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Lynne Simpson, appellee, v. Lincoln Public Schools, appellant.

___ N.W.3d ___

Filed March 22, 2024. No. S-23-490.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** Whether a plaintiff's claims are precluded by an exemption to the Political Subdivisions Tort Claims Act is a question of law for which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.
2. **Summary Judgment: Appeal and Error.** An appellate court reviews the district court's ruling on a motion for summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Summary Judgment: Final Orders: Legislature: Appeal and Error.** The general rule is that an order denying summary judgment is not a final, appealable order. But the Legislature carved out a limited exception to this general rule when it enacted Neb. Rev. Stat. § 25-1902(1)(d) (Cum. Supp. 2022) to create a new category of final orders for purposes of appeal.
5. **Immunity: Constitutional Law: Political Subdivisions: Legislature.** The sovereign immunity of the State and its political subdivisions is preserved in Neb. Const. art. V, § 22. This constitutional provision is not self-executing, and no suit may be maintained against a political subdivision unless the Legislature, by law, has provided otherwise.
6. **Political Subdivisions Tort Claims Act: Immunity: Waiver: Legislature.** Through the enactment of the Political Subdivisions Tort Claims Act, the Legislature has allowed a limited waiver of sovereign immunity with respect to some, but not all, types of tort claims.

7. **Political Subdivisions Tort Claims Act: Jurisdiction: Dismissal and Nonsuit.** When an exemption under the Political Subdivisions Tort Claims Act applies, the proper remedy is to dismiss the claim for lack of subject matter jurisdiction.
8. **Political Subdivisions Tort Claims Act.** The purpose of the discretionary function exemption of the Political Subdivisions Tort Claims Act is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. The discretionary function exemption extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions.
9. ____. A two-part analysis determines whether the discretionary function exemption of the Political Subdivisions Tort Claims Act applies. First, the court must consider whether the action is a matter of choice for the acting political subdivision or employee. Second, if the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield.
10. ____. The discretionary function exemption of the Political Subdivisions Tort Claims Act will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because in that event, the employee has no rightful option but to adhere to the directive. For the same reason, the exemption will not apply when a statute, regulation, or policy prohibits the challenged action. If the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exemption to protect.
11. **Political Subdivisions Tort Claims Act: Courts: Immunity: Waiver: Legislature.** The judiciary does not have the power to waive sovereign immunity; decisions on whether and how to limit the government's potential tort liability belong to the Legislature.
12. **Political Subdivisions Tort Claims Act.** Broadly speaking, actors at the highest level of government are more likely as a general matter to be engaged in policy decisions to which the discretionary function exemption applies than actors at the operational level, where the spectrum of acts from discretionary to merely ministerial is on greater display.
13. ____. Generally, employment and termination decisions are discretionary and involve a judgment of the kind that the discretionary function exemption is designed to shield.

Appeal from the District Court for Lancaster County: SUSAN I. STRONG, Judge. Reversed and remanded with direction.

Joshua J. Schauer and Haleigh B. Carlson, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellee.

Michael T. Hilgers, Attorney General, Eric J. Hamilton, and Zachary B. Pohlman for amicus curiae State of Nebraska.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

I. INTRODUCTION

After Lincoln Public Schools (LPS) terminated Lynne Simpson's employment, Simpson sued for wrongful discharge in violation of public policy. LPS claimed it had immunity and moved for summary judgment, but the district court overruled the motion. Because we conclude that LPS' decision to terminate Simpson's employment fell within the discretionary function exemption[1] of the Political Subdivisions Tort Claims Act (PSTCA),[2] we reverse, and remand with direction.

II. BACKGROUND

1. Simpson's Employment With LPS

LPS is a political subdivision of the State of Nebraska. Simpson began employment with LPS in 2010. She was an at-will employee at all times.

In August 2017, Simpson sustained an injury in the course and scope of her employment. She subsequently filed workers' compensation forms with LPS to be reimbursed for examinations and treatment. While reviewing Simpson's medical records, a workers' compensation case management nurse for LPS noticed that some records contained different middle initials for Simpson. In March 2018, the nurse notified

[1] Neb. Rev. Stat. § 13-910(2) (Reissue 2022).

[2] See Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2022).

Genelle Moore, a background investigation specialist for LPS, of the different iterations of Simpson's name and Moore investigated the discrepancies.

On April 2, 2018, Marla Styles, a human resources specialist for LPS, held a meeting with Simpson, Simpson's attorney, Moore, and several individuals associated with LPS. The purpose of the meeting was to address concerns about Simpson's employment applications with LPS and discrepancies regarding her name and date of birth. Moore asserted that Simpson used different name iterations and did not disclose a criminal charge on her online employment applications. Simpson stated that she was born in January 1959 and given the name Leona Lynne Fairchild. A shoplifting incident at a department store was brought up, and Simpson provided an explanation of what occurred. The police report did not match Simpson's version of the event. Further, the police report included names of "'Lynn, Leana Fairchild' and 'Leana Lynn Simpson'" and listed a different date of birth.

After the meeting and a followup investigation, Styles prepared a memorandum recommending that LPS terminate Simpson's employment. She made the recommendation based upon her evaluation of Simpson's credibility. According to the memorandum, Simpson received positive performance appraisals and LPS staff members shared that Simpson's absence "would change the culture of their building (she is known as 'Mama Lynne')." But the staff members also had concerns regarding honesty of the staff. Eric Weber, an associate superintendent of human resources for LPS, reviewed Styles' recommendation and determined that Simpson's employment with LPS should end. On April 13, 2018, LPS terminated Simpson's employment.

2. Pleadings and Motion

Simpson sued LPS. She had previously filed a tort claim with LPS, but withdrew it after more than 6 months had elapsed. Simpson claimed that LPS sought reasons to end her employment due to her workers' compensation injury.

She sought damages for wrongful discharge in violation of Nebraska public policy. LPS asserted numerous affirmative defenses in its answer. It alleged that Simpson's claims were barred by sovereign immunity and that LPS was immune from the claims under § 13-910. LPS subsequently moved for summary judgment.

3. Summary Judgment Hearing

Evidence adduced during the hearing established discrepancies concerning Simpson's name and date of birth. Simpson was born in Texas in January 1959. But her Texas driver's license showed a different date of birth, which Simpson attributed to a typographical error. The name on Simpson's birth certificate is Leona Lynne Fairchild. But when filling out official documents, Simpson sometimes used "Leana" rather than "Leona." She did so because "Leana" was the name originally printed on her Social Security card. At some point after Simpson married, she changed the name on her Social Security card to "Lynne Fairchild Simpson."

The evidence also showed discrepancies regarding Simpson's reporting of her criminal history. Simpson's initial LPS employment application—a paper application—was destroyed in a fire. Thus, neither party could establish whether Simpson reported any criminal history on it. But Simpson testified in her deposition that she disclosed on the application a felony forgery conviction in Texas and "credit card abuse." She testified that at the time of her initial interview with LPS, she reported that she had a conviction in Texas. The background check specialist for LPS at the time stated that if Simpson disclosed a felony conviction, he would have discussed it with Styles, and that he did not recall any discussion with Styles or Weber regarding Simpson.

In 2010, Simpson applied for a full-time position with LPS and completed a "non-paper" application. In response to a question regarding criminal offenses, Simpson answered "checks[,] dismissed." She testified that she did not list any other offenses because she was still employed by LPS and

"this was an update." In applications submitted in 2011, 2012, 2013, and 2014, Simpson reported "checks, [department store], Paid."

Weber determined that it was not in LPS' best interests to continue Simpson's employment. He made that decision based on concerns with Simpson's inability to provide credible reasons for her use of different names and dates of birth, along with related concerns about her honesty. LPS presented evidence that for the 2017-18 school year, LPS rescinded 52 offers of employment for matters related to background checks and rescinded 46 offers for failures to disclose. Weber stated that LPS handles hundreds of workers' compensation claims each year. He would not have approved the recommendation to terminate Simpson's employment if he suspected that it was motivated by the workers' compensation claim.

Simpson adduced evidence that LPS hired a private investigator to observe her daily activities. Approximately 6 months after filing the instant lawsuit, Simpson filed a petition in the Nebraska Workers' Compensation Court seeking benefits. The compensation court determined that Simpson was entitled to vocational rehabilitation benefits and ordered LPS to pay permanent disability benefits.

4. District Court's Order

The district court overruled LPS' motion for summary judgment. It first addressed LPS' argument that the exclusivity provisions of the Nebraska Workers' Compensation Act[3] deprived the court of subject matter jurisdiction. The court reasoned that Simpson's claim against LPS did not necessarily arise from her work injury for purposes of § 48-148 and that she stated a claim for wrongful discharge in retaliation for filing a workers' compensation claim. The court explained that "§ 48-148 does not apply to wrongful discharge cases where the discharge is not due to the injury itself but is in retaliation for seeking workers' compensation benefits."

[3] See Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2021 & Supp. 2023).

The court next turned to LPS' argument that it was immune under the discretionary function exemption. The court found: "[T]he decision to terminate [Simpson's employment] was not an administrative decision grounded in social, economic, and political policy considerations, but a discretionary act at the operational level. [Citation omitted.] As such, it was not a discretionary function which the PSTCA was designed to shield." The court determined that LPS was not entitled to sovereign immunity.

Finally, the court considered LPS' argument that the decision to terminate Simpson's employment was not unlawful. The court stated that after viewing the evidence in the light most favorable to Simpson, there was sufficient evidence to establish a prima facie case of retaliatory discharge and to create a genuine issue of material fact concerning whether LPS' stated reason for terminating Simpson's employment was a legitimate, nondiscriminatory reason or was pretext for discharge in retaliation for filing the workers' compensation claim.

LPS appealed, and we granted its petition to bypass review by the Nebraska Court of Appeals.[4]

III. ASSIGNMENTS OF ERROR

LPS assigns that the district court erred in (1) finding that LPS was not immune from Simpson's claim and failing to dismiss the case for lack of subject matter jurisdiction and (2) failing to find that it lacked subject matter jurisdiction over Simpson's claim due to the exclusivity provisions of the Nebraska Workers' Compensation Act.

IV. STANDARD OF REVIEW

[1] Whether a plaintiff's claims are precluded by an exemption to the PSTCA is a question of law for which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.[5]

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[4] See Neb. Rev. Stat. § 24-1106(2) (Cum. Supp. 2022).

[5] See *Clark v. Sargent Irr. Dist.*, 311 Neb. 123, 971 N.W.2d 298 (2022).

[2] An appellate court reviews the district court's ruling on a motion for summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.[6]

V. ANALYSIS

1. Appellate Jurisdiction

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[7] Simpson asserts that we lack jurisdiction because the appeal is from the denial of a motion for summary judgment.

[4] The general rule is that an order denying summary judgment is not a final, appealable order.[8] But the Legislature carved out a limited exception to this general rule when it enacted Neb. Rev. Stat. § 25-1902(1)(d) (Cum. Supp. 2022) to create a new category of final orders for purposes of appeal.[9] Under § 25-1902(1)(d), a final order now includes "[a]n order denying a motion for summary judgment when such motion is based on the assertion of sovereign immunity or the immunity of a government official."

Recently, we addressed the circumstances under which a summary judgment motion will satisfy the requirements of § 25-1902(1)(d).[10] We declared that "when a motion for summary judgment asserts that the plaintiff's claim falls within one or more of the statutory exemptions under . . . the PSTCA, the motion is based on the assertion of sovereign immunity within the meaning of § 25-1902(1)(d)."[11] We held that

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] See *id.*

[11] *Id.* at 133, 971 N.W.2d at 308.

"to satisfy the final order requirement under § 25-1902(1)(d) based on the assertion of sovereign immunity, the motion for summary judgment must do more than merely reference sovereign immunity; the nature and substance of the motion must actually present a claim of sovereign immunity."[12] Applying that analysis, we found jurisdiction to review one of the assigned errors—that the trial court erred in denying summary judgment based on the applicability of the discretionary function exemption.[13]

Here, Simpson challenges whether LPS' motion for summary judgment was "based on the assertion of sovereign immunity" under § 25-1902(1)(d). LPS' motion merely stated that there were no genuine issues of material fact. And Simpson observes that LPS made no mention of immunity in its statement of undisputed facts.

But on the other hand, LPS alleged sovereign immunity and immunity under § 13-910 as affirmative defenses in its answer. And LPS asserted in its brief to the district court that if the discretionary function exemption applied, LPS was immune from suit.

The substance of LPS' motion, as argued in both parties' briefing and as addressed by the district court, presented a claim of sovereign immunity. Thus, LPS' assigned error that the court erred in denying summary judgment based on the applicability of the discretionary function exemption is reviewable under § 25-1902(1)(d). We now turn to that assigned error.

2. Immunity

The chief issue is whether LPS' decision to terminate Simpson's employment was a discretionary function for which LPS retained immunity. We start by broadly discussing a political subdivision's immunity, the limited waiver of

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[12] *Id.* at 136, 971 N.W.2d at 309.

[13] See *Clark v. Sargent Irr. Dist., supra* note 5.

immunity under the PSTCA, and exemptions from the waiver. Then, we focus on the discretionary function exemption.

(a) Sovereign Immunity and Waiver

[5] The sovereign immunity of the State and its political subdivisions is preserved in Neb. Const. art. V, § 22.[14] This constitutional provision is not self-executing, and no suit may be maintained against a political subdivision unless the Legislature, by law, has provided otherwise.[15]

[6] Through enactment of the PSTCA, the Legislature has allowed a limited waiver of sovereign immunity with respect to some, but not all, types of tort claims.[16] The PSTCA's waiver of immunity is subject to exemptions as set forth in § 13-910.[17] We are mindful that statutes purporting to waive the protection of sovereign immunity are to be strictly construed in favor of the sovereign and against waiver.[18] In order to strictly construe the PSTCA against a waiver of sovereign immunity, courts apply a broad reading to any statutory exemptions from a waiver of sovereign immunity.[19]

[7] When an exemption under the PSTCA applies, the proper remedy is to dismiss the claim for lack of subject matter jurisdiction.[20] As mentioned, the exemption at issue here is the discretionary function exemption.

(b) Discretionary Function Exemption

The discretionary function exemption provides that the PSTCA does not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a

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[14] *Id.*

[15] See *id.*

[16] See *id.*

[17] See *Mercer v. North Central Serv.*, 308 Neb. 224, 953 N.W.2d 551 (2021).

[18] See *Edwards v. Douglas County*, 308 Neb. 259, 953 N.W.2d 744 (2021).

[19] *Id.*

[20] See *Clark v. Sargent Irr. Dist., supra* note 5.

discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused."[21] Under this exemption, a political subdivision retains immunity for discretionary action by an employee taken on the political subdivision's behalf.

[8] The purpose of the discretionary function exemption is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.[22] The discretionary function exemption extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions.[23] It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exemption applies in a given case.[24]

[9] A two-part analysis determines whether the discretionary function exemption applies.[25] First, the court must consider whether the action is a matter of choice for the acting political subdivision or employee.[26] Second, if the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield.[27] Both parts of the analysis must be met for the exemption to apply.[28] The district court found that LPS did not satisfy the second part, but Simpson's argument appears to also challenge the first part. We start there.

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[21] § 13-910(2).

[22] See *Mercer v. North Central Serv., supra* note 17.

[23] See *id*.

[24] See *Lambert v. Lincoln Public Schools*, 306 Neb. 192, 945 N.W.2d 84 (2020).

[25] See *id.*

[26] *Id*.

[27] See *id*.

[28] See *id.*

(i) Matter of Choice

Determining whether the act involves a matter of choice is mandated by the language of the statutory exemption, because conduct cannot be discretionary unless it involves an element of judgment or choice.[29] Hiring and firing decisions are typically discretionary in nature.[30] But Simpson contends that public policy prohibits the action here. She argues that "LPS lacks the choice to retaliate against Simpson for her necessary resort to workers[']compensation benefits."[31]

[10] The discretionary function exemption of the PSTCA will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because in that event, the employee has no rightful option but to adhere to the directive.[32] For the same reason, the exemption will not apply when a statute, regulation, or policy prohibits the challenged action.[33] If the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exemption to protect.[34]

Simpson's contention that public policy prohibits the action stems from a judicial decision, *Jackson v. Morris Communications Corp.*[35] There, we "recognize[d] a public policy exception to the at-will employment doctrine and allow[ed] an action for retaliatory discharge when an

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[29] See *Clark v. Sargent Irr. Dist., supra* note 5.

[30] See, e.g., *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207 (D.C. Cir. 1997); *Larson by Larson v. Miller*, 76 F.3d 1446 (8th Cir. 1996); *Richman v. Straley*, 48 F.3d 1139 (10th Cir. 1995).

[31] Brief for appellee at 16.

[32] See *Clark v. Sargent Irr. Dist., supra* note 5.

[33] See *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119 (D.C. Cir. 2015).

[34] *Clark v. Sargent Irr. Dist., supra* note 5.

[35] *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

employee has been discharged for filing a workers' compensation claim."[36] Simpson draws on that public policy exception to essentially argue that Nebraska common law restricted LPS' discretion to discharge an at-will employee in retaliation for filing a workers' compensation claim.

[11] But a court-made policy cannot be the source of a waiver of sovereign immunity under the PSTCA. The judiciary does not have the power to waive sovereign immunity; decisions on whether and how to limit the government's potential tort liability belong to the Legislature.[37] Courts must not, through judicial construction, usurp the Legislature's role in drawing the line between governmental liability and immunity.[38]

The Legislature has waived immunity for some employment-based claims. A statute specifically authorizes suit against "[t]he state and governmental agencies created by the state" for claims arising under the Nebraska Fair Employment Practice Act.[39] That act makes it unlawful to, among other things, discharge an employee due to the employee's race, color, religion, sex, disability, marital status, or national origin.[40] It also makes retaliation against an employee under certain circumstances an unlawful employment practice.[41]

Whether a political subdivision's tort liability should be expanded to include a claim for wrongful discharge in retaliation for filing a workers' compensation claim is a matter we leave to the Legislature. In the absence of such a statutory policy, we cannot find a waiver of immunity.

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[36] *Id.* at 432, 657 N.W.2d at 641.

[37] See *Edwards v. Douglas County, supra* note 18.

[38] *Id.*

[39] See Neb. Rev. Stat. § 48-1126 (Reissue 2021).

[40] See Neb. Rev. Stat. § 48-1104(1) (Reissue 2021).

[41] See Neb. Rev. Stat. § 48-1114(1) (Reissue 2021).

The termination decision here involved an element of judgment. Weber stated that his decision to terminate Simpson's employment was not dictated or required by any policy of LPS. Further, the Legislature explicitly instructed that the discretionary function exemption applies "whether or not the discretion is abused."[42] Simpson's mere allegation of wrongful termination does not eliminate immunity under the discretionary function exemption. We conclude that the first part of the test is satisfied.

(ii) Judgment of Kind That Exemption Is Designed to Shield

[12] Moving to the second part of the test, the inquiry is whether the action or decision is grounded in social, economic, and political policy.[43] Broadly speaking, actors at the highest level of government are more likely as a general matter to be engaged in policy decisions to which the discretionary function exemption applies than actors at the operational level, where the spectrum of acts from discretionary to merely ministerial is on greater display.[44]

The Nebraska appellate courts have not addressed whether the discretionary function exemption of the PSTCA applies to employment decisions. But federal courts have considered the question in connection with the discretionary function exception of the Federal Tort Claims Act.[45] Because the federal act is substantially similar to the PSTCA, we consider guidance from federal courts.[46]

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[42] § 13-910(2).

[43] See *Lambert v. Lincoln Public Schools, supra* note 24.

[44] See *Wizinsky v. State*, 308 Neb. 778, 957 N.W.2d 466 (2021).

[45] 28 U.S.C. § 2680(a) (2018).

[46] See *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

Federal courts have determined that issues of employee retention involve the exercise of policy judgment and fall within the discretionary function exception of the federal act.[47] With respect to a negligence claim, the Eighth Circuit reasoned: "[D]ecisions to 'investigate, hire, fire, and retain' employees are generally discretionary. Thus, these decisions fall within the discretionary function exception and cannot be the basis for liability on the part of the school district."[48] The 10th Circuit held that "[d]ecisions regarding employment and termination are inherently discretionary"[49] and "are precisely the types of administrative action the discretionary function exception seeks to shield from judicial second-guessing."[50] The court explained that "employment and termination decisions are, as a class, the kind of matters requiring consideration of a wide range of policy factors, including 'budgetary constraints, public perception, economic conditions, individual backgrounds, office diversity, experience and employer intuition.'"[51] Similarly, the D.C. Circuit held that "decisions concerning the hiring, training, and supervising of . . . employees are discretionary in nature, and thus immune from judicial review."[52]

Many state courts have similarly concluded that employment decisions are of the kind that the discretionary function

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[47] See 35A Am. Jur. 2d *Federal Tort Claims Act* § 41 (2021). See, also, *Miller v. U.S.*, 992 F.3d 878 (9th Cir. 2021); *Burkhart v. Washington Metro. Area Transit Auth., supra* note 30; *Larson by Larson v. Miller, supra* note 30; *Richman v. Straley, supra* note 30; *Radford v United States*, 264 F.2d 709 (5th Cir. 1959).

[48] *Larson by Larson v. Miller, supra* note 30, 76 F.3d at 1457.

[49] *Richman v. Straley, supra* note 30, 48 F.3d at 1146.

[50] *Id.* at 1147.

[51] *Sydnes v. U.S.*, 523 F.3d 1179, 1186 (10th Cir. 2008).

[52] *Burkhart v. Washington Metro. Area Transit Auth., supra* note 30, 112 F.3d at 1217.

exemption seeks to shield.[53] However, the Iowa Supreme Court reached a contrary conclusion.[54]

[13] We agree with the majority of courts that have considered the question. We hold that generally, employment and termination decisions are discretionary and involve a judgment of the kind that the discretionary function exemption is designed to shield. A court does not inquire into the intent of the political subdivision employee when making a specific personnel decision, nor does it ask whether policy analysis was the real reason for the decision.[55] Instead, a court asks categorically, rather than case specifically, whether the kind of conduct at issue can be based on policy concerns.[56] A decision to terminate an individual's employment is susceptible to a policy analysis. In making such a decision, a political subdivision may be called upon to balance competing interests and take public perception into consideration.

Here, the undisputed facts show that the decision to terminate Simpson's employment was not made by her immediate supervisor. Rather, a human resources specialist recommended that LPS terminate Simpson's employment after a meeting and a followup investigation. The recommendation went up the chain of command to Weber, the associate superintendent of human resources, who was the final decisionmaker with regard to continuing or terminating the employment of certain positions. In making that decision, Weber presumably weighed information about Simpson's being a well-liked employee with good performance appraisals against

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[53] See, e.g., *Ex Parte Hugine*, 256 So. 3d 30 (Ala. 2017); *Storm v. Town of Ponce Inlet*, 866 So. 2d 713 (Fla. App. 2004); *Doss v. City of Savannah*, 290 Ga. App. 670, 660 S.E.2d 457 (2008); *Wayment v. Holmes*, 112 Nev. 232, 912 P.2d 816 (1996); *City of Hidalgo v. Prado*, 996 S.W.2d 364 (Tex. App. 1999).

[54] *Doe v. Cedar Rapids Community School Dist.*, 652 N.W.2d 439 (Iowa 2002).

[55] See *Sydnes v. U.S., supra* note 51.

[56] See *id.*

information about her criminal history and honesty issues and made a policy judgment.

Under the facts of this case, the discretionary function exemption applies and LPS is entitled to immunity. We cannot categorically rule out the possibility that different facts might, in a proper case, lead to a different conclusion on the second step of the discretionary function analysis.

3. EXCLUSIVITY

LPS also assigned that the district court erred in failing to find that the court lacked subject matter jurisdiction over Simpson's claim due to the exclusivity provisions of the Nebraska Workers' Compensation Act. Because we have determined that the district court lacked subject matter jurisdiction over Simpson's claim due to LPS' immunity from suit, we need not determine whether the exclusivity issue bears on the correctness of the final order such that we would have appellate jurisdiction.[57]

VI. CONCLUSION

We conclude that the decision to terminate Simpson's employment involved an element of judgment of the type that the Legislature intended to shield; accordingly, LPS has immunity under the discretionary function exemption. We reverse the district court's contrary conclusion and remand the cause with direction to dismiss.

REVERSED AND REMANDED WITH DIRECTION.

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[57] See, *Clark v. Sargent Irr. Dist., supra* note 5; *State v. Abernathy*, 310 Neb. 880, 969 N.W.2d 871 (2022); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).