

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; BRENNNA 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' Reply Brief
(Oral Argument Requested)

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A. Because Godfrey’s claims fail as a matter of law, the Court should reverse the ruling denying judgment notwithstanding the verdict and direct the district court to dismiss this lawsuit.

1. As Commissioner, Godfrey was a public officer, not an employee, so his claims fail as a matter of law.

At its core, Godfrey’s case rests on uncontroverted, familiar facts. As Commissioner, Godfrey held a fixed-term appointment, served as an agency head, and performed some duties in a “quasi-judicial” role.¹ *Godfrey v. State*, 898 N.W.2d 844, 846 (Iowa 2017).

Godfrey pleaded that he was an “appointed state officer,”²

acknowledging 2008 Iowa Acts ch. 1191 § 14—which covers

“appointed state officers”—set the range for his salary as

Commissioner.³ In opening statement, Godfrey’s counsel described

Godfrey’s role as a “public official,” and “executive officer,”

“executive in the Branstad administration,” “appointed official,”

¹ JA.I-2400-2404 ¶¶ 17-24, 37-46, 51-52, 57-58.

² JA.I-2404 ¶ 58.

³ JA.I-2401 ¶ 33.

“quasi-judicial officer,” and even “judicial officer.”⁴ Godfrey and his counsel reiterated those terms during trial.⁵ And in summation, Godfrey’s counsel reminded the jury that as Commissioner, Godfrey was an “executive officer” and a “quasi-judicial officer.”⁶

Because he was a public officer, Godfrey’s claims fail as a matter of law. Godfrey’s discrimination and retaliation claims fail because the ICRA’s plain language protects employees, not public officers. Iowa Code §§ 216.2(6)-(7), 216.6(1). Godfrey’s constitutional-tort claim fails because the *Godfrey* tort protects *individual* rights drawn from the Iowa Constitution’s Bill of Rights, not public offices and appointments that were “created for the benefit of the state.”

⁴ JA.IV-2031 [27:5-12], 2036 [32:22-25], 2038 [34:1-17], 2044 [40:16], 2045 [41:24], 2046 [42:2-6], 2048-2049 [44:15-45:3], 2050 [46:4-5], 2052 [48:5-8], 2052 [48:23-25], 2058 [54:3-6].

⁵ JA.IV-2048 [44:21-22], 2098 [94:14-17], 2099 [95:18-19], 2315 [122:20-22], 2403 [210:11-15], 3605 [126:14-16]; JA.V-314 [87:17-23], 1502 [150:19-22]; Tr. Transcript Vol. IX, 06/17/2019 47:17-18, 49:6-10; Tr. Transcript Vol. XX, 06/20/2019 86:6-7.

⁶ JA.VI-514-515 [31:24-32:7], 532 [49:16-20].

Godfrey, 898 N.W.2d at 869-71, 878-79; *Clark v. Herring*, 260 N.W. 436, 439-40 (Iowa 1935).

In his appellate brief, Godfrey dodges this critical issue. First, he turns a blind eye to Defendants' opening brief, claiming we failed to cite supporting authority, or failed to cite a statute or case that contradicted his viewpoint. (Appellee's Pr. Br. 10-11). Godfrey also touts that he performed work as Commissioner, was paid for it, was appointed and confirmed, and the legislature created the Commissioner's office by statute for a six-year term. (Appellee's Pr. Br. 11-12).

Regarding Godfrey's authorities argument, Godfrey seemingly overlooked the statutes Defendants cited in their opening brief, including Iowa Code §§ 216.2(6)-(7), 216.6(1), 86.1, the Salary Act §§ 13-14, and statutes within Iowa Code chapters 8A, 66, and 69. In drafting statutes, the legislature certainly knows how to distinguish between a public officer and an employee. *See, e.g.*, Iowa Code § 68B.2 (separately defining "local employee," "local official," "official,"

“state employee,” and “statewide elected official”); Iowa Code § 669.2(4) (broadly defining “employee of the state”⁷ under Iowa Tort Claims Act to include public officers). In enacting the ICRA, the legislature chose to regulate actions impacting an employee, but didn’t provide protections to a public officer. Iowa Code §§ 216.2(6)-(7), 216.6(1).

In enacting the Salary Act § 13, the legislature appropriated funds for salaries paid to “appointed state officers” and directed the governor to establish those officers’ salaries within the specified ranges. *See also* 2010 Iowa Acts ch. 1193 § 17. In the same appropriations bill, the legislature distinguished appointed state officers from other officials by separately establishing salaries for elected officials and judicial officers. 2008 Iowa Acts ch. 1191 §§ 11-

⁷ The ITCA’s broad definition explicitly covers public officers, defining “employee of the state” to include:
officers, agents, or employees of the state or any state agency, including members of the general assembly, and persons acting on behalf of the state or any state agency in any official capacity
Iowa Code § 669.2(4).

12.⁸ For State employees (distinct from State officers), the legislature generally appropriated funds for salaries and wages to the salary adjustment fund; to pay plans covering noncontract employees; and to the board of regents for employee salaries. 2008 Iowa Acts ch. 1191 §§ 15-17.

Turning to Godfrey's other argument, the parties generally agree on facts surrounding Godfrey's appointment, but disagree regarding the legal consequences. Godfrey merely cites facts and declares they establish he was an employee. Yet the legal analysis this Court applies confirms Godfrey was a public officer rather than an employee.

In distinguishing between public officers and employees, the "question is not primarily one of language but rather of statutory powers and duties." *McKinley v. Clarke Cnty.*, 293 N.W. 449, 451 (Iowa

⁸ Governor Culver issued an item veto for section 12. 2008 Iowa Acts ch. 1191, p. 1043.

1940). Generally, five factors distinguish a public officer from an employee:

- (1) The position must be created by the ... legislature ...
- (2) A portion of the sovereign power of government must be delegated to that position.
- (3) The duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority.
- (4) The duties must be performed independently and without control of a superior power other than the law.
- (5) The position must have some permanency and continuity, and not be only temporary and occasional.

State v. Pickney, 276 N.W.2d 433, 435-36 (Iowa 1979) (citing *State v. Spaulding*, 72 N.W. 288, 290 (Iowa 1897); *State v. Taylor*, 144 N.W.2d 289, 292 (Iowa 1966)). Each factor supports the conclusion that Godfrey was a public officer rather than an employee.

First, the legislature created the position. Iowa Code § 86.1. Godfrey concedes this point. He pleaded it.⁹ His counsel opened his case-in-chief by reading aloud section 86.1, which creates the Commissioner position, a public office.¹⁰ The statute defines the

⁹ JA.I-2400 ¶ 22.

¹⁰ JA.IV-2090-2091 [86:12-87:1].

qualifications for holding the office. Iowa Code § 86.1. This factor demonstrates that Godfrey was a public officer.

Second, the Commissioner exercises a portion of sovereign power. *See, e.g.*, Iowa Code §§ 84A.5(5) (“The executive head of the division is the ... commissioner”); 85A.27 (granting Commissioner jurisdiction over “operation and administration of the compensation provisions” regarding occupational disease); 85B.15 (granting Commissioner jurisdiction over “operation and administration of the compensation provisions” regarding occupational hearing loss); 86.8 (granting Commissioner authority including to adopt and enforce rules necessary to enforce statutes regarding workers’ compensation, occupational disease compensation and occupational hearing loss, and to administer oaths and examine books and records); 86.13 (granting Commissioner authority to award workers’ compensation benefits); 86.13A (granting Commissioner authority to monitor compliance and impose assessments); 86.27 (Commissioner must approve any contested case settlement). *See also* *Tebbs v. Denmark*

Light & Tel. Corp., 300 N.W. 328, 330 (Iowa 1941) (legislature’s intention in enacting “Workers’ Compensation Act [was] to place its administration very largely in the ... Commissioner”). The Commissioner holds adjudicative authority;¹¹ appoints deputy commissioners;¹² and the Commissioner’s appeal decision is “final agency action.”¹³ Godfrey admitted that as Commissioner, he made State policy. (JA.V-2498-2499 [183:19-184:2]). Governor Branstad considered the Commissioner a policymaker, too. (JA.IV-3686 [207:17-19]).

Godfrey proved the second factor established he was a public officer shortly after commencing his case-in-chief, when Godfrey’s counsel read to the jury an excerpt from Iowa Administrative Code rule 876-1.1 (2019).¹⁴ The district court then permitted Godfrey’s

¹¹ Iowa Admin. Code r. 876-1.1 (2019).

¹² Iowa Code §§ 86.2, 86.17.

¹³ Iowa Code § 86.24.

¹⁴ Godfrey’s counsel read one sentence from the rule:

The function of the Division of Workers’ Compensation of the Department of Workforce Development is to

counsel to distill and summarize the statutes and the administrative rule she had read aloud, through her own evidentiary statement to the jury:

The indicated chapters provide for the rights and duties of persons injured in employment and the responsible employers and insurance carriers. The chapters are commonly referred to as the Workers' Compensation chapters of the Iowa Code. The Iowa Workers' Compensation commissioner is the executive head of the Division of Workers' Compensation who serves a six-year term appointed by the governor and confirmed by the Senate. Two major sections within the division, Compliance and Adjudication, carry out the purpose of the division as set out by the laws of the state.

(JA.IV-2093 [89:9-21]).

Third, as already discussed — and as Godfrey conceded throughout trial — the legislature defined the Commissioner's powers and duties. *See generally* Iowa Code chs. 84-86;¹⁵ *see also* *Tischer v. City of Council Bluffs*, 3 N.W.2d 166, 173 (Iowa 1942) ("powers of the ...

adjudicate the rights and duties of persons provided for in Iowa Code Chapters 85, 85A, 85B, 86 and 87.
(JA.IV-2092 [88:10-19]).

¹⁵ *E.g.*, Iowa Code §§ 84A.5(5), 85A.27, 85B.15, 86.8.

commissioner are purely statutory”); *Zomer v. W. River Farms, Inc.*, 666 N.W.2d 130, 133 (Iowa 2003) (“commissioner has the power to decide any issue necessary to a determination of whether a claimant is entitled to workers’ compensation benefits”). This factor demonstrates that Godfrey was a public officer.

Fourth, as Godfrey repeatedly highlighted, the Commissioner’s duties and powers are performed independently and without control of a superior power other than the law.¹⁶ The Commissioner’s decisions are final agency action, and aren’t subject to review by anyone within the executive branch. Iowa Code § 86.24. Review must be initiated by an aggrieved party through the judicial branch, with a limited scope of review. Iowa Code § 17A.19; *see also Marovec v. PMX Indus.*, 693 N.W.2d 779, 787 (Iowa 2005) (where discretion is vested in the agency, courts must not “trench in the slightest degree upon the

¹⁶ JA.IV-2123 [119:5-9], 3114 [128:18-22], 3555-3556 [76:15-77:19]; JA.V-3139-3140 [26:21-27:8].

prerogatives of the [commissioner]”). This factor shows that Godfrey was a public officer.

Fifth, given the fixed six-year term,¹⁷ Godfrey’s role as Commissioner had a degree of permanency and continuity, a fact that Godfrey emphasized throughout trial.¹⁸ Further demonstrating the Commissioner’s role as a public officer, Godfrey’s counsel read aloud to the jury Iowa Code section 69.19 (2019),¹⁹ titled “[t]erms of appointments confirmed by the senate.”²⁰ Establishing the start and end date for Godfrey’s appointment, the statute applies to appointees

¹⁷ Iowa Code § 86.1.

¹⁸ JA.IV 2039 [35:11-14], 2048 [44:21-25], 2090-2091 [86:12-87:1], 2093 [89:17], 3312 [145:1-2]; 3520 [41:22-25], 3621 [142:4-10]; JA.V-430 [203:3-6], 431 [204:9-24], 449 [222:2-4], 1250 [76:10-12, 22-24], 2218 [107:14-17], 2252-2253 [141:23-142:4], 2568 [58:19-23].

¹⁹ Although counsel referred to section 69.18, she read aloud section 69.19. (JA.IV-2091 [87:2-8]).

²⁰ As read by Godfrey’s counsel, Iowa Code § 69.19 stated:

All terms of office of positions which are appointed by the governor, have a fixed term, and are subject to confirmation by the Senate shall begin at 12:01 a.m. on May 1st in the year of appointment and expire at 12:00 midnight on April 30 in the year of expiration.
(JA.IV-2091 87:4-8).

rather than employees. Iowa Code § 69.19; JA.V-431 [204:13-24]. Chapter 69 itself applies only to elected and appointed public officials:²¹ it established when Godfrey's term commenced and ended, how Godfrey had to resign (or his obligation to hold over, if he didn't resign and no successor qualified), the Governor's obligations upon receiving Godfrey's written resignation, and the process to fill the vacancy. *See, e.g.*, Iowa Code §§ 69.1A, 69.3, 69.4, 69.7, 69.8. These procedures are strikingly different from the statutes and rules governing State employees and applicants for State employment. *See* JA.VI-113-115 [48:12-50:11]; Iowa Code §§ 8A.411 (establishing state merit employment system); 8A.413(1)-(17) (directing DAS to establish human resources management rules applicable to employees);²² 8A.412(6) (excepting from human

²¹ Emphasizing the distinction between an employee and appointed officer, one statute even restricts activities and compensation for a person who is both an employee of an appointive board, commission, or council *and* a member of the board, commission, or council. Iowa Code § 69.17.

²² *See also* Iowa Admin. Code 11 ch. 52 (job classification); ch. 54 (recruitment, application, and examination); ch. 56 (filling vacancies);

resources management system “appointments which are by law made by the governor”).

The process to remove Godfrey from office was also statutory. Godfrey’s counsel read aloud to the jury Iowa Code section 66.26, titled “[a]ppointive state officers,” which outlines the causes by which an Executive Council majority vote could remove an appointive state officer.²³ That removal process doesn’t come close to resembling the process for involuntarily terminating a State employee’s employment. *Compare* Iowa Code § 66.26, *with* Iowa Code § 8A.413(19) (listing causes for “discharge, suspension, or reduction in job classification or pay grade,” process for notifying employee, and delegating to DAS rulemaking authority). Godfrey emphasized that he could be removed from office *only* by this extraordinary procedure, which is inapplicable to employees.²⁴ He even elicited

ch. 58 (probationary period); ch. 59 (promotion, transfer, temporary assignment, reassignment and voluntary demotion).

²³ JA.IV-2091-2092 [87:20-88:9].

²⁴ JA.IV-2038 [34:5-17], 2041 [37:16-18], 2050 [46:17-21].

testimony that Ambassador Branstad, Boeyink, and Findley agreed Godfrey hadn't engaged in egregious misconduct to support removal for cause, so the Governor never attempted it.²⁵ Surely Godfrey agrees this factor established he was a public official rather than an employee.

Finally, this Court has recognized two additional factors, an oath of office and receipt of salary. *Francis v. Iowa Emp. Sec. Comm'n*, 98 N.W.2d 733, 735 (Iowa 1959); *McKinley*, 293 N.W. at 451. Both establish that Godfrey was a public officer rather than an employee.

The Iowa Constitution required Godfrey, as an appointed public officer, to "take an oath or affirmation to support the Constitution of the United States, and of this state, and also an oath of office." Iowa Const. art. XI, § 5.

Pursuant to the Salary Act, Godfrey received a salary through a legislative appropriation and the governors' actions in establishing

²⁵ JA.IV-2044-2046 [40:24-42:24], 2378 [185:3-14], 2858-2859 [166:14-167:18], 2863-2864 [171:19-172:7], 2867 [175:12-19].

salary. Godfrey's counsel read aloud to the jury an excerpt from Salary Act § 13, the section from the appropriations bill requiring the governor to establish appointive state officers' salaries.²⁶ Then she concluded her presentation opening Godfrey's case-in-chief with summary evidentiary statements regarding Salary Act § 14, which established the salary range applicable to the Commissioner.²⁷

Even Godfrey's successor, Commissioner Cortese, testified that as Commissioner, he held a statutory appointment and was not an employee. (JA.V-1460 [86:3-9]). Iowa law and the uncontroverted evidence conclusively established that as Commissioner, Godfrey was a public officer rather than an employee. *See also Francis*, 98 N.W.2d at 736 (claimant was public officer rather than employee

²⁶ JA.IV-2093-2094 [89:22-90:14].

²⁷ Godfrey's counsel stated:

I'm going to move to state officer salary range and read the salary range for Range 5, which is \$73,250 minimum and \$112,070 maximum. And then reading from Subsection 5: The following are Range 5 positions. Labor commissioner and Workers' Compensation commissioner are included.

(JA.IV-2093-2094 [89:22-90:14]).

when she served as county superintendent of schools and state superintendent of public instruction). *McKinley*, 293 N.W. at 450 (county engineer was public officer rather than employee); *Hop v. Brink*, 217 N.W. 551, 554 (Iowa 1928) (road superintendent was public officer rather than employee). As a matter of law, his claims fail.

From a practical standpoint, this outcome comports with common sense. The complaints that Godfrey lodged in this case demonstrate his role as Commissioner had the trappings and privilege of a public officer. He assembled his case-in-chief with alleged adverse “employment” actions involving conduct that no State employee would ever encounter. (Appellee’s Pr. Br. 4, 12-21). Godfrey complained that as an “official in state government,” he should have been invited to the Governor’s *department head* (not all-employee) retreat. (JA.V-1924 [104:15-22]; JA.XI-318-319). He objected to the Governor’s exercise of constitutional authority²⁸ through an item veto that adversely impacted funding for a new position in the

²⁸ Iowa Const. art. III, § 16.

Division that Godfrey oversaw as part of his statutory duties. (JA.VIII-268-275). He claimed the Governor—the elected Chief Executive Officer responsible for ensuring the State budget is properly administered²⁹—“micro-manag[ed]” the budget of the State agency that Godfrey was appointed to oversee. (Appellee’s Pr. Br. 4). He grumbled that the Governor’s Office never issued a press release—that Godfrey drafted to publicize “[he] was still doing good things ... despite the fact that [his] pay had been cut”—yet the press release didn’t mention Governor Branstad or his priorities, and instead discussed Governors Vilsack and Culver, and repeated Godfrey’s name ten times. (JA.V-1933 [113:21-25]; JA.VIII-607-608).

And Godfrey now characterizes as an adverse action alleged “public false allegations” about him.³⁰ (Appellee’s Pr. Br. 4, 20). In

²⁹ Iowa Const. art. IV, § 1, § 8, § 9; Iowa Code §§ 8.3, 8.21, 8.30, 8.33, 8.35.

³⁰ Godfrey attempts to resuscitate his liberty-interest claim, which the district court dismissed by granting Defendants’ motion for directed verdict. JA.VI-402-403 [94:23-95:15]; JA.I-2409 ¶¶ 76-78; *Godfrey*, 898 N.W.2d at 846. This claim is the functional equivalent of defamation, and Defendants are absolutely immune from liability. Iowa Code

that context, on July 12, 2011, the day after the salary decrease, Governor Branstad participated in a monthly “Ask the Governor” radio show, during which the Governor answered direct questions from constituents.³¹ One caller to the show that day was workers’ compensation attorney Saffin Parrish-Sams, who litigated cases before the Commissioner and was also Godfrey’s personal friend and former coworker.³² Parrish-Sams didn’t identify herself during the call. With scripted questions—apparent from the statistics and historical details she referenced—Parrish-Sams asked the Governor to explain why he had reduced Godfrey’s salary.³³ The Governor responded, mentioning his dissatisfaction with Godfrey’s

§ 669.14(4); *Minor v. State*, 819 N.W.2d 383, 406-08 (Iowa 2012); *Godfrey v. State*, 847 N.W.2d 578, 589 (Iowa 2014) (Waterman, J., dissenting); *Godfrey*, 847 N.W.2d at 600-01 (Mansfield, J. dissenting). Godfrey didn’t cross-appeal the district court’s ruling, so he cannot secure relief from that ruling on appeal. *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 728 (Iowa 2008).

³¹ JA.IV-2291-2292 [98:20-99:2], 3616 [137:19-25]; JA.IX-339.

³² JA.V-2252 [141:7-11], 2258-2259 [147:25-148:8], 2260 [149:14-19]; JA.IX-339; Tr. Transcript Vol. VII, 06/13/2019 14:22-25, 15:4-16:13, 22:18-22, 37:18-39:12.

³³ JA.IX-339.

performance.³⁴ The Governor's response was absolutely privileged, and couldn't have supported liability against the State or the Governor in his official capacity. *See Ryan v. Wilson*, 300 N.W. 707, 711-17 (Iowa 1941); *see also Barr v. Matteo*, 360 U.S. 564, 572-76 (1959); *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982); Restatement (Second) of Torts § 591 (1977).

The facts presented in Godfrey's case-in-chief confirm Godfrey was a public officer. After Godfrey learned about the salary reduction, he contacted legislators, the Attorney General's Office, and the media, publicizing the salary decision and his sexual orientation. (JA.IV-3340 [173:3-8]; JA.V-314 [87:17-23], 2223 [112:13-21], 2238-2239 [127:24-128:9], 2258 [147:6-24], 2260 [149:3-23], 2533 [23:10-21]; JA.IV-2050 [46:5-16], 2079-2080 [75:21-76:20], 2106 [103:3-9], 2109 [105:12-20]; 3089-3092 [103:16-106:7], 3100 [114:3-25]; JA.XI-270-276). Democratic legislators promptly turned the situation into a political row,

³⁴ JA.IV-3619-3620 [140:10-141:15], 3621-3622 [142:13-143:11]; JA.IX-339.

attacking the Republican Governor. (JA.VIII-131-144, 495-497; JA.XI-272-276; JA.IV-2285-2290 [92:2-97:3]).

These events are poles apart from the types of employee tribulations the ICRA was designed to remedy. The actions about which Godfrey complained were entwined with the proper functioning of the Executive Branch and our State's constitutional government. Moreover, because Godfrey served as a public officer for the benefit of the public, he didn't have a property right in the Commissioner position, the prospective salary associated with it, or the purported process Godfrey associates with the salary-establishing decision. *See Clark*, 260 N.W. at 439-40; *see also State ex rel. Ohio AFL-CIO v. Voinovich*, 631 N.E.2d 582, 593 (Ohio 1994) (industrial commission members who exercised quasi-judicial functions held public offices and had no property right in them).

Godfrey was a public officer, not an employee. Consequently, his ICRA and constitutional-tort claims fail as a matter of law.

2. **Although the legislature didn't create a property interest when it enacted the appropriations bill that contains the Salary Act, Governor Branstad considered the Salary Act in making the salary-establishing decision.**

As a public officer, Godfrey didn't have a property right to a specific future salary within the specified range. *McKinney v. Univ. of Pittsburgh*, 915 F.3d 956 (3d Cir. 2019). Even if he did, Godfrey admits that effective July 11, 2011, Governor Branstad established Godfrey's salary within the authorized range. Salary Act §§ 13-14; JA.I-3403 ¶ 48; *see also* 2010 Iowa Acts ch. 1193 § 17(1). The Salary Act directed the governor to establish a salary within the specified range ("governor shall establish a salary")—and that's precisely what Governor Branstad did. *Id.*

So Godfrey challenges the Governor's thought process in reaching the salary-establishing decision. Godfrey contends that when the legislature appropriated money to establish appointed state officer salaries, the legislature imposed an obligation on the governor to consider four factors when setting each state officer's salary—an

obligation so imperative that an appointed state officer has a constitutional property right to the four-factor consideration process. Moreover, he argues, Governor Branstad deprived him due process because the Governor didn't explicitly consider all four factors when establishing Godfrey's salary in July 2011.

Godfrey's constitutional-tort claim fails on the facts and the law. Turning to the facts, Governor Branstad didn't make a rash decision when establishing Godfrey's salary. Instead, he met with Chief of Staff Boeyink and Legal Counsel Findley, discussed the Salary Act, and ultimately made a decision:

we looked at the statute, and we looked at what the responsibility was, and I wanted to make sure that I made the thoughtful decision as I'm required to do and which I did.

(JA.IV-3590 [111:20-23]). He testified "we looked at the totality of [Godfrey's] responsibility" and "we tried to look at everything."

(JA.IV-3591 [112:2-3], 3591 [112:12]). *See also* JA.IV-3586-3588 [107:11-109:21], 3610 [131:2-11].

Similarly, Findley testified the Salary Act “contains some of the key provisions that I would have discussed with the Governor.” (JA.IV-2860 [168:14-15]). She testified the “[G]overnor assessed Christopher Godfrey under this statute, the 2008 Iowa Acts, reviewed the different factors and decided to set Chris Godfrey’s salary at the low end of the range ... he reviewed the different factors and the statute.” (JA.IV-2865 [173:11-14, 23-24]). *See also* JA.IV-2867 [175:14-17] (“I ... reviewed the salary statute with the Governor”); JA.IV-2873 [181:4-5] (“[The Governor] did consider it, because I went over every factor in this law with him.”); JA.IV-3068-3073 [82:12-87:15] (testifying that during the July 5, 2011 meeting, the Governor reviewed Godfrey’s experience, changes in the duties of the position, Godfrey’s performance of assigned duties, subordinates’ salaries, and other items); JA.IV-3079-3083 [93:21-97:21], 3134 [148:10-19], 3136 [150:4-9].

Boeyink, who was not a lawyer, testified that “Brenna ... did a review on the governor’s authority as it relates to setting Mr.

Godfrey's salary." (JA.IV-2378 [185:3-18]). *See also* JA.IV-2220-2221 [27:22-28:3], 2221 [28:8-19].

This uncontroverted evidence establishes Governor Branstad considered the factors as required by the Salary Act, and also establishes immunity because the Governor acted with due care and Findley advised the Governor with due care. Yet in Godfrey's view, that wasn't enough. He contends the governor must carefully analyze and thoroughly review each enumerated factor, then articulate a rationale for each. He criticizes the Governor's decision-making process as insufficiently exhaustive because the Governor didn't collect and study every possible factoid or paper regarding Godfrey before making the salary-establishing decision.

The Salary Act's plain text doesn't require such a colossal effort. The Salary Act never specified *how* a governor should go about "considering" each enumerated factor or any non-enumerated factor.

The Salary Act didn't require discussion.³⁵ It didn't require document review or research. Governor Branstad didn't have to call Governor Vilsack and Governor Culver and ask them to pull their Godfrey appointment files from the archives.³⁶ He didn't need Godfrey's resume, or to request that DAS provide the salaries of Godfrey's subordinates. The Salary Act didn't require the Governor to create a record memorializing his thought process "considering" each factor. The Salary Act didn't require the Governor to complete a formal written or even an informal performance evaluation,³⁷ or to provide Godfrey constructive feedback. The Salary Act didn't require the Governor to articulate a rationale for the salary-establishing decision in any way.

³⁵ For evidentiary support, Godfrey primarily relies on a snippet from Boeyink's testimony that he didn't recall discussing other factors. (Appellee's Pr. Br. 6). Boeyink later clarified: "I don't recall verbatim those conversations." (JA.IV-2229 [36:13-18]).

³⁶ The former governors' appointment files had been archived. (JA.IV-3038 [52:4-20], 3110-3111 [124:12-125:8]).

³⁷ Governor Branstad never provided performance evaluations for any nonelected appointee. (JA.IV-3612 [133:16-22], 2868 [176:7-24]; JA.V-1460 [86:18-22]).

If the legislature intended the governor to engage in a comprehensive four-factor analysis, it would have explicitly said so, as it did for merit employees. The legislature directed DAS to establish “a performance management system for all employees in the executive branch,”³⁸ but expressly excluded gubernatorial appointees and governor’s staff. Iowa Code § 8A.412(3), (6). Surely when the General Assembly delegated to the governor responsibility to establish nonelected state official salaries, it didn’t intend to administratively burden the State’s Chief Executive Officer³⁹ with a rigorous four-factor review process.

The plain language not only fails to support Godfrey’s interpretation; interpretive considerations counsel against it. Those include “the purpose of the statute, the policies and remedies

³⁸ Iowa Code § 8A.413(16).

³⁹ Iowa Const. art. IV, § 1 (vesting in governor “supreme executive power of the state”); Iowa Code § 7E.1(2)(a) (“governor, as the chief executive officer of the state, should be provided with the facilities and the authority to carry out the functions of the governor’s office efficiently and effectively within the policy limits established by the legislature”).

implicated, and the consequences resulting from different interpretations.” *Albaugh v. The Reserve*, 930 N.W.2d 676, 683 (Iowa 2019). The Salary Act was contained in an *appropriations*⁴⁰ bill—not a performance management system for appointive state officers. 2008 Iowa Acts ch. 1191. The legislature appropriated funds for salaries—and directed the governor to exercise constitutional and statutory executive authority⁴¹ to administer the appropriation—by establishing a salary within the specified range. The legislature has never codified the alleged four-factor consideration process that Godfrey claims created a property interest.

⁴⁰ See JA.IV-3068 [82:12-23]; Iowa Code § 3.4(2) (defining appropriation bill as “a bill which has as its primary purpose the making of appropriations of money from the public treasury”); 2008 Iowa Acts ch. 1191, pp. 1042-1044, excerpt from Governor Culver’s item veto message.

⁴¹ Iowa Const. art. IV, § 1 (“supreme executive power of this state shall be vested in a chief magistrate”); Iowa Const. art. IV, § 8 (governor “shall transact all executive business with the officers of the government, civil and military”); Iowa Const. art. IV, § 9 (governor shall “take care that the laws are faithfully executed”); Iowa Code §§ 8.3, 8.21, 8.30, 8.35.

No Iowa governor seems to have interpreted the Salary Act § 13 as requiring such protracted review in establishing nonelected state officer salaries. The trial record contained no evidence that Governors Vilsack or Culver performed exacting review when establishing appointee salaries; Culver never even met Godfrey.⁴² Tellingly, Godfrey didn't object to the process that Governors Vilsack and Culver used when granting him significant and frequent salary increases. (JA.VIII-879-886). Godfrey failed to offer any evidence showing that Governor Branstad applied a different review process in establishing salaries for other appointed state officers. His complaint was only that his salary was reduced while the salary of others was not.

Even Gronstal—Democratic senate majority leader in 2011 and a political opponent—believed Governor Branstad established Godfrey's salary in compliance with the Salary Act:

⁴² JA.IV-2589-2590 [111:24-112:18], 2596-2597 [118:22-119:7], 3165-3166 [197:23-198:3]; JA.V-444 [217:9-10], 2261 [150:3-9], 2290 [179:9-21]; JA.VIII-879-886; JA.IX-102.

Q. Do you recall earlier when you described a conversation with Governor Branstad after the time Chris Godfrey's salary was reduced....

A. [Gronstal]. I said, "You have the right—He said, "I have the right under the law." And I said, "Yes. I don't dispute the right. It doesn't make it right."

Q. And as the Senate majority leader, you were admitting, sir, that he had the right to do that?

A. [Gronstal]. He has the legal right to set salaries, yes.

(JA.IV-3363 [196:10-20]).

And the district court and Godfrey's interpretation would cause confusion about the contours of the alleged property right. The Salary Act's plain text stated, "by considering, among other items," then spelled out four factors. Salary Act § 13. If the Salary Act mandated the governor to consider the four enumerated factors, wouldn't it also have mandated the governor to consider "other items," which the legislature structurally placed immediately after "by considering" and before the enumerated factors? Godfrey's interpretation would render "other items" superfluous. On the other hand, interpreting Salary Act § 13 to impose a duty on the governor

to consider the four factors and “other items” when establishing salary is nonsensical, because a governor could never fulfill an obligation to consider unspecified “other items.” Neither interpretation comports with common sense. *Albaugh*, 930 N.W.2d at 683 (court should not interpret statute to render terms superfluous or meaningless); *Brakke v. Iowa Dep’t Nat. Res.*, 897 N.W.2d 522, 534 (Iowa 2017) (“courts should interpret the statute in a reasonable fashion to avoid absurd results.”).

Although the legislature may qualify appropriations to “state[] how and for what purposes the money may be expended,” the legislature may not, “under the guise of a qualification upon an appropriation, violate the separation of powers by invading the Governor’s authority to exercise executive functions.” *Welden v. Ray*, 229 N.W.2d 706, 710 (Iowa 1975). *See also* Iowa Const. art. III, § 1. If the Salary Act directed the governor *how* to evaluate a nonelected political appointee, and imposed a *duty* on the governor to evaluate a nonelected state officer in a particular manner before establishing

salary, the legislature would have encroached on executive branch authority in violation of the constitutional separation of powers. *See Welden*, 229 N.W.2d at 710. *See* Iowa Const. art. IV, § 1, § 8, § 9. The better interpretation passes constitutional muster. *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 773 (Iowa 2019).

If Godfrey thought the salary-reduction decision was improper, his remedy was mandamus. He could have asked a court to establish he should receive the same salary throughout the remainder of his appointed term, and to compel payment for the difference in the salary he received and the salary he claimed he should have received. *O'Connor v. Murtaugh*, 281 N.W. 455, 457-60 (Iowa 1938); *Morris v. Hosmer*, 166 N.W. 295, 295 (Iowa 1918); *Bryan v. Cattell*, 15 Iowa 538 (1864).

But Godfrey didn't want to recover salary. He wanted vindication and instead spent nine years litigating this politically motivated lawsuit.

- 3. This Court should apply its venerable precedent limiting the ICRA’s continuing violation doctrine to harassment claims and conclude Godfrey failed to establish an adverse employment action.**

Analyzed independently, each alleged adverse employment action fails as a matter of law. Civil rights laws are meant to remedy workplace harms—not bruised egos. Suggesting these alleged events are insufficient standing alone, Godfrey tries to rescue his ICRA claims by stringing together multiple discrete actions, arguing their cumulative impact establishes a “continuing violation.” (Appellee’s Pr. Br. 12-21).

Godfrey’s “continuing violation” theory flouts precedent requiring an ICRA employment-practice claim to be predicated on either a discrete adverse employment action or harassment. *Farmland Foods v. Dubuque Human Rights Comm’n*, 672 N.W.2d 733, 740–43 (Iowa 2003). In *Farmland Foods*, this Court clarified that under the ICRA, an unfair or discriminatory “employment practice” requires a discrete action. 672 N.W.2d at 740-43 (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110–21 (2002)). That means it relates “to a

discrete act or single ‘occurrence,’ even when it has a connection to other acts.” *Morgan*, 536 U.S. at 111. See also *Farmland Foods*, 672 N.W.2d at 740-41.

In *Dindinger*, this Court confirmed that no valid “continuing violation” doctrine applies to ICRA employment-practice claims that are based on discrete employment actions. *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 571–72 (Iowa 2015). The Court explained “in *Farmland Foods*, we aligned ourselves the unanimous view of the Supreme Court in *Morgan* that the continuing violation doctrine does not apply to cases involving discrete discriminatory acts, as opposed to hostile work environment claims.” *Dindinger*, 860 N.W.2d at 571 (citing *Farmland Foods*, 672 N.W.2d at 741).

Before trial, Godfrey dismissed his hostile-work-environment claims, so the jury did not consider them. (JA.IV-660). Under the ICRA, discrete discriminatory or unfair employment practices are “separately actionable,’ not a basis for invoking the continuing violation theory.” *Dindinger*, 860 N.W.2d at 571–72 (citing *Farmland*

Foods, 672 N.W.2d at 741). Godfrey’s argument that the cumulative impact of separate decisions establishes a continuing violation fails as a matter of law.

4. **Because Godfrey offered no evidence that Governor Branstad knew Godfrey was gay, his speculative theory about motive was legally insufficient to support his claims.**

Godfrey’s sexual-orientation discrimination claim was based on rank speculation and was unsupported by substantial evidence. Just as speculation is insufficient to establish a genuine issue of material fact for trial, it is insufficient to support a verdict. *Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 337 (Iowa 2020); *Willey v. Riley*, 541 N.W.2d 521, 527 (Iowa 1995). “Substantial evidence” must support each element of Godfrey’s claims. *Winger v. C.M. Holdings, L.L.C.*, 881 N.W.2d 433, 445 (Iowa 2016). Substantial evidence requires “the circumstances have ‘sufficient probative force to constitute the basis for a legal inference, and not for mere speculation.’” *Harsha v. State Savings Bank*, 346 N.W.2d 791, 800 (Iowa

1984). “Circumstances are not sufficient when the conclusion in question is based on surmise, speculation, or conjecture.” *Id.*

Ambassador Branstad testified he did not know Godfrey was gay when he made the salary-reduction decision. (JA.IV-3667 [188:4-7]). He learned Godfrey was gay after Godfrey had been informed about the salary-reduction decision. (JA.IV-3667-3668 [188:8-189:9]). Findley informed that Governor that Godfrey was gay after Godfrey’s attorney, Conlin, called Findley and threatened a lawsuit because Godfrey was gay. (*Id.*).

At trial, Godfrey failed to identify any evidence that Branstad knew Godfrey was gay before the Governor reduced Godfrey’s salary effective July 11, 2011. Instead, Godfrey relied solely on evidence that *people other than Branstad* knew Godfrey was gay. In this politically motivated lawsuit, every Democratic legislator that testified in Godfrey’s case-in-chief had previously sued Governor Branstad. *See, e.g., Homan v. Branstad*, 887 N.W.2d 153 (Iowa 2016) (Courtney, McCoy, Gronstal, and Dearden, who “testified” through inadmissible

hearsay); *Homan v. Branstad*, 812 N.W.2d 623 (Iowa 2012) (Dotzler).

While they apparently knew Godfrey was gay, their testimony focused on partisan jabs toward Republican politicians, including Branstad.⁴³

Godfrey also presented testimony from State employees and appointees from IWD and the Workers' Compensation Division, who regularly interacted with Godfrey. These witnesses worked closely with Godfrey in the same department and building.⁴⁴ Several met Godfrey's partner at the office or social gatherings.⁴⁵ Godfrey had

⁴³ JA.IV-2517-2521 [39:7-43:12], 2547 [69:19-21], 2547-2550 [69:25-72:3], 2550 [72:24], 2605-2606 [127:20-128:19], 2707 [15:6-14], 2734 [42:7-18], 3338-3339 [171:8-172:24], 3351-3352 [184:23-185:12], 3353 [186:12-186:25]; JA.V-344-346 [117:13-119:7], 347-348 [120:22-121:10], 349-350 [122:19-123:5], 379-394 [152:17-167:11], 396-397 [169:1-170:12], 399 [172:10-13], 399-403 [172:22-176:10], 404-405 [177:19-178:14], 413 [186:3-7], 414-415 [187:13-188:10].

⁴⁴ JA.IV-3785 [219:19-24]; JA.V-672 [183:5-13]; Tr. Transcript Vol. XII, 06/20/2019 35:18-25; Tr. Transcript Vol. XVII, 06/27/2019 105:19-106:5.

⁴⁵ JA.V-83-84 [18:10-19:9]; JA.V-1473 [106:8-12]; Tr. Transcript Vol. VI, 06/12/2019 207:16-21, 209:17-210:9; Tr. Transcript Vol. XII, 06/20/2019 89:10-22; Tr. Transcript Vol. XIII, 06/21/2019 61:18-62:9.

even hired some deputy commissioners who testified in his case-in-chief.⁴⁶

Also, a few attorneys who practiced workers' compensation law and persons involved with workers' compensation issues testified they knew Godfrey was gay. These witnesses had worked with Godfrey for the same employer, or as opposing counsel in a case, met Godfrey's partner at legal networking events or seminars, or were Godfrey's close personal friends and houseguests.⁴⁷ One retired workers' compensation attorney was personal friends with Godfrey, knew Godfrey was gay, and had stayed at Godfrey's house

⁴⁶ Tr. Transcript Vol. VI, 06/12/2019 207:16-208:2; Tr. Transcript Vol. XII, 06/20/2019 35:3-7; Tr. Transcript Vol. XIII, 06/21/2019 60:17-20, 61:14-17.

⁴⁷ JA.IV-3776 [188:8-12]; JA.V-1480 [128:6-14], 2359-2360 [44:24-45:9], 2375 [60:1-8], 2562 [52:7-16]; Tr. Transcript Vol. VI, 06/12/2019 209:17-210:6; Tr. Transcript Vol. VII, 06/13/2019 14:22-25, 15:4-25, 22: 18-22, 31:4-8, 35:1-3, 37:18-38:12; Tr. Transcript Vol. III, 06/07/2019 194:5-195:4.

when visiting Des Moines.⁴⁸ After he retired, that attorney wrote a letter supporting Godfrey as Commissioner.⁴⁹

These witnesses failed to present any personal knowledge that Branstad knew Godfrey was gay when he made the decision to reduce Godfrey's salary. None testified that he or she told Branstad that Godfrey was gay. None testified that anyone else told Branstad that Godfrey was gay. Not one witness presented sworn testimony that Branstad knew Godfrey was gay. (JA.IV-2572-2573 [94:25-95:4], 2751 [59:5-8], 3234 [67:22-68:1], 3251-3252 [84:23-85:8], 3356 [189:22-24]; JA.V-76 [11:4-11], 135 [70:20-22], 411 [184:20-23], 1351 [176:16-18], 1516 [164:6-9], 2284-2285 [173:14-174:17]).

Unlike the witnesses who had established personal relationships with Godfrey, Branstad met Godfrey once, on December 29, 2010, for approximately thirty minutes at the

⁴⁸ Tr. Transcript Vol. VI, 06/12/2019 154:12-16, 155:6-8, 156:4-6, 159:24-25, 165:17-166:16.

⁴⁹ Tr. Transcript Vol. VI, 06/12/2019 160:7-15; JA.IX-376-377.

Governor-elect's office.⁵⁰ Godfrey traveled to the meeting with Labor Commissioner Neil—who met with the Governor after Godfrey's meeting, and the Governor also asked Neil to resign.⁵¹ Godfrey presented no evidence that he said or did anything during that brief meeting that would lead Branstad to believe he was gay.⁵² Branstad never met Godfrey's partner.⁵³

Although Godfrey's counsel attempted to portray Godfrey's sexual orientation as public knowledge, Godfrey acknowledged that due to the federal government's "don't ask, don't tell" policy—which was not formally withdrawn until September 2011—and his partner's

⁵⁰ JA.IV-2333-2334 [140:23-141:5]; JA.V-605-606 [116:17-117:4], 2611 [101:18-22]; JA.IV-3525 [46:19-24], 3605 [126:23-25].

⁵¹ JA.IV-3152-3153 [184:23-185:16]; JA.IV-2144-2145 [140:17-141:5], 2149 [145:4-10], 2162 [158:1-6].

⁵² JA.IV-3525-3527 [46:19-48:11], 3536 [57:5-25], 3538-3539 [59:19-60:5], 2144-2146 [140:23-142:2], 2153-2154 [149:3-150:7], 2154-2155 [150:14-151:17], 2160 [156:3-13], 2161 [157:6-15], 2162-2163 [158:1-159:13], 2164 [160:13-14], 2168 [164:10-167:3], 2171-2172 [167:10-168:6]; JA.IV-2219-2220 [26:20-27:1], 2370 [177:16-20], 2404-2405 [211:15-212:7]; JA.V-432 [205:3-11], 605 [116:17-126:16], 2267-2268 [156:4-157:11], 2389-2390 [74:21-75:9], 2533 [23:10-21], 2612 [102:5-14].

⁵³ JA.IV-3661 [182:16-18].

employment with the United States Air Force and Iowa Air National Guard, to protect his partner's career, Godfrey only disclosed his sexual orientation to trusted persons. (JA.V-2282-2284 [171:20-173:13]; Tr. Transcript Vol. XXII, 07/05/2019 23:1-12). Governor Vilsack recalled his concern about Godfrey and "his partner's welfare" for that very reason. (JA.IV-2520 [42:9-19]).

Godfrey notes that as President of Des Moines University, Branstad still socialized, so *someone* must have told him. Yet Godfrey failed to present any evidence that during a social encounter, someone actually told Branstad that Godfrey was gay. Branstad denied that anyone ever told him. (JA.IV-3677-3678 [198:20-199:15]).

"Speculation ... is not evidence." *Willey*, 541 N.W.2d at 527. And a verdict cannot stand "when supported by nothing but conjectural hindsight." *True v. Larimore*, 123 N.W.2d 5, 10 (Iowa 1963). Godfrey supported his claim with nothing more than surmise, speculation, and conjecture, which was legally insufficient to establish an inference of discriminatory motive. *See Harsha*, 346

N.W.2d at 800; *see also Andrade v. Lego Sys., Inc.*, 205 A.3d 807, 816 (Conn. App. Ct. 2019) (speculative theory that supervisor knew the plaintiff was gay because the plaintiff once referred to his “partner” insufficient to support inference of discriminatory motive).

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.

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/s/ Debra Hulett

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September 24, 2020

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