In The Iowa Supreme Court
Supreme Court No. 19-1954

CHRISTOPHER J. GODFREY,

Plaintiff-Appellee,

vs.

STATE OF IOWA; TERRY BRANSTAD, Governor of the State of Iowa, in his official capacity; BRENNA FINDLEY, Legal Counsel to the Governor of the State of Iowa, in her official capacity,

Defendants-Appellants.

Appeal from the District Court for Jasper County
The Honorable Brad McCall

Appellants' Final Brief
(Oral Argument Requested)

Frank Harty, AT003356
Debra Hulett, AT0003665
Katie Graham, AT0010930
David Bower, AT0009246
NYEMASTER GOODE, P.C.
700 Walnut Street, Suite 1600
Des Moines, Iowa 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045

Email: fharty@nyemaster.com
Email: dlhulett@nyemaster.com
Email: klgraham@nyemaster.com
Email: dbower@nyemaster.com
Attorneys for Defendants-Appellants State of Iowa, Terry Branstad, Governor of the State of Iowa, in his official capacity, and Brenna Findley, Legal Counsel to the Governor of the State of Iowa, in her official capacity

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

Statement of issues presented for review

This appeal challenges a $1,500,000 judgment against the State and Terry Branstad, Governor of the State of Iowa, in his official capacity, and Brenna Findley, Legal Counsel to the Governor of the State of Iowa, in her official capacity. (JA.VI-621-623, 2541-2544). In January 2012, Christopher Godfrey, then-Iowa's Workers' Compensation Commissioner ("Commissioner"), filed suit challenging Governor Branstad's July 2011 decision to reduce the Commissioner's salary to the lowest amount authorized by the legislature under 2008 Iowa Acts ch. 1191 §§ 13-14 ("Salary Act"). (JA.I-68-77, 2397-2412). Over seven years later, Polk County District Judge Brad McCall presided over a six-week jury trial, resulting in verdicts for Godfrey on three claims: Iowa Civil Rights Act ("ICRA") sexual-orientation discrimination; ICRA retaliation; and a *Godfrey* constitutional-tort claim in which Godfrey claimed Defendants denied him procedural and substantive due process based on his Democratic political affiliation by asking him to resign and reducing

his salary to the lowest amount authorized by the Salary Act. The issues on appeal are:

Division 1

Did the district court make errors of law in allowing the jury to decide Godfrey's claims, all of which failed to state actionable legal claims under Iowa law and in any event, were unsupported by substantial evidence, and in denying Defendants' motions for directed verdict and judgment notwithstanding the verdict, because:

- Defendants acted lawfully toward a nonelected political appointee, as Governor Branstad had discretion to establish an appointed state officer's salary and violated no law in asking a political appointee to resign;
- the governor's legal counsel cannot be liable in tort for the governor's decision to reduce an appointed state officer's salary because the legislature vested the discretion to establish salary solely in the governor;
- the ICRA is inapplicable to a governor's decisions regarding a nonelected political appointee;
- Godfrey failed to present substantial evidence regarding an adverse "employment" action under the ICRA;

- the ICRA discrimination verdict is unsupported by substantial evidence because the uncontroverted evidence established Branstad wasn't motivated by Godfrey's sexual orientation;

- the ICRA retaliation verdict was unsupported by substantial evidence because Godfrey didn't engage in protected activity before July 11, 2011, and after that, Godfrey didn't experience an adverse action;

- Godfrey's constitutional-tort procedural-due-process claim failed as a matter of law because Godfrey didn't have a protected property interest, the law does not preclude a governor from considering "political" factors regarding nonelected political appointees, and to the extent Godfrey was entitled to process, he received the process he was due;

- Godfrey failed to state a constitutional-tort substantive-due-process claim;

- Defendants are immune because they exercised due care and exercised discretionary functions under Iowa Code § 669.14(1).

Iowa Const. art. I, § 9
Iowa Const. art. III, § 16
Iowa Const. art. IV, § 1
Iowa Const. art. IV, § 8
Iowa Const. art. IV, § 9
Ackelson v. Manley Toy Direct, LLC, 832 N.W.2d 678 (Iowa 2013)
Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991)
Baldwin v. City of Estherville, 929 N.W.2d 691 (Iowa 2019)
Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2019)
Bd. of Regents v. Roth, 408 U.S. 564 (1972)
Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751 (Iowa 2019)
Bowers v. Polk Cty. Bd. of Supervisors, 638 N.W.2d 682 (Iowa 2002)

Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006)
Cty. of Sacramento v. Lewis, 523 U.S. 833 (1998)
Clark v. Herring, 260 N.W. 436 (Iowa 1935)
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)
Colton v. Branstad, 372 N.W.2d 184 (Iowa 1985)
Danielson v. Brennan, No. 17-35928, 764 F. App'x 622 (9th Cir. Mar. 25, 2019)
DeBoom v. Raining Rose, Inc., 772 N.W.2d 1 (Iowa 2009)
Doe v. State, 943 N.W.2d 608 (Iowa 2020)
Drielak v. Pruitt, 890 F.3d 297 (D.C. Cir. 2018)
Dunham v. Wadley, 195 F.3d 1007 (8th Cir. 1999)
Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995)
Easton v. Howard, 751 N.W.2d 1 (Iowa 2008)
Estate of Franken, 944 N.W.2d 853 (Iowa 2020)
Exec. Air Taxi Corp. v. City of Bismarck, 518 F.3d 562 (8th Cir. 2008)
Farmland Foods v. Dubuque Human Rights Comm'n, 672 N.W.2d 733 (Iowa 2003)
Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275 (Iowa 2000)
Gates v. Del. Cty., 12 Iowa 405 (1861)
Geraci v. Moody-Tottrup, Int'l, Inc., 82 F.3d 578 (3d Cir. 1996)
Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)
Greenwood Manor v. Iowa Dep't of Pub. Health, 641 N.W.2d 823 (Iowa 2002)
Haskenhoff v. Homeland Energy Sols., LLC, 897 N.W.2d. 553 (Iowa 2017)
Hulme v. Barrett, 480 N.W.2d 40 (Iowa 1992)
Kelly v. State, 525 N.W.2d 409 (Iowa 1994)
King v. State, 818 N.W.2d 1 (Iowa 2012)
Leatherbury v. C&H Sugar Co., 911 F. Supp. 2d 872 (N.D. Cal. 2012)
Lee v. Halford, 540 N.W.2d 426 (Iowa 1995)
McElroy v. State, 703 N.W.2d 385 (Iowa 2005)
McGuire v. Indep. Sch. Dist. No. 833, 863 F.3d 1030 (8th Cir. 2017)
McKinney v. Pate, 20 F.3d 1550 (11th Cir 1994)
McKinney v. Univ. of Pittsburgh, 915 F.3d 956 (3d Cir. 2019)

Movers Warehouse, Inc. v. City of Little Canada, 71 F.3d 716 (8th Cir. 1995)
Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012)
Nicholas v. Penn. State Univ., 227 F.3d 133 (3d Cir. 2000)
Notelzah, Inc. v. Destival, 537 N.W.2d 687 (Iowa 1995)
Paskert v. Kenma-ASA Auto Plaza, Inc., 950 F.3d 535 (8th Cir. 2020)
Prebilich-Holland v. Gaylord Entm't Co., 297 F.3d 438 (6th Cir. 2002)
Reno v. Flores, 507 U.S. 292 (1993)
Sellers v. Deere & Co., 791 F.3d 938 (8th Cir. 2015)
Shockency v. Ramsey Cty., 493 F.3d 941 (8th Cir. 2007)
Smith v. Thompson, 258 N.W. 190 (Iowa 1934)
State v. Russell, 897 N.W.2d 717 (Iowa 2017)
State v. Smokers Warehouse Corp., 737 N.W.2d 107 (Iowa 2007)
Stillians v. State, 843 F.2d 276 (8th Cir. 1988)
Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005)
Truong v. Hassan, 829 F.3d 627 (8th Cir. 2016)
Walker v. State, 801 N.W.2d 548 (Iowa 2011)
Willey v. Riley, 541 N.W.2d 521 (Iowa 1995)
1931 Iowa Acts ch. 257 § 24
1973 Iowa Acts ch. 1 § 1(29)
2008 Iowa Acts ch. 1191 § 11
2008 Iowa Acts ch. 1191 § 12
2008 Iowa Acts ch. 1191 § 13
2008 Iowa Acts ch. 1191 § 14
Iowa Code § 7E.1 (2019)[1]
Iowa Code § 7E.2 (2019)
Iowa Code § 7E.3 (2019)
Iowa Code § 7E.4 (2019)
Iowa Code § 7E.5 (2019)
Iowa Code § 8A.412(4) (2019)

[1] The 2019 Iowa Code is cited unless the statute in place at the relevant time was different on a matter that materially impacts the analysis in this appeal.

Iowa Code § 8A.412(6) (2019)
Iowa Code § 17A.11(1) (2019)
Iowa Code § 66.1A (2019)
Iowa Code § 69.4(3) (2019)
Iowa Code § 69.16C (2019)
Iowa Code § 69.19 (2019)
Iowa Code § 86.1 (2019)
Iowa Code § 86.4 (2019)
Iowa Code § 86.5 (2019)
Iowa Code § 86.18 (2019)
Iowa Code § 216.15(1) (2019)
Iowa Code § 216.2(6) (2019)
Iowa Code § 216.2(7) (2019)
Iowa Code § 216.6(1) (2019)
Iowa Code § 216.6(1)(a) (2019)
Iowa Code § 216.11 (2019)
Iowa Code § 216.11(2) (2019)
Iowa Code § 669.14(1) (2019)
Iowa Admin. Code r. 481-10.1 (2008)
Iowa Admin. Code r. 481-10.29 (2008)
Iowa Admin. Code r. 481-10.29(2)(b) (2008)
Iowa Admin. Code r. 481-15.5(3)(c) (2017)
Black's Law Dictionary 124 (11th ed. 2019)
Black's Law Dictionary 662 (11th ed. 2019)
S.F. 568, 66th Gen. Assemb., 1975 Session

Division 2

Did the district court abuse its discretion in admitting evidence regarding:

- The public-policy views of Branstad and other Republican politicians, alleged "anti-gay" views of the Republican Party of Iowa, the Republican Party of Iowa's 2010 Platform, Branstad's item veto, legislative policy proposals from Republican senators, and the personal and religious beliefs of individual members of the Iowa Association of Business and Industry; all as proxies for discriminatory motive; and

- An alleged out-of-court statement by senator Dearden "to show motive, intent, knowledge," when such statement was not offered to show the impact on the listener?

Iowa Const. art. I, § 2
Iowa Const. art. III, § 16
Iowa Const. art. X
Bond v. Floyd, 385 U.S. 116 (1966)
Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)
Des Moines Register & Tribune v. Dwyer, 542 N.W.2d 491 (Iowa 1996)
Elrod v. Burns, 427 U.S. 347 (1976)
Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000)
Hawkins v. Grinnell Reg. Med. Ctr., 929 N.W.2d 261 (Iowa 2019)
Homan v. Branstad, 812 N.W.2d 623 (Iowa 2012)
John v. U.S., 77 Fed. Cl. 788 (2007)
Kurth v. Iowa Dep't of Transp., 628 N.W.2d. 1 (Iowa 2001)
McElroy v. State, 637 N.W.2d 488 (Iowa 2001)
State v. Sallis, 574 N.W.2d 15 (Iowa 1998)
Teague v. Mosley, 552 N.W.2d 646 (Iowa 1996)

U.S. v. Robel, 389 U.S. 258 (1967)
Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)
Iowa R. Evid. 5.401
Iowa R. Evid. 5.402
Iowa R. Evid. 5.403
Iowa R. Evid. 5.702
Iowa R. Evid. 5.802

Division 3

Did the jury instructions materially misstate the law, confuse and mislead the jury, prejudicing Defendants by:

- directing the jury that the governor doesn't have complete discretion to establish a nonelected political appointee's salary within the range established by the legislature;
- directing the jury that it should decide liability regarding Godfrey's constitutional-tort claim, a question of law, and determine what process Godfrey was due;
- describing Godfrey's relationship with the State as an employer-employee relationship when Godfrey was a nonelected political appointee;
- failing to specify the at-issue adverse "employment" action in the ICRA discrimination and retaliation marshaling instructions;
- directing the jury that for the ICRA discrimination and retaliation claims, the "cumulative effect of actions," rather than a discrete action, suffices to establish an adverse "employment" action;

- failing to specify the at-issue protected activity in the ICRA retaliation marshaling instruction and defining a legally flawed standard of protected activity to include personal beliefs that are not communicated to a decision-maker;

- failing to distinguish the standards for ICRA and constitutional-tort damages?

Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992)
DeBoom v. Raining Rose, Inc., 772 N.W.2d 1 (Iowa 2009)
Dindinger v. Allsteel, 860 N.W.2d 557 (Iowa 2015)
Doe v. Cent. Iowa Health Sys., 766 N.W.2d 787 (Iowa 2009)
Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996)
Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275 (Iowa 2000)
Haskenhoff v. Homeland Energy Sols., LLC, 897 N.W.2d. 553 (Iowa 2017)
Herbst v. State, 616 N.W.2d 582 (Iowa 2000)
Hulme v. Barrett, 480 N.W.2d 40 (Iowa 1992)
Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n, 895 N.W.2d 446 (Iowa 2017)
State v. Russell, 897 N.W.2d 717 (Iowa 2017)
2008 Iowa Acts ch. 1191 § 13
Iowa Code § 8A.416(1) (2019)
Iowa Code § 216.15(9)(a)(8) (2019)
Iowa Code § 216.15(13) (2019)
Eighth Circuit Model Civil Jury Instruction 5.40 (2019)
Eighth Circuit Model Civil Jury Instruction 10.41 (2019)

Division 4

Did the district court abuse its discretion and deprive Defendants their right to present a full and fair defense by (1) permitting Godfrey to present emotional-distress evidence after he refused to answer deposition questions about his medical condition, then (2) precluding Defendants from presenting any evidence at trial regarding Godfrey's medical condition in response to his testimony about emotional distress?

Dean v. Cunningham, 182 S.W.3d 561 (Mo. 2006)
Doe v. Cent. Iowa Health Sys., 766 N.W.2d 787 (Iowa 2009)
Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996)
Fagen v. Grand View Univ., 861 N.W.2d 825 (Iowa 2015)
Giza v. BNSF Ry., 843 N.W.2d 713 (Iowa 2014)
Lawson v. Kurtzhals, 792 N.W.2d 251 (Iowa 2010)
Pexa v. Auto Owners Ins. Co., 686 N.W.2d 150 (Iowa 2004)
State v. Leedom, 938 N.W.2d 177 (Iowa 2020)
Stender v. Blessum, 897 N.W.2d 491 (Iowa 2017)
Van Stelton v. Van Stelton, No. C11-4045-MWB, 2013 WL 5574566 (N.D. Iowa Oct. 9, 2013)
Whitley v. C.R. Pharmacy Serv., Inc., 816 N.W.2d 378 (Iowa 2012)
Iowa Code § 622.10(2) (2019)
Iowa R. Civ. P. 1.500(1)(b)
Iowa R. Civ. P. 1.517(3)(a)
Iowa R. Civ. P. 1.704(2)
Iowa R. Civ. P. 1.708(1)(b)
Iowa R. Civ. P. 1.708(2)

Iowa R. Civ. P. 1.708(2)(a)
Iowa R. Evid. 5.401
Iowa R. Evid. 5.613
Iowa R. Evid. 5.803(4)
Iowa R. Prof. Conduct 32:3.4(c)
Iowa R. Prof. Conduct 32:3.4(d)
Iowa R. Prof. Conduct 32:8.4(d)

Division 5

Is a $1.5 million emotional-distress award excessive under Iowa law, where Godfrey gave the jury the impression that he did not seek or receive medical treatment for emotional distress?

Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996)
Goettelman v. Stoen, 182 N.W.2d 415 (Iowa 1970)
Jasper v. H. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009)
Sallis v. Lamansky, 420 N.W.2d 795 (Iowa 1988)
Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n, 895 N.W.2d 446 (Iowa 2017)

Division 6

Trial judges have inherent authority to manage trial. In this jury trial, during the third week, Godfrey refused to continue presenting his case-in-chief because one of his attorneys was absent. The absence occurred because Godfrey's attorney claimed she couldn't continue trial in the Polk County Historic Courthouse. Godfrey filed three

motions to move the trial location, all of which the Chief Judge denied, and four Justices declined to intervene and change the Chief Judge's decision. Nonetheless, Judge McCall informed Defendants he would grant Godfrey a mistrial, then suggested to Defendants they agree to change venue to accommodate Godfrey's and his attorney's request to move trial. To avoid a mistrial, which would have wasted the time and expense invested in a jury trial that had reached its third week, Defendants agreed under duress to the forced venue change. Did Judge McCall abuse his discretion in refusing to order Godfrey to proceed with his case-in-chief and forcing an illegal venue change on Defendants?

Fry v. Blauvelt, 818 N.W.2d 123 (Iowa 2012)
Metz v. Amoco Oil Co., 581 N.W.2d 597 (Iowa 1998)
Iowa Code § 602.6105 (2019)
Iowa Code of Judicial Conduct 51:2.11(A)(1)
Iowa R. Civ. P. 1.945

Routing statement

This Court previously decided two interlocutory appeals. *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017); *Godfrey v. State*, 847 N.W.2d 578 (Iowa 2014). This appeal presents substantial issues of first impression and asks the Court to enunciate legal principles regarding the Governor's executive authority over nonelected political appointees. Iowa R. App. P. 6.1101(2)(c); 6.1101(2)(f).

Statement of the Case

This lawsuit was about Governor Branstad's July 2011 decision to reduce a nonelected political appointee's pay to the lowest amount authorized by the legislature. (JA.I-68-77).[2] In January 2012, Godfrey filed suit challenging Branstad's pay-reduction decision, asserting claims against the State and six individuals (all Republican) in their personal and official capacities. *Id*. Godfrey asserted nineteen different claims before dismissing most. (JA.I-94, 391, 896-930, 1627-1628, 1760-1761; JA.IV-142, 658, 660).

On May 31, 2019, Polk County District Judge McCall presided over a six-week jury trial. (JA.VI-2370). On July 12, 2019, after summations, the jury considered three claims: (1) ICRA sexual-orientation discrimination against the State; (2) ICRA retaliation against the State; (3) a *Godfrey* constitutional-tort claim against the State and Branstad, Boeyink, and Findley in their official capacities as

[2] We refer to the Joint Appendix as "JA" followed by the volume and page number, so "JA.I-10" is Joint Appendix, Volume I, page 10.

Governor, Chief of Staff, and Legal Counsel. Godfrey claimed a property interest in maintaining the salary established by Branstad's predecessor (Culver), and alleged Defendants denied him due process because he was a Democrat, by asking him to resign and reducing his salary. (JA.I-2397-2412; JA.VI-468-482).

On July 15, 2019, the jury returned a verdict in Godfrey's favor. On the ICRA claims, the jury awarded $400,000 in past and $100,000 in future emotional distress. (JA.VI-621-623, 2541-2544). On the tort claim, the jury awarded $800,000 for past and $200,000 for future emotional distress. (*Id.*). Although the verdict form instructed the jury to "use the same damage assessment" for all claims, the jury ignored that directive, and Judge McCall concluded the jury made a mistake in entering the verdict, then entered judgment for $1,500,000. (*Id.*).

Statement of the Facts

In 2006, then-Governor Vilsack (Democrat) appointed Godfrey (Democrat) Commissioner. (JA.VIII-888; JA.IX-342, 1253). In 2007, then-Governor Culver (Democrat) appointed Godfrey Commissioner,

with senate confirmation. (JA.IX-354, 362). In 2009, Culver reappointed Godfrey, with senate confirmation. (JA.IX-367, 374-375).

In December 2010, following Branstad's election, Boeyink, the Governor-elect's chief of staff, wrote resignation-request letters from Branstad to thirty nonelected political appointees, including Godfrey. (JA.IV-2114 [110:10-19], 2116-2123 [112:9-119:4]; JA.IV-2356-2367 [163:17-174:5]; JA.IX 1051-1079). Godfrey declined. (JA.VIII-100).

On December 29, 2010, Governor-elect Branstad, Boeyink, and Lieutenant Governor-elect Reynolds met with Godfrey for approximately 30 minutes. (JA.IV-2114 [110:16-19], 2126-2128 [122:1-124:18], 2142-2155 [138:18-151:17], 2161-2164 [157:6-160:14], 2219-2220 [26:6-27:1], 2367-2368 [174:6-175:8]; JA.VIII-105; JA-IX-1112). Branstad asked Godfrey to resign, expressing concerns the Commissioner demonstrated anti-employer bias, was not fair and evenhanded in decision-making, and could impede Branstad's business-development and job-growth goals. (*Id.*). Godfrey again declined to

resign, and upon Branstad's inauguration, continued the appointment. (JA.I-2401-2402 ¶¶ 38-43; JA.IX-1103).

At fiscal-year onset, on approximately July 5, 2011, Governor Branstad consulted with Chief of Staff Boeyink and Legal Counsel Findley regarding Godfrey. (JA.IV-2220-2232 [27:22-39:25], 2239-2245 [46:17-52:22], 2247-2272 [54:14-79:23], 2858-2873 [166:4-181:19], 3586-3592 [107:6-113:24], 3605-3608 [126:4-129:20], 3616 [137:2-6], 3686-3687 [207:5-208:7]; JA.XI-226-231). They reviewed 2008 Iowa Acts ch. 1191 §§ 13-14 ("Salary Act"), which governed salaries for nonelected political appointees. (*Id.*). Branstad decided to reduce Godfrey's salary to the lowest amount authorized by the legislature, and directed Boeyink to advise Godfrey. (*Id.*). Branstad also directed Boeyink to offer Godfrey the opportunity to resign. (*Id.*).

On July 11, 2011, Boeyink asked Godfrey to resign, which Godfrey declined, then notified Godfrey about the pay-reduction decision. (*Id.*). Subsequently, Godfrey retained Branstad's 1982 political rival, Roxanne Conlin—Godfrey's friend and former boss—

to challenge and publicize Branstad's decision. (JA.IV-2239 [46:3-10], 2268-2269 [75:21-76:23]; JA.V-324-325 [97:16-98:23], 2252-2260 [141:7-149:23]; JA.VIII-131-144, 496-497; JA.IX-338-339, 1010-1014, 1050, 1154-1157; JA.XI-270-276).

Argument

Division 1

The verdicts are contrary to law and unsupported by substantial evidence.

Before the evidence closed, Defendants moved for a directed verdict. (JA.V-2770-2808, 2817-2841 [5:4-29:14]; JA.VI-501-502 [18:1-19:4]). After trial, Defendants moved for judgment notwithstanding the verdict. (JA.VI-648-669, 696-746, 2371-2392).

The standard for judgment notwithstanding the verdict is to correct errors at law. *Easton v. Howard*, 751 N.W.2d 1, 4 (Iowa 2008).

A. Branstad acted lawfully toward a nonelected political appointee.

1. The Governor has complete discretion to establish an appointed state officer's salary within the statutory range.

Godfrey challenges the Governor's decision to reduce his salary within the range established by the legislature. Salary Act §§ 13-14.[3] The legislature delegated to the governor a duty to establish salary for nonelected political appointees:

> Sec. 13. APPOINTED STATE OFFICERS. The governor shall establish a salary for appointed nonelected persons in the executive branch of state government holding a position enumerated in the section of this division of this Act that addresses the salary ranges of state officers within the range provided, by considering, among other items, the experience of the individual in the position, changes in the duties of the position, the incumbent's performance of assigned duties, and subordinates' salaries.

Salary Act § 13.

The court misinterpreted the Salary Act to create a right to continued salary at the amount established by a prior governor; then

[3] JA.XI-230-232.

allowed the jury to second-guess the Governor's salary-establishing decision if "improper, constitutionally prohibited factors" and "impermissible discriminatory factors" were involved. (JA.VI-2374). That interpretation ignores the Salary Act's plain language and interferes with the governor's constitutional authority holding "supreme executive power of this state;"[4] and constitutional obligations to "transact all executive business with the officers of government,"[5] and "take care that the laws are faithfully executed." Iowa Const. art. IV, § 9.

Vilsack appointed Godfrey effective December 30, 2005, with an $85,000 annual salary. (JA.VIII-897-884). In June 2006, Vilsack raised Godfrey's salary 2%. (*Id*.). Although Godfrey voluntarily resigned before Culver's inauguration,[6] in December 2006, Vilsack increased Godfrey's salary another 5%, to $91,041.60. (*Id*.).

---

[4] Iowa Const. art. IV, § 1.
[5] Iowa Const. art. IV, § 8.
[6] JA-IX-1507.

After Culver appointed Godfrey, in July 2007, he increased Godfrey's salary 3%; then implemented another increase to $108,804.80.[7] (*Id.*). In July 2008, Culver increased Godfrey's salary 3% to the top range: $112,068.94. (*Id.;* JA.V-429 [202:19-23]). Salary Act § 14. That salary continued through July 11, 2011, when Branstad established Godfrey's salary at $73,250—an amount "within the range provided." (JA.IX-100; JA.XI-1339-1342).

The starting point is the statutory text. *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020). The Court "give[s] words their ordinary meaning." *Estate of Franken*, N944 N.W.2d 853, 859 (Iowa 2020). Here, "the language of the statute is plain and unambiguous." *Id.* at 860. The Salary Act:

- provided a non-exhaustive list of "items" for the governor's consideration;
- expressly authorized the governor to consider subjective "items" such as "incumbent's performance of assigned duties," without defining performance standards, specifying

[7] The Commissioner salary range was $73,250-$112,070. Salary Act § 14.

assigned duties, or requiring any particular formal or informal process;

- failed to specify the weight or relative importance the governor could assign to delineated or non-delineated items;
- neither required an upward salary adjustment nor prohibited a downward salary adjustment; and
- never incorporated grounds to override, discredit, disagree with, or nullify the governor's salary-establishing decision.

To fulfill constitutional and statutory executive duties,[8] the governor must be able to insist upon accountability from executive-branch officers. The legislature could have taken a different approach, as it did for judicial positions and elected officials, by establishing specific salaries. 2008 Iowa Acts. ch. 1191 §§ 11-12. Previously, the legislature established fiscal-year salary for nonelected political appointees, including Commissioner. *E.g.*, 1973 Iowa Acts ch. 1 § 1(29); 1931 Iowa Acts ch. 257 § 24; *see also Smith v. Thompson*, 258 N.W. 190, 193 (Iowa 1934) (legislature holds authority to set or delegate setting public-officer salaries). In 1975, correlating

[8] *E.g.*, Iowa Const. art. IV, §§ 1, 8-9; Iowa Code §§ 7E.1-7E.5.

with the IAPA's enactment, the legislature changed its approach, by "setting a salary range for certain state officials and designated employees of the state and providing for the governor to set salaries within such ranges." S.F. 568, 66th Gen. Assemb., 1975 Session.[9] The legislature explained:

> This bill establishes salary ranges for appointive officials in state government…. The bill does not provide for a specific salary rate for officials which has been past practice in many instances. It allows the governor, to consider a number of factors in establishing a salary rate within the ranges established in the bill for a specific position. These factors include whether a person is temporary, permanent, full or part-time, experience, changes in duties, past performance, the availability of qualified persons for the position, and the salaries being paid subordinates. *It should be noted that the bill does not limit consideration to these factors, only specifies that these factors shall be considered among other factors*.

Id. 4-5 (emphasis added).

The legislature made a policy decision to give the governor leeway in establishing salaries—making the governor accountable to the electorate for those decisions. In the 2014 gubernatorial election,

[9] JA.VI-2564-2580.

after Godfrey filed this lawsuit, Iowa voters had an opportunity to hold Branstad accountable. Branstad was reelected.

2. **The Governor's Legal Counsel cannot be liable for the salary-reduction decision.**

The legislature didn't delegate the duty to establish salary to the Governor's Legal Counsel. Salary Act § 13. Findley provided legal advice; the Governor made the salary-establishing decision. (JA.IV-2220-2222 [27:22-29:24], 2227 [34:4-13], 2229 [36:2-20], 2239-2244 [46:17-51:2], 2252-2257 [59:16-64:24], 2858-2873 [166:4-181:19], 3586-3592 [107:6-113:2], 3605-3607 [126:1-128:14], 3616 [137:2-6], 3686-3687 [207:5-208:7]). Findley cannot be liable.

3. **A Governor and Governor-elect's resignation request to a nonelected political appointee is lawful and cannot result in liability or damages.**

Governor-elect Branstad twice asked Godfrey to resign. (JA.I-2421 ¶¶ 37-40). In July 2011, Boeyink communicated Governor Branstad's resignation request. (JA.I-2421 ¶¶ 44-45). Even Vilsack agreed resignation requests associated with a gubernatorial transition are routine "so … the governor could make his own choices." (JA.IV-

2558-2559 [80:23-81:17]; JA.VIII-95; JA.IX-1505-1508, 1185-1219). Godfrey was not adversely impacted; he declined and continued the appointment until he voluntary resigned "for a bigger job" in 2014. (JA.V-2228-2231 [117:8-120:24], 2243-2245 [132:1-134:14], 2537 [27:12-22]).

B. The ICRA verdicts are contrary to law and unsupported by substantial evidence.

1. The ICRA is inapplicable to a governor's decisions regarding a nonelected political appointee.

The ICRA doesn't apply to a nonelected political appointee. An appointee is not an "employee." Black's Law Dictionary 124 (defining appointee: "Someone who is appointed."), 662 (defining employee: "Someone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.") (11th ed. 2019). *See also Stillians v. State*, 843 F.2d 276, 278-79 (8th Cir. 1988).[10]

[10] Overruled in part on other grounds, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991).

Godfrey was not an "employee;" he had neither an at-will nor contractual employment relationship with the State. *Clark v. Herring*, 260 N.W. 436, 439-40 (Iowa 1935) (no property/contractual rights with public office). He was an "appointive officer," exempt from Iowa's employee merit system. Iowa Code § 8A.412(4), (6). The appointment was governed by statute, not contract. *E.g.,* Iowa Code §§ 86.1 (appointive office); 69.19 (fixed-term appointments); 66.1A (statutory process to remove appointee). Had Godfrey not resigned from office in writing to the Governor, he would have continued holding the appointment until the term expired. Iowa Code § 69.4(3); *Gates v. Del. Cty.*, 12 Iowa 405 (1861). Like other appointive officers, the Commissioner is presumptively an executive-branch policy decisionmaker. *Lee v. Halford*, 540 N.W.2d 426, 429-30 (Iowa 1995); *Clark*, 260 N.W. at 438-39; *Stillians*, 843 F.2d at 278-79.

The analysis starts and ends with the unambiguous statutory text. *Doe,* 943 N.W.2d at 610. The ICRA protects an "employee;"[11] regulates an "employer;"[12] and prohibits "unfair employment practices."[13] If the legislature intended the ICRA to govern political appointees, it would have said so explicitly.

Sound policy supports excluding appointees from the ICRA's scope. Imposing liability would limit routine efforts by Iowa governors to ensure diversity when making political appointments. (JA.IX-1185-1219). *See also* Iowa Code § 69.16C (encouraging

---

[11] "'Employee' means any person employed by an employer." Iowa Code § 216.2(6).

[12] Iowa Code § 216.2(7).

[13] Iowa Code § 216.6(1), titled "Unfair Employment Practices," states:

> It shall be an unfair or discriminatory practice for any:
>
> a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate *in employment* against any applicant for *employment* or any *employee* because of the … sexual orientation … of such applicant or *employee*, unless based upon the nature of the occupation. [emphasis added].

appointing authorities to consider qualified minority persons).

Vilsack acknowledged appointing Godfrey *because* he was gay:

> [I]t was also important to send a message. I was aware … Chris was gay, and we wanted to make sure our administration … reflect[ed] the diversity that we felt was important.

(JA.IV-2510-2511 [32:22-33:1]).

Imposing ICRA liability on a governor's decisions regarding nonelected appointees would interfere with the governor's constitutional obligation to insist upon accountability from executive-branch state officers without legislative or judicial interference. Iowa Const. art. IV, §§ 1, 8-9. *See also Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 773 (Iowa 2019) (applying constitutional-avoidance rule to interpret statute and "steer clear of constitutional shoals when possible"). The ICRA is inapplicable.

2. **A governor-elect couldn't have discriminated "in employment" against a political appointee.**

Godfrey stated no viable ICRA claim regarding *Governor-elect* Branstad's resignation requests. On its face, the ICRA is inapplicable. Iowa Code §§ 216.6(1)(a); 216.2(6)-(7). In December 2010, Branstad

wasn't an "employer,"[14] and couldn't have discriminated against Godfrey "in employment." Iowa Code § 216.6(1). Godfrey reported to then-Governor Culver; Branstad lacked authority to impact Godfrey's appointment. (JA.IV-2128 [124:1-12]).

3. **Godfrey failed to present substantial evidence regarding an adverse employment action.**

An essential element of an ICRA claim is a discrete adverse "employment" action. Iowa Code §§ 216.6(1); 216.11; *Farmland Foods v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 742 (Iowa 2003). "Minor changes in working conditions that only amount to an inconvenience" are insufficient. *Id.* For a discrimination claim, the plaintiff must prove the at-issue action caused an objectively material change in working conditions. *Id.*; *Sellers v. Deere & Co.*, 791 F.3d 938, 945 (8th Cir. 2015). For a retaliation claim, the plaintiff must prove the at-issue action was "materially adverse," resulting in changed

[14] "'Employer' means the state of Iowa or any political subdivision, … department, …, and every other person employing employees within the state." Iowa Code § 216.2(7).

working conditions that would "have dissuaded a reasonable worker from making … a charge." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 67-68 (2006); *see also Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d. 553, 602 (Iowa 2017). "[L]ack of an adverse action is fatal." *Sellers*, 791 F.3d at 945.

Godfrey presented evidence regarding alleged incidents that failed to satisfy the legal standard for an ICRA adverse action, which the jury considered in deciding liability,[15] including:

- two resignation requests from Governor-elect Branstad, which Godfrey declined;
- one resignation request from Governor Branstad, which Godfrey declined;
- incidents that Godfrey never administratively exhausted;
- not being invited to a "Department Head" retreat;
- not issuing Godfrey's own press release touting himself;
- Governor Branstad's line item veto regarding an appropriation; and
- reversion of unused funds.

[15] As discussed later, the instructions further complicated the issue by not specifying the at-issue adverse action.

a) **The spurned resignation requests were not adverse actions.**

Godfrey may not have welcomed the resignation requests, but he rebuffed them, so they never materially impacted his appointment. "[A]n employment action is not adverse merely because the employee does not like it or disagrees with it." *Farmland Foods*, 672 N.W.2d at 742. Individually or cumulatively, each declined resignation request failed to establish an adverse action.

b) **The ICRA barred liability for claims that Godfrey never administratively exhausted.**

On April 13, 2012, Godfrey filed his third and final administrative charge. (JA.II-865-871). Over seven years later, Godfrey claimed two additional ICRA violations that were not administratively exhausted.

"Persons who seek to assert their rights under the ICRA ... must follow the statutory processes to obtain relief," including administrative exhaustion. *Ackelson v. Manley Toy Direct, LLC*, 832 N.W.2d 678, 680 (Iowa 2013); Iowa Code § 216.15(1). The "scope of a civil suit … for retaliation" must be limited to "claims properly

brought before the appropriate administrative body." *Paskert v. Kenma-ASA Auto Plaza, Inc.*, 950 F.3d 535, 539 (8th Cir. 2020). Courts consider whether an incident first raised in a lawsuit is "like or reasonably related to the allegations of the [administrative] charge." *Id.*; *McElroy v. State*, 703 N.W.2d 385, 390 (Iowa 2005).

First, Godfrey complained about the Governor's May 2012 item veto, which impacted funding for a new Division deputy director position. (JA.VIII-874). Second, Godfrey complained about the State's standard practice for reversion of unspent funds to IWD at fiscal year-end. (JA.IV-2053 [49:8-18]). These budgetary matters didn't resemble the salary reduction, resignation requests, or any other incident alleged in Godfrey's administrative charges. (JA.II 865-871). Godfrey never exhausted these alleged actions, so the jury shouldn't have considered them.

c) Godfrey failed to establish any other adverse action.

i. Department Head retreat.

Godfrey didn't experience an adverse action when he wasn't invited to the October 2011 "Department Head" retreat. Boeyink coordinated the retreat, inviting department heads in the State's email distribution list "IA Dept Directors-Executive Branch." (JA.VI 105-106 [40:5-41:14]; JA.VIII-527-534). Iowa Code § 7E.5 (principal executive-branch departments). Boeyink invited two other Branstad appointees who supported Branstad's goals. (JA.IV-2302-2319 [109:12-126:18], 3092-3095 [106:8-109:5]).

Godfrey experienced no material adversity. *Drielak v. Pruitt*, 890 F.3d 297, 300 (D.C. Cir. 2018) (no adverse action when employee not invited to meetings). Missing that one-day retreat was at most "an inconvenience" with no material impact on his appointment. *Farmland Foods*, 672 N.W.2d at 742.

ii. **Press release.**

Godfrey drafted a press release about himself, then complained the Governor's Office never released it. (JA.VIII-607-608; JA.IV-3740-3743 [148:15-151:21]). Godfrey failed to show material adversity. *Leatherbury v. C&H Sugar Co.*, 911 F. Supp. 2d 872, 882 (N.D. Cal. 2012) (failure to give praise or gold star not adverse action).

iii. **Budget matters.**

As previously discussed, Godfrey alleged *the Division* was adversely impacted by two appropriation decisions, the Governor's line item-veto and standard reversion of unused funds to IWD at fiscal year-end. (JA.VIII-874; JA.VI-102-105 [37:13-40:16], 131-135 [66:14-70:16]). These fiscal matters weren't adverse actions.

These decisions impacted the State, the Division, and arguably Iowa taxpayers, workers, employers, and insurance carriers, but not Godfrey. (JA.VI-130-137 [65:24-72:24]). *Danielson v. Brennan*, No. 17-35928, 764 F. App'x 622 (9th Cir. Mar. 25, 2019) (no adverse action where mail delivery adversely impacted postal service rather than employee).

On May 25, 2012, Branstad exercised his item-veto power, vetoing the legislature's earmarked $153,000 to fund a new Division management position. (JA.VIII-874). The Governor's exercise of constitutional item-veto authority[16] cannot violate the ICRA. *Colton v. Branstad*, 372 N.W.2d 184, 190-91 (Iowa 1985) (legislature cannot deprive governor constitutional powers through legislation).

Additionally, Godfrey failed to establish a materially adverse *change* in working conditions. *Farmland Foods*, 672 N.W.2d at 741. The item veto left the status quo intact. Department of Management Director Roederer testified transferred funds always revert back if unspent. (JA.VI-131-135 [66:14-70:16], 164-165 [99:19-100:24]). Godfrey cannot establish the required material adversity.

4. **The discrimination verdict is unsupported by substantial evidence.**

Branstad's decisions couldn't have been motivated[17] by Godfrey's sexual orientation, because the uncontroverted record

[16] Iowa Const. art. III, § 16.
[17] *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 12-13 (Iowa 2009).

established that before the July 11, 2011 pay reduction, Branstad *did not know* Godfrey was gay. Substantial evidence requires "sufficient probative force to constitute the basis for a legal inference" and not "surmise, speculation or conjecture." *Willey v. Riley*, 541 N.W.2d 521, 527 (Iowa 1995). There was *no evidence*, let alone "substantial evidence," that Branstad knew Godfrey was gay before Boeyink informed Godfrey about the salary-reduction decision.

a) **Branstad didn't know Godfrey was gay.**

When a plaintiff's protected-class attributes aren't obvious, such as religion or sexual orientation, a plaintiff must "prove[] that the employer knew about the plaintiff's particular personal characteristic." *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996). Otherwise, the plaintiff cannot establish the protected characteristic was a motivating factor in the challenged decision. *Prebilich-Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 443-44 (6th Cir. 2002).

No witness testified, and no exhibit revealed that Branstad knew Godfrey was gay. Branstad testified he didn't know Godfrey was gay until Godfrey publicized it *after* the salary reduction. (JA.IV-3678 [199:8-11], 3682 [203:17-22], 3686-3688 [207:23-209:14]). Boeyink and Findley testified that when Branstad made the salary-reduction decision, they didn't know Godfrey was gay. (JA.IV-2098-2099 [94:14-95:12], 2254-2258 [61:20-65:5], 2873-2878 [181:20-186:23], 3014 [28:15-19], 3071 [85:15-16]). They became aware Godfrey *might* be gay on July 8, 2011, but never told Branstad. (*Id*.).

Godfrey asked the jury to speculate Branstad knew by parading in individuals who asserted it was "common knowledge" amongst the Vilsack administration and Democrat legislators. *E.g.*, JA.IV-2517-2521 [39:21-43:12], 2569-2571 [91:9-93:17] (Vilsack); 2717-2727 [25:5-35:9] (senator Dotzler, Democrat); 3261-3270 [94:1-103:17] (former senator Courtney, Democrat); 3033-3311 [136:1-144:25], 3318-3323 [151:9-156:6] (former senator and senate majority leader Gronstal, Democrat); JA.V 378-413 [151:1-186:7] (Polk County supervisor,

former senator and representative McCoy, Democrat); 1483-1488 [131:11-136:3] (Culver-administration political appointee Walsh, Democrat); 2567-2568 [57:12-58:7] (Godfrey).

Godfrey presented *no evidence* this alleged "common knowledge" was transmitted to Branstad. (JA.IV 2253-2258 [60:8-65:5], 2394-2396 [201:5-203:9], 2571-2573 [93:3-95:8], 2751 [59:5-12], 2873-2878 [181:20-186:23], 3350-3357 [183:12-190:2], 3678 [199:8-11], 3682 [203:17-22], 3713-3714 [121-122]; JA.V-411-412 [184:2-185:4], 1350 [176:10-18]; 1516 [164:6-9], 2281-2285 [170:11-174:23]). Moreover, the trial record is uncontroverted: Branstad wasn't around. Working as Des Moines University's President, he disengaged from politics. (JA.IV-3509-3515 [30:11-36:4], 3530 [51:7-17], 3677-3678 [198:20-199:11]).

Any inference that Branstad knew Godfrey was gay prior to July 11, 2011 is based *only* upon speculation and conjecture, which was insufficient to submit this claim to a jury. *Easton*, 751 N.W.2d at 6.

b) **Branstad didn't harbor anti-gay animus.**

No evidence suggested Branstad personally harbored anti-gay animus. Branstad appointed and worked closely with gay men.

In February 2011, Branstad appointed Doug Hoelscher, an openly gay man, as Director, Office of Federal-State Relations. (JA.V-3251-3276 [9:8-34:15]). Hoelscher spent considerable time with Branstad in Iowa and D.C., attended National Governors' Association conferences with him, and considered him a mentor. (*Id*.). Branstad knew Hoelscher was gay and attended social events with him and his long-time partner. (*Id*.).

Dan Wolter, a former Branstad speechwriter, worked closely with Branstad and believed Branstad knew he was gay. (JA.V-2723-2730 [92:10-99:24]). Yet today, Wolter considers Branstad a father figure and mentor. (*Id*.).

Ambassador Branstad's current Chief of Staff, Steve Churchill—the one employee Branstad was permitted to take with him to China—is gay. (JA.VI-171-180 [106:1-115:7], 197-198 [132:23-

133:7]). Every day, Churchill spends considerable time with the Ambassador. (*Id*.). Churchill has worked with Branstad five times over 37 years. (*Id*.). Churchill emphasized: "I'm too old, too gray, and I'm too gay" to work for someone who treated gay men differently. (JA.VI-175-180 [110:11-115:7]).

5. **The retaliation verdict is unsupported by substantial evidence.**

To establish retaliation, Godfrey had to prove: (1) he engaged in statutorily protected activity; (2) the State took adverse "employment" action against him; and (3) a causal connection. *Hulme v. Barrett,* 480 N.W.2d 40, 42 (Iowa 1992). Godfrey failed to establish he engaged in protected activity before the salary reduction occurred. After July 11, 2011, Godfrey failed to establish a causal relationship between his protected activity and an adverse action.

a) **Before the salary reduction, Godfrey didn't engage in protected activity.**

Retaliation is an "unfair or discriminatory practice" taken against an employee "because such person has lawfully opposed any practice forbidden *under this chapter*, obeys the provisions *of this*

chapter, or has filed a complaint, testified, or assisted in any proceeding *under this chapter*." Iowa Code § 216.11(2) (emphasis added).

Godfrey failed to establish protected activity before the July 11, 2011 salary reduction. Godfrey testified he opposed discrimination in December 2010 upon receiving the resignation-request letter, and told his partner and two Democrat appointees: "[H]ere we go again. Look what [Republican leadership is] doing to me now." (JA.V-2255-2257 [144:2-146:3]).

Godfrey failed to prove Branstad, the decision-maker, had actual or constructive knowledge that Godfrey engaged in protected activity. *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 289 (Iowa 2000) ("if the employer has no knowledge the employee engaged in the protected activity causation cannot be established"). When Godfrey declined the December 2010 resignation requests, he wasn't opposing a practice the ICRA prohibits; obeying the ICRA; or participating in an ICRA proceeding. As a Democrat appointee who

made a personal choice not to resign in response to a Republican governor-elect's request, Godfrey voiced no complaint within the ICRA's scope—until after the salary reduction, when he retained Conlin.

b) **After the salary reduction, Godfrey didn't experience adverse action.**

As discussed, alleged incidents after the salary reduction fell short of a "tangible change in working conditions that produce[d] a material employment disadvantage." *Sellers*, 791 F.3d at 942. Consequently, Godfrey failed to marshal substantial evidence that he experienced an adverse action in response to protected activity. *Hulme*, 480 N.W.2d at 42-43.

C. **The constitutional-tort verdict is contrary to law and unsupported by substantial evidence.**

Defendants previously argued Godfrey couldn't state an actionable claim for money damages based on conduct allegedly violating Iowa's Constitution, article I, section 9. *Godfrey*, 898 N.W.2d at 849-52, 882-99.

Although, by way of interlocutory appeal, the Court recognized a *Bivens* claim under the Iowa Constitution, Defendants reiterate their prior arguments and request the Court reconsider the decision. Specifically, the Court held Godfrey's claim that he was deprived of a constitutional property interest in his salary without due process because of partisan politics was improperly dismissed, but "expressed no view whatsoever on the underlying merits of the case," and "[o]ne of the disadvantages of interlocutory appeal is the piecemeal consideration of issues." *Id.* at 846-847, 876, 880. Moreover, it's awkward to sensibly integrate these facts within a due-process framework, because the facts just don't fit.

Although the Court intended a *Godfrey* claim would "ensur[e] effective enforcement of constitutional rights" and "vindicate social policies,"[18] the facts Godfrey presented at trial didn't advance judicial enforcement of the Iowa Bill of Rights. This Court described the Iowa Constitution as "a vital check on government encroachment of

[18] *Godfrey*, 898 N.W.2d at 877.

individual rights,"[19] yet in holding the Commissioner appointment, Godfrey didn't have individual rights; he held "a personal public trust, created for the benefit of the state." *Clark*, 260 N.W. at 439-40. Pursuant to *Clark*, there is no property interest in an appointee's position, let alone accompanying salary. *Id*.

Moreover, the evidence didn't support Godfrey's factual premise, that "partisan motivation" caused the salary reduction.[20] The Governor disagreed with Godfrey's policies as Commissioner, and trial played out as a juror referendum on Godfrey's change-oriented, progressive agenda or Branstad's preference for stability, predictability, and fairness. It's not a jury's role to make public policy choices, and Godfrey previously conceded if Defendants reduced his salary based on policy disagreements, "there would be no

---

[19] *Godfrey*, 898 N.W.2d at 881 (Mansfield, J. dissenting) (emphasis added).

[20] As discussed, the evidence didn't support Godfrey's other claim that his sexual orientation was the but-for cause of the salary-reduction decision.

constitutional claim." *Godfrey*, 898 N.W.2d at 898-99 (Mansfield, J. dissenting).

1. Godfrey's procedural-due-process claim fails as a matter of law.

Procedural due process protects against the deprivation of substantive rights without appropriate procedural safeguards. *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002). "Before a deprivation of due process can be claimed, a person must demonstrate entitlement to a … property interest that has been violated." *Notelzah, Inc. v. Destival*, 537 N.W.2d 687, 691 (Iowa 1995). If a property interest is recognized, the court decides what process is constitutionally due. *Bowers*, 638 N.W.2d at 691. The court erred in holding Godfrey had a property interest in the Salary Act's process itself, and a salary level "based upon the factors set forth in the law, and not based on strictly partisan political purposes." (JA.VI-474).

a) Godfrey had no property interest in statutory process.

A property interest is created and defined "not by the Constitution but by an independent source such as state law." *Bowers*,

638 N.W.2d at 691. Thus, when a court recognizes a property interest, "the property has been distinguishable from the procedural obligations on state officials to protect it." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 771 (2005) (Souter, J., concurring). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("'Property' cannot be defined by the procedures provided for its deprivation"). Yet the court instructed there was a property interest in the Salary Act process:

> Plaintiff had a constitutional property interest in maintaining his salary at the level it was at when Defendant Branstad took office … unless [Branstad adjusted] his salary … to a different amount in compliance with the factors set forth in the law for setting salaries….

(JA.VI-475).

Conflating substance and process improperly reduces the Due Process Clause to a "mere tautology." *Cleveland Bd. of Educ.*, 470 U.S. at 541. Because Godfrey didn't have a property interest in the Salary Act's process, the jury shouldn't have considered it.

b) **Godfrey didn't have a property interest in a particular salary level.**

Establishing a property right requires a "legitimate claim of entitlement" to the benefit. *Greenwood Manor v. Iowa Dep't of Pub. Health,* 641 N.W.2d 823, 837 (Iowa 2002) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 77 (1972)). "A mere abstract desire or unilateral expectation of receiving a benefit are insufficient to establish an entitlement." *Greenwood Manor*, 641 N.W.2d at 837.

A statute might create a property interest where "it contains particularized substantive standards that guide a decision maker and … when it limits the decision maker's discretion by using mandatory language (both requirements are necessary)." *Dunham v. Wadley*, 195 F.3d 1007, 1009 (8th Cir. 1999). Where there is "considerable discretion," there is no property interest. *McGuire v. Indep. Sch. Dist. No. 833*, 863 F.3d 1030, 1035 (8th Cir. 2017).

Thus, a property interest in a particular salary is recognized "*only* where there is explicit assurance to that effect." *McKinney v. Univ. of Pittsburgh*, 915 F.3d 956, 961 (3d Cir. 2019) (emphasis in

original). *See also Clark,* 260 N.W. at 439-40. "[W]here there is ambiguity or it is explicit that a public employee's salary *can* be reduced, [courts] do not recognize a property interest in a set salary." *McKinney*, 915 F.3d at 961 (emphasis in original). This is especially true when salary adjustments are based on "performance." *Id.* at 962-63 (plaintiff's error conflated "[a] prospective benefit with the continued receipt of an existing benefit; his last year's … salary.").

Here, the Salary Act doesn't "mandate" any particular salary. It provides only that "[t]he governor shall establish a salary for appointed nonelected persons … *within the range provided*." Salary Act § 13 (emphasis added). Godfrey's salary was set by Governor Culver—exercising his "considerable discretion." Governor Branstad—exercising his own discretion—felt otherwise. *McGuire*, 863 F.3d at 1035. Godfrey had no "claim of entitlement" to a specific salary amount and thus no property interest.

c) Godfrey didn't have a property interest in a salary level free from "partisan political" considerations.

Godfrey had no property interest in a salary free from "partisan political purposes." (JA.IV-474). His due-process claim was predicated on a false narrative—that he was a "quasi-judicial officer" defending "judicial independence" from Republicans. This narrative is incorrect, both factually and legally. However, the district court accepted it, holding the Commissioner's most significant (and most visible) duty—deciding final agency decisions—is immune from a governor's evaluation.

The source of such a right remains a mystery. It plainly does not come from the Constitution. *Bowers*, 638 N.W. 2d at 691; *see also* Iowa Const. art. IV, § 1 ("supreme executive power of this state" is vested in the governor). Nor does it come from the Salary Act. Salary Act § 13 (listing non-exclusive factors, including "performance"). At various times, the court suggested this "property interest" might be found in Iowa Code Chapter 86, Iowa Code sections 86.4 and 86.5, the Iowa Code of Administrative Judicial Conduct ("the ICAJC"), and

common-law "quasi-judicial" functions. (JA.IV-99-105, 110, 123-137). However, none suggest—much less establish—a "legitimate claim of entitlement" to the property interest declared by the court. *Greenwood Manor*, 641 N.W.2d at 837. The district court's conclusion the legislature intended "to help insulate the Commissioner from the shifting winds of politics that may occur as the Governor's office changes hands" ignores the law (and reality). (JA.IV-136).

The district court erroneously concluded the ICAJC's ethical canons apply to the Commissioner's final agency decisions, ignoring the ICAJC's express disclaimer of that very application. The canons expressly apply to agency heads only "when these persons act as *presiding officers*."[21] Iowa Admin. Code r. 481-10.29 (2008) (emphasis added). Agency heads, "unlike administrative law judges, have multiple duties imposed on them by law"—*i.e.*, they serve as

[21] Iowa Admin. Code r. 481-10.1 (2008) (defining "presiding officer": "all persons who preside in contested case proceedings under Iowa Code section 17A.11(1)"; Iowa Code § 86.18 (distinguishing "contested case proceedings" from "appeal proceedings").

policymakers. *Id.* Godfrey acted as a policymaker when issuing final agency decisions, not a "presiding officer" to whom the ICAJC canons might apply.[22]

The Commissioner's policymaking role is evident from the IAPA itself. While interpretations of the law are reviewed de novo, Godfrey's factual determinations were unassailable so long as supported by "substantial evidence." *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012). *See also Dunlavey v. Economy Fire and Cas. Co.*, 526 N.W.2d 845, 849 (Iowa 1995) (Commissioner's findings of fact "have the effect of a jury verdict"). Further, the Commissioner may apply law to facts in *any* manner that is not "irrational, illogical, or wholly unjustifiable." *Neal*, 814 N.W.2d at 518. Even deputy commissioners aren't prohibited from the "development of public

[22] This legislative intent was further clarified in later revisions to the ICAJC: "Code does not apply to persons who participate only in the making of a final decision in a contested case without serving as a presiding officer…." Iowa Admin. Code r. 481-15.5(3)(c) (2017).

policy by contested case adjudication." Iowa Admin. Code r. 481-10.29(2)(b) (2008).

These deferential standards gave Godfrey broad discretion to issue final agency decisions in accordance with *his own* policy goals. As a matter of law—and by design—that is perfectly appropriate. But so too is the Governor's ability to review the Commissioner's performance, whether through a "partisan political" lens or otherwise. As the only member of the Executive accountable to the People, the Governor's performance evaluation of Executive agency heads is a performance evaluation on behalf of the People. A jury should not—as it did here—have to sit through six weeks of tedious legal argument evaluating the propriety of scores of agency and judicial workers'-compensation decisions.[23]

[23] *E.g.*, JA.VIII-276-353, 536-606, 661-762, 839-849, 896-972; JA.IV-3506-3508 [27:3-29:8]; JA.IX-111-182, 430-437, 441-494, 814-855, 876-930, 932-952, 954-958; JA.X-570-JA.XI-225; JA.V-314-316 [87:24-89:22]; 1077-1104 [31:25-58:18], 1108-1130 [62:5-84:24].

Godfrey didn't have a property interest in a salary amount determined free from the Governor's evaluation of his final agency decisions.[24]

d) Godfrey received all the process to which he was due.

In assessing Godfrey's performance and ultimately reducing his salary, Branstad considered information from businesses and industry constituents. (JA.IV-2114 [110:16-19], 2126-2128 [122:1-124:18], 2142-2155 [138:18-151:17], 2161-2164 [157:6-160:14], 2219-2220 [26:6-27:1], 2367-2368 [174:6-175:8]; JA.VIII-105; JA.IX-1111-1112). Branstad discussed Godfrey's performance with him during the December 29, 2010 meeting, including sharing his goals and

[24] The court improperly permitted the jury to find Godfrey has a property interest free from consideration of "political affiliation." (JA.VI-475). Godfrey didn't bring a First Amendment retaliation claim. Such a claim would fail under the public-employment policymaking exception, *Shockency v. Ramsey Cty.*, 493 F.3d 941, 950 (8th Cir. 2007); no evidence suggested Godfrey's Democrat political affiliation motivated Branstad's decision; and Branstad appointed multiple Democrats, including prior Commissioner Iris Post. (JA.IV-2372-2373 [179:2-180:8], 3042-3043 [56:15-57:6], 3296-3298 [129:17-131:1], 3681-3685 [202:18-206:19]; JA.V-3137-3139 [24:6-26:20]).

concerns, and Godfrey was given the opportunity to respond. (*Id*.). While perhaps not "elaborate," the procedures afforded were adequate and comported with the ability to respond to Branstad's performance concerns. *State v. Russell*, 897 N.W.2d 717, 733 (Iowa 2017) (due-process analysis).

2. **Godfrey's substantive-due-process claim fails as a matter of law.**

A finding that state action violates substantive due process inherently, and necessarily, defines the scope of our Constitution. Such constitutional questions always present "an issue of law for the judge, not a question of fact for the jury." *Truong v. Hassan*, 829 F.3d 627, 631 (8th Cir. 2016); *see also King v. State*, 818 N.W.2d 1, 31 (Iowa 2012). A court, not a jury, must decide whether Defendants' conduct violated Godfrey's substantive-due-process rights.

Because there is no "property interest" to protect, Godfrey's substantive-due-process claim likewise fails. *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 718 (8th Cir. 1995). Even if a property

interest existed, the court erred by failing to direct a verdict for Defendants.

a) **Non-legislative state action implicates substantive due process only where it results in deprivation of a "fundamental" property interest.**

In analyzing challenges to *non-legislative* state action—specifically, adverse employment actions—the property interest must be "fundamental" to implicate substantive due process. *See Nicholas v. Penn. State Univ.*, 227 F.3d 133, 142 (3d Cir. 2000) (citing cases); *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir 1994). Under Iowa law, "there is no fundamental constitutional right to public employment." *Kelly v. State*, 525 N.W.2d 409, 411 (Iowa 1994). Consequently, even if Godfrey had a property interest in a particular salary amount, the salary reduction wouldn't implicate substantive due process.

Because there is no fundamental constitutional right to a particular salary, Godfrey's substantive-due-process claim fails as a matter of law.

b) **Where there is a "fundamental" property interest, non-legislative state action implicates substantive due process only where it "shocks the conscience."**

This Court has identified "two strands" of substantive due process:

> First, in evaluating government legislation that involves a life, liberty, or property interest, there must be a reasonable fit between the government purpose and the means chosen to advance that purpose.
>
> ***
>
> Second, a violation of substantive due process may arise from government action that "shocks the conscience."

Behm v. City of Cedar Rapids, 922 N.W.2d 524, 550 (Iowa 2019).

For non-legislative state action, "only the most egregious" conduct implicates substantive due process—conduct "which shocks the conscience." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). For legislative state action, courts apply traditional substantive due process tiers of scrutiny. *Exec. Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 565 (8th Cir. 2008).

This distinction between legislative and non-legislative state action is "crucial." *Nicholas*, 227 F.3d at 139-40 (Alito, J.). Legislative

acts "generally apply to a larger segment of—if not all of—society; laws and broad-ranging executive regulations are the most common examples." *McKinney*, 20 F.3d at 1557 n.9. By contrast, non-legislative acts "characteristically apply to a limited number of persons (and often to only one person)," and "typically arise from the ministerial or administrative activities of members of the executive branch." *Id.* *See also Nicholas*, 227 F.3d at 139 n.1. "The most common examples are employment terminations." *McKinney*, 20 F.3d at 1557 n.9.

As a result, while all substantive-due-process challenges relate to the *substance* of the challenged conduct (legislative or non-legislative), the focus of the two inquiries logically differ. Challenges to legislative action focus on the *fit* between "the governmental purpose and the means chosen to advance that purpose." *Reno v. Flores*, 507 U.S. 292, 305 (1993). *See also Behm*, 922 N.W.2d at 550. Conversely, challenges to non-legislative action focus on the *egregiousness* of the conduct—whether it "shocks the conscience."

Lewis, 523 U.S. at 847 n.8; *Nicholas*, 227 F.3d at 139-40. Here, the analysis turns to non-legislative action.

Only "the most egregious governmental abuses against liberty or property rights" shock the conscience. *State v. Smokers Warehouse Corp.*, 737 N.W.2d 107, 111 (Iowa 2007). "With the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the [Court] is not easily shocked." *Id.*

Branstad's duty to consider Godfrey's "performance of assigned duties" when establishing his salary surely permitted his lawful consideration of his perception—developed while listening to constituents—that Godfrey was not fair and evenhanded. Salary Act § 13. A salary reduction within a prescribed, discretionary statutory range is not, under any definition, "offensive to human dignity." *Smokers Warehouse*, 737 N.W.2d at 107.

c) **Even applying a legislative action standard, Branstad's decision had a "reasonable fit" with the "legitimate government purpose" implementing policy goals that he was elected to pursue.**

Every governor has a "legitimate" interest in implementing the policy goals he or she was elected to pursue. In the modern administrative state, much policymaking authority is delegated to and implemented by executive-branch agency heads. The discretionary authority to assess agency-head performance—delegated *solely* to the governor—is a necessary part of advancing his or her policy goals. Salary Act § 13. There is plainly a "reasonable fit" between the implementation of a governor's policy goals and the ability to increase or reduce the salaries of those tasked with implementation.

3. **Defendants have immunity.**

Defendants are immune from suit and liability because they exercised due care and performed discretionary functions. Iowa Code § 669.14(1); *Baldwin v. City of Estherville*, 929 N.W.2d 691, 697 (Iowa 2019). Analyzing immunity, Iowa courts apply a two-prong test: (1)

"whether the act in question was a matter of choice for the acting employee;" and (2) "whether the judgment was of the kind the exception was designed to protect" based on public-policy considerations. *Walker v. State*, 801 N.W.2d 548, 555 (Iowa 2011). The discretionary-function exception "prevent[s] judicial 'second guessing' of … decisions grounded in social, economic, and political policy." *Id.*

Establishing Godfrey's salary within the Salary Act's range was clearly "a matter of choice." The Salary Act didn't require Branstad to retain the same salary year-to-year. No case law exists that would have notified Defendants about Godfrey's purported property interest in continuing the same salary.

Further, establishing appointee salaries and related budgetary concerns are matters committed to the governor's discretion. Salary Act § 13. An elected governor must be able to rely on his political appointees to efficiently and effectively enact his policy goals. Iowa Const. art. IV, § 9 (governor must "take care … laws are faithfully

executed"); *Shockency*, 493 F.3d at 950 (political loyalty necessary for policymaking positions). In asking Godfrey to resign and reducing his salary, Branstad made policy decisions that the discretionary-function exception is designed to protect.

Branstad exercised due care and performed a discretionary function when he asked Godfrey to resign and later established Godfrey's salary within the designated range. Defendants have immunity.

D. **All claims should be dismissed.**

These claims fail as a matter of law, should never have been submitted to the jury, and the verdicts were unsupported by substantial evidence. The court erred in denying Defendants' summary-judgment motion, directed-verdict motion, instructing the jury on these claims, and denying Defendants' motion for judgment notwithstanding the verdict.

Division 2

Evidentiary errors deprived Defendants a fair trial.

Defendants preserved error by moving in limine to exclude evidence and lodging objections when the evidence was offered. (JA.IV-2017-2021 [13:22-17:1], 1811-1820). Defendants moved for a new trial, which was denied. (JA.VI-662-664, 792-809, 2403-2409).

The standard for a ruling admitting hearsay is to correct errors of law. *Hawkins v. Grinnell Reg. Med. Ctr.*, 929 N.W.2d 261, 266 (Iowa 2019). The standard to challenge all other rulings admitting evidence is abuse of discretion. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

A. Democrat senator Dearden's alleged conversation in which Godfrey disclosed he was gay was hearsay.

The court allowed Godfrey to present testimony about an out-of-court statement by senator Dearden regarding Godfrey's 2009 confirmation. (JA-IV-2717-2727 [25:15-35:14], 3150-3151 [182:6-183:2], 3319-3321 [152:5-154:23]). Multiple Democrat legislators (*not* Dearden) testified over objection that Godfrey asked Dearden if he

anticipated confirmation problems, and Dearden joked: "There shouldn't be any trouble with your confirmation at all unless you're gay. You're not gay, are you?" (*Id.*). Witnesses testified the story spread through the Democratic caucus. (*Id.*). The court reasoned Dearden's statement was "offered to show motive, intent, knowledge" and wasn't hearsay. (JA.IV-2725 [33:10-13]).

An out-of-court statement may be admitted when offered for a non-hearsay purpose "to show notice to or knowledge of *the listener*." *McElroy v. State*, 637 N.W.2d 488, 501-02 (Iowa 2001) (emphasis added). Dearden's statement wasn't offered to show the listener's motive, intent, or knowledge. It was offered to suggest that if the Democratic caucus heard it, then-senator Reynolds must have heard it, too. (JA.IV-2717-2727 [25:15-35:13]).

Consequently, it was inadmissible hearsay. Iowa R. Evid. 5.802. The statement improperly allowed the jury to speculate then-senator Reynolds heard the Dearden story and knew Godfrey was gay, when

in fact, no witness testified Reynolds or Defendants ever heard or knew.

Admitting hearsay over objection is presumably prejudicial "unless the contrary is affirmatively established." *Hawkins*, 929 N.W.2d at 265-66. Godfrey can't overcome the presumption of prejudice because the evidence relates to a critical issue in the case—whether Branstad knew Godfrey was gay—and attempts to impute knowledge about Godfrey's sexual orientation to Defendants based on inadmissible evidence. *Id.*

B. The court improperly admitted irrelevant and prejudicial evidence and lay opinion as a proxy for discriminatory motive.

Godfrey's witness examinations focused on public-policy views including same-sex marriage and adoption, *Varnum*, constitutional amendments, safe-school legislation, hate-crime legislation, expanding the ICRA, and personal religious beliefs. (JA.IV-3489-3491 [10:5-12:15], 3591-3592 [112:1-113:18], 3596-3598 [117:6-119:19], 3636-3637[157:5-158:18]; JA.V-1230-1240 [56:2-66:19]). Godfrey offered this

evidence to support a constitutionally-impermissible inference: a democratically-elected governor not "supportive" of a particular agenda is more likely to discriminate.

Relevancy focuses on the tendency of evidence to make a consequential fact more or less probable. Iowa R. Evid. 5.401; *Graber*, 616 N.W.2d at 637. Irrelevant evidence is inadmissible, but "the converse proposition," that relevant evidence is admissible, is not assured. *Id*. Erroneous rulings admitting Godfrey's irrelevant evidence unfairly prejudiced Defendants. Iowa R. Evid. 5.403; *State v. Sallis*, 574 N.W.2d 15, 17 (Iowa 1998) (relevance objection sufficient to raise Rule 5.403 objection).

1. **Public-policy views and political affiliation.**

Evidence regarding public-policy views and political affiliation was admitted to show discriminatory motive—essentially, guilt by political association. These public-policy positions cannot be used to prove discrimination.

a) **Candidate and Governor Branstad's public-policy views.**

Self-government permits and requires the election of candidates favored by the majority. Liability based, even in part, on an elected official's public-policy positions restrains the People's right to "alter or reform" their government. Iowa Const. art. I, § 2; art. X. Yet that's precisely what Godfrey was permitted to do.

Elected officials "have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them … also so they may be represented in governmental debates by the person they have elected to represent them." *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). An elected official's public-policy positions are the "highest rung" of speech the First Amendment protects. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010).

Godfrey cross-examined Branstad about policy views expressed on the campaign trail and as Governor including same-sex marriage and adoption, and failure to sign a proclamation supporting

gay rights. (JA-IV-3633-3644 [154:5-165:3], 3661-3666 [182:19-187:12], 3704-3705 [112:8-113:17], 3708 [116:1-10], 3709-3711 [117:6-119:19]; JA.IX-379). This evidence failed to make any fact of consequence regarding Branstad's motive more or less probable, was unconstitutional, and highly prejudicial to Defendants. Iowa R. Evid. 5.401-5.403, 5.702.

b) **Republican Party of Iowa's alleged "anti-gay" views and its 2010 Platform.**

The right to associate with a political party is "an integral part" of a citizen's constitutional freedoms. *Elrod v. Burns*, 427 U.S. 347, 357 (1976). Defendants' affiliation with the Republican Party of Iowa ("RPI") was used to prove discrimination:

> If the evidence establishes that the Republican Party is, in fact, "anti-gay", testimony of the individual defendant's affiliation with the Republican Party would make it more likely that a particular action was motivated by "anti-gay" animus.

(JA.IV-1813, 2019-2020 [15:11-16:7]). Consequently, much of trial impermissibility focused on the RPI's 2010 Platform planks and beliefs of allegedly "anti-gay" retired state senators.

i. **Republican senators.**

Democrat politicians testified about alleged "anti-gay" sentiments of senate Republicans in the decade *before* Branstad's election. Most egregious was former senator Matt McCoy's testimony that in his "experience between 2000 and 2008 … the overall arching philosophy … of the Republican senators … was … very anti-gay." (JA.V-379-381 [152:17-154:25]).

McCoy also testified about a failed 2004 senate confirmation of a gay man to the State education board. (JA.V-379-394 [152:17-167:16]). McCoy testified he was "outed" by another senator during floor debate. (*Id.*). The follow-up summarizes Godfrey's case in a nutshell: "Senator Veenstra, who outed you publicly on the floor … *is he a Republican*?" (*Id.*). Other Democrat politicians provided similar testimony about "anti-gay" Republicans. (JA.IV-2517-2521 [39:7-43:12] (Vilsack), 3351-3352 [184:13-185:14] (Gronstal)).

In 2000-2008, Iowa had Democrat governors; Defendants weren't senators; and Branstad wasn't involved in politics. An elected

official's affiliation as a Republican cannot be used to prove discrimination. Iowa R. Evid. 5.401-5.403; 5.702.

ii. **2010 RPI Platform.**

Godfrey spent considerable time seeking to admit the RPI's 2010 Platform, even though Defendants were not involved in writing it, nor had they even read it. (JA.IV-2918-2919 [226:1-227:11], 3000-3003 [14:11-17:1], 3105-3106 [119:19-120:2], 3641-3642 [162:6-163:3]). Godfrey focused on planks involving marriage, adoption, *Varnum*, anti-bullying, teaching homosexuality in schools, and the ICRA's scope. (*Id.*).

The document itself was finally "authenticated," and various planks read into evidence, by Democrat Michael Gartner, longtime advocate that the State should pay to settle this case. (JA.V-2701-2703 [70:1-72:23], 2711-2712 [80:20-81:1], 2714-2717 [83:3-86:8]; JA.VIII-160-208). Yet both Branstad and Vilsack testified, and Gartner agreed, that gubernatorial candidates don't read the party platforms, let alone run

on them. (JA.IV-2567-2568 [89:2-90:8], 3641 [162:6-15]; JA.V-2706-2708 [75:23-77:23]).

Political party association cannot be used as a litmus test for improper motive. *U.S. v. Robel*, 389 U.S. 258, 264-65 (1967). The 2010 RPI Platform should have been excluded as irrelevant and unfairly prejudicial. Iowa R. Evid. 5.401-5.403.

2. **Personal and religious beliefs of persons affiliated with ABI.**

A governor's liability cannot rise and fall on alleged personal beliefs of constituents. Iowa R. Evid. 5.402. Defendants moved to exclude evidence regarding personal and religious beliefs of ABI members and employees, as well as witness views regarding the ICRA's scope,[25] which the court denied, reasoning:

> If the evidence establishes ABI or its employees … were "anti-gay" in 2010 and 2011, and also establishes the individual defendants, including Branstad, relied upon information and advice received from ABI in making the decisions related to Godfrey, it is more probable the employment actions taken against Godfrey were due to his sexual orientation.

[25] JA.IV-553-555.

(JA.IV-1818, 2992-2993 [6:8-7:6]).

Godfrey examined ABI's former lobbyist John Gilliland about his upbringing, religious beliefs, and personal political views. The leap the jury was asked to make was extraordinary: if John Gilliland is "anti-gay," then ABI must be "anti-gay," and because Governor Branstad listened to ABI, he must be "anti-gay." (JA.V-1228-1240 [54:14-66:19]). Godfrey also examined witnesses about Gilliland's and ABI's views on 2007 ICRA amendments and religion, just as he did with Branstad and Findley. (JA.IV-3106-3109 [120:14-123:2], 3665-3666 [186:16-187:12]; JA.V-1228-1229 [54:19-55:25]). Dennis Murdock, former ABI member, testified Godfrey's sexual orientation was an "elephant in the room" when ABI considered his nomination. (JA.IV-3230-3256 [63:1-89:1]). The jury should never have heard this "evidence," Iowa R. Evid. 5.401, 5.403,[26] which featured prominently in Godfrey's closing. (JA.VI-537 [54:10-16]).

[26] Murdock's testimony was also inadmissible hearsay. Iowa R. Evid. 5.802.

C. **The court erred in admitting evidence regarding Branstad's item veto and legislative action proposed by Republicans.**

Godfrey presented evidence regarding constitutional executive action and legislative proposals to show alleged discriminatory bias and motive—specifically, Branstad's item-veto, and positions on constitutional marriage amendment. (JA.VIII-874; JA.IV-3629-3633 [150:4-154:4]; JA.V-293-299 [40:18-46:3], 310-311 [57:19-58:1]). Separation-of-powers principles prohibit liability based on such evidence.

Based on separation-of-powers considerations and the judiciary's refusal to disturb "the respective roles and regions of independence of the coordinate branches of government,"[27] the political-question doctrine "exclude[s] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *John v. U.S.*, 77

[27] *Des Moines Register & Tribune v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996).

Fed. Cl. 788, 825 (2007). When established, courts refuse to "intervene or attempt to adjudicate the matter." *Dwyer*, 542 N.W.2d at 495.

The governor's constitutional veto authority cannot form the basis for civil liability. Iowa Const. art. III, § 16. So long as exercised in the manner prescribed therein, a governor's veto authority is absolute and not subject to judicial review. *Homan v. Branstad*, 812 N.W.2d 623, 628-29 (Iowa 2012).

The same is true of legislative proposals, whether bills or proposed constitutional amendments. *Teague v. Mosley*, 552 N.W.2d 646, 649 (Iowa 1996) (all actions taken "in a legislative capacity" are absolutely privileged to protect "the functions" performed by the People's elected representatives). To hold otherwise would infringe on the People's right to self-government.

Neither the wisdom of such actions, nor the motivations of the actors are questions for the courts or juries—they are questions for the ballot box. Iowa R. Evid. 5.401-5.403.

D. **The evidence prejudiced Defendants, so the remedy is a new trial.**

"[P]rejudice is presumed," mandating a new trial, "when evidence is erroneously admitted." *Graber*, 616 N.W.2d at 641. To defeat the prejudice presumption, Godfrey must affirmatively show the suitably admitted evidence supports the verdict as "the only proper" decision. *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d. 1, 8 (Iowa 2001). Godfrey cannot do so here.

Division 3

The jury instructions materially misstated the law and allowed the jury to find Defendants liable and award damages on legally improper grounds, prejudicing Defendants.

Prior to summations, Defendants objected to the jury instructions. (JA.VI-397-438 [89:4-130:17], 499-500 [16:15-17:24]; JA.IV-1875-1929; JA.V-3043-3053, 3301-3319; JA.VI-307-317; 318-321).

This Court reviews jury-instruction challenges to correct errors at law. *DeBoom*, 772 N.W.2d at 5.

A. **The instruction restricting the Governor's discretion to set salary materially misstated the law.**

The instructions directed the jury that under the Salary Act, Branstad couldn't consider "strictly partisan political purposes,"[28] a phrase Godfrey's attorney coined but the instructions never defined:

> In setting salaries pursuant to this provision the Governor is obligated to exercise discretion based upon the factors set forth in the law, and not based on strictly partisan political purposes.

(JA.VI-474, Instruction 28).

The Salary Act contains no such limitation. Salary Act § 13. No Iowa law prohibits the Governor from considering "partisan political purposes" in assessing a *political appointee's* performance, although Iowa law expressly prohibits considering such factors for *employees*. Iowa Code § 8A.416(1) (prohibiting discrimination against merit-system employees based on political opinions or affiliation). The instruction materially misstated the law, inappropriately commented on the evidence, and overemphasized Godfrey's theory of the case.

[28] JA.I-2424 ¶ 71.

This material error was compounded by repetition in other instructions. (JA.VI-474-476, Instructions 28, 30-31).

B. The constitutional-tort instruction materially misstated the law.

As discussed, because a due-process claim cannot be based on the process itself and because there was no property interest, the jury instructions on due process materially misstated the law. (JA.VI-475-476, Instructions 30-33). Further, the jury was improperly tasked with deciding the process Godfrey was due, which is a question of law. *Russell*, 897 N.W.2d at 733.

Finally, the marshaling instruction erroneously combined elements of procedural and substantive due process, used a substantive-due-process standard applicable to land-use regulations, *Bakken v. City of Council Bluffs*, 470 N.W.2d 34, 38 (Iowa 1991), and permitted the jury to decide whether Defendants' conduct violated Godfrey's substantive-due-process rights. *Truong*, 829 F.3d at 631. (JA.VI 475-476, Instruction 31).

C. **The instructions erroneously referred to an "employee" and "employment" relationship.**

The instructions referred to standards applicable to an "employee" and governing an "employment" relationship. (JA.VI-471-474, Instructions 18-27). As discussed, Godfrey was a political appointee, not an employee, and these instructions materially misstated the law.

D. **The discrimination and retaliation instructions failed to specify the at-issue adverse "employment" action and provided a legally flawed standard.**

Contrary to settled law, the marshaling instructions on discrimination and retaliation failed to define the at-issue discrete adverse "employment" actions. (JA.VI-471-472, Instructions 19-20). The discrimination instruction's first element, and the retaliation instruction's second element, stated: "Defendant took adverse action against plaintiff." (*Id*.).

For employment-practice claims based on discrete actions, marshaling instructions must specify the at-issue adverse action. In *DeBoom*, relying on an Eighth Circuit model instruction, this Court

approved a marshaling instruction that specified termination as the discrete adverse action. 772 N.W.2d at 11 n.7 ("Defendants discharged plaintiff"). Even today, the Eighth Circuit's model marshaling instructions for discrimination and retaliation require a description of the discrete adverse action alleged. Eighth Circuit Model Civil Jury Instruction 5.40 n.2 (2019); Instruction 10.41 n.6 (2019) (select appropriate term "depending upon whether the allegedly retaliatory action involved discharge, demotion, failure to promote, reassignment, suspension, etc.").

Specifying the adverse action is akin to the requirement that a tort-claim marshaling instruction include a specification of negligence. *See, e.g.*, *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000). We don't ask juries to generally decide if *some* action in the trial record was negligent. *Id*. Instead, the district court serves as gatekeeper, crafting an instruction based on the governing law and sufficiency of the evidence. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 151 (Iowa 1992).

These fundamentally flawed marshaling instructions allowed the jury to consider alleged adverse "employment" actions[29] that were legally insufficient to support an ICRA claim. Because the marshaling instructions failed to specify the adverse action, the jury was also impermissibly permitted to consider decade-old actions outside the 300-day charge-filing limitation period.[30] Iowa Code § 216.15(13); *Dindinger v. Allsteel*, 860 N.W.2d 557, 567 (Iowa 2015).

The ICRA requires a causal relationship between the discrete action upon which a jury finds liability and a compensatory-damages award. *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 471-72 (Iowa 2017); *Dutcher v. Randall Foods*, 546 N.W.2d 889, 894 (Iowa 1996). Because the marshaling instructions

---

[29] The instructions described "adverse action" as one involving "material consequences to an employee," which was never defined. (JA.VI-472, Instruction 21).

[30] Vilsack speculated that in 2006, Republican senators wouldn't confirm Godfrey because he was gay. (JA.IV-2517-2522 [39:7-44:21], 2547-2550 [69:14-72:24]). Because the instructions broadly defined State "agents," (JA.VI-468, Instruction 12), the jury could have found the State liable for conduct by Republican legislators before Branstad's election.

failed to identify a discrete action, the jury couldn't tailor an award to "actual damages" caused by the at-issue adverse action. Iowa Code § 216.15(9)(a)(8).

Additionally, the instructions provided a legally flawed adverse-action definition. Before trial, Godfrey dismissed his hostile-work-environment claim. (JA.IV-660). Godfrey's remaining discrimination and retaliation claims were limited to discrete actions—not continuing violations or cumulative effects. *Dindinger*, 860 N.W.2d at 571-72. Nevertheless, the jury was erroneously instructed to consider "the cumulative effect of actions taken by [Defendant] in determining whether the actions amount to an 'adverse action.'"[31]

E. The retaliation instructions failed to specify the at-issue protected activity and provided a legally flawed standard.

As discussed, retaliation is an action taken *in response to* protected activity. *Hulme*, 480 N.W.2d at 42-43. The instruction on

[31] JA.VI-472, Instruction 21.

"protected activity" improperly directed the jury that Godfrey merely had to prove he "ma[de] any type of complaint about conduct [that Godfrey] reasonably believed may constitute discrimination or retaliation as well as opposing, avoiding or objecting to conduct [Godfrey] reasonably believes may be discriminatory." (JA.VI-473, Instruction 24). Moreover, the retaliation marshaling instruction failed to specify Godfrey's alleged protected activity. (JA.VI-472, Instruction 20).

Because the instruction omitted the indirect object, the jury could have concluded that in December 2010, Godfrey engaged in protected activity when he privately advised his partner discrimination was afoot. (JA.V-2255-2257 [144:2-146:3]). These instructions never required Defendants to have been on notice that Godfrey opposed discrimination or retaliation. *Fitzgerald*, 613 N.W.2d at 289. The court failed to carry out its proper role as gatekeeper in identifying protected activity, then materially misstated the law in directing the jury to identify it.

F. **The instructions conflated the damages standards.**

The damages instruction failed to advise the jury that any damages awarded for emotional distress must be directly related to the conduct associated with each distinct claim. (JA.VI-477-478, Instruction 35). Under the ICRA, "[o]nly those damages 'caused by the discriminatory or unfair practice' are compensable." *Dutcher*, 546 N.W.2d at 894.

Additionally, under *Doe v. Central Iowa Health System,* the court shouldn't have submitted Godfrey's claim for constitutional-tort damages because the evidence was insufficient to support it. 766 N.W.2d 787, 791-94 (Iowa 2009). Furthermore, Godfrey presented insufficient evidence to support an instruction regarding damages for future emotional distress. The errors in the instruction were compounded by the verdict form, which incorporated each and every final instruction. (JA.VI-621-623).

G. **The flawed instructions prejudiced Defendants.**

Reversal is required where erroneous jury instructions result in prejudice. *DeBoom*, 772 N.W.2d at 5. Courts presume prejudice

"unless the record affirmatively establishes that there was no prejudice." *Haskenhoff*, 897 N.W.2d. at 579. These flawed instructions prejudiced Defendants, because the jury rendered a verdict based on materially misleading statements about the governing law.

Division 4

Rulings regarding Godfrey's medical condition denied Defendants their right to present a full and fair defense.

Based on Godfrey's refusal to answer deposition questions about his medical condition, Defendants moved for sanctions to prohibit Godfrey from offering evidence regarding his alleged emotional distress, which the court denied. (JA.VIII-2005-2033; JA.IV-654-657). Conversely, the court granted Godfrey's motion excluding evidence regarding Godfrey's physical and emotional health. (JA.IV-1803-1804; JA.VII-729-1064; JA.V-2200-2212 [89:24-101:21], 2249-2250 [138:19-139:3], 2267-2281 [156:4-170:6], 2323-2335 [8:2-20:12], 2425-2427 [110:19-112:23]; JA.VI-664-665, 812-832, 2412-2415). Defendants made an offer of proof and later moved for a new trial. (*Id*.).

For statutory and rule interpretation, the standard is to correct errors at law. *Fagen v. Grand View Univ.*, 861 N.W.2d 825, 829 (Iowa 2015). The standard for a ruling denying discovery sanctions is abuse of discretion. *Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 389 (Iowa 2012). The standard for rulings excluding evidence based on relevance is abuse of discretion. *Giza v. BNSF Ry.*, 843 N.W.2d 713, 718 (Iowa 2014).

A. **Godfrey waived the physician-patient privilege.**

As a patient-litigant, Godfrey waived the physician-patient privilege because he made his "condition ... an element or factor of [his] claim." Iowa Code § 622.10(2); *Fagen*, 861 N.W.2d at 832.

Godfrey's pleadings established waiver. He sought damages for past and future "mental and emotional harm and anguish, anxiety, fear, depression, loss of enjoyment of life, degradation, disgrace, uncertainty, apprehensiveness, grief, restlessness, dismay, tension,

and unease, pain and suffering."[32] *Stender v. Blessum*, 897 N.W.2d 491, 515 (Iowa 2017).

Discovery confirmed Godfrey's waiver. Godfrey received treatment for "depression" allegedly caused by Defendants' conduct. (JA.VII-114 [552:2-5]). In 2012, Godfrey testified he received treatment for his alleged harm:

> [Attorney LaMarca]: Have you received any type of medical treatment for … damages you are claiming in this case?
>
> ***
>
> [Godfrey]: I have continued treatment and spoken quite significantly with Nicky Mendenhall.[33]

(JA.III-2025 [445:8-13]).

In 2018, Godfrey designated as experts Mendenhall and his D.C.-area therapist "regarding the mental health effects of

---

[32] JA.I-74, 76, 2405-2406, 2408-2410.

[33] Since 2007, Godfrey had "either weekly or biweekly" counseling with Mendenhall, a therapist. (JA.VII-109-110 [428:21-429:19]; JA.I-1845-1917).

Defendants' treatment of Plaintiff and the psychological implications of the discrimination and retaliation."[34] (JA.I-1845-1847).

Early on, in 2012, Judge Hutchison granted Defendants' motion to compel medical records, concluding "that right to privacy and general privilege which protects medical records has been waived." (JA.I-305). He found Godfrey "is claiming far more than garden-variety emotional distress." (JA.I-304). Judge Hutchison reasoned access to Godfrey's medical records was essential for Defendants to present a full and fair defense, especially because Godfrey had been treated by a mental-health counselor for anxiety "both before and after the incident which gave rise to his claims," and:

> Assuming defendants have wronged plaintiff and have caused damage to him, they must be responsible for the damages they have caused—but only for those damages they have caused, and not for a pre-existing condition. In this case, there would be no way for jurors to evaluate the claims Mr. Godfrey is making for emotional distress caused by defendants without knowing the baseline of his condition.

[34] Before trial, Godfrey claimed he designated both therapists "by mistake." (JA.IV-151).

(JA.I-304-305). Godfrey never sought interlocutory review.

As trial approached, Godfrey bolstered the waiver. He withdrew his salary-damages claim, contemporaneously increasing his emotional-distress damages to $6-10 million. (JA.III-2029).

At trial, Godfrey requested only damages for emotional distress. (JA.VI-621-623). In summation, Conlin argued Godfrey didn't want salary damages because "[t]hat's not even a fraction of what he deserves." (JA.VI-547 [64:3-4]). Conlin requested "human damages, not economic damages," covering "[d]egradation, embarrassment, grief, anguish, stigma" and "disgrace, uncertainty, exhaustion, and tension" over "the rest of [Godfrey's] life," citing a jury instruction that presumptively established Godfrey's 35.1-year life expectancy. (JA.VI-549-553 [66:7-70:11]; JA.VI-478, Instruction 36).

The damages jury instruction defined "emotional distress" to "include ... mental anguish or loss of enjoyment of life as well as emotional pain and suffering, fear, apprehension and anxiety." (JA.VI-477-478, Instruction 35). The verdict form asked the jury to

consider only emotional-distress damages. (JA.VI-621-623). The jury awarded $1,500,000 in past and future emotional-distress damages. (*Id.*; JA.VI-2541-2544).

B. Godfrey's discovery misconduct warranted a sanction precluding him from offering "emotional-distress" evidence.

Despite Godfrey's privilege waiver, during his July 2012 deposition, Godfrey refused to answer questions about his prior, concurrent, or subsequent emotional health. (JA.VII-108-115; JA.III-2018-2026). Conlin objected to several questions based on "privacy" and directed Godfrey to not answer, including:

- "How would you describe your overall health … the only time you met with Governor Branstad in December of 2010?" [JA.III-2020, 427:20-428:6]
- "When you started seeing [Mendenhall] in 2007, for what purpose was that?" [JA.III-2021, 429:20-23]
- "Are you still seeing [Mendenhall] for the same reason throughout this entire time period you told us about you've seen her?" [JA.III-2021, 429:24-430:4]
- "What was the basis for your anxiety?" [JA.III-2023, 437:14-16]
- "Have you taken any type of medication since December 20, 2010 to the present that has to do with any type of emotional condition? [JA.III-2024, 441:14-18]

- "[W]hat was the diagnosis for which you were taking bupropion?" [JA.III-2024, 443:1-5]
- "Have you ever been diagnosed with a bipolar disorder?" [JA.III-2024, 443:21-23]
- "Have you ever been diagnosed with any type of manic depressive disorder?" [JA.III-2024, 443:24-444:1]

Godfrey agreed with his attorney's directive not to answer. (JA.III-2022 [433:12-21]). Acknowledging futility, Defendants' counsel eventually discontinued questioning. (JA.III-2025 [445:18-446:21]). Following the deposition, Godfrey never moved for an order.

If Conlin considered the questions objectionable, she could either assert an objection and allow Godfrey to answer, or under limited circumstances, instruct Godfrey to not answer. Iowa R. Civ. P. 1.708(1)(b) (attorney may direct client not to answer "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under rule 1.708(2)"). *See also Van Stelton v. Van Stelton*, No. C11-4045-MWB, 2013 WL 5574566, at *15 (N.D. Iowa Oct. 9, 2013) (interpreting comparable language under federal rule). Flouting the rule, Conlin directed Godfrey to not

answer because "it invaded his privacy." (JA.IV-440-441 [10:25-11:1]; JA.III-2023-2024). Conlin's directive based on "privacy" was frivolous and knowingly disregarded Rule 1.708(1)(b). Iowa R. Prof. Conduct 32:3.4(c)-(d).

By refusing to answer relevant, probative questions, Godfrey and Conlin engaged in discovery abuse. As a precursor to sanctions, Defendants had no obligation to request a second deposition. The rule expressly authorizes a sanction on "a person who impedes, delays, or frustrates the fair examination of the deponent." Iowa R. Civ. P. 1.708(2)(a). *See also* Iowa R. Civ. P. 1.517(3)(a) (self-executing sanction to exclude at trial information not disclosed in discovery).

Based on Godfrey's refusal to answer these and other questions, Defendants moved for sanctions to preclude Godfrey from offering evidence regarding alleged emotional harm at trial. (JA.III-2005-2017). The court denied the motion, reasoning Defendants never demanded a second deposition, so Godfrey's refusal to answer questions "is no more attributable to Godfrey than the Defendants."

(JA.IV-656). He recognized *Defendants were prejudiced* because "Godfrey has not been deposed regarding his health history." (*Id*.). Although Judge McCall considered reopening Godfrey's deposition on emotional distress and damages, in the written ruling, he rejected that approach because discovery had closed. (*Id*.; JA.IV-445).

Courts have inherent power to impose sanctions for discovery abuse, including excluding evidence. *Lawson v. Kurtzhals*, 792 N.W.2d 251, 258-59 (Iowa 2010). When considering a sanctions request, relevant factors include the party's reasons for failing to provide the evidence during discovery; the evidence's importance; the time the opposing party needs to prepare; and the propriety of a continuance. *Id*. Considering the relevant factors,[35] a sanction was warranted. The court abused discretion in failing to impose sanctions.

First, as a patient-litigant, Godfrey had no legitimate reason for refusing to answer questions about his condition. Iowa R. Civ. P.

[35] Because Godfrey never provided the evidence, the last two factors are inapplicable.

1.708(1)(b); *State v. Leedom*, 938 N.W.2d 177, 189 (Iowa 2020) (no waiver when deponent answers questions on cross-examination). Conlin's directive not to answer inhibited Defendants' effort to obtain discovery and prepare for trial, and was prejudicial to the administration of justice. Iowa R. Prof. Conduct 32:8.4(d). Godfrey, an Iowa-licensed attorney (and an Iowa agency head who engaged in "quasi-judicial" activity), shared responsibility for that failure. (JA.III-2022 [433:10-21]).

Second, obtaining Godfrey's sworn testimony about his own condition was essential for Defendants "to present a full and fair defense." *Fagen*, 861 N.W.2d at 832. Defendants couldn't obtain the critical evidence from any other source. *See also* Iowa R. Civ. P. 1.704(2) ("[a]ny part" of opposing-party deposition admissible at trial).

Finally, the court's ruling adversely affected Defendants' substantial rights because it deprived them their opportunity to "present a fair and full defense." *Fagen*, 861 N.W.2d at 832. At trial,

Godfrey testified *for the first time ever* regarding his alleged emotional distress. (JA.V-2233-2249 [122:5-138:8]).

Judge McCall abused his discretion in denying the motion for sanctions and allowing Godfrey to present evidence regarding alleged emotional harm at trial.

C. The excluded evidence regarding Godfrey's medical condition, including emotional health, was relevant.

Godfrey's harm included sleeplessness, oversleeping, self-isolation, crying, pacing, bruxism, insecurity, feeling unsafe, lost ability to trust, and an inability to "get justice" before his father and aunt passed away. (JA.VI-547-549 [64:1-66:20]). As a patient-litigant, Godfrey affirmatively and voluntarily placed his condition in issue and sought damages for emotional harm. Iowa Code § 622.10(2); *Stender*, 897 N.W.2d at 515. Consequently, the "entire spectrum" of Godfrey's medical condition was relevant and admissible to afford Defendants their "right to present a full and fair defense." *Id*.

During trial, Judge McCall prohibited Defendants from offering or using any information in Godfrey's medical records, reasoning

Godfrey's damages were "garden variety," so the evidence lacked relevance:

> [W]hen an individual is simply alleging garden-variety emotional distress damages, the fact that the individual has experienced similar-type feelings because of life events that occurred in the past is not relevant.

(JA.V-2427 [112:18-23]). The jury was never able to measure Godfrey's emotional harm against the "baseline" previously identified by Judge Hutchinson.

Under the circumstances, Iowa law does not recognize a "garden-variety" exclusionary rule based on relevance. The ruling stymied Defendants' right to counter Godfrey's damages claim, prohibiting:

- baseline evidence about Godfrey's condition before December 2010;
- cross-examination about other sources of emotional distress;
- cross-examination about causation including similar symptoms not attributable to Defendants' alleged conduct;
- impeaching Godfrey with inconsistent statements about causation;
- challenging the presumptive 35.1-year life expectancy jury instruction.

Godfrey had the burden to prove a causal relationship between his alleged harm and Defendants' alleged conduct. *Dutcher*, 546 N.W.2d at 894 (under ICRA, "[o]nly those damages caused by the discriminatory or unfair practice are compensable,"); *Doe*, 766 N.W.2d at 792-94 (emotional-distress tort damages "needs expert testimony to prove causation unless the causation is so obvious that it is within the common knowledge and experience of a layperson").

Without question, evidence regarding Godfrey's condition was relevant: it made a fact of consequence more or less probable. Iowa R. Evid. 5.401. When a plaintiff seeks substantial damages for pain and suffering, "[e]vidence concerning other medical conditions that have and will impact [plaintiff's] physical and mental well-being and his ability to enjoy life are *clearly relevant*" to damages. *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 158 (Iowa 2004) (emphasis added).

The excluded evidence squarely challenged Godfrey's evidence and damages claim. Medical records revealed that within five years before December 3, 2010, Godfrey was diagnosed with mental-health

conditions described in the *DSM-5*, including depression, acute reaction to stress, anxiety disorder, and fatigue;[36] prescribed medications for anxiety and depression (bupropion, alprazolam, and paroxetine);[37] reported symptoms that mirrored the harm he claimed Defendants caused (sleeplessness, oversleeping, self-isolation, crying spells, pacing, bruxism, insecurity, feeling unsafe, lost ability to trust, anger, anxiety, feelings of powerlessness, restlessness, fatigue, panic attacks, and depression);[38] and reported to his therapist that since early childhood, he felt oppressed, manipulated, used, controlled, ignored, and victimized.[39] Additionally, since 2007, Godfrey received mental-health therapy "either weekly or biweekly," during which he discussed stressors in his life. (*Id*.). Godfrey's records revealed multiple other stressors, including chronic relationship problems with his partner, previous romantic relationships, rejection,

---

[36] JA.VII-735, 738-741, 747-752.
[37] JA.VII-735, 739-741, 747-752.
[38] JA.VII-735, 738-741, 747-752, 852-885.
[39] JA.VII-109-110 [428:21-429:19], 741, 747, 749-752, 826-883.

insecurity, criticism, and stress related to health risks associated with Godfrey's sexual history and lifestyle. (JA.VII-737-916).

Yet Judge McCall excluded all such evidence[40] based on a "garden-variety" gloss that conflated the admissibility standard under Rule 5.401 with a discovery standard. *Stender*, 897 N.W.2d at 514-15 (admissibility); *Fagen*, 861 N.W.2d at 831-35 (discovery). In September 2012, Judge Hutchison ruled Godfrey's damages weren't "garden variety." (JA.I-304). Judge McCall essentially erased Godfrey's medical history and shielded Godfrey from rigorous cross-examination and impeachment.

Iowa law doesn't allow for a garden-variety discovery exception, and even if such an exception exists, it was inapplicable here. Iowa Code § 622.10(2); Iowa R. Civ. P. 1.500(1)(b). In a genuine "garden-variety" case, a defendant might argue the plaintiff's "emotional distress and humiliation were not so severe as to require

[40] JA.V-2323-2325 [8:1-20:12], 2425-2427 [110:12-112:23], 2200-2212 [89:24-101:21], 2268-2281 [157:12-170:4].

medical or physical consultation or treatment." *Dean v. Cunningham*, 182 S.W.3d 561, 569 (Mo. 2006). Here, Defendants couldn't make that argument because they knew the truth: Godfrey admitted receiving medical treatment for alleged harm by Defendants (JA.III-2018-2026); and designated as experts his Iowa and D.C. therapists. (JA.I-1845-1847).

Throughout his life, Godfrey struggled with chronic anxiety and depression related primarily to his sexual orientation. (JA.VII-734-916). At trial, Godfrey portrayed himself as a pristine picture of sanity and stability, who since childhood was able to overcome stressors he associated with his sexual orientation. (JA.V-319-322 [92:10-95:14], 327-333 [100:20-106:24], 2238 [127:10-13]). Then, according to Godfrey's narrative—the only one permitted at trial—he succumbed to stressors that he personally attributed to Defendants and their alleged intolerance. (JA.V-2233-2249 [122:5-138:21], 2255-2257 [144:21-146:4]).

In summation, and consistent with Godfrey's unchallenged testimony, Conlin noted Godfrey couldn't sleep; slept too much; grinded his teeth; paced; isolated himself; cried; and "lost the ability to trust 100%." (JA.VI-547-553 [64:1-70:19]). Yet the court expressly precluded Defendants from asking Godfrey, if before 2011, he had problems sleeping; crying spells; bouts of depression; bruxism; lack of motivation to exercise; pacing; and lost trust in authority figures. (JA.V-2425-2427 [110:21-112:23]). Defendants were prohibited from pointing out that Godfrey refused to answer questions about his mental health. (*Id.*). Defendants couldn't even impeach Godfrey with his prior statements to medical providers. Iowa R. Evid. 5.613; 5.803(4). (JA.VII-788; JA.V-2267-2281 [156:4-170:4]).

In summary, Godfrey was permitted to blame Defendants for any symptoms he chose, for the first time at trial, with no ability for Defendants to counter. Godfrey testified about "garden-variety" emotional distress, Defendants couldn't cross-examine or impeach him, and then, based solely on lay testimony, the jury awarded

$1,500,000. The excessive damages award confirms Judge McCall's handcuff rulings prevented Defendants from presenting a full and fair defense. The Court should grant a new trial. *Giza,* 843 N.W.2d at 726.

Division 5

The excessive $1,500,000 damages award is the product of passion and prejudice.

Defendants timely moved for a new trial, which the court denied. (JA.VI-667, 832-837, 2416-2418).

The standard is abuse of discretion. *Sallis v. Lamansky*, 420 N.W.2d 795, 799 (Iowa 1988).

A. **The evidence was insufficient to support the award.**

An excessive award is "necessarily based on insufficient evidence." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 771 (Iowa 2009). Emotional-distress awards are "not without boundaries;" they must be "limited to a reasonable range derived from the evidence." *Id.* at 772-73.

Judge McCall characterized the admitted evidence as "truly ... garden-variety emotional distress." (JA.V-2327 [12:13-19]). Godfrey's evidence consisted solely of lay testimony from himself, his boyfriend, and friends, who described symptoms resembling what this Court described as "common consequences"[41] *after an employment termination*, such as insomnia, oversleeping, bruxism, crying episodes, distrust, and pacing. (JA.V-2437-2443 [122:5-128:17]; JA.VI-547-553 [64:1-70:11]). Yet Godfrey didn't allege termination. On this record, the evidence—uncorroborated by expert opinion—is insufficient to support the award.

B. **The award is flagrantly excessive.**

A "clearly excessive verdict gives rise to a presumption that it was the product of passion or prejudice." *Jasper*, 764 N.W.2d at 771. The presumption arises here because the uncontroverted facts show that it exceeds the limits of fair compensation and bears no

[41] *Jasper*, 764 N.W.2d at 759-60, 772-73.

"reasonable relationship" to the loss. *Simon Seeding*, 895 N.W.2d at 472.

This award far exceeds emotional-distress verdicts the Court has evaluated in the employment context. *Jasper*, 764 N.W.2d at 772-73. ($100,000 award for termination excessive); *Simon Seeding*, 895 N.W.2d at 473 ($45,000 award for harassment and termination not excessive, citing "racially offensive epithets" and lay testimony about impact on complainant). Unlike *Jasper* and *Simon Seeding*, Godfrey—a nonelected political appointee rather than an employee—was neither fired nor subjected to offensive slurs. After the salary reduction, he continued working until he voluntarily resigned for a more lucrative job. (JA.V-2537 [27:12-22]). He repeatedly asserted that he sought only "garden-variety" damages; no damages for lost wages; and the same amount for all claims. *E.g.*, JA.V-2200-2212 [89:24-101:21], 2323-2335 [8:2-20:12]; 01/21/2020 Ruling-Application for Order Nunc Pro Tunc p. 3. Yet the verdict is 5-15 times the $100,000 verdict held

excessive in *Jasper*, and 11-33 times the $45,000 award found "larger than other recent awards,"[42] but not excessive in *Simon Seeding*.

The "ICRA does not allow for 'punitive damages' disguised as an award for emotional distress." *Simon Seeding*, 895 N.W.2d at 473 (citation omitted). The disconnect between "garden-variety" stress and a seven-figure verdict shows the award was presumptively punitive.

C. The evidentiary rulings provoked the jury to make an excessive award.

The record is replete with evidence showing erroneous evidentiary rulings fueled the jury's inflated verdict. Those rulings shackled Defendants and guaranteed a one-sided case. *Goettelman v. Stoen*, 182 N.W.2d 415, 421 (Iowa 1970) (excessive verdict based on "inflammatory evidence").

Godfrey's history of recent mental-health treatment, medication, and diagnoses were verboten. Defendants couldn't cross-

[42] 895 N.W.2d at 473.

examine Godfrey regarding other sources of emotional distress, attack his claim that Defendants caused the alleged harm, or challenge the presumptive 35.1-year life expectancy. Judge McCall even barred impeachment regarding Godfrey's statements to therapists about Defendants. (JA.VII-824-825).

Additionally, Judge McCall permitted Godfrey to testify about his alleged emotional distress *from trial*, although the ICRA doesn't authorize damages for such alleged harm. *Dutcher*, 546 N.W.2d at 894. During opening, defense counsel used a PowerPoint slide with words about a "personal gift" from the Iowa legislature. That phrase, a rhetorical flourish referring to legislation benefitting Godfrey,[43] was never spoken. Yet Conlin claimed Harty accused Godfrey of receiving a "bribe." (JA.IV-2184-2188 [180:25-184:21], 2211 [18:9-24:4]).

Despite Conlin's objections, she repeatedly reminded the jury about the so-called "personal gift."[44] On direct examination, Conlin

[43] JA.IV-2212-2214 [19:9-21:25].
[44] JA-IV-2132-2133 [128:23-129:15], 2533-2534 [55:13-56:9].

asked Godfrey "How do you feel about being accused of getting a personal gift from the Iowa legislature?" (JA.V-2000-2002 [180:16-182:11]). Over Defendants' objection, Godfrey testified about "significant fear" that he might lose his current job based on opening statement. (*Id*.). The court refused a curative instruction. (JA.V-2008-2010 [188:15-190:14]), 2117 [6:1-13], 2095-2099).

Individually and cumulatively, the evidentiary rulings deprived Defendants a fair trial, prevented substantial justice, and provoked the jury to award damages based on passion and prejudice. *Goettelman*, 182 N.W.2d at 421.

Division 6

In response to Godfrey's misconduct refusing to proceed with his case-in-chief, Judge McCall forced an illegal venue change, depriving Defendants a fair trial.

Defendants moved for a new trial, which Judge McCall denied. (JA.VI-668-669, 837-845, 2418-2424).

The standard of review is abuse of discretion. *Fry v. Blauvelt*, 818 N.W.2d 123, 132 (Iowa 2012).

During April 2019 hearings, preliminary construction in the Historic Courthouse was ongoing. (JA.IV-230; JA.VII-707-708, 726-727). When trial commenced, active construction had been separated from court proceedings by a "sealed wall or partition designed to deal with the issues of dust and noise associated with the need to hold court in a building partially under construction;" and measures were taken to ensure air quality in Courtroom 208. (*Id*.). Although the courtroom conditions were as different as night and day, Godfrey nevertheless filed three motions to move trial. (*Id*.; JA.VII-700-706, 710-725). On June 7, Conlin stopped appearing at trial. (JA.IV-2486-2490 [8:9-12:16]).

On June 19, Godfrey refused to continue presenting his case-in-chief. (JA.V-163-180 [3:1-20:18]). Godfrey advised he intended to move for a mistrial. (*Id*.). In response, Judge McCall warned he would grant a mistrial:

> defendants need to be aware that that is the position the plaintiffs are going to take if the Supreme Court continues to deny an alternate location for the trial. … I certainly think that such a motion may well have significant merit.

(JA.V-126 [61:16-22]).

Subsequently, Judge McCall predicted a mistrial would be unnecessary if the parties agreed to change venue. (JA.VI-2420-2422). Defendants argued that air testing showed the courtroom was safe and agreed to an illegal venue change[45] under duress of Judge McCall's mistrial threat. (JA.V-205-213 [1:1-11:19]; JA.VI-2420-2421).

Ruling on Defendants' post-trial motions, Judge McCall admitted he orchestrated the venue change but declared Defendants' contention that the air quality was acceptable as a "***blatantly false statement***," citing an April 11, 2019 letter from defense counsel sent after a hearing held months before Courtroom 208 had been remediated for trial. (JA.VI-2421, 2424) (emphasis in original). After the April 2019 letter was sent, the situation was remedied, as outlined by the Chief Judge. (JA.VII-707-708). Judge McCall was well aware of these changes, yet intemperately chose to mischaracterize Defendants' statement.

[45] Iowa Code § 602.6105.

Judge McCall should have used his trial management authority and ordered Godfrey to continue presenting his case-in-chief. Iowa R. Civ. P. 1.945; *Metz v. Amoco Oil Co.,* 581 N.W.2d 597, 599 (Iowa 1998). Godfrey's dilatory tactics and Judge McCall's failure to appropriately manage trial and forced venue change prejudiced Defendants, who had to present key defense witnesses by videotape rather than live. (JA.V-2932-3042, 3243-3296; JA.VI-205-306). Defendants incurred additional costs associated with travel to Jasper County and the extended duration of trial. (JA.V-188).

The remedy is a new trial in the proper venue, with a different judge. If the case is remanded for trial, Judge McCall should be disqualified. Iowa Code of Judicial Conduct 51:2.11(A)(1).

Conclusion

Defendants-Appellants respectfully request that the Court reverse the judgment and remand the case, with instructions to dismiss Plaintiff Godfrey's claims and enter judgment on all claims in

Defendants' favor. Alternately, this Court should reverse the judgment and remand for a new trial with a different judge.

Request for oral submission

Defendants-Appellants respectfully request oral argument.

/s/Frank Harty, AT003356
/s/Debra Hulett, AT0003665
/s/David Bower, AT0009246
/s/Katie Graham, AT0010930
NYEMASTER GOODE, P.C.
700 Walnut Street, Suite 1600
Des Moines, Iowa 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: fharty@nyemaster.com
Email: dlhulett@nyemaster.com
Email: dbower@nyemaster.com
Email: klgraham@nyemaster.com
ATTORNEYS FOR
DEFENDANTS-APPELLANTS

Certificate of compliance
with type-volume limitation, typeface requirements, and type-style requirements

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[X] this brief contains 13,930 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Palatino Linotype 14 point font.

/s/ Debra Hulett

Attorney's cost certificate

I, Debra Hulett, certify that there were no costs to reproduce copies of Appellants' Final Brief because the appeal is being filed exclusively in the Appellate EDMS system.

/s/ Debra Hulett

September 23, 2020

Certificate of filing and service

I hereby certify that on September 23, 2020, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

Roxanne Conlin
Devin Kelly
Jean Mauss
ROXANNE CONLIN & ASSOCIATES, P.C.
3721 SW 61st Street, Suite C
Des Moines, IA 50321-2418
Phone: (515) 283-1111
Fax: (515) 282-0477
Email: roxlaw@aol.com
Email: dkelly@roxanneconlinlaw.com
Email: jmauss@roxanneconlinlaw.com
ATTORNEYS FOR PLAINTIFF

/s/ Debra Hulett