IN THE IOWA DISTRICT COURT FOR POLK COUNTY

POLLY CARVER-KIMM, Plaintiff, v. KIM REYNOLDS, PAT GARRETT, GERD CLABAUGH, SARAH REISETTER, SUSAN DIXON, and STATE OF IOWA, Defendants.	CASE NO. LACL148599 **ORDER RE: DEFENDANTS' MOTION FOR PARTIAL DISMISSAL**

The court has before it defendants' motion for partial dismissal of plaintiff's second amended petition. Plaintiff resisted the motion. The court held a hearing on October 10, 2021. Thomas Duff appeared on behalf of the plaintiff. Polly Carver-Kimm also appeared. Assistant Attorney General Samuel Langholz appeared on behalf of defendants.

I. BACKGROUND FACTS.[1]

Plaintiff, Polly Carver-Kimm ("Carver-Kimm"), was hired in 2007 by the Iowa Department of Public Health ("IDPH") as the Public Information Officer.

[1] The facts are taken from the allegations in the second amended petition. On a motion to dismiss the court must accept as true the petition's well-pleaded factual allegations, but not its legal conclusions. *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014).

Her title changed to communications director during her tenure, but she held the same position with the same duties through March 2020.[2] Until March 2020, Carver-Kimm was in charge of all IDPH communications, including public information requests and COVID-19 related communication.[3] During these periods defendant Kim Reynolds was the Governor of the State of Iowa; defendant Pat Garrett was the communications director for Governor Reynolds; defendant Gerd Clabaugh was the director of the IDPH; defendant Sarah Reisetter was the deputy director of the IDPH; and Susan Dixon was the bureau chief of the policy and workforce services division of IDPH.[4]

In early March 2020, the State activated emergency protocols because of the COVID-19 pandemic.[5] Those protocols included activating the emergency command center ("ECC") and the use of ECC email addresses for COVID-19 related communications instead of the normal State of Iowa email addresses.[6] The normal process for complying with open records requests under Iowa Code chapter 22 for emails was to contact the office of the chief information officer and request that they compile the emails responsive to the request.[7] The requested documents

[2] Second Amended Petition (Sec. Amend. Pet.) ¶ 5.
[3] *Id.* at ¶ 6.
[4] Sec. Amend. Pet. at ¶¶ 2-3C.
[5] *Id.* at ¶ 7.
[6] *Id.*
[7] *Id.* at ¶ 8.

were then gathered internally from staff. After the emails and documents were compiled, Carver-Kimm would forward them to Heather Adams, the Assistant Attorney General assigned to the IDPH, for review and redaction. After Adams completed her review, Carver-Kimm would produce the approved emails and documents to the requesting party.[8] During the 13 years that Carver-Kimm worked for IDPH, the governor's office was never involved in this process. Carver-Kimm alleges that at the "direction and behest" of Governor Reynolds and Garrett, IDPH sought to "slow, stifle and otherwise divert the free flow of information to the media (and public) concerning the spread of COVID 19 and the State of Iowa's response to the ongoing pandemic."[9]

On at least one occasion, Garrett told Carver-Kimm to "hold" the production of records already approved by Adams.[10] The record in dispute was a list of questions to be used as part of the Test Iowa website evaluation to address whether someone needed to be tested for COVID-19.[11] In early March 2020, Carver-Kimm was informed by Reisetter that all press releases should go through the governor's office.[12] On March 12, 2020, all media inquiries related to COVID-19 were

[8] *Id.*
[9] *Id.* at ¶ 8A.
[10] Sec. Amend. Pet. at ¶ 9.
[11] *Id.*
[12] *Id.* at ¶ 10.

rerouted through Reisetter.[13] On March 13, 2020, when Reisetter complained to Carver-Kimm about the volume of media inquiries related to COVID-19, Carver-Kimm offered to resume her normal duties. She told Reisetter that she had experience with such media inquiries and it was easier for her to reassume this responsibility.[14] Reisetter responded that such inquires may be easy for Carver-Kimm to handle, but they were not easy "for other people."[15] After this, Amy McCoy, legislative liaison for IDPH, began handling COVID-19 related media inquiries. Carver-Kimm was told this change was made because McCoy was working out of the state emergency operations center ("SEOC").[16]

On March 17, 2020, Carver-Kimm was moved to the SEOC but was not asked to resume COVID-19 related media responses.[17] In early April 2020, Carver-Kimm received a request for emails from specific IDPH email addresses relating to COVID-19. The email addresses were the state's normal email addresses, not the ECC email addresses.[18] Carver-Kimm asked Assistant Attorney General Adams whether the ECC emails should be produced. Adams eventually confirmed that the ECC emails should be included in response to this specific

[13] *Id.* at ¶ 11.
[14] *Id.* at ¶ 12.
[15] *Id.* at ¶ 13.
[16] *Id.*
[17] *Id.* at ¶ 14.
[18] *Id.* at ¶ 15.

request.[19] Although similar requests were later made by other news agencies, the ECC emails were never again searched and responsive documents in the ECC emails were never produced.

In April 2020, Garrett complained that Carver-Kimm was posting the daily new case numbers to the IDPH website prior to the governor's press conference.[20] On April 19, 2020, Carver-Kimm emailed Reisetter stating that she had only done this once several weeks before, and thus she felt she was being accused of something she did not do.[21] On April 20, 2020, Director of IDPH Clabaugh told Carver-Kimm that she was no longer allowed to update the IDPH website.[22]

During the week of April 21, 2020, Carver-Kimm informed her supervisors that a news reporter had brought to her attention the alleged unsanitary working conditions and lack of social distancing at the SEOC.[23] Multiple persons, including Clabaugh, demanded the name of the journalist who made these observations. When Carver-Kimm refused to give the name of the journalist, more assigned job duties were taken from her including being in charge of social media and working with the counties and local government entities.[24]

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[19] Sec. Amend. Pet. at ¶ 16.
[20] *Id.* at ¶ 17.
[21] *Id.*
[22] *Id.* at ¶ 18.
[23] *Id.* at ¶ 19.
[24] *Id.*

In May 2020, Carver-Kimm fulfilled an open records request submitted by Iowa Public Radio.[25] Later that month, the New Yorker and USA Today made similar requests. Carver-Kimm informed the New Yorker and USA Today that if they slightly modified their requests, she could immediately produce the emails that had already been approved for release to Iowa Public Radio. The New Yorker and USA Today modified their requests and later asked Carver-Kimm to send them all responses to open records requests submitted by other news agencies. Carver-Kimm did so because this was a common practice in state government.[26]

In late May 2020, the New Yorker began asking questions critical of the state hygienic lab referencing the documents produced by Carver-Kimm.[27] Reisetter sent her an email questioning how the New Yorker received those documents. When Carver-Kimm responded, Reisetter asked whether producing the documents "was even legal."[28] On June 4, 2020, Carver-Kimm was no longer allowed to respond to any open records requests, including those dealing with COVID-19.[29] On June 15, 2020, the New Yorker published an article critical of the company running "Test Iowa" utilizing the previously released emails.[30] On

[25] *Id.* at ¶ 20.
[26] Sec. Amend. Pet. at ¶ 21.
[27] *Id.* at ¶ 22.
[28] *Id.*
[29] *Id.* at ¶ 23.
[30] *Id.* at ¶ 24.

June 17, 2020, Carver-Kimm was no longer allowed to respond to any media inquiries involving COVID-19 or any other infectious disease.

Throughout March, April, May, and June of 2020, Carver-Kimm had regular conversations with Karla Dorman in human resources.[31] She complained to Dorman that the ongoing removal of her duties and responsibilities amounted to mismanagement, abuse of authority, and was a specific danger to public health given the ongoing state-wide pandemic.[32]

On July 2 or 3, 2020, Tony Leys with the Des Moines Register asked Carver-Kimm for the pregnancy termination statistics for the State of Iowa.[33] Carver-Kimm alleges this is publicly available information routinely produced in the past, and as such she gave Leys the requested information. On July 12, 2020, the Des Moines Register ran a story that showed the number of pregnancy terminations in Iowa had climbed by 25% in 2019 after continuously decreasing for decades.[34] The article attributed the increase to the decision to cease participation in a federally funded family planning program. Carver-Kimm states the Leys article was likely embarrassing to Governor Reynolds who promoted and

[31] *Id.* at ¶ 25.
[32] *Id.*
[33] *Id.* at ¶ 26.
[34] Sec. Amend. Pet. at ¶ 27.

supported the 2017 plan to expel Planned Parenthood and other abortion providers from family planning programs and replace it with a state financed program.[35]

On July 15, 2020, Carver-Kimm was told that she could either resign or be terminated due to "restructuring."[36] She initially chose termination, but agreed to an involuntary resignation after being told that she would forfeit her accumulated vacation time if terminated. Carver-Kimm alleges she was forced to quit by the IDPH under the authority and/or at the direction of Clabaugh, Reisetter, and/or Dixon.[37] In her petition, Carver-Kimm also specifically alleges

> Upon information and belief, Defendants Reynolds and Garrett had the ability to effectuate the decision to terminate Plaintiff's employment and had input into or influence over the decision to terminate Plaintiff. Defendant Clabaugh served at the pleasure of Defendant Reynolds, giving Reynolds—and Garrett as a member of Reynolds' cabinet—considerable sway over Clabaugh's decisions. In turn, Reisetter and Dixon were obliged to follow the decisions of Clabaugh.[38]
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> Upon information and belief, Defendants Reynolds and Garrett directed, influenced, authorized and/or had input into the decision to terminate Polly's employment.[39]

Carver-Kimm filed her initial petition on September 2, 2020, against Governor Reynolds, Garrett, and the State of Iowa, alleging wrongful discharge in violation of Iowa Code section 70A.28, Iowa's whistleblower statute. On the same

[35] *Id.* at ¶ 28.
[36] *Id.* at ¶ 29
[37] *Id.*
[38] *Id.* at ¶ 29A.
[39] *Id.* at ¶ 29B.

date she also filed an allegation of wrongful discharge based upon a violation of public policy and a constitutional claim with the State Appeal Board. The Iowa Attorney General's office did not address these claims within six months of the September 2, 2020 filing. Accordingly, on May 24, 2021, Carver-Kimm requested that both claims be withdrawn from consideration by the State Appeal Board pursuant to Iowa Code section 669.5. Once withdrawn from consideration by the State Appeal Board, Carver-Kimm filed an application to amend her petition with this court on June 4, 2021, to add these two claims as counts II (wrongful discharge) and III (free speech constitutional claim). The application to amend was granted on June 22, 2021. On July 1, 2021, the State of Iowa, Reynolds, and Garrett filed a motion to dismiss pursuant to Iowa Rule of Civil Procedure 1.421. The motion requested dismissal of the amended petition in its entirety.

In response to the motion to dismiss, Carver-Kimm filed a motion seeking leave to file a second amended petition on July 28, 2021. The court granted the request on August 11, 2021. The second amended petition added Clabaugh, Reisetter, and Dixon as defendants with respect to count I alleging violations of 70A.28, added specific allegations regarding the role of Governor Reynolds and Garrett in the decision to terminate her, and removed the constitutional free speech claim. Defendants filed a motion to partially dismiss the second amended petition on August 26, 2021. Governor Reynolds, Garret and the State of Iowa seek

dismissal of the whistleblower claims. Defendants do not seek to dismiss the whistleblower claims against Clabaugh, Reisetter, or Dixon. The defendants State of Iowa, Reynolds and Garrett seek dismissal of the wrongful discharge under count II. Carver-Kimm filed a resistance to the motion to dismiss and brief in support on September 21, 2021. Defendants filed a reply brief on October 1, 2021. The Iowa Freedom of Information Counsel filed a brief in resistance to the motion to dismiss on September 7, 2021. It was stipulated by the parties that this would be treated as an *amicus curiae* brief, and the court entered an order to this effect on September 24, 2021.

II. LEGAL STANDARDS.

Rule 1.421(1)(f) of the Iowa Rules of Civil Procedure permits a party to request dismissal of a petition if it fails to state a claim upon which relief may be granted. Rule 1.403(1) requires that a petition contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

> A "petition need not allege ultimate facts that support each element of the cause of action[;]" however, a petition "must contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition." The 'fair notice' requirement is met if a petition informs the defendant of the incident giving rise to the claim and the general nature of the claim.[40]

[40] *U.S. Bank v. Barbour,* 770 N.W.2d 350, 354 (Iowa 2009) (citations omitted).

"A motion to dismiss is properly granted only if a plaintiff's petition on its face shows no right to recover on its face under any state of facts."[41] Further, in determining whether the plaintiff has stated a claim upon which relief may be granted, courts consider only the facts alleged in the petition, or those of which judicial notice may be taken.[42]

On a motion to dismiss, the court accepts as true the petition's well-pleaded factual allegations, but not its legal conclusions.[43] Therefore, "a dismissal at this stage must rest on legal grounds."[44] Nearly every case will survive a motion to dismiss under notice pleading.[45] "Motions to dismiss are disfavored . . . . Lawyers should exercise 'professional patience' and challenge vulnerable cases by summary judgment or at trial instead of through 'premature attacks on litigation by motions to dismiss.'"[46]

III. MERITS.

A. Whistleblower Claim against Defendants Reynolds and Garrett.

[41] *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003) (quoting *Ritz v. Wapello Co. Bd. of Sup.* 595 N.W.2d 786, 789 (Iowa 1999)).
[42] *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 586 (Iowa 2004).
[43] *Shumate*, 846 N.W.2d at 507.
[44] *Trobaugh,* 668 N.W.2d at 580.
[45] *Barbour*, 770 N.W.2d at 353.
[46] *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 296 (Iowa 2020) (quoting *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991)).

Defendants contend the State should also be dismissed from count I. However, at the hearing on this motion defendants conceded that with the addition of Clabaugh, Reisetter, and Dixon as defendants count I should proceed whether the State is a named party or not. Thus, they stated the issue of whether the State is a proper party did not matter because the State will be indemnifying and defending these individual defendants regardless. As such, the court concludes the State will not be dismissed from count I by agreement of the parties.

Carver-Kimm contends she was forced to quit her employment with the IDPH by defendants in retaliation for her reports to Dorman in human resources that some of her duties were being given to other employees over several months in the spring of 2020.[47] She alleges having other employees perform her duties "amounted to mismanagement, abuse of authority and a specific danger to public health given the ongoing statewide pandemic."[48] Defendants contend that Governor Reynolds and Communications Director Garrett should be dismissed because neither had the legal authority to discharge Carver-Kimm as she was an executive branch employee who was not appointed by the governor.

Section 70A.28(2) provides:

> A person shall not discharge an employee from . . . a position in a state employment system administered by . . . a state agency as a reprisal for . . . a disclosure of information to a person providing

[47] Sec. Amend. Pet. ¶ 31-33.
[48] *Id.* at ¶ 31.

> human resource management for the state . . . if the employee, in good faith reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

A violation of this provision may be enforced through a civil action for certain limited damages and equitable relief.[49] A "person" who violates the provision "commits a simple misdemeanor."[50]

The language in section 70A.282) is similar to language in the Iowa Civil Rights Act ("ICRA"), which makes it illegal for a "person . . . to discharge any employee . . ." on the basis of various protected characteristics and actions.[51] As such, an analogy can be drawn between the ICRA and our supreme court's interpretation of it and the whistleblower statute. "[A]n individual who is personally involved in, and has the ability to effectuate, an adverse employment action may be subject to individual liability for discrimination under 216.6 or retaliation under 216.11(2)."[52] The court in *Rumsey* further held that individual liability is not construed "so strictly that it is limited to only those with final decision-making authority."[53] Carver-Kimm alleged in her petition that Governor Reynolds and Garrett had the "ability to effectuate the decision to terminate

[49] *Id.* § 70A.28(5).
[50] *Id.* § 70A.28(4).
[51] Iowa Code § 216.6.
[52] *Rumsey v. Woodgrain Millwork, Inc.,* 962 N.W.2d 9, 35 (Iowa 2021).
[53] *Id.* at 35.

Plaintiff's employment and had input into or influence over the decision to terminate Plaintiff."[54]

In *Jasper v. H. Nizam, Inc.,* 764 N.W.2d 751 (Iowa 2009), the Iowa Supreme Court set out the individual liability standard for claims of wrongful discharge in violation of public policy. They rejected the final decision-maker test, holding that individual liability may attach to "individual officers of a corporation who authorized or directed the discharge of an employee for reasons that contravene public policy."[55] Carver-Kimm alleged in her petition that Reynolds and Garrett "directed, influenced, authorized and/or had input into the decision to terminate [Plaintiff's] employment."[56]

As set forth above, for purposes of reviewing a motion to dismiss this court must accept as true the petition's well-pleaded factual allegations.[57] Based on this and the other standards set forth above that this court is required to apply in a motion to dismiss, the court concludes that Carver-Kimm set forth sufficient allegations in her petition that defendants Reynolds and Garrett effectuated her termination. Consequently, dismissal is not appropriate at this stage of the case.

[54] Sec. Amend. Pet. ¶ 29A.
[55] *Jasper,* 764 N.W.2d at 777.
[56] Sec. Amend. Pet. ¶ 29B.
[57] *Shumate,* 846 N.W.2d at 507.

Defendants' motion to dismiss defendants Reynolds and Garrett under count I is denied.

B. Wrongful Discharge as a Violation of Public Policy under Chapter 22.

Although Carver-Kimm stated in a footnote in her brief that her second amended petition also sought to add Clabaugh, Reisetter, and Dixon to count II, neither her motion to amend nor the second amended petition actually adds these additional defendants. As such, it appears she will need to further amend her petition to add these defendants to count II if she wants them as named parties. The court will only address the motion as it pertains to the State of Iowa, Reynolds and Garrett since they are the only defendants named presently. However, the court does not believe its analysis below would change if Clabuagh, Dixon and Reisetter were named defendants in count II.

Carver-Kimm next contends she was wrongfully discharged in violation of public policy. She alleges she was terminated for performing her job duties and repeatedly complying with Iowa's Open Records law found in Iowa Code chapter 22. Iowa recognizes a "cause of action for wrongful discharge from employment when the reasons contravene public policy."[58]

[58] *Jasper,* 764 N.W.2d at 761, *as amended on denial of reh'g* (Mar. 5, 2009) (citing *Fitzgerald v. Salsbury Chem., Inc.,* 613 N.W.2d 275, 280 (Iowa 2000)).

In order to prevail on a claim of wrongful discharge in violation of public policy, Carver-Kimm must prove the following: (1) the existence of a clearly defined and well-recognized public policy that protects the employee's activity; (2) this public policy would be undermined by the employee's discharge from employment, (3) the employee engaged in the protected activity, and (4) the employee's protected activity was the determining factor for the employer's discharge of the employee.[59] The first two elements constitute questions of law to be determined by the court.[60] Previously, our supreme court has relied on a statute or administrative rule as the source of public policy to support the tort.[61] However, the court has also held there "need not be an express statutory mandate of protection before an employee's conduct is shielded from adverse employment action."[62] "[W]e look to other statues which not only define clear public policy but imply a prohibition against termination from employment to avoid undermining that policy."[63] Generally the statute supporting the public policy exception must

[59] *Grim v. Centrum Valley Farms, L.L.P.,* 2016 WL 1090575, at *5 (N.D. Iowa March 18, 2016) (citing *Rivera v. Woodward Resource Ctr.,* 865 N.W.2d 887, 894-98 (Iowa 2015)).
[60] *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.,* 835 N.W.2d 293, 300 (Iowa 2013) (citing *Fitzgerald,* 613 N.W.2d at 282).
[61] *Jasper,* 674 N.W.2d at 762.
[62] *Teachout v. Forest City Comm. School Dist.,* 584 N.W.2d 296, 300 (Iowa 1998).
[63] *Fitzgerald,* 613 N.W.2d at 283.

"relate to the public health, safety, and welfare and embody a clearly defined and well-recognized public policy that protects the employee's activity."[64]

The court must first determine as a matter of law whether Carver-Kimm has asserted the existence of a clearly defined and well recognized public policy that protects her activity. Carver-Kimm alleges Iowa Code chapter 22, and more specifically section 22.8(3), provides the requisite clearly defined and well recognized public policy. Section 22.8(3) states, in pertinent part: "[T]he district court shall take into account *the policy of this chapter that free and open examination of public records is generally in the public interest* even though such examination of public records may cause inconvenience or embarrassment to public officials or others."[65]

Our supreme court recognizes that chapter 22 plays an integral role in the oversight of our state government and its actors.

> Iowa Code chapter 22 is our state's freedom of information statute. *Rathmann v. Bd. of Dirs.,* 580 N.W.2d 773, 777 (Iowa 1998). "The purpose of the statute is 'to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.'" *Id.* (quoting *Iowa Civil Rights Comm'n v. City of Des Moines,* 313 N.W.2d 491, 495 (Iowa 1981)). "Accordingly, there is a presumption of openness and disclosure under this chapter." *Gabrilson v. Flynn,* 554 N.W.2d 267, 271 (Iowa 1996). "Disclosure is the rule, and one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the

[64] *Berry v. Liberty Holdings, Inc.,* 803 N.W.2d 106, 110 (Iowa 2011).
[65] Iowa Code § 22.8(3) (2019) (emphasis added).

> exemption's applicability." *Clymer v. City of Cedar Rapids,* 601 N.W.2d 42, 45 (Iowa 1999).[66]
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> [W]rongful-discharge cases that have found a violation of public policy can generally be aligned into four categories of statutorily protected activities: (1) exercising a statutory right or privilege, (2) refusing to commit an unlawful act, (3) performing a statutory obligation, and (4) reporting a statutory violation.[67]

Here, Carver-Kimm contends her activity of complying with Iowa's open records law under chapter 22 regarding Iowa's response to the COVID-19 pandemic and other matters as part of the State duties fall under both categories (1) and (3).

"The purpose of chapter 22 is to open the doors of government to public scrutiny and to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act."[68] The court finds that providing the citizens of Iowa with information on the activities of their government furthers the welfare of the citizens of Iowa as a whole.

The court does not agree with the defendants' argument that recognizing such a public policy exception would open the litigation "flood gates." As our supreme court has noted, such argument could "be made to practically every public policy claim which serves as the basis for a wrongful discharge claim."[69] Yet the

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[66] *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652–53 (Iowa 2011).
[67] *Jasper*, 764 N.W.2d at 762 (internal citations omitted).
[68] *Diercks,* 806 N.W.2d at 652 (citation omitted). *See also* Op. Iowa Att'y Gen. No. 97-10-1(L) (October 22, 1997), 1997 WL 988716, at *3 ("Disclosure of public records is the general rule, with presumption in favor of disclosure.").
[69] *Fitzgerald,* 613 N.W.2d at 289.

court has repeatedly recognized such claims. "It is up to the fact finder, in most instances, to determine whether any particular case has merit. We simply recognize a tort for discharge in violation of a public policy to provide truthful testimony, and leave it to the jury to determine if the facts support the claim."[70]

Moreover, the policy would not "eviscerate at-will employment within state government" as alleged by the State.[71] The public policy at issue here is limited to chapter 22 and the "lawful custodians" who are charged with complying with open records requests under Iowa Code section 22.1. Under that section "each government body shall delegate to particular officials or employees of that government body the responsibility for implementing the requirements of this chapter. . . ." Carver-Kimm had the specific obligation to fulfill open records requests for IDPH. She contends she did so and was forced to quit based on her performance of this duty. Thus the narrow and clearly defined public policy that protected Carver-Kimm's employment activity was her designated role as the lawful custodian under chapter 22 responsible for implementing the requirements of chapter 22 for the IDPH. As the lawful custodian she should be allowed to fulfill her obligations under chapter 22 without reprisal if done legally and properly.

[70] *Id.*
[71] Def. Brief p. 20.

In addition, the fact Carver-Kimm did not allege she was asked to violate this or any other public policy by her employer does not bar her claim for wrongful termination. As our supreme court made clear in *Fitzgerald,*

> the dismissal of an employee can jeopardize public policy when the employee has engaged in conduct consistent with public policy without a request by the employer to violate public policy just as it can when the employee refuses to engage in conduct which is inconsistent with public policy when requested by the employer. The focus is on the adverse actions of the employer in response to the protected actions of the employee, not the actions of the employer which may give rise to the protected actions of the employee. Furthermore, in considering whether the dismissal undermines public policy, we not only look to the impact of the discharge on the dismissed employee, but the impact of the dismissal on other employees as well. Public policy applies to all employees. If the dismissal of one employee for engaging in public policy conduct will discourage other employees from engaging in the public policy conduct, public policy is undermined.[72]

Defendants cite to three cases from other states. They allege these courts have held that their respective open records statutes cannot give rise to a wrongful-discharge claim. First, the court notes that none of these cases are controlling as they are all from other jurisdictions. Second, for the following reasons the court finds each of these cases to be distinguishable from the case at hand and thus not persuasive.

[72] *Fitzgerald,* 613 N.W.2d at 288.

In *Watson v. Cuyahoga Metro. Hous. Auth.,* 2014 WL 1513455 (Ohio Ct. App. April 17, 2014), the employee who released the documents, Watson, was not doing so pursuant to a lawful request. Rather she was abusing her authority within her public service position to search the housing authority's video surveillance system to help her son establish an alibi after he was accused of theft and drug-related crimes on the housing authority's property.[73] In addition, the Ohio court determined that the records Watson requested and retrieved for and from herself were not public records, but confidential investigatory materials.[74] Thus, the plaintiff in *Watson* was terminated for abusing her authority and releasing confidential documents to herself. There is no allegation of such misconduct here. Carver-Kimm alleges she was terminated for properly fulfilling a lawful open records request in the ordinary course of her position as a records custodian. Therefore, *Watson* is distinguishable.

In *Kiefer v. Town of Ansted, West Virginia,* 2016 WL 6312067, *1 (W. Va. Oct. 28, 2016), the alleged violation of public policy was that the public employee was discharged for making an open records request. The West Virginia court found that such a request was not a clearly and sufficiently defined public policy to support a wrongful-discharge claim.[75] Here Carver-Kimm asserts she was

[73] *Watson,* 2014 WL 1513455, *1
[74] *Id.* at *9-10.
[75] *Kiefer,* 2016 WL 6312067, at *3.

terminated because she performed her statutory obligations under chapter 22 by producing records per an open records request. Therefore, at most *Kiefer* stands for the proposition that personally requesting records is not a sufficiently clear or important public policy to support a wrongful discharge claim. Here Carver-Kimm was producing records to the public, not requesting them for herself. It is also noted that Kiefer could not be fined or removed from office if he did not submit his open records request correctly. Carver-Kimm could be fined or removed from her position if she found to have violated the provisions of chapter 22.[76] Accordingly, *Kiefer* is also distinguishable.

Finally, defendants cite to *Shero v. Grand Savings Bank,* 161 P.3d 298 (Ok. 2007). In that case, Shero was suing the City of Grove for an open records claim and was an employee of Grand Savings Bank.[77] The City of Grove was a customer of the bank and pressured the bank to have Shero drop his claim.[78] The bank fired Shero when he refused to do so.[79] Shero attempted to rely upon the state's open records act to find a policy to support his wrongful discharge claim. The court determined Oklahoma's open records act was not sufficient to support a wrongful discharge claim because the act did not express protection against discharge for

[76] Iowa Code §§ 22.10(3)(b)-(d).
[77] *Shero,* 161 P.3d at 299.
[78] *Id.*
[79] *Id.*

employees.[80] However, the Iowa Supreme Court has determined that Iowa law will recognize a sufficient public policy even if the statute as issue does not contained express employment protections. "Some statutes articulate public policy by specifically prohibiting employers from discharging employees for engaging in certain conduct or other circumstances. Yet, we do not limit the public policy exception to specific statues which mandate protection for employees."[81] Thus, the court also finds *Shero* distinguishable.

Accordingly, the court concludes there is a sufficiently clear and well-recognized public policy under Iowa's open records law that protects Carver-Kimm's activities when complying with open records requests and performing the duties of her employment.

The court further concludes that this public policy would be undermined if State employees, designated as law custodians under chapter 22, were forced to quit when they complied with or attempted to comply with the provisions of chapter 22.

Carver-Kimm must also show that she performed her statutory obligation and it was the determining factor in the employer's discharge. The "elements of causation and motive are factual in nature and generally more suitable for

[80] *Id.* at 301-02.
[81] *Fitzgerald,* 613 N.W.2d at 283.

resolution by the finder of fact."[82] Here, Carver-Kimm alleged she performed her statutory obligations and was forced to quit based on that performance. As set forth above, the court must accept her allegations as true. She specifically pled this was in contradiction to the public policy of the State of Iowa to have free and open examination of public records. Accordingly, the court concludes dismissal is not appropriate on Carver-Kimm's claim that she was forced to quit due to her repeated efforts to comply with her obligations under Iowa's open records law regarding Iowa's response to the pandemic and other matters.

Defendants also argue that Governor Reynolds and director Garrett should be dismissed from this count because they have qualified immunity under recently enacted Iowa Code section 669.14A. Effective June 17, 2021, the legislature gave state employees qualified immunity from monetary damages brought under the State Tort Claims Act in certain circumstances.[83] As relevant here, the statue states that an employee

> shall not be liable for monetary damages if . . . [t]he right, privilege, or immunity secured by law was not clearly established at the time of the alleged deprivation, or at the time of the alleged deprivation the state of the law was not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law.[84]

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[82] *Lloyd v. Drake University*, 686 N.W.2d 225, 229 (Iowa 2004).
[83] *See* 2021 Iowa Acts ch. 183 (S.F. 342), secs. 12, 16 (to be codified at Iowa Code § 669.14A).
[84] *Id.* § 669.14A(1)(*a*).

To determine prospective or retroactive application, the court must first identify the "specific conduct regulated in the statute," which is the "event of legal consequence," and then determine whether this event occurred before or after the statute's effective date.[85] If the event occurred after the statute's effective date, then there is no retroactive application.[86] Generally, "a cause of action accrues when the aggrieved party has a right to institute and maintain a suit."[87] Here, the injury to Carver-Kimm premised on her wrongful termination claim was when she was forced to quit her job. As such her wrongful-termination claim accrued in July 2020.[88] This was nearly a year before section 669.14A became effective in June 2021. Accordingly, to apply section 669.14A to count II the court would have to apply it retroactively.

"The first step in determining whether a statute has retroactive effect is to assess whether the legislature expressly stated its intent that the statute should apply retrospectively."[89] "A statute is presumed to be prospective in its operation

[85] *Hrbek v. State*, 958 N.W.2d 779, 782 (Iowa 2021).
[86] *Id.*
[87] *Skadburg v. Gately,* 911 N.W.2d 786, 793 (Iowa 2018) (citations omitted); *see also Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 408 (Iowa 1993) ("It is well settled that no cause of action accrues under Iowa law until the wrongful act produces loss or damage to the claimant.").
[88] *See Stephenson v. ADA,* 789 A.2d 1248, 1250-1251 (2002) (collecting federal and state court cases holding that wrongful discharge/termination claims accrue when the plaintiff receives notice of termination).
[89] *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (Iowa 2015).

unless expressly made retrospective."[90] Nothing in section 669.14A states it is to be applied retrospectively.

"The next step is to ascertain whether 'the statute affects substantive rights or relates merely to a remedy.'"[91]

> If the law is substantive, we presume it operates prospectively only. If the statute is remedial, we presume it operates retrospectively. A statute is not remedial merely because one might say, colloquially, that its purpose is to "remedy" a defect in the law. [I]f a mere legislative purpose to remedy a perceived defect in the law made a statute remedial, very few statutes would not fall within this classification. . . . When a statute creates new rights or obligations, it is substantive rather than procedural or remedial.[92]

Newly enacted section 669.14A creates new rights for certain state employees and limits the rights of plaintiffs to bring suit against such employees by obligating them to meet a new and higher standard to prove their claim. Therefore, as it creates new rights and obligations it is substantive in nature. Accordingly, the court concludes that because the statute does not expressly state it is to be applied retroactively and the section affects substantive rights it should not be applied retroactively. Therefore, this section does not apply to Carver-Kimm's claims in count II against defendants Reynolds and Garrett. Defendants' motion to dismiss with regard to count II is denied.

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[90] Iowa Code § 4.5.
[91] *Dindinger*, 860 N.W.2d at 563 (quoting *Anderson Fin. Servs., LLC v. Miller,* 769 N.W.2d 575, 579 (Iowa 2009)).
[92] *Id.* (internal quotations and citations omitted).

Finally, defendants make the same argument here as to count I. They contend that even if the court were to recognize a wrongful termination claim in violation of public policy based on chapter 22, the tort must be dismissed as to Governor Reynolds and Director Garrett because neither of them had the authority to terminate Carver-Kimm. For all of the same reasons set forth in section IIIA above regarding count I, the court concludes Carver-Kimm has set forth sufficient allegations in her petition that defendants Reynolds and Garrett effectuated her termination. Thus, they cannot be dismissed based on this ground at this stage of the litigation.

IT IS THEREFORE ORDERED that defendants' motion for dismissal of Governor Reynolds and Garrett from count I is **DENIED**.

IT IS FURTHER ORDERED defendants' motion for dismissal of count II is **DENIED.**

State of Iowa Courts

Case Number	**Case Title**
LACL148599	POLLY CARVER KIMM VS KIM REYNOLDS ET AL
Type:	OTHER ORDER

So Ordered

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2021-12-22 13:10:46