IN THE IOWA SUPREME COURT
Supreme Court No. 19-1954

CHRISTOPHER J. GODFREY,

Plaintiff-Appellee,

vs.

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

Defendants-Appellants.

APPEAL FROM IOWA DISTRICT COURT FOR JASPER COUNTY
THE HONORABLE BRAD MCCALL

APPELLEE'S AMENDED FINAL BRIEF

(Oral Argument Requested)

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Routing Statement

This third appeal asks the Court to enunciate legal principles regarding the self-executing constitutional right to due process, the statute setting forth the salary considerations for appointed officials, and the ethical obligations of the Iowa Workers' Compensation Commissioner in the exercise of quasi-judicial duties. Iowa R. App. P. 6.1101(2)(c); 6.1101(2)(f).

Statement of the Case

On January 11, 2012, Plaintiff-Appellee Christopher J. Godfrey ("Godfrey") filed this action in Iowa District Court for Polk County for adverse actions Defendants took against him in the scope of his employment as Iowa Workers' Compensation Commissioner ("WC Commissioner"). Trial commenced in Polk County on June 5, 2019. Following a change of venue, trial resumed on June 20, 2019 in Jasper County and concluded July 12, 2019.

Claims ultimately submitted to the jury included:

1) Discrimination based on sexual orientation in violation of Iowa Code Chapter 216;
2) Retaliation in violation of Iowa Code Chapter 216; and,
3) Deprivation of the due process right to a property interest in violation of Iowa Constitution Article I, section 9.

The jury returned its verdict July 15, 2019, in favor of Plaintiff on all three counts. Defendants-Appellants State of Iowa, Terry Branstad ("Branstad"), Brenna Findley ("Findley") appealed.

Statement of the Facts

Godfrey was appointed interim WC Commissioner by Governor Vilsack in 2006. (JA.VIII 0894-95). The Iowa Senate confirmed Godfrey in 2007 and re-confirmed him for a new six-year term by unanimous vote in 2009. (Id). Godfrey is gay and a Democrat. (JA.V-0327-328).

During his 2010 campaign for Governor, Branstad disclosed his beliefs that marriage was between one-man and one-woman and that same-sex marriage caused the downfall of the ancient societies that permitted it. (JA.IX-0379; JA.IV-3704[112:9-24]). Findley shared Branstad's views. (JA.IV-2914[222:4-9]).

Governor-Elect Branstad requested Godfrey's resignation on December 3, 2010 in writing and December 29, 2010 in person. (JA.VIII 0099, JA.VIII-101; JA.IV-3525-27[46:6-48:11]; JA.IV-2140[136:4-11]). Godfrey declined and stated his intention to serve out his six-year term pursuant to Iowa Code § 86.1. (JA.VIII-100; JA.IV-2145-46).

Branstad and Findley investigated ways to remove him but determined that Godfrey could not be terminated based on permissible criteria in the removal statute. (JA.IV-2858-59[166:14-167:5]). So Defendants pressured him to resign through adverse employment actions that included:

1. Failing to conduct a legitimate performance review before seeking Godfrey's resignation for a third time[1];

2. Requesting his resignation a third time on July 11, 2011[2];

3. Cutting his salary by nearly $40,000 when he declined to resign[3];

4. Excluding Godfrey from the Governor's retreat, an information-sharing and networking opportunity attended by similarly situated division heads[4];

5. Excluding Godfrey from performance reviews that were conducted for similarly situated administration officials[5];

6. Use of a line-item veto on a legislatively approved salary for a Chief Deputy Commissioner[6];

7. Micro-managing the Division's budget, unlike Defendants' oversight of divisions managed by similarly situated employees and Godfrey's successor[7];

8. Refusing to issue a press release announcing a professional accomplishment that reflected well on Godfrey and the Division[8]; and,

9. Making public false allegations that Godfrey was responsible for increasing costs of workers' compensation insurance premiums and was not fair.[9]

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1 JA.IV-2796-2798; JA.IV-3508-09[29:9-30:10], 3540-43[61:10-64:4].
2 JA.IV-2253[60:8-18], 2254[61:8-14].
3 JA.IX-100; JA.IX-503.
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7 JA.V-2120-121[9:5-10:2]; JA.VIII-071; JA.V-0678-679[189:25-190:3]; JA.V-0250-252[132:11-134:3]; JA.IX-0078-081.
8 JA.VIII-0607-608; JA.IV-3741-742[149:15-150:4].
9 JA.IX-339.

These actions were taken despite objective measures of Godfrey's competence and success. Iowa's workers' compensation system was rated top in the nation in 2009. (JA.VIII-082). Labor economist Dr. John Burton provided a thorough analysis of Godfrey's exemplary work as WC Commissioner. (JA.V-1077-1130[31:25-84:24]).

The jury determined that Defendants' adverse employment actions were motivated by discriminatory animus on the basis of sexual orientation, retaliation, and political partisanship. (JA.V.VI-0621).

Argument

Division I

The verdicts are consistent with the law and supported by substantial evidence.

Godfrey does not dispute that Defendants preserved this appeal issue.

A. Branstad did not act lawfully toward a nonelected political appointee.

1. The Governor does not have unfettered discretion to establish an appointed state officer's salary within the statutory range.

When Branstad took office in January 2011, Godfrey had been Iowa's WC Commissioner for five years. His salary was $112,068.84. On July 11, 2011, Defendants reduced Plaintiff's salary to $73,250.00, the lowest level allowed by statute. Iowa Acts 1191 § 14 (2008). (*See* JA.IX-100).

The legislature dictated criteria the Governor must use in setting the WC Commissioner's salary.

> The governor shall establish a salary for appointed nonelected persons . . . by considering, among other items, [1] the experience of the individual in the position, [2] changes in the duties of the position, [3] the incumbent's performance of assigned duties, and [4] subordinates' salaries.

Iowa Acts 1191 § 13 (2008) (numbering added).

Chief of Staff Jeffrey Boeyink ("Boeyink") testified that Branstad made the decision to cut Godfrey's salary July 5, 2011. (JA.IV-2218[25:3-11]). Boeyink admitted that Godfrey's experience was never discussed in reaching the decision. (JA.IV-2224[31:11-18]). There were no changes in Godfrey's duties. (JA.IV-2224[31:19-25]; JA.IV-2225-226[32:24-33:1]). No consideration was given to salaries of Godfrey's subordinates. (JA.IV-2225[32:15-23]). No consideration was given to these three of four mandatory criteria in the statute. (JA.IV-2227-229[34:14-36:9]).

Branstad admitted he never provided Plaintiff with a performance evaluation and never looked at his personnel file or prior performance evaluations. (JA.IV-3612-613[133:20-134:3]). Branstad never received complaints about Godfrey's work ethic, professionalism, timely completion of administrative duties, or interactions with legislators. (JA.IV-3540-541[61:14-62:9]).

Defendants argue that the court "misinterpreted the Salary Act[10] to create a right to continued salary at the amount established by a prior governor." (Appellant-Defendants' Brief ("Def-Brief") 35). Rather, the court held that: "Implicit in the allocation of authority to consider 'other factors' is the restriction that the 'other factors' considered may not be improper, unconstitutionally prohibited factors." (JA.VI-2374)

Defendants argue that the act provided a non-exhaustive list of items for Branstad to consider and granted him discretion to consider non-enumerated criteria unconstrained by the Iowa Civil Rights Act ("ICRA"). (Def-Brief 37-38). The act's legislative history cited by Defendants erodes their argument that the statutory criteria are non-mandatory. "**[T]he bill does not limit consideration to these factors, only specifies that these factors shall be considered among other factors**." S.F. 568, 66th Gen. Assemb. (1975).

Defendants ask the Court to give the words of the statute their "ordinary meaning." (Def-Brief 35-37). Plaintiff agrees that the word 'shall' should be assigned its 'ordinary meaning.' "[W]e have interpreted the term

[10] When Defendants' refer to the "Salary Act," they are referring to Iowa Acts 1191 §§ 13-14 (2008).

"shall" in a statute to create a mandatory duty, not discretion." *State v. Kawonn*, 609 N.W.2d 515, 521-22 (Iowa 2000).

Branstad violated the Iowa Act 1191 section 13 by cutting Plaintiff's salary without considering three of four mandatory criteria.

2. The Governor's legal counsel can be liable for acts related to the salary-reduction decision.

Defendants argue that Findley cannot be liable for Plaintiff's salary reduction because it was authorized by Branstad. (Def-Brief 40). Findley can be liable even if she did not personally possess authority to reduce Plaintiff's salary. With regard to the sexual orientation and retaliation claims, the question is did Findley, who was directly involved in the adverse personnel actions, act with discriminatory animus. *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 7 (Iowa 2009). With regard to the due process claim, the question is whether Findley exercised due care. *Baldwin v. City of Estherville*, 915 N.W.2d 259, 279 (Iowa 2018).

As legal counsel to Branstad, Findley played a key role in slashing Godfrey's salary. (JA.IV-2768[76:2-6]; JA.IV-2774[82:15-21]; JA.IV-2871-873[179:7-181:5]). The jury determined that Defendants reduced Plaintiff's salary on a basis disallowed by law, the decision was clearly arbitrary and unreasonable, and damaged Plaintiff. (JA.VI-0475-476; JA.VI-0622).

Plaintiff was not given adequate due process. (JA.VI-0475-476; JA.VI-0622).

The jury was then asked to consider whether each "Defendant acted with all due care to conform to the requirements of the law in making the decision to reduce Plaintiff's salary." (JA.VI-0476). Branstad and Findley did not exercise due care. (JA.VI-0622).

Abundant evidence supported the verdict. Despite her legal training, when providing counsel to Branstad, Findley did not know how many decisions the WC Commissioner issued. (JA.IV-2796[104:14-24]). She reviewed only five decisions for the governor. (JA.IV-2796-797[104:25-105:7]). She had no idea what percentage those five decisions represented to the overall number of decisions before the agency. (JA.IV-2797[105:8-12]). She never evaluated any cases the business community liked or cases in which Plaintiff ruled in the employer's favor. (JA.IV-2837-839[145:6-147:5]).

3. A Governor and Governor-elect's resignation request to a nonelected political appointee can result in liability when motivated by discriminatory animus.

Defendants argue that Branstad's requests for Plaintiff's resignation are not actionable because Godfrey was not terminated. (Def-Brief 40-41).

We would not be here if Defendants' sole action against Plaintiff were the requests for resignation and Plaintiff had been allowed to continue his

term without interference and retaliation. A number of adverse employment actions followed Plaintiff's refusal to resign, chief among them was the $40,000 salary reduction. (JA.IX.100). Plaintiff also suffered significant personal distress caused by the Governor's repeated insistence that he resign.

B. The ICRA verdicts are consistent with the law and supported by substantial evidence.

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

Defendants argue that the "ICRA doesn't apply to a nonelected political appointee" because an "appointee is not an 'employee'." (Def.-Brief 41-44). No authority cited supports Defendants' contention.

Defendants offer *Clark* for the assertion that Plaintiff "had neither an at-will nor contractual employment relationship with the state." (Def-Brief 42, citing *Clark v. Herring*, 260 N.W. 436, 439-40 (Iowa 1935)). There was no dispute in *Clark* regarding the insurance commissioner's status as an employee of the State of Iowa. *Id*. The case examined the removal statute's constitutionality. *Id*. at 438.

Plaintiff here does not challenge the removal statute's constitutionality. As Findley testified, it had no bearing on actions taken against Godfrey.

> [A]lthough there is a removal statute for people who have [a six-year fixed-term], when I reviewed the removal statute, none

> of those grounds appeared to apply. And I recall the governor seemed to indicate agreement with that assessment in my view.

(JA.IV-2859[167:1-5]).

In *Halford,* cited by Defendants, a deputy director corrections was terminated without cause. *Lee v. Halford*, 540 N.W.2d 426, 427-28 (Iowa 1995). Because the deputy "served at the pleasure of the director of corrections," was not appointed for a term of years, and was not a merit employee, he did not have a property interest in his position. *Id*. at 429. Nothing in this case states that the deputy director was not a state employee. It strongly suggests that an appointment for a term-of-years, in fact, creates a property interest. No statute or case Defendants cite contradict the WC Commissioner's status as a State employee.

Plaintiff accepted appointment as WC Commissioner as an employee and was paid a salary. (JA.VIII-0879; JA.XI-1339-342; JA.IX-0503; JA.VIII-0888). Following his second Senate confirmation[11], this appointment for a term of six years. Iowa Code § 86.1 (JA.VIII-0894-895). Plaintiff had a job description. Iowa Code § 86.8. "The director of the Iowa Workforce Development ("IWD") [directed] the administrative and compliance functions and controlled the docket of the division of workers'

[11] Plaintiff's first senate confirmation was to fill the remainder of a term vacated early by the prior commissioner. (JA.VIII-0894-895).

compensation." Iowa Code § 84A.1(3)(b). Godfrey's salary was publicly available in Iowa's "State Employee Salary Book." (JA.IX-0503).

Plaintiff was an employee even within the definition identified by Defendants because he was serving under an express contract of hire that gave the employer the right to control his work performance. Black's Law Dictionary 124 (11th ed. 2019).

Finally, the Iowa Supreme Court already decided that Godfrey is entitled to ICRA protections. *Godfrey v. State*, 898 N.W.2d 844, 892-93 (2017). Chief Justice Cady wrote, "I find the [ICRA] provides [an adequate] remedy here, at least with respect to Christopher J. Godfrey's claim against the State for discrimination on the basis of sexual orientation." *Id*. at 880. This statement implicitly recognized Plaintiff as employee entitled to the ICRA's protections.

2. The governor-elect discriminated "in employment" against a political appointee as part of a continuing violation.

Defendants argue that the ICRA is not applicable to Branstad's 2010 requests for resignation because he was not yet governor and therefore, was without authority to impact Godfrey's appointed position. (Def-Brief 44-45). The two requests for resignation in December 2010 standing in isolation do not constitute discrimination pursuant to the ICRA. Rather, Plaintiff proved his employment discrimination claim through, *inter alia*, various instances

of disparate treatment. Branstad's requests for Godfrey's resignation reflect his desire to eliminate Godfrey from his administration. The requests for resignation contributed to the substantial evidence of Defendants' discriminatory intent. *See also infra* Div. I.B.3.

3. Godfrey presented substantial evidence of adverse employment actions.

Defendants isolate discriminatory acts and argue that, considered separately, each incident was "minor" and did not constitute substantial evidence of discrimination. (Def-Brief 45-51). *Glaringly absent from Defendants' list of discriminatory acts is their reduction of Godfrey's salary by nearly $40,000 without notice.* This was unquestionably an adverse action under the standard that applies to discrimination as well as retaliation. *See, e.g. Jackman v. Fifth Judicial Dist. Dep't of Corr. Serv.*, 728 F.3d 800, 804 (8th Cir. 2013).

Moreover, the jury may consider multiple incidents cumulatively to determine whether—in combination—they are "material" enough to count. *Haskenhoff v. Homeland Energy Solutions*, LLC, 897 N.W.2d 553, 641 (Iowa 2017) (Appel, J., concurring). The jury properly found that the $40,000 pay cut, alone or in connection with other acts, sufficiently adverse to be meaningful.

a) The resignation requests were adverse actions.

Defendants argue requests for resignation were not adverse actions because Godfrey declined to resign and his appointment was not materially impacted. (Def-Brief 47). This argument fails because the requests for resignation were surrounded by additional adverse acts intended to force Godfrey to resign, followed by slashing his salary by nearly $40,000.00.

The resignation requests also provide evidence of disparate treatment. Plaintiff provided evidence that, *inter alia*, two heterosexual men (Dave Neil and Stephen Larson) who were initially asked to resign were then permitted to maintain their employment without further requests to resign and without salary cuts. (JA.IV-3680-682[201:16-203:16]; JA.V-3187-188[74:5-75:9]). The requests for Plaintiff's resignation provide evidence that Branstad treated Godfrey differently than his heterosexual colleagues. This is evidence of disparate treatment discrimination based on the employer's pattern and practice. *Iowa City Human Rights Com'n v. Roadway Exp., Inc.*, 397 N.W.2d 508, 511-12 (1986).

b) The ICRA did not bar claims that Godfrey administratively exhausted.

Defendants argue that Plaintiff did not administratively exhaust his claims. (Def-Brief 47-48).

Plaintiff filed three separate charges with the Iowa Civil Rights Commission: Aug. 25, 2011, Jan. 3, 2012, and Apr. 13, 2012. (JA.II-1921-1941). Godfrey's timely filed ICRC claims identified distinct discrimination and retaliation claims. (Id.)

The Iowa Supreme Court considered administrative exhaustion issues and determined that a separate report is not required for every discriminatory event. "To force a plaintiff to file a new administrative charge with each continuing incident of discrimination would create needless procedural barriers." *Lynch v. City of Des Moines*, 454 N.W.2d 827, 832-33 (Iowa 1990). Claims that "reasonably relate" to plaintiff's reported claims are proper. *Id*.

Cited by Appellants, *Ackelson* addresses whether punitive damages are available under the ICRA. *Ackelson v. Manley Toy Direct, LLC*, 832 N.W.2d 678, 680 (Iowa 2013). The only mention of administrative exhaustion is in dicta and states that an individual must follow the framework for reporting a complaint of retaliation in Iowa Code section 216.15(1). *Id.* at 680. That is precisely what Godfrey did.

Plaintiff requests that the trial court's ruling be affirmed. "All of the ongoing adverse actions taken by Defendants against Godfrey that were not

explicitly outlined in the civil rights claims 'were reasonably related to' Godfrey's administratively exhausted claims." (JA.VI-2384).

c) Plaintiff established additional adverse actions.

i. Department head retreat.

Branstad held a "Governor's Leadership Retreat" on October 10, 2011. (JA.VIII-0527-535). Boeyink described the meeting's importance.

> This will be great opportunity to put the entire team together . . . to discuss best practices for measuring employee performance, upcoming budget issues, health care and wellness initiatives; technology applications and consolidation, and plans for the rolling review of existing departmental regulations.

(JA.VIII-0527).

Defendants argue that Plaintiff's exclusion from the Governor's retreat did not constitute "material adversity" because it was for "Department Head[s]" and Plaintiff was a Division Head. (Def-Brief 49). Defendants readily admitted that two non-department heads were invited. *Id.* They missed some.

- Mike Mauro, Labor Commissioner
- Stephen Larson, Administrator
- Susan Voss, Commissioner of Insurance
- James Schipper, Superintendent of Banking
- Dan Miller, Executive Director, Iowa Public Television
- Elizabeth Jacobs, Chair of Utilities Board
- Timothy Orr, Adjutant General, Iowa Nat'l Guard.

- Sam Langholz, State Public Defender
- Donna Mueller, CEO, IPERS
- Terry Rich, CEO, Iowa Lottery Authority
- Mark Schouten, Director, Office of Drug Control Policy
- David Worley, Veterans Home Commandant

(*Cf.* JA.VIII-0533-34; JA.VIII-0800-807; JA.II-1301-302).

Mike Mauro, a division head like Godfrey, attended the retreat and testified that topics discussed at the retreat would be important to any administrator who managed a budget. (JA.V-0675[186:22-24]). Contrary to Boeyink's testimony, Mauro did not give a presentation at the retreat. (Id.) Stephen Larson admitted that the retreat was "productive." (JA.V-3198-199[85:5-86:9]). Plaintiff was aware of the tangible benefits he could have gained from attending the retreat. (JA.V-1923-924[103:10-104:8]).

Plaintiff's position qualified him for an invitation to attend the retreat; yet he was intentionally excluded. Exclusion from professional meetings may be part of an adverse employment action. *Channon*, 629 N.W.2d at 864. Furthermore, "conduct that is not separately actionable but may become actionable based upon its 'cumulative impact' may be pursued on a continuing violation theory." *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 571-72 (Iowa 2015).

ii. Press release.

Plaintiff was selected as a member of the National Academy of Social Insurance (NASI). (JA.VIII-0607-608). Dr. Burton explained that NASI is a prestigious organization for professional membership. (JA.V-1063[17:2-14]).

Godfrey was trying to limit the damage to his reputation caused by Branstad. The press release was intended "to let people know that . . . I was still doing my job despite the fact that my pay had been cut." (JA.V-1933[113:21-25]).

Defendants refused to publish the press release. (JA.IV-3742-743[150:25-151:3]; JA.VIII-0607-608; JA.IV-3741-742[149:15-150:4]). While this incident is likely not an adverse employment action all by itself, it is part of the panoply of negative actions by Defendants that, together, create adverse action.

iii. Budget matters (plural).

Defendants argue that appropriation decisions involving the Workers' Compensation Division impacted the State, but not Plaintiff personally. (Def-Brief 50-51). The jury found differently. The decisions made it more difficult for Godfrey to do his job, deprived him of a Chief Deputy who

would have helped handle appeal decisions, and allowed Godfrey to give more attention to planning and managerial aspects of his job.

Defendants also refused to allow Godfrey to carry money forward from one budget year to the next as had been allowed in prior years. (JA.V-0247-249; JA.IX-085). Long-time Financial Management Bureau Chief Kelly Taylor ("Taylor"), who had a detailed understanding of the Division's budget, said that money generally carried forward. (Id). This disrupted Godfrey's work and the Division's planned budget for the following year.

Second, the Governor line-item vetoed $153,000 intended to provide salary for a Chief Deputy Commissioner that was specifically allocated by the legislature to assist with Godfrey's workload. (JA.VIII-272; JA.VIII-874; JA.V-238[120:2-22]). Findley advised Branstad regarding the line-item veto. (JA.IV-2899-900[207:10-208:1]; JA.V-0238-239[120:2 121:1]). It was the only time that Taylor had seen a governor veto a section of a line item. (JA.VIII-272; JA.IV-3380[213:1-14], 3386-389 [219:24-222:14]). Taylor questioned the legality of the veto with members of the administration including Findley. (JA.IX-0086-088). This highly unusual veto was personally distressing to Godfrey, made it more difficult to do his job, deprived him of help to handle appeal decisions, and prevented him from giving more attention to strategic aspects of his job.

Third, Plaintiff was subjected to ongoing micromanagement of his budget not experienced by others. IWD Director Wahlert questioned whether Plaintiff's travel requests were within his budget even though the he had no history of budget overruns. (JA.V-2120-121[9:5-10:2]; JA.VIII-071). Mike Mauro testified that Wahlert never micromanaged his budget. (JA.V-0678-679[189:25-190:3]). Taylor testified that Wahlert scrutinized the Workers' Compensation budget more than other budgets. (JA.V-0250-252; JA.IX-0078-080).

Plaintiff was treated worse than other similarly situation employees with regard to budgeting practices which made it harder for Plaintiff to perform his job and provides additional evidence of a continuing violation.

iv. Additional adverse actions.

Defendants hope to limit the Court's consideration to three groups of adverse actions they identified. Not only do their groupings omit the salary reduction that was egregious in form and substance, they also omit additional adverse employment actions.

On July 12, 2011, Branstad went on state-wide radio program and made the false allegation that Godfrey was responsible increasing costs of workers' compensation insurance premiums and the position required someone who could be "more fair." (JA.IX-339). Joseph Cortese, the current

WC Commissioner, testified that it is a serious matter to accuse a commissioner of being biased because the "system needs to be perceived as being fair." (JA.V-1397-398[23:23-24:4]). Cortese likewise testified that to accuse a commissioner, in the exercise of quasi-judicial duties, of not being fair is a serious character attack. (JA.V-1398-399[24:21-25:4]).

In 2012, Branstad conducted performance reviews for all directors and division heads, including similarly situated division heads. (JA.VIII-0069-070; JA.IV-2340-342[147:3-149:8]; JA.IV-3613-3615[134:4-136:2]). Godfrey was excluded. (Id). Exclusion from a performance review denied him the opportunity to get meaningful feedback regarding his work and defend himself from Branstad's gross misunderstanding of Godfrey's work.

4. The discrimination verdict is supported by substantial evidence.

Defendants allege that it is "uncontroverted" that Branstad did not know Plaintiff was gay before he decided to cut his pay. (Def-Brief 51-52). Substantial circumstantial evidence allowed the jury to make a legitimate inference that Branstad knew Godfrey was gay before the decision was made to slash his salary. *See Banwart v. 50th Street Sports, L.L.C.*, 910 N.W.2d 540, 545 (Iowa 2018).

a) The jury reasonably concluded that Branstad knew Godfrey was gay.

Plaintiff was openly gay his entire career and his sexual orientation was widely known in the legislature, in IWD, throughout workers' compensation law community, as well as the business community around Iowa. Godfrey's sexual orientation was such common knowledge among people closely associated with Branstad that it was reasonable for the jury to infer that Branstad knew Godfrey was gay.

i. Godfrey was openly gay his entire professional life.

Godfrey has been openly gay since law school in 1996. (JA.V-0327-328[100:25-101:25]). In each employment setting he has held since becoming an attorney, his employers and co-workers knew he was gay. (JA.V-334[107:11-14]; JA.V-3299 Depo.-Beresford-[33:4-19]); JA.V-2359-360[44:24-45:9]; JA.V-3164[51:1-12]).

ii. Knowledge of Plaintiff's sexual orientation within IWD.

When he began working at the Division of Workers' Compensation, others on staff across IWD already knew or quickly learned that Plaintiff was gay. The following witnesses offer a partial list:

- Deputies Erin Pals. (JA.IV-3175[209:17-20[12]])
- Deputy Jennifer Gerrish-Lampe. (JA.V-313[61:21-25]).

[12] Appendix missing lines 19-20 of Plaintiff's designation.

- Deputy Joe Walsh. (JA.V-1480[128:6-14]).
- Deputy James Elliott. (JA.V-236[25:21-25]).
- Deputy Michelle McGovern. (JA.V-1534-535[194:11-195:4]).
- Hearing administrator Siri Chanthavong. (JA.IV-3785-786[219:19-220:1]).
- Assistant Commissioner Janna Martin. (JA.V-1473[106:1-106:12]).
- Deputy Helenjean Walleser. (JA.V-2745[132:5-9]).
- Labor Commissioner David Neil. (JA.IV-3150[182:6-24]).
- IWD Director Elisabeth Buck. (JA.V-0083-084[18:24-19:1]).
- Labor Commissioner Michael Mauro. (JA.V-0671[182:5-13]).

No witnesses testified that Plaintiff's sexuality was unknown or a secret.

iii. Knowledge of Plaintiff's sexual orientation at the Capitol.

Governor Vilsack was aware that Plaintiff was gay when he nominated him in January 2006. (JA.IV-2509-511[31:18-33:1]). It was common knowledge during his nomination process. (JA.IV-2517[39:21-22]).

Homosexuality had become a hot political issue, and many Republicans expressed hostility toward granting civil rights protections to the LGBTQ community. (JA.IV-2518-519[40:13-41:2]). Vilsack believed that Godfrey's sexual orientation played a role in his inability to be confirmed in 2006. (JA.IV-2517-518[39:23-40:12]). Vilsack withdrew

Plaintiff's name from Senate consideration and re-appointed him as interim commissioner. (JA.IV-2522-523[44:9-45:5]; JA.VIII-888; JA.VIII-894).

Gay rights continued to be controversial to some Iowans. In 2007, the ICRA was amended to include sexual orientation as a protected class. (JA.IV-2499-500[21:21-22:3]). Former State Senator Matt McCoy testified that from 2000 to 2008, the Iowa Republican Party was "stridently anti-gay." (JA.V-382[155:15-25]).

State Senator Tom Courtney took part in Plaintiff's confirmation hearings. (JA.IV-3262[95:9-11]). It was open knowledge around the Capitol during that time that Plaintiff was gay. (JA.IV-3262[95:15-23]). Courtney introduced Plaintiff and Plaintiff's partner, Sean, to other Senators. (JA.IV-3265-267[98:14-100:2]). During one confirmation process, Courtney introduced Plaintiff and his partner to then-Senator Kim Reynolds in Senate chambers. (JA.IV-3267[100:3-11]; JA.IV-3267-268[100:21-101:18]). McCoy witnessed Sean and Reynolds' introduction. (JA.V-0394-395[167:22-168:7]).

Attorney Saffin Parrish-Sams met with her State Senator, Pat Ward to discuss Plaintiff's nomination and in the process discussed his sexual orientation. (JA.IV-3223-224[33:13-34:25]; 3225-227[35:1-37:3]). Senator Michael Gronstal said knowledge of Plaintiff's sexual orientation created

"static" during the confirmations. (JA.IV-3318-320[151:13-153:3]). Prior to Plaintiff's salary being slashed, Senator Dotzler told Boeyink that he could not think of any reason Branstad would take negative action against Plaintiff unless it was "because he was gay." (JA.IV-2730[38:1-24]).

iv. Business community's knowledge of Plaintiff's sexual orientation.

Many witnesses from businesses and organizations testified Godfrey's sexual orientation was widely known. Dennis Murdock, former Central Iowa Power Cooperative CEO and ABI President, learned after an ABI meeting that some members of the ABI Board were withholding their support of Godfrey's confirmation because he was gay.[13] (JA.IV-3245-246[78:18-79:25]).

Ann Anhalt, MidAmerican Energy employee and Iowa Workers' Compensation Advisory Committee ("IWAC") member, was aware Plaintiff was gay, and recalled that he brought his partner to IWAC's annual dinner. (JA.IV-3776[188:8-17]). Defense witness Scott Folkers, attorney for Winnebago Industries, testified that he knew Plaintiff was gay prior to

[13] Recall that the day after Branstad slashed Godfrey's salary, Branstad said he took the action at the behest of ABI. (JA.IX-339 – Branstad told listeners "Talk to the Iowa Association of Business and Industry. They are the ones that encouraged me to [replace Godfrey].") ABI actually took no official position on Godfrey's nomination. (JA.V-1215[41:5-12]).

Branstad's 2010 re-election. (JA.V-2941[10:12-18]). He said Plaintiff's sexual orientation would come up in "social settings" like bars. (JA.V-2991[69:2-15]; JA.V-2995[73:6-23]).

v. Branstad did not take a "temporary leave" from politics.

Defendants argue that Godfrey's 2006, 2007, and 2009 confirmation hearings were remote events that Branstad knew nothing about because was serving as president of Des Moines University ("DMU"). (JA.IV-3513[34:8-12]). Branstad admitted that he continued to socialize during this period. (JA. IV-3513[34:21-23]). Some of his friends were lobbyists. (JA.IV-3511[32:12-17]). In fact, he remained so well connected that during the fall of 2009 he was approached by numerous people to run for governor again, only months after Plaintiff's second confirmation hearing and this Court's *Varnum*[14] decision. (JA.IV-3513-514[34:24-35:17]). Given his history as an Iowa Governor, his continued political connections, and his 2009 return to the campaign trail, the jury could reasonably find Branstad exaggerated his "break" from politics.

vi. Knowledge of Plaintiff's sexual orientation by Branstad's staff.

Findley and Boeyink denied knowing Plaintiff's sexual orientation prior to July 5, 2011, when Branstad order the cut to Godfrey's salary.

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[14] *Varnum v. Brien*, 763 N.W.2d 862 (Iowa Apr. 3, 2009)

(JA.IV-2218[25:3-11]; JA.IV-2858[166:4-13]). In the narrow window between July 5, 2011 and July 11, 2011, when they carried out the salary cut, they both claim to have learned for the first time that Godfrey was gay.

Findley testified that she first learned Plaintiff was gay on July 8, 2011, when she was doing research on Plaintiff's appointment and a blog post "popped up" on her screen. (JA.IV-2873-874[181:20-182:19]). She does not recall what search she was performing that generated the unusual content. (JA.IV-2874-875[182:20-183:2]). Even though she served as legal counsel to Branstad, who was about to take adverse employment action against a member of a protected class, Findley claimed she decided not to tell Branstad. (JA.IV-2875-878[183:20-186:23]).

Boeyink testified that he learned Plaintiff was gay on July 8, 2011, when Findley confided to him that she had come across the information on a blog. (JA.IV-2254-256[61:20-63:9]). This contradicted Senator Dotzler's testimony who recalled discussing Godfrey's sexual orientation with Boeyink at the Iowa Speedway months earlier. (JA.IV-2730[38:1-24]). Boeyink claimed he sought no additional information about Godfrey's sexual orientation, and purposefully decided not to tell Branstad about it. (JA.IV-2255[62:13-20], 2256-258[63:10-65:5]).

There is not a scrap of documentation supporting Defendants' stories. (JA.IV-2241-243[48:19-50:17]; JA.IV-2885-886[193:18-194:9]; JA.IV-3558-589[79:14-80:1], 3569[90:11 22]).

If the jury believed Dotzler over Boeyink, they likely also concluded that Boeyink was lying about when he learned Godfrey was gay. And if he was lying about that, it stands to reason that he was also lying about not ever telling Branstad this fact. Given how controversial the issue of gay rights was the time, Godfrey's sexual orientation was important information for Branstad to know, particularly because many important Republicans held strong negative views about gay rights.[15]

vii. Conclusion.

The District Court concluded, "Having had the opportunity to evaluate Branstad's denials as he testified, the jury verdict clearly reflects the jury's rejection of Branstad's denials." (JA.VI-2385). The jury concluded that Branstad knew Plaintiff was gay when he took adverse employment action against him.

[15] Branstad testified that while he was running for office in 2010 gay marriage was a "hot button" issue. (JA.IV-3642[163:4-12]).

b) Branstad harbored anti-gay animus.

Defendants argue Branstad could not have harbored anti-gay animus because he had three gay friends. (Def-Brief 55). Expert witness Dr. Kevin Nadal provided a response to this defense.

> Q. [Atty Fiedler]: [I]f I have a black friend, [d]oes that mean that I can't hold any biases against African-Americans?
>
> A. [Dr. Nadal]: It absolutely does not mean that you cannot hold biases or do not hold biases against African-Americans. In fact, if you announce that you have a black friend, it makes me more suspicious that you have biases against black people.

(JA.V-0544-545[55:8-56:3]).

While Defendants hold out Doug Hoelscher as an example of one of Branstad's gay friends, Dr. Nadal scrutinized Branstad's testimony regarding Hoelscher.

Here is how Branstad described Doug Hoelscher:[16]

> Doug Hoelscher, he grew up on a farm up here in Hamilton County, Iowa; farm kid, he's gay, **but** he's somebody that I respect a great deal, and I think he's done a great job, and I know he's had a partner for over ten years.

(JA.IV-3689[210:9-15]) (Emphasis added).

[16] Mr. Hoelscher lives in Washington D.C. and therefore was not in Branstad's immediate work environment. (JA.IV-2098-099[94:25-95:12]; JA.V-2767-768[Depo.264:22-265:2]).

Dr. Nadal testified that the 'but' in that explanation "indicated bias that [Branstad] had towards gay people. Why not just say, 'I worked with this person,' period. Why was there a need to add, 'But he's a great person'?" (JA.V-0559-560[70:11-71:1]).

A more accurate understanding of Branstad's views regarding homosexuality are reflected by his own words on the topic, prior to the time this lawsuit was filed and he had any motive to be untruthful. In October 2009, Branstad had this to say about the *Varnum* decision:

> . . . I was like most Iowans, really shocked to see what our Supreme Court did, and I believe it needs to be overturned, with a uh, constitutional amendment, . . .

(JA.IX-0379).

As 2010 nominee to the State's highest office, Branstad was the figurehead of the Iowa Republican Party. That year the Republican Party platform contained the following planks:

> 6.02 We call for the repeal of sexual orientation in the Iowa Civil Rights Code and we oppose any other legislation or executive order granting rights, privileges, or status for persons based on sexual orientation.
>
> 6.03 We support an amendment to both the U. S. and Iowa constitutions that states that all marriages should be traditional one natural male and one natural female, omitting transgendered.
>
> 6.06 We oppose the State of Iowa, its Courts, and its political subdivisions creating or recognizing a legal status

identical or substantially similar to that of marriage for unmarried individuals.

6.07 We favor improvement, strengthening, and simplification of adoption laws, and oppose adoption by homosexuals.

(JA.VIII-0180-181).

Those planks were consistent with contemporaneous statements Branstad made while campaigning in 2010. Following is a quote attributed to Branstad in 2010 in response to why he was uncomfortable with same-sex marriage:

> Well, it's got to do with the whole structure of the American society. And a lot of people say when other ancient societies have gone this direction, it was the beginning of the end of their society. Because, the building blocks of really having stable culture is really having one-man, one-woman marriage.

(JA.IV-3704[112:9-24]).

During his deposition on November 26, 2014, Branstad agreed that he could have made that statement in 2010 and affirmed that he still believed it at the time of his 2014 deposition. (JA.IV-3704-705[112:25-113:3]).

When describing Pride month, Branstad testified that "gay people celebrate the fact that they're—that they're gay and they're proud of it, and they have flags that are rainbow flags." (JA.IV-3636[157:5-11]). Dr. Nadal explained that this fundamentally misses the true meaning of Pride month which is a "celebration that acknowledges decades, centuries of oppression . . ." (JA.V-0553-554[64:7-65:1]. Likewise, Branstad twice referred to

sexual orientation as sexual "preference," suggesting a person can choose to be gay or straight. (JA.IV-3635[156:17-21], 3638[159:14-17]).

Branstad's conduct toward Plaintiff also reflected discriminatory animus. It is significant that Godfrey was the only executive officer whose pay was ever reduced by Terry Branstad. (JA.IV-2099[95:18-20]). Throughout the entire time he was Governor, Branstad never once met with Plaintiff to get to know him better, discuss concerns, share information he allegedly heard from constituents, or to offer Plaintiff an opportunity to comply with Defendants' expectations. (JA.IV-3605[126:23-25]). Branstad made similarly situated employees aware of complaints and provided them the opportunity to respond. (JA.V-3118-120[5:22-7:1]).

Furthermore, the alleged performance "review" provides substantial evidence that Plaintiff's sexual orientation was a motivating factor in the decision to request his resignation and subsequently slash his salary. To this day, Findley does not believe gays and lesbians deserve equal rights. (JA.IV-2914[222:4-9]). In terms of a "performance review," Findley testified that she presented Branstad with a handful of Workers' Compensation decisions that he asked about, but when asked whether she actually investigated how that handful of decisions related to the vast quantity of decisions that were issued by the agency, her answer was no. (JA.IV-2796-798[104:14-106:4]).

She did not attempt a fair and rational investigation because Plaintiff's performance was simply not the reason Branstad requested his resignation.

As with Boeyink, if Branstad knew Godfrey was gay, then he lied about that fact to the jury. A reasonable jury could find that the only reason Branstad would not be truthful about his knowledge of Godfrey's sexual orientation was because he was, in fact, treating Godfrey differently because of his sexual orientation.

Based on this, and other evidence presented at trial, a reasonable jury concluded that Branstad not only knew Plaintiff was gay, but was motivated to request Plaintiff's resignation and subsequently slash his salary because Plaintiff is gay.

5. The retaliation verdict is supported by substantial evidence.

Plaintiff showed he was retaliated against by proving that: (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a causal connection exists between the first two elements. *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 750 (Iowa 2006). Plaintiff has introduced substantial evidence with respect to each element.

Defense counsel want to limit Godfrey's retaliation claim to the resignation requests and salary reduction. (Def-Brief 56-58). In reality, Plaintiff's retaliation claim is based on a continuing violation involving

those and multiple other actions. They include exclusion from the Governor's retreat, micromanagement not experienced by other division managers, cutting the Division's budget to make Plaintiff's job harder, and exclusion from performance reviews and feedback provided to similarly situated employees.

The retaliation claim was appropriately submitted to the jury, and their verdict should be upheld. *Dennett v. City of Des Moines*, 347 N.W.2d 691, 692 (Iowa Ct. App. 1984).

a) Before the salary reduction, Godfrey engaged in protected activity.

Appellants again argue that Branstad could not have engaged in an "unfair or discriminatory practice" because he did not have "actual or constructive knowledge that Godfrey [was] engaged in a protected activity." (Def-Brief 56-57 citing *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 289 (Iowa 2000)). The *Salsbury* Court examined an exception to the at-will employment doctrine. *Id*. at 281-82. To the extent that this Court wishes to consider the public policy causation standard as persuasive in ICRA cases, the *Salsbury* case offers some useful guidance.

> Generally, causation presents a question of fact. Thus, if there is a dispute over the conduct or the reasonable inferences to be drawn from the conduct, the jury must resolve the dispute. . . . Additionally, **any dispute over the employer's knowledge of**

> **the conduct is generally for the jury**, as well as the existence of other justifiable reasons for the termination.

Salsbury Chem., Inc., 613 N.W.2d at 289 (emphasis added).

Branstad requested Plaintiff's resignation on December 3, 2010. (JA.VIII-099). Godfrey informed Branstad that his position was secured by law. (JA.VIII-100). Informing Branstad that he declined to resign constituted opposition to the discriminatory act.

On December 29, 2010, Defendant set a meeting with Plaintiff to extract a resignation. (JA.VIII-105). There was essentially no chance that Plaintiff could convince Branstad not to ask for his resignation a second time. (JA.IV-2140[136:4-11]). Informing Branstad again that he declined to resign constituted opposition to the discriminatory act.

And finally, on July 11, 2011, Boeyink again requested Plaintiff's resignation. When he refused to resign, on order from Branstad, Boeyink slashed Plaintiff's annual salary from $112,068.94 to $73,250.00 in an immediate and direct act of retaliation.[17] (JA.IV-2253-254[60:12-61:19]; JA.IX-100; JA.IX-503).

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[17] As noted earlier, two other appointed officials, were asked and declined to resign, were allowed to continue in their positions without salary reductions, and continued working unobstructed. (JA.IV-3164[196:2-10] – testimony of Dave Neil; JA.V-3187-188[74:5-75:24] – testimony of Stephen Larson).

Defendants attempted to convince the jury that Godfrey's salary cut was due to performance deficits. They failed. The jury made a separate and reasonable inference from the evidence and testimony regarding Godfrey's retaliation claim. (JA.VI-621).

b) After the salary reduction, Godfrey experienced adverse action.

Defendants again argue that the other acts of retaliation alleged by Plaintiff did not cause a "tangible change" in Plaintiff's employment. (Def-Brief 58).

Defendants look to federal law to argue that Plaintiff may not prove his case using the continuing violation doctrine, but Iowa Courts validate the use of this doctrine to prove discrimination claims brought under the ICRA.

> [C]onduct that is not separately actionable but may become actionable based upon its "cumulative impact" may be pursued on a continuing violation theory if some of the conduct occurred within the limitations period.

Dindinger, 860 N.W.2d at 571-72.

C. The constitutional-tort verdict is consistent with the law and supported by substantial evidence.

1. Godfrey's procedural-due-process claim does not fail as a matter of law.

The District Court held that Plaintiff had a legitimate claim of entitlement "to continue in his position at a salary based on the factors set

forth in the statute." (JA.VI-2389). Defendants argue this ruling was incorrect. (Def-Brief 61).

a) Godfrey' property interest was created by statute and protected by due process.

Defendants argue that the District Court "[c]onflat[ed] substance and process" by creating a "property interest in the Salary Act process." (Def-Brief 62). Defendants' argument never defines the phrase "salary act process." (*Id*.)

Iowa Acts sets forth criteria the governor "shall" consider to adjust the WC Commissioner's salary. 2008 Iowa Acts 1191 § 13.

Instruction 30 states in part:

> Plaintiff had a constitutional property interest in maintaining his salary at the level it was at when Branstad took office as Governor of the State of Iowa, **unless his salary was adjusted by Branstad to a different amount in compliance with the factors set forth in the law for setting salaries**, explained in Instruction No. 28.

(JA.VI-0475)(Emphasis added).

The instruction makes clear that the statute created the constitutionally protected property right. The sole purpose of the instruction is to establish Branstad's obligation pursuant to the statute. (Id).

Defendants assert that property rights are created by an independent source such as state law, not the Constitution. (Def-Brief 61-62, citing

Bowers v. Polk Cty. Bd. Of Supervisors,[18] 638 N.W.2d 682, 691 (Iowa 2002). Plaintiff here agrees that his property interest in his six-year appointment was created by state law. Iowa Code § 86.1. Likewise, state law sets forth requirements for setting the salary amount within the permissible salary range. Iowa Acts 1191 §§ 13, 14 (2008).

Citing to a concurring opinion, Defendants argue that the property must be "distinguishable from the procedural obligations on state officials to protect it." (Def-Brief 62, quoting *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 771 (2005)). The court in *Castle Rock* determined that the plaintiff's restraining order did not constitute a property right because it did not have an "ascertainable monetary value . . . as even our 'Roth-type property-as-entitlement' cases have implicitly required" *Castle Rock*, 545 U.S. at 766 (referencing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972)). Justice Souter's wrote a separate concurrence to reject plaintiff's legal strategy which attempted to circumvent *Roth*. *Id*. at 771. That issue is dicta that has nothing to do with the present case. Godfrey's

[18] The facts of *Bowers* have nothing in common with the present case. In *Bowers*, the plaintiff fell short of petition signatures required to force a referendum. *Bowers*, 638 N.W.2d at 687.

property interest has an ascertainable monetary value and is consistent with the principle in *Roth*.[19] *Id.*

Defendants cite *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). In *Loudermill*, the employer argued that rights defined by the legislature[20] could likewise be limited by the legislature.[21] *Id*. at 539. The Supreme Court stated that due process is a federal constitutional right, not to be limited by state legislatures. *Id*. at 541 ("The right to due process is conferred, not by legislative grace, but by constitutional guarantee.").

Instruction 28 identified the property interest quoting Iowa Acts 1191 § 13 (2008). (JA.VI-0474). Instruction 30 quoted above identified conduct that would constitute a violation of Plaintiff's statutorily created property interest. (JA.VI-0475). Instruction 31 identified the elements of the violation Plaintiff was required to prove. Instruction 33 – the due process instruction - required the jury to consider whether Plaintiff was given a

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[19] The facts of the present case are distinguished from *Roth* in that Godfrey had an established term of employment, whereas the plaintiff in *Roth* held a non-tenured position. *Id*. at 576-77; Iowa Code § 86.1. (JA.VIII-0894-895).

[20] Under Ohio's Statute, civil servants were entitled to continued employment except for good cause shown. Ohio Rev. Code Ann. § 124.11 (1984).

[21] The statute states that dismissed employees (no advance warning) be provided the reason for removal, given 10 days to appeal to the state personnel agency, and then be given a hearing within 30 days. Ohio Rev. Code Ann. § 124.34 (1984).

meaningful opportunity to respond to the proposed salary reduction prior to the reduction. (JA.VI-0475-476).

The court did not conflate substance with process. The jury was instructed to determine whether the statute that embodied Plaintiff's constitutional property interest was violated. If so, the jury was instructed to determine whether Plaintiff's due process rights were violated. These distinct findings were separately considered and recorded on the verdict form. (JA.V.VI-0622 Questions 4a and 4b).

b) Godfrey had a property interest in his salary.

Defendants argue that Plaintiff had no property interest in maintaining his salary at a prior level. (Def-Brief 63-64). They implicitly acknowledge that Plaintiff has a property right within the salary range identified in 2008 Iowa Acts 1191 section 14 – meaning the governor is required by law to follow the statute. Defendants then pivot to argue that the mandatory criteria for setting the salary in 2008 Iowa Acts 1191 section 13 are without any meaning – so a governor can do as he pleases. This argument is internally inconsistent and contradicted by the plain language of the statute. Iowa Acts 1191 § 13 (2008).

Defendants cite to *Greenwood Manor* for the principle that a property right requires a "legitimate claim of entitlement." *Greenwood Manor v. Iowa*

Dep't of Pub. Health, 641 N.W.2d 823, 837 (Iowa 2002). In *Greenwood Manor*, three nursing homes challenged issuance of a certificate of need for a fourth nursing home. *Id*. The Court held that they did not have a property right in the issuance of a certificate of need to another facility because it did not prohibit the existing nursing homes from continuing their operations. *Id*. at 838. Unlike *Greenwood Manor*, Plaintiff's appointment provided a legitimate claim of entitlement to continue as WC Commissioner pursuant to, *inter alia*, Iowa Acts sections 13-14.

Parties agree that:

> [A] state statute or policy can create a constitutionally protected property interest, first, when it contains particularized substantive standards that guide a decision maker and, second, when it limits the decision maker's discretion by using mandatory language (both requirements are necessary).

Dunham v. Wadley, 195 F.3d 1007, 1009 (8th Cir. 1999).

Here, the statute "contains particularized substantive standards that guide a decision maker" by listing four criteria to be considered in setting an appointed officer's salary. *Id.* at 1009; Iowa Code § 86.1; Iowa Acts 1191 § 13 (2008). The statute likewise contains "limits [on] the decision maker's discretion by using mandatory language" when it states that the governor "**shall** establish a salary for appointed nonelected person" by considering those four criteria. 2008 Iowa Acts 1191 § 13. *(Emphasis added).*

Defendants argue that the four criteria contained in the statute are non-essential and can be ignored. (Def-Brief 63, citing *McGuire v. Independent School District No. 833*, 863 F.2d 1030, 1035 (8th Cir. 2017)). The statute in *McGuire* gave the employee "a 'mere subjective expectancy' of continued employment." *Id*. The employee (a coach) was an at-will employee, and did not have an appointment for a term of years as Godfrey did pursuant to Iowa Code section 86.1 and Iowa Acts sections 13-14. *Id*.

The criteria in the statute sets out particularized and substantive standards to guide the governor's decision making and the mandatory language in the statute is sufficient to establish Plaintiff's property interest in his salary. *Dunham*, 195 F.3d at 1009; Iowa Acts 1191 § 13.

c) Godfrey had a property interest in a salary level free from "partisan political" considerations.

Defendants argue that Plaintiff presented "a false narrative" when he asserted that, while adjudicating contested cases and issuing appeal decisions, he functioned as a quasi-judicial officer with corresponding ethical duties to remain impartial. (Def-Brief 65-69). Reading this section of Defendants' brief should give pause to any proponent of an independent judiciary.

This argument implicitly acknowledges that Branstad's criticism of Plaintiff's performance was politically based. Plaintiff was unwilling to

abdicate his quasi-judicial duty of impartiality to comply with Branstad's political agenda. Boeyink admitted that "all of the inputs the governor got would have been from businesses, business owners, representatives of organizations who promote business climate issues in the state of Iowa." (JA.IV-2109-110[105:25-106:5]). The concern was not about Plaintiff's administration of the division but specifically his contested case rulings and their impact on workers' compensation insurance rates for businesses.[22]

Boeyink reiterated in numerous ways that the governor gave supremacy to business interests over the independence of the agency in issuing contested case rulings. "[T]he main purpose for the governor wishing to cut Mr. Godfrey's salary was his view that his performance and anti-employer bias[23] was hurting the governor's ability to create jobs, yes." (JA.IV-2229[36:10-18]).

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[22] Q: [Atty Fiedler]: Did you ever hear any criticism regarding Chris's responsibilities as they pertained to administrative rules that the department promulgated?
A: [Branstad] No.
(JA.IV-3541[62:3-6]).

[23] If there was evidence of bias in contested case rulings, the removal statute allows removal of a commissioner who exercises "gross partiality." Iowa Code § 66.26 (2011). Defendants considered the statute and determined that Plaintiff's conduct did not satisfy that criteria. (JA.IV-2234-235[41:15-42:14]).

The question of whether the Plaintiff, in his role issuing appeal decisions in contested cases, was a quasi-judicial officer was raised prior to trial. The court considered the issue at length. (JA.IV-0123-137).

> **Plaintiff Godfrey acted in a quasi-judicial capacity when he conducted de novo reviews of contested workers' compensation cases and issued appeal decisions** pursuant to Iowa Code chapters 85, 85A, 85B, 86, 87, and 17A. Iowa cases that have defined "quasi-judicial" make it clear that an agency's powers must be delegated from the legislature. The Workers' Compensation Commissioner's powers are specifically delegated by the legislature; **the Commissioner is prevented from deciding cases in ignorance of the law**.

(Id. at 62) (Emphasis added).

Defendants ask this court to reverse the District Court and hold that the ethics rules that apply to deputy commissioners in deciding contested cases do not apply the WC Commissioner when issuing appeal decisions in contested cases. (Def-Brief 66)

The legislature delegated duties to the WC Commissioner to adjudicate appeals of arbitration hearing decisions (also known as "proposed decisions"). Iowa Code § 86.24. The legislature's grant of quasi-judicial authority to the Division of Workers' Compensation is defined in greater detail in the Iowa Administrative Code.

> The Iowa workers' compensation commissioner is the executive head of the division of workers' compensation who serves a six-year term, appointed by the governor and confirmed by the senate. Two major sections within the division, compliance and

> adjudication, carry out the purpose of the division as set out by the laws of this state.

Iowa Admin. Code 876-1.1.

> **The adjudication section determines, by adjudicative means, the rights and liabilities of parties in a disputed claim by conducting hearings and rendering decisions; approving settlements in accordance with the statutes; and conducting appeals within the division**.

Id.

The Iowa Administrative Code sets out four ethical cannons for deciding contested cases. Iowa Admin. Code 481-10.29 (1)-(4) (2011).

> The code of administrative judicial conduct is designed to govern the conduct, in relation to their adjudicative functions in contested cases, of all persons who act as presiding officers under the authority of Iowa Code section 17A.11(1). . . . **This code is to be construed so as to promote the essential independence of presiding officers in making judicial decisions**.

Iowa Admin. Code 481-10.29.

Defendants argue that this does not apply to the WC Commissioner. (Def-Brief 66-68). They attempt to draw a distinction between hearings where a deputy is the "presiding officer" and appeal proceedings where, even though the WC Commissioner considers the case de novo, he is somehow not bound by the canons of administrative judicial conduct. (Def-Brief 66, n. 21). Defendants urge that the WC Commissioner is allowed to make final agency decisions in contested case proceedings "in

accordance with his own policy goals." (Def-Brief 68). Defendants offer no authority for that statement because there is none. The current WC Commissioner, appointed by Branstad, refuted Defendants' position when he testified that he is a quasi-judicial officer. (JA.V-1398[24:5-7]).

Furthermore, Defendants ignore caselaw that leaves no doubt that the WC Commissioner acts in a quasi-judicial capacity when issuing appeal decisions in contested cases.

"The decision of the workers' compensation commissioner is final agency action." Iowa Code § 86.24(5). "**The commissioner's findings have the effect of a jury verdict**, and we broadly and liberally apply those findings in order to uphold rather than defeat the commissioner's decision." *Dunlavey v. Economy Fire and Cas. Co.*, 526 N.W.2d 845, 849 (Iowa 1995).

> We have defined a judicial proceeding as 'one carried on in a court of justice or recognized by law, wherein the rights of parties which are recognized and protected by law are involved and may be determined.'. . . **It includes quasi-judicial proceedings such as those before the industrial commissioner**.

Kennedy v. Zimmerman, 601 N.W.2d 61, 65 (Iowa 1999) (emphasis added).

The WC Commissioner is "required to base his factual determinations on substantial evidence and **properly apply the pertinent legal principles to those facts in reaching a decision.**" *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005) (emphasis added).

Defendants went further than to argue that the WC Commissioner should politicize appeal decisions. They urged that he should politicize the issuance of arbitration decisions of deputy commissioners by: [1] firing or disciplining deputies (who are undisputedly bound by the code of administrative judicial conduct) who were not getting on board with Branstad's political goals,[24] and [2] review decisions by deputy commissioners even without an appeal.[25]

Plaintiff asks the Court to reject Defendants' attempts to politicize the quasi-judicial functions of the WC Commissioner and Division of Workers' Compensation. Ruling to the contrary would eviscerate legislation intended to protect injured workers.

d) Godfrey did not receive the process to which he was due.

"If a property interest in continued employment exists, then the employee is entitled to a [pre-adverse action] hearing that comports with the requirements of due process." *Bennett v. City of Redfield*, 446 N.W.2d 467, 472 (Iowa 1989). "'[T]he root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is

[24] JA.IV-3592-593[113:18-114:18], 3612[133:7-15]; JA.IV-2790[98:12-20], 2853-854[161:18-162:7].

[25] JA.IV-2790-791[98:12-99:6].

deprived of any significant property interest.'" *Id.* at 542 (emphasis in original).

Godfrey was afforded absolutely no due process. Defendants argue that hearsay from business constituents was all of the information Branstad needed to make his decision to slash Plaintiff's salary. (Def-Brief 69-70). And while they argued earlier that the requests for resignation could not be considered discriminatory acts because Branstad was not yet his employer, they now ask the Court to consider Plaintiff's December 29, 2010 meeting with the governor-elect, his performance review. (Id). This argument is advanced despite trial testimony from Boeyink, Findley and Branstad that the reduction of Plaintiff's salary was not considered until near the conclusion of the legislative session in June 2011. (JA.IV-2173[169:11-17]).

> Q. At that meeting did you support Governor Branstad's -- Governor-Elect Branstad's decision to cut Commissioner Godfrey's salary?
>
> A. That decision was not made at the meeting of December 29th.
>
> Q. That was made about July 5th; correct?
>
> A. Yes, July 5th was the meeting when the governor -- when the governor made the decision to cut Mr. Godfrey's salary.

(JA.IV-2218[25:3-11]).

Branstad did not meet with Plaintiff between December 2010 and July 11, 2011. Nor did anyone from his administration. On July 11, 2011,

Godfrey was summoned to Boeyink's office for an 11:00 meeting. (JA.IV-2258-259[65:18-66:1]). The alleged "anti-employer bias" was not discussed at the meeting. (JA.IV-2260[67:6-18]). The meeting lasted three or four minutes. (JA.IV-2261[68:12-14]). By 11:02, Boeyink had sent an email to the personnel office with instructions to reduce Plaintiff's salary. (JA.IX-100).

Branstad was restricted by statute in assessing Plaintiff's performance for purposes of setting his salary. He did not merely reduce Plaintiff's salary. He slashed it from the top of the pay scale to the bottom of the pay scale, such that Plaintiff's salary was lower than all of the deputy commissioners he supervised. This action was not based on the criteria in the statute. It was based on constitutionally impermissible factors, including Godfrey's political affiliation.

Defendants' reduction of Godfrey's salary constituted a significant and measurable deprivation. He was given no opportunity for a hearing before being deprived of a significant property interest. *Loudermill*, 470 U.S. at 542. Plaintiff received no due process.

2. Godfrey's substantive-due-process claim does not fail as a matter of law.

Plaintiff also established a violation of substantive due process. "The first step in analyzing a substantive due process challenge is to identify the

nature of the individual right involved." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002). Substantive due process "prevents the government from interfering with 'rights implicit in the concept of ordered liberty" *Id.* at 237. Godfrey had a liberty interest in property.

Once the right at issue is identified, the Court applying a rational basis standard "must determine whether the [action] is 'rationally related to a legitimate governmental interest.'" *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012). "Legitimate governmental interests" have the ring of common sense. *Id*. at 23. The interference must be "clearly arbitrary and unreasonable" with "no substantial relation to the public health, safety, morals or general welfare." *Blumenthal Inv. Trs. v. City of West Des Moines*, 636 N.W.2d 255, 263-64 (Iowa 2001).

Godfrey's salary was slashed by one-third for no legitimate reason. The due process violation was both procedural and substantive.

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

Defendants request the Court adopt a new analysis for evaluating substantive due process rights based on federal law. (Def-Brief 71). Iowa courts have already established standards for evaluating substantive due process rights. A new standard is unnecessary. *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 233 (Iowa 2018).

Defendants next cite *Kelly,* to assert that "there is no fundamental constitutional right to public employment." (Def-Brief 71, citing *Kelly v. State,* 525 N.W.2d 409, 411 (Iowa 1994)). The case did not examine substantive due process rights. Though it did state that there is "no fundamental constitutional right to public employment," none of the employees involved had an appointment to their positions for a term-of-years.

Godfrey has proven a constitutional right to his salary based on the statutory framework set out above. Deprivation of a significant portion of his salary constituted a violation of his substantive due process rights.

b) Where there is a proven property interest, non-legislative state action implicates substantive due process

Defendants identify two strands of substantive due process claims. (Def-Brief 72, quoting *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 550 (Iowa 2019)). First, in evaluating a liberty or property interest, "there must be a reasonable fit between the government purpose and the means chosen to advance that purpose." *Id*. at 550. "Second, a violation of substantive due process may arise from government action that 'shocks the conscience.'" *Id.* at 550. The present case should be considered under the first strand of analysis to determine whether there a reasonable fit between the government purpose and the means chosen to advance that purpose.

Defendants turn away from *Behm* and again attempt to alter Iowa constitutional law by applying federal law. They assert that Iowa should create a distinction between "legislative" (challenging the legislation) and non-legislative state action (challenging the conduct of a state actor). (Def-Brief 72-74). Defendants urge the Court to apply the rational basis test to the "legislative" challenges and the "shocks the conscience" test to the "non-legislative state action." Defendants argue a lower burden should be placed on a "large group" of people to prove a statute violates the constitution and a higher burden should be placed on an individual to prove a state actor violated an individual's constitutional rights.

This violates Iowa's Bill of Rights. *Bivens*-type claims "teach us that a constitutional claim is designed 'to vindicate social policies which, are aimed predominantly at restraining the Government as an instrument of popular will.'" *Godfrey*, 898 N.W.2d at 877. **"[A] government official acting unlawfully in the name of the state 'possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own**.'" *Id*. at 879 (emphasis added).

The Iowa Supreme Court "jealously guard[s] [its] right and duty to differ from the United States Supreme Court, in appropriate cases, when construing analogous provisions in the Iowa Constitution." *Hensler v. City*

of Davenport, 790 N.W.2d 569, 579 n. 1 (Iowa 2010). Plaintiff urges the Court to reject Defendants attempt to relegate individual Iowans a lesser degree of constitutional protection than those granted to the majority.

c) Applying a legislative action standard, Branstad's decision did not have a "reasonable fit" with the "legitimate government purpose" implementing policy goals that he was elected to pursue.

Defendants argue that Defendants actions satisfy the rational basis test. (Def-Brief 75). They argue that there was a "reasonable fit" between implementing Defendants' "policy goals" and "the ability to increase or reduce the salaries of those tasked with implementation." (Id).

First, nothing in the statute states its purpose is to provide a tool to advance the governors partisan political agenda. Iowa Act 1191 § 13. It is a personnel management provision directing the governor to exercise care and to apply objective standards in determining the salary level for appointed state officers.

Second, the "policy goal" involved interfering with the quasi-judicial duties of the WC Commissioner for political partisan purposes. To comply with Defendants' "goal" of making agency decisions more "pro-business" would have required violation of the administrative code of judicial conduct.

3. Defendants do not qualify for immunity.

Defendants argue that they are immune from liability because setting Godfrey's salary within the range set out in the salary act was discretionary function and the salary level was "a matter of choice." (Def-Brief 75, citing *Walker v. State*, 801 N.W.2d 548, 555 (Iowa 2011)). Defendants misinterpret the word "discretionary" as it relates to this case.

> [T]he primary factor in determining whether a particular activity qualifies as a discretionary function is whether the decision to act involves the evaluation of broad policy factors. If so, the decision is more likely to be characterized as a discretionary function.

Walker, 801 N.W.2d at 555.

Here the statute sets out the discrete, measurable objective criteria Defendants were required to consider. Iowa Code 1191 § 13. Defendants made no effort to comply with the statutory requirements when setting Plaintiff's salary. *See supra*, Div. I.A.1.

Instruction Number 34 appropriately captured the "all due care" standard. (JA.VI-0476). The jury reasonably found that Defendants Branstad and Findley did not do so.

D. No claims should be dismissed.

Plaintiff brought valid claims for discrimination, retaliation, and constitutional violations. The claims were appropriately submitted to the

jury. Plaintiff requests the Court affirm the trial court's rulings and the jury's verdict.

Division 2

No evidentiary errors deprived Defendants of a fair trial.

Godfrey does not dispute that Defendants preserved this appeal issue.

The Court reviews "most evidentiary rulings by the district court for an abuse of discretion" but "reviews hearsay rulings for correction of errors at law." *McElroy v. State*, 637 N.W.2d 488, 493 (Iowa 2001).

A. Democrat senator Dearden's conversation in which Godfrey disclosed he was gay was not hearsay.

Defendants argue that an out-of-court statement by Senator Dearden offered by multiple witnesses was inadmissible hearsay because it was offered to suggest that if the Democratic caucus heard it, "Reynolds must have heard it, too." (Def-Brief 78-80). There was no testimony from or about Reynolds relating to the Dearden story.

A statement not offered to prove as true the matters asserted in the statement is not hearsay. Iowa R. Evid. 5.801(c)(2). The court ruled that the statement was admissible because it was offered to show motive, intent, or knowledge. (JA.IV-2725[33:10-13]). Testimony about the Dearden story was offered to show that a conversation about Godfrey being gay circulated

widely at the Capitol and his sexual orientation was not a secret. (JA.IV-2725-727[33:23-35:2]).

The testimony, not offered for its truth, was not hearsay, therefore it was not prejudicial to Defendants.

B. The court properly admitted relevant and nonprejudicial evidence, and lay opinion as evidence for discriminatory motive.

1. Public-policy views and political affiliation.

a) Branstad's public-policy views.

Defendants argue that it was improper to ask Branstad his views on homosexuality, a topic at the center of and directly relevant to this case. (Def-Brief 82-83).

It was Plaintiff's burden to prove, *inter alia*, that his sexual orientation was a motivating factor for the adverse employment actions. (JA.VI-0471). Because "discriminatory motive will rarely be announced or readily apparent . . . evidence concerning the employer's state of mind is relevant in determining what motivated the acts in question." *Hamer v. Iowa Civil Rights Com'n*, 472 N.W.2d 259, 263 (Iowa 1991). Branstad's views on homosexuality were highly probative to the issue of Branstad's intent when he took adverse employment action against Plaintiff.

Branstad was not denied his first amendment rights. He spoke freely on the campaign trail and elsewhere. He served as governor until he

voluntarily left the position. The right to free speech is not a license to discriminate. Winning an election does not shield the governor from his discriminatory employment actions as Governor.

Plaintiff appropriately sought testimony from Branstad regarding his views relating to homosexuality. His views on gay rights and marriage made it more probable that his adverse employment actions against Godfrey were motivated by discriminatory animus. Iowa R. Evid. 5.401. The evidence was permissible, relevant, and highly probative.

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

i. Republican senators.

Defendants bristle that witness Matt McCoy testified regarding LGBTQ issues in the Iowa Senate from 2000 to 2008, it was his impression that the Republican senators had an "overall arching philosophy" that was "anti-gay.[26]" (Def-Brief 84). McCoy's testimony was subject to successful objections and vigorous cross-examination. (JA.V-0392-393[165:21-166:6], 0400[173:12-24], 0406-415[179:23-188:12]). Defendants were in no way

[26] Defendants had no difficulty categorizing Plaintiff as "anti-business" with absolutely no foundation. McCoy was providing first-person testimony about the environment he observed in Iowa's Senate.

prohibited from calling Republican senators to counter McCoy's testimony. They chose not to do so.

As noted above, Branstad's campaign started in 2009 and his testimony that he was insulated from politics from 2000 to 2008 was not credible. *See* Div. I.B.4.a.ii. Contemporary Republican philosophies regarding homosexuality provide useful context because they are consistent with values that Branstad articulated during his own campaign. *See* Div. I.B.4.b.

Testimony about cultural norms within the Republican Party regarding homosexuality contemporaneous to Branstad's campaign to be its leader was highly relevant. Iowa R. Evid. 5.401.

ii. 2010 RPI Platform.

The 2010 Republican Party Platform contains a number of planks that seek to limit or eliminate rights of gay people in Iowa. (JA.VIII-0180-181).

Defendants argue that Plaintiff improperly used political party association as a litmus test for motive. (Def-Brief 85-86, citing *U.S. v. Robel*, 389 U.S. 258, 264-65 (1967)).

Iowa law provides a salient comparison. "The use of racial epithets may not only support an inference of discrimination based on race, but may

also support an inference that racial animus motivated other conduct." *Farmland Foods, Inc.*, 672 N.W.2d at 745.

Branstad sought to lead a Republican Party when its primary policy paper contained many anti-gay planks. Though he claims never to have read it, he campaigned on identical policy positions. While Defendants were not known to use overt anti-gay epithets, the consistency between Branstad's campaign positions and those in the Platform provide evidence of discriminatory animus highly relevant to his adverse employment actions against Godfrey.

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

Defendants argues that that anti-gay views of people with whom they routinely communicated and upon whom they relied, should not have been allowed into evidence. (Def-Brief 86-87). In order to consider this point, it helps to know the role John Gilliland ("Gilliland") played in adverse employment actions taken against Plaintiff.

Gilliland, Vice-President of ABI, became aware of Godfrey's sexual orientation in 2006. (JA.V-1211[37:22-25]). In 2007, ABI lobbied against amending the Iowa Civil Rights Act to include protections based on sexual orientation. (JA.V-1228-229[54:19-55:4]). Gilliland personally opposed the 2009 *Varnum* decision. (JA.V-1230[56:19-23] "I was raised to - - in my

family church - - that we supported the traditional marriage between a man and a woman").

In 2010, Gilliland had access to Branstad's transition team and met with them at their offices before inauguration. (JA.V-1251-252[77:12-78:4], 1252-253[78:20-79:7]). He was a trusted advisor who met near weekly with Boeyink. (JA.IV-2134[130:5-130:17]). He lobbied Defendants to get rid of Godfrey. (JA.VIII-0106; JA.V-1251-252[77:12-78:4]). When Gilliland learned that Godfrey was planning to serve out his term, he conveyed to Branstad's staff, "Too long…" (JA.VIII-0525-526). Press Secretary Albrecht and Branstad admitted that Gilliland asked him to get rid of Godfrey. (JA.IV-3724-725[132:20-133:1]). After Branstad told the press that ABI urged him to seek Plaintiff's resignation, Gilliland provided the Governor's communications manager a "talking points" memo to manage the fallout. (JA.IX-0339; JA.VIII-0498). Gilliland may not have been on the State's payroll but he played a significant role in shaping Defendants' actions relating to Plaintiff.

Gilliland, who actively influenced Branstad with regard to Godfrey, also held discriminatory views with regard to homosexuality. His testimony provides relevant context to Branstad's decision-making. Iowa R. Evid. 5.401.

C. The court did not err in admitting evidence regarding Branstad's item veto and legislative action proposed by Republicans.

Defendants argue scrutinizing executive actions and legislative proposals is improper. (Def-Brief 88-89, citing *Des Moines Register & Tribune v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996)). Defendants raised and the District Court ruled on the issue of nonjusticiability of these actions.

> The disagreement between the parties in the case at bar is not whether Branstad or the legislature had the authority to take the action they took in accordance with constitutional or statutory authority, but rather whether the action constitutes evidence of discrimination or retaliation when it was taken. As Godfrey notes, "Defendants' conduct, not a statute, is at issue." Defendants' arguments to the contrary are without merit.

(JA.VI-2409).

D. The evidence did not prejudice Defendants, so a new trial is unwarranted.

Defendants have not identified any erroneous ruling. The District Court did not abuse its discretion in evidentiary rulings. Plaintiff requests the Court deny Defendants' request for a new trial.

Division 3

The jury instructions accurately stated the law and allowed the jury to find Defendants liable and award damages on legally proper grounds, without prejudice.

Godfrey does not dispute that Defendants preserved this appeal issue.

The Court reviews "jury instructions for the correction of errors at law." *McElroy*, 637 N.W.2d at 493. "Instructions must be read as a whole. A party is not entitled to any particular form of instruction, but merely to instructions which fairly state the law as applied to the facts." *Rumley v. City of Mason City*, 320 N.W.2d 648, 652 (Iowa Ct. App. 1982).

A. The instruction restricting the Governor's discretion to set salary did not misstate the law.

The final paragraph of Instruction 28 states,

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

(JA.VI-0474) (emphasis added).

The instruction does not prohibit the governor from considering factors in addition to the mandatory criteria. Those discretionary considerations may include partisan political purposes.[27] However, the statute contains mandatory language which cannot be supplanted with strictly partisan political purposes.

[27] Plaintiff's primary argument as it relates to partisan political purposes is that no state employee, including the governor, should be permitted to interfere with the quasi-judicial duties of the Commissioner, particularly when motivated by partisan political purposes. It is less about party affiliation than the protections that must be afforded quasi-judicial officers when deciding contested cases to preserve their independence.

While there may be some subjective components in evaluating the WC Commissioner's performance, the other three criteria set out in the statute and Instruction 28 are largely objective criteria. By stating that the governor could not make his decision "based on *strictly* partisan purposes," the last sentence in Instruction 28 reminds the jury that at minimum the governor must evaluate the statute's objective, non-partisan criteria.

Instructions 28, 30, and 31 correctly state the law.

B. The constitutional-tort instruction did not misstate the law.

In arguing that Instructions 30 through 33 were improper, Defendants seek reconsideration of legal issues addressed earlier in the brief. (Def-Brief 92). Following is Plaintiff's response to the densely packed and scarcely articulated issues in this portion of Defendants' brief.

1. Despite Defendants' characterization of the statute as the "Salary Act Process," it is not a "process." It is simply two sections of one statute that relate to one another. Iowa Acts 1191 §§ 13-14; *see also supra* Div. I.C.1.a.

2. Plaintiff had a property interest in his salary. *See supra* Div. I.C.1.b.

3. The Instruction on due process correctly stated the law. *See supra* Div. I.C.1.a.

4. The Instruction properly defined for the jury the process Plaintiff was due. *See supra* Div. I.C.1.a.

5. With respect to Instruction 31, the marshalling instruction correctly separated the elements of procedural and substantive due process

and fairly stated the law as applied to the facts. *See supra* Div. I.C.1.a.

6. The instruction correctly used a substantive-due-process-standard applicable to constitutional property interest. *See* JA.VI-2399.

7. The case cited by Defendants provides no authority regarding appropriate substantive due process instructions. (Def-Brief 92). The jury was provided appropriate instruction to determine whether Defendants' conduct violated Godfrey's substantive due process rights.

Defendants failed to identify any legal error in Instructions 30 through 33.

C. The instructions did not erroneously refer to an "employee" and "employment" relationship.

In arguing that Instructions 18 through 27 were improper Defendants seek reconsideration of the employer/employee relationship issue addressed earlier. (Def-Brief 93). Defendants' argument fails here for the same reasons set forth above. *See supra* Div. I.B.1.

D. The discrimination and retaliation instructions did not fail to specify the adverse "employment" action and did not provide a legally flawed standard.

Defendants find fault with Instructions 19 and 20 because they did not identify a discrete adverse employment action. (Def-Brief 93-96). They are essentially re-arguing that Iowa does not recognize a continuing violation doctrine. The continuing violation doctrine is a well-established principle in Iowa employment law. *See supra* Div. I.B.2 and 5.

In *DeBoom,* plaintiff alleged a single act of wrongful termination. She did not allege a continuing violation or hostile work environment. *Id*. The phrase "discrete adverse action" that Defendants' attribute to *DeBoom* does not appear in the case. The Court found reversible error because the instruction added elements to her burden of proof that were not warranted by existing law. *DeBoom*, 772 N.W.2d at 11-12, 14. The *DeBoom* case provides no assistance to analysis of instructions in Godfrey's case.

Defendants again urge this court to adopt federal instruction that Iowa law has not embraced. (Def-Brief 93-94). Defendants also argue that the instructions are flawed because Godfrey dismissed his hostile work environment claim pre-trial.[28] (Def-Brief 96).

The District Court answered both of Defendants' arguments. (JA.VI-2383).

Defendants also complain that Instruction 21 was improper because the phrase "material consequences to an employee" was not defined. (Def-Brief 95).

[28] The pleading stated, "This dismissal does not affect, and is not intended to effect, any of Plaintiff's other causes of action including: sexual orientation discrimination, retaliation, and due process." (JA.IV-0660)

The language in the instruction is ordinary and given context such that a reasonable juror could apply the law to the facts of this case. "Words in an instruction need not be defined if they are of ordinary usage and are generally understood. A meaning of a word can be ascertained by its context." *State v. Weiss*, 528 N.W.2d 519, 520 (Iowa 1995).

Plaintiff requests that the Court hold that that instructions 19 through 21 are in accord with existing Iowa law.

E. The retaliation instructions did not fail to specify the protected activity and did not provide a legally flawed standard.

Defendants object to Instruction 20 to re-argue that Plaintiff's refusal to resign did not satisfy the opposition to discrimination because Godfrey did not explicitly tell Branstad the requests constituted discrimination or retaliation. (Def-Brief 96-97). Defendants' misapprehend the opposition requirement.

Branstad's knowledge of Plaintiff's sexual orientation was proven by circumstantial evidence. *See supra* Div. I.B.4.a. Plaintiff's refusal to resign constituted opposition to that discrimination. *Channon*, 629 N.W.2d at 862. *See supra* Div. I.B.5.a. Instruction 20 properly defined "protected activity."

F. The instructions did not conflate damages standards.

Defendants allege that Instruction No. 35 did not advise the jury that emotional distress damages must relate to the conduct "associated with each

distinct claim." (Def-Brief 98, citing *Dutcher v. Randall Foods*, 546 N.W.2d 889, 894 (Iowa 1996)).

Instruction 35 states in part, "In assessing emotional distress damages you should consider the nature, character and seriousness of the emotional distress experienced by Plaintiff, **caused by the Defendants' actions**." (JA.VI-0477).

In *Dutcher*, the Court found that the alleged damages related to the plaintiff's filing of the lawsuit (her husband's family would no longer talk to her as a result) rather than the employer's conduct. *Dutcher*, 546 N.W.2d at 894. No evidence of this sort is present in Godfrey.

Defendants argue that the Plaintiff did not present enough evidence to submit the constitutional-tort damages to the jury. (Def-Brief 98, citing *Doe v. Central Iowa Health System*, 766 N.W.2d 787, 791-94 (Iowa 2009)).

Defendants attempt to recast Plaintiff's claim for emotional damages away from garden-variety to extreme disability as was the case in *Doe*.[29]

Godfrey was not required to disclose medical records to claim garden-variety emotional distress. *Fagen v. Grandview University*, 861 N.W.2d 825, 836 (Iowa 2015). Garden-variety emotional distress is "the emotional suffering any normal person would have experienced because of the [harm] he endured, and not as a specific psychiatric or psychological condition." *Id*.[30] While Justice Mansfield issued a dissent in *Fagen* rejecting use of

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[29] Doe's non-employment breach of privacy claim is not directly applicable to Godfrey's employment law claims. However, the *Doe* Court held open the potential for garden-variety emotional distress claims even in a case such as Doe's. "Doe is not required to produce expert testimony . . . of emotional distress to the jury if causation is so obvious that it is within the common knowledge and experience of a layperson." *Doe*, 766 N.W.2d at 795. The facts in Doe required it. Doe's claim for breach of privacy occurred during his hospitalization following a suicide attempt. *Id*. at 794. His mother's recent death was one cause of his suicide attempt. *Id*. at 791. Two months later a sexual harassment complaint was lodged against him. *Id*. Following investigation, he was disciplined. *Id*. Afterwards he felt uncomfortable around co-workers and transferred to another work-site. *Id*. Given these extreme, contemporaneous events, the Court reasoned that his severe emotional distress was unlikely within the common knowledge and experience of a layperson. These factual differences reinforce the legal distinction between the Doe and Godfrey.

[30] This definition of garden-variety is consistent across jurisdictions. "[T]he generalized insult, hurt feelings and lingering resentment which anyone could be expected to feel given the defendant's conduct." *Flowers v. Owens*, 274 F.R.D. 218, 225–26 (N.D. Ill. 2011). "[T]he distress that any healthy, well-adjusted person would likely feel as a result of being so victimized." *Kunstler v. City of N.Y.*, 2006 WL 2516625, at *9 (S.D.N.Y. Aug. 29, 2006).

garden-variety emotional damages in personal injury cases, he acknowledged that he saw "the policy arguments for a garden-variety exception in the employment litigation field . . ." *Id*. at 841.

Plaintiff testified to his emotions and the distress caused by Defendants' actions. He did not testify to any specific medical condition associated with those emotions. The evidence was sufficient to support his claim for emotional distress damages and the instruction for it was proper.

G. The instructions were not flawed and did not prejudice Defendants.

Defendants failed to identify any errors in the instructions. Plaintiff requests the Court deny Defendants' request for reversal.

Division 4

Rulings regarding Godfrey's medical condition did not deny Defendants their right to present a full and fair defense.

Godfrey does not dispute that Defendants preserved this appeal issue.

"[B]ecause this case involves the statutory interpretation of Iowa Code section 622.10, [the Court reviews] for corrections of errors at law." *Fagen*, 861 N.W.2d at 829. Privacy is a constitutional issue that is reviewed de novo. *Id*. Iowa Code section 622.10 is "consistently" interpreted "liberally to accomplish its goal of fostering candid communications between doctor and patient." *Id*.

A. Godfrey did not waive the physician-patient privilege.

Plaintiff sought garden-variety emotional distress damages. Defendants did not have the right to access Plaintiff's medical records at trial. The District Court played an appropriate role as gatekeeper for the admissibility of mental health records and did not prejudice the development of a full and fair defense.

Defendants argue that Plaintiff waived the physician-patient privilege because he made his condition an element of his claim. (Def-Brief 100, citing *Fagen*, 861 N.W.2d at 832). Defendants cite to *Fagen's* discussion about Iowa Code section 622.10 and the parameters of releasing medical records during litigation. However, the legal analysis in *Fagen* concludes that an individual is not required to disclose medical records to claim garden-variety emotional distress. *Fagen*, 861 N.W.2d at 836.

Defendants argue that Plaintiff's damages claim provided defense with unlimited access to his mental health records. (Def-Brief 100-01 citing *Stender v. Blessum*, 897 N.W.2d 491, 515 (Iowa 2017)). The *Stender* case involved extreme physical and emotional violence and is easily distinguished from the present case.

The jury received damages instructions on Stender's pain and suffering claims that included "**future physical and mental pain and**

suffering, and future loss of use of the full mind and body." *Id*. at 515 (emphasis added).

The pain and suffering Stender endured is not the type of emotional suffering a normal person would ever experience.[31] Pronounced and severe psychiatric conditions were at issue. An expert offered testimony on her condition. A case involving extreme physical and mental assault is not on point with Godfrey's employment law case.

Defendants argue that Plaintiff sought treatment for depression related to Defendants actions in this case. (Def-Brief 101). The mere fact of seeing a therapist or psychiatrist does not remove Plaintiff's emotional response from the same type of emotional response any normal person would have experienced as a result of the discrimination, retaliation and violation of due process rights he endured.

Mental health treatment should not be stigmatized. Many people with severe mental health conditions never seek treatment. Many emotionally healthy people seek treatment to remain healthy. To signal to victims of discrimination that filing a claim for discrimination will require disclosure of

[31] Stender was subjected to such an extreme, shocking, and prolonged physical and sexual assault that the court devoted a full page of its decision to describe the gruesome details. *Stender*, 897 N.W.2d at 499.

the individual's entire mental and physical health history will cause a chilling effect on legitimate claims of discrimination.

Plaintiff did not claim a specific psychiatric injury or disorder, or unusually severe distress. He made no claim for past or future medical expenses, or loss of full mind and body. His right to privacy is intact.

Prior to trial, Defendants sought to exclude all evidence linking Plaintiff's emotional distress without medical testimony. (JA.IV-1826-827). Following a hearing on Motion in Limine ("MIL") No. 24, the Court determined that the motion would not be granted because

> [a]t argument on the motions Defendants concede Godfrey may testify as to the symptoms he experienced and his belief as to their connection to the Defendants' conduct but he may not testify as to any medical diagnosis that has been reached by a physician.

(Id).

Early in the course of discovery, Plaintiff complied with an order to produce a medical waiver for his mental health records to Defendants. (JA.IV-0171-183). As a result, Defendants were in possession of Plaintiff's mental health records. Plaintiff sought to prohibit Defendants from use of his medical records at trial. (JA.IV-1803-804). The ruling put controls on the admission of Plaintiff's medical records but did not prohibit use or

admissibility of the records. (Id). Though MIL No. 24 was deemed "granted," at heart the ruling contained a huge caveat.

> It is certainly not appropriate to simply conclude all of the records are admissible because Godfrey has placed his mental health condition at issue. On the other hand, this Court can certainly imagine circumstances under which portions of the records would be both relevant and admissible. **As suggested by Defendants, it is appropriate for the Court to be "the gatekeeper of the ultimate admissibility of the evidence . . . at trial" after assessing the specific records Defendants seek to admit.**

(JA.IV-1804)(Emphasis added).

The Court explained precisely how Defendants could exploit the caveat.

> For example, statements "made for medical diagnosis or treatment . . . describe[ing] medical history [or] past or present symptoms or sensations" are considered to be exceptions to the hearsay rule. Rule 5.803(4). If Godfrey testifies at trial as to past or present symptoms or sensations and the medical records reflect his statements to his doctors were inconsistent, that portion of the records would likely be admissible.

(JA.IV-1804 n.5).

Before and during trial, the District Court made it clear that it intended to serve as gatekeeper regarding whether Plaintiff would exceed the boundaries of garden-variety emotion damages such that Defendants would be permitted to use Plaintiff's medical records on cross-examination. (JA.V-2210-212[99:22-101:10]).

At trial, Plaintiff sought recovery for emotional distress, humiliation, and other similar non-economic damages. (JA.V-2233-2241[122:22-130:25]). He testified to normal feelings anyone would have due to job insecurity and an unexpected 35 percent pay cut: apprehension, isolation, hurt, fatigue, inadequacy, loss of interest, etc. (Id.) None of these feelings rise to the level of an independently diagnosable condition. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., 2013).

Following Plaintiff's direct testimony the Court determined that Plaintiff's testimony did not exceed the boundaries of garden variety emotional distress. (JA.V-2326-330[11:11-15:14]). *See also* JA.VI-2414.

Even though Defendants were not permitted to enter the medical records into evidence at will, the District Court allowed them to cross-examine Plaintiff using content of the medical records.

> Mr. Harty may ask questions that he believes are pertinent to exploring the nature and extent of the garden-variety emotional distress Mr. Godfrey claims to have experienced. The fact that some of the questions he asks may be informed by facts that he learned from the mental health records doesn't matter.

(JA.V-2328-329[13:24-14:4]).

Despite this broad grant of permission to use information from the medical records, Defendants did not make further request to enter the

medical records into evidence. Represented by skilled defense counsel, Defendants did not request admission of specific medical records that fell within the caveat offered by the District Court. The only conclusion that can be drawn from Defendants' case presentation is that Godfrey did not testify to past or present symptoms or sensations that were "inconsistent with the medical records or statements to his doctors." (JA.IV-1804 n.5).

Plaintiff's closing argument regarding emotional distress was also within the boundaries of garden variety emotional distress damages. (JA.VI-0551-553[68:5-70:11]). Though Defendants conclude their argument by taking issue with some of the specific terms used in Instruction No. 35, the instruction read as a whole is consistent with Plaintiff's claim for garden variety emotional distress damages.

B. Godfrey did not engage in discovery misconduct that warranted a sanction precluding him from offering "emotional-distress" evidence.

In this brief point, Defendants re-argue their pre-trial Motion for Sanctions to assert that the District Court should have prohibited Plaintiff from providing testimony about his emotional distress based on his refusal to answer questions at his deposition. (Def-Brief 104-09). The illegitimacy of this argument is exposed by the following timeline.

May 24, 2012	Defendants filed a Motion to Compel Plaintiff's medical records.

On June 6, 2012	Plaintiff resisted asserting Plaintiff's right to privacy in the context of a garden variety emotional distress claim.
July 9 – 11, 2012	Plaintiff's deposition was taken.
September 4, 2012	Court ordered Plaintiff to sign medical release. (JA.I-0305-306).
August 1, 2018	Discovery closed for Defendants. (JA.I-1843).

When his deposition was taken in July 9-11, 2012, Plaintiff's resistance to Defendants' motion to compel his medical records was on file and awaiting a hearing and ruling. Plaintiff had a good faith belief that the court would not require him to waive physician-patient privilege. He declined to answer questions based on the status of pleadings at that time.

Defendants argue that Plaintiff's counsel's instruction to her client not to answer was frivolous and a knowing disregard of Rule 1.708(1)(b). (Def-Brief 106). A plaintiff's right to privacy is not frivolous and Plaintiff's counsel had a duty to protect her client from unwarranted invasions of privacy. Furthermore, it was within Defendants' power to suspend the deposition to seek an order compelling Plaintiff to respond to questions. Iowa R. Civil Proc. 1.708(2)(b).

On September 4, 2012, the Court ordered Plaintiff to provide Defendants with a waiver to obtain his medical records. Plaintiff provided Defendants with a medical waiver so they could obtain the records that the

Court ruled discoverable. (JA.IV-0171-184 – 2015 and 2018 Plaintiff's medical releases provided to Defendants). As a result, Defendants gained possession of Plaintiff's mental health records. (JA.IV-0178-179 – Summary of medical records exchanged). The District Court noted that "Godfrey arguably provided more information than required." (JA.IV-0656).

The District Court observed that Defendants never sought to re-depose Plaintiff following the 2012 order regarding Plaintiff's mental health records.

> The discovery deadline for the Defendants was August 1, 2018. Had Defendants demanded a continuation of Godfrey's deposition prior to that date it is likely the Court would have compelled him to appear for a continued deposition. They did not make such a request. Accordingly, Defendants' motion for sanctions is denied.

(Id).

Defendants had six years to seek a court order requiring Plaintiff to answer questions regarding his mental health. They never did. Instead, they made the strategic decision to file a Motion for Sanctions less than a month before trial attempting to exclude his emotional distress claim. The District Court did not abuse its discretion in denying Defendants' Motion for Sanctions.

C. Excluded evidence regarding Godfrey's medical condition, including emotional health, was not relevant.

Plaintiff testified to experiencing garden variety emotional distress. He did not make claims for past or future medical expenses, lost wages, or lost earning capacity. He did not allege that he developed a psychiatric disorder due to discrimination. No medical expert provided opinions about the severity of his condition. Once again relying on *Stender*, Defendants argue that Godfrey placed his condition at issue. (Def-Brief 109-16). For the reasons discussed above, *Stender* has no applicability to Godfrey's case. *See supra* Div. 4.A.

Defendants argue that the 2012 ruling requiring Godfrey to turn over his medical records entitled them to put on evidence of Plaintiff's baseline psychological condition. (Def-Brief 109). That ruling was based on the judge's explicitly stated belief that Plaintiff would seek damages for lost wages, loss of earning capacity, loss of benefits and other emoluments of employment. (JA.I-0304-305). During the course of discovery and extensive litigation in years following this ruling, Plaintiff's claims were modified.

The jury was appropriately instructed to base all damages on the causal relationship between Defendants' actions and Plaintiff's emotional distress. With regard to due process, the jury was required to determine whether the "Defendants' decision to reduce Plaintiff's salary was the cause

of damages to the Plaintiff." (JA.VI-0475-476). That instruction was reinforced. (JA.VI-476 – "As to element 3 of Instruction No. 31, the Defendants' conduct is a cause of the Plaintiff's harm if, but-for the Defendants' conduct, the harm would not have occurred."). Instruction 35 reinforces the causation standard for all claims emphasizing the nexus between Defendants' actions and damages.

Defendants again cite to *Dutcher* to argue that Plaintiff did not establish the causal relationship between Defendants' actions and his emotional distress. (Def-Brief 111). The *Dutcher* case stands for the principle that a plaintiff cannot recover for the stress of litigation. *Dutcher*, 546 N.W.2d at 894. The jury here was instructed not to consider the stress of litigation. (JA.VI-0477 – "[Plaintiff] is not entitled to recover for emotional distress caused by the stresses of litigation, including the stresses associated with the trial of his claims.").

Defendants next argue that Plaintiff's medical condition was relevant. (Def-Brief 111, citing *Pexa v. Auto Owners Ins. Co*., 686 N.W.2d 150, 158 (Iowa 2004)). *Pexa* brought a personal injury case seeking pain and suffering including "past and future damages for loss of use of body." *Id.* at 155, 158. Garden variety emotional distress damages were not sought or addressed in the case.

Defendants offered 294 pages of Plaintiff's physical and mental health records into the court record. (Def. Offer of Proof 7/8/19). In this argument, Defendants cherry-picked references to the medical records. Using string cites, they lump together non-diagnostic symptoms to make Plaintiff's condition look far more severe than the records would fairly reflect. (Def-Brief 112, n. 36-37). They also mingle references in treatment records before and after December 2010. (Def-Brief 112-13, n. 38-40).

Though Defendants argue that Plaintiff struggled with chronic emotional issues throughout his life, defense counsel are not medical experts. Defendants did not name a medical expert or procure a medical expert report. Defendants offer only uninformed, biased, and speculative assumptions based on their non-expert review of Plaintiff's medical records. This is precisely the prejudice Plaintiff sought to prevent in requesting the Court prohibit use of Plaintiff's medical records. Even if the District Court permitted Defendants to use the medical records, Defendants had not developed or prepared any means of presenting this evidence to the jury.

Defendants erroneously argue that they were prevented from cross-examining and impeaching Plaintiff with regard to his emotional distress claims. The District Court appropriately prohibited use of Godfrey's medical records unless and until Defendants could establish he testified in a manner

inconsistent with the content of the records. *See supra* Div. 4.A. Defendants did not utilize the methodology allowed by the Court's ruling. The District Court is not to blame for Defendants' decision not to use Plaintiff's mental health records to cross-examine him with regard to his emotional distress claims. The District Court did not abuse its discretion.

Division 5

The $1,500,000 damages award is not the product of passion and prejudice.

Godfrey does not dispute that Defendants preserved this appeal issue.

"[R]eview of a court's ruling on a motion to amend the verdict should be for abuse of discretion." *Anderson v. Anderson Tooling, Inc.*, 928 N.W.2d 821, 826 (Iowa 2019).

A. Evidence was sufficient to support the award.

Civil rights violations cause a special kind of anguish:

> The right which is violated by an employer which discriminates on the basis of a protected characteristic is not the employee's right to the job, but the employee's right to equal, fair, and impartial treatment, the violation of which frequently results in a significant injury to the victim's dignity and a demoralizing impairment to his or her self-esteem.

Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1232-33 (3d Cir. 1994)). "A victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw." *Id.*

The amount of damages awarded is peculiarly a jury, not a court, function. *Gordon v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999). A jury's verdict on damages should only be disturbed if it is "'flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.'" *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 292 (Iowa 1994).

Defendants argue that the emotional distress damages were excessive. (Def-Brief 116, citing *Jasper v. H. Nizam*, 764 N.W.2d 751, 773 (Iowa 2009)). In *Jasper*, an employee was terminated for disagreeing with her employer over appropriate staffing levels at the day-care facility where she worked. The Court held that $100,000 in damages was not supported by the evidence because the employee had only worked for the employer for a few months, there was no specific term of employment, and the emotional distress was restricted to the first days and months following the termination. *Id.* at 773.

The *Jasper* case is not comparable to the harm suffered by Plaintiff in the present case. Plaintiff's testimony regarding the harm he suffered is substantiated by the persistent and shocking actions of Defendants.

B. The award is not excessive.

Defendants' argue that a new trial should be granted because the damages were excessive and appear to have been influenced by passion or prejudice. (Def-Brief 117-18).

A new trial may be granted only if Defendants shows that their substantial rights were materially affected by excessive damages influenced by passion or prejudice. Iowa R. Civ. Proc. 1.1004(4). "Passion is the state of mind produced when the mind is powerfully acted upon and influenced by something external to itself [and] ... is one of the emotions of the mind known as anger, rage, sudden resentment, or terror." *WSH Properties, LLC v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). An "evidentiary basis for the jury's assessment of damages dispels any presumption that the excessiveness of the verdict was motivated by passion." *Id*. at 50-51.

In the present case, the highest elected official in the State and his staff violated the law when they slashed Plaintiff's salary by 35 percent without reason or notice, and based, in part, on his sexual orientation. Abundant evidence was presented to the jury that this action was motivated by discriminatory intent. The discriminatory and retaliatory acts continued. *See* Div. I.B.3.

The damage award is supported by objective and substantial evidence. Defendants have offered no evidence that their substantial rights were materially affected or that the jury was influenced by passion or prejudice.

No amount of money can truly make up for enduring the degrading treatment Plaintiff was subjected to during the Branstad administration. Damage awards are not a scientific matter of determining some absolute "amount" for the harm; it is a matter of weighing moral values and determining the consensus of the community, as represented by the jury.

The job of the jury is to determine and apply the conscience of the community on a matter for which there is no exact "right" answer. *See Webner v. Titan Dist., Inc.*, 101 F. Supp. 2d 1215, 1226 (N.D. Iowa 2000). This Court has "pointed out many times that comparison of verdicts in different cases is not helpful in determining the propriety of an award in a given case—each must be determined upon the evidence therein." *Wagaman v. Ryan*, 142 N.W.2d 413, 420 (Iowa 1966).

Defendants list various cases to support their argument that the jury's verdict was excessive. The diversity of facts in each of those cases underscores the caselaw that the facts of each unique case must drive evaluation of the jury's award. While any exact comparisons to other cases are impossible, multi-million-dollar results are not terribly unusual in civil

rights cases. Plaintiff could list an equal number of cases where the jury's verdict equals or exceeds the verdict in this case. Here are a few comparable cases:

- The jury in *Anderson v. State*, No. LACL131321 (Polk County 2017) valued a woman's emotional distress suffered on account of sexual harassment and retaliation at $2,195,000.
- After a jury verdict that included $1,056,000 in emotional distress damages for one plaintiff, the University of Iowa paid $6.5 million to settle *Greisbaum & Meyer v. State*, Nos. LACL134713 and LACL133931 (Polk County 2017) for claims of gender and sexual orientation discrimination, as well as retaliation.
- A central Iowa jury decided a woman who was sexually harassed endured past and future emotional distress valued at $1,800,000. *Renneger v. Manley Toy Direct*, LLC, 4:10-cv-00400 (S.D. Iowa 2015).
- A nursing home paid $4 million to settle the sex discrimination, harassment, and retaliation case of a West Des Moines woman who had been its Chief Operating Officer. *See Iowa Supreme Court Attorney Disciplinary Bd. v. Stowers*, 823 N.W.2d 1, 5 (Iowa 2012).
- A Polk County jury found an Ames woman had sustained over $2.5 million in emotional distress damages as a result of sexual harassment, discrimination and retaliation. *McElroy v. State*, CL 74459 (Polk County 2003).

Ultimately, comparison of verdicts is of limited value. "Our legal system has not attempted to set schedules of presumptive awards for various types of injuries, and a court cannot and should not do that under the guise of determining 'comparability.'" *Zurba v. United States*, 247 F. Supp. 2d 951, 962 (N.D. Ill. 2001). The trial court correctly judged this verdict on its

own merits—on the evidence presented in the courtroom—and not by comparing it to fact patterns in other cases where it did not see the witnesses and hear the evidence.

C. The evidentiary rulings did not provoke the jury to make an excessive award.

Here Defendants bundle their complaints about the District Court's evidentiary rulings hoping that together their grievances will appear sturdier than each complaint standing alone. Defendants rely on *Goettelman v. Stoen*, 182 N.W.2d 415, 421 (Iowa 1970). (Def-Brief 119-20). The *Goettelman* Court determined that there was not a rational relationship between evidence presented to the jury on future wealth accumulation and the amount awarded. Id. Instead, the jury was biased for plaintiff based on testimony regarding defendant's drinking and philandering. *Id*.

In the present case, there is no inconsistency between the evidence presented and the damages awarded. Individually and cumulatively, the evidentiary rulings provided a fair presentation of the evidence and concluded with a just result.

Division 6

Godfrey did not engage in misconduct, did not refuse to proceed with his case-in-chief, and Judge McCall did not force an illegal venue change, depriving Defendants a fair trial.

Godfrey does not dispute that Defendants preserved this appeal issue.

A decision to grant or deny a motion for change of venue is reviewed for correction of errors at law. *Becker v. Wright*, 540 N.W.2d 250, 253 (Iowa 1995).

In Defendants final argument, they take umbrage with the mid-trial change in venue brought about by a joint motion of the parties. They fail to articulate any prejudice that resulted.

The Historic Courthouse was under construction at the time of the trial. The environment had dirt and air particulate associated with renovation of an aging building. While court administration had taken some measures to control and improve air quality, the efforts were not sufficient to prevent ill effects.

On April 11, 2019, Defendants wrote to the District Court reporting that after just a couple hours in the courthouse the defense team was

"experiencing respiratory issues." (JA.VI-2424). They now argue that by the time trial commenced air quality was much improved.[32]

Regardless of the defense team's response, Plaintiff was profoundly impacted when his attorney of record since the commencement of this litigation in 2012 became unable to represent him due to her response to the air quality in the building. Plaintiff's lead attorney left the courtroom June 7, 2019 and was unable to return on orders from her pulmonologist.

On more than one occasion, Attorney Paige Fiedler raised her concern regarding prejudice to Plaintiff proceeding without the only attorney who had a full understanding of his case. (See e.g. JA.IV-3218-3222[7:11-11:7])

Defendants at that time seemed to understand the gravity of what was at stake and wanted the trial to continue. They responded Fiedler's plea: "Your Honor, just briefly for the record. . . . We have never opposed Ms. Conlin's request for an accommodation. We do not proceed opposing her request for accommodation to the extent it's renewed." (JA.IV-3221[10:17-23]).

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[32] In their JNOV Motion, before the District Court made public JNOV Ruling Exhibit A, Defendants made no mention of an alleged distinction in air quality before and during trial in their JNOV brief. (JA.VI-0840 "Defense counsel experienced no health problems or concerns from the air quality.").

Now Defendants complain that they were prejudiced by the delay in the trial. Their complaints reflect a literal willingness to exploit someone's illness in an effort to gain advantage. Defendants have offered no authority or evidence of prejudice due to the unavoidable, minor delay in the trial.

The Joint Motion for Change of Venue was signed by lead defense counsel. (JA.V-0185-186). Defendants' regret over the decision to join in the motion, does not generate reversible error before this court.

Plaintiff filed his original petition on January 11, 2012. (JA.I-68-77). Interlocutory appeals delayed the trial but the case was set to proceed to trial on January 14, 2019. (JA.I-1843).

On August 22, 2018, Defendants asked the Court to extend the trial date again. (JA.I-2184). The reason was that George LaMarca, who had "serves as the lead attorney for Defendants" had sent his clients a letter "informing them that he had to withdraw from this case for health reasons." (JA.I-2185). They argued that, "Substantial justice will be more nearly obtained if a continuance is allowed, so the lead trial attorney of Defendants' choice will have adequate time to prepare for trial and will be available to participate in the trial as lead attorney for Defendants." (JA.I-2371-373).

The Court considered Defendants' Motion:

> [A]s suggested by counsel for the Defendants, there is perhaps no better reason to continue a case than an attorney's inability

> to continue representation due to health reasons. While there was literally a team of attorneys representing the Defendants, LaMarca was lead counsel, with the team assembled and led by him. Forcing the Defendants to proceed to trial without the assistance of their chosen attorney would deny Defendants "substantial justice".

(JA.I-2372). With that reasoning, the Court granted Defendants' Motion to Continue. (Id).

Defendants made their Motion to Continue when trial that was not scheduled to commence for nearly five months. The Order continuing the trial provided Defendants ten months to prepare for trial.

Accusing Plaintiff of using "dilatory tactics" with full knowledge that the modest delays were due to the hospitalization of his lead counsel is beneath the dignity of any conscientious practitioner of law.

Conclusion

Plaintiff-Appellee respectfully request that the Court affirm the District Court judgment in its entirety. Alternately, this Court should reverse the judgment and remand for a new trial with Judge McCall.

Request for oral submission

Plaintiff-Appellee respectfully request oral argument.

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Certificate of compliance

with type-volume limitation*, and typeface and type-style requirements

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

[X] this brief contains 17,393 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) ***as allowed by the Court's 9/2/2020 Order granting Plaintiff-Appellee's Motion to File an Over-length Brief.***

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

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

/s/ Jean Mauss

Certificate of filing and service

I hereby certify that on October 14, 2020, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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