IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-2021
Polk County Law No. LACL146501

TODD P. HALBUR,

Plaintiff-Appellee / Plaintiff-Cross-Appellant,

vs.

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

Defendant-Appellant / Defendant-Cross-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JUDGE DAVID NELMARK,
FIFTH JUDICIAL DISTRICT OF IOWA

APPELLEE AND CROSS-APPELLANT'S FINAL BRIEF

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- *Danker v. Wilimek*, 577 N.W.2d 634, 636 (Iowa 1998)
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- *L.F. Noll Inc. v. Eviglo,* 816 N.W.2d 391, 393 (Iowa 2012)
- *Lippman v. Ethicon, Inc.*, 119 A.3d 215, 226-27 (N.J. 2015)
- *Sand v. An Unnamed Local Gov't Risk Pool*, 988 N.W.2d 705, 708 (Iowa 2023)
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- *Zimmer v. Vander Waal*, 780 N.W.2d 730, 732–33 (Iowa 2010)

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- *Iowa Code § 70A.28*

Other Sources:

- BLACK'S LAW DICTIONARY, *Disclosure* (11th ed. 2019)

II. Does Iowa Code section 70A.28 provide an exclusive remedy when a State employer is fired for refusing to engage in illegal activity?

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- *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275 (Iowa 2000)
- *Ferguson v. Exide Technologies, Inc.*, 936 N.W.2d 429 (Iowa 2019)
- *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017)
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- *Peters v. Burlington N. R.R.,* 492 N.W.2d 399, 401 (Iowa 1992)
- *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018)

Statutes and Regulations:

- Iowa Code § 8A.311
- *Iowa Code § 70A.28*
- Iowa Code Section 730.5
- Iowa Admin. Code r. 11-117.11(8A)

ROUTING STATEMENT

Appellee agrees with Appellant that Appellant's novel argument presents an issue of first impression for the Iowa Supreme Court. As such, Appellee recommends retention by the Court. *See* Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Todd Halbur, the comptroller for the Iowa Alcoholic Beverage Division responsible for the division's accounting operations, disclosed to his supervisor two instances of illegality. First, Halbur disclosed his analysis that the division was systematically overcharged Iowa's class E liquor license holders for liquor – to the tune of more than $8 million over a course of years. Second, Halbur disclosed to his supervisor, ABD Administrator Stephen Larson, Halbur's assessment that Larson had bound the ABD to a no-bid contract in violation of state procurement laws intended to make sure that state contracts are awarded competitively and fairly. Furthermore, Halbur refused to sign off on a scheduled payment to the vendor at issue due to his belief that the contract was illegal.

In retaliation for Halbur's disclosures and refusal to participate in illegality, Larson fired Halbur on July 24, 2018. Halbur brought causes of action against Larson for wrongful discharge in violation of public policy and retaliation in violation of Iowa Code § 70A.28(2) – the whistleblower protection law covering state employees. Halbur's claim for wrongful discharge in violation of public policy was dismissed by the district court following a motion to dismiss from Larson, while the whistleblower

retaliation claim was resolved in Halbur's favor via a jury verdict on October 7, 2022.

Larson contended in the district court that Halbur was fired for poor performance. But this question is not in dispute in this appeal. A Polk County jury found Halbur proved his whistleblower retaliation case against Larson and awarded $1 million in economic and emotional distress damages. In this appeal, Larson only argues that Halbur's disclosures to Larson were not of the type protected by section 70A.28(2). This issue was the focus of Larson's Motion for Summary Judgment filed June 21, 2022 and of the district court's Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment dated August 24, 2022 and its Order amending its summary judgment ruling dated September 27, 2022.

Larson's appeal impermissibly asks the Court to look beyond the plain language of Section 70A.28(2) and judicially engraft his policy preferences into the section. This would erode whistleblower protections enacted by the Iowa legislature. The Court should affirm the district court's summary judgment rulings on this matter and the judgment entered November 9, 2022.

Halbur cross-appeals the district court's grant of Larson's motion to dismiss Halbur's claim for wrongful discharge in violation of public policy based on Halbur's refusal to sign off on a payment pursuant to the illegally

entered contract. Iowa's procurement laws and regulations define a public policy, and the Iowa Supreme Court has recognized the availability of a claim to employees who are fired in violation of such policies.

STATEMENT OF THE FACTS

A. The Parties

Plaintiff Todd Halbur (hereinafter "Halbur") served as the Comptroller / Accountant 4 for the Iowa Alcoholic Beverages Division ("ABD") from April 20, 2015, until July 24, 2018. *See* Amended Petition, at ¶¶ 6, 23, App. 16, 18; Defendant's Answer to Plaintiff's Amended Petition at Law at ¶¶ 6, 23, App. 65, 67. In the position of Comptroller / Accountant 4, Halbur was expected to plan, direct and oversee all accounting of ABD's estimated $300,000,000.00 operation. *See* Amended Petition, at ¶ 7, App. 16; Defendant's Answer to Plaintiff's Amended Petition at Law at ¶ 7, App. 65. He was expected to advise the Administrator and COO on all matters of cash management, inventory control, audit findings and adjustments. *Id*. He was required to analyze trends in financial reports and advise on procedural change of action steps needed to ensure the Division meets the reversion expectations of REC and that the Division maintains the standards of accounting practices of the Department of Management, the Governor's office and GAAP. *Id*.

Defendant Stephen Larson (hereinafter "Larson") has served as the Administrator of the ABD since May 2010. See MSJ Appx.[1] 68 (Larson Dep. Tr., at 7:25-8:4). In the position of Comptroller / Accountant 4, from the initiation of his employment to approximately September 2016, Halbur reported to Tim Iverson, COO. *See* Amended Petition, at ¶ 8, App. 16; Defendant's Answer to Plaintiff's Amended Petition at Law ¶ 8, App. 66. From approximately September 2016 until on or about July 12, 2018, Halbur reported to Stephen Larson, Administrator. *Id*. Halbur then reported to Herb Sutton from July 12, 2018, until Halbur's employment was terminated on July 24, 2018. *Id*.

B. Excessive Markup of Alcoholic Liquor in Violation of the Law

The ABD is the sole wholesaler of liquor in the State of Iowa. *See* Iowa Code ch. 123. The ABD is restricted by law in how much it can markup alcoholic liquor. *See* Iowa Code §123.24(2). Under Iowa law, the price of alcoholic liquor sold by the division shall consist of the (a) 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*. ABD may increase the price markup on selected kinds of alcoholic liquor sold by the ABD, so long as the average

[1] In this brief, Defendant's Appendix In Support of His Motion for Summary Judgment shall be abbreviated as "MSJ Appx."

return to the ABD on all sales of alcoholic liquor does not exceed the wholesale price paid by ABD and the fifty percent markup. Iowa Code § 123.24(2)(b).

The ABD has never reduced a markup on any bottle of liquor to an amount less than the wholesale price and a fifty percent markup. MSJ Suppl. Appx.[2] 30 (Larson Dep. Tr., at 157), Appx. Vol 2 at 46.

At times relevant to this case, the ABD engaged in a practice known as "buyouts." MSJ Appx. 38 (Betram Dep. Tr., at 52), Appx. Vol. 2 at 22. A buyout was the practice of the ABD purchasing temporarily price-reduced (TPR) products at the end of the temporary period. *Id*. A "temporary price reduction" (TPR) was a temporary price reduction of the price of alcoholic liquor offered by the supplier to the retailer. MSJ Appx. 38 (Betram Dep. Tr., at 52), Appx. Vol. 2 at 22. "So if the period ended the end of the month, we would purchase certain amounts of products and then sell them the next month at the original price or the regular price." MSJ Appx. 38 (Betram Dep. Tr., at 52), Appx. Vol. 2 at 22. In other words, according to Larson, "we would buy low and sell high." MSJ Suppl. Appx. 31 (Larson Dep. Tr., at 158), Appx. Vol. 2 at 47. But the ABD calculated the 50% markup at the regular, non-

[2] In this brief, Plaintiff's Appendix In Support of His Resistance to Defendant's Motion for Summary Judgment shall be abbreviated as "MSJ Suppl. Appx."

reduced price. This had the effect of creating a markup in excess of the statutory cap.

a. The Walding Letter, Kennedy Analysis, and Conclusion by ABD That There Was No Violation of the Law:

In May 2013, Lynn Walding, on behalf of Diageo Americas, a liquor supplier, sent Larson an email raising concerns about ABD's price markups, particularly as it related to ABD's practice of engaging in product "buyouts". MSJ Appx. 24 (Tort Claim Response, at 2); Appx. Vol. 4 at 21-22; MSJ Appx. 65 (Halbur Dep. Tr., at 180:2-11), Appx. Vol. 2 at 65. More specifically, Walding wrote, in part, the following:

> At the same time, the validity of the program may be in question itself. Iowa Code section 123.24(4)(2013), provides that," The price of alcoholic liquor sold by the [Iowa Alcoholic Beverages] division shall include a markup of up to fifty percent of the wholesale price paid by the division for the alcoholic liquor." [Emphasis added.] While the agency does have authority to vary the markup on various kinds of products. Id., the overall average still cannot exceed the fifty percent cap on the price that the state paid for the product. Absent an equivalent reduction in pricing elsewhere, the code clearly does not permit products that are purchased to be resold to the class E licensees beyond the fifty percent level, regardless if the price has subsequently increased. . . . A longstanding practice, to my knowledge, the Iowa Attorney General's office has never opined on the subject. Thus, Iowa's buyout program could be in conflict with the agency's statutory pricing authority and should be reviewed for compliance.

MSJ Appx. 83 (Larson Dep. Tr., at 184), Appx. Vol. 2 at 50; MSJ Suppl. Appx. 40-42 (Depo. Ex. 18), Appx. Vol. 2 at 5-7.

In response to Walding's email, Larson tasked ABD analyst Victor Kennedy with reviewing ABD's wholesale sales and product management practices. MSJ Appx. 24 (Tort Claim Response, at 2); Appx. Vol. 4 at 21-22; MSJ Appx. 65 (Halbur Dep. Tr., at 180:2-11), Appx. Vol. 2 at 65. Kennedy's analysis showed that the ABD charged an annual markup of 50.9%, a markup of .9% in excess of the statutory cap for 2014. MSJ Appx. 83 (Larson Dep. Tr., at 182) Appx. Vol. 2 at 50; MSJ Suppl. Appx. 34 (Larson Dep. Tr., at 188-189) Appx. Vol. 2 at 51.

In response to the analysis showing an overcharge in excess of the statutory cap, Administrator Larson "agreed that [Kennedy's] work product was accurate…" and Larson had no reason to disagree that "we may be over 50 percent for that period of time in which he did that analysis." MSJ Appx. 82 (Larson Dep. Tr., at 180), Appx. Vol. 2 at 49.

Larson did speak with the ABD leadership team at that time, which included Halbur's predecessor, Tammy Plowman, and asked, "What caused that…? … because … we're following all the rules." MSJ Appx. 82 (Larson Dep. Tr., at 180), Appx. Vol. 2 at 49. He noted that the finding was "duly noted." MSJ Appx. 82 (Larson Dep. Tr., at 181), Appx. Vol. 2 at 49. They

then decided, "let's wait another year and see if it does that [whether there continued to be an excess markup], or what happened there, but then you get on to other things." MSJ Appx. 82 (Larson Dep. Tr., at 180), Appx. Vol. 2 at 49. Even though, they got "on to other things," according to Larson "…there was no effort to deep six this." MSJ Appx. 82 (Larson Dep. Tr., at 181, 183), Appx. Vol. 2 at 49-50.

Larson blamed the inaction of Halbur's predecessors (Plowman and Iverson) for failure to take any corrective action to address the overcharge as "That's their job. And of course, that didn't happen." MSJ Suppl. Appx. 34 (Larson Dep. Tr., at 186), Appx. Vol. 2 at 51.

Even though he agreed that Kennedy's work product was accurate, Larson and his management team concluded that there was no violation of Iowa Code § 123.24. MSJ Appx. 25-28 (Tort Claim Response, at 1-3) Appx. Vol. 4 at 21-23. In other words, even though he was presented with information that the ABD practices may be in violation of the law back in 2013, no action was taken by Larson to address the issue, in part, because the management team that included the then Comptroller, Tammy Plowman, concluded that there was no violation of the law. *Id*.

b. The Accenture Report; Halbur Becomes Aware Of Violation Of Law Discloses that Finding to Larson; Buyout Practice Ends:

In the summer of 2017, ABD hired a consulting company, Accenture, to do an in-depth analysis of ABD's portfolio and product practices. MSJ Appx. 24 (Tort Claim Response, at 3); Appx. Vol. 4 at 22; MSJ Appx. 39 (Bertram Dep. Tr., at 58:6-12), Appx. Vol. 2 at 23. The reason Accenture was retained to do this analysis was to explore ways the ABD could maximize profits. MSJ Appx. 65 (Halbur Dep. Tr., at 178-179), Appx. Vol. 2 at 65.

The Accenture analysis and published report alerted Halbur to a potential overcharge in excess of the statutory cap by ABD as it showed what the markup would be when the ABD did a buyout. MSJ Appx. 59 (Halbur Dep. Tr., at 137), Appx. Vol. 2 at 60; MSJ Suppl. Appx. 16 (Halbur Dep. Tr., at 140), Appx. Vol. 2 at 61. Due to Accenture's findings, Halbur worked to determine what was causing the revenue discrepancy with TPR products. MSJ Appx. 24 (Tort Claim Response, at 3); Appx. Vol. 4 at 23; MSJ Appx. 39 (Bertram Dep. Tr., at 60:3-12), Appx. Vol. 2 at 23. He assigned Leisa Bertram to assist him with that project. MSJ Appx. 39 (Bertram Dep. Tr., at 60-61), Appx. Vol. 2 at 23.

Bertram concluded that the ABD had exceeded the statutory 50% markup cap in 2013 by $2,553,488.00, in 2014 by $2,407,018.00, in 2015 by $1,701,227.00, in 2016 by $1,176,036.00, and in 2017 by $421,949.00. MSJ Appx. 40 (Betram Dep. Tr., at 62-63), Appx. Vol. 2 at 24.

Halbur scheduled a meeting that included Administrator Larson and during that meeting, according to Larson, "Todd [Halbur] brought forward an analysis at that point" in which he shared his opinion as Comptroller that the ABD's use of buyouts of TPRs caused ABD to be charging a markup in excess of the statutory cap, a violation of the law. MSJ Suppl. Appx. 32 (Larson Dep. Tr., at 162-163), Appx. Vol. 2 at 48. This was a disclosure to a public official by Halbur of an issue that he reasonably believed evidenced a violation of law or rule, mismanagement, and/or an abuse of authority. Halbur encouraged Administrator Larson to report the overcharge issue to the governor's office and the auditor's office. MSJ Suppl. Appx. 17 (Halbur Dep. Tr., at 147), Appx. Vol. 2 at 63. Halbur recommended to Larson that the ABD stop doing buyouts of temporarily price-reduced items. MSJ Appx. 60 (Halbur Dep. Tr., at 142), Appx. Vol. 2 at 62. ABD's buyout practice stopped in the fall of 2017. MSJ Appx. 60 (Halbur Dep. Tr., at 142), Appx. Vol. 2 at 62. This obviously had the effect of diminishing the ABD's revenues at a time when the agency was looking for ways to increase revenue. Further, it shed light on an illegal overcharge going back to at least 2013.

C. The No-Bid BMI Contract; Halbur's Disclosure to Larson That Contract Was Not Properly Procured in Violation of the Law; Halbur's Refusal to Pay BMI

The ABD is bound by law to follow the Department of Administrative Services procurement regulations. MSJ Suppl. Appx. 29 (Larson Dep. Tr., at 92), Appx. Vol. 2 at 45. Larson first became aware of Beverage Merchandising, Inc., when he met BMI's CEO, Jim Farrell, at a conference for the National Conference of State Liquor Administrators in 2015. MSJ Appx. 73, 74 (Larson Dep. Tr., at 33:13-21, 36:7-10), Appx. Vol. 2 at 39-40.

Larson as Administrator of the ABD entered into a contract with BMI on June 26, 2017. MSJ Appx. 74 (Larson Dep. Tr., at 37), Appx. Vol. 2 at 40; MSJ Appx. 3-7 (Depo. Ex. 2), Appx. Vol. 2 at 8-12. The contract provided that ABD could terminate the agreement without cause upon 60 days' written notice, subject to the procedures laid out in the agreement. *Id*. The contract provided that it would automatically renew for successive periods of one year for the first three years, unless terminated by either party with 60 days prior written notice. MSJ Suppl. Appx. 29 (Larson Dep. Tr., at 93), Appx. Vol. 2 at 45. Pursuant to the contract, ABD agreed to pay BMI a monthly subscription service fee of $3,500 per month beginning in September 2017. MSJ Appx. 76 (Larson Dep. Tr., at 45), Appx. Vol. 2 at 41. Thus, the contract would cost ABD $42,000 per year if it was not cancelled pursuant to the terms of the contract. MSJ Suppl. Appx. 29 (Larson Dep. Tr., at 93), Appx. Vol. 2 at 45.

The laws and regulations governing procurement of goods provide that anything over $25,000 would need to go through a competitive bidding process. MSJ Suppl. Appx. 15 (Halbur Dep. Tr., at 109), Appx. Vol. 2 at 58,; *See also* Iowa Code §§ 8A.301(a)(2), 8A.311, and 8A.311A. Nonetheless, the June 26, 2017, BMI contract did not go through a competitive bidding process through the Department of Administrative Services (DAS). MSJ Suppl. Appx. 39 (Larson Dep. Tr., at 36-37), Appx. Vol. 2 at 40.

ABD paid the first invoice from BMI in August 2017. MSJ Appx. 55 (Halbur Dep. Tr., at 118:17-119:4), Appx. Vol. 2 at 59. Larson then presented three more BMI invoices to Halbur for payment in December 2017. MSJ Appx. 55 (Halbur Dep. Tr., at 118:17-119:7), Appx. Vol. 2 at 59. In January 2018, Halbur disclosed to Larson his view as Comptroller that the contract should have been competitively bid. MSJ Appx. 55 (Halbur Dep. Tr., at 119:13-120:25), Appx. Vol. 2 at 59.

On June 18, 2018, BMI Operations Manager Jeff Hertzberg emailed Larson an invoice from BMI for the month of July 2018. MSJ Suppl. Appx. 26 (Larson Dep. Tr., at 61), Appx. Vol. 2 at 42; MSJ Suppl. Appx. 43-49 (Depo. Ex. 12), Appx. Vol. 2 at 13-19,. On June 26, 2018, Larson responded to Hertzberg's email to indicate that Halbur was CC'd and that Halbur would process the invoice in fiscal year 2019, which began on July 1, 2018. *Id*. In

other words, despite his complaint to Larson that the ABD had entered into an illegal no-bid contract, Larson instructed Halbur to issue payments to BMI pursuant to said contract.

On June 27, 2018, Halbur responded to the email to say that he would not sign off on further payments to BMI and disclosed his view that the contract had not been properly procured in violation of laws and regulations of the State of Iowa. MSJ Appx. 77 (Larson Dep. Tr., at 62-64), Appx. Vol. 2 at 43. In notifying Larson of his view that the contract was illegal, Halbur was making a disclosure to a public official of an issue that he reasonably believed evidenced a violation of law or rule, mismanagement, a gross abuse of funds, and/or an abuse of authority. Further, by not signing off on payments to the no-bid contract, Halbur was refusing to engage in illegality.

D. Larson's Conclusion That Halbur Was Not Listening to Him; Change of Supervisor for Halbur; Halbur's Employment Terminated:

a. Larson Believes that Halbur is Not Listening to Him; Changes Halbur's Supervisor:

In late June 2018, Larson felt that Halbur was no longer listening to him. MSJ Appx. 70-71 (Larson Dep. Tr., at 21-23), Appx. Vol. 2 at 36. His solution was to have Larson be supervised by Herb Sutton instead of Larson. *Id*. Larson's decision to formalize this change in supervision of Halbur was

made in late June 2018, possibly on June 29, 2018, two days after Halbur refused to sign checks to BMI. MSJ Appx. 70 (Larson Dep. Tr., at 20), Appx. Vol. 2 at 36.

Halbur was notified of the change on or about July 12, 2018, during a meeting with Larson and Sutton. MSJ Suppl. Appx. 4 (Halbur Dep. Tr., at 32-33), Appx. Vol. 2 at 54; *See also* MSJ Appx. 94 (Sutton Dep. Tr., at 47:6-48:18), Appx. Vol. 2 at 28. Furthermore, at the meeting, Halbur was notified that his duties were modified such that he no longer had final sign-off authority on the payment of invoices. MSJ Suppl. Appx. 5 (Halbur Dep. Tr., at 36), Appx. Vol. 2 at 55. This change meant, as comptroller, the chief financial officer of the ABD, that he would no longer have final approval on payment of invoices. MSJ Appx. 51 (Halbur Dep. Tr., at 40), Appx. Vol. 2 at 56. This was contrary to Larson's previously stated policy position that he wanted the comptroller of the ABD to have final sign-off authority for the agency. MSJ Suppl. Appx. 6 (Halbur Dep. Tr., at 42), Appx. Vol. 2 at 57.

After notifying Halbur that he would no longer be reporting to Administrator Larson and that he would instead be reporting to Sutton and after notifying him that he, as Comptroller, would no longer be signing off on all invoices as the final signatory, they said to Halbur, "We want you to think about it." MSJ Suppl. Appx. 4 (Halbur Dep. Tr., at 33), Appx. Vol. 2 at 54.

Halbur responded, "Well, okay." *Id*. They then said, "You should leave for today, and take Friday off to think about it." *Id*. Halbur responded that he didn't think there was anything to think about and that he did not need any time off to think about the changes. MSJ Suppl. Appx. 4-5 (Halbur Dep. Tr., at 33-34), Appx. Vol. 2 at 54-55. Larson insisted that he take the time off. *Id*. Halbur was asked about this at his deposition:

> Q: . . . it sounds like there's some sort of insinuation that they didn't think you were going to stick around.
>
> A: I think that's what they thought. I didn't - - I did not give that indication. I think they probably thought that, that they were going to give me an opportunity to quit, and I didn't think there was any reason to quit.

MSJ Appx. 51 (Halbur Dep. Tr., at 38), Appx. Vol. 2 at 56.

b. Halbur's Employment is Terminated by Larson:

The decision to terminate Halbur's employment was made by Administrator Larson. MSJ Suppl. Appx. 36 (Sutton Dep. Tr., at 62), Appx. Vol. 2 at 30. The decision to terminate Halbur's employment was made on July 23, 2018. MSJ Suppl. Appx. 36 (Sutton Dep. Tr., at 63), Appx. Vol. 2 at

30. Halbur's employment with the ABD was terminated on July 24, 2018. MSJ Appx. 97 (Sutton Dep. Tr., at 60), Appx. Vol. 2 at 29.

The decision to terminate Halbur's employment was made even though as of late June 2018, Larson testified that he had no reason to terminate Halbur's employment. MSJ Appx. 72-73 (Larson Dep. Tr., at 29-30), Appx. Vol. 2 at 38-39. The decision to terminate Halbur's employment was made even through, in Larson's last performance evaluation of Halbur, Larson wrote that Halbur either "met expectations" or "exceeded expectations" in every single category. MSJ Appx. 64 (Halbur Dep. Tr., at 175), Appx. Vol. 2 at 64. The decision to terminate Halbur's employment was made even though the ABD bypassed an effort to have Halbur address any alleged performance issues via a performance improvement plan such as work directives, something that Sutton as a member of management has done before. MSJ Suppl. Appx. 37 (Sutton Dep. Tr., at 72), Appx. Vol. 2 at 32. The decision to terminate Halbur's employment was made by Larson even though Larson testified that as of late June 2018, he had no reason to terminate Halbur's employment. MSJ Appx. 73 (Larson Dep. Tr., at 30), Appx. Vol. 2 at 39.

Sutton had made the recommendation to Larson to terminate Halbur's employment despite the fact that he had only served as Halbur's supervisor

for three or four days as Halbur had been out on a preapproved family vacation in July 2018. MSJ Appx. 98 (Sutton Dep. Tr., at 66), Appx. Vol. 2 at 31.

E. Timing of Termination Related to Halbur's Protected Activity:

The following is the timeline of relevant events leading to Halbur's termination:

- On **June 18, 2018**, BMI Operations Manager Jeff Hertzberg emailed Larson an invoice from BMI for the month of July 2018. MSJ Appx. 78 (Larson Dep. Tr., at 66), Appx. Vol. 2 at 44; MSJ Suppl. Appx. 43-49 (Depo. Ex. 12), Appx. Vol. 2 at 13-19.
- On **June 26, 2018**, Larson responded to Hertzberg's email to indicate that Halbur was CC'd and that Halbur would process the invoice in fiscal year 2019, which began on July 1, 2018. *Id*.
- On **June 27, 2018**, Halbur responded to the email to say that he would not sign off on payment of the invoice and disclosed his opinion that the contract had not been properly procured in violation of the law. MSJ Appx. 77 (Larson Dep. Tr., at 62-64), Appx. Vol. 2 at 43.
- Larson did not respond to Halbur's June 27, 2018, email. MSJ Appx. 77 (Larson Dep. Tr., at 64), Appx. Vol. 2 at 43.

- It was on or about **June 29, 2018**, that Larson formalized the plan to have Halbur be supervised by Sutton, because Larson believed that Halbur was no longer listening to him. MSJ Appx. 70 (Larson Dep. Tr., at 20), Appx. Vol. 2 at 49, 36.
- Sutton described the explanation that was provided by Larson at the time:

> Q. When Mr. Larson told you that this change would take place, did he explain why it was that he thought that was the appropriate time to make the change?
>
> A. Yeah, he did. It was a very short description. He was just clearly frustrated.
>
> Q. Can you elaborate upon that?
>
> A. Things were not getting done that he wanted done, and it seemed as if he could not encourage Todd to get those things done.
>
> Q. And this is something that Mr. Larson shared with you?
>
> A. Yes.

MSJ Appx. 93 (Sutton Dep. Tr., at 44-45), Appx. Vol. 2 at 27 (emphasis added).

- It was on **July 12, 2018**, that Halbur was notified that Sutton would be his supervisor.

- Furthermore, at that meeting, Halbur was notified that his duties were modified such that he no longer had final sign-off authority on the payment of invoices. MSJ Suppl. Appx. 5 (Halbur Dep. Tr., at 36), Appx. Vol. 2 at 55. This meant, as comptroller, the chief financial officer of the ABD, that he would no longer have final approval on payment of invoices. MSJ Appx. 51 (Halbur Dep. Tr., at 40), Appx. Vol. 2 at 56.
- This was contrary to Larson's previously stated policy position that he wanted the comptroller of the ABD to have final sign-off authority for the agency. MSJ Suppl. Appx. 6 (Halbur Dep. Tr., at 42), Appx. Vol. 2 at 57.
- Due to a preplanned vacation and direction that he take off the rest of the day of July 12, 2018 and the next day, Halbur was only supervised by Sutton for 3-4 days before the decision was made by Larson to terminate Halbur's employment on **July 23, 2018**. MSJ Appx. 98 (Sutton Dep. Tr., at 66), Appx. Vol. 2 at 31.
- Halbur's employment with the ABD was terminated on **July 24, 2018**. MSJ Appx. 97 (Sutton Dep. Tr., at 60), Appx. Vol. 2 at 29.

F. Procedural History:

On January 29, 2020, Halbur filed an Amended Petition at Law and Jury Demand that included a public policy wrongful discharge claim and a claim pursuant to Iowa Code 70A.28(2) against Larson. *See* Amended Petition at Law and Jury Demand, App. 15-23.

On February 14, 2020, Larson filed Defendants' Motion to Dismiss, Or, in the Alternative to Strike or Recast Plaintiff's Amended Petition. *See* Defendants' Motion to Dismiss, Or, In the Alternative to Strike or Recast Plaintiff's Amended Petition, Appx. 24-34. With the motion, Larson, in part, argued that Halbur could not maintain a public policy wrongful discharge claim because Iowa Code 70A.28(2) provided an exclusive remedy. *Id*. On February 24, 2020, Halbur filed a resistance to Defendant's motion to dismiss. A hearing was held on or about March 4, 2020. *See* Plaintiff's Resistance to Defendants' Motion to Dismiss, Or, In the Alternative, to Strike Or Recast Plaintiff's Amended Petition, Appx. 35-44. On May 4, 2020, the Honorable Judge Jeanie Vaudt entered an order granting Defendant's motion, in part. *See* Order Granting Defendants' Motion to Dismiss, Or In the Alternative, to Strike or Recast Plaintiff's Amended Petition In Part and Denying Motion In Part, Appx. 52-64. With that order, the court dismissed Halbur's public policy wrongful discharge claim. *Id*. In doing so, the court erroneously concluded

that Iowa Code Chapter 70A.28(2) was the exclusive remedy available to Halbur. *Id*.

On June 21, 2022, Larson filed Defendant's Motion for Summary Judgment. *See* Defendant's Motion for Summary Judgment. With the motion, Larson argued, in part, that Halbur had failed to establish that he had made protected disclosures to the correct public official to warrant the protections of Iowa Code 78A.28. *Id*. On July 8, Halbur filed a resistance to the motion for summary judgment. *See* Plaintiff's Resistance to Defendant's Motion for Summary Judgment. On August 24, 2022, the Honorable Judge David Nelmark entered an order that denied Defendant's Motion for summary judgment as it relates to Larson's argument that Halbur had failed to establish that he had made a protected disclosure. *See* Order Granting In Part And Denying In Part Defendant's Motion for Summary Judgment, Appx. 128-134. In that decision, the court summed up the rationale as follows:

> Iowa's whistleblower statute does not limit protection to those who report to public officials other than the wrongdoer or limit protection to those who discover wrongdoing outside their normal job duties. There are rational reasons for the Legislature to have refrained from narrowing protections in these ways. The Court will not infer such limitations.

Id.

The case proceeded to trial. Following a five-day jury trial, a Polk County jury found that Halbur was terminated because he had disclosed

information to Larson that Halbur reasonable believed demonstrated a violation of a law or rule, mismanagement, a gross abuse of funds or an abuse of authority. *See* Verdict Form, Appx. 149; Jury Instructions, Appx. 138-148. The jury ordered Larson to pay Halbur $487,500 in back pay and $512,500 in past emotional distress. *Id*.

On December 9, 2022, Larson filed a Notice of Appeal. On December 19, 2022, Halbur filed a Notice of Cross-Appeal. On appeal, Larson argues that the district court erred in denying his motion for summary judgment. On cross-appeal, Halbur argues that the district court erred in granting Larson's motion to dismiss his public policy wrongful discharge claim.

ARGUMENT

I. HALBUR'S DISCLOSURES ARE NOT EXEMPTED FROM PROTECTION UNDER IOWA CODE § 70A.28(2).

A. Error preservation and standard of review.

Plaintiff-Appellee agrees that Defendant-Appellant preserved error on whether the district court erred in denying Larson's motion for summary judgment as it relates to Larson's argument that Halbur's disclosures of illegality were not made to the proper public official.

Plaintiff-Appellee disagrees with Defendant-Appellant's articulation of the standard of review. In his brief, Larson asserts that the district court's denial of his motion for summary judgment based on the court's interpretation of scope of Iowa Code § 70A.28(2) should be reviewed de novo. *See* Appellant's Proof Brief. Larson cites *Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 19 (Iowa 2014) to support this argument. *Id*. Larson misinterprets the holding in *Smith*. *Id*.

In *Smith*, the Court reviewed the district court's decision related to the interpretation of the applicable statute for corrections of errors at law, not de novo. See *Smith*, 851 N.W.2d at 19, quoting *L.F. Noll Inc. v. Eviglo,* 816 N.W.2d 391, 393 (Iowa 2012) ("The district court's interpretation of a statute is reviewed for correction of errors at law.").

Here, according to Larson, "The sole issue … on appeal is whether Halbur's conduct … constitutes a protected disclosure under section 70A.28(2)." *See* Appellant's Proof Brief. He acknowledges that "…this appeal stems not from any jury factual finding, but from the district court's overbroad reading of section 70A.28…" *Id*. When a denial of a motion for summary judgment by a district court is appealed and there are no genuine issues of material fact existing, the Court reviews the district court's decision for correction of errors at law, not de novo. See *Zimmer v. Vander Waal*, 780

N.W.2d 730, 732–33 (Iowa 2010) ("When no genuine issue of material fact exists, our job is to determine whether the district court correctly applied the law.") (citing *Kragnes v. City of Des Moines,* 714 N.W.2d 632, 637 (Iowa 2006); See also *Estate of Ryan v. Heritage Trails Assocs., Inc.,* 745 N.W.2d 724, 728 (Iowa 2008) ("We review questions of statutory construction for the correction of errors at law.").

B. Halbur's communications to Larson were protected "disclosures" for application of section 70A.28(2).

Larson's sole argument on appeal presents a question of statutory interpretation regarding Iowa Code § 70A.28(2). Notably, Larson is not contesting that Halbur proved causation in the district court. The District Court in its summary judgment ruling found Halbur presented sufficient evidence of causation for his claims to be tried to a jury. *See* Order Granting In Part And Denying In Part Defendant's Motion for Summary Judgment, Appx. 128-134; *See* also the District Court's "Order" dated 9/27/2022, Appx. 135-137. Larson never challenged the sufficiency of Halbur's evidence on causation through a motion for directed verdict. Subsequently, a Polk County jury found Halbur proved Larson fired him in retaliation for making disclosures and awarded Halbur $1 million in economic and emotional

distress damages[3]. *See* Verdict Form, Appx. 149; Jury Instructions, Appx. 138-148. The causal link between Halbur's whistleblowing activities and his firing is undisputed here.

Rather, Larson argues Halbur is not entitled to whistleblower protections because Halbur "did not disclose information to a proper party." *See* Appellant's Proof Brief. Larson's argument has two prongs. First, that Halbur's communications to Larson were not "disclosures" as the term is used in section 70A.28(2), and second that Larson was not a proper party for Halbur to make disclosures to. *Id*. Both arguments fail under scrutiny. The facts support the district court's finding that Halbur's communications related to ABD's excessive markups of alcohol and the BMI contract constituted "disclosures." Further, the idea that disclosures to a public official are exempt from whistleblower protections when the public official is the whistleblower's supervisor is not supported by the language of section 70A.28(2). Larson's idea would inhibit the "laudable public policy" animating section 70A.28(2) of curbing law-breaking, mismanagement, and abuses in state government by leaving employees who make disclosures to a supervisor vulnerable to retaliation without recourse.

[3] The jury, it seems, saw more to Halbur's case than "just a handful of routine, internal work conversations." *See* Appellant's Proof Brief.

First, Larson hints in his proof brief that the communications from Halbur to Larson at issue were not "disclosures" as that term is used in section 70A.28(2). *See* Appellant's Proof Brief. "Disclosure" is not defined in the section. Larson cites to *Huffman v. Office of Personnel Management* to argue a "disclosure" requires the whistleblower to "reveal something that was hidden and not known." 263 F.3d 1341, 1350 (Fed. Cir. 2001); *See also* BLACK'S LAW DICTIONARY, *Disclosure* (11th ed. 2019) (Defining "disclosure" as "The act or process of making known something that was previously unknown."). Applying this definition to "disclosure" is consistent with the Iowa Supreme Court's method for interpreting undefined words in statutes. *Bob Zimmerman Ford, Inc. v. Midwest Automotive I, L.L.C.*, 679 N.W.2d 606, 610 (Iowa 2004) ("When the legislature has not defined the words of a statute, we look to prior decisions of this court, similar statutes, dictionary definitions, and common usage.").

Applying this framework, the district court reviewed the record at summary judgment and determined the relevant communications from Halbur to Larson were indeed "disclosures." *See* Order Granting In Part And Denying In Part Defendant's Motion for Summary Judgment. As it relates to the excessive mark-up of alcohol, Halbur had a meeting with Larson in which he disclosed to Larson the mechanism that caused ABD to overcharge

for alcohol to the tune of more than $8 million and his assessment that the overcharge was an illegality that should be reported to the governor's office and state auditor. MSJ Suppl. Appx. 32 (Larson Dep. Tr., at 162-163), Appx. Vol. 2 at 48; MSJ Appx. 40 (Betram Dep. Tr., at 62-63), Appx. 24. Halbur's communication to Larson that the mark-up was illegal was contrary to what Larson had concluded with the input of the ABD management team that included Halbur's predecessor, Tammy Plowman. MSJ Appx. 25-28 (Tort Claim Response, at 1-3); Appx. Vol. 4 at 21-23;. Similarly, regarding the BMI contract, Halbur communicated to Larson in both January and June of 2018 his assessment that the ABD had illegally entered the BMI contract in violation of state procurement laws. MSJ Appx. 55 (Halbur Dep. Tr., at 119:13-120:25), Appx. Vol. 2 at 59; MSJ Appx. 77 (Larson Dep. Tr., at 62-64), Appx. Vol. 2 at 43. Prior to those communications, this was not information Larson had considered. MSJ Appx. 78 (Larson Dep. Tr., at 66-67), Appx. Vol. 2 at 44. In both instances, Halbur communicated information "that was previously unknown" to Larson. MSJ Suppl. Appx. 32 (Larson Dep. Tr., at 162-163), Appx. Vol. 2 at 48; MSJ Appx. 78 (Larson Dep. Tr., at 66-67), Appx. Vol. 2 at 44. As such, the district court was correct in finding these communications constituted "disclosures." *See* Order

Granting In Part And Denying In Part Defendant's Motion for Summary Judgment, Appx. 30.

Next, Larson's appeal tries to convince the Court to rewrite section 70A.28(2) to reflect how he *wishes* it read. Larson argues Halbur's communications do not qualify as "disclosures" protected by section 70A.28(2) because they involved "matters within his normal job duties" or disclosures that Halbur made in the course of his regular duties. *See* Appellant's Proof Brief. The Court can reject this argument by simply reviewing the text of section 70A.28(2). *State v. Doe*, 903 N.W.2d 347, 351 (Iowa 2017) ("In interpreting a statute, we first consider the plain meaning of the relevant language, read in the context of the entire statute, to determine whether there is ambiguity … If there is no ambiguity, we apply that plain meaning."). Section 70A.28(2) protects from retaliation a person who makes "a disclosure of *any* information" evidencing abuse to a qualifying person or entity (emphasis added). Here, section 70A.28(2) is unambiguous; "any information" necessarily encompasses information the whistleblower discloses regarding "matters within their normal job duties."

The plain language of section 70A.28(2) contains no language restricting the application of statute because the information disclosed related to the employee's normal job duties or because making such

disclosures was a requirement of the job. This Court is not permitted to carve out categories of disclosures exempt from protection to suit Larson's preferences when the statute itself does not. *Sand v. An Unnamed Local Gov't Risk Pool*, 988 N.W.2d 705, 708 (Iowa 2023) (quoting *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020)) ("If the 'text of a statute is plain and its meaning is clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction.'").

The New Jersey Supreme Court employed the same reasoning in *Lippman v. Ethicon, Inc.*, 119 A.3d 215, 226-27 (N.J. 2015). In attempting to use *Lippman* to bolster his argument, Larson's appeal mischaracterizes by omission. In *Lippman*, the plaintiff alleged the defendant violated New Jersey's Conscientious Employee Protection Act when it fired him in retaliation for internally reporting his concerns that medical devices manufactured and marketed by the defendant were dangerous and violated federal law. *Id.* at 218. The plaintiff, a medical doctor who served as the chief medical officer for the defendant, raised concerns as part of his role on the defendant's quality board tasked with analyzing risks the company's products might pose to consumers. *Id.* at 218-19. The plaintiff alleged his firing was in retaliation for reporting his concerns and advising recalls and further testing. *Id.* at 218.

The defendant in *Lippman* argued the plaintiff was not protected by New Jersey's Conscientious Employee Protection Act because the act does not protect whistleblowing regarding a "watchdog employees' regular job responsibilities." *Id.* at 221. But the court rejected that argument, holding that the plain language of the statute justified no such restriction. *Id.* at 381 ("Starting with that plain language, by its very terms, CEPA does not define employees protected by the Act as inclusive of only those with certain job functions. An 'employee' is '*any* individual who performs services for an under the control and direction of an employer for wages or other remuneration.'"). The court held that adopting the defendant's interpretation would violate the principle of statutory construction "not to engraft language that the Legislature has not chosen to include in a statute." *Id.*

In citing *Lippman*, Larson argues to this Court that the New Jersey Supreme Court extended protections under the state's whistleblower law to reach "normal job duty" employees because of a section included in the New Jersey statute regarding an employee's refusal to participate in illegal activity or objection to such activity – language that Larson correctly notes is not present in section 70A.28(2). *See* Appellant's Proof Brief. Actually, the court examined the object/refuse section of the statute in response to a "strained" argument from the defendant and simply noted the section further

supported its finding that the plain language of the statute extended protections. *See id.* at 228 ("It would be wholly incongruent to strain the normal definition of 'object' into some implicit requirement that limits a class of employee to whistleblower protection only for actions taken outside of normal job duties. Yet that is precisely what defendants seek to do through their argument."). This Court should follow the New Jersey Supreme Court in recognizing its obligation to enforce the intent of the legislature as expressed in the plain text of the statute. *Doe*, 943 N.W.2d at 610. "A disclosure of any information" means *any* information. Iowa Code § 70A.28(2) (2018).

Even if this Court were to find section 70A.28(2) ambiguous in regard to "normal job duty" employees or disclosures, the Court's principles of statutory interpretation weigh against a judicially-crafted restriction removing them from protection. In interpreting a statute, the Court must "consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied, seeking a result that will advance, rather than defeat, the statue's purpose." *Danker v. Wilimek*, 577 N.W.2d 634, 636 (Iowa 1998) (quoting *Harris v. Olson*, 558 N.W.2d 408, 410 (Iowa 1997)). Larson concedes section 70A.28(2) promotes "laudable public policy" by pushing state employees to disclose – and thus help curb – wrongdoing, waste, and

abuse in Iowa government. *See* Appellant's Proof Brief. As the district court noted, state employees whose job duties require investigating and assessing compliance and legal matters are those who are "most likely" to uncover and be in a position to disclose wrongdoing. *See* Order Granting In Part And Denying In Part Defendant's Motion for Summary Judgment; *See also Lippman*, 119 A.3d at 228 ("CEPA-protected conduct can occur within the course of an employee's normal job duties because it would be likely that the employee would be asked to participate in employer activity within the course of, or closely related to, his or her core job functions."). It makes sense that disclosures made by an employee are likely to be those regarding matters within their normal job duties. Removing these disclosures from protection would inhibit, not advance, section 70A.28(2)'s goal of encouraging disclosures that will curb abuse.

C. Section 70A.28(2) protects disclosures made to an employee's supervisor.

Larson's other point of contention is that section 70A.28(2) does not protect Halbur's disclosures because they were made to Larson, Halbur's supervisor. As support, Larson relies most heavily on *Huffman v. Office of Personnel Management* – one court's non-binding interpretation of a separate, federal statute. 263 F.3d 1341 (Fed. Cir. 2001). Larson ignores entirely the Iowa Supreme Court's prescribed method for interpreting the

Iowa Code and the previously-referenced dictate that the Court refrain from interpretation if "the text of the statute is plain and its meaning is clear." *Sand*, 988 N.W.2d at 708.

The text of section 70A.28(2) as it read at the time of Halbur's firing expressly listed the proper recipients of a disclosure. Section 70A.28(2) provides:

> a person shall not discharge an employee … as a reprisal … for a disclosure of any information by that employee to a member or employee of the general assembly, a disclosure of information to the office of the ombudsman, or a disclosure of information to any other public official or law enforcement agency.[4]

Iowa Code § 70A.28(2) (2018).

The section plainly states a "public official" is a proper recipient of a disclosure for purposes of protection from retaliation. *Id.* Larson concedes he is a "public official." *See* Appellant's Proof Brief. Nowhere in the text of section 70A.28(2) did the legislature carve out from protection disclosures to a "public official" in cases where the public official is the whistleblower's supervisor or require that a disclosure be made outside of the employee's

[4] Section 70A.28(2) protection also requires the disclosure "evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Larson does not contest that the illegality of the price mark-up and BMI contract qualify as wrongdoing.

chain of command. *Id.*; *State v. Iowa Dist. Court for Johnson Cnty.*, 730 N.W.2d 677, 679 (Iowa 2007) ("Statutory text may express legislative intent by omission as well as inclusion."). The district court recognized it did not have authority to inject Larson's policy preferences of how section 70A.28(2) ought to work into the statute. See Order Granting In Part And Denying In Part Defendant's Motion for Summary Judgment. This court is obligated to as well. *Iowa Dist. Court for Johnson Cnty.*, 730 N.W.2d at 679. ("When a proposed interpretation of a statute would require the court to 'read something into the law that is not apparent from the words chosen by the legislature,' the court will reject it." (quoting *State v. Guzman-Juarez*, 591 N.W.2d 1, 2 (Iowa 1999)).

Beyond being contrary to the text, Larson's proposed interpretation of section 70A.28(2) defeats the purpose of protecting whistleblowers who come forward with concerns and promotes absurd results. *Danker*, 577 N.W.2d at 636; *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999) ("In looking at the language used, we will not construe a statute in a way which creates an impractical or absurd result."). Imagine this scenario: An employee makes a disclosure regarding illegalities to his "public official" supervisor and implores the supervisor to report the illegality to the state auditor's office. The supervisor then immediately terminates the employee before the

employee has an opportunity to report the conduct to the auditor himself. Under this scenario, Larson would argue that section 70A.28(2) provides no recourse to the fired employee. This is an absurd result. *Schultz*, 604 N.W.2d at 62. Even more so given the fact that, as the district court recognized, it makes sense that an employee who discovers wrongdoing would first report the wrongdoing to a supervisor. *See* Order Granting In Part And Denying In Part Defendant's Motion for Summary Judgment; *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 307-308 (Iowa 2013) ("it makes more sense that an employee would first discover the problem and report it internally before lodging a complaint externally. Moreover, this allows the employer to correct the deficiency in a reasonably prompt manner.").

D. The Legislature's intent has been to expand, not restrict, whistleblower protections under Section 70A.28(2).

Section 70A.28(2) indeed advances "laudable public policy" as Larson concedes. When the legislature has amended section 70A.28, the purpose has been to expand, not shrink, the disclosures protected by the statute. In 2019, the legislature amended section 70A.28(2) to expand qualifying disclosures to those made to persons "providing human resource management for the state." *See* S.F. 502, 88th G.A., 1st Sess. (2019). The legislature also expanded the remedies available to whistleblowers who

suffer retaliation to include civil damages. *Id.* The legislature made these changes as a direct consequence of a whistleblower scandal in the Waukee Community School District[5] in which reports by an employee to human resources who later suffered retaliation were implicated[6]. The intent of the legislature to protect whistleblowers is clear not only from the plain text of section 70A.28(2), but from the legislature's more recent actions to provide more protections, not less.

E. The Court should affirm the district court's denial of Larson's Motion for Summary Judgment.

Halbur did not merely "complain to his supervisor," as Larson mischaracterizes the communications between the two that became the locus of his lawsuit. *See* Appellant's Proof Brief. Rather, Halbur disclosed to Larson a pattern and practice of the ABD that had resulted in millions of dollars of overcharges to Iowa's class E liquor licensees. MSJ Suppl. Appx. 32 (Larson Dep. Tr., at 162-163), Appx. Vol. 2 at 48; MSJ Appx. 40

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[5] *Senate Video SF 502*, Iowa Legislature, at 12:12:56-12:14:21 PM (March 26, 2019), https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190326084831569&dt=2019-03-26&offset=12262&bill=SF%20502&status=i&ga=88.

[6] Sen. Charles Schneider, *Waukee schools issues prompt whistleblower legislation*, Des Moines Register (March 6, 2019, 12:53 a.m.), https://www.desmoinesregister.com/story/news/local/community/2019/03/06/charles-schneider-legislation-strengthens-iowas-whistleblower-protections/3076373002/.

(Betram Dep. Tr., at 62-63), Appx. Vol. 2 at 24. Halbur further disclosed to Larson that Larson had bound the ABD to a no-bid contract in violation of state laws and regulations. MSJ Appx. 55 (Halbur Dep. Tr., at 119:13-120:25), Appx. Vol. 2 at 59; MSJ Appx. 77 (Larson Dep. Tr., at 62-64), Appx. Vol. 2 at 43. Today, there is no longer dispute that, because of these disclosures, Halbur was fired from his job as comptroller of the ABD. The Court should reject Larson's arguments because they are contrary to the text of section 70A.28(2), they inject policy preferences not reflected in the text, and create absurd results that erode, not promote, the whistleblower protections that Iowans rely on for effective, ethical state governance.

II. BECAUSE IOWA CODE § 70A.28(2) DOES NOT PROVIDE AN EXCLUISVE REMEDY, HALBUR'S PUBLIC POLICY WRONGFUL DISCHARGE CLAIM IS NOT BARRED.

A. Error Preservation

Halbur preserved error on the issue of whether his public policy wrongful discharge claim was preempted by Iowa Code § 70A.28(2) by filing a resistance to Defendants' Motion to Dismiss, Or, In the Alternative, to Strike or Recast Plaintiff's Amended Petition on February 24, 2020, and by resisting Defendant's motion at a hearing held on or about March 4, 2020. The district court thereafter issued a ruling addressing the issue on May 4, 2020, captioned "ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, OR IN

THE ALTERNATIVE, TO STRIKE OR RECAST PLAINTIFF'S AMENDED PETITION IN PART AND DENYING MOTION IN PART." Thus, the issue was raised and addressed by the district court. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.") (citing, *Metz v. Amoco Oil Co.,* 581 N.W.2d 597, 600 (Iowa 1998) ("issues must be presented to and passed upon by the district court")); See also *Peters v. Burlington N. R.R.,* 492 N.W.2d 399, 401 (Iowa 1992) ("issues must be raised and decided by the [district] court").

B. Standard of Review

The issue Halbur raises on appeal is whether the district court erred in granting Defendant's motion to dismiss. The standard of review is for corrections of errors at law. See *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018) ("On a motion to dismiss, we review for corrections of errors at law, unless the motion to dismiss is on a constitutional issue, in which case our review is de novo.") (citing *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017); *Hedlund v. State*, 875 N.W.2d 720, 724 (Iowa 2016)).

C. The Whistleblower Claim was Not Halbur's Exclusive Remedy

The Iowa Supreme Court has long recognized the availability of a public policy wrongful discharge claim to an employee who is fired because she refused to participate in illegal activity. See *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275 (Iowa 2000) (recognizing claim when employee terminated for refusing to commit perjury); See also *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751 (Iowa 2009) (Refusal to work in understaffed daycare center in violation of administrative regulations).

With his assertion of public policy wrongful discharge claims, Halbur asserts he was terminated because he refused to engage in illegal activity. This is distinguishable from his Iowa Code 70A.28(2) whistleblower claims, where he asserts that he was terminated for communicating information to a public official that he reasonably believed evidenced illegality, mismanagement, a gross abuse of funds, and/or an abuse of authority.

With his motion to dismiss, Larson relied on *Ferguson v. Exide Technologies, Inc.*, 936 N.W.2d 429 (Iowa 2019) to argue that Iowa Code § 70A.28(2) is an exclusive remedy and, therefore, Halbur is barred from bringing public policy wrongful termination claims. *Ferguson* is distinguishable. In *Ferguson*, the plaintiff asserted a claim of wrongful discharge in violation of public policy. *Ferguson*, 936 N.W.2d at 430. Iowa Code Section 730.5 was the source of the policy for Ferguson's tortious

discharge action. *Id*. at 431. Importantly, § 730.5 provides for a civil cause of action. *Id*. In *Ferguson*, the Court concluded that Ferguson could not bring a wrongful discharge claim based on a violation of 730.5 because she already had a statutory remedy under section 730.5 for the same conduct. *Id*. The *Ferguson* Court explained it's rationale:

> In keeping with the original purpose of the common law action, when the legislature includes a right to civil enforcement in ***the very statute that contains the public policy*** a common law claim would protect, the common law claim for wrongful discharge in violation of public policy becomes unnecessary. In this situation, the 'legislature has weighed in on the issue and established the parameters of the governing public policy.'

Id. At 434-35 (quoting *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 686 (Iowa 2001)) (emphasis added).

Here, with his public policy wrongful discharge claim, Halbur is claiming, in part, that he was terminated because he refused to take part in the commission of an unlawful act – a violation of the laws and administrative regulations governing competitive bidding. He was fired after he refused to sign checks to a vendor who had received a no-bid contract in violation of the law. Importantly, while the State's procurement laws, and regulations define a public policy[7], they do not create an independent cause of action to an

[7] See Iowa Admin. Code 11-117.3(8A): "It is the policy of the state to obtain goods and services from the private sector for public purposes to achieve

individual who is terminated because he refuses to violate them. See Iowa Code § 8A.311, Iowa Admin. Code r. 11-117.11(8A). Furthermore, Iowa Code 70A.28(2) does not create a legal remedy for an employee who is terminated because he refuses to engage in illegality. Instead, it merely protects an employee from retaliation if he is terminated for disclosing certain information. As such, the rationale used by the *Ferguson* Court to find Section 730.5 an exclusive remedy is not present in this case. For this reason, the fact that Iowa Code 70A.28(2) provides a cause of action to Halbur who was terminated for communicating information about illegality does not preclude Halbur from asserting a public policy wrongful termination claim based on the protected activity of refusing to engage in illegality.

CONCLUSION

For the reasons stated herein, Halbur requests the court enter an order affirming the district court's decision denying Larson's motion for summary judgment and affirming the judgment entered following trial. In the event, the court reverses the district court's ruling on summary judgment, Halbur asks the court to reverse the district court's decision that granted Larson's motion to dismiss Halbur's public policy wrongful discharge claim against Larson.

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value for the taxpayer through a competitive selection process that is fair, open, and objective."

REQUEST FOR ORAL ARGUMENT

Halbur requests to be heard in oral argument.

Respectfully submitted,

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Dated: November 27, 2023

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that he, or a person acting on his behalf, filed Appellee's Final Brief with the Clerk of the Iowa Supreme Court via EDMS on November 27, 2023.

The undersigned further certifies that on November 27, 2023 he, or a person acting on his behalf, did serve Appellee's Final Brief on the other party to this appeal via EDMS and by emailing on (1) copy hereof to each of the following counsel of record.

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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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