

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

JENS NISSEN,)	
Appellant,)	
)	
and)	CASE NO. 102267
)	
STATE OF IOWA)	
(IOWA WORKFORCE DEVELOPMENT),)	
Appellee.)	

DECISION AND ORDER

Pursuant to Iowa Code section 70A.28(6), Appellant Jens Nissen filed a State employee whistleblower appeal with the Public Employment Relations Board (PERB), alleging that the State, Iowa Workforce Development (IWD), terminated his employment on October 12, 2018, as reprisal for Nissen’s reporting of workplace violence. Nissen alleges that, as a result, the State violated Iowa Code section 70A.28(2). The State denies any and all allegations of wrongdoing or that a violation occurred within the meaning of Iowa Code section 70A.28(2).

Pursuant to notice, a virtual evidentiary hearing on the State employee whistleblower appeal was held before the Board on February 24 and 25, 2021. Attorney Mark Sherinian represented Nissen and attorneys Caroline Barrett and Molly Weber represented the State. The hearing was closed to the public pursuant to Iowa Code section 70A.28(6) and PERB rule 621—17.6(20,70A). The parties filed post-hearing briefs on May 24, 2021.

Based upon the entirety of the record, and having reviewed and considered the parties' briefs, we conclude Jens Nissen failed to establish that the State's actions with regard to Nissen were in violation of Iowa Code section 70A.28(2).

I. FINDINGS OF FACT.

Petitioner Nissen's termination of employment arose from his actions surrounding an employee he supervised, Deb Babb. Multiple investigations concluded Babb's conduct created a hostile work environment. These investigations are part of the record as well as the State of Iowa Office of Ombudsman findings, "Investigation of Alleged Whistleblower Retaliation at the Iowa Division of Labor," issued May 21, 2019.

We reviewed all the allegations in conjunction with the testimony and all other parts of the record. In making the following findings, we have given greater weight to substantiated evidence. We have attempted to reconcile perceived conflicts in the evidence. Where the evidence is not reasonably reconcilable, we have credited that which is most reasonable and consistent with other credible evidence, giving consideration to established criteria for the making of credibility determinations such as the witnesses' actual knowledge of the facts, memory, interest in the outcome of the case and candor.

A. Background.

Jens Nissen began his employment with the State, Iowa Division of Labor (DOL), in 1989, as an industrial hygienist with the Occupational Safety Health Administration (OSHA) enforcement. Although the DOL operates as a separate division, the DOL is part of Iowa Workforce Development (IWD). Nissen was

promoted several times; first to a public service executive manager (classified as “PSM 1”) in 2005, and again in 2014, when Iowa Labor Commissioner Michael Mauro appointed Nissen as the OSHA Administrator (classified as “PSM 2”). Nissen worked as the administrator until the time of his termination on October 12, 2021. As administrator, Nissen oversaw the State’s OSHA program, enforcement activities and office operations.

At all times relevant, Nissen reported to Commissioner Mauro and Deputy Labor Commissioner Pam Conner who was also classified as “PSM 2.” The organizational chart depicts four work units of employees under Nissen and Conner. Nissen supervised two of the unit’s managers, Deb Babb and Luther Peddy, both of whom were classified as PSM 1. All four unit managers also reported to Conner.

Mauro generally discouraged email communications and held weekly Monday morning meetings with all the managers. Mauro held several public offices before his appointment as the Labor Commissioner in 2011. Conner is his long-time family friend and had previously worked for Mauro in various capacities before joining DOL. Mauro also knew Babb for many years from Babb’s previous political activist work.

Nissen claims Babb was known as a bully as far back as 2005. Babb had told Nissen that she would give him the courtesy of letting him know before she came after him. Before Mauro was appointed commissioner, Nissen alleges he filed a complaint in 2010 for a hostile work environment due to actions of several employees including Babb. However, Nissen did not specifically name the

perpetrators and he states the complaint “never went anywhere” because yelling and intimidation were not considered violence at the time. When Mauro promoted Babb to a managerial position in 2014, Nissen objected because he believed other candidates interviewed by Mauro and Nissen were more qualified.

Babb managed thirteen (13) employees and reported to both Nissen and Conner. From 2009-2019, Nissen annually evaluated Babb’s performance eight times and never noted or commented on Babb’s bullying, threatening, intimidating, or otherwise inappropriate conduct. The relevant State Violence-Free Workplace policy in effect stated in part the State’s commitment to “providing a work environment free from threats, intimidation, harassment, and acts of violence against the public, vendors, clients, customers, and employees.” It further provided that any manager or supervisor who fails to act upon employee complaints or on personal knowledge of conduct in violation of the policy would be subject to disciplinary action up to and including discharge.

B. July 12 Garmoe Complaint.

When Garmoe first started his employment, Babb had essentially told Garmoe that there would be hell to pay if he crossed her. Garmoe went to Nissen’s office about twice a month to discuss his negative interactions with Babb. At one point, Nissen took Garmoe to the hospital when they thought Garmoe was having a heart attack. It turned out to be a panic attack from stress. On April 30, 2018, Nissen witnessed Babb inappropriately use a combative tone with Garmoe. Nissen did not talk with Babb about the incident.

On Thursday, July 12, 2018, safety inspectors Jason Garmoe and Scott Buckley went to Nissen's office after Babb had been rude to staff at a police station where they were working. They complained of Babb's confrontational conduct towards others, her threatening and intimidation of Garmoe, and her disparate treatment of employees. Nissen asked them to put their complaints in writing and return them to him. Nissen repeated his request when he saw Buckley the next day and again when he saw Garmoe on the following Monday. Buckley and Garmoe never gave written complaints to Nissen nor did Nissen follow-up with any subsequent communication that the matter had been handled.

Sometime in summer 2018, Nissen phoned IWD's human resources manager, Andrea Macy, to discuss new work rules. During the course of that conversation, Nissen mentioned the situation at DOL not being and referenced disparate treatment. Although Macy encouraged Nissen to identify the perpetrators, Nissen would not mention names. Macy described the conversation as cryptic.

C. August 3 Anonymous Complaint/August 13-22 Investigation.

On August 3, an anonymous complaint was sent to the Governor's office alleging DOL employees in Babb's unit were using a toy to make sexual innuendos; Babb participated in the inappropriate conduct; and that DOL employees were leaving due to a hostile work environment perpetrated by Babb. The complaint alleged Babb intimidated and threatened employees she did not like. Babb was portrayed as unapproachable on workplace matters and shielded from accountability by her relationship with Mauro. Nissen was only mentioned once.

“Many of these issues have been brought to the attention of Jens Nissen.” His “reaction is to figuratively throw his hands in the air and say that he can’t do anything” because of Babb’s relationship with Conner and Mauro.

The complaint was provided to Director of Administrator Services (DAS) Janet Phipps. On August 7, 2018, DAS Employment Bureau Chief Brad Thomas gave a copy of the complaint to Macy. That same day, Macy shared the complaint with Conner and Mauro as well as the IWD director, Beth Townsend. They agreed that it was appropriate to investigate the allegations.

Thomas conducted the investigation and interviewed ten employees, including Nissen, from August 13 to August 22. In his interview on August 14, Nissen acknowledged that he had heard Babb threaten, intimidate, or bully employees. Nissen recalled the prior occurrence when Babb had been “out of line” with “combative” and “intimidating” counseling of Garmoe. Nissen admitted that he had not addressed it with Babb. He answered similarly when Thomas asked,

Q: Have you addressed this with her in the past, about her approach with her employees and those kinds of things?

A: No.

Nissen pointed to Babb’s friendship with Conner as the reason why he did not address it. Nissen did not indicate any instances where he ever reported Babb’s behavior to higher-ups.

A second anonymous complaint outlining similar allegations was received on August 27, 2018.

On September 5, Thomas finalized his investigative report, which was approved by his supervisor DAS-Human Resources Enterprise’s (DAS-HRE) chief

operating officer, Christy Niehaus. The investigation revealed that Babb had yelled at or threatened employees. The report concluded there was sufficient evidence to find Babb had violated the State's Violence-Free Workplace policy. The report also included in part:

Nissen admits Babb used combative and intimidating language during an April 30, 2018, meeting in Nissen's office while Babb was counseling Garmoe. Nissen said he felt the manner in which the counseling was done was out of line.

Nissen said Garmoe and Buckley complained to Nissen about Babb threatening them during a separate incident. . . . Nissen asked both employees to provide written statements to him, but they have not.

Nissen admits Babb uses combative and intimidating language as mentioned above, but Nissen has done nothing to address the situation with Babb because of her relationship with the Commissioner and Deputy Commissioner.

Phipps drafted a memorandum cover letter and enclosed a copy of the report to Mauro on September 11. As a result of the report, Mauro met with Phipps and Niehaus on September 17. Phipps opined the actions of Babb and Nissen were egregious and made a "very strong recommendation" that Mauro terminate their employment. Phipps outlined her concern for liability if employees claimed a hostile work environment existed at DOL and the State did nothing about it. Additionally, she indicated that both employees were the subjects of previous complaints. With respect to Nissen, Phipps explained in part that Nissen was not a strong supervisor. In Phipps' opinion, there was a troubled environment that Nissen was in charge of and could not get resolved for a period of time. Both Babb and Nissen were at-will employees and not entitled to just cause protections.

Both Phipps and Macy described Mauro as hesitant in terminating both Babb and Nissen's employment. Mauro did not take the decision to terminate their employment lightly. Mauro, Macy, and Conner discussed a follow-up investigation. This led to Macy meeting with Niehaus and two others to discuss the matter and propose a further investigation of her own. Macy had hoped this would uncover additional information to assist Mauro in his decision.

D. September 19 Managers' Meeting.

Before Macy began her investigation, Mauro held the regular managers' meeting on Wednesday, September 19. Nissen and Luther (Don) Peddy sat on one side of the table while Mauro, Joseph Mullen, Conner, and Babb sat on the other side of the table. Mauro vented about the anonymous complaint.

According to Mullen, Mauro claimed nobody ever told him about any problem with Babb.¹ Mauro knew she was abrasive, but Mauro was upset that employees had not approached him about the problem. At some point in the meeting, Babb asked the group if there was a hostile environment and only Nissen raised his hand and said yes. When asked who, Nissen blamed Conner. Mauro then voiced his support of Conner.

Mauro acted betrayed about unspecified information getting out of their meetings. Mauro appeared agitated and irritated in discussing these leaks and having each other's backs. While Nissen and Mullen did not understand what Mauro was stating. Nissen testified in part, "[E]ven to this day, I don't know what

¹ On cross-examination, Mullen admitted he had testified in his deposition that Mauro made this statement.

he's talking about." Nissen believed Mauro was directing the comments squarely at Nissen. Things got heated and Nissen stood up and denied his involvement. The meeting ended abruptly.

E. Macy Investigation/Nissen's Termination.

For her investigation, Macy interviewed eight (8) current and three former DOL employees. Only one had been previously interviewed by DAS. Comments were made about Babb's aggressive communications, how the employees walked on eggshells because of her and "you do not know what you're going to get when you go into [Babb's] office." On October 8, Macy met with Mauro and Conner to share her tabulated findings. Macy concluded Babb's work unit was obviously dysfunctional and what Babb did was "pretty bad." Moreover, Babb was Nissen's responsibility, Nissen was her direct supervisor, and Nissen did nothing about Babb's conduct.

On October 10, Mauro and Macy met with Nissen and Babb separately. Nissen characterized it as a rehash of the September 19 meeting. Macy reported Nissen and Babb deflected blame on the other. Nissen never brought up any instances where he had addressed Babb's behavior or reported it to Mauro. However, according to Nissen, he was not aware of any wrongdoing on his part and was never asked why he failed to bring the problem to Mauro. Nissen wondered why Mauro and Macy discussed putting him in a non-supervisory position.

Following their meetings, Mauro tried to salvage Babb and Nissen's employment by a reorganization of their positions. Nonetheless, his intentions were thwarted by DAS. On October 12, Macy and IWD attorney Ben Humphrey

met with Niehaus who told them, due to potential lawsuits and public scrutiny, the Governor would intervene if Mauro did not follow through with the terminations of Babb and Nissen. As a result, that same day, Mauro terminated Nissen's employment and Babb resigned in lieu of termination.

F. Ombudsman Complaint and Report.

It is uncontested that Nissen was an at-will, non-merit State employee who was not covered by a collective bargaining agreement. On November 9, 2018, Nissen filed a complaint of whistleblower retaliation with the State of Iowa, Office of Ombudsman pursuant to Iowa Code section 70A.28(2). Nissen alleged DOL terminated his employment on October 12, 2018, in reprisal for Nissen's disclosures regarding violations of the State's Violence-Free Workplace policy by Babb. Nissen alleges that he disclosed the information to DOL Commissioner Michael Mauro on at least four separate occasions: July 16, August 16, September 19, and October 10, 2018.

Pursuant to Iowa Code sections 2C.11A and 70A.28(2), the Ombudsman Office's statutory authority with respect to Nissen's complaint was limited to conducting an investigation to make findings and not recommendations. For its investigation, the Ombudsman interviewed fourteen (14) current or former employees as well as seven (7) others and reviewed sixteen (16) previously recorded investigatory interviews. On May 21, 2019, the Ombudsman Office issued its confidential findings (also referred to as "Report"). Pursuant to Iowa Code section 70A.28(6), these findings may be introduced as evidence before PERB. Accordingly, the Ombudsman's Report of its "Investigative Findings" was admitted

into the record as State's Exhibit A. The findings are not binding in the determinations and conclusions we reach.

Due to the Ombudsman's neutral role and its extensive review and investigation, we have given its findings great weight in our assessment and determination of our own factual findings for this particular case. Many of our previous findings of fact mirror the Ombudsman's underlying findings. Thus, it is unnecessary to repeat those particular findings. There are, however, a number of other pertinent Ombudsman's findings which we highlight as a final part of our findings of fact relevant to our legal analysis. The Ombudsman frames its analysis as three questions and a finding for each.

First, the Report includes the question and finding,

1. Did Nissen Receive Reports of Improper Behavior by Babb, or Witness It Himself?

....

Finding: In our judgment, these two official reports are adequate to show that Nissen had reason to believe Babb might be in violation of State policies, or had engaged in mismanagement or an abuse of authority.

This finding was based on Nissen's August 14 DAS interview wherein he reported witnessing or hearing about Babb threaten and bully employees. Nissen specifically referenced the April 30 meeting when Babb was confrontational with Garmoe and the underlying complaints made by Garmoe and Buckley to Nissen on July 12.

Second, the Report addresses the question of whether Nissen disclosed Babb's behavior to Mauro:

2. Did Nissen Disclose Babb's Improper Behaviors to Mauro? If So, When?

.....

Finding: We cannot conclude with certainty that Nissen told Mauro in explicit terms that Babb was harassing or bullying employees or was responsible for a hostile workplace before their final meeting on the subject on October 10, 2018.

In reaching this finding, the Ombudsman includes an analysis of four occasions where Nissen alleges he reported Babb's inappropriate conduct to Mauro:

(1) On July 16, Nissen alleges he went to Mauro's office and discussed Garmoe and Buckley's complaint made to Nissen on July 12. Allegedly, Mauro responded back to Nissen that same day that "all was OK." By Nissen's account, Mauro did not express anger for Nissen making the report and there was no overt sign that Nissen might face trouble for making the report. Mauro unequivocally denies the meeting took place. Neither Conner nor Macy recall Mauro ever mentioning such a meeting. (2) Nissen alleges that on August 16, he was summoned to Mauro's office. Mauro allegedly voiced his displeasure that Nissen's name was all over the anonymous complaint; accused Nissen of leaking management meeting information; and questioned why Nissen threw up his hands about employee gripes. Nissen alleges he told Mauro that Babb threatens her staff and Nissen had told Mauro about it in the past. Neither Mauro nor Conner, indirectly, recalls this meeting. Nissen did not tell anyone about it. (3) The weekly managers' meeting took place on September 16. The Ombudsman Report states in part, "Nissen's account of Mauro's statements on August 16 management closely resemble those made by Mauro during the September 19 management meeting, according to first-person accounts from Peddy and Mullen." In their recollection

of the meeting, neither Peddy nor Mullen recalled Nissen making any reference to a prior disclosure Nissen had made to Mauro about Babb. Neither recalled Nissen stating anything explicit about Babb in the meeting. Nissen clearly and openly stated at the meeting that he thought a hostile work environment existed at DOL.

(4) On October 10, Nissen met with Mauro and Macy. Nissen stated the three rehearsed the hostile workplace allegations and Babb's role in it. Macy recalled Nissen blaming Babb for the problems described by employees in their DAS and IWD interviews.

As other points on this issue, the Report provides Nissen denied writing the complaint or knowing who wrote the complaint. The Ombudsman noted there was no corroborating evidence to support Nissen's claim that he brought his concerns about Babb to Mauro on July 12 or August 16. While Nissen spoke of a hostile environment in the tumultuous September 19 management meeting, none of those attending recalled Nissen identifying Babb as the cause. In the October 10 meeting with Macy and Mauro, Nissen did blame Babb for the problems probed in the DAS and IWD investigations.

The third and final question and finding provide,

3. Did Mauro Fire Nissen in Retaliation for Nissen's Disclosure?

. . . .

Finding: Nissen's only confirmed act of whistleblowing on October 10 came too late to support the theory that his firing was retaliatory. Even if Nissen's version of events is accurate, other evidence suggests that DAS – not Mauro – pushed for Nissen's discharge. Whatever disclosure Nissen made to Mauro, they appeared to play no part in DAS' recommendation for termination.

In reaching this finding, the Ombudsman noted several things. Mauro became aware of the anonymous complaint against Babb as early as August 7,

learned of Nissen's testimony to DAS as early as September 5, and confronted his management staff on September 19. However, the Ombudsman could not confirm that Nissen disclosed his concerns about Babb directly to Mauro before October 10. The Ombudsman concluded it was implausible that Mauro fired Nissen on October 12 for the disclosure he made two days earlier when Mauro had the opportunity to retaliate and did not do so. Additionally, when Nissen allegedly met with Mauro on July 12 to report employees' complaints on Babb, Nissen never described any anger by Mauro as a result. Given the time that ensued between the receipt of the anonymous complaint and Nissen's termination, "Mauro was never determined to take drastic action against Nissen, no matter when Nissen may have blown the whistle."

As we have previously indicated, the Ombudsman Investigative Findings are persuasive. Before turning to our analysis, we address one fact dispute covered by the Ombudsman for the purposes of our Findings of Fact.

We have not included as our findings of fact that Nissen reported his concerns or employees' complaints about Babb to Mauro on July 16 and on August 16. As the Ombudsman determined, there is no corroborating evidence to support these findings aside from Nissen's own testimony and contemporaneous notes he had taken. Further, Nissen's other actions are inconsistent with the notion that he reported Babb's behavior to Mauro on these occasions. Nissen did not tell any person about his meetings. Nissen never followed up with Garmoe and Buckley on what he had done to rectify their situation or to verify that things had indeed been taken care of by Mauro. Nissen did not mention his conversations with

Mauro when he was interviewed by Thomas. Although he claims he was not asked the question, it is certainly relevant to another question Thomas asked, “Have you addressed this with [Babb] in the past, about her approach with her employees and those kinds of things? In response, it would seem Nissen should have mentioned his July 16 meeting with Mauro who allegedly took care of the employees’ complaints about Babb.

Additionally, we have not included, as a finding of fact, Nissen’s claims that he discussed Babb in the September 19 managers’ meeting and referenced his past discussions with Mauro. Neither Mullen nor Peddy recalled Nissen’s mention of Babb. In fact, Mullen recalled Mauro stating, in the meeting, that nobody ever told him about the problem with Babb. Moreover, when Nissen raised his hand that he believed there was a hostile workplace, Nissen did not place blame on Babb and reference any prior complaints he allegedly made to Mauro. Rather, he named Conner as the perpetrator. For these reasons and the basis of the Ombudsman’s finding, we do not find that Nissen reported or explicitly discussed employees’ complaints about Babb’s behavior in a meeting with Mauro on July 16 or August 16 or the managers’ meeting on September 19.

II. CONCLUSIONS OF LAW.

A. Legal Standards.

Pursuant to Iowa Code section 70A.28(6), Nissen filed his whistleblower complaint with PERB. Nissen claims he was terminated in reprisal for his disclosure of protected information to Commissioner Mauro. The information concerned Babb’s conduct in violation of the State’s Violence-Free Workplace

policy. Nissen was an at-will employee. Generally, employment at-will means either party may end the employment relationship at any time, for any reason, or for no reason at all. *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 300 (Iowa 2013). However, an at-will employee may sue for wrongful discharge when the employer's reasons for terminating the employment violate a clearly defined and well-recognized public policy. *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109 (Iowa 2011). Whistleblowing is an example of one such public policy. *Dorshkind*, 835 N.W.2d at 300.

Iowa Code section 70A.28 established “a public policy against retaliatory discharge of public employees and considers the violation of the policy to be a public harm.” *Hedlund v. State*, 930 N.W.2d 707, 716 (Iowa 2019); *Worthington v. Kenkel*, 684 N.W.2d 228, 233 (Iowa 2004). As the courts have done, we parse relevant portions of section 70A.28 for this case as follow:

A person shall not discharge an employee ... as reprisal ... for disclosure of any information by that employee to a member or employee of the general assembly a disclosure of information to the office of the ombudsman or a disclosure of information to a person providing human resource management to the state ... or a disclosure of information to any other public official or law enforcement agency if the employee reasonably believes, in good faith, the information evidences a violation of law or rule, mismanagement, ... an abuse of authority.

Iowa Code § 70A.28(2). *See also Walsh*, 913 N.W.2d at 521. Section 70A.28(6) allows employees, who are not merit employees or covered by collective bargaining agreements, to file an administrative action to enforce the provisions of subsection 2. Those employees may file an appeal with PERB “within thirty calendar days following the later of the effective date of the action or the date a finding is issued

to the employee by the office of the ombudsman pursuant to section 2A.11A.” See § 70A.28(6).

To prevail, the employee must establish all elements: the non-merit and non-contract employee (1) made a disclosure of information; (2) to a public official or other section 70A.28 listed recipient; (3) in good faith, reasonably believed the information evidenced a violation of law or other section 70A.28 listed act; and (4) suffered adverse employment action as reprisal for the disclosure. *See, e.g., Hedlund*, 930 N.W.2d at 916.

B. Analysis.

There is no dispute as to several elements of Nissen’s claim. As a non-merit and non-contract covered employee, Nissen was entitled to file an appeal pursuant to Iowa Code section 70A.28. There is no dispute that if Nissen made a protected disclosure as he asserts, he made the disclosure to a public official as required by section 70A.28(2). Additionally, it is not contested that Nissen reasonably believed the information allegedly disclosed was evidence of mismanagement, an abuse of authority, or other prohibited act specified by section 70A.28. Nissen had good reason to believe that his first-hand accounts and employee complaints about Babb’s conduct were a violation of the State’s Violence-Free Workplace policy.

At issue are two of the elements relating to disclosure and whether Nissen’s termination was in reprisal for any such disclosure. The State contends Nissen never made a disclosure of this protected information to Mauro and there was no causal connection between his termination and any alleged disclosure.

1. Did Nissen make a disclosure of protected information to Mauro?

Nissen alleges that he made protected disclosures when he reported or discussed Babb's conduct with Mauro on four separate occasions: July 16, August 16, September 19, and October 10. There are several facts relevant to this issue.

In our findings of fact, we assessed the evidence and determined Nissen did not report his concerns or Garmoe and Buckley's complaints to Mauro on July 16. We reached a similar finding with respect to Nissen's meeting with Mauro on August 16. We also found that in the managers' meeting on September 19, Nissen did not discuss Babb or reference any prior meetings with Mauro. In the meeting, Mauro had asked why nobody had told him about the problem with Babb. When Nissen stated his opinion that there's a hostile workplace, he named Conner as the perpetrator although Babb had allegedly been the subject of his discussions with Mauro. Based on our findings, there is not sufficient evidence that Nissen engaged in these communications, blew the whistle, and made protected disclosures on these occasions.

Regarding the final occasion, we agree with the Ombudsman's finding that Nissen made a protected disclosure on October 10 in his meeting with Macy and Mauro. By all accounts, Nissen discussed Babb and blamed her for the hostile workplace, which was a violation of the State's Violence-Free Workplace policy. In so doing, Nissen made a disclosure of protected information to a public official, Mauro.

For all of these reasons, we conclude Nissen did not make "disclosures" of protected information to Mauro on July 16, August 16, or September 19. However,

Nissen did make a disclosure of protected information on October 10 in his meeting with Mauro and Macy.

2. Was Nissen terminated in reprisal for his disclosure?

An employee must establish all elements set forth in section 70A.28 including that the employee “suffered adverse employment action as reprisal for the disclosure.” Nissen fails to establish that his termination was in reprisal for his protected disclosure.

With respect to the last element, there must be a “casual connection” between the discharge or other adverse employment action and the disclosure. In its most recent case on the subject, the Court declined in determining whether this casual connection requires the disclosure to be a “determining factor” or a “contributing factor” for the adverse employment action taken. *See Smith v. Iowa State Univ. Sci. & Tech.*, 851 N.W.2d 1, 34 (Iowa 2014) (jury instruction only required the adverse action to be “after” the disclosure).

The requirements have different origins. A “determining factor” is derived from common law claims of discharge in retaliation for protected activity. *Id.* at 18. “The causation standard in a common law retaliatory discharge case is high.” *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 301 (Iowa 1998). “The employee's engagement in protected conduct must be the *determinative* factor in the employer's decision to take adverse action against the employee.” *Id.* “Contributing factor” is derived from the Federal Whistleblower Act and with a *prima facie* case, shifts the burden to the employer to prove by clear and convincing

evidence that it would have taken the same personnel action in the absence of the disclosure. *Smith*, 851 N.W.2d at 34.

Regardless of the standard, Nissen urges the Board to consider several factors, analyzed by the Courts, as proof that the disclosure was a determining or contributing factor in the decision to discharge the employee. First is the temporal proximity of the disclosure to the discharge; whether there is evidence that the adverse employment action occurred within a period of time such that a reasonable person could conclude the disclosure was a contributing factor. *See, e.g., Tekippe v. State*, 798 N.W.2d 736 (Table), 2011 WL 768659 at 5 (Iowa Ct. App. 2011).

Nissen also cites other cases as support for our consideration of two other factors: whether the employer followed its own policies and procedures in disciplining the employee (citing *Hackman v. New Hampton Mun. Light Plant*, 872 N.W.2d 199 (Table), 2015 WL 59651978 (Iowa App. Ct. 2015)); and evidence of statements made by decision-maker which reveal a concern or anger for the protected activity (citing *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751 (Iowa 2009)). Although we are not convinced these two cases necessarily stand for the propositions stated, we consider a host of factors in reaching our conclusion.

As the State succinctly asserts, the question before us on this issue is whether Nissen's termination was in reprisal for his disclosure and not whether Nissen was terminated for just cause. We think the timeline of events is important in assessing this element of Nissen's whistleblower complaint. There is no evidence suggesting reprisal after Nissen allegedly made his first disclosure on July 16. The

Ombudsman pointed out that by Nissen's own account, Mauro expressed no anger and there was no overt sign that Nissen faced any trouble for his report.

Thereafter, on August 8, Mauro received a copy of the anonymous complaint and provided a copy of the resulting DAS investigative report on or about September 11. In the meeting on September 17, Phipps "strongly recommended" Mauro terminate both; Babb for her conduct in violating the State's Violence-Free Workplace policy, and Nissen for his supervision of her and responsibility for allowing her conduct over a period of time. The anonymous complaint had even referenced Nissen figuratively throwing up his arms about Babb's conduct. Given these valid reasons propounded by the DAS director herself, Mauro could have terminated Babb and Nissen that day. Instead, according to Phipps and Macy, Mauro hesitated and required additional information and a second investigation by Macy.

In the managers' meeting, Mauro was upset about the anonymous complaint. He expressed frustration that nobody had come to him about Babb's conduct and vented his concern that someone had leaked information from his management meetings. Whatever statements or anger Mauro expressed at this meeting stemmed from the anonymous complaint—a protected disclosure Nissen did not make.

Following this meeting, Macy completed her own investigation on October 8 that may have provided more detail, but reflected substantively the same results as the DAS investigation. Nonetheless, the record reflects Mauro pursued alternative options to terminating Babb and Nissen's employment. On October 10,

he and Macy met with both employees separately and even mentioned a non-supervisory role to Nissen. At this meeting, Nissen did make a protected disclosure by discussing Babb's conduct and blame in creating a hostile workplace. Nissen described the meeting as a rehashing of the complaint. There is no evidence to suggest Mauro reacted negatively. The Ombudsman Report points out that at this point, Mauro had known about Babb's conduct for some time. At this point, we are not persuaded that Nissen was clueless in the meeting, especially after they brought up his move to a non-supervisory role. Nor are we persuaded that Nissen never brought up his prior reports of Babb because he was not asked.

Two days later, Mauro was told in no uncertain terms that the Governor would intervene if he did not terminate both Babb and Nissen. Subsequently, Mauro offered both Babb and Nissen the opportunity to resign in lieu of termination. Mauro terminated Nissen's employment. While the timing of Nissen's termination could suggest Nissen's prior disclosure was a factor, timing is insufficient, by itself to support the causation element. *See Hulme v. Barrett*, 480 N.W.2d 40, 43 (Iowa 1992) (wrongful discharge tort claim).

More importantly, the evidence is overwhelming that the reason for Mauro's decision was the Governor and DAS Director's ultimatum that Mauro terminate Nissen for his supervision of Babb and responsibility for allowing the conduct to continue for a period of time. Nissen was actually terminated as a result of another's protected disclosure, *i.e.*, anonymous complaint, rather than in reprisal for his own protected disclosure.

We have considered Nissen's other claims regarding the State's failure to conduct an appropriate investigation as to his supervision and role of Babb or the State's failure to investigate the political alliance of Babb, Conner, and Mauro or his claim that he was the "fall guy." Our role is not to assess Nissen's termination in the terms of a "just cause" standard. Rather, we are required to determine whether Nissen was terminated in reprisal for a protected disclosure. We considered his claims in this light.

Based on the evidence, it would be a leap to conclude Mauro terminated Nissen in reprisal for Nissen's protected disclosure. Although he alleges he was not fairly investigated, Nissen missed several opportunities to account for his role in Babb's conduct. Nissen never brought up any prior reporting or examples of addressing Babb's conduct when he was interviewed in August. Nissen never brought up any prior reporting or examples of addressing Babb's conduct when he said there was a hostile workplace on September 19. Instead, he focused on Conner. In his meetings with Mauro and Macy, Nissen never brought up any prior reporting or examples of addressing Babb's conduct. Nissen may claim he was the "fall guy" for Mauro to blame, but Nissen's role and accountability arose from the anonymous letter. It is inconceivable that Mauro authored the anonymous complaint that alleged Nissen figuratively threw up his hands with respect to Babb's conduct. While the political alliance of Mauro, Babb, and Conner may have contributed to the hostile workplace and explained Nissen's failure to act, it does not delegitimize the reason why Nissen was terminated.

For all these reasons, we conclude the State and specifically Mauro, did not terminate Nissen's employment in reprisal for his protected disclosure of information. Nissen failed to establish a causal connection between his disclosure and the termination of his employment. His disclosure was neither a contributing nor determinative factor in the decision to terminate his employment.

3. Summary.

We conclude that on October 10, 2018, Nissen made a disclosure of information protected to Labor Commissioner Mauro. However, we conclude Nissen failed to establish his termination on October 12, 2018, was in reprisal for his protected disclosure.

Consequently, we order the following:

ORDER

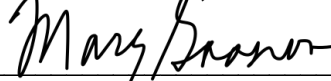
Jens Nissen's Iowa Code section 70A.28 whistleblower complaint is DISMISSED.

DATED at Des Moines, Iowa, this 30th day of September 2021.

PUBLIC EMPLOYMENT RELATIONS BOARD



Erik M. Helland, Chair



Mary T. Gannon, Member

Original filed EDMS.