committed trespass on arrestee's apartment; arrestee opened front door a crack to respond to police officer's knock while investigating noise complaint, police officer put his foot in doorway so arrestee could not close it, arrestee asked police officer to remove his foot from her doorway six times, police officer told arrestee he did not need a search warrant

when she asked him to show her a search warrant authorizing his presence at her home, and police officers proceeded to enter her apartment clearly without her consent to arrest her for misdemeanor without warrant. Iowa Const. art. 1, § 8.

[15] **Arrest** ⇐ Exigent circumstances
Arrest ⇐ Probable cause
Arrest ⇐ Nature of offense

Probable cause that arrestee committed misdemeanor did not justify warrantless entry into her apartment to arrest her pursuant to exigent-circumstances exception to warrant requirement, even though arrestee provided police with false name when they were investigating noise complaint; arrestee committed simple misdemeanor. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8.

[16] **Criminal Law** ⇐ Jurisdiction and proceedings for review; preservation of error

State did not preserve its argument, on defendant's appeal from bench trial conviction for possession of cocaine and interference with official acts by resisting arrest, that warrantless entry into defendant's apartment to make arrest for providing false name to police officer investigating noise complaint was justified under exigent-circumstances exception to warrant requirement by police officer's purported reasonable suspicion that defendant had engaged in disorderly conduct, where State did not present such issue to the district court. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8.

[17] **Criminal Law** ⇐ Jurisdiction and proceedings for review; preservation of error

Defendant did not preserve, on appeal from bench trial conviction for possession of cocaine and interference with official acts by resisting arrest, her argument that new crime exception to exclusionary rule did not apply to vial of cocaine obtained with search warrant that was issued after police officers made unlawful warrantless entry into defendant's apartment to arrest her for a misdemeanor charge because new offense of interfering with official acts by resisting arrest could not be based on defendant's conduct during initial unlawful arrest; question of interpretation of language of statute setting forth offense of interference with official acts was not presented to, or decided by, district court. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8; Iowa Code Ann. § 719.1(1)(a).

[18] **Obstructing Justice** ⇐ What constitutes resistance; force or violence

Sufficient evidence supported finding that arrestee hindered police officers' actions when arresting her, as required to support her conviction for interference with official acts by resisting arrest, including her twisting and jostling around while officers attempted to place handcuffs on her, and her lack of cooperation as police tried to deal with initial placement of handcuffs, which allegedly was uncomfortable.

Iowa Code Ann. § 719.1(1)(a).

[19] **Obstructing Justice** ⇐ What constitutes resistance; force or violence

The standard for establishing a violation of the statute setting forth the offense of interference with official acts based on resisting arrest is generally fairly low, and the key question is whether the police officer's actions were hindered. Iowa Code Ann. § 719.1(1)(a).

[20] **Criminal Law** ⇐ Causal nexus; independent discovery or basis or source

New crime exception to exclusionary rule did not apply to vial of cocaine obtained with search warrant that was issued after police officers made unlawful warrantless entry into defendant's apartment to arrest her for a misdemeanor charge, since any application of exception was based on new crime of interference with official acts by resisting arrest, and defendant threw vial of cocaine on floor prior to her resisting initial

arrest. U.S. Const. Amend. 4; Iowa Const. art. 1, § 8; Iowa Code Ann. § 719.1(1)(a).

***906** On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, District Associate Judge.

The defendant challenges the denial of her motion to suppress evidence obtained during a warrantless search of her apartment to investigate a misdemeanor charge and conviction of interference with official acts. **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Attorneys and Law Firms

Martha J. Lucey, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Special Counsel, for appellee.

Appel, J., delivered the opinion of the court, in which all justices joined.

Opinion

APPEL, Justice.

In this case, we consider whether evidence obtained by law enforcement after a warrantless entry into an apartment for a misdemeanor charge passes constitutional muster under the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. For the reasons below, we conclude that the warrantless entry into Wilson's apartment to arrest her was unlawful. Therefore, evidence related to her conviction of possession of cocaine obtained from the unlawful entry must be suppressed. We also conclude, however, that Wilson's conviction of interference with official acts is sufficiently attenuated from the unlawful entry to permit admission of evidence of her own illegal conduct under the "new crime exception" to the exclusionary rule. So, Wilson's conviction for possession of cocaine is reversed, while her conviction of interference with official acts is affirmed.

I. Factual and Procedural Background.

A. Investigation and Arrest. Based on our review of the record, including the ***907** transcript of the suppression hearing and the exhibits, including bodycam videos of the incident, [1] we make the following findings of fact.

On July 5, 2019, Jamie Miller, a uniformed Ames police officer, was dispatched to a fourplex apartment building in Ames to investigate a noise complaint in violation of an Ames municipal ordinance. Once Miller arrived, he could hear noise while he was in the common hallway of the fourplex apartment. Miller, however, did not have equipment to measure the sound level necessary to determine if there was a violation of the noise ordinance but admitted that the level required for such a violation was "very high." Instead, Miller proceeded to knock on the door to the apartment. A woman came to the door and opened it between six to twelve inches in a guarded fashion in response to the knock. Miller identified himself as a police officer, explained that there had been a noise complaint, and proceeded to ask the woman for her name and some identification. Wilson initially refused to provide Miller with a name, stating she did not have to do so. Miller repeated his request several times, and eventually Wilson provided Miller with the name "Ebony."

Miller continued to press Wilson, asking for her complete name. After an unproductive exchange in which Wilson stated several times that she wanted her lawyer called, Wilson attempted to shut the door to her apartment. In response, Miller put his left hand on the doorway and his foot six inches across the threshold to prevent Wilson from shutting the door. Wilson asked Miller to remove his foot from her door six times, which Wilson refused to do. Wilson asked Miller where his warrant was, drawing a reply from Miller that he did not need a search warrant for her name.

Miller admitted that when he put his left hand on the door and foot six inches into the apartment, he had not determined that Wilson had provided a false name, nor did he have reason to believe that Wilson possessed weapons or was engaged in drug violations.

After Miller prevented Wilson from closing her door, Wilson then provided Miller with a different name—Destiny Miller—after she glanced at Miller's name tag. Another uniformed Ames police officer on the scene, Adam McPherson, used the police database but was unable to find a "Destiny Miller" with the same birth date as provided by Wilson. In order to

determine the true name of the occupant of the apartment, McPherson used his computer to search utilities records and determined that the person responsible for utilities at the apartment was Edna Wilson. When Miller confronted her with the name of Edna Wilson, Wilson confirmed that it was her name.

Upon confirmation that her name was Edna Wilson, and not Destiny Miller, Miller decided to arrest Wilson for obstruction of justice by providing the police with a false name. Miller advised Wilson that she was under arrest, stepped further into the apartment, and began the process of placing her in handcuffs. As the officers entered the apartment to arrest Wilson, McPherson saw Wilson throw an object from her hand. A close look at the bodycam ***908** video shows that the object was thrown around the time when the two officers grasped Wilson's arms to effectuate the arrest. Miller first held Wilson's left arm while McPherson was approaching Wilson. Then, as McPherson was getting closer, Wilson quickly stretched out her free right hand to toss away the vial. Immediately after Wilson threw the object away, McPherson was able to grab and handcuff Wilson's right hand. After both hands were handcuffed, she started to twist, making it hard for the officer to secure her arrest. The officers later observed a white powdery residue on the floor and a small vial. They also located a marijuana joint and a baggie containing two grams of marijuana.

During the arrest, Wilson protested using profanity, accused the police of harassment, and asked others in the apartment to call her lawyer. She was not generally cooperative as Miller and McPherson tried to handcuff her behind her back, twisting her body and arms in a fashion that made the arrest more difficult than it needed to be. Miller suffered a cut and scrape to his left arm as a result of his effort to handcuff Wilson. After Wilson's arrest, McPherson applied for a search warrant for the apartment based upon what officers observed inside the apartment. The search warrant was issued, and the police executed the warrant. The white substance in the vial later tested as .6 grams of cocaine salt.

The State charged Wilson with interference with official acts causing bodily injury, possession of marijuana, second offense, and possession of cocaine, first offense. The cocaine charge was later amended to a second offense. Wilson pleaded not guilty and waived speedy trial.

B. Motion to Suppress. Wilson filed a motion to suppress, alleging that the officer made an illegal warrantless entry into her home, and then used the information obtained from the illegal entry to obtain a search warrant. Wilson argued that a warrantless entry into the home was unlawful under the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution. The State countered that Miller had no reasonable expectation of privacy because she opened the door of the residence and was in plain view when the officers determined to arrest her. The State further asserted that the evidence was admissible under the new crime exception to the exclusionary rule. According to the State, the new crime was interference with official acts when Wilson hindered or resisted her arrest.

The district court denied the motion to suppress. The district court found that there was no question that by placing his hand on the door and foot past the door threshold, the officer broke the plane of Wilson's apartment. Relying on *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), however, the district court found that Wilson had no reasonable expectation of privacy in the entryway to the apartment. Further, the district court observed that a crime was being committed in the presence of the police officers, namely, harassment of public officials by providing a false name. As a result, the officers had a right to arrest Miller.

After the motion to suppress was denied, Wilson submitted to a bench trial pursuant to an agreement with the State. The State amended count I to interference with official acts, a simple misdemeanor, and agreed to dismiss the possession of marijuana charge. The trial court found Wilson guilty of the count I interference charge and of the count III charge of possession of cocaine, second offense.

C. Appeal. Wilson appealed, arguing that the district court erred in denying her ***909** motion to suppress and that there was insufficient evidence to support the State's interference charge. We transferred the case to the court of appeals. The court of appeals assumed, without deciding, that the initial entry by Miller violated the Fourth Amendment. But when Wilson resisted arrest, the court of appeals observed that "she created probable cause that she was committing a new crime." According to the court of appeals, when Wilson resisted arrest, she provided law enforcement with new grounds to arrest her. Consequently, the court of appeals held that the narcotics discovered as a result of Miller's lawful arrest were not subject to suppression and affirmed the district court's judgment.

Wilson sought further review, which we granted.

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II. Standard of Review.

[1] [2] [3] [4] "When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, our standard of review is de novo." *State v. Coffman*, 914 N.W.2d 240, 244 (Iowa 2018) (quoting *State v. Storm*, 898 N.W.2d 140, 144 (Iowa 2017)). "We examine the whole record and 'make an independent evaluation of the totality of the circumstances.' " *Id.* (quoting *Storm*, 898 N.W.2d at 144). "Each case must be evaluated in light of its unique circumstances." *State v. Kurth*, 813 N.W.2d 270, 272 (Iowa 2012) (quoting *State v. Krogmann*, 804 N.W.2d 518, 523 (Iowa 2011)). In seeking to sustain an exception to the warrant requirement, the state bears the burden of proof. *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *Payton v. New York*, 445 U.S. 573, 586–87, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

III. Analysis.

A. Positions of the Parties.

1. *Wilson.* Wilson asserts that Miller entered her apartment without a warrant when he put his hand on the door and foot past the door jamb into the apartment. She asserts that the intrusion into her home by Miller violated her reasonable expectation of privacy in her apartment. According to Wilson, she only opened the door as necessary to respond to the knock on the door by the police. In so doing, she claims she did not expose her apartment to public view and did not abandon her right of privacy in her residence.

Wilson recognizes that in *Santana*, the United States Supreme Court held that a person in her open doorway when the police observed her cannot claim a reasonable expectation of privacy. 427 U.S. at 42, 96 S.Ct. 2406. Wilson, however, maintains she was not standing in an open doorway when the police arrived but only opened the door so far as to respond to the knock of the police. When she attempted to terminate the encounter, Miller then intruded into the residence by preventing her from closing the door. Under these circumstances, Wilson suggests, there is no surrender of the reasonable expectation of privacy of the home. *See* *Cummings v. City of Akron*, 418 F.3d 676, 686 (6th Cir. 2005) (holding that opening the door very slightly at the request of the police does not constitute exposing oneself to the public view and therefore there was no surrender of legitimate expectation of privacy).

Wilson also argues that the case *State v. Legg*, 633 N.W.2d 763 (Iowa 2001)—relied on by the State—is distinguishable. In *Legg*, an officer followed the defendant into her garage after she failed to stop for a traffic violation. *Id.* at 765. The *Legg* court found the officer's warrantless entry unreasonably invaded her protected privacy interests. *Id.* at 771–74. But according ***910** to the *Legg* court, the arrest was not unreasonable because the officer had probable cause to arrest her for a serious misdemeanor (OWI). *Id.* at 773. Further, the probable cause to arrest for an OWI was supported by exigent circumstances because Legg could have accessed alcohol in an effort to impair the reliability of test results. *Id.* at 772. Here, Wilson argues that the crime that is advanced to support the warrantless arrest of Wilson was a simple misdemeanor, not a serious misdemeanor. Further, the police identified no exigent circumstances requiring the arrest of Wilson.

Wilson recognizes that the officers were investigating a noise complaint and that Wilson eventually provided a false name to the officers. But Wilson maintains that there was no evidence that the noise ordinance of the City of Ames was violated. Further, according to Wilson, the interference arising from the giving of a false name is a simple misdemeanor. These are not the kind of "grave offenses" that justify a warrantless intrusion of the home.

In support of her claim that the officers lacked a basis for warrantless entry of Wilson's home based on minor crimes, Wilson cites *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732. She also cites one of this court's first search and seizure cases, *McClurg v. Brenton*, we stated: "No amount of incriminating evidence, whatever its source, will supply the place of such warrant. At the closed door of the home, be it palace or hovel, even bloodhounds must wait till the law, by authoritative process, bids it open." 123 Iowa 368, 98 N.W. 881, 882 (1904).

Wilson recognizes that Miller may have had probable cause regarding the noise complaint and the provision of a false

name to the officers. But, according to Wilson, there were no exigent circumstances or other exceptions to the warrant requirement available to justify a warrantless search of Wilson's home for these minor offenses. *See State v. Naujoks*, 637 N.W.2d 101, 108–10 (Iowa 2001).

Finally, Wilson addresses the State's contention that even if the initial entry was unlawful, Wilson committed a new crime when she resisted arrest, and the evidence of drug possession was admissible as a result of the search arising from it. Wilson points us to the language of Iowa Code section 719.1(1)(*a*) (2019), regarding interference with official acts. The language of this Code section specifically requires that in order to commit the crime of interference with official acts, the act must be "within the scope of the lawful duty or authority" of the officer. *Id.* Wilson argues that at the time of the further warrantless intrusion into Wilson's apartment, the officers were not acting "within the scope of the lawful duty or authority" of the police, and as a result, no interference occurred under the statute. This statutory argument appears not to have been raised in *State v. Dawdy*, 533 N.W.2d 551 (Iowa 1995)—another case relied upon by the State.

In the alternative, Wilson asserts that the record lacks substantial evidence that Wilson resisted or obstructed her arrest. Citing *Lawyer v. City of Council Bluffs*, 361 F.3d 1099, 1107 (8th Cir. 2004), Wilson asserts that "the key question is whether the officer's actions were hindered." While Wilson may have been "yelling and screaming" during the arrest, Wilson asserts that objecting or even passively failing to cooperate does not establish interference. Instead, asserts Wilson, there must be evidence of active interference with law enforcement. *See Small v. McCrystal*, 708 F.3d 997, 1004–05 (8th Cir. 2013).

2. *Position of the State.* The State argues that because Wilson opened the door to police when they knocked and stood on the threshold of her home that she had no ***911** reasonable expectation of privacy needed to trigger the special protections afforded to the home under the Fourth Amendment. *See Santana*, 427 U.S. at 42, 96 S.Ct. 2406. The State also finds support in a number of federal appellate court cases. *See United States v. Gori*, 230 F.3d 44, 54 (2d Cir. 2000) (finding when a door is voluntarily opened by an occupant, the Fourth Amendment's protection of the home were not implicated); *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987) (holding the arrest was effected before the agents entered the room, therefore there was no protectable expectation of privacy at the time of the arrest). Because Wilson was in a public place, the State argues, police officers were free to arrest her "for an offense committed or attempted in their presence," including disorderly conduct (the noise emitting from her apartment) and providing false identification information. *See* Iowa Code § 804.7(1); *see also United States v. Watson*, 423 U.S. 411, 423–24, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (holding warrantless public arrests on probable cause do not violate the Fourth Amendment).

In the alternative, the State maintains that even if *Santana* and its progeny do not apply, the officers had probable cause to arrest Wilson for the ongoing crimes of disorderly conduct and interference with official acts. The State claims that *Welsh* applies only to civil infractions and not to crimes that involve imprisonment. The State asserts that the crimes of disorderly conduct, providing false information, and interference with official acts are simple misdemeanors punishable by a fine or imprisonment not to exceed thirty days. *See* Iowa Code §§ 719.1(1)(*a*) (interference with official acts), .1A (false identification); *id.* § 723.4(1) (disorderly conduct); *id.* § 903.1 (simple misdemeanor punishment). As a result, the State claims they are outside the scope of the categorical rule in *Welsh.*

Finally, the State asserts that even if the police entry were unlawful, the evidence need not be suppressed because Wilson committed a new crime when she resisted arrest. In support of its argument, the State cites *Dawdy*, 533 N.W.2d 551. In *Dawdy*, the court declared: "Even though an initial arrest is unlawful, a defendant has no right to resist the arrest. If the defendant does so, probable cause exists for a second arrest for resisting. A search incident to the second arrest is lawful." *Id.* at 555. The rationale of the rule is that a defendant should not be given carte blanche to commit further criminal acts simply because the causal chain began with police misconduct. *See United States v. Bailey*, 691 F.2d 1009, 1016–18 (11th Cir. 1982).

B. Overview of Search and Seizure Principles.

[5] [6] [7] [8] 1. *Invasion of the home: chief evil at the core.* We start with a basic proposition that police

intrusion into the home implicates the very core of the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution.[2] On the eve of the American Revolution, Lord Chief Justice Pratt declared that " '[t]o enter a man's house' without a proper warrant ... is to attack 'the liberty of the subject' and 'destroy ***912** the liberty of the kingdom,' " *Lange v. California*, —— U.S. ——, 141 S. Ct. 2011, 2023, 210 L.Ed.2d 486 (2021) (quoting *Huckle v. Money* (1763) 95 Eng. Rep. 768, 769). The lessons of recent English precedents were incorporated into the United States Constitution through the Fourth Amendment. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585–86, 100 S.Ct. 1371 (quoting *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972)). "Freedom" in one's own "dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.* at 587, 100 S.Ct. 1371 (quoting *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970) (en banc)). At the "very core" of the Fourth Amendment "stands 'the right of a [resident] to retreat into [one's] own home and there be free from unreasonable governmental intrusion.' " *Collins v. Virginia*, —— U.S. ——, 138 S. Ct. 1663, 1670, 201 L.Ed.2d 9 (2018) (quoting *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013)). "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409.

[9] Because interests in privacy and security[3] in the home are so fundamental, the United States Supreme Court has declared that "a firm line" is drawn for search and seizure principals at the entrance to the home. *Payton*, 445 U.S. at 589–90, 100 S.Ct. 1371. "[A]ny physical invasion of the structure of the home, 'by even a fraction of an inch' [i]s too much." *Kyllo v. United States*, 533 U.S. 27, 37, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 512, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). A violation occurs when a lawfully present officer moves a turntable only "a few inches." *Arizona v. Hicks*, 480 U.S. 321, 325, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) ("[T]aking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy ....").

The magisterial terms of the classic search and seizure are based on what we all know: the home is a remarkable place. It is a place of solitude and group activity, love and tears, arguments and forgiveness, grace and selfishness, individual expression and collective decisions, couch surfing and weight lifting, fine wine and bad beer, live goldfish and dead pizza, clothing that is too loose, clothing that is too tight, diaries and personal notes, and prescription drugs and intimate items. It is the place where we learn to crawl and where we want to be when we die, where marriages prosper and fail, where family problems are discussed over the kitchen table, and where the new in-laws come seeking, and sometimes getting, acceptance. And on and on. The precedents demonstrate that ***913** privacy of the home is fortified by strong constitutional protection.

[10] 2. *Jealously guarding the home by drawing lines: trespass and reasonable expectation of privacy.* In *State v. Wright*, we recently noted that a search and seizure violation under article I, section 8 of the Iowa Constitution may occur "when, without a warrant, the officer physically trespasses on protected property." 961 N.W.2d 396, 416 (Iowa 2021). This notion fits comfortably with the declaration of the Supreme Court in *Kyllo v. United States* that an invasion of even an inch in the home is a constitutional violation. 533 U.S. at 37, 121 S.Ct. 2038. In the alternative, we also have recognized that a defendant may establish a legitimate expectation of privacy in the premises searched. *State v. Nitcher*, 720 N.W.2d 547, 553–54 (Iowa 2006); *Naujoks*, 637 N.W.2d at 106–07. Whether a person has a legitimate expectation of privacy is decided on a case-by-case basis. *Naujoks*, 637 N.W.2d at 106–07.

[11] 3. *Exigent circumstances supporting warrantless misdemeanor arrests: rare.* Exigent circumstances have been recognized as one of the "narrowly and jealousy drawn exceptions to the warrant requirement" that applies even to entry of homes. *State v. Day*, 161 Wash.2d 889, 168 P.3d 1265, 1267 (2007) (en banc) (quoting *State v. Stroud*, 106 Wash.2d 144, 720 P.2d 436, 438 (1986) (en banc), *overruled on other grounds by* *State v. Valdez*, 167 Wash.2d 761, 224 P.3d 751 (2009) (en banc)). Exigent circumstances include a risk of serious injury, a threat to officer safety, and a likelihood

of destruction of evidence. *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006).

The United States Supreme Court considered whether the mere fact that a person has committed a misdemeanor permits law enforcement to enter the home without a warrant to arrest the offender in *Welsh*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732—the key United States Supreme Court case in this area. In the *Welsh* case, the state engaged in a warrantless search of a home to arrest an OWI offender. *Id.* at 742–43, 104 S.Ct. 2091. Under Wisconsin law, the OWI offense in *Welsh* was nonjailable. *Id.* at 754, 104 S.Ct. 2091. The central question in *Welsh* was whether the warrantless seizure could be considered justified by exigent circumstances. *Id.* at 750, 104 S.Ct. 2091.

The Supreme Court said no. *Id.* at 753, 104 S.Ct. 2091. The *Welsh* Court noted that in *Payton v. New York*, warrantless arrests of felons was found to be prohibited by the Fourth Amendment absent exigent circumstances. *Id.* at 749, 104 S.Ct. 2091. Such exigent circumstances are not likely to be found where minor crimes are involved. *Id.* at 750, 104 S.Ct. 2091. *Welsh* cited the famous words of Justice Jackson in his concurrence in *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), stating that law enforcement seeking to avoid the warrant requirement in the context of the case involving a minor offense showed

> a shocking lack of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it.... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it.

Welsh, 466 U.S. at 750–51, 104 S.Ct. 2091 (quoting *McDonald*, 335 U.S. at 459, 69 S.Ct. 191 (Jackson, J., concurring)). Justice Jackson further commented in *McDonald* on the lack of a magistrate's involvement ***914** in finding probable cause to search a home, stating: "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." 335 U.S. at 460, 69 S.Ct. 191.

The *Welsh* Court made clear that the minor nature of a crime is a major factor to consider in determining whether exigent circumstances are present. 466 U.S. at 753, 104 S.Ct. 2091. The *Welsh* Court declared that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed." *Id.*

The question of warrantless searches for misdemeanors came back to the United States Supreme Court in *Lange v. California*, ––– U.S. ––––, 141 S. Ct. 2011, 210 L.Ed.2d 486. In *Lange*, an obnoxious driver who was signaled to pull over by the police drove for four seconds to his driveway and went into his attached garage. *Id.* at 2016. The patrol officer followed him into the structure to make an arrest. *Id.* The state defended the warrantless arrest on the ground that the Fourth Amendment always permits law enforcement to enter the home to arrest a fleeing misdemeanor defendant. *Id.*

The Supreme Court rejected the argument. *Id.* at 2018–24. The *Lange* Court noted that the exigent-circumstances exception was designed for situations presenting a "compelling need for official action and no time to secure a warrant." *Id.* at 2017 (quoting *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013)). The

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exigent-circumstances exception, according to the *Lange* Court, was "case specific." *Id.* at 2018.

Each year, millions of Americans are prosecuted for misdemeanors. Many commentators have noted, generally unfavorably, about the presence of misdemeanor crimes in every aspect of the American life. *See, e.g.*, Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611, 629–39 (2014) (outlining and discussing the data demonstrating the dramatic rise in misdemeanors beginning in the mid-1990s in New York City); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. Rev. 971, 1014–19 (2020) (discussing her takeaways from misdemeanor data, including that misdemeanor systems affect a tremendous number of people and disproportionately affect people of color). Given the ubiquity of misdemeanor offenses, a low bar to warrantless entry of the home would give police discretion that resembles a general warrant and is subject to arbitrary enforcement. As noted in a recent federal appellate court case, "[I]f the presumption against warrantless entries stemming from minor crimes is to have any meaning, the exigency must be a serious one in that context." *Smith v. Stoneburner*, 716 F.3d 926, 931 (6th Cir. 2013). Otherwise, simple misdemeanors could lead to millions of home invasions for, say, violation of a noise ordinance. *Bash v. Patrick*, 608 F. Supp. 2d 1285, 1290 (M.D. Ala. 2009).

4. *Does opening the door to the home open the door to a warrantless search of misdemeanants?* An important issue percolating through the search and seizure cases is whether a resident who opens the door to respond to the knock of officers surrenders the privacy protected by the Fourth Amendment or similar state constitutional provisions where the officers have probable cause to believe the resident has committed a misdemeanor.

Recent court cases have focused on *Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300. In *Santana*, police drove to ***915** the home of Santana and found her in the doorway of her home. *Id.* at 40, 96 S.Ct. 2406. When they got out of their vehicles, Santana retreated into her home's vestibule. *Id.* The officers followed her into the house and discovered heroin. *Id.*

The *Santana* Court upheld the warrantless search. *Id.* at 43, 96 S.Ct. 2406. The *Santana* Court emphasized, however, that the case involved "a realistic expectation that any delay would result in destruction of evidence." *Id.* Further, the case involved a felony. *Id.* at 41, 96 S.Ct. 2406. Finally, because of the location of Santana standing in her doorway looking, the incident "ha[d] been set in motion in a public place." *Id.*

Recently, the United States Supreme Court in *Lange* addressed the meaning of *Santana* in the context of whether it should be broadly construed to permit warrantless entry into the home to arrest misdemeanants. *Lange*, 141 S. Ct. at 2019. The *Lange* Court answered the question in the negative. *Id.* at 2019–20. The *Lange* Court emphasized that in *Santana*, the crime that generated the pursuit involved a felony, not a misdemeanor. *Id.* at 2020. Further, the *Lange* Court reasoned that the facts in *Santana* showed exigent circumstances because there was an appreciable risk of destruction of evidence. *Id.* at 2018. But the *Lange* Court held that *Santana* did not authorize warrantless entry to arrest misdemeanants. *Id.* at 2020. According to *Lange*, the members of the Court "are not eager—more the reverse—to print a new permission slip for entering the home without a warrant." *Id.* at 2019.

[12] 5. *New crime exception to the exclusionary rule.* The exception to the exclusionary rule urged by the State in this case is the new crime exception. As explained in *Dawdy*, under the new crime exception: "Even though an initial arrest is unlawful, a defendant has no right to resist the arrest. If the defendant does so, probable cause exists for a second arrest for resisting. A search incident to the second arrest is lawful." *Id.*

The new crime exception has not been universally endorsed. Two cases are worthy of note. In *Jones v. State*, the Delaware Supreme Court rejected application of the new crime exception in a case where the new crime was resisting arrest. 745 A.2d 856, 873–74 (Del. 1999). According

to the *Jones* court, to contend that evidence that was obtained pursuant to an unlawful *Terry*-type stop is admissible because of events that occurred because of the illegal conduct is "a bootstrap analysis." *Id.* at 873. Similarly, in *State v. Beauchesne*, the New Hampshire Supreme Court rejected application of the new crime exception where an officer unlawfully grabbed a defendant who then threw something away. 151 N.H. 803, 868 A.2d 972, 975, 983–84 (2005). Subsequent search of the defendant's person revealed cocaine. *Id.* at 975. The *Beauchesne* court engaged in a balancing analysis, concluding that the interest in enforcing the law regarding resisting arrest had to be weighed against the abuse that could occur if evidence obtained as a result of an illegal arrest was used against a defendant. *Id.* at 983–84.

[13] C. Discussion. We begin by considering whether Wilson had a constitutional interest in protecting her home under the facts presented. We conclude that she did. Wilson only opened the door as necessary to respond to Miller's knock. She did not expose herself or her apartment to the public in plain view. And, she sought to close the door, as she was entitled to do, after an unproductive exchange with Miller. It is hard to see how such conduct surrendered Wilson's expectation of privacy and permitted police to enter her apartment to effect a custodial arrest. *See Morse v. Cloutier*, 869 F.3d 16, 27 (1st Cir. 2017) (finding no surrender of privacy when answering door in response to a ***916** knock); *United States v. Allen*, 813 F.3d 76, 82 (2d Cir. 2016) ("[W]here law enforcement officers have summoned a suspect to the door of his home, and he remains inside the home's confines, they may not effect a warrantless 'across the threshold' arrest in the absence of exigent circumstances."); *LaLonde v. County of Riverside*, 204 F.3d 947, 955 (9th Cir. 2000) (finding no surrender of privacy where officers were standing at the doorway and the defendant was a few feet inside the door answering questions and holding that subsequent crossing of threshold was an illegal entry); *United States v. Berkowitz*, 927 F.2d 1376, 1387 (7th Cir. 1991) (holding that the right to privacy is not surrendered by answering the door in response to a knock and recognizing that the right to close the door to one's dwelling and exclude people from entering is one of the most important elements of personal privacy); *United States v. McCraw*, 920 F.2d at 229 (4th Cir. 1990) (holding that partially opening a door to determine the identity of persons knocking on the door does not surrender privacy in the home); *State v. Maland*, 140 Idaho 817, 103 P.3d 430, 435 (2004) (recognizing that there is no surrender of expectation of privacy when opening a door in response to a knock); *see also* *Kentucky v. King*, 563 U.S. 452, 470, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) ("[E]ven if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.").

We think *Santana* is not applicable in this case. In *Santana*, when the suspect spotted police coming toward her home to conduct an arrest without a warrant, she retreated to the confines of her home. 427 U.S. at 40, 96 S.Ct. 2406. Further, when they arrested the defendant, the defendant was standing on her threshold and was thus in a "public" place where "[s]he was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." *Id.* at 42, 96 S.Ct. 2406. Here, Wilson was not standing outside her home when the encounter began and was not standing on the threshold of her home when she was arrested. She was inside her home and only opened the door a crack when she heard a knock at the door. She then sought to terminate the encounter. We do not believe under these circumstances that Wilson abandoned any privacy of the home beyond what police officers could see through the partially opened doorway.

[14] Further, the reasonable expectation of privacy test is not the only test to determine whether the officers acted unlawfully when they entered the apartment. In *Wright*, we stated that "[w]ithin the meaning of article I, section 8, an officer acts unreasonably when, without a warrant, the officer physically trespasses on protected property." 961 N.W.2d at 416. Here, the officers violated article I, section 8 when they committed a trespass. As Miller's body camera footage clearly shows, he put his foot in the door so Wilson could not close it. He was asked by Wilson to remove his foot from her home six times. When asked to show her a search warrant authorizing his presence at her home, Miller told Wilson "I don't need a warrant." And, finally, the officers proceeded to enter the apartment to arrest Wilson, clearly without her consent.

[15] The next question is whether probable cause that Wilson committed minor crimes was sufficient to justify a warrantless

search of her apartment. We think not. In *Welsh*, the Supreme Court declared it is a categorical rule that only "rarely" should a misdemeanor support the warrantless search of the home. 466 U.S. at 753, 104 S.Ct. 2091. The Supreme Court in *Lange* made it clear that the proportionality ***917** theme in *Welsh* was not limited to civil infractions but to "minor" infractions. *Lange*, 141 S. Ct. at 2020–22.

[16] We do not find that *Santana* supports the State's position. In *Santana*, the entry into the defendant's house was justified by the exigent circumstance of "hot pursuit" of a fleeing felon. *Santana*, 427 U.S. at 42–43, 96 S.Ct. 2406. There was no hot pursuit of a fleeing felon in this case. Wilson committed only a simple misdemeanor. Further, while on appeal, the State claims that there was reasonable suspicion that Wilson was engaged in disorderly conduct, a misdemeanor, that issue was not presented to the district court and is not preserved on appeal. In any event, a different misdemeanor does not change our analysis of *Welsh* and *Santana*.

In short, there were two unlawful invasions of Wilson's home. The first occurred when the officer put his hand on the door and foot past the threshold. The second occurred when Miller and McPherson entered the apartment to make the arrest on Wilson.

Finally, we consider the new crime exception to the exclusionary rule. The new crime exception is a relatively obscure and rarely invoked exception to the exclusionary rule. This court first recognized the exception in 1995 in *Dawdy*, 533 N.W.2d 551. *Dawdy* involved an automobile stop that the defendant alleged was unlawful. *Id.* at 552. In *Dawdy*, this court assumed that the initial stop was unlawful. *Id.* at 553. After the stop, the defendant resisted arrest. *Id.* at 554. The *Dawdy* court declared: "Even though an initial arrest is unlawful, a defendant has no right to resist the arrest. If the defendant does so, probable cause exists for a second arrest for resisting. A search incident to the second arrest is lawful." *Id.* at 555.

The *Dawdy* court stated that strong policy reasons underlie this rule, noting that a contrary rule would virtually immunize a defendant from prosecution for all crimes the defendant might commit that have a sufficient causal connection to the police misconduct. *Id.* Further, extending the fruit of the poisonous tree doctrine to immunize a defendant from arrest for a new crime gives the defendant an intolerable carte blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. *Id.* The *Dawdy* court reasoned that this result is too far-reaching and too high a price for society to pay in order to deter police misconduct. *Id.*

Wilson does not respond to the State's assertion that federal law recognizes a new crime exception to the Fourth Amendment. Further, she does not suggest that a different standard than that found in the federal caselaw should be applied under the Iowa Constitution. Under these circumstances, we use the standards for the new crime exception under federal law, but we reserve the right to apply the exception in a different fashion. *See NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 45 (Iowa 2012); *State v. Oliver*, 812 N.W.2d 636, 650 (Iowa 2012); *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009).

Wilson also advances the statutory argument that her conduct did not fall within the scope of Iowa Code section 719.1(1)(*a*) because her *initial* arrest violated the Fourth Amendment and article I, section 8. Because her arrest was unlawful under the Fourth Amendment and article I, section 8, Wilson reasons that the arrest was not "within the scope of the lawful duty or authority of [the] officer." Iowa Code § 719.1(1)(*a*). She further suggests that, in any event, there was insufficient evidence to support her conviction of interference with official acts.

We first address the question of whether interference with official acts occurred when the officers made an unlawful entry. ***918** The precise question, at least in Wilson's appellate brief, is whether officers are acting "within the scope of their lawful duties and authorities" when they enter an apartment to make an arrest that turns out to be an unconstitutional seizure. This specific question was not addressed in *Dawdy*.

The question is impacted—if not controlled—by *State v. Thomas*, 262 N.W.2d 607 (Iowa 1978). In *Thomas*, this court considered whether a defendant could be convicted of resisting arrest even though the arrests were illegal. *Id.* at 610–11. Assuming the arrest to be illegal, we declared that "we [were] not prepared to endorse or excuse their resistance [ ]hereto." *Id.* at 610. We noted that Iowa had enacted a statute expressly stating that "[a] person is not authorized to use force to resist an arrest, either of [the person's self] or another[,] ... by a peace officer ..., even if the person believes that the arrest is unlawful or the arrest is in fact unlawful." *Id.* at 611 (quoting Iowa Code § 804.12 (Supp. 1977)). Further, we overruled our prior cases regarding common law immunity for resisting unlawful arrests. *Id.* at 610–11. Although the *Thomas* case is not a model of clarity, it appears to endorse the notion that when the statute refers to "legal authority" to make arrests, it does not exclude arrests that later turn out to be unlawful under the seizure principles. *Id.* at 611.

[17] Notwithstanding the above, our examination of the transcript of the hearing on the motion to suppress and the order of the district court reveals that the question of interpretation of the statutory language in Iowa Code section 719.1(1)(*a*) was not presented to or decided by the district court. As a result, the question is not preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537–41 (Iowa 2002).

[18] **[19]** The next question is whether Wilson was actually engaged in interference with official acts by resisting arrest. Examination of the bodycam video footage is the key. At the outset, we note that the standard for establishing a violation of the interference with official acts statute is generally fairly low. As noted in *Lawyer*, "[t]he key question is whether the officer's actions were hindered." 361 F.3d at 1107; *see also State v. Donner*, 243 N.W.2d 850, 864 (Iowa 1976) (stating that evidence is sufficient where the person charged engaged in actual opposition to the officer to the use of actual or constructive force). In our view, the bodycam videos reveal that Wilson did hinder the arrest, not by her language, her calls for a lawyer, or her profanity, but by her twisting and jostling around while officers attempted to place handcuffs on her. It may be that the handcuffs were originally uncomfortably placed, but she was not cooperative as police tried to deal with the situation. It took several minutes to make the arrest. Given the rather low standard for interference with official acts, we conclude that there was sufficient evidence to support her conviction.

[20] We now consider the application of the new crime exception to this case. Based on our review of the record, Wilson threw the vial of cocaine on the floor prior to her resisting arrest. The bodycam video of McPherson shows that he had only approached Wilson and was at the very early stages of subduing her when the drugs were thrown. Prior to throwing of the cocaine, there is no evidence yet that Wilson was resisting arrest. Thus, McPherson saw the drug thrown prior to the new crime of interference with official acts.

Whether the cocaine evidence was discovered prior to Wilson's beginning the new crime of interference as a result of the illegal entry of the officers raises a timing question that has been considered by at least one federal court. In *United States v. Gaines*, the Fourth Circuit Court of Appeals ***919** considered whether the defendant's commission of a crime *after* discovery of a gun by police is admissible under the new crime exception. 668 F.3d 170, 171 (4th Cir. 2012). The court said no. *Id.* at 174. The court employed the attenuation analysis of *Wong Sun v. United States*, 371 U.S. 471, 491–92, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). *Gaines*, 668 F.3d at 173–75. Where the new crime was committed after the discovery of the gun, the new crime did not amount to an intervening act that severed the relationship of the discovery of the gun to prior police illegality. *Id.* at 174–75. As a result, the evidence of the gun was suppressed. *Id.* at 176. A similar approach was applied in *United States v. Camacho*, 661 F.3d 718, 730–31 (1st Cir. 2011) (finding that the exclusionary rule applied where police discovered a gun after an illegal search but before the defendant shoved the police officer), and *United States v. Beauchamp*, 659 F.3d 560, 573–75 (6th Cir. 2011) (excluding evidence discovered by police subsequent to illegal police action but before new crime of attempted flight).

We find the analysis in *Gaines* persuasive. In this case, the white powder and vial were not uncovered as a result of a new crime of interference, but as a result of the original illegal entry. Because the discovery of the throwing of the substance was not linked to the new crime but to the illegal entry, we conclude it should have been suppressed.

This case involved a trial on the minutes. The minutes included reference to the cocaine that should have been excluded. We think the job of excising evidence that should

have been suppressed from the minutes and considering whether there is substantial evidence to support the conviction based on the minutes is a question to be considered by the district court in the first instance. We therefore vacate Wilson's conviction of possession of cocaine and remand the case to the district court for further proceedings.

IV. Conclusion.

For the above reasons, we affirm Wilson's conviction of interference with official acts but vacate Wilson's conviction of possession of cocaine and remand the case to the district court for further proceedings.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All Citations

968 N.W.2d 903

Footnotes

1 We note that the bodycam videos were extremely helpful in determining the facts in this case and prevented the factual disputes in this case from descending into a swearing match between police officers and criminal defendants. As will be apparent in this opinion, the bodycams cut both for and against Wilson. The bodycams support her contention that the warrantless entry into the apartment was unlawful. On the other hand, the bodycams support the State's contention that by hindering her arrest, Wilson interfered with official acts.

2 Wilson brings her search and seizure claim under both the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution. She does not suggest that the Iowa Constitution should be interpreted in a fashion different from the federal framework. We therefore consider both claims but apply the federal framework, reserving the right to apply that framework in a fashion different from federal law.

King v. State, 797 N.W.2d 565, 571 (Iowa 2011); *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009).

3 Wilson does not specifically mention "secure" or "security" in her appellate brief, but both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution utilize the term in their text. The concept of security in search and seizure law historically has not received much attention. That may be beginning to change. *See generally* David H. Gans, *"We Do Not Want to be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 Colum. J. Race & L. 239 (2021) (providing a comprehensive account of the text, history, and original meaning on the Fourteenth Amendment's limitations on policing); Luke M. Milligan, *The Forgotten Right to be Secure*, 65 Hastings L.J. 713 (2014) (discussing the "to be secure" text of the Fourth Amendment and arguing for a broader interpretation as an alternative method to control the costs of regulatory delay).

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IN THE COURT OF APPEALS OF IOWA

No. 19-0749
Filed October 21, 2020

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONCORRION SPATES,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris (trial) and Thomas A. Bitter (second motion for new trial), Judges.

Doncorrion Spates appeals his convictions for murder, attempted murder, and intimidation with a deadly weapon. **CONDITIONALLY AFFIRMED AND REMANDED.**

Martha J. Lucey, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Richard Bennett, Assistant Attorney General, for appellee.

Considered by Tabor, P.J., and May and Greer, JJ.

MAY, Judge.

Doncorrion Spates was convicted of murder in the first degree, attempted murder, and intimidation with a dangerous weapon for his participation in a drive-by shooting. On appeal, Spates argues (1) the jury venire did not represent a fair cross-section of the community; (2) the district court abused its discretion when it denied his motion for new trial based on the weight of the evidence; and (3) the district court erred when it denied a second motion for new trial alleging the jury was not fair and impartial. We conditionally affirm and remand for further proceedings detailed in this opinion.

I. Background.

On July 17, 2016, four men left a get-together and travelled to a local store. Jacques Williamson drove his Chevy Tahoe. His passengers were Spates, Shavondes Martin, and Armand Rollins.

After leaving the store, Williamson drove the Tahoe by a Waterloo residence. Some young men were in the front yard. Martin reached over Williamson and shot out of the driver's window. Shots also rang out from the Tahoe's rear driver's-side window. Three men in the yard were hit by bullets. One of them died from his wounds.

The State charged Williamson, Spates, Martin, and Rollins for the shooting. Williamson pled guilty in exchange for a reduction in charges and his truthful testimony against Spates, Martin, and Rollins. The State tried Spates, Martin, and Rollins together. The jury acquitted Martin and Rollins. But it convicted Spates. He appeals.

II. Analysis.

A. Fair Cross Section

We begin with Spates's claim that the jury venire did not represent a fair cross-section of the community. Because Spates's claim is rooted in the state and federal constitutions, our review is de novo. *State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017). To obtain relief, Spates must establish three elements:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

State v. Lilly, 930 N.W.2d 293, 299 (Iowa 2019) (quoting *Plain*, 898 N.W.2d at 822).

As for the first element, Spates alleges African-Americans were excluded from the jury pool. The State concedes that African-Americans are a "distinctive" group for purposes of this analysis. So Spates established the first element.

With respect to the second element, the district court found representation of African-Americans in the jury venire could not be reliably determined. This is because a large portion of prospective jurors declined to self-identify their race on the jury questionnaire. But we need not explore the second element further because, as will be explained, Spates cannot satisfy the third element.

The third element requires Spates to show that the purported "underrepresentation is due to *systematic* exclusion of the group in the jury-selection process." *Id.* (emphasis added) (citation omitted). "[S]tatistically significant disparities alone are not enough. Rather, [Spates] must tie the disparity to a particular practice." *See id.* at 307.

Here, the jury venire was selected from voter-registration data and Iowa Department of Transportation (DOT) data. Spates suggests a more diverse pool could be drawn if additional sources of data were utilized. That does not seem like an unreasonable proposition. But Spates fails to demonstrate that drawing individuals just from DOT and voter-registration data results in "*systematic* exclusion" of African-Americans. *See id.* at 299 (emphasis added). Instead, he relies on the purported underrepresentation in itself. But, as the State points out, this alone is not sufficient to establish a causal connection. *See id.* at 305–06. Rather, Spates "must show evidence of a statistical disparity over time that is *attributable to the system for compiling jury pools.*" *Plain*, 898 N.W.2d at 824 (emphasis added). Spates has not done so. He does not connect the system to the purported disparity. So his challenge fails on the third element.

As a fallback position, Spates suggests remand is appropriate in light of the supreme court's decisions in *Lilly*, 930 N.W.2d 293, *State v. Veal*, 930 N.W.2d 319 (Iowa 2019), and *State v. Williams*, 929 N.W.2d 621 (Iowa 2019). But Spates does not explain what difference *Lilly*, *Veal*, or *Williams* could make to his case. He claims we should remand "to give" him "an opportunity to develop a record" in light of those decisions. But he does not explain—even in general terms—*how* he would develop the record differently as to any of the three *Plain* elements. And so he does not explain how a different record might support a different outcome.

Because Spates has not explained how remand could help his case, we cannot conclude remand is necessary.

B. Weight of the Evidence

Spates also challenges the district court's denial of his motion for new trial based on the weight of the evidence. Our review is "for an abuse of discretion." *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016). "'A district court abuses its discretion when it exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable[,]' which occurs when the district court decision 'is not supported by substantial evidence or when it is based on an erroneous application of the law.'" *State v. Wickes*, 910 N.W.2d 554, 564 (Iowa 2018) (alteration in original) (citation omitted).

"Under Iowa Rule of Criminal Procedure 2.24(2)(b)(6), [the] district court may grant a new trial '[w]hen the verdict is contrary to law or evidence.'" *Id.* at 570. "A verdict is contrary to the weight of the evidence only when a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.* (internal quotation marks omitted) (quoting *Ary*, 877 N.W.2d at 706). "The district court reaches this determination by applying the weight-of-the-evidence standard, which requires the district court to decide 'whether "a greater amount of credible evidence" suggests the verdict rendered was a miscarriage of justice.'"[1] *Id.* (quoting *Ary*, 877 N.W.2d at 706). As Spates recognizes, "[g]iven this exacting standard, a district court should only grant a motion for new trial 'in the extraordinary case in which the evidence preponderates heavily against the verdict rendered.'" *Quoting Ary*, 877 N.W.2d at 706.

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[1] Spates does not challenge whether the district court applied the weight-of-the-evidence standard.

Spates argues his case warrants a new trial because much of the incriminating evidence against him came from the driver of the Tahoe, Williamson. Williamson's trial testimony varied some from prior depositions. Williamson also admitted he previously lied to investigators. And Spates keys in on Williamson's statements about Spates's exact location in the backseat of the Tahoe. At one point, Williams stated Spates was in the rear passenger-side seat; he later stated Spates moved to the rear driver-side seat, one of the windows from which the shooting occurred.[2] Given these weaknesses, Spates contends Williamson's testimony should be treated as a nullity. *See State v. Smith*, 508 N.W. 2d 101, 103 (Iowa Ct. App. 1993) (noting "testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court" (citation omitted)).

We disagree. True, Williamson's testimony was not totally consistent with his prior statements. But it was not so contradictory as to render his testimony absurd or impossible. *Cf. State v. Lopez*, 633 N.W.2d 774, 785 (Iowa 2001).

Spates also notes a witness testified she saw a black sleeve out of the back window of the vehicle. And Spates wore a white T-shirt the night of the shooting. But we do not find these facts particularly compelling. The witness did not specifically testify that the person with the black sleeve fired a gun. Instead, she testified she saw an arm covered in a black sleeve extended out of the vehicle

[2] The State admitted surveillance video at trial, that Spates now relies upon, presumably showing Spates getting into the rear passenger seat when the men left the store. But on appeal, we cannot play the footage due to apparent damage to the flash drive. However, we note Spates's contention that the footage showed him get into the rear passenger seat is consistent with Williamson's testimony that Spates initially sat in the rear passenger seat.

window and then saw a flash. In fact, she specifically testified she did not see a gun. And it stands to reason that if the shooter was the person with the black sleeve, then the witness might well have seen a gun in the person's hand as their arm fully extended out the window as described by the witness. This leaves open the reasonable inference that Spates, in his white T-shirt—and one of only two people in the back seat—was the shooter instead.

Moreover, during their investigation, police recovered casings in two different calibers. This suggests two different guns were fired. It is not a leap to conclude there were two shooters—one in front and one in back of the Tahoe. This reasonable conclusion is consistent with Williamson's testimony and further implicates Spates as a shooter.

Additionally, we note that, before the group left for the liquor store that evening, Spates briefly got into the backseat of the vehicle. One could infer he placed a weapon in the vehicle with the intention of using it later.

On this record, we cannot conclude the district court abused its discretion in denying the motion for new trial.

C. Impartial Jury

Finally, Spates claims the district court erred in denying his second motion for new trial because he did not receive a fair and impartial trial.

Spates's motion claimed racial animus impacted jury deliberations. Spates is African-American—and his motion alleged jurors made derogatory statements about African-Americans during the deliberation process. In light of *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017), the district court responded by

permitting the parties to question jurors. All twelve jurors testified.[3] Some jurors testified to hearing remarks related to race—but no juror testified that race impacted the verdict. The district court denied Spates's motion for new trial. Spates moved for an expanded ruling explicitly addressing the issue under the Iowa Constitution. The court denied that motion as well.

On appeal, Spates argues he was entitled to a new trial under the federal constitution as interpreted in *Pena-Rodriguez* and its progeny or, alternatively, under "an independent approach under Article 1, section 10 of the Iowa Constitution." The State doubts the district court should have even permitted questioning of the jurors regarding their internal discussions. In any event, the State believes the record supports the district court's denial of Spates's request for a new trial.

We begin our analysis by acknowledging the importance of jurors in our system of justice. We entrust jurors with enormous responsibility—and justifiably so. We believe our jurors are "intelligent and impartial." *Fowle v. Parsons*, 141 N.W. 1049, 1050 (Iowa 1913) (citation omitted). They carry "the common knowledge and experience" of our citizenry. *Id.* (quoting *Moore v. Chicago, R.I. & P. Ry. Co.*, 131 N.W. 30, 32 (Iowa 1911)). And although, "[l]ike all human institutions, the jury system has its flaws, . . . experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense." *Pena-Rodriguez*, 137 S. Ct. at 861.

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[3] The trial judge and judicial assistant also testified. A different judge heard and decided Spates's motions relating to racial statements by jurors.

So "[a] general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations." *Id.* "This principle, itself centuries old, is often referred to as the no-impeachment rule." *Id.* In Iowa, the "no-impeachment rule" is codified in Iowa Rule of Evidence 5.606(b). It generally protects jurors from being called to testify about "any statement made or incident that occurred during the jury's deliberations; the effect of anything upon that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Iowa R. Evid. 5.606(b)(1); *see Doe v. Johnston*, 476 N.W.2d 28, 34 (Iowa 1991) ("To protect the sanctity of the jury room and the deliberative process itself, however, the rule also renders jurors incompetent to testify regarding arguments, votes, and mental reactions occurring during the deliberations.").[4]

But, like all of our laws, rule 5.606(b) is subject to the constitutions of the United States and Iowa. *See* U.S. Const. art. VI, cl. 2. ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); Iowa Const. art. XII, § 1 ("This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void."). If rule 5.606(b)

[4] Rule 5.606(b)(2) does contain some narrow exceptions. It says, "[a] juror may testify about whether: (A) Extraneous prejudicial information was improperly brought to the jury's attention. (B) An outside influence was improperly brought to bear on any juror. (C) A mistake was made in entering the verdict on the verdict form."

Neither Spates nor the State suggests that any of these codified exceptions apply here.

conflicts with the state or federal constitutions, the rule must yield. *See Goodwin v. Iowa Dist. Ct.* , 936 N.W.2d 634, 649 (Iowa 2019) (McDonald, J., specially concurring) (noting "the Iowa Constitution provides any law—without regard to its source—inconsistent therewith 'shall be void'" (quoting Iowa Const. art. XII, § 1)).

And, indeed, both constitutions expressly regulate the conduct of criminal prosecutions. A key example is the right to trial by an impartial jury. It is protected by both the Sixth Amendment to the United States Constitution[5] and Article I, section 10 of the Iowa Constitution.[6] Here are their texts:

Sixth Amendment of the United States Constitution	**Article 1, section 10 of the Iowa Constitution**
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (Emphasis added.)	In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial *by an impartial jury*; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel. (Emphasis added.)

In *Pena-Rodrguez*, the Supreme Court considered whether the Sixth Amendment requires a constitutional exception to no-impeachment rules—like our

[5] The Sixth Amendment applies to the states through the Fourteenth Amendment. *State v. Biddle*, 652 N.W.2d 191, 200 (Iowa 2002).
[6] Article I, section 9 of the Iowa Constitution also assures the right to trial by jury. ("The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.")

rule 5.606(b)—"when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." 137 S. Ct. at 861. The Court answered in the affirmative. *Id.* at 869. The Court explained:

> that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id.

Significantly, though, the *Pena-Rodriguez* Court did not explain "what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias." *Id.* at 870. Nor did the *Pena-Rodriguez* Court "decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted." *Id.* The Court left these issues open for development by the lower courts. As far we can tell, no Iowa appellate court has previously addressed either issue.

And so this case calls on us to plow some fairly new ground. In doing so, we rely heavily on the words of *Pena-Rodriguez* itself. We find useful guidance in this excerpt:

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial

> court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Id. at 869.

We have also considered our courts' traditional vigilance in protecting the right to trial by an impartial jury. Indeed, we believe "[t]he right to a trial by an impartial jury lies at the very heart of due process." *State v. Christensen*, 929 N.W.2d 646, 669 (Iowa 2019) (alteration in original) (quoting *Smith v. Phillips*, 455 U.S. 209, 224 (1982) (Marshall, J., dissenting)); *see also Dixon v. State*, No. 16-2195, 2018 WL 3471833, at *6 (Iowa Ct. App. July 18, 2018) (citation omitted). "To protect the defendant's right to trial by a fair and impartial jury, we have in place an elaborate pretrial process to select and empanel a fair and impartial jury." *Dixon*, 2018 WL 3471833, at *6. But "[w]hen these processes fail and *a* biased juror is seated on the case, the defendant's right to trial by an impartial jury is compromised." *Id.* (emphasis added). To repeat: if even *a single* biased juror is seated, the process has failed. *Id.* "This failure directly affects the defendant's interest in having a fair determination of guilt." *Id.* (citing *Patton v. United States*, 281 U.S. 276, 292 (1930) ("A constitutional jury means twelve [persons] as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person."), *abrogated by Williams v. Florida*, 399 U.S. 78, 91–92 (1970)). "This failure also undermines the public's confidence in the integrity of our trial processes." *Id.*

With these principles in mind, we turn to the practical question that faced the district court, namely, how the court should respond to a motion for new trial

based on evidence of race-related statements by jurors. Like the district court, we think the process should have two parts.

First, the court must decide whether—notwithstanding rule 5.606(b)—*Pena-Rodriguez* requires the court to hear juror testimony about alleged race-related statements. As in the case at bar, we anticipate this determination will depend primarily on affidavits presented by the defendant. The question for the court to decide is whether defendant has presented "compelling evidence" that—if believed—would establish that a "juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." *Pena-Rodriguez*, 137 S. Ct. at 861. In making this evaluation, the court should consider both the content and the context of the alleged statements. *Id.* at 869 (noting the determination depends on "all the circumstances, including the content and timing of the alleged statements").

If the defendant fails to meet this threshold standard, the inquiry ends. But if the defendant meets this standard, then the court should next consider whether a new trial is appropriate.

At this second stage, we anticipate that—as in the case at bar—the district court will conduct an evidentiary hearing at which the defendant and the State may present live testimony from jurors and, if appropriate, other witnesses. Ultimately, the court should make findings of fact—including, whenever appropriate, express credibility determinations—as to (1) whether defendant has proven by "compelling evidence" that—*in fact*—a "juror made clear and explicit statements" relating to race; and (2) if so, the specific content and context of the statements, including both the particular words spoken and any relevant contextual details. Then, based

on the content and context of the statements—including the larger context of the evidence and issues in the trial—the court should determine whether defendant has proved by "compelling evidence" that, in fact, a "juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." *See id.* If so, the court should grant a new trial.

We emphasize that both determinations—whether to receive juror testimony and whether to grant a new trial—should be based on *objective* circumstances, e.g., what was said; how and when it was said; what was said and done before and after; whether and how the statements relate to evidence in the case; whether and how the statements relate to the issues the jury will decide when reaching a verdict. Conversely, neither determination should depend on the jurors' *subjective* evaluations of their own motives—or the motives of other jurors—in voting to convict. On this issue, we follow the example of cases involving the improper introduction of extraneous information, another narrow area in which courts are permitted to consider juror testimony. *See* Iowa R. Evid. 5.606(b)(2)(A). Those cases hold that, although it is proper for the district court to consider jurors' testimony about the introduction of extraneous matter, it is not proper for the court to rely on *jurors' assessments* of the "influence, or lack thereof" of the extraneous matter on their verdict. *See, e.g., Doe v. Johnston*, 476 N.W.2d 28, 34 (Iowa 1991). For example, in *Doe*, there was evidence a juror improperly brought a cartoon into the jury room. *Id.* Our supreme court held it was appropriate to consider the introduction of the cartoon and its relationship—or lack thereof—to the issues at trial. *Id.* But the district court should not have considered juror "affidavits stating that the cartoon in no way influenced their decision." See *id.* This is because the

"[t]he impact of the misconduct is to be judged *objectively* by the trial court in light of all the allowable inferences brought to bear on the trial as a whole." *Id.* at 35 (emphasis added). "[N]either the [c]ourt nor counsel may inquire into *the subjective effect* of these external influences upon particular jurors. Rather, the court must determine whether such extraneous information was prejudicial by determining how it would [a]ffect *an objective 'typical juror.'*" *Urseth v. City of Dayton*, 680 F. Supp. 1084, 1089 (S.D. Ohio 1987) (emphasis added); *see also Christensen*, 929 N.W.2d at 679 ("We also note that our prior cases adopt the view that juror statements about *the impact of* the improperly introduced influence are not admissible on the question of prejudice. What can be considered is *objective facts*—who said what to whom and when and what specifically was injected into the jury discussion. *But juror assessments about the impact* of the improper extraneous influence *are off limits*." (emphasis added) (internal citation omitted)).

Similarly, when deciding whether to grant a new trial on the basis of a juror's race-related statements, the relevant inquiry is not whether jurors *subjectively* believe racial animus impacted their own vote or anyone else's. Instead, the relevant inquiries are (1) what was the content and context of the race-related statements; and (2) viewed objectively, do those statements establish that the speaker's "racial animus was a significant motivating factor in his or her vote to convict." *See Pena-Rodriguez*, 137 S. Ct. at 861. And again we emphasize that—if even one juror voted to convict because of race—a new trial is required. *See Christensen*, 929 N.W.2d at 681 ("A jury consisting of even one biased juror is constitutionally infirm.").

But we also emphasize that, as Justice Appel has noted, *Pena-Rodriguez* offers a "very narrowly crafted" remedy that applies only in "the worst of cases." *State v. Veal*, 930 N.W.2d 319, 345 (Iowa 2019) (Appel, J., dissenting in part and concurring in part). And as the Court said in *Pena-Rodriguez*, "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." 137 S. Ct. at 869. Likewise, not every statement suggesting "racial bias or hostility" will require a new trial under the standard we describe here—which, of course, closely parallels the *Pena-Rodriguez* standard for permitting jurors to testify. *See id.* Rather, at both stages, a race-related comment will only "qualify" if it "tend[s] to show that racial animus was a significant motivating factor in the juror's vote to convict."[7] *See id*

With these principles in mind, we turn to Spates's claim. It requires us to consider two questions. First, did the district court abuse its discretion by permitting Spates to present juror testimony about race-related statements? *Id.* ("Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence."). Second, did the district court abuse its discretion by denying Spates's motion for new trial? *See State v. Webster*, 865 N.W.2d 223, 231 (Iowa 2015)

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[7] We decline Spates's invitation to hold that Article I, section 10 of the Iowa Constitution requires a per se standard under which any "racist statement" by a juror is enough—in itself—to automatically "establish[] that the juror relied upon racial bias or animus in reaching a verdict." As explained, we believe the Sixth Amendment as interpreted in *Pena-Rodriguez* suggests a much more nuanced approach that considers the exact content of juror statements, their context, and their relationship—if any—to the issues the jury must decide. The briefs give us no reason to conclude the Iowa Constitution requires a different approach.

(holding our standard of review for "a denial of a motion for a new trial based upon . . . juror bias [is] for an abuse of discretion"); *see also Christensen*, 929 N.W.2d at 682 (Waterman, J., specially concurring) (noting "[w]e have long held that rulings on motions for new trial or mistrial based on juror misconduct or bias are reviewed for an abuse of discretion" and collecting cases).

We address each question in turn.

1. Decision to hear juror testimony.

The present issues arose when, in July 2018, Spates's counsel filed his second motion for new trial. It alleged that Spates's counsel had "recently spoken with a juror" who advised "that two fellow jurors made comments during deliberations which that juror deemed to be racist." And the motion cited *Pena-Rodriguez.*

Spates also sought permission to subpoena jurors as witnesses for a hearing on his claim. In support, Spates's counsel signed and filed an affidavit. It reported counsel's recollection of a personal conversation with a juror. According to the affidavit, the juror heard two other jurors—one male and the other female—say "derogatory things about black people" during deliberations. It also provided details, including these:

> f. While deliberating over why the defendants left a shell casing left in the vehicle, the male juror stated that they're "all" in gangs and if you do drive by shootings "all the time" you're just used to it, and that was why the defendants overlooked disposing of the casing.
>
> g. During deliberations, the female juror stated that the way black people are raised, "it's o.k. to kill people".

In a thorough, detailed ruling, the district court granted Spates's request for juror testimony. The court reasoned:

> Here, the defendant is African-American, and the allegation is that a juror or jurors said derogatory things about African-American people during deliberations. The specific comments are included in the defendant's filings. *Those comments, if made, tend to show that race played a substantial factor in the deliberation process and in the verdict reached by the jury.* Pursuant to the U.S. Supreme Court's holding in *Pena*, this court is compelled to consider the evidence of the juror's statement and any resulting denial of the defendant's jury trial guarantees. Hearing will be held, and the defendant will be permitted to offer testimony from the juror(s) in question.

(Emphasis added.)

We see no abuse of discretion in this ruling. While the court could have chosen to demand other evidence—such as an affidavit signed by a juror rather than the second-hand recollections of an attorney—the court had discretion to accept counsel's representations. Moreover, the statements detailed in the affidavit drew a direct connection between race-based assumptions and verdict-determining facts, namely, "drive by shootings" and "kill[ing] people." And so, like the district court, we think the statements detailed in the affidavit—"if made"—could very well show that racial animus played a substantial role in one or more jurors' decisions to convict. So we agree the court was "compelled to consider the evidence of the juror's statement[s] and any resulting denial of the defendant's jury trial guarantees." The court was right to hold a hearing and receive juror testimony.

2. Denial of new trial.

In another thorough, detailed ruling, the district court concluded the motion for new trial should be denied. As will be explained, we remand to make additional findings and conclusions in a new ruling on the motion for new trial. But we

emphasize that our disposition of this matter should not be read as a criticism of the district court, which did not have this opinion as guidance. On the contrary, we applaud the district court's thoughtful rulings on the novel issues presented by *Pena-Rodriguez* and the facts of this case.

Still, we conclude the district court's approach differed from the approach we have outlined here. Most significantly, in denying Spates's motion for new trial, the district court relied in part on the jurors' *subjective evaluations* of their own motives. The court noted "[e]very juror confirmed that his/her verdict was unaffected by the defendant's race." As explained, however, we do not believe subjective considerations of this kind should be a part of the analysis. *Cf. Doe*, 476 N.W.2d at 34–35 (holding that district court should not have considered juror affidavits stating that the cartoon in no way influenced their decision in extraneous evidence case).

So we remand for the district court to rule again on the motion for new trial in light of this opinion and the current record. The court's determinations on remand should include:

(1) whether the defendant has proved by "compelling evidence" that a "juror made clear and explicit statements" relating to race;

(2) if so, the specific content of the statements;

(3) all relevant context for the statements; and,

(4) ultimately, whether defendant has proven by "compelling evidence" that a "juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." As explained, this is an objective determination based on

the content and context of the statements, including the evidence and issues in the trial.

If the district court answers this last question in the affirmative, a new trial should be granted. Otherwise, the conviction and sentence will stand.

III. Conclusion.

Spates's challenge to the jury venire fails because he has not established any underrepresentation of a distinctive group in the jury venire was the result of systematic exclusion. The district court did not abuse its discretion when it denied Spates's motion for new trial based on the weight of the evidence. And we remand to the district court to make additional findings as to Spates's second motion for new trial.

CONDITIONALLY AFFIRMED AND REMANDED.

IN THE COURT OF APPEALS OF IOWA

No. 18-1715
Filed November 27, 2019

JENNY FISHEL,
Plaintiff-Appellant,

vs.

MICHAEL REDENBAUGH,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, Christopher L. Bruns, Judge.

Jenny Fishel appeals the district court's refusal to award financial support as part of a civil domestic-abuse protective order. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Robert L. Teig, Cedar Rapids, for appellant.

Michael Redenbaugh, Cedar Rapids, pro se appellee.

Considered by Tabor, P.J., and Mullins and May, JJ.

MAY, Judge.

Can a civil domestic-abuse protective order require the defendant to pay a "sum of money for the separate support and maintenance of the plaintiff" *even if* the defendant is not otherwise obligated to support the plaintiff? *See* Iowa Code § 236.5(1)(b)(6) (2018). The district court answered this question in the negative. We disagree. We remand for further proceedings.

I. Background Facts and Proceedings

Jenny Fishel and Michael Redenbaugh have been in a relationship for twelve years. They have two minor children together. They have never been married.

Fishel claims their relationship has been marred by "an off and on history of physical abuse" by Redenbaugh. Fishel petitioned the district court for a domestic-abuse protective order. She requested several forms of relief, including an order for financial support pursuant to Iowa Code section 236.5(1)(b)(6).

On August 30, 2018, the district court heard Fishel's petition. But the court declined to address Fishel's request for support. Instead, the court advised the parties that if it granted a protective order, then the court would set a separate hearing on the issue of support.

Later the same day, the court entered a protective order in Fishel's favor. It did not award support.

Fishel filed a "motion to reconsider, enlarge, or amend or for new trial." Among other things, Fishel asked the court to award support.

The district court entered an order denying Fishel's motion. It stated in part:

> Section 236.5 does not create an independent right to support. Rather, it gives the court the discretion to award support in certain cases when such support would otherwise be allowed by Iowa and federal law.
>
> The parties to this action have never been married. They were not living together immediately prior to the filing of the petition in this action. Iowa does not recognize claims for palimony. *Slocum v. Hammond*, 346 N.W.2d 485 (Iowa 1984). Thus, there was no legal basis in this case to award alimony or something akin thereto. The fact that the protected party was assaulted by the defendant does not, in and of itself, generate a right to support.

Fishel now appeals. She raises two issues, one procedural and one substantive. On the procedural front, Fishel claims the court was obligated to address the support issue during the August 30 hearing. In Fishel's view, it was improper to postpone the support issue for a separate hearing. As a substantive matter, Fishel claims the district court erred in concluding section 236.5 did not authorize an award of support.

II. Analysis

We begin with Fishel's substantive claim. We review issues of statutory interpretation for correction of errors at law. *In re Chapman*, 890 N.W.2d 853, 856 (Iowa 2017).

Chapter 236 is Iowa's Domestic Abuse Act. Iowa Code § 236.1. A plaintiff "seeking a protective order pursuant to chapter 236 must prove by a preponderance of the evidence that the [defendant] committed 'domestic abuse.'" *Huntley v. Bacon*, No.16-0044, 2016 WL 3271874, at *1 (Iowa Ct. App. June 15, 2016); *see* Iowa Code §§ 236.4(1), .6. "Domestic abuse" occurs when (1) the defendant commits an assault as defined in section 708.1 against the plaintiff; and (2) the defendant and plaintiff are in one of the relationships identified in section 236.2. *See* Iowa Code § 236.2(2); *Clark v. Pauk*, No.14-0575, 2014 WL 6682397,

at *3 (Iowa Ct. App. Nov. 26, 2014) ("'Domestic abuse' means an assault as described in section 708.1 committed by a person in a specified relationship with the victim."). Those qualifying relationships include, among others:

- "family or household members[1] who resided together at the time of the assault," Iowa Code § 236.2(2)(a);
- "separated spouses" who were "not residing together at the time of the assault," *id.* § 236.2(2)(b);
- "persons who are parents of the same minor child, regardless of whether they have been married or have lived together at any time," *id.* § 236.2(2)(c);
- "persons who have been family or household members residing together within the past year and are not residing together at the time of the assault," *id.* § 236.2(2)(d); and
- "persons who are in an intimate relationship," *id.* § 236.2(2)(e).[2]

Section 236.5 governs the contents of the protective order. It provides in part:

> 1. Upon a finding that the defendant has engaged in domestic abuse:
>
> . . . .
>
> b. The court may grant a protective order . . . which may contain but is not limited to any of the following provisions:
>
> . . . .
>
> (6) Unless prohibited pursuant to 28 U.S.C. § 1738B, *that the defendant pay the clerk a sum of money for the separate support and maintenance of the plaintiff* and children under eighteen.

---

[1] "'Family or household members' means spouses, persons cohabiting, parents, or other persons related by consanguinity or affinity." Iowa Code § 236.2(4)(a). But "'[f]amily or household members' does not include children under age eighteen of persons" that otherwise qualify as family or household members. *Id.* § 236.2(4)(b).

[2] An "'[i]ntimate relationship' means significant romantic involvement that need not include sexual involvement." It "does not include casual social relationships or associations in a business or professional capacity." Iowa Code § 236.2(5).

[5]

(Emphasis added.)

The portion quoted just above—subparagraph 6—is at the center of this appeal. In Fishel's view, subparagraph 6 authorized the district court to order "that the defendant" pay a specified "sum of money for the separate support and maintenance of the plaintiff." *Id.* § 236.5(1)(b)(6). An order of support was authorized, Fishel contends, *regardless* of whether *any other* statutory provision—such as section 598.21A—*also* required the defendant to pay her support.

The district court took the opposite view. It concluded section 236.5 "does not create an independent right of support." Rather, in the district court's view, section 236.5 only authorizes an award of support "in certain cases when such support *would otherwise be* allowed by Iowa and federal law." (Emphasis added.)

To decide which view is correct, we apply traditional principles of statutory interpretation. We begin with the understanding that "[i]t is not the function of courts to legislate." *Hansen v. Haugh*, 149 N.W.2d 169, 241 (Iowa 1967). We "are constitutionally prohibited from doing so." *Id.* (citing Iowa Const. art. III., § 1). Instead, "[i]t is our duty to accept the law as the legislative body enacts it." *Holland v. State*, 115 N.W.2d 161, 164 (Iowa 1962). So we apply each statute "as it is written." *Moss v. Williams*, 133 N.W. 120, 121 (Iowa 1911). We find a statute's meaning in the "text of the statute," the "words chosen by the legislature." *State v. Childs*, 898 N.W.2d 177, 184 (Iowa 2017) (citation omitted).

Applying these principles here, we conclude Fishel is correct. The words of subparagraph 6 convey an unambiguous message: In any chapter 236 protective order, the district court may include an express requirement "that the defendant"—the abuser—pay a specified "sum of money for the separate support and

[6]

maintenance of the plaintiff"—the victim. Iowa Code § 236.5(1)(b)(6). Subparagraph 6 does include one exception: It prohibits awards that would violate "28 U.S.C. § 1738B," a federal provision that relates only to child support. But that is the only exception. There is no exception for plaintiffs like Fishel who never married their abusers and, therefore, are not *also* entitled to support under another statutory provision, such as section 598.21A. Indeed, nothing in subparagraph 6—or elsewhere in chapter 236—suggests that support can only be awarded to plaintiffs who are already entitled to support.

So we reject the view that support can only be awarded to a plaintiff for whom support is already available. Rather, based on the unambiguous words of the statute, we conclude that any chapter 236 protective order "*may*" provide for the "separate support and maintenance of the plaintiff," regardless of what other rights the plaintiff might hold. Iowa Code § 236.5(1)(b)(6) (emphasis added); *see* Iowa Code § 236.7(1) (stating "[a] proceeding under this chapter . . . is *in addition to* any other civil or criminal remedy" (emphasis added)).

We emphasize the word "may." In general, "may" authorizes but does not require. *See* Iowa Code § 4.1(30) (comparing "may" with "shall" and "must"). "May" is permissive, not mandatory. *See Clark*, 2014 WL 6682397, at *4. "May" signifies discretion.[3]

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[3] *See, e.g.*, *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 796 (Iowa 2011) ("The district court's reading of § 982.552(c)(2)(i) as permissive, not mandatory, in construction was reinforced in its view by the definition of 'may' in the Iowa Code which states the word 'may' merely invokes a power, not a duty."); *Yohn v. Bd. of Dirs./Clear Lake Sanitary Dist.*, 672 N.W.2d 716, 717 (Iowa 2003) ("Use of the word 'may' in section 358.16 strongly suggests the petitioners have no right to force the limited annexation of their property; this decision rests in the discretion of the district."); *In re Adoption of S.J.D.*, 641 N.W.2d 794, 798 (Iowa

So we certainly do not imply that every protective order *must* provide for support. Rather, we conclude only that the district court has *discretion* to order support regardless of whether the plaintiff is—or is not—also entitled to support under another statute.

Here, the district court concluded it did not have discretion to award support because "support would" not "*otherwise* be allowed" to Fishel under state or federal law. (Emphasis added.) For the reasons explained, we believe this conclusion was erroneous. So we remand for further proceedings consistent with this opinion. *See, e.g.*, *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1999).

We offer no opinion as to whether (1) an award of support is appropriate; or (2) if so, what amount would be appropriate. We commit those questions, in the first instance, to the sound discretion of the district court on remand.

III. Disposition

We affirm the district court's entry of the August 30, 2018 Final Domestic Abuse Protective Order. We remand for further proceedings concerning Fishel's request for support under Iowa Code section 236.5(1)(b)(6).

2002) ("By using the word 'may,' the legislature signaled its intention to place the decision about whether to file an affidavit to reveal or not reveal the biological parent's identity squarely in the discretion of that parent."); *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997) ("The first part of the rule is discretionary: the district court *may* order amendment so as to correct errors or omissions that either are or are not substantive."); *State ex rel. Lankford v. Allbee*, 544 N.W.2d 639, 641 (Iowa 1996) ("Moreover, the use of the word 'may' indicates that the director has discretion to make any of the deductions permitted by section 904.702."); *Feller v. Scott Cty. Civil Serv. Comm'n*, 435 N.W.2d 387, 390 (Iowa Ct. App. 1988) ("The use of the word 'may' in the statute confers a power and places discretion within the one who holds the power.").

In light of this disposition, we conclude Fishel's procedural arguments about the August 30 hearing are moot. So we decline to address them. *See Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015) ("It is our duty on our own motion to refrain from determining moot questions." (citation omitted)).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

E-FILED 2018 JUN 13 8:07 AM POLK - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

ROY KARON, an individual, and PEDDLER, LLC, an Iowa Corporation, Plaintiffs, v. JAMES MITCHELL, an individual, WYNN ELLIOTT, an individual, ELLIOTT AVIATION, a corporation, ELLITOTT AVIATION AIRCRAFT SALES, INC., a corporation, d/b/a ELLIOTTJETS, Defendants.	Case No.: LACL140490 **ORDER ON MOTION TO DISMISS**

Plaintiffs allege Defendants defrauded them into buying an airplane at an excessive price. On February 23, 2018, Plaintiffs filed their petition. On April 13, 2018, Defendants filed a motion to dismiss.

Defendants contend that, as part of the airplane transaction, the parties entered a "purchase agreement." It is attached to Defendants' motion as Exhibit AA.

The purchase agreement includes a "Choice of Law and Jurisdiction" clause. It appears as paragraph 9 on pages 8 and 9.

It states as follows:

9. **CHOICE OF LAW AND JURISDICTION**. Seller and Purchaser agree this Agreement will be deemed made and entered into and will be performed wholly within the State of Kansas, and any dispute arising under, out of, or related in any way to this Agreement, the legal relationship between Seller and Purchaser, or the transaction that is the subject of this Agreement will be governed and construed under the laws of the State of

Kansas, USA, exclusive of conflicts of laws. Any dispute arising under, out of, or related in any way to this Agreement, the legal relationship between Seller and Purchaser or the transaction that is the subject of this Agreement will be adjudicated solely and exclusively in the United States District Court for the State of Kansas, in Wichita, Kansas, or, if that court lacks jurisdiction, Kansas state courts of the 18th Judicial District. Each of the parties consents to the exclusive, personal jurisdiction of these courts and, by signing this Agreement, waives any objection to venue of the Kansas courts.

This clause is referred to here as "Paragraph 9."

Defendants ask this Court to enforce Paragraph 9. Specifically, Defendants ask this Court to: (1.) dismiss with prejudice because, *inter alia*, Plaintiffs' claims are barred by the applicable Kansas statutes of limitation; or, in the alternative, (2.) dismiss without prejudice because Kansas, not Iowa, is the parties' chosen venue.

Plaintiffs respond that, because they have alleged that the purchase agreement was "procured by fraud" and is "void ab initio," the Court cannot enforce Paragraph 9 of the purchase agreement. Plaintiffs emphasize that, because the purchase agreement is not "fully integrated," their claims of fraudulent inducement are not precluded.

Importantly, though, Plaintiffs' fraud claims are about the

transaction as a whole, through which they were allegedly "defrauded out of $400,000." (Plaintiffs' brief, p. 8). Plaintiffs make no claim that *Paragraph 9* was induced by fraud. Nor do Plaintiffs claim that Paragraph 9 *itself* is otherwise invalid.

Thus, the problem before the Court is similar to one that sometimes arises in the context of arbitration: If a contract contains an arbitration clause, and if the plaintiff claims that *the entire contract* was fraudulently induced, should the arbitration clause be enforced?

In *Prima Paint*, the United States Supreme Court held that if the plaintiff's allegations of fraud are directed to *the total transaction*, and not to the arbitration clause *itself*, then the arbitration clause should be enforced. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). Arbitrators, not judges, should resolve allegations of fraud in the transaction "as a whole." *See Madol v. Dan Nelson Auto. Grp.*, 372 F.3d 997, 1000 (8th Cir. 2004) (applying *Prima Paint*).

Iowa has adopted the *Prima Paint* rule. In *Dacres*, our Supreme Court said this:

> We are convinced that the decision of the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), interpreting the Federal Arbitration Act should be applied to claims made under Iowa contract law involving alleged fraud in the inducement. The Court held in that case that, if a claim of fraud in the inducement is aimed at the entire contract and that contract includes an agreement for arbitration of disputes with respect thereto, the fraud claim is properly to be determined by the arbitrators. Only if the fraud in the inducement claim is specifically directed at the arbitration clause itself is it subject to litigation in a court. *Id.* at 404, 87 S.Ct. at 1806, 18 L.Ed.2d at 1277. We approve that rule and apply it in the present case. Because Dacres' allegations of fraud in the inducement go to the entire agreement, they were properly determined by the arbitrators.

Dacres v. John Deere Ins. Co., 548 N.W.2d 576, 578 (Iowa 1996).

Of course, Paragraph 9 is not an arbitration clause. Instead, it contains venue and choice of law provisions. Courts have held, however, that the *Prima Paint* rule applies with equal force to venue and choice of law provisions. *See, e.g., Stamm v. Barclays Bank of New York*, 960 F. Supp. 724, 729 (S.D.N.Y. 1997) (citing *Prima Paint* and other authorities for the proposition that a "claim of fraud in the inducement of a contract is insufficient to invalidate a forum selection or choice-of-law clause found in that contract"). As Magistrate Judge Walters correctly observed, venue and choice of

law provisions "would be practically unenforceable if they could be avoided simply by an allegation of fraud in the inducement." *Morris v. McFarland Clinic P.C.*, No. CIV. 4:03-CV-30439, 2004 WL 306110, at *2 (S.D. Iowa Jan. 29, 2004).

The Court concludes, therefore, that the *Prima Paint* rule should be used to determine whether Paragraph 9 is enforceable. *See Dacres*, 548 N.W.2d at 578. As already explained, Plaintiffs' claims of fraud are about *the transaction as a whole*. Plaintiffs do not claim that Paragraph 9 *itself* was fraudulently induced. Therefore, under the *Prima Paint* rule, Paragraph 9 should be enforced.

The analysis is not over, though. Paragraph 9 includes *both* a selection of Kansas law *and* a selection of Kansas courts. Therefore, in applying Paragraph 9, the Court has two options: (1.) dismiss the case for refiling in Kansas; or (2.) retain the case and apply Kansas law to the substantive issues before the Court, e.g., Defendants' statute of limitations defense.

The parties have not voiced strong opinions about this issue. Although Defendants would prefer the latter option, they acknowledge the Court is free to choose either.

The Court finds guidance in familiar principles of contract interpretation. Whenever practicable, contract language should not be treated as "meaningless." *LDF Food Grp., Inc. v. Liberty Mut. Fire Ins. Co.*, 36 Kan. App. 2d 853, 863, 146 P.3d 1088, 1095 (2006); *accord Kerndt v. Rolling Hills Nat. Bank*, 558 N.W.2d 410, 416 (Iowa 1997). Rather, to the extent practicable, "all provisions" should be "given effect." *Jenkins v. T.S.I. Holdings, Inc.*, 268 Kan. 623, 635, 1 P.3d 891, 899 (2000); *accord Hubbard v. Marsh*, 241 Iowa 163, 168, 40 N.W.2d 488, 491 (1950) (noting it is "fundamental that all words used in written instruments must be given effect, if reasonably possible").

These principles suggest the Court should enforce all of Paragraph 9, not just part of it. That way, the parties will receive the full benefit contemplated by Paragraph 9: Kansas substantive law applied by a Kansas court.

Therefore, the Court **ORDERS** as follows:

1. Defendants' motion to dismiss is **GRANTED** in part and **DENIED** in part.

2. Plaintiffs' petition is **DISMISSED without prejudice**.

3. If Plaintiffs refile this case, they must do so in Kansas federal or state court as required by Paragraph 9 of the purchase agreement.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACL140490	ROY KARON ET AL VS JAMES MITCHELL ET AL

So Ordered

David May, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2018-06-13 08:07:24 page 8 of 8

IN THE COURT OF APPEALS OF IOWA

No. 18-1910
Filed November 6, 2019

IN RE THE MARRIAGE OF ANDREA KAY MANN AND STEVEN ROBERT MANN

Please see note on page 32.

Upon the Petition of
ANDREA KAY MANN,
Petitioner-Appellee,

And Concerning
STEVEN ROBERT MANN,
Respondent-Appellant.

Appeal from the Iowa District Court for Dickinson County, Carl J. Petersen, Judge.

Steven Mann appeals several provisions of the decree dissolving his marriage to Andrea Mann. **AFFIRMED AS MODIFIED.**

Matthew G. Sease of Sease & Wadding, Des Moines, for appellant.

Joseph L. Fitzgibbons of Fitzgibbons Law Firm, L.L.C., Estherville, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and May, JJ.

Please see note on page 32.

VAITHESWARAN, Presiding Judge.

Steven and Andrea Mann married in 2002 and divorced in 2017. The district court denied Steven's request for spousal support and assigned a higher value to his guns and accounts receivable than he requested. On appeal, Steven asks us to revisit both issues.

I. Spousal Support

Steven requested spousal support based on the disparity in his income relative to Andrea's. The district court denied the request, reasoning as follows:

> This is a marriage of 16 years. Steven was married previously. The parties entered the marriage with modest means and now leave the marriage with reasonable assets. Steven['s] employment circumstances have not changed over the period of the marriage. Andrea has improved her earning capacity through her own determination. Steven did not sacrifice for Andrea to improve her earning capacity. Traditional alimony would not be appropriate based upon the length of the marriage and the earning capacity of both parties. Rehabilitative alimony is not appropriate based upon the parties' current employment circumstances. Finally, Steven is not entitled to reimbursement alimony. The record before the Court does not demonstrate that Steven is in need of alimony. Based upon the entire record, the property distribution above and the factors set forth above, the Court concludes alimony shall not be awarded to either party.

On appeal, Steven argues the following factors justified an award of traditional alimony: (A) the length of his marriage, (B) the disparity between his earnings and Andrea's, (C) the fact that most of the couple's assets were accumulated during the marriage, (D) a claimed inequitable property distribution (E) his limited education, (F) the age difference between the parties, and (G) what he characterizes as Andrea's reasonable ability to pay spousal support. *See* Iowa Code § 598.21A(1) (2017) (setting forth the factors for consideration in award of

Please see note on page 32,

spousal support). Based on these factors, he seeks (H) modification of the dissolution decree to grant him spousal support "from anywhere between $2395 per month to $3329 per month." He does not specify a duration.

Although a district court has "considerable latitude" in making an award of spousal support, we will modify the award if "it fails to do equity between the parties." *In re Marriage of Schenkelberg*, 824 N.W2d 481, 486 (Iowa 2012). Our review is de novo. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

A. "[D]uration of the marriage is an important factor for an award of traditional spousal support." *In re Marriage of Gust*, 858 N.W.2d 402, 410 (Iowa 2015). "[M]arriages lasting twenty or more years commonly cross the durational threshold and merit serious consideration for traditional spousal support." *Id.* at 410–11. But the supreme court has approved an award of traditional spousal support in a marriage lasting sixteen years. *Schenkelberg*, 824 N.W.2d at 486–87.

We agree with Steven that the length of the marriage did not preclude an award of traditional spousal support. We turn to the other factors he raises.

B. "The comparative income of the spouses is another factor for the court to consider when evaluating an award of spousal support." *Id.* at 486. "Where there is a substantial disparity, . . . [w]e have . . . approved spousal support where it amounts to approximately thirty-one percent of the difference in annual income between spouses." *Gust*, 858 N.W.2d at 411–12.

Steven and Andrea's earnings differential was significant. Andrea acknowledged as much in confirming the accuracy of figures included in a

Please see note on page 32.

summary prepared by Steven. Those annual earnings figures for the four years preceding the dissolution trial were as follows:

	Andrea	Steve
2017	$118,286	$15,730
2016	$137,734	$8859
2015	$107,129	$14,416
2014	$124,843	$16,847

Although Andrea testified Steven could earn more if he consistently billed his customers, she agreed she handled the bookkeeping for the business until 2017 and there was no issue with billing until then. Notably, Andrea's annual salary would far outstrip Steven's even if we accepted her testimony that he could earn as much as $5000 per month.

The district court found Andrea's annual income was $118,000 and Steven had an earning capacity of $36,000. Joint tax returns support these figures. We conclude the disparity in earnings justified an award of spousal support.

C., D. "All property of the marriage that exists at the time of the divorce, other than gifts and inheritances to one spouse, is divisible property." *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). "Property division and alimony should be considered together in evaluating their individual sufficiency." *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). "Alimony may . . . be awarded to a spouse in addition to the distribution of property." *In re Marriage of Hansen*, 733 N.W.2d 683, 702 (Iowa 2007).

Steven argues the parties accumulated most of their assets during the marriage and "obtained a certain style of living that [he] will have no opportunity to recapture." He also contends, "A majority of the assets awarded to [him] are non-liquid and are nonrevenue generating" and "the assets which are liquid[] are mostly

Please see note on page 32.

retirement accounts which cannot be truly liquidated without severe tax penalties." Finally, he notes that he "was also left with all of the parties' marital debt obligations, totaling $57,000." In his view, these property-related factors support an award of spousal support.

The couple appeared to live a comfortable but not extravagant lifestyle. Although many of the assets allocated to Steven were non-liquid, they were business-related assets that assisted him in generating revenue. In addition, Steven received a non-retirement stock fund with a value of $53,503.05. As for the debt allocation, most if not all the debts were accumulated by Steven in connection with his business or following the couple's separation. *See id.* at 703. Specifically, the parties testified to the following purposes for each debt assigned to Steven:

$14,934	Steve's 2014 Chevrolet Silverado
$6500	Steve's 2004 Chevrolet pickup
$3726	Steve's business credit card
$7499	Joint account with each party holding a credit card; amount reflects accumulated debt on Steven's credit card
$9138	Purchase for Steven's business
$6500	business loan
$2500	Payroll
$4400	Payroll
$1328	Payroll
$1328	Payroll

We conclude the property-related factors Steven raises as grounds for an award of spousal support do not independently support his request for an award.

E. "The educational level of each party at the time of marriage and at the time the action is commenced" is a factor for consideration in the spousal support determination. Iowa Code § 598.21A(1)(d). Steven did not have a college degree.

Please see note on page 32.

He began a lawn-mowing service at the age of twelve and continued in that business, later adding a snow-removal service. For a period of time, he also worked as a bartender. Andrea received a bachelor's degree in business management. She used her degree to pursue promotions within the company employing her. Her education enhanced her earning capacity and is a factor favoring an award of spousal support to Steven. *See In re Marriage of Clinton*, 579 N.W.2d 835, 838 (Iowa Ct. App. 1988).

F. Age is a factor in the spousal support determination. *See* Iowa Code § 598.21A(1)(b). Steven argues his age of forty-nine makes "it difficult for [him] to enter into any new career path." On our de novo review, we disagree. There is no indication Steven lacked the physical or mental ability to begin a new career, if necessary. There also is scant evidence evincing a physical inability to continue in his chosen field. The key roadblock to success was his failure to collect the debts owed to him for services rendered. Shortly before trial, Steven attempted to address the issue by contacting his mother and sister about bookkeeping programs that could be installed on his computer. His age had no bearing on whether he could learn to manage the business side of his operation.

G. Finally, we must consider Andrea's ability to pay spousal support. *See Gust*, 858 N.W.2d at 411–12. Andrea testified her expenses consumed her monthly salary and she had no spare money to pay alimony. On our de novo review, we disagree.

Andrea listed her annual income as less than $80,000. As noted, the district court found she received an annual salary of $118,000, a figure supported by the couple's joint tax returns. Even if we accept Andrea's monthly expense total—an

Please see note on page 32.

amount Steven contends is inflated—her income as found by the district court would more than accommodate a spousal support award. We are left with the disposition.

H. There are three established categories of spousal support—traditional, rehabilitative, and reimbursement. *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). "The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued." *Gust*, 858 N.W.2d at 408 (quoting *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997)). "Traditional spousal support is 'payable for life or so long as a spouse is incapable of self-support.'" *Becker*, 756 N.W.2d at 826 (quoting *In re Marriage of Francis*, 442 N.W.2d 59, 63–64 (Iowa 1989)). "Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting." *Francis*, 442 N.W.2d at 63. "Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses." *Id.* at 64. Finally, reimbursement alimony "is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other." *Id.*

Although our courts have articulated these three categories of spousal support, "there is nothing in our case law that requires us, or any other court in this state, to award only one type of support." *Becker*, 756 N.W.2d at 827. After

Please see note on page 32.

considering the statutory factors, the court may fashion an award that overlaps the lines drawn for each category. *See id.*; *In re Marriage of Witherly*, 867 N.W.2d 856, 859 (Iowa Ct. App. 2015) (characterizing district court's spousal support award as a combination of traditional and rehabilitative alimony).

We conclude Steven is entitled to spousal support based on the length of the marriage and the earnings disparity, together with Andrea's education and her prospect for advancement and enhanced earnings. These are the hallmarks of a traditional alimony award. But we recognize that, unlike many situations in which traditional alimony is awarded, Steven earned income throughout the marriage, in his chosen profession. *Cf. Gust*, 858 N.W.2d at 415 ("As is often the case where traditional spousal support is awarded, Linda spent many years as a stay-at-home mom."); *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993) ("By mutual agreement, Linda spent most of those years out of the work force."). Although Andrea's income was significantly greater than his, he was not incapable of self-support in the long-term. He simply needed time to gain the business acumen Andrea exercised during the marriage. For that reason, the award also bears some resemblance to rehabilitative alimony, which has the purpose of self-sufficiency.

Having concluded Steven is entitled to spousal support, we turn to the amount and duration of the award. For awards of traditional alimony, "[w]here there is a substantial [earnings] disparity," the supreme court has stated, "[W]e do not employ a mathematical formula to determine the amount of spousal support." *Gust*, 858 N.W.2d at 411–12. At the same time, the court has "approved spousal

Please see note on page 32.

support where it amounts to approximately thirty-one percent of the difference in annual income between spouses." *Id.* at 412.

Steven hangs his hat on the thirty-one percent figure in advocating for a $2395 per month to $3329 per month spousal-support award. He does not specify a duration, presumably because traditional alimony awards ordinarily are of unlimited duration. *See id.* at 415. But, as *Gust* noted, they need not be. *Id.* The duration may be limited where, "after a period of rehabilitation and retraining, the income of the payee spouse 'should allow [the payee] to become self-supporting at a standard of living reasonably comparable to the standard of living [the payee] enjoyed during the marriage.'" *Id.* (quoting *Becker*, 756 N.W.2d at 827). And, of course, rehabilitative alimony is of limited duration. *Becker*, 756 N.W.2d at 826.

We conclude Steven should receive $2395 in spousal support per month. The amount represents thirty-one percent of the lowest income difference between Andrea and Steven's earnings in the four years preceding the dissolution trial. We further conclude Andrea shall pay the sum for a period of three years, which should afford Steven sufficient time to learn the bookkeeping and accounting side of his business. The dissolution decree is modified to reflect these changes.

II. Property Distribution

Steven also challenges the district court's property division as inequitable. He specifically questions the valuation of his business accounts receivable and the value of his guns. In relevant part, the district court stated:

> The parties stipulate to a great majority of the assets and liabilities. The only contentious issue is the accounts receivable that have not been billed for several months. Each party asserts a certain dollar figure . . . . A further contention is the value of guns. It appears that Steven is an avid hunter and has a dozen or so firearms. Andrea

Please see note on page 32.

> asserts the value to be $20,000, while Steven asserts the value to be $1000, and presents that a majority of the guns were gifts from his father.

The district court assigned a value of $66,000 to the accounts receivable and a value of $5000 to the guns. Both figures are within the range of evidence. *See Hansen*, 733 N.W.2d at 703 ("Ordinarily, a trial court's valuation will not be disturbed when it is within the range of permissible evidence."); *In re Marriage of Gensley*, 777 N.W.2d 705, 720 (Iowa Ct. App. 2009) (same).

III. Appellate Attorney Fees

Andrea requests appellate attorney fees in an unspecified amount. An award of appellate attorney fees rests within this court's discretion. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Andrea has the financial ability to pay her own attorney fees. Accordingly, we decline her request.

AFFIRMED AS MODIFIED.

Tabor, J., concurs; May, J., concurs in part and dissents in part

MAY, Judge (concurring in part and dissenting in part)

I appreciate the majority's thoughtful, well-written opinion. Like the majority, I would affirm the district court's division of the parties' property. I would also deny appellate attorney fees.

As to spousal support, however, I part ways. For the reasons discussed below, I would affirm the district court's decision to deny support.

As will also be discussed, however, I would not accept Andrea's invitation to consider Steven's domestic abuse as part of our spousal-support analysis. While public policy may support her invitation, our current law does not.[1]

I. Denial of spousal support was an equitable outcome.

I begin with our principles of review. In general, the trial judge is best positioned to understand the parties and their situations. While appellate courts "must rely on the printed record," the trial judge "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) (citation omitted). So we appreciate "the district court is best positioned to evaluate the needs of parties." *In re Marriage of Dirkx*, No. 18-0422, 2019 WL 3330625, at *2 (Iowa Ct. App. July 24, 2019). And we "recognize the [district] court [is] in the best position to balance the parties' needs." *In re Marriage of Gust*, 858 N.W.2d 402, 416 (Iowa 2015).

Because of the district court's superior vantage point, we afford that court "considerable latitude" in fashioning or denying an award of spousal support. *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996). While our review is de

[1] To be clear: I believe the majority agrees with me on the domestic abuse issue. I draw attention to the issue because it seems likely to arise again in the future.

novo, we will disturb the district court's determination "only when there has been a failure to do equity." *Id.*

Latitude means "freedom of action or choice." *Latitude*, Webster's New Collegiate Dictionary (1977). It is akin to discretion. *See In re Marriage of Duffy*, No. 16-1446, 2017 WL 2684352, at *2 (Iowa Ct. App. June 21, 2017) ("We give the [district] court considerable discretion in awarding spousal support and will disturb its award only when the decree fails to do equity."); *In re Marriage of El Krim*, No. 16-1620, 2017 WL 2465806, at *4 (Iowa Ct. App. June 7, 2017) ("[W]e give the district court considerable discretion in awarding spousal support and will disturb an award only if we find it inequitable.'); *In re Marriage of Beauchamp*, No. 15-0107, 2016 WL 4384483, at *3 (Iowa Ct. App. Aug. 17, 2016 ("We give the district court considerable discretion in awarding spousal support and will disturb its award only when the decree fails to do equity.").

Because we afford the district court "considerable latitude" in determining spousal support, *Benson*, 545 N.W.2d at 257, there must often be more than one equitable outcome. There must often be a significant *range* of results, any of which will satisfy equity. If the district court's determination falls within that range—within that "considerable latitude"—we should not conclude there has been a "failure to do equity." *Id.* We should not choose a different result. Instead, we should defer to the district court's determination.

"This deference to the [district] court's determination is decidedly in the public interest." *Id.* "When appellate courts unduly refine these important, but often conjectural, judgment calls, they thereby foster appeals in hosts of cases, at

staggering expense to the parties wholly disproportionate to any benefit they might hope to realize." *Id.*

Applying these principles here, I think denial of spousal support was an equitable result that fell within the district court's "considerable latitude." *Id.* So I would defer to the district court's determination.

Iowa law affords no absolute right to spousal support. *See Gust*, 858 N.W.2d at 408. Rather, "any form of [spousal support] is discretionary with the court." *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). This is clear from the governing statute, Iowa Code section 598.21A (2017), which provides "the court *may*" award spousal support after considering several listed factors. (Emphasis added.)

Cases applying section 598.21A "have identified three kinds of support: traditional, rehabilitative, and reimbursement." *Gust*, 858 N.W.2d at 408. A fourth kind, transitional, is also recognized. *See In re Marriage of Hansen*, No. 17-0889, 2018 WL 4922992, at *16 (Iowa Ct. App. Oct. 10, 2018) (McDonald, J., concurring specially) (collecting cases).

Steven claims he is entitled to traditional support. But I believe the district court correctly rejected this claim. In *Gust*, the court noted "marriages lasting twenty or more years commonly cross the durational threshold and merit serious consideration for traditional spousal support." 858 N.W.2d at 410–11. Steven and Andrea's marriage fell four years short of that "threshold." While this alone does not categorically prohibit Steven's claim, it was not wrong for the district court to find it weighed against him.

More importantly, perhaps, the record does not suggest Steven and Andrea had a "traditional" marriage. By this, I mean it does not appear the parties agreed—tacitly or explicitly—that one spouse would earn money while the other would sacrifice his or her career to stay home with children. *See, e.g.*, *id.* at 410 (noting "when the parties agree a spouse should stay home to raise children, the economic consequences of absence from the workplace can be substantial"); *In re Marriage of Arevalo*, No. 16-1326, 2017 WL 4050076, at *3 (Iowa Ct. App. Sept. 13, 2017) (finding traditional support justified in part because one spouse "spent a number of the marital years outside the workforce, as she cared for the children and the family home"). Rather, as the district court found, Steven and Andrea "shared routine care of the children." And they both participated in the workplace. They both had—and have—ample opportunity for professional achievement.

It is true that Andrea's earning capacity has grown more than Steven's. But this benefits Steven in at least two ways: (1) Andrea's earnings have greatly increased the couple's marital property; as a result, the property division has provided Steven with substantial assets he was unlikely to acquire by himself; and (2) Andrea's income reduces Steven's obligations under the child-support guidelines.

Like the district court, I believe Steven deserves no additional reward for Andrea's professional success. Her success has not been the result of any "sacrifice" by Steven. Instead, the court found, "Andrea has improved her earning capacity through her own determination." As Andrea correctly points out, equity does not require us to "penalize one party's industriousness to subsidize the other party's lack thereof."

For all of those reasons, I do not believe Steven should receive traditional support. Nor is he entitled to any other recognized form of support. For example, rehabilitative support provides support while the dependent spouse receives training or education in an effort to become self-sustaining. *See In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). But Steven does not request an opportunity for re-education or retraining. He has not requested temporary support while he learns the bookkeeping and accounting functions of his business—a business he has pursued since age twelve. So I would decline to award rehabilitative support. *See In re Marriage of Robert*, No. 11-0876, 2012 WL 2122310, at *5–6 (Iowa Ct. App. June 13, 2012) (clarifying a party seeking support bears burden of proving his or her entitlement to support).

Reimbursement support doesn't apply, either. "Reimbursement spousal support allows the spouse receiving the support to share in the other spouse's future earnings in exchange for the receiving spouse's contributions to the source of that income." *Becker*, 756 N.W.2d at 826. Generally, this form of support is awarded when the marriage dissolves shortly after one of the parties obtains a professional degree or licensure with the financial support from the other. *See In re Marriage of Gutcher*, No. 17-0593, 2018 WL 5292082, at *3 (Iowa Ct. App. Nov. 7, 2018); *In re Marriage of Mueller*, No. 01-1742, 2002 WL 31425414, at *3 (Iowa Ct. App. Oct. 30, 2002). That did not occur here.

Finally, I would not grant transitional support. "[T]ransitional support applies where the recipient spouse may already have the capacity for self-support at the time of dissolution but needs short-term assistance in transitioning from married status to single status due to the economic and situational consequences of

dissolution." *See Hansen*, 2018 WL 4922992, at *17. But "[w]here a party does not need assistance in transitioning to single life, then transitional support is not appropriate." *Id.* Here, the district court properly concluded the record "does not demonstrate that Steven is in need of alimony." And Steven does not ask us for "short-term assistance." *See id.* So I would award none.

In short, none of the recognized forms of support applies here. Nor do I see other grounds to conclude the district court failed to do equity. So I would affirm.

II. The district court properly handled evidence of domestic abuse.

Andrea notes that, when she filed her petition for dissolution, she sought and received an injunction "to remove Steven from the marital home and prevent his return" due to an incident of domestic abuse. Indeed, the record suggests Steven abused Andrea on multiple occassions. Andrea argues Steven's history of abuse provides additional justification for the district court's refusal to award spousal support in his favor.

Her argument deserves consideration. As one author observed, "[b]arring [spousal support] to abusers not only denies them the resources to continue their harassment; it also severs post-divorce ties between abuse victims and their tormentors, thereby providing the opportunity of a complete escape from an ongoing debilitating situation." Sarah Burkett, *Finding Fault and Making Reparations: Domestic Violence Conviction As A Limitation on Spousal Support Award*, 22 J. Contemp. Legal Issues 492, 497 (2011).

But Andrea has not cited, and I have not found, any clear authority that domestic abuse is a *permissible* consideration when determining spousal support under Iowa law. Unlike California, Iowa's spousal support statute does not

expressly mention domestic abuse. *Compare* Cal. Fam. Code § 4325 (2017) (providing for a rebuttable presumption against awarding spousal support to spouse convicted within the past five years of domestic abuse perpetrated against the other spouse), *with* Iowa Code § 598.21A(1) (listing factors for consideration when determining support and making no reference to domestic abuse).

Moreover, in *In re Marriage of Goodwin*, our supreme court held domestic abuse could not be considered when dividing marital property, a closely-related issue. 606 N.W.2d 315, 323–24 (Iowa 2000). The *Goodwin* court explained that consideration of domestic abuse "would introduce the concept of fault into a dissolution-of-marriage action, a model rejected by our legislature in 1970." *Id.* In support of its holding, the court cited its 1972 decision in *In re Marriage of Williams*, 199 N.W.2d 339, 341 (Iowa 1972). *Id.* The *Williams* court made it clear that, under Iowa's modern dissolution statute, "the 'guilty party' concept must be eliminated" and, moreover, "evidence of the conduct of the parties insofar as it tends to place fault for the marriage breakdown on either spouse must also be rejected as a factor in awarding property settlement or an allowance of alimony or support money." 199 N.W.2d at 345.

In light of *Goodwin* and *Williams*, it appears Iowa courts are not permitted to consider domestic abuse when deciding spousal support.[2] Indeed, the dissenters in *Williams* raised this very point. Justice Uhlenhopp posited a "not rare" hypothetical in which a "husband in frequent fits of rage visits violent physical

[2] *But cf. Goodwin*, 606 N.W.2d at 322–23 (approving district court's award of "additional assets in lieu of" spousal support "[g]iven the acrimonious relationship between the parties").

abuse on his blameless wife and children, eventually driving them from the home by his cruelty." *Id.* at 349 (Uhlenhopp, J., dissenting). He questioned: "Is the court to be allowed to know these facts along with the other equities in the case in deciding upon a fair adjustment of the parties' financial rights and obligations? Or is the court to function in a vacuum so far as the parties' conduct is concerned?" *Id.*

So I believe the district court properly handled the domestic-abuse evidence in this case. Although the court properly considered domestic abuse in connection with child custody issues, the court did not include domestic abuse in its analysis of spousal support. *See* Iowa Code § 598.41(1)(b) (noting there is a rebuttable presumption against awarding joint custody if there is a history of domestic abuse). This was the proper approach as our law stands.

III. Conclusion.

For the reasons explained above, I conclude the district court's denial of spousal support was not inequitable. As to that issue, I respectfully dissent. I concur in all other parts of the majority opinion.

Writing Samples

for

David May

Majority opinion in *Fishel v. Redenbaugh*....2-9

Order in *Karon et al. v. Mitchell et al.*....10-17

Dissenting opinion in In re *Marriage of Mann*....28-35

Please note: To provide context, I have also included the majority opinion from In re *Marriage of Mann* as pages 18 through 27. To be clear, though, those pages were written by another judge; they are not my work product.

IN THE COURT OF APPEALS OF IOWA

No. 18-1715
Filed November 27, 2019

JENNY FISHEL,
Plaintiff-Appellant,

vs.

MICHAEL REDENBAUGH,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, Christopher L. Bruns, Judge.

Jenny Fishel appeals the district court's refusal to award financial support as part of a civil domestic-abuse protective order. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Robert L. Teig, Cedar Rapids, for appellant.

Michael Redenbaugh, Cedar Rapids, pro se appellee.

Considered by Tabor, P.J., and Mullins and May, JJ.

MAY, Judge.

Can a civil domestic-abuse protective order require the defendant to pay a "sum of money for the separate support and maintenance of the plaintiff" *even if* the defendant is not otherwise obligated to support the plaintiff? *See* Iowa Code § 236.5(1)(b)(6) (2018). The district court answered this question in the negative. We disagree. We remand for further proceedings.

I. Background Facts and Proceedings

Jenny Fishel and Michael Redenbaugh have been in a relationship for twelve years. They have two minor children together. They have never been married.

Fishel claims their relationship has been marred by "an off and on history of physical abuse" by Redenbaugh. Fishel petitioned the district court for a domestic-abuse protective order. She requested several forms of relief, including an order for financial support pursuant to Iowa Code section 236.5(1)(b)(6).

On August 30, 2018, the district court heard Fishel's petition. But the court declined to address Fishel's request for support. Instead, the court advised the parties that if it granted a protective order, then the court would set a separate hearing on the issue of support.

Later the same day, the court entered a protective order in Fishel's favor. It did not award support.

Fishel filed a "motion to reconsider, enlarge, or amend or for new trial." Among other things, Fishel asked the court to award support.

The district court entered an order denying Fishel's motion. It stated in part:

> Section 236.5 does not create an independent right to support. Rather, it gives the court the discretion to award support in certain cases when such support would otherwise be allowed by Iowa and federal law.
>
> The parties to this action have never been married. They were not living together immediately prior to the filing of the petition in this action. Iowa does not recognize claims for palimony. *Slocum v. Hammond*, 346 N.W.2d 485 (Iowa 1984). Thus, there was no legal basis in this case to award alimony or something akin thereto. The fact that the protected party was assaulted by the defendant does not, in and of itself, generate a right to support.

Fishel now appeals. She raises two issues, one procedural and one substantive. On the procedural front, Fishel claims the court was obligated to address the support issue during the August 30 hearing. In Fishel's view, it was improper to postpone the support issue for a separate hearing. As a substantive matter, Fishel claims the district court erred in concluding section 236.5 did not authorize an award of support.

II. Analysis

We begin with Fishel's substantive claim. We review issues of statutory interpretation for correction of errors at law. *In re Chapman*, 890 N.W.2d 853, 856 (Iowa 2017).

Chapter 236 is Iowa's Domestic Abuse Act. Iowa Code § 236.1. A plaintiff "seeking a protective order pursuant to chapter 236 must prove by a preponderance of the evidence that the [defendant] committed 'domestic abuse.'" *Huntley v. Bacon*, No.16-0044, 2016 WL 3271874, at *1 (Iowa Ct. App. June 15, 2016); *see* Iowa Code §§ 236.4(1), .6. "Domestic abuse" occurs when (1) the defendant commits an assault as defined in section 708.1 against the plaintiff; and (2) the defendant and plaintiff are in one of the relationships identified in section 236.2. *See* Iowa Code § 236.2(2); *Clark v. Pauk*, No.14-0575, 2014 WL 6682397,

at *3 (Iowa Ct. App. Nov. 26, 2014) ("'Domestic abuse' means an assault as described in section 708.1 committed by a person in a specified relationship with the victim."). Those qualifying relationships include, among others:

- "family or household members[1] who resided together at the time of the assault," Iowa Code § 236.2(2)(a);
- "separated spouses" who were "not residing together at the time of the assault," *id.* § 236.2(2)(b);
- "persons who are parents of the same minor child, regardless of whether they have been married or have lived together at any time," *id.* § 236.2(2)(c);
- "persons who have been family or household members residing together within the past year and are not residing together at the time of the assault," *id.* § 236.2(2)(d); and
- "persons who are in an intimate relationship," *id.* § 236.2(2)(e).[2]

Section 236.5 governs the contents of the protective order. It provides in part:

> 1. Upon a finding that the defendant has engaged in domestic abuse:
>
> . . . .
>
> b. The court may grant a protective order . . . which may contain but is not limited to any of the following provisions:
>
> . . . .
>
> (6) Unless prohibited pursuant to 28 U.S.C. § 1738B, *that the defendant pay the clerk a sum of money for the separate support and maintenance of the plaintiff* and children under eighteen.

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[1] "'Family or household members' means spouses, persons cohabiting, parents, or other persons related by consanguinity or affinity." Iowa Code § 236.2(4)(a). But "'[f]amily or household members' does not include children under age eighteen of persons" that otherwise qualify as family or household members. *Id.* § 236.2(4)(b).

[2] An "'[i]ntimate relationship' means significant romantic involvement that need not include sexual involvement." It "does not include casual social relationships or associations in a business or professional capacity." Iowa Code § 236.2(5).

(Emphasis added.)

The portion quoted just above—subparagraph 6—is at the center of this appeal. In Fishel's view, subparagraph 6 authorized the district court to order "that the defendant" pay a specified "sum of money for the separate support and maintenance of the plaintiff." *Id.* § 236.5(1)(b)(6). An order of support was authorized, Fishel contends, *regardless* of whether *any other* statutory provision—such as section 598.21A—*also* required the defendant to pay her support.

The district court took the opposite view. It concluded section 236.5 "does not create an independent right of support." Rather, in the district court's view, section 236.5 only authorizes an award of support "in certain cases when such support *would otherwise be* allowed by Iowa and federal law." (Emphasis added.)

To decide which view is correct, we apply traditional principles of statutory interpretation. We begin with the understanding that "[i]t is not the function of courts to legislate." *Hansen v. Haugh*, 149 N.W.2d 169, 241 (Iowa 1967). We "are constitutionally prohibited from doing so." *Id.* (citing Iowa Const. art. III., § 1). Instead, "[i]t is our duty to accept the law as the legislative body enacts it." *Holland v. State*, 115 N.W.2d 161, 164 (Iowa 1962). So we apply each statute "as it is written." *Moss v. Williams*, 133 N.W. 120, 121 (Iowa 1911). We find a statute's meaning in the "text of the statute," the "words chosen by the legislature." *State v. Childs*, 898 N.W.2d 177, 184 (Iowa 2017) (citation omitted).

Applying these principles here, we conclude Fishel is correct. The words of subparagraph 6 convey an unambiguous message: In any chapter 236 protective order, the district court may include an express requirement "that the defendant"—the abuser—pay a specified "sum of money for the separate support and

maintenance of the plaintiff"—the victim. Iowa Code § 236.5(1)(b)(6). Subparagraph 6 does include one exception: It prohibits awards that would violate "28 U.S.C. § 1738B," a federal provision that relates only to child support. But that is the only exception. There is no exception for plaintiffs like Fishel who never married their abusers and, therefore, are not *also* entitled to support under another statutory provision, such as section 598.21A. Indeed, nothing in subparagraph 6—or elsewhere in chapter 236—suggests that support can only be awarded to plaintiffs who are already entitled to support.

So we reject the view that support can only be awarded to a plaintiff for whom support is already available. Rather, based on the unambiguous words of the statute, we conclude that any chapter 236 protective order "*may*" provide for the "separate support and maintenance of the plaintiff," regardless of what other rights the plaintiff might hold. Iowa Code § 236.5(1)(b)(6) (emphasis added); *see* Iowa Code § 236.7(1) (stating "[a] proceeding under this chapter . . . is *in addition to* any other civil or criminal remedy" (emphasis added)).

We emphasize the word "may." In general, "may" authorizes but does not require. *See* Iowa Code § 4.1(30) (comparing "may" with "shall" and "must"). "May" is permissive, not mandatory. *See Clark*, 2014 WL 6682397, at *4. "May" signifies discretion.[3]

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[3] *See, e.g.*, *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 796 (Iowa 2011) ("The district court's reading of § 982.552(c)(2)(i) as permissive, not mandatory, in construction was reinforced in its view by the definition of 'may' in the Iowa Code which states the word 'may' merely invokes a power, not a duty."); *Yohn v. Bd. of Dirs./Clear Lake Sanitary Dist.*, 672 N.W.2d 716, 717 (Iowa 2003) ("Use of the word 'may' in section 358.16 strongly suggests the petitioners have no right to force the limited annexation of their property; this decision rests in the discretion of the district."); *In re Adoption of S.J.D.*, 641 N.W.2d 794, 798 (Iowa

So we certainly do not imply that every protective order *must* provide for support. Rather, we conclude only that the district court has *discretion* to order support regardless of whether the plaintiff is—or is not—also entitled to support under another statute.

Here, the district court concluded it did not have discretion to award support because "support would" not "*otherwise* be allowed" to Fishel under state or federal law. (Emphasis added.) For the reasons explained, we believe this conclusion was erroneous. So we remand for further proceedings consistent with this opinion. *See, e.g.*, *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1999).

We offer no opinion as to whether (1) an award of support is appropriate; or (2) if so, what amount would be appropriate. We commit those questions, in the first instance, to the sound discretion of the district court on remand.

III. Disposition

We affirm the district court's entry of the August 30, 2018 Final Domestic Abuse Protective Order. We remand for further proceedings concerning Fishel's request for support under Iowa Code section 236.5(1)(b)(6).

2002) ("By using the word 'may,' the legislature signaled its intention to place the decision about whether to file an affidavit to reveal or not reveal the biological parent's identity squarely in the discretion of that parent."); *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997) ("The first part of the rule is discretionary: the district court *may* order amendment so as to correct errors or omissions that either are or are not substantive."); *State ex rel. Lankford v. Allbee*, 544 N.W.2d 639, 641 (Iowa 1996) ("Moreover, the use of the word 'may' indicates that the director has discretion to make any of the deductions permitted by section 904.702."); *Feller v. Scott Cty. Civil Serv. Comm'n*, 435 N.W.2d 387, 390 (Iowa Ct. App. 1988) ("The use of the word 'may' in the statute confers a power and places discretion within the one who holds the power.").

In light of this disposition, we conclude Fishel's procedural arguments about the August 30 hearing are moot. So we decline to address them. *See Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015) ("It is our duty on our own motion to refrain from determining moot questions." (citation omitted)).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

ROY KARON, an individual, and PEDDLER, LLC, an Iowa Corporation,

Plaintiffs,

v.

JAMES MITCHELL, an individual, WYNN ELLIOTT, an individual, ELLIOTT AVIATION, a corporation, ELLITOTT AVIATION AIRCRAFT SALES, INC., a corporation, d/b/a ELLIOTTJETS,

Defendants.

Case No.: LACL140490

ORDER ON MOTION TO DISMISS

Plaintiffs allege Defendants defrauded them into buying an airplane at an excessive price. On February 23, 2018, Plaintiffs filed their petition. On April 13, 2018, Defendants filed a motion to dismiss.

Defendants contend that, as part of the airplane transaction, the parties entered a "purchase agreement." It is attached to Defendants' motion as Exhibit AA.

The purchase agreement includes a "Choice of Law and Jurisdiction" clause. It appears as paragraph 9 on pages 8 and 9.

It states as follows:

9. **CHOICE OF LAW AND JURISDICTION**. Seller and Purchaser agree this Agreement will be deemed made and entered into and will be performed wholly within the State of Kansas, and any dispute arising under, out of, or related in any way to this Agreement, the legal relationship between Seller and Purchaser, or the transaction that is the subject of this Agreement will be governed and construed under the laws of the State of

Kansas, USA, exclusive of conflicts of laws. Any dispute arising under, out of, or related in any way to this Agreement, the legal relationship between Seller and Purchaser or the transaction that is the subject of this Agreement will be adjudicated solely and exclusively in the United States District Court for the State of Kansas, in Wichita, Kansas, or, if that court lacks jurisdiction, Kansas state courts of the 18th Judicial District. Each of the parties consents to the exclusive, personal jurisdiction of these courts and, by signing this Agreement, waives any objection to venue of the Kansas courts.

This clause is referred to here as "Paragraph 9."

Defendants ask this Court to enforce Paragraph 9. Specifically, Defendants ask this Court to: (1.) dismiss with prejudice because, *inter alia*, Plaintiffs' claims are barred by the applicable Kansas statutes of limitation; or, in the alternative, (2.) dismiss without prejudice because Kansas, not Iowa, is the parties' chosen venue.

Plaintiffs respond that, because they have alleged that the purchase agreement was "procured by fraud" and is "void ab initio," the Court cannot enforce Paragraph 9 of the purchase agreement. Plaintiffs emphasize that, because the purchase agreement is not "fully integrated," their claims of fraudulent inducement are not precluded.

Importantly, though, Plaintiffs' fraud claims are about the

transaction as a whole, through which they were allegedly "defrauded out of $400,000." (Plaintiffs' brief, p. 8). Plaintiffs make no claim that *Paragraph 9* was induced by fraud. Nor do Plaintiffs claim that Paragraph 9 *itself* is otherwise invalid.

Thus, the problem before the Court is similar to one that sometimes arises in the context of arbitration: If a contract contains an arbitration clause, and if the plaintiff claims that *the entire contract* was fraudulently induced, should the arbitration clause be enforced?

In *Prima Paint*, the United States Supreme Court held that if the plaintiff's allegations of fraud are directed to *the total transaction*, and not to the arbitration clause *itself*, then the arbitration clause should be enforced. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). Arbitrators, not judges, should resolve allegations of fraud in the transaction "as a whole." *See Madol v. Dan Nelson Auto. Grp.*, 372 F.3d 997, 1000 (8th Cir. 2004) (applying *Prima Paint*).

Iowa has adopted the *Prima Paint* rule. In *Dacres*, our Supreme Court said this:

> We are convinced that the decision of the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), interpreting the Federal Arbitration Act should be applied to claims made under Iowa contract law involving alleged fraud in the inducement. The Court held in that case that, if a claim of fraud in the inducement is aimed at the entire contract and that contract includes an agreement for arbitration of disputes with respect thereto, the fraud claim is properly to be determined by the arbitrators. Only if the fraud in the inducement claim is specifically directed at the arbitration clause itself is it subject to litigation in a court. *Id.* at 404, 87 S.Ct. at 1806, 18 L.Ed.2d at 1277. We approve that rule and apply it in the present case. Because Dacres' allegations of fraud in the inducement go to the entire agreement, they were properly determined by the arbitrators.

Dacres v. John Deere Ins. Co., 548 N.W.2d 576, 578 (Iowa 1996).

Of course, Paragraph 9 is not an arbitration clause. Instead, it contains venue and choice of law provisions. Courts have held, however, that the *Prima Paint* rule applies with equal force to venue and choice of law provisions. *See, e.g., Stamm v. Barclays Bank of New York*, 960 F. Supp. 724, 729 (S.D.N.Y. 1997) (citing *Prima Paint* and other authorities for the proposition that a "claim of fraud in the inducement of a contract is insufficient to invalidate a forum selection or choice-of-law clause found in that contract"). As Magistrate Judge Walters correctly observed, venue and choice of

law provisions "would be practically unenforceable if they could be avoided simply by an allegation of fraud in the inducement." *Morris v. McFarland Clinic P.C.*, No. CIV. 4:03-CV-30439, 2004 WL 306110, at *2 (S.D. Iowa Jan. 29, 2004).

The Court concludes, therefore, that the *Prima Paint* rule should be used to determine whether Paragraph 9 is enforceable. *See Dacres*, 548 N.W.2d at 578. As already explained, Plaintiffs' claims of fraud are about *the transaction as a whole*. Plaintiffs do not claim that Paragraph 9 *itself* was fraudulently induced. Therefore, under the *Prima Paint* rule, Paragraph 9 should be enforced.

The analysis is not over, though. Paragraph 9 includes *both* a selection of Kansas law *and* a selection of Kansas courts. Therefore, in applying Paragraph 9, the Court has two options: (1.) dismiss the case for refiling in Kansas; or (2.) retain the case and apply Kansas law to the substantive issues before the Court, e.g., Defendants' statute of limitations defense.

The parties have not voiced strong opinions about this issue. Although Defendants would prefer the latter option, they acknowledge the Court is free to choose either.

The Court finds guidance in familiar principles of contract interpretation. Whenever practicable, contract language should not be treated as "meaningless." *LDF Food Grp., Inc. v. Liberty Mut. Fire Ins. Co.*, 36 Kan. App. 2d 853, 863, 146 P.3d 1088, 1095 (2006); *accord Kerndt v. Rolling Hills Nat. Bank*, 558 N.W.2d 410, 416 (Iowa 1997). Rather, to the extent practicable, "all provisions" should be "given effect." *Jenkins v. T.S.I. Holdings, Inc.*, 268 Kan. 623, 635, 1 P.3d 891, 899 (2000); *accord Hubbard v. Marsh*, 241 Iowa 163, 168, 40 N.W.2d 488, 491 (1950) (noting it is "fundamental that all words used in written instruments must be given effect, if reasonably possible").

These principles suggest the Court should enforce all of Paragraph 9, not just part of it. That way, the parties will receive the full benefit contemplated by Paragraph 9: Kansas substantive law applied by a Kansas court.

Therefore, the Court **ORDERS** as follows:

1. Defendants' motion to dismiss is **GRANTED** in part and **DENIED** in part.

2. Plaintiffs' petition is **DISMISSED without prejudice**.

3. If Plaintiffs refile this case, they must do so in Kansas federal or state court as required by Paragraph 9 of the purchase agreement.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACL140490	ROY KARON ET AL VS JAMES MITCHELL ET AL

So Ordered

David May, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2018-06-13 08:07:24 page 8 of 8

Please see note on page 1.

IN THE COURT OF APPEALS OF IOWA

No. 18-1910
Filed November 6, 2019

IN RE THE MARRIAGE OF ANDREA KAY MANN AND STEVEN ROBERT MANN

Upon the Petition of
ANDREA KAY MANN,
Petitioner-Appellee,

And Concerning
STEVEN ROBERT MANN,
Respondent-Appellant.

Appeal from the Iowa District Court for Dickinson County, Carl J. Petersen, Judge.

Steven Mann appeals several provisions of the decree dissolving his marriage to Andrea Mann. **AFFIRMED AS MODIFIED.**

Matthew G. Sease of Sease & Wadding, Des Moines, for appellant.

Joseph L. Fitzgibbons of Fitzgibbons Law Firm, L.L.C., Estherville, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and May, JJ.

Please see note on page 1.

VAITHESWARAN, Presiding Judge.

Steven and Andrea Mann married in 2002 and divorced in 2017. The district court denied Steven's request for spousal support and assigned a higher value to his guns and accounts receivable than he requested. On appeal, Steven asks us to revisit both issues.

I. Spousal Support

Steven requested spousal support based on the disparity in his income relative to Andrea's. The district court denied the request, reasoning as follows:

> This is a marriage of 16 years. Steven was married previously. The parties entered the marriage with modest means and now leave the marriage with reasonable assets. Steven['s] employment circumstances have not changed over the period of the marriage. Andrea has improved her earning capacity through her own determination. Steven did not sacrifice for Andrea to improve her earning capacity. Traditional alimony would not be appropriate based upon the length of the marriage and the earning capacity of both parties. Rehabilitative alimony is not appropriate based upon the parties' current employment circumstances. Finally, Steven is not entitled to reimbursement alimony. The record before the Court does not demonstrate that Steven is in need of alimony. Based upon the entire record, the property distribution above and the factors set forth above, the Court concludes alimony shall not be awarded to either party.

On appeal, Steven argues the following factors justified an award of traditional alimony: (A) the length of his marriage, (B) the disparity between his earnings and Andrea's, (C) the fact that most of the couple's assets were accumulated during the marriage, (D) a claimed inequitable property distribution (E) his limited education, (F) the age difference between the parties, and (G) what he characterizes as Andrea's reasonable ability to pay spousal support. *See* Iowa Code § 598.21A(1) (2017) (setting forth the factors for consideration in award of

Please see note on page 1.

spousal support). Based on these factors, he seeks (H) modification of the dissolution decree to grant him spousal support "from anywhere between $2395 per month to $3329 per month." He does not specify a duration.

Although a district court has "considerable latitude" in making an award of spousal support, we will modify the award if "it fails to do equity between the parties." *In re Marriage of Schenkelberg*, 824 N.W2d 481, 486 (Iowa 2012). Our review is de novo. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

A. "[D]uration of the marriage is an important factor for an award of traditional spousal support." *In re Marriage of Gust*, 858 N.W.2d 402, 410 (Iowa 2015). "[M]arriages lasting twenty or more years commonly cross the durational threshold and merit serious consideration for traditional spousal support." *Id.* at 410–11. But the supreme court has approved an award of traditional spousal support in a marriage lasting sixteen years. *Schenkelberg*, 824 N.W.2d at 486–87.

We agree with Steven that the length of the marriage did not preclude an award of traditional spousal support. We turn to the other factors he raises.

B. "The comparative income of the spouses is another factor for the court to consider when evaluating an award of spousal support." *Id.* at 486. "Where there is a substantial disparity, . . . [w]e have . . . approved spousal support where it amounts to approximately thirty-one percent of the difference in annual income between spouses." *Gust*, 858 N.W.2d at 411–12.

Steven and Andrea's earnings differential was significant. Andrea acknowledged as much in confirming the accuracy of figures included in a

Please see note on page 1.

[4]

summary prepared by Steven. Those annual earnings figures for the four years preceding the dissolution trial were as follows:

	Andrea	Steve
2017	$118,286	$15,730
2016	$137,734	$8859
2015	$107,129	$14,416
2014	$124,843	$16,847

Although Andrea testified Steven could earn more if he consistently billed his customers, she agreed she handled the bookkeeping for the business until 2017 and there was no issue with billing until then. Notably, Andrea's annual salary would far outstrip Steven's even if we accepted her testimony that he could earn as much as $5000 per month.

The district court found Andrea's annual income was $118,000 and Steven had an earning capacity of $36,000. Joint tax returns support these figures. We conclude the disparity in earnings justified an award of spousal support.

C., D. "All property of the marriage that exists at the time of the divorce, other than gifts and inheritances to one spouse, is divisible property." *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). "Property division and alimony should be considered together in evaluating their individual sufficiency." *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). "Alimony may . . . be awarded to a spouse in addition to the distribution of property." *In re Marriage of Hansen*, 733 N.W.2d 683, 702 (Iowa 2007).

Steven argues the parties accumulated most of their assets during the marriage and "obtained a certain style of living that [he] will have no opportunity to recapture." He also contends, "A majority of the assets awarded to [him] are non-liquid and are nonrevenue generating" and "the assets which are liquid[] are mostly

retirement accounts which cannot be truly liquidated without severe tax penalties." Finally, he notes that he "was also left with all of the parties' marital debt obligations, totaling $57,000." In his view, these property-related factors support an award of spousal support.

The couple appeared to live a comfortable but not extravagant lifestyle. Although many of the assets allocated to Steven were non-liquid, they were business-related assets that assisted him in generating revenue. In addition, Steven received a non-retirement stock fund with a value of $53,503.05. As for the debt allocation, most if not all the debts were accumulated by Steven in connection with his business or following the couple's separation. *See id.* at 703. Specifically, the parties testified to the following purposes for each debt assigned to Steven:

$14,934	Steve's 2014 Chevrolet Silverado
$6500	Steve's 2004 Chevrolet pickup
$3726	Steve's business credit card
$7499	Joint account with each party holding a credit card; amount reflects accumulated debt on Steven's credit card
$9138	Purchase for Steven's business
$6500	business loan
$2500	Payroll
$4400	Payroll
$1328	Payroll
$1328	Payroll

We conclude the property-related factors Steven raises as grounds for an award of spousal support do not independently support his request for an award.

E. "The educational level of each party at the time of marriage and at the time the action is commenced" is a factor for consideration in the spousal support determination. Iowa Code § 598.21A(1)(d). Steven did not have a college degree.

Please see note on page 1.

He began a lawn-mowing service at the age of twelve and continued in that business, later adding a snow-removal service. For a period of time, he also worked as a bartender. Andrea received a bachelor's degree in business management. She used her degree to pursue promotions within the company employing her. Her education enhanced her earning capacity and is a factor favoring an award of spousal support to Steven. *See In re Marriage of Clinton*, 579 N.W.2d 835, 838 (Iowa Ct. App. 1988).

F. Age is a factor in the spousal support determination. *See* Iowa Code § 598.21A(1)(b). Steven argues his age of forty-nine makes "it difficult for [him] to enter into any new career path." On our de novo review, we disagree. There is no indication Steven lacked the physical or mental ability to begin a new career, if necessary. There also is scant evidence evincing a physical inability to continue in his chosen field. The key roadblock to success was his failure to collect the debts owed to him for services rendered. Shortly before trial, Steven attempted to address the issue by contacting his mother and sister about bookkeeping programs that could be installed on his computer. His age had no bearing on whether he could learn to manage the business side of his operation.

G. Finally, we must consider Andrea's ability to pay spousal support. *See Gust*, 858 N.W.2d at 411–12. Andrea testified her expenses consumed her monthly salary and she had no spare money to pay alimony. On our de novo review, we disagree.

Andrea listed her annual income as less than $80,000. As noted, the district court found she received an annual salary of $118,000, a figure supported by the couple's joint tax returns. Even if we accept Andrea's monthly expense total—an

Please see note on page 1.

amount Steven contends is inflated—her income as found by the district court would more than accommodate a spousal support award. We are left with the disposition.

H. There are three established categories of spousal support—traditional, rehabilitative, and reimbursement. *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). "The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued." *Gust*, 858 N.W.2d at 408 (quoting *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997)). "Traditional spousal support is 'payable for life or so long as a spouse is incapable of self-support.'" *Becker*, 756 N.W.2d at 826 (quoting *In re Marriage of Francis*, 442 N.W.2d 59, 63–64 (Iowa 1989)). "Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting." *Francis*, 442 N.W.2d at 63. "Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses." *Id.* at 64. Finally, reimbursement alimony "is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other." *Id.*

Although our courts have articulated these three categories of spousal support, "there is nothing in our case law that requires us, or any other court in this state, to award only one type of support." *Becker*, 756 N.W.2d at 827. After

Please see note on page 1.

considering the statutory factors, the court may fashion an award that overlaps the lines drawn for each category. *See id.*; *In re Marriage of Witherly*, 867 N.W.2d 856, 859 (Iowa Ct. App. 2015) (characterizing district court's spousal support award as a combination of traditional and rehabilitative alimony).

We conclude Steven is entitled to spousal support based on the length of the marriage and the earnings disparity, together with Andrea's education and her prospect for advancement and enhanced earnings. These are the hallmarks of a traditional alimony award. But we recognize that, unlike many situations in which traditional alimony is awarded, Steven earned income throughout the marriage, in his chosen profession. *Cf. Gust*, 858 N.W.2d at 415 ("As is often the case where traditional spousal support is awarded, Linda spent many years as a stay-at-home mom."); *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993) ("By mutual agreement, Linda spent most of those years out of the work force."). Although Andrea's income was significantly greater than his, he was not incapable of self-support in the long-term. He simply needed time to gain the business acumen Andrea exercised during the marriage. For that reason, the award also bears some resemblance to rehabilitative alimony, which has the purpose of self-sufficiency.

Having concluded Steven is entitled to spousal support, we turn to the amount and duration of the award. For awards of traditional alimony, "[w]here there is a substantial [earnings] disparity," the supreme court has stated, "[W]e do not employ a mathematical formula to determine the amount of spousal support." *Gust*, 858 N.W.2d at 411–12. At the same time, the court has "approved spousal

Please see note on page 1.

support where it amounts to approximately thirty-one percent of the difference in annual income between spouses." *Id.* at 412.

Steven hangs his hat on the thirty-one percent figure in advocating for a $2395 per month to $3329 per month spousal-support award. He does not specify a duration, presumably because traditional alimony awards ordinarily are of unlimited duration. *See id.* at 415. But, as *Gust* noted, they need not be. *Id.* The duration may be limited where, "after a period of rehabilitation and retraining, the income of the payee spouse 'should allow [the payee] to become self-supporting at a standard of living reasonably comparable to the standard of living [the payee] enjoyed during the marriage.'" *Id.* (quoting *Becker*, 756 N.W.2d at 827). And, of course, rehabilitative alimony is of limited duration. *Becker*, 756 N.W.2d at 826.

We conclude Steven should receive $2395 in spousal support per month. The amount represents thirty-one percent of the lowest income difference between Andrea and Steven's earnings in the four years preceding the dissolution trial. We further conclude Andrea shall pay the sum for a period of three years, which should afford Steven sufficient time to learn the bookkeeping and accounting side of his business. The dissolution decree is modified to reflect these changes.

II. Property Distribution

Steven also challenges the district court's property division as inequitable. He specifically questions the valuation of his business accounts receivable and the value of his guns. In relevant part, the district court stated:

> The parties stipulate to a great majority of the assets and liabilities. The only contentious issue is the accounts receivable that have not been billed for several months. Each party asserts a certain dollar figure . . . . A further contention is the value of guns. It appears that Steven is an avid hunter and has a dozen or so firearms. Andrea

Please see note on page 1.

asserts the value to be $20,000, while Steven asserts the value to be $1000, and presents that a majority of the guns were gifts from his father.

The district court assigned a value of $66,000 to the accounts receivable and a value of $5000 to the guns. Both figures are within the range of evidence. *See Hansen*, 733 N.W.2d at 703 ("Ordinarily, a trial court's valuation will not be disturbed when it is within the range of permissible evidence."); *In re Marriage of Gensley*, 777 N.W.2d 705, 720 (Iowa Ct. App. 2009) (same).

III. Appellate Attorney Fees

Andrea requests appellate attorney fees in an unspecified amount. An award of appellate attorney fees rests within this court's discretion. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Andrea has the financial ability to pay her own attorney fees. Accordingly, we decline her request.

AFFIRMED AS MODIFIED.

Tabor, J., concurs; May, J., concurs in part and dissents in part

MAY, Judge (concurring in part and dissenting in part)

I appreciate the majority's thoughtful, well-written opinion. Like the majority, I would affirm the district court's division of the parties' property. I would also deny appellate attorney fees.

As to spousal support, however, I part ways. For the reasons discussed below, I would affirm the district court's decision to deny support.

As will also be discussed, however, I would not accept Andrea's invitation to consider Steven's domestic abuse as part of our spousal-support analysis. While public policy may support her invitation, our current law does not.[1]

I. Denial of spousal support was an equitable outcome.

I begin with our principles of review. In general, the trial judge is best positioned to understand the parties and their situations. While appellate courts "must rely on the printed record," the trial judge "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) (citation omitted). So we appreciate "the district court is best positioned to evaluate the needs of parties." *In re Marriage of Dirkx*, No. 18-0422, 2019 WL 3330625, at *2 (Iowa Ct. App. July 24, 2019). And we "recognize the [district] court [is] in the best position to balance the parties' needs." *In re Marriage of Gust*, 858 N.W.2d 402, 416 (Iowa 2015).

Because of the district court's superior vantage point, we afford that court "considerable latitude" in fashioning or denying an award of spousal support. *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996). While our review is de

[1] To be clear: I believe the majority agrees with me on the domestic abuse issue. I draw attention to the issue because it seems likely to arise again in the future.

novo, we will disturb the district court's determination "only when there has been a failure to do equity." *Id.*

Latitude means "freedom of action or choice." *Latitude*, Webster's New Collegiate Dictionary (1977). It is akin to discretion. *See In re Marriage of Duffy*, No. 16-1446, 2017 WL 2684352, at *2 (Iowa Ct. App. June 21, 2017) ("We give the [district] court considerable discretion in awarding spousal support and will disturb its award only when the decree fails to do equity."); *In re Marriage of El Krim*, No. 16-1620, 2017 WL 2465806, at *4 (Iowa Ct. App. June 7, 2017) ("[W]e give the district court considerable discretion in awarding spousal support and will disturb an award only if we find it inequitable.'); *In re Marriage of Beauchamp*, No. 15-0107, 2016 WL 4384483, at *3 (Iowa Ct. App. Aug. 17, 2016 ("We give the district court considerable discretion in awarding spousal support and will disturb its award only when the decree fails to do equity.").

Because we afford the district court "considerable latitude" in determining spousal support, *Benson*, 545 N.W.2d at 257, there must often be more than one equitable outcome. There must often be a significant *range* of results, any of which will satisfy equity. If the district court's determination falls within that range—within that "considerable latitude"—we should not conclude there has been a "failure to do equity." *Id.* We should not choose a different result. Instead, we should defer to the district court's determination.

"This deference to the [district] court's determination is decidedly in the public interest." *Id.* "When appellate courts unduly refine these important, but often conjectural, judgment calls, they thereby foster appeals in hosts of cases, at

staggering expense to the parties wholly disproportionate to any benefit they might hope to realize." *Id.*

Applying these principles here, I think denial of spousal support was an equitable result that fell within the district court's "considerable latitude." *Id.* So I would defer to the district court's determination.

Iowa law affords no absolute right to spousal support. *See Gust*, 858 N.W.2d at 408. Rather, "any form of [spousal support] is discretionary with the court." *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). This is clear from the governing statute, Iowa Code section 598.21A (2017), which provides "the court *may*" award spousal support after considering several listed factors. (Emphasis added.)

Cases applying section 598.21A "have identified three kinds of support: traditional, rehabilitative, and reimbursement." *Gust*, 858 N.W.2d at 408. A fourth kind, transitional, is also recognized. *See In re Marriage of Hansen*, No. 17-0889, 2018 WL 4922992, at *16 (Iowa Ct. App. Oct. 10, 2018) (McDonald, J., concurring specially) (collecting cases).

Steven claims he is entitled to traditional support. But I believe the district court correctly rejected this claim. In *Gust*, the court noted "marriages lasting twenty or more years commonly cross the durational threshold and merit serious consideration for traditional spousal support." 858 N.W.2d at 410–11. Steven and Andrea's marriage fell four years short of that "threshold." While this alone does not categorically prohibit Steven's claim, it was not wrong for the district court to find it weighed against him.

More importantly, perhaps, the record does not suggest Steven and Andrea had a "traditional" marriage. By this, I mean it does not appear the parties agreed—tacitly or explicitly—that one spouse would earn money while the other would sacrifice his or her career to stay home with children. *See, e.g.*, *id.* at 410 (noting "when the parties agree a spouse should stay home to raise children, the economic consequences of absence from the workplace can be substantial"); *In re Marriage of Arevalo*, No. 16-1326, 2017 WL 4050076, at *3 (Iowa Ct. App. Sept. 13, 2017) (finding traditional support justified in part because one spouse "spent a number of the marital years outside the workforce, as she cared for the children and the family home"). Rather, as the district court found, Steven and Andrea "shared routine care of the children." And they both participated in the workplace. They both had—and have—ample opportunity for professional achievement.

It is true that Andrea's earning capacity has grown more than Steven's. But this benefits Steven in at least two ways: (1) Andrea's earnings have greatly increased the couple's marital property; as a result, the property division has provided Steven with substantial assets he was unlikely to acquire by himself; and (2) Andrea's income reduces Steven's obligations under the child-support guidelines.

Like the district court, I believe Steven deserves no additional reward for Andrea's professional success. Her success has not been the result of any "sacrifice" by Steven. Instead, the court found, "Andrea has improved her earning capacity through her own determination." As Andrea correctly points out, equity does not require us to "penalize one party's industriousness to subsidize the other party's lack thereof."

For all of those reasons, I do not believe Steven should receive traditional support. Nor is he entitled to any other recognized form of support. For example, rehabilitative support provides support while the dependent spouse receives training or education in an effort to become self-sustaining. *See In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). But Steven does not request an opportunity for re-education or retraining. He has not requested temporary support while he learns the bookkeeping and accounting functions of his business—a business he has pursued since age twelve. So I would decline to award rehabilitative support. *See In re Marriage of Robert*, No. 11-0876, 2012 WL 2122310, at *5–6 (Iowa Ct. App. June 13, 2012) (clarifying a party seeking support bears burden of proving his or her entitlement to support).

Reimbursement support doesn't apply, either. "Reimbursement spousal support allows the spouse receiving the support to share in the other spouse's future earnings in exchange for the receiving spouse's contributions to the source of that income." *Becker*, 756 N.W.2d at 826. Generally, this form of support is awarded when the marriage dissolves shortly after one of the parties obtains a professional degree or licensure with the financial support from the other. *See In re Marriage of Gutcher*, No. 17-0593, 2018 WL 5292082, at *3 (Iowa Ct. App. Nov. 7, 2018); *In re Marriage of Mueller*, No. 01-1742, 2002 WL 31425414, at *3 (Iowa Ct. App. Oct. 30, 2002). That did not occur here.

Finally, I would not grant transitional support. "[T]ransitional support applies where the recipient spouse may already have the capacity for self-support at the time of dissolution but needs short-term assistance in transitioning from married status to single status due to the economic and situational consequences of

dissolution." *See Hansen*, 2018 WL 4922992, at *17. But "[w]here a party does not need assistance in transitioning to single life, then transitional support is not appropriate." *Id.* Here, the district court properly concluded the record "does not demonstrate that Steven is in need of alimony." And Steven does not ask us for "short-term assistance." *See id.* So I would award none.

In short, none of the recognized forms of support applies here. Nor do I see other grounds to conclude the district court failed to do equity. So I would affirm.

II. The district court properly handled evidence of domestic abuse.

Andrea notes that, when she filed her petition for dissolution, she sought and received an injunction "to remove Steven from the marital home and prevent his return" due to an incident of domestic abuse. Indeed, the record suggests Steven abused Andrea on multiple occassions. Andrea argues Steven's history of abuse provides additional justification for the district court's refusal to award spousal support in his favor.

Her argument deserves consideration. As one author observed, "[b]arring [spousal support] to abusers not only denies them the resources to continue their harassment; it also severs post-divorce ties between abuse victims and their tormentors, thereby providing the opportunity of a complete escape from an ongoing debilitating situation." Sarah Burkett, *Finding Fault and Making Reparations: Domestic Violence Conviction As A Limitation on Spousal Support Award*, 22 J. Contemp. Legal Issues 492, 497 (2011).

But Andrea has not cited, and I have not found, any clear authority that domestic abuse is a *permissible* consideration when determining spousal support under Iowa law. Unlike California, Iowa's spousal support statute does not

expressly mention domestic abuse. *Compare* Cal. Fam. Code § 4325 (2017) (providing for a rebuttable presumption against awarding spousal support to spouse convicted within the past five years of domestic abuse perpetrated against the other spouse), *with* Iowa Code § 598.21A(1) (listing factors for consideration when determining support and making no reference to domestic abuse).

Moreover, in *In re Marriage of Goodwin*, our supreme court held domestic abuse could not be considered when dividing marital property, a closely-related issue. 606 N.W.2d 315, 323–24 (Iowa 2000). The *Goodwin* court explained that consideration of domestic abuse "would introduce the concept of fault into a dissolution-of-marriage action, a model rejected by our legislature in 1970." *Id.* In support of its holding, the court cited its 1972 decision in *In re Marriage of Williams*, 199 N.W.2d 339, 341 (Iowa 1972). *Id.* The *Williams* court made it clear that, under Iowa's modern dissolution statute, "the 'guilty party' concept must be eliminated" and, moreover, "evidence of the conduct of the parties insofar as it tends to place fault for the marriage breakdown on either spouse must also be rejected as a factor in awarding property settlement or an allowance of alimony or support money." 199 N.W.2d at 345.

In light of *Goodwin* and *Williams*, it appears Iowa courts are not permitted to consider domestic abuse when deciding spousal support.[2] Indeed, the dissenters in *Williams* raised this very point. Justice Uhlenhopp posited a "not rare" hypothetical in which a "husband in frequent fits of rage visits violent physical

[2] *But cf. Goodwin*, 606 N.W.2d at 322–23 (approving district court's award of "additional assets in lieu of" spousal support "[g]iven the acrimonious relationship between the parties").

abuse on his blameless wife and children, eventually driving them from the home by his cruelty." *Id.* at 349 (Uhlenhopp, J., dissenting). He questioned: "Is the court to be allowed to know these facts along with the other equities in the case in deciding upon a fair adjustment of the parties' financial rights and obligations? Or is the court to function in a vacuum so far as the parties' conduct is concerned?" *Id.*

So I believe the district court properly handled the domestic-abuse evidence in this case. Although the court properly considered domestic abuse in connection with child custody issues, the court did not include domestic abuse in its analysis of spousal support. *See* Iowa Code § 598.41(1)(b) (noting there is a rebuttable presumption against awarding joint custody if there is a history of domestic abuse). This was the proper approach as our law stands.

III. Conclusion.

For the reasons explained above, I conclude the district court's denial of spousal support was not inequitable. As to that issue, I respectfully dissent. I concur in all other parts of the majority opinion.