THE SUPREME COURT OF IOWA

Supreme Court No. 22-0243
Polk County No. LACL128372

LARRY R. HEDLUND, Plaintiff-Appellee

vs.

STATE OF IOWA, K. BRIAN LONDON, COMMISSIONER OF THE IOWA DEPARTMENT OF PUBLIC SAFETY, Individually, CHARIS M. PAULSON, DIRECTOR OF CRIMINAL INVESTIGATION Individually, GERARD F. MEYERS, ASSISTANT DIRECTOR DIVISION OF CRIMINAL INVESTIGATION, individually,

Defendants-Appellants

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE PAUL D. SCOTT

PLAINTIFF-APPELLEE FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DO THE 2019 AMENDMENTS TO IOWA CODE SECTION 70A.28, WHICH ALLOW A PLAINTIFF TO COLLECT ADDITIONAL REMEDIES, APPLY TO PLAINTIFF'S CLAIMS?

Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, University of Iowa, 763 N.W.2d 250 (Iowa 2009)
Iowa Code § 70A.28(5) (2021)
Anderson Financial Services, LLC v. Miller, 769 N.W.2d 575 (Iowa 2009)
City of Waterloo v. Bainbridge, 749 N.W.2d 245 (Iowa 2008)
Remedial Statute, Black's Law Dictionary, 1457 (4th ed. 1951)
State ex re. Turner v. Limbrecht, 246 N.W.2d 330 (Iowa 1976)
Schmitt v. Jenkins Truck Lines, Inc., 149 N.W.2d 789 (Iowa 1967)
Dindinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)
Iowa Code § 216.6A (2021)
Landgraf v. USI Fil Products, 511 U.S. 244 (1994)
Schultz v. Gosselink, 148 N.W.2d 434 (Iowa 1967)
Iowa Code § 619.17 (2021)
State ex rel. Buechler v. Vinsand, 318 N.W.2d 208 (1985)
State ex rel. Miller v. Hydro Mag, Ltd., 436 N.W.2d 617 (Iowa 1989)
Anderson Financial Services, LLC v. Miller, 769 N.W.2d 575 (Iowa 2009)
Janda v. Iowa Indus. Hydraulics, Inc., 326 N.W.2d 339 (Iowa 1982)
Dolezal v. Bockes, 602 N.W.2d 348 (Iowa 1999)
Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1985)
In re Marshall, 805 N.W.2d 145 (Iowa 2011)
Senate File 400 (2019)
Hunter v. Colfax Consol. Coal Co., 154 N.W. 1037 (Iowa 1915)
Iowa Code § 70A.29 (2021)
Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994)
Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850 (Iowa 1973)
Consumer Frauds Act
1965 Iowa Acts ch. 438, Preamble
Senate File 502 (2019)

1991 Civil Rights Act
1990 Civil Rights Act
Hrbek v. State, 958 N.W.2d 779 (Iowa 2021)
Iowa Code § 822.3A (2021)
2019 Iowa Acts ch. 109, § 1
Wellmark, Inc. v. Iowa District Court for Polk County, 890 N.W.2d 636 (Iowa 2017)
Brokaw v. Winfield-Mt. Union Community School Dist., 788 N.W.2d 386 (Iowa 2010)

II. DOES "CIVIL DAMAGES" INCLUDE DAMAGES FOR EMOTIONAL DISTRESS, AND DOES THE CAP ON DAMAGES APPLY ONLY TO CIVIL DAMAGES OR TO ALL DAMAGES RECOVERABLE UNDER SECTION 70A.28?

Iowa Code § 70A.28 (2021)
Iowa Code § 808B.8 (2021)
Damages, Black's Law Dict. 351-52 (5th ed. 1979)
Iowa Code § 80H.5 (2021)
Iowa Code § 91 (2021)
Iowa Code § 613.17 (2021)
Iowa Code § 321J.25(5) (2021)
Iowa Code § 611.11 (2021)
Civil, Black's Law Dict., 222 (5th ed. 1979)
Iowa Code § 808B.8 (2021)
Minn. Code § 611A.79 (2020)
Hedlund v. State, 930 N.W.2d 707 (Iowa 2019)
Westco Agronomy Co. v. Wollesen, 909 N.W.2d 212 (Iowa 2017)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals. The case does not present any constitutional questions regarding the validity of a statute. Iowa R. App. P. 6.1101(2)(a) (2021). There is no conflict of Iowa authorities on the issue of when a statute applies retrospectively. Iowa R. App. P. 6.1101(2)(b) (2021). While the retrospective application of the whistleblower amendment is an issue of first impression, it will not have broad public importance. The decision on this issue will only affects a small number of cases that were pending at the time the whistleblower statute was amended. Iowa R. App. P. 6.1101(2)(c-d) (2021). This case presents an application of existing legal principles. Iowa R. App. P. 6.1101(3)(a) (2021).

STATEMENT OF THE CASE

On June 28, 2019, this Court ruled that Plaintiff-Appellee Hedlund ("Hedlund") was only entitled to equitable relief and was not entitled to a jury trial under the then existing whistleblower statute. *Hedlund v. State*, 930 N.W.2d 707, 718 (Iowa 2019). During the 2019 legislative session the Iowa legislature amended the whistleblower statute to allow recovery of civil damages. The amendment went into effect on July 1, 2019—three days after this Court's ruling in *Hedlund*.

On remand Hedlund asked the district court to determine whether the amendment to 70A.28 creating additional remedies was retrospective and therefore applicable to Hedlund's pending claim. The district court agreed, finding that the amendments regarding remedies were remedial and therefore were presumed to apply retrospectively. The district court then applied a three-part test to determine whether Defendants-Appellants ("Defendants") could overcome this presumption. Applying this three-part test, the district court determined that the legislature intended the amendment to apply retrospectively and that Defendants did not meet its burden to overcome the presumption of retrospective application.

STATEMENT OF THE FACTS

Because the facts giving rise to this case are of minimal importance, only a brief summary will be provided. The issue before the Court is purely legal, and the Court's decision does not depend on any of the facts that gave rise to Hedlund's wrongful termination claim.

Hedlund worked in the Iowa Division of Criminal Investigation for 25 years as one of its top criminal investigators. Throughout his tenure he received high marks in all of his annual reviews, received dozens of letters of commendation from the public and law enforcement officials around the stated, and never had a single disciplinary action against him.

In 2013 Hedlund made three separate disclosures that were covered by section 70A.28. *Hedlund v. State*, 930 N.W.2d 707, 717 (Iowa 2019).

The most important incident, though, was summarized by this Court in Hedlund's prior appeal:

> Hedlund departed from Cedar Rapids on the afternoon of April 26. On his way to Fort Dodge, he spotted a black SUV doing a "hard ninety." Hedlund contacted the Iowa State Patrol. Trooper Matt Eimers intercepted the speeding SUV but determined it was an official state vehicle under the operation of another Iowa State Patrol trooper for the purpose of transporting the Governor of Iowa. The SUV was not stopped and no citation was issued.
>
> On April 29, Hedlund sent Paulson a lengthy email regarding Meyers's inability to perform his job. A half-hour later,

> Hedlund sent another email to Paulson and Meyers designated "a complaint against myself." This email detailed the Governor's SUV incident. Hedlund summarized his failure to issue a citation to a speeding vehicle.
>
> I take full responsibility for the incident being initiated and as such will accept the responsibility of ensuring that the appropriate actions are taken to address this incident. As the ranking sworn peace officer involved in this incident and as a Supervisor with the Department of Public Safety, I should have insisted that the vehicle be stopped.

Id. at 714.

On May 1, 2013—just two days after complaining about the governor's speeding SUV—Defendants placed Hedlund on administrative leave. The Professional Standards Bureau investigated Hedlund over the next three months and issued a 500-page report on July 17, 2013. Defendants terminated Hedlund that same day. *Id.*

Hedlund filed the present action alleging wrongful discharge in violation of Iowa Code § 70A.28 on August 8, 2013.

ARGUMENT

BRIEF POINT I

THE 2019 AMENDMENT TO SECTION 70A.28 ALLOWING A PLAINTIFF TO COLLECT CIVIL DAMAGES APPLIES TO PLAINTIFF'S PENDING CLAIMS

I. THE AMENDMENTS TO THE WHISTLEBLOWER STATUTE ARE REMEDIAL AND APPLY RETROSPECTIVELY

"The first step in determining if a statute applies retrospectively, prospectively, or both is to determine whether the legislature expressly stated its intention." *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, University of Iowa*, 763 N.W.2d 250, 266 (Iowa 2009). "In the absence of a legislative declaration that the statute applies retrospectively, the second step of the analysis is to determine whether the statute is procedural, remedial, or substantive." *Id.* The parties agree that the amendments to section 70A.28 do not expressly state whether they apply retrospectively or prospectively only. *See* Iowa Code § 70A.28(5) (2021). Therefore, the second step is where the Court's analysis begins. The Court must first determine whether the amendment allowing a plaintiff to recover additional remedies is remedial.

"If a statute is remedial, we presume a retrospective operation and employ a three-part test to determine if retrospective application is

consistent with legislative intent." *Anderson Financial Services, LLC v. Miller*, 769 N.W.2d 575, 579 (Iowa 2009) The Court must then examine "the language of the act, consider the manifest evil to be remedies, and determine whether there was an existing statute governing or limiting the mischief which the new act is intended to remedy." *Id.* In this case, retrospective application of the amendments is consistent with legislative intent and Defendants cannot overcome the presumption of retrospective application.

A. The Amendment to Section 70A.28 allowing a plaintiff to collect civil damages is remedial

1. Providing an additional remedy for an existing cause of action is a remedial change

"A substantive statute creates, defines, and regulates rights." *City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 249 (Iowa 2008). "A substantive statute also takes away a vested right." *Id.* In contrast, "a remedial statute gives an injured person a private remedy for a wrongful act. Generally, a remedial statute is designed to correct an existing law or redress an existing grievance." *Id.* This Court has also adopted the definition of a remedial statute contained in Black's Law Dictionary (4th ed.), p. 1457:

> One that intends to afford a private remedy to a person injured by the wrongful act. That is designed to correct an existing law, redress an existing grievance, . . .

> A statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before . . .

State ex re. Turner v. Limbrecht, 246 N.W.2d 330, 331 (Iowa 1976) (quoting Black's Law Dictionary, 1457 (4th ed.)).

The amendment to section 70A.28 allowing a plaintiff to collect civil damages is remedial in nature. This amendment "gives [plaintiff] a private remedy for a wrongful act" and "corrects an existing law[.]" *See Bainbridge*, 749 N.W.2d at 249. Therefore, applying the definitions from *Bainbridge*, the amendment to 70A.28 is clearly remedial. The definitions from Black's Law Dictionary further support this conclusion. The amendment to 70A.28 affords Plaintiff a remedy. It also gives Plaintiff a different remedy than he had before. The amendment to 70A.28 is remedial under any and all of definitions endorsed by the Iowa Supreme Court.

This Court's decision in *Schmitt v. Jenkins Truck Lines, Inc.* is directly on point. 149 N.W.2d 789 (Iowa 1967). The plaintiff-decedents in *Schmitt* were involved in a fatal accident on January 15, 1965. *Id.* at 557. The statute dictating the damages that are available in wrongful death damages was amended on July 4, 1965. *Id.* at 558. This amendment allowed a plaintiff to collect damages for loss of services and support in a wrongful death action. *Id.* at 790. This was an expansion of damages previously available to a plaintiff. *Id. Schmitt* held that "legislation

providing the means or method whereby causes of action may be effectuated, wrongs be redressed and **relief obtained is remedial**." *Id.* at 792 (emphasis added). *Schmitt* noted that there was a history of Iowa Supreme Court decisions holding the "the measure of damages for a tortious wrong pertains to remedy rather than substantive law." *Id.* *Schmitt* reaffirmed this rule: "we are committed to the rule that damages are essentially a part of the remedy." *Id.* *Schmitt* ultimately held that the amendment allowing for additional damages applied retrospectively. *Id.* at 793.

Defendants' reliance on *Dindinger v. Allsteel, Inc.* is blatantly misguided. 860 N.W.2d 557 (Iowa 2015). *Dindinger* considered whether imposition of a strict liability standard on employers for wage discrimination was substantive or remedial. *Id.* at 564. *Dindinger* held that the amendment made significant substantive changes to the law: "rather than requiring discrimination based on protected status to be *independently proved*, section 216.6A *defines* discrimination as the act of paying lower wages." *Id.* (emphasis in original). "Section 216.6A of the Iowa Code therefore creates an entirely new cause of action: strict liability on the party of employers for paying unequal wages." *Id.*

The *Dindinger* amendment is completely different than the amendment to section 70A.28. The statutory amendment at issue here does not create a new cause of action and does not change the burden of proof. It merely allows a plaintiff to collect civil damages. The rule in Iowa remains that "damages are essentially a part of the remedy." *Schmitt*, 149 N.W.2d at 793.

Defendants also rely on the United States Supreme Court case *Landgraf v. USI Fil Products* in support of their argument that a statute which allows for the collection of additional damages is substantive. 511 U.S. 244 (1994). In *Landgraf* the Supreme Court addressed whether the 1991 amendments to the federal civil rights act applied to a pending case. *Id.* at 250. The 1991 amendments allowed a plaintiff to collect compensatory damages, punitive damages, and provided for a jury trial. *Id.* at 249. *Landgraf* ultimately concluded that the addition of compensatory damages as a remedy was substantive. *Id.* at 286. However, the Supreme Court's decision was grounded in federal law that is irreconcilable with Iowa law.

The fundamental differences between Iowa and federal law are demonstrated by Footnote 37. The footnote confirmed that "We have sometimes said that new 'remedial' statutes, like new 'procedural' ones, would presumptively apply to pending cases. While that statement holds true

for some kinds of remedies, we have not classified a statute introducing damages liability as the sort of 'remedial' change that should presumptively apply in pending cases." *Id.* at FN 37. In other words, under federal law adding new categories of damages is **not** a remedial change to the law. *Landgraf* simply cannot be squared with this Court's decision in *Schmitt*. 149 N.W.2d at 793. *Schmitt* expressly held that changes which affect or add new damages are remedial changes to a statute, and a statute that allows for the collection of new or additional damages may be applied retrospectively. *Id.* Because we are applying Iowa and not federal law, *Schmitt* controls in this situation.

2. When a statutory amendment makes both substantive and remedial changes, the remedial changes are presumed to apply retrospectively

Defendants next argue that all of the amendments to section 70A.28 should be considered substantive because one small part of it is substantive. In addition to providing remedies to a claimant, the amendment makes changes to subsection (2) of 70A.28 by expanding the persons to whom violations can be reported to "human resource management." It also makes a substantive change by adding a "good faith" component to the disclosure requirements. However, these substantive changes do not render all other parts of the amendment substantive.

Iowa law is well-established that when a statute makes both substantive and remedial changes, the remedial changes are applied retrospectively while the substantive changes are applied prospectively only. *Schultz v. Gosselink*, 148 N.W.2d 434 (Iowa 1967). In *Schultz*, this Court considered the retroactivity of a statute that amended the rule on contributory negligence. 148 N.W.2d at 435 (citing Iowa Code § 619.17 (2021)). The statutory amendment at issue eliminated the plaintiff's burden of pleading and proving freedom from contributory negligence which the court found "relates to remedy and procedure." The amendments also shifted the burden of proof to defendant to plead and prove negligence and proximate cause which the Court found substantive. *Id*. at 435. "We hold the new statute, now section 619.17, Code 1966, affects both remedial or procedural and substantive rights. As to burden of proof the statute is retroactive and, of course, prospective. As to the quantum of proof it is prospective only."

This rule was reaffirmed in *Vinsand*, which held that "even when only part of an enactment is remedial or procedural, [retrospective] effect is ordinarily given to that part." *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 210 (1985). *In Vinsand* the Court was confronted with the proper application of a newly passed statute to pending litigation. The statute at

issue made paternity blood tests admissible under certain circumstances. In analyzing whether the statute applied to the pending litigation the court made the following determination: "To the extent section 675.41 affects the admissibility of blood test results, it does not create or divest a substantive right but merely establishes a rule of evidence. Thus, at least to that extent it is applicable to proceedings that were pending on its applicable date. . . We therefore conclude that section 675.41 governed the admissibility of the blood test results in the present case."

Applying this standard to the present case, it is clear that the remedial or procedural portions of the amendment to section 70A.28 are presumed to apply retrospectively. This is true regardless of whether other parts of the amendment made substantive changes to the statute. *See Vinsand*, 318 N.W.2d at 210; *Schultz*, 148 N.W.2d at 437.

B. Because the amendment is remedial, it is presumed to apply retrospectively

Iowa law is clear. When a legislative enactment is remedial, retrospective application is presumed. This Court expressly held in *State ex rel. Turner v. Limbrecht* that a statute's substantive or remedial/procedural nature determines whether prospective or retrospective application is presumed: "the question becomes whether § 713.24 affects substantive rights or is simply procedural or remedial in nature. Such a classification

controls which presumption, prospective or retrospective, shall be indulged." 246 N.W.2d 330, 332 (Iowa 1976) *overruled on other grounds by, State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 622 (Iowa 1989). This holding was reaffirmed in 2015: "If the statute is remedial, we presume it operates retrospectively." *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (Iowa 2015).

This Court has repeated this bedrock principle on many occasions. *Anderson Financial Services, LLC v. Miller*, 769 N.W.2d 575, 579 (Iowa 2009) (holding "If the statute is remedial, we presume a retrospective operation and employ a three-part test to determine if retroactive application is consistent with legislative intent."); *Janda v. Iowa Indus. Hydraulics, Inc.*, 326 N.W.2d 339, 344 (Iowa 1982) (holding "when a statute relates solely to a remedy or procedure, it is ordinarily applied both prospectively and retrospectively."); *Dolezal v. Bockes*, 602 N.W.2d 348, 351 (Iowa 1999) (holding "procedural legislation applies to all actions—that that have accrued or are pending and future actions.").

Defendants advance an incorrect statement of law by arguing that a statute can only apply retrospectively if there is an "unavoidable implication" that the amendments were intended to apply retrospectively. Not true. The "unavoidable implication" doctrine only applies to substantive

statutes, not remedial ones. This is clearly demonstrated by every single case Defendants rely upon. The very first case Defendants cite makes this crystal clear. "Statutes which specifically affect **substantive rights** are construed to operate prospectively only unless legislative intent to the contrary clearly appears from the express language or by necessary and unavoidable implication." *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491 (Iowa 1985) (emphasis added).

Because the amendment to subsection 5 of 70A.28 is remedial, Hedlund is not required to show legislative intent for retrospective application by unavoidable implication. Instead, the burden is on Defendants to overcome the presumption of retrospective application. *See Limbrecht*, 246 N.W.2d at 332 (holding that whether statute is substantive or procedure "controls which presumption, prospective or retrospective, shall be indulged.").

C. Retrospective application of the amendment is consistent with legislative intent

Because the amendment to Section 70A.28(5) is remedial, it is presumed to apply retrospectively. Therefore, the Court should next apply the three part test from *Limbrecht* to determine if Defendants can overcome this presumption. The three factors are (1) the language of the act; (2) the manifest evil to be remedied; and (3) whether there was a previously

existing statute governing or limiting the mischief which the new act is intended to remedy. *See Limbrecht*, 246 N.W.2d at 333.

1. The language of the amendment, the explanation of the bill, and legislative history show that retrospective application was intended

The first factor weighs heavily in favor of retrospective application. Beginning with the text of the amendment itself, it is clear that the legislature intended retrospective application. The amendment directly addresses the remedies available to aggrieved employees. The amendment to subsection 5 reads:

> A person who violates subsection 2 is liable to an aggrieved employee for affirmative relief including reinstatement, with or without back pay, or civil damages in an amount not to exceed three times the annual wages and benefits received by the aggrieved employee prior to the violation of subsection 2, and any other equitable relief the court deems appropriate, including attorney fees and costs.

This entire subsection deals with the remedies available to aggrieved employees. Iowa Courts "presume that the legislature was aware of the statutory and case law developments." *In re Marshall*, 805 N.W.2d 145, at 158 (Iowa 2011). Because the legislature is aware that remedial statutes are presumed to be retrospective, and because they enacted an unquestionably remedial amendment, the Court should infer that the legislature intended the amendment to apply retrospectively.

The legislative history—as reflected in the text of the bill explanation section—strongly suggests that the remedial changes to the statute apply to pending cases. The "Explanation" to Senate File 400[1] states, in pertinent part, as follows:

> The bill provides that an aggrieved employee may recover civil damages in an amount up to three times the employee's wages and benefits **at the time of the violation of the Code section.**

(App. 59) (emphasis added)

In Hedlund's case the time of the violation of the code section was his date of termination: July 17, 2013. In other words, Hedlund's wages and benefits in July 2013 (and not some later date) should be used in calculating his civil damages. This legislative history solidifies the presumption of retroactivity.

The legislative history of the amendment further supports a finding that retrospective application was intended. First, it can be safely assumed that the legislature knew at the time of passage of the statute that whistleblower claims were pending against various state and local governments. *Cf. Hunter v. Colfax Consol. Coal Co.*, 154 N.W. 1037, 1046 (Iowa 1915) (holding "We must assume the Legislature had some

[1] This bill was later renumbered as SF 502 and signed into law by Governor Reynolds on May 10, 2019. The bill originally only made changes to 70A.29—the whistleblower law applied to municipal governments. It was amended on the floor to make virtually identical changes to 70A.28.

knowledge of the state of the case law when it acted.") Second, Hedlund can show that the legislature had actual knowledge of Hedlund's specific claim. Multiple legislators were quoted in a 2013 Des Moines Register article about Hedlund's case. (App. 44) These legislators included Jeff Danielson, then Chairman of the Senate State Government Committee, as well as House Public Safety Committee Chairman Clel Baudler.

Defendants argue that this 2013 article cannot evidence legislative intent for the 2019 amendment. However, Hedlund is not offering this article to show express intent. Rather, it is offered to show that the legislature had knowledge of pending whistleblower actions at the time they amended the whistleblower statute in 2019. This was also the purpose for which the district court used the article. This is an example of Defendants deliberately misconstruing Hedlund's arguments and the district court's decision.

On March 26, 2019, at 12:12 PM, Senator Dennis Guth made opening remarks on Senate File 502—the successor bill to SF 400 and the bill that later amended 70A.28. Senator Guth stated "Senate File 502 is actually a whistleblower protection bill first initiated because of recent activities over at the Waukee School District." (App. 56) Senator Guth was referring to the embezzlement scandal in the Waukee School District that persisted for many

years. This embezzlement continued unabated in part because employees feared retaliation.

The legislative purpose of providing remedies for past whistleblowing is further supported by a Des Moines Register article written by Senator Charles Schneider titled "Waukee schools issues prompt whistleblower legislation." In this article Senator Schneider recounted the issues at the Waukee School District and then stated "As a state legislator, my thoughts immediately turned to opportunities for improving state law to address situations like the one in Waukee." (App. 42) Because this legislation was enacted to address retaliatory behavior that had already occurred, this necessarily implies an intent that the amendments apply retrospectively. Senator Schneider concludes his opinion piece by stating "As a state, we should do everything we can to encourage and support those who exercise this small act of courage." (App. 43) A holding that the amendments to section 70A.28 apply retrospectively would further this purpose.

Importantly, Defendants have not pointed to any language of the amendments, in the explanation paragraph, or the legislative history that undermines the presumption of retrospective application. Defendants have wholly failed to carry their burden of overcoming this presumption.

2. *The evil to be remedied—uncompensated or undercompensated whistleblowers who have been illegally fired—favors retrospective application*

The changes to 70A.28(5) affect the remedies available to an aggrieved state employee. Clearly, the evil to be remedied by this amendment is that employees were not being made whole after being illegally terminated. By making additional damages available, the legislature sought to ensure that whistleblowers were made whole and fully compensated for their harms and losses. This conclusion is bolstered when the purpose of allowing compensatory damages is considered.[2] "The purpose of compensatory damages is to return an injured party to the party's original position." *Lara v. Thomas*, 512 N.W.2d 777, 783 (Iowa 1994). Unlike punitive damages whose purpose is to punish and deter,[3] compensatory damages are inherently backwards looking.

Despite this unavoidable conclusion, Defendants nevertheless argue that the only evil to be remedied by the amendments is to encourage whistleblowers to report wrongful conduct by the State. This argument rings true only with respect to the substantive amendments in subsection 2 which expands the scope of persons to whom disclosures can be made. It is hard to

[2] As discussed below, "civil damages" referenced in the amendment are compensatory damages.

[3] "Exemplary damages are intended to punish the defendant and deter others from similar wrongdoing." *Northrup v. Miles Homes, Inc. of Iowa*, 204 N.W.2d 850, 861 (Iowa 1973).

imagine that a potential whistleblower would be more likely to report wrongdoing because of the availability of limited compensatory damages. Defendants might also argue that the purpose of the civil damages provision is to deter state officials from retaliating against whistleblowers. Again, this argument would carry weight only if the damages were forward facing such as punitive damages—whose purpose is to deter bad behavior in the future. Compensatory damages by their very nature are backward facing. There is no serious argument that adding compensatory damages to a statute is not remedial in nature.

There is precious little case law applying the second factor to remedial statutes which are presumed to apply retroactively. The most significant discussion of this factor (as well as the third factor) comes from the *Limbrecht* case which involved an amendment to the Consumer Frauds Act. *Limbrecht*, 246 N.W.2d at 331. In holding that the amendments were remedial and should be applied retrospectively, the court analyzed these additional elements.

> Consideration of the evil sought to be remedied tends to strengthen the argument for retrospective application. Section 713.24 was passed as chapter 438 of the Acts of the 61st General Assembly. The preamble of the Act states: "An Act outlawing certain consumer frauds, and providing more effective regulatory and enforcement procedures" Acts of the 61st G.A., 1965 Regular Session, ch. 438, Preamble.

> The preamble indicates legislative awareness of actions already deemed to be consumer frauds. Addressing the existing frauds contradicts any contention the legislature was dealing only with future conduct. More importantly the language indicates the legislature intended to improve the regulatory and enforcement procedures then existing. It is certainly not inferable from such language that prospective application only was intended by the legislature.
>
> We believe the legislature intended the section to have retrospective application.

Id. at 333-34.

Like the amendment in *Limbrecht*, the amendment to section 70A.28 showed that the legislature was aware of actions already deemed to be illegal retaliation against whistleblowers. Addressing this existing illegal retaliation "contradicts any contention the legislature was dealing only with future conduct." *Id.* Additionally, the amendment to 70A also sought to improve the enforcement procedures by providing aggrieved employees with additional remedies, just like in *Limbrecht*. This weighs in favor of retrospective application.

3. Because a statute previously existed to govern this conduct, this favors retrospective application

Finally, Defendants completely misconstrue the holding in *Limbrecht*. While the Consumer Fraud Act was a new statute, the court attached no real importance to that fact given the body of common law existing prior to enactment. The Court found that the legislature was aware of common law

protecting consumers from fraud and intended to strengthen those protections through the statute. The Supreme Court never held that the consumer protection act was an entirely new scheme as Defendants represent. The full discussion from *Limbrecht* (which was already quoted from above) follows:

> Consideration of the evil sought to be remedied tends to strengthen the argument for retrospective application. Section 713.24 was passed as chapter 438 of the Acts of the 61st General Assembly. The preamble of that Act states: 'An Act outlawing certain consumer frauds, and providing more effective regulatory and enforcement procedures.' Acts of the 61st G.A., 1965 Regular Session, ch. 438, Preamble.
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> We believe the legislature intended the section to have retrospective application.

Id. at 333-34. In this case, the legislative history of Senate File 502 provides compelling unrebutted evidence that the legislature contemplated that ability to recover "civil damages" should be applied retroactively to a pending case. Defendants have completely failed to overcome the presumption that the amendments to section 70A.28 should be applied retrospectively.

Finally, Defendants reliance on *Landgraf* on this point is again misplaced. The 1991 Civil Rights Act was passed one year after President George H.W. Bush vetoed the 1990 Civil Rights Act. *Landgraf*, 511 U.S. at 255-56. The 1990 bill had a provision that expressly made its application retrospective. *Id.* at 255. President George H.W. Bush vetoed the 1990 act, in part, because of its "unfair retroactivity rules." *Id.* at 256. The *Landgraf* court therefore concluded that the lack of language making the 1991 bill retrospective was intentional, and likely part of a legislative compromise. *Id.* at 256. There is no similar legislative history in this case.

II. APPLICATION OF THE AMENDMENTS TO SECTION 70A.28 IS NOT RETROSPECTIVE APPLICATION

To determine prospective or retrospective application, one must first identify the "specific conduct regulated in the statute," which is the "event of legal consequence." *Hrbek v. State*, 958 N.W.2d 779, 783 (Iowa 2021). If the event of legal consequence occurs after the statute was amended, applying the amended statute is not retrospective application. *See id.*

The Court addressed this issue in *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021). The statute at issue prohibited postconviction-relief ("PCR") applicants represented by counsel from filing any pro se documents with the courts. *Id.* at 781 (citing Iowa Code § 822.3A (2021)). At the time this amendment took effect, John Hrbek had been litigating a pending PCR

application for thirty-four years. *Id.* Hrbek argued that applying the newly amended statute to his pending PCR application would be retrospective application. *Id.* at 782.

Hrbek set out the rule for determining whether application of a statute to a pending case is retrospective application:

> [A]pplication of a statute is in fact retrospective when a statute applies a new rule, standard or consequence to a *prior* act or omission. The prior act or omission is the event of legal consequence that the rule regulates. The event of legal consequence is the specific conduct regulated in the statute.

Id. at 782-83 (internal citations and quotations omitted) (emphasis in original). *Hrbek* held that the event of legal consequence was the filing of pro se documents. Therefore, application of the new statute to a pending case to prohibit further filing of pro se documents was **not** retrospective application. *Id.* at 783.

The specific conduct regulated by the amendment to subsection 5 is the award of damages to a wronged employee. *See* 2019 Iowa Acts ch. 109, § 1. Accordingly, the event of legal consequence is the court's award of damages to a plaintiff at a trial. *See Hrbek*, 958 N.W.2d at 783. While Hedlund's case has been pending for nearly a decade, no judge or jury has awarded Hedlund any damages, and no judge or jury will do so until 2023 at the earliest. Therefore, the event of consequence will necessarily occur after

July 1, 2019—the date the statute went into effect. *See* 2019 Iowa Acts ch. 109, § 1; *Hrbek*, 958 N.W.2d at 783. Applying the amendments to subsection 5 of 70A.28 is not retrospective application. Therefore, Hedlund can recover civil damages and is entitled to a jury trial. *See Hrbek*, 958 N.W.2d at 783.

III. THE LAW OF THE CASE HAS NO APPLICABILITY TO THIS ISSUE

Defendants argue that the law of the case doctrine applies, and therefore prevents Hedlund from taking advantage of the newly amended whistleblower statute. It is true that this Court held that the remedies available under the prior version of 70A.28 are equitable. However, that is not the issue currently before this Court. The present issue is whether the amendments to section 70A.28 are retrospective—an issue this Court did not address in *Hedlund* (or any other case). Defendants' attempt to shoehorn this issue to fit the law of the case doctrine completely ignores the thrust of Hedlund's argument: that 70A.28 was amended after the Supreme Court's decision, and this amendment applies retrospectively.

Defendants are correct that the old version of 70A.28 is solely equitable in nature. Hedlund is not asking the Court to reexamine this decision. Rather, Hedlund is asking the Court to apply a newly amended version of the statute to his case. Because this Court never ruled on whether

the newly amended statute applied to Hedlund's case—a fact Defendants appear to concede—the law of the case doctrine has no applicability.

IV. HEDLUND HAS NOT WAIVED HIS ARGUMENT FOR RETROSPECTIVE APPLICATION OF 70A.28

Defendants also raise the creative argument that Hedlund waived his right to a jury trial because, at one point in time, he allowed the trial court to schedule a bench trial. In support of this ludicrous position, Defendants cite to a single case: *Wellmark, Inc. v. Iowa District Court for Polk County*, 890 N.W.2d 636 (Iowa 2017). In that case, a party **stipulated** that they were only pursuing a per se action. Plaintiff's representation that the court should schedule a 10-day bench trial based on the procedural posture of the case at the time is not a stipulation.

If agreeing to a bench trial was a stipulation that a case could only be tried in equity, then an agreement to a jury trial would similarly be a stipulation that a case can only be tried at law. In this case, Defendants have agreed to schedule a jury trial four separate times: on August 11, 2016; on November 16, 2017; on May 19, 2020; and again on August 18, 2021. If Defendants argument is correct—that agreeing to schedule a trial to a jury or to the bench amounts to a stipulation regarding the equitable or legal nature of a claim—then Defendants have on four occasions stipulated that the

claims are legal in nature. Of course this is not the law, and the Court should reject this argument.

Defendants now take this argument a step further: they assert that agreeing to a bench trial not only waives the right to a jury trial, but also waives the right to compensatory damages. This ignores the fact that a judge sitting as a fact-finder may award compensatory damages. *See Brokaw v. Winfield-Mt. Union Community School Dist.*, 788 N.W.2d 386 (Iowa 2010) (affirming award of $23,000 in compensatory damages in a bench trial). Hedlund never stated to the district court or to Defendants that he was waiving his right to seek compensatory damages, or that he was agreeing to try the case solely in equity. Common sense dictates that if Hedlund waived his right to a jury trial—a dubious proposition—he did not waive his right to seek compensatory damages.

BRIEF POINT II

PLAINTIFF MAY COLLECT CIVIL DAMAGES, AND THE CAP ON DAMAGES IN SECTION 70A.28(5) DOES NOT APPLY TO BACK PAY OR ATTORNEYS' FEES

In this case, Hedlund seeks the following items of damages: (1) reinstatement with or without back pay; (2) civil money damages in the form of emotional distress and damage to reputation; and (3) attorney fees and costs. The State suggested during an oral argument in the trial court that back pay, civil damages and attorney fees and costs are collectively subject to the cap. This argument ignores the distinction between legal and equitable relief.

I. THE TERM "CIVIL DAMAGES" IS BROAD AND INCLUDES DAMAGES FOR EMOTIONAL DISTRESS AND HARM TO PLAINTIFF'S REPUTATION

Damages for emotional distress and harm to reputation are recoverable as "civil damages" under the amended 70A.28. Civil damages generally include actual and punitive damages.[4] Although not explicitly defined in Iowa Code § 70A.28, "civil damages" logically means damages allowed in a civil suit. "Every proceeding in court is an action, and is civil,

[4] Iowa Code § 808B.8; *Damages*, Black's Law Dict. 351-52 (5th ed. 1979), *c.f.*, Iowa Code § 80H.5 (2021) (immunity for any "civil damages" for acting in good faith implying immunity from all damages including punitive damages); Iowa Code § 91(2021); Iowa Code § 613.17 (2021) (immunity from any "civil damages" for negligent acts or omissions implying immunity from all damages); Iowa Code § 321J.25(5) (2021) (immunity for any "civil damages" for negligence).

special, or criminal." Iowa Code § 611.11 (2021). "Civil" means "Relating to private rights and remedies sought by civil actions contrasted with criminal proceedings." *Civil*, Black's Law Dict., 222 (5th ed. 1979). "Damages" mean "A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful acts act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another." *Damages*, Black's Law Dict., 351-52 (5th ed. 1979). "Damages may be compensatory or punitive according to whether they are awarded as the measure of actual loss suffered or as punishment for outrageous conduct to and to deter future transgressions . . . Compensatory or actual damages consist of both general and specific damages." *Id.* at 352.

These Black's Law Dictionary definitions closely track the law in Iowa and in other states. *See* Iowa Code § 808B.8 (2021) (stating that civil damages includes actual damages and punitive damages); Minn. Code § 611A.79 (2020) (stating that civil damages includes actual damages and punitive damages). Because Hedlund can collect civil damages under Iowa Code § 70A.28, he is entitled to damages for emotional distress and harm to his reputation.

II. ONLY "CIVIL DAMAGES" ARE SUBJECT TO THE CAP

The recent amendment to the statute includes the following deletions and additions:

> A person who violates subsection 2 is liable for affirmative relief including reinstatement, with or without back pay, ~~or~~ civil damages in an amount not to exceed three times the annual wages and benefits received by the aggrieved employee prior to the violation of subsection 2, and any other equitable relief the court deems appropriate, including attorney fees and costs.

Iowa Code § 70A.28(5)(a) (2021).

The only item of damage subject to the cap is Hedlund's civil damages—here the damages for emotional distress and damage to his reputation. In this case the plain language of the statute and its grammatical structure make clear that the cap applies only to civil damages because that language appears immediately after "civil damages." Additionally, the clause allowing for civil damages and instating the cap is found in a separate and independent clause set off from the rest of the statute by commas. Finally, the clause providing for civil damages and imposing a cap was part of an independent bill that added this specific language.

The legal and equitable nature of the damages further bolsters this argument. Hedlund previously argued that under the pre-amendment version of the statute that he was entitled to a jury trial and emotional

distress damages. *Hedlund,* 930 N.W.2d at 718. The Court found, however, that "any other equitable relief" necessarily implies that the "affirmative relief" is equitable. *Id*. In other words, the relief provided under the pre-amendment statute was entirely equitable in nature and "If the legislature intended to permit actual damages under the relief of section 70A.28(5)(a), it would have so provided." *Id*. The legislature clearly did so with the 2019 amendments.

The Court already determined in this case that under the previous language of the statute the relief available under 70A.28(5)(a) was entirely equitable. *Id.* The recent amendment makes the legal remedy of civil or actual damages available. The cap on law damages does not and cannot limit the remedies available in equity. After all, "Law issues are for the jury and equitable issues are for the court." *Id. quoting, Westco Agronomy Co. v. Wollesen*, 909 N.W.2d 212, 225 (Iowa 2017). The remedies of reinstatement (with or without backpay) and attorney fees and costs are equitable in nature and therefore not submitted to the jury. The State's argument would obliterate the distinction between remedies available at law and remedies available in equity.

CONCLUSION

The 2019 amendment to Section 70A.28 is remedial and therefore presumed to apply retrospectively. Defendants cannot overcome this presumption through application of the *Limbrecht* three-part test. Therefore, Section 70A.28 applies retrospectively. Moreover, given the Court's recent ruling in *Hrbek*, the amended Section 70A.28 may apply to Hedlund's case even without retrospective application.

Defendants' arguments seeking to sidestep these conclusions fare no better. The issue of whether the Section 70A.28 as amended applies to Hedlund's case was never decided by this Court. The law of the case has no application. Additionally, Hedlund did not waive his right to compensatory damages by agreeing to schedule a bench trial on a single occasion.

Finally, under the amended Section 70A.28, Hedlund may collect emotional distress damages equal to three times his yearly wages and benefits. The cap on these damages only applies to Hedlund's "civil damages" and does not apply to the other equitable relief available to him—attorneys' fees and backpay.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. of App. P. 6.903(1)(g)(1) because this brief contains 6,659 words , excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of issues and certificates).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 pt.

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