IN THE SUPREME COURT OF IOWA

No. 22–2021

TODD P. HALBUR,

Appellee/Cross-Appellant,

vs.

STEPHEN LARSON, Administrator of the Alcoholic Beverages Division in his Official Capacity,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court
For Polk County, LACL146501
Hon. David Nelmark, District Judge

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ROUTING STATEMENT

This case presents an issue of first impression for the Iowa Supreme Court: whether complaining to your supervisor, about your supervisor, regarding matters within your normal and expected job duties, constitutes protected whistleblowing under Iowa Code section 70A.28. Because guidance on this issue will help inform employers and employees across the state, Appellant recommends retention by the Court. *See* Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

The Comptroller for the Alcohol Beverages Division, Todd Halbur, expressed to his supervisor—the Division's Administrator Stephen Larson—that he disagreed with his supervisor's decisions on two matters. First, he disputed the Division's price mark-up calculations, alleging the miscalculation caused overcharges to Class "E" liquor licensees. Second, he disputed his supervisor's decision that a vendor contract was not required to go through the competitive bidding process.

Later, Halbur was fired for unsatisfactory job performance. In response, Halbur sued Larson, claiming whistleblower retaliation. According Halbur, complaining to your supervisor, about your supervisor, regarding matters squarely within your job duties, is protected whistleblowing under Iowa Code section 70A.28, and thus shielded him from termination.

Halbur's suit brought a statutory cause of action under Iowa Code section 70A.28 and a common law retaliatory discharge claim against Larson. Larson moved to dismiss both claims, arguing (1) Halbur did not engage in any protected whistleblowing—solely internal complaints to your supervisor, about your supervisor, which are categorically outside of section 70A.28—and (2) Halbur's retaliatory discharge claim was based on section 70A.28, and thus his common law action was precluded by statute. Docs. 0012, 0018

(Def. Mtn. to Dismiss, Feb. 14, 2020; Mar. 2, 2020). The district court denied Larson's motion as to the first argument, finding Halbur fell within section 70A.28's protections because he "elected to whistle blow to a public official who happened to be his agency administrator." Doc. 0023, at 11, Order (May 4, 2020). The district court dismissed the common-law claim and the case proceeded to trial.

After a four-day jury trial, the jury returned a verdict for Halbur. Doc. 0228, at 1, Order Amending Judgment (Jan. 5, 2023). The jury awarded Halbur $1 million in damages. *Id.* Pursuant to the statutory damages cap within section 70A.28(5)(*a*), the court reduced the award to $351,000. *Id.*

Larson now appeals.

STATEMENT OF THE FACTS

A. The Alcohol Beverages Division and its duties.

After the Twenty-First Amendment repealed Prohibition, Iowa announced the "public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as" provided by the Iowa Liquor Control Act. Iowa Code § 1921-f(1) (1935). That public policy remains today, codified in the updated Iowa Alcoholic Beverages Control Act. Iowa Code ch. 123 (2023).

The Alcohol Beverage Division ("ABD") "administer[s] and enforce[s] the laws of this state concerning alcoholic beverage control." Iowa Code §123.4. Among its many duties, ABD sells wholesale liquor, as well as regulates the licensing and sale of alcoholic beverages across the state. *See* Iowa Code ch. 123.

ABD is run by an Administrator, who is appointed by the Governor and confirmed by the Senate for a four-year term. Iowa Code § 123.7(1). The Administrator executes ABD's policies and practices, including the Division's licensing functions, trade policies, and the wholesale of spirits. (10/5/22 (Part II) Tr. 87:20–88:25). The Administrator has significant discretion when deciding how to execute Chapter 123 and is the final decisionmaker over policy matters related to licensing, trade practices, procurement, and all other agency functions. (10/5/22 (Part II) Tr. 88:15-25).

ABD is also overseen by an advisory and policy-making body, the Alcoholic Beverages Commission ("the Commission"), which consists of five members appointed by the Governor. *See* Iowa Code § 123.5. The Administrator and other ABD officials, including the Comptroller, make regular reports to the Commission and participate in regular commission meetings. (10/4/22 Tr. 24:15–22, 117:21–118:5, 220:3–25); (10/5/22 (Part II) Tr. 58:17–22, 95:7–20). ABD is further required to produce an annual report to the Governor on the operation and financial position of the division for

the preceding fiscal year. *See* Iowa Code § 123.16. ABD, as with any other state agency, is subject to Iowa's competitive bidding laws. *See* Iowa Admin. Code r. 11-117.3(8A), 11.117.5(8A).

Relevant to this suit, ABD sells "alcoholic liquor at wholesale only," and to holders of "class 'E' retail alcohol licenses" only. Iowa Code § 123.24. When selling liquor, ABD's pricing must consist of: (a) "the manufacturer's price," and (b) "a markup of up to fifty percent of the wholesale price paid by the division for the alcoholic liquor." *Id.* § 123.24(2). Even so, ABD may nevertheless "increase the markup on select kinds of alcoholic liquor" so long as "the average return to the division on all sales of liquor does not exceed the wholesale price paid by the division and the fifty percent markup." *Id.* § 123.24(2)(*b*).

B. ABD Comptroller.

In April 2015, Halbur began serving as ABD's Comptroller. (10/3/22 Tr. 50:22-51:18). As Comptroller, Halbur managed "the [$300 million] revenue stream of liquor" oversaw the finance department and was tasked with the "responsibility" of ensuring "contracts are procured correctly." (10/3/22 Tr. 51:5-12). Halbur's duties also included "advis[ing] the Administrator and the COO on all matters of cash management, inventory control, audit findings and adjustment." (Ex. E).

Halbur's managerial duties included supervising ABD's financial management bureau, hiring staff, maintaining and updating position description questionnaires for bureau positions, and completing performance evaluations for bureau employees. (Ex. E; Vol. IV App. 13); (Ex. 22; Vol. IV App. 6); (10/3/22 Tr. 50:22–51:18, 82:2–83:25, 84:10–20, 183:6–22, 186:6–23, 187:22–188:10). And Halbur planned, directed, and oversaw all ABD's accounting functions, including "budgeting, reporting, cash transfer, receivables, payables, state assets, payroll, and all financial records required within the function of state government, and that of ABD." (Ex. E; Vol. IV App. 13.)

Initially, Halbur reported to then-COO Tim Iverson. (10/3/22 Tr. 51:21–23.) When Iverson left ABD in 2016, Halbur began reporting directly to ABD Administrator Stephen Larson. (10/3/22 Tr. 52:2–5.) In June 2018, Larson officially returned the Comptroller position to the supervision of the COO, Herb Sutton. (10/5/22 (Part I) Tr. 80:20-23); (10/5/22 (Part II) Tr. 19:5–20:8).

C. Halbur's alleged disclosures.

Halbur's claim rests on two "disclosures": first, complaining that ABD's price markup of alcoholic beverages exceeded the fifty percent cap; second, disputing Larson's view that a contract need not proceed through competitive bidding.

1. *ABD's price markup of alcoholic beverages.*

In 2017, ABD hired the consulting firm Accenture to analyze the division's financial portfolio and product practices. (10/3/22 Tr. 61:18–62:13, 63:1–4); (10/4/22 Tr. 171:6–25). That analysis also reviewed ABD's pricing practices. *Id.* In August 2017, Accenture provided a report to ABD, which showed the division was receiving a greater revenue impact from products under temporary price reductions ("TPRs") compared to regularly priced products. (10/3/22 Tr. 63:19–64:23); (10/4/22 Tr. 172:14–25).

The report specifically highlighted both the price markup on TPRs and ABD's practice of product "buyouts"—where the Division would buy the remaining stock of discounted products at the end of the discount period from a supplier, and then markup the price on the product based on its non-discounted wholesale price after the discount period ended. (10/3/22 Tr. 60:13–61:15, 63:19–64:1); (10/4/22 Tr. 40:4–9). According to Halbur, after receiving the report, Halbur expressed concerns about those buyouts to Larson. (10/3/22 Tr. 67:17–68:5.)

But ABD had already assessed the legality of buyouts. In 2013, Larson received a letter from Lynn Walding outlining concerns about buyouts, and whether they caused problems with maintaining ABD's statutory profit margins. (Ex. 25, Vol. III App.

15). Walding was Larson's immediate predecessor as ABD Administrator and had instituted the buyouts practice during his tenure. (10/5/22 (Part II) Tr. 91:10–12); (10/6/22 Tr. 58:15–25).

In response to Walding's letter, Larson tasked Victor Kennedy, a budget analyst within the financial management bureau, with reviewing the Division's wholesales and product management practices. (10/6/22 Tr. 62:11–16). In 2014, Kennedy provided his findings, determining that "buyouts" resulted in a less than one percent increase in the markup rate for those products. (10/4/22 Tr. 148:19–24); (10/6/22 Tr. 62:17–20).

Larson and the other members of ABD leadership, including then-Comptroller Tammy Plowman, as well as members of ABD's regulatory compliance team, assessed Kennedy's findings and determined that the buyouts do not violate section 123.24. (10/4/22 Tr. 148:19–24); (10/6/22 Tr. 62:21–65:23). The State Auditor, responsible for auditing ABD's books, never later found any violations in its audits of ABD. (10/4/22 Tr. 218:19–219:5); (10/6/22 Tr. 78:15–23).

Still, in November 2017, on Halbur's recommendation, ABD stopped its buyouts, without any objection or pushback from Larson or any other ABD official. (10/4/22 Tr. 142:13–143:24, 174:24–175:1, 217:5–8).

Based on Accenture's report, Halbur tasked Leisa Bertram—Halbur's "second-in-command" within the financial management bureau—with determining what was causing ABD's TPR revenue discrepancy as identified by Accenture. (10/4/22 Tr. 172:22–173:15). She determined the pricing software system within ABD was incorrectly processing TPRs, causing a miscalculation in the TPRs marked-up prices. (10/5/22 (Part I) Tr. 42:20–43:9).

In January 2018, Nicole Scebold—ABD products manager in charge of pricing—worked with Island Technologies, the company that provided the pricing system, to develop a fix. (10/4/22 Tr. 214:15–24); (10/5/22 (Part I) Tr. 43:10–15). After the fix was ready, all that was needed to implement it was Halbur's approval. But Halbur did not respond to Scebold for four months, creating a significant delay. (10/5/22 (Part I) Tr. 42:3–16).

At that point, a series of meetings including Halbur, Larson, and the rest of ABD leadership team led to Larson approving the recommended fix. (10/3/22 Tr. 70:9–71:11). ABD implemented that fix on May 30, 2018, and it went into effect July 1, 2018. (10/4/22 Tr. 215:16–24).

During meetings in May and June 2018, Halbur told Larson that Larson needed to tell the Governor, State Auditor, Attorney General, and Legislature about ABD's financials. (10/4/22 Tr. 148:2–12); (10/6/22 Tr. 72:12–17). Larson told Halbur that before he

would bring the issue to the Governor, Halbur would need to create a more thorough report of the situation. (10/6/22 Tr. 72:12–24; 76:1–7).

On June 8, 2018, Halbur forwarded an email to Larson from Bertram, containing TPR calculations. (Ex. 27, Vol. III App. 18.) Larson had requested the calculations. (10/3/22 Tr. 82:23–25.) Halbur's email to Larson stated: "Please see the email below from Leisa with her attachments of her analysis confirming the Markup percentage on [TPRs]. We can have a follow up meeting to discuss further next steps." (Ex. 27, Vol. III App. 18.)

At no point did Larson instruct Halbur to keep any information secret, nor did he direct Halbur not to discuss the TPR issue externally, nor did Larson prevent Halbur from raising the issue with any of the previously mentioned officials or to the Commission. (10/4/22 Tr. 164:1–12.) Still, Halbur failed to attempt to contact any officials outside ABD about this matter. (10/5/22 (Part II) Tr. 15:2-3, 84:3–19.)

2. *ABD's 2017 contract with BMI.*

On June 26, 2017, ABD entered into a Non-Exclusive Bulk Data Service Agreement with a third-party contractor, Beverages Merchandising, Inc. ("BMI"). (Ex. F, Vol. III App. 45.) That contract hired BMI to create a recordkeeping system where an auditor or

investigator could verify whether a supplier was honoring promotional deals and discounts to Class "E" retailers, boosting transparency within the Iowa alcoholic beverages industry. (10/5/22 Tr. (Part II) 108:3–9); (Farrell Dep. Tr. 24:24–25:9).

Larson first learned of BMI during a 2015 conference hosted by the National Conference of State Liquor Administrators. (10/5/22 Tr. (Part II) 99:22-100:11). At the time of the contract, BMI was the only company in the nation providing that service. The contract hired BMI to run a subscription-model service for one year, with an automatic renewal for three more years, unless either party provided written notice of termination. (Ex. F.)

As Comptroller, Halbur's job duties included performing final review and sign-off on all service contract payments. In practice, he delegated that task to Bertram. (10/3/22 Tr. 89:14-90:1, 91:2–8); (10/4/22 Tr. 183:23–184:17, 184:21–185:21, 195:16–23). Halbur approved the first payment to BMI in August 2017. (10/3/22 Tr. 96:9–14); (10/4/22 Tr. 221:8–15). Halbur then approved three more payments in December 2017 and one more in January 2018, at which point he asked Larson for a copy of the contract for review. (10/3/22 Tr. 98:6–99:2); (Ex. 3). Halbur had also been aware of ABD's talks with BMI, as the matter had been the subject of prior Commission meetings earlier in 2017, and Halbur had been copied

on emails during the lead-up to the 2017 contract. (10/4/22 Tr. 116:25–117:20, 118:24–121:11); (Exs. C, H; Vol. III App. 23, 51).

In January 2018, Halbur informed Larson of his belief that the BMI contract needed to go through the competitive bidding process, based on the total value of the contract over a three-year period. (10/3/22 Tr. 99:3–16); (10/6/22 Tr. 22:13–23). At that time, the matter was moot—ABD and BMI had agreed to pause the contract to reassess its scope. (10/6/22 Tr. 22:24–23:4); (Farrell Dep. Tr. 10:1–11, 13:5–12). BMI did not bill ABD between January and May 2018.

In June 2018, BMI sent ABD an invoice for services, which Larson passed to Halbur for processing. (Ex. 14, Vol. III App. 7). Halbur claims he refused to sign the contract, though the email thread contains no such refusal, nor any express statement that the contract was illegal. (*Id.*) Moreover, because the parties had reworked the scope of the project, Larson did not renew the contract and instead submitted the project for competitive bidding. (10/6/22 Tr. 41:11–20, 52:13–25); (Farrell Dep. Tr. 18:22–19:1). The bidding process lasted through the summer of 2018, and ultimately, the contract was awarded to BMI. (Farrell Dep. Tr. 19:2–4).

At no point did Halbur discuss this matter or his concerns about the legality of the 2017 BMI contract and the related payments issued by ABD to any state officials outside ABD. (10/5/22

(Part II) 15:2–3, 84:3–19.) Furthermore, at no point did Larson or any other ABD officials prevent Halbur from doing so. (10/4/22 Tr. 164:1–12); (10/6/22 Trial Tr. 92:21–25).

D. Halbur's termination.

Throughout Halbur's tenure at ABD, he struggled with personnel management. (10/4/22 Tr. 57:4–16); (Ex. C, Vol. III, App. 23). Maintaining sufficient staffing levels within the financial management bureau and performing performance evaluations necessary for employee pay raises were consistent concerns. (10/4/22 Tr. 84:10–20); (Ex. C, Vol. III App. 23).

Halbur's performance issues came to a head in May 2018, when senior bureau team member Dee Nelson informed Larson that she was retiring that September. (10/5/22 Tr. (Part I) 25:14–26:12); (10/5/22 Tr. (Part II) 32:22–33:25); (10/6/22 Tr. 51:10–52:6). Larson emphasized to Halbur the need to hire a replacement for Nelson before her retirement, so Nelson could personally onboard and train her replacement. (10/5/22 Tr. (Part II) 32:22–33:25); (10/6/22 Tr. 51:10–52:6). But Halbur took no steps to fill the position. (10/5/22 Tr. (Part II) 33:20–25.)

Although Larson had always intended to restore the Comptroller to the COO's supervision, Halbur's mismanagement of Nelson's retirement prompted Larson to place Halbur under COO

Sutton's direct supervision in June 2018. (10/5/22 Tr. (Part II) 57:7–18); (10/6/22 Tr. 50:24–51:24). Larson hoped Sutton could get a better performance out of Halbur. (10/6/22 Tr. 51:17–52:6.)

After meeting with Halbur on July 14, 2018, to discuss several pressing items, Sutton concluded that Halbur was still not listening and would not alter his performance. (10/5/22 Tr. (Part II) 65:10–18; Ex. 21, Vol. III App. 14). At that point, Sutton recommended to Larson that Halbur be terminated. (10/5/22 Tr. (Part II) 65:19–66:14). Larson accepted Sutton's recommendation and terminated Halbur's employment on July 24, 2018. (Ex. 2, Vol. III App. 5).

E. Course of proceedings.

Halbur filed his petition on December 10, 2019, asserting claims against the State of Iowa ("the State"), ABD, and Larson in both his individual capacity and his official capacity (collectively, "Defendants"). (Plf.'s Petition, Vol. I App. 6). Halbur's petition asserted four counts: wrongful termination in violation of public policy against the State, ABD, and Larson in his official capacity ("Count I"); wrongful termination in violation of public policy against Larson in his individual capacity ("Count II"); violation of Iowa Code section 70A.28 against the State, ABD, and Larson in his official capacity ("Count III"); and a section 70A.28 claim

against Larson in his individual capacity ("Count IV"). (Plf.'s Petition, Vol I App. 6).

Defendants moved to dismiss Halbur's suit. (Def. Motion to Dismiss (12/30/19)). First, Defendants argued Halbur's common-law claims were pre-empted by section 70A.28, as the only public policy Halbur referenced was the protection of state whistleblowers. *Id.* Second, Defendants argued Halbur's section 70A.28 claims failed because the State and ABD were not "persons" for purposes of the statute and because Halbur had not made a disclosure to a proper public official under the statute. *Id.* And Defendants argued that Halbur's discussions with Larson were not protected disclosures, as Halbur merely internally complained to Larson about of Larson's own actions. *Id.*

On January 29, 2020, Halbur filed his Amended Petition, adding some additional factual allegations and dropping his claim under Count IV. (Plf.'s Amended Petition, Vol. I App. 15). On February 14, 2020, Defendants again moved to dismiss Halbur's claims, reasserting their previous arguments. (Def. Motion to Dismiss (2/14/20)).

On May 4, 2020, the district court partially granted Defendants' motion. (Order Granting in Part, Denying in Part Def. MTD (5/4/20), Vol. I App. 52). The District Court dismissed Counts I and II as preempted by section 70A.28. (*Id.* at 4–8.) The District

Court also dismissed the State and ABD as named defendants for Count III but denied Defendants' motion as to Larson in his official capacity, holding Halbur's purely internal discussions with his supervisor could fall within the protections of section 70A.28. (*Id.* at 10–11.) The case proceeded to discovery, and later Larson moved for summary judgment, which was ultimately denied. (Order (8/24/22); Order (9/27/22)).

The matter proceeded to a four-day jury trial. On October 7, 2022, the jury returned a verdict for Halbur, awarding him damages in the form of past lost wages and past emotional distress. (Jury Verdict (10/7/22), Vol. I App. 149.) On October 21, 2022, Larson moved the District Court to adjust the award of damages to conform with the statutory cap on civil damages under section 70A.28(5). (Def. Motion to Conform Judgment, Vol. I App. 151.) Halbur did not resist that adjustment, and the District Court entered judgment on November 9, 2022. (Judgment (11/9/22), Vol. I App. 156.)

On December 9, 2022, Larson filed his Notice of Appeal with the District Court. (Def. Notice of Appeal, Vol. I App. 158.) On December 19, 2022, Halbur filed his Notice of Cross-Appeal. (Plf.'s Notice of Cross-Appeal, Vol. I App. 160.)

ARGUMENT

I. Halbur's whistleblower claim fails because he did not make any protected disclosure.

A. Error preservation and standard of review.

Larson preserved error on whether Halbur's conduct could qualify as a protected disclosure under section 70A.28 by raising the issue in its motion to dismiss and obtaining a ruling which was "definitive and dispositive" of the issue. *Schooler v. Iowa Dep't of Transp.*, 576 N.W.2d 604, 607 (Iowa 1998) ("We find that the DOT properly preserved error by raising the issue in its motion to dismiss. The district court's decision on that motion was definitive and dispositive of the issue. Requiring a party to file additional motions when the district court has already addressed the precise issue in a prior ruling would be a waste of judicial resources.").

And Larson confirmed with the trial court that he was "not waiving anything" by proceeding through trial in line with the prior ruling that Halbur's discussions with Larson could qualify as proper disclosures under section 70A.28. (09/16/22 Tr. 57:9–58:10 (instructing counsel "nothing I am saying or will do in trial waives the argument that you raised in any motion to dismiss on that basis.")).

The sole issue Larson raises on appeal is whether Halbur's conduct—complaining to his supervisor, about his supervisor,

regarding matters within his normal job duties—constitutes a protected disclosure under section 70A.28. Because this appeal stems not from any jury factual finding, but from the district court's overbroad reading of section 70A.28, challenges to whether conduct falls within the protections of section 70A.28 are reviewed de novo. *Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 19 (Iowa 2014).

B. Iowa's whistleblower statute and the bounds of protected disclosures.

"Iowa's whistleblower statute protects state employees who disclose to a public official information that the employee reasonably believes 'evidences a violation of law or rule, mismanagement, a gross abuse of funds, [or] an abuse of authority.'" *Ackerman v. State*, 19 F.4th 1045, 1054 (8th Cir. 2021) (quoting Iowa Code § 70A.28(2)). Section 70A.28(2), despite being a "151-word linguistic jungle," implements laudable public policy: it pushes state workers to notify those in positions of power if they believe the law has been violated. *Walsh v. Wahlert*, 913 N.W.2d 517, 521 (Iowa 2018). Some examples of the authorities referred to in the statute include general assembly members, the ombudsman's office, human resources professionals, law enforcement officers, and public officials.

But to invoke the statute's protections, employees must perform specific conduct. It is not enough that an employee merely recognizes malfeasance or refuses to participate in misconduct—the employee must "*affirmatively disclose* to those designated in the statute information" showing unlawful conduct. *Hegeman v. Kelch*, 666 N.W.2d 531, 533 (Iowa 2003) (emphasis added).

The importance of affirmative disclosure to the proper recipient within whistleblower statute has been litigated, with some courts confirming that "disclosure" requires more than just disputing a course of conduct with the alleged wrongdoer. On that point, *Huffman v. Office of Personnel Management* is instructive. 263 F.3d 1341 (Fed. Cir. 2001). There, an employee within the Office of Inspector General ("OIG") made several complaints to his supervisor, the Inspector General, about his supervisor, the Inspector General. *Id.* at 1344. The employee alleged the Inspector General violated personnel policies; "circumvented merit system principles" by hiring auditors without competition; and grossly mismanaged and wasted funds. *Id.* at 1345. He also complained to his supervisor that other OIG employees were engaged in misconduct. *Id.*

When the employee was later fired, he brought a whistleblower complaint. *Id.* at 1344–45. On appeal, the Federal Circuit addressed whether the employee made a protected

disclosure under the Whistleblower Protection Act of 1989 ("WPA"). *Id.* at 1347. The Federal Circuit concluded complaints to a supervisor, about the supervisor, are not "disclosures" under the WPA. *Id.* at 1344.

Like section 70A.28, the WPA protected "any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." *Id.* at 1347 (quoting 5 U.S.C. § 2302(b)(8)(A) (1994)). The court divided the employee's conduct into two categories: (1) complaints "made by an employee to a supervisor about the conduct of the supervisor," and (2) complaints "made to a supervisor about the conduct of other government employees or about other matters within the scope of the WPA." *Id.*

For the first category, "the WPA does not apply where an employee makes complaints to the employee's supervisor about the supervisor's own conduct." *Id.* at 1348. "Discussion and even disagreement with supervisors over job-related activities is a normal part of most occupations. It is entirely ordinary for an employee to fairly and reasonably disagree with a supervisor who overturns the employee's decision." *Id.* (quoting *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998)). When an employee

complains to his supervisor, he does "no more than voice his dissatisfaction with his superiors' decision." *Id.* at 1349 (quoting *Willis*, 141 F.3d at 1143). Moreover, complaints "directed to the wrongdoers themselves is not normally viewable as whistleblowing' under the WPA." *Id.* (quoting *Horton v. Dep't of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995)).

The WPA required whistleblowers to affirmatively make a "disclosure" to reap the benefits of the Act. *Id.* Although disclosure was not defined in the Act, the common definitions of the term all embrace "reveal[ing] something hidden and not known." *Id.* at 1349–50 (contrasting "disclose" with broader terms like "report" and "state). Accordingly, an employee does not make a protected "disclosure" by merely reporting or stating "that there has been misconduct by a wrongdoer to a wrongdoer"—the wrongdoer already knew of the complained-of conduct. *Id.* at 1350.

Beyond the textual bounds of "disclosure," the policy of the WPA also supports this conclusion. *Id.* "The purpose of the statute is to encourage disclosures that are likely to remedy the wrong," which excludes the wrongdoer themselves. *Id.* And extending whistleblower protection to every employee who voices disagreement with a supervisor "would also have drastic adverse consequences." *Id.* Nearly every employee who disagreed with their supervisor's actions "could claim protection of the Act." *Id.* Thus, to

reap the benefits of whistleblower protection, an employee who believes his supervisor is engaging in misconduct must disclose the alleged misconduct to someone other than the errant supervisor.

Iowa's whistleblower statute is substantially similar to the WPA. *See* 5 U.S.C. § 2302(b)(8)(A). After *Huffman*, Congress amended the WPA to reach disclosures made to supervisors and disclosures within the course of an employee's job duties. *See* Whistleblower Protection Enhancement Act of 2012, PL 112-199, § 101(b)(2)(C), 126 Stat. 1465, 1466 (2012) (codified at 5 U.S.C. § 2302(f)). Though first modeled after the WPA, the Iowa Legislature declined to correspondingly amend section 70A.28 to capture such disclosures. Accordingly, pre-amendment WPA caselaw is highly persuasive authority for this Court.

New Jersey also provides a helpful contrast point. The New Jersey Supreme Court interpreted its whistleblower statute to reach employees who, as part of their normal job duties, report on compliance and identify illegalities. *Lippman v. Ethicon, Inc.*, 119 A.3d 215, 228 (N.J. 2015). The court reached its decision based on the structure of the New Jersey whistleblower statute, which extended protection to those who "object" or "refuse to participate" in illegal activity. *Id.* The court concluded that protecting passive refusal or objection must mean the legislature meant to reach conduct taken within an employee's ordinary job duties. *Id.*

Iowa's statute, conversely, contains no language protecting passive refusals or mere objections to practices—it protects only affirmative disclosures. *See also City of Fort Worth v. Pridgen*, 653 S.W.3d 176, 185 n.6 (Tex. 2022) (contrasting Texas's whistleblower protections for all those who "report" misconduct and other states that require "disclosure" of misconduct).[1]

In sum, Iowa's whistleblower statute is substantially similar to the pre-amendment WPA. That the Legislature used "disclose" rather than "report" or "state" carries significance. And while the statute is intended to broadly protect whistleblowers and to motivate disclosure of misconduct, it should not be interpreted so broadly as to shield all employees who engage in the everyday conduct of disagreeing with their supervisor. To qualify for the statute's protection, an employee must do more than object to illegal conduct. Instead, he must make an affirmative disclosure of information to an appropriate recipient. *Hegeman*, 666 N.W.2d at 533.

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[1] And unlike other states, Iowa does not explicitly protect reports to supervisors. *See* Fla. Stat. § 112.3187(7) (encompassing "employees who file any written complaint to their supervisory officials").

C. Halbur's complaints and communications to his supervisor were not protected disclosures.

Against that backdrop, Halbur's discussions with his direct supervisor about his supervisor's decision-making falls outside of section 70A.28's protections. Indeed, Halbur's alleged whistleblowing conduct amounts to just a handful of routine, internal work conversations.

Halbur (among other ABD employees) received the Accenture report in August 2017 and relayed to Larson that he believed that buyouts could be an issue under Iowa Code section 123.24. Reviewing financial reports and advising the Administrator about ABD finances is squarely within Halbur's normal job duties. Larson accepted Halbur's recommendation, and ABD ceased buyouts in November 2017.

Halbur had another conversation with Larson (and others) in May 2018 about possible markup issues with TPRs—despite sitting on a computer fix for four months. (10/5/22 (Part I) Tr. 42:3-16); (10/5/22 (Part II) Tr. 8:17-9:5). And the TPR fix was implemented at the end of May. (10/4/22 Tr. 215: 4-24); (10/5/22 (Part II) Tr. 9:6-12). Again, participating in meetings, strategizing solutions, and advising the Administrator about ABD finances are squarely within Halbur's normal and expected job duties. And good faith discussions and disagreements don't transform into protected

whistleblowing merely because an attendee in the meeting is also a public official.

On June 8, Halbur forwarded an email to Larson from Bertram, passing along her TPR calculations and adding "Please see the email below from [Bertram] with her attachments and her analysis confirming the Markup percentage on TPR's. We can have a follow up meeting to discuss further next steps." (Ex. 27); (10/4/22 Tr. 146:20–23). Of course, Larson and Halbur had approved the TPR fix, and it had been implemented. (10/5/22 (Part II) Tr. 9:6–12). And Bertram's calculations were done at Larson's request. (10/3/22 Tr. 82:23–25). Forwarding calculations to your supervisor, which were done at the request of your supervisor, does not meet any plausible reading of "disclosure" to a "public official."

And in January 2018, Halbur asked to see the contract for BMI, despite approving payments for several months. Halbur stated the contract should have gone through the bidding process and declined to approve any more invoices. (10/3/22 Tr. 99:6–12.) Again, Halbur testified he was tasked with the "responsibility" of ensuring "contracts are procured correctly," and thus this type of review and advise falls squarely within his normal and expected job duties. (10/3/22 Tr. 51:5–12.) And BMI was never discussed in connection with his termination roughly six months later. (10/5/22 Tr. 66:15–17.)

Halbur made no attempt to inform any entity or person outside of ABD of his beliefs. Instead, Halbur performed his job and engaged in discussions and, at times, disagreement, with his supervisor. But that his supervisor happened to be the Administrator of a state agency does not transform Halbur's routine workplace communications into protected whistleblowing. Indeed, Halbur's conduct is indistinguishable from other employees across the state who may also at times object to a particular workplace practice or contract. The only difference here is Halbur's good fortune of reporting to a public official, rather than a regular supervisory employee. *Skare v. Extendicare Health Servs., Inc.*, 515 F.3d 836, 841 (8th Cir. 2008) ("Skare's job duties as nursing director and regional nurse consultant required her to ensure compliance with applicable laws and to expose unlawful behavior internally. Skare did not become a statutory whistleblower by merely exercising her duties to report compliance problems at her facilities.").

As in *Huffman*, "[d]iscussion and even disagreement with supervisors over job-related activities is a normal part of most occupations. It is entirely ordinary for an employee to fairly and reasonably disagree with a supervisor who overturns the employee's decision." 263 F.3d at 1348 (quoting *Willis*, 141 F.3d at 1143). When an employee complains to his supervisor, he does "no

more than voice his dissatisfaction with his superiors' decision." *Id.* at 1349 (quoting *Willis*, 141 F.3d at 1143).

Because Halbur did not make the type of communication protected by section 70A.28—he did not disclose information to a proper party—the district court erred, the verdict must be versed, and his claim must be dismissed.

CONCLUSION

For the reasons stated, the district court should be reversed, and Larson is entitled to judgment as a matter of law.

REQUEST FOR ORAL ARGUMENT

The State requests to be heard in oral argument.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 and contains 5,385 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 27th day of November 2023, I, or a person acting on my behalf, filed this brief and served it on counsel of record to this appeal with via EDMS.

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