IN THE COURT OF APPEALS OF IOWA

No. 2-390 / 11-1548
Filed October 3, 2012

PATRICIA J. ZWANZIGER,
Plaintiff-Appellant,

vs.

JENNIFER O'BRIEN, Floyd County Public Health/Home Health Care Agency and FLOYD COUNTY,
Defendants-Appellees.

Appeal from the Iowa District Court for Butler County, Stephen P. Carroll, Judge.

Patricia Zwanziger appeals from the district court's dismissal of her retaliatory discharge claim under Iowa Code section 70A.29 (2007). **AFFIRMED.**

Gary J. Boveia of Boveia Law Firm, Waverly, for appellant.

Beth E. Hansen of Swisher & Cohrt, P.L.C., Waterloo, for appellees.

Heard by Vogel, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Patricia Zwanziger appeals from the district court's dismissal of her Iowa Code section 70A.29 (2007)[1] claim, which she asserts arose from her disclosure of agency mismanagement. Zwanziger contends the district court erred in striking her jury demand, and in determining the statute did not allow for recovery of damages for pain and suffering or for emotional distress allegedly caused by the discharge. Because section 70A.29 contemplates only equitable relief, to be determined by the court, we affirm the rulings of the district court.

I. Background Facts and Proceedings.

Patricia Zwanziger was the interim administrator of the Floyd County Public Health/Home Health Care Agency until February 18, 2008, and then moved to a position as a part-time staff registered nurse. Jennifer O'Brien began her duties as the administrator of the Floyd County Public Health/Home Health Care Agency on February 18, 2008.

On June 2, 2008, Zwanziger filed a petition against Jennifer O'Brien, the Floyd County Public Health/Home Health Care Agency, and Floyd County (hereinafter collectively referred to as O'Brien), alleging Jennifer O'Brien was the administrator of the agency and "was planning on changing" one of the Medicare programs, and it was Zwanziger's belief that the "proposed actions . . . would be mismanagement of the agency." Acting on this belief, Zwanziger contacted J. Patrick McDonnell, the chair of the Floyd County Board of Health, to voice "her

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[1] Iowa Code section 70A.29 (transferred from section 79.29 by the 1993 Iowa Code) is known as the "whistleblower" statute. *See Hill v. Iowa Dep't of Emp't Servs.*, 442 N.W.2d 128, 131 (Iowa 1989).

concerns." Zwanziger alleged that O'Brien thereafter "authored a notice of termination based in part on Plaintiff's said contact" with the chair, which Zwanziger alleged was "an act of reprisal in violation of Iowa Code section 70A.29."

Both parties filed written demands for a jury trial. Subsequently, O'Brien filed a motion seeking to strike both demands and for the matter to be submitted to the court.[2] The district court initially ruled Zwanziger was entitled to a jury trial. However, following O'Brien's renewed motion to strike the jury demand, and relying on court interpretations of other whistleblower statutes, the district court concluded the relief granted by section 70A.29 was equitable in nature and would be tried to the court sitting in equity.

Following a six-day trial,[3] the district court found Zwanziger had failed to establish a predicate for a reasonable belief that mismanagement was occurring, or that her disclosure to McDonnell was the determining factor in her termination.[4] Because Zwanziger failed to establish a prima facie case of termination in reprisal of protected activity, the court dismissed the claims against defendants.

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[2] *See* Iowa R. Civ. P. 1.903(1) ("All issues shall be tried to the court except those for which a jury is demanded. Issues for which a jury is demanded shall be tried to a jury unless the court finds that there is no right thereto or all parties appearing at the trial waive a jury in writing or orally in open court.").

[3] Trial was held on November 30, December 1, 2, 6, 8, and 10, 2010. The court's ruling was filed on August 23, 2011.

[4] The parties agree that Zwanziger was required to show (1) as a county employee, she engaged in a protected activity (disclosed information to a county official she reasonably believed was evidence of mismanagement); (2) she suffered an adverse employment decision; and (3) the defendants discharged her as a reprisal for the disclosure. *See generally Yockey v. State*, 540 N.W.2d 418, 422 (Iowa 1995) (discussing burden-shifting analysis and elements of prima facie case of retaliatory discharge claim); *accord Hulme v. Barrett*, 449 N.W.2d 629, 633 (Iowa 1989).

Zwanziger now appeals.

II. Scope and Standard of Review.[5]

This case turns on our interpretation of Iowa Code section 70A.29. Because interpretation of a statute is a question of law, our review is for correction of errors at law. *See L.R. Noll Inc. v. Eviglo*, 816 N.W.2d 391, 393 (Iowa 2012).

III. Discussion.

Zwanziger does not challenge the trial court's factual findings, only its determinations that she was not entitled to a jury trial, or to seek damages for pain and suffering and emotional distress. We confine our discussion to those issues. *See Richter v. Shelby Cnty.*, 745 N.W.2d 505, 511 (Iowa 2008).

A. Jury trial. We begin with the statutory language of the claim invoked by Zwanziger's petition. Iowa Code section 70A.29(1) provides:

> A person shall not discharge an employee from or take or fail to take action regarding an employee's appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, a position in employment by a political subdivision of this state as a reprisal for a disclosure of any information by that employee to a member or employee of the general assembly, or an official of that political subdivision or a state official or for a disclosure of information to any other public official or law enforcement agency if the employee 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. This section does not apply if the disclosure of the information is prohibited by statute.

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[5] Zwanziger's brief fails to comply with Iowa Rule of Appellate Procedure 6.903(2)(g)(2), which requires "a statement addressing the scope and standard of appellate review" and citation to relevant authority.

Subsection 3 then states, "Subsection 1 may be enforced through a civil action." Iowa Code § 70A.29(3). It continues, "A person who violates subsection 1 is liable to an aggrieved employee for affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs." *Id*. § 70A.29(3)(a).[6] No Iowa appellate court has ruled upon the issue of whether such an action includes the right to a jury trial.

Zwanziger's claim of right to a jury trial raises numerous grounds, but she does not—because she cannot—rely upon an explicit statutory statement of a right to jury trial. *Cf.*, Age Discrimination in Employment Act, 29 U.S.C. §626(c)(2) ("In an action brought under paragraph (1), a person *shall be entitled to a trial by jury* of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action." (emphasis added)).

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[6] Addressing the parallel provision pertinent to state employees, Iowa Code § 70A.28, our supreme court has stated:

> Our legislature has enacted a statute that forbids retaliation or reprisal against a state employee who discloses information the employee reasonably believes "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." Iowa Code § 70A.28(2). This provision is part of a comprehensive chapter of the Code dealing with public employees and is known as a whistle-blower statute. This whistle-blower statute makes a violation of its prohibitions a criminal offense and also creates a civil remedy. The remedies available in a civil action include reinstatement of the discharged employee or other equitable relief, as well as attorney fees and costs.

Worthington v. *Kenkel*, 684 N.W.2d 228, 230-31 (Iowa 2004) (citations omitted).

Zwanziger contends she is entitled to a jury trial under Article 1, section 9 of the Iowa Constitution, which provides that "the right of trial by jury shall remain inviolate."

Zwanziger argues that a common law claim for wrongful discharge has long-existed in Iowa, citing *Park v. Independent School District No. 1*, 21 N.W. 567 (Iowa 1884). We must point out, however, that the claim in *Park* was grounded upon a teacher's statutory right to appeal an allegedly wrongful discharge. *See Park*, 21 N.W. at 568-69. And that statutory right is grounded upon contract. *See Kirkpatrick v. Indep. Sch. Dist. of Liberty*, 5 N.W. 750, 751 (Iowa 1880) (noting that question certified was "whether, in case of board of school directors discharge a teacher upon the ground of incompetency, without complying with section 1734 of the code, he can *at once maintain an action for damages as for breach of contract*" (emphasis added)). The *tort* of wrongful discharge is not so long-recognized, developing as a public-policy exception to an employer's right to discharge an at-will employee. *See generally Springer v. Weeks & Leo Co., Inc.*, 475 N.W.2d 630, 632-33 (Iowa 1991) (listing "in chronological order" the cases developing and refining the tort of retaliatory or wrongful discharge—beginning with *Davenport v. City of Des Moines*, 430 N.W.2d 405, 407 (Iowa 1988)).

"A right to a jury trial, if it arises only by virtue of statute, is not fundamental." *State ex rel. Bishop v. Travis*, 306 N.W.2d 733, 734 (Iowa 1981). We note, "there is no right to a jury trial generally in cases brought in equity. Generally, if the cause of action is equitable in character, even in part, and equity

jurisdiction once attaches, full and complete adjustment of the rights of all parties will be properly made in the suit." *Weltzin v*. *Nail*, 618 N.W.2d 293, 296 (Iowa 2000) (internal quotation marks and citations omitted).

We look then to the language of section 70A.29 to determine whether it provides for a cause of action that is "equitable in character." *See id*. Under that statutory provision, a person who discharges a county employee "as a reprisal" for a protected disclosure, "is liable to an aggrieved employee for affirmative relief including reinstatement, with or without back pay, *or any other equitable relief* the court deems appropriate, including attorney fees and costs." Iowa Code § 70A.29(1), (3)(a) (emphasis added). The phrase "any *other* equitable relief" necessarily implies that the "affirmative relief" authorized is equitable relief. *See Fjords N.*, *Inc*. *v*. *Hahn*, 710 N.W.2d 731, 737 (Iowa 2006) ("Under the last-antecedent rule, '[r]eferential and qualifying words and phrases, where no contrary intent appears, refer solely to the last antecedent.'" (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:33, at 369 (6th ed. 2000)).

We note, too, that the relief provided for under section 70A.29 differs from the relief authorized in the Iowa Civil Rights Act (ICRA), which provides for "[p]ayment to the complainant of damages for an injury caused by the discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees." Iowa Code § 216.15(a)(8). Clearly, if the legislature intended to permit "actual damages" in an action under section 70A.29, it could have so stated, as it did in section 216.15(a)(8).

Whether a litigant is entitled to a jury trial under the ICRA has been the subject of much debate. In *Smith v*. *ADM Feed Corp*., 456 N.W.2d 378 (Iowa 1990), in a five-to-four decision, the court ruled there was no right to jury trial. But, *Smith* was overruled in *McElroy v*. *State*, 703 N.W.2d 385, 393-95 (Iowa 2005), where the court explained:

> In *Smith*, a sharply divided court held there was no right to a jury trial under the ICRA. . . .
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> In its statutory analysis, the majority in *Smith* concluded the district court in an ICRA action "sits as the [Iowa Civil Rights Commission] and is empowered only to grant that relief authorized" by the ICRA. 456 N.W.2d at 381. The majority stressed the administrative nature of the ICRA framework and concluded that affording a jury trial in district court "would substantially interfere with a statutory scheme which delegates to the court only that limited power held by the commission." *Id*. Concerned that ruling to the contrary would result in a time consuming process which would place "a greater emphasis . . . on a money recovery over other available relief," the majority concluded the statute should not be interpreted to afford litigants a jury trial. *Id*. The majority also noted that the statute itself did not say whether a jury trial was afforded, and considered this silence as evidence the legislature did not intend a jury trial. *Id*. at 380-81.
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> On further examination, we conclude the majority's statutory analysis in *Smith* was fundamentally flawed and must be overruled. As four members of this court pointed out in *Smith*, the majority erred when it concluded the ICRA framework was administrative in nature:
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> > The district court does *not* sit as a civil rights commission; it does not screen cases as does the commission; it does not investigate cases like the commission; nor does a court hear cases under the commission's rules. When the legislature sought to provide a partial answer to the backlog of undisposed claims before the civil rights commission, it did so by providing an *alternative* to the administrative proceeding in the form of an ordinary civil action.
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> *Id*. at 387-88 (Carter, J., dissenting). While it is true the ICRA generally requires plaintiffs to exhaust their administrative remedies, there is nothing extraordinary about the nature of a district court proceeding brought once those remedies are so

exhausted. The ICRA is no different than any other statute providing a cause of action. The ICRA has always permitted a plaintiff to sue for monetary damages in the district court. For this reason, it is not surprising the legislature did not expressly indicate claimants were entitled to a jury trial under the ICRA—it was assumed.

Far from "substantially interfer[ing] with [the] statutory scheme," interpreting the ICRA framework as written would alleviate the problems that have arisen since *Smith* was decided. In *Smith*, the dissent pointed out that denying the right to a jury trial on ICRA claims would not only run contrary to legislative intent, but would also prove infelicitous because plaintiffs bringing several different causes of action would have some of them tried by a jury, with others tried to the court. *Id*. at 388. Fifteen years later, the dissent's prophesy has come true.

Further problems have arisen. Shortly after *Smith* was decided, Congress passed legislation that granted litigants the right to a jury trial under Title VII. *See* 42 U.S.C. § 1981. Subsequently, the Eighth Circuit ruled it was not bound to our pronouncement in *Smith*. *See Pickens v*. *Soo Line R*.*R*., 264 F.3d 773, 779 (8th Cir. 2001). Federal district courts in Iowa have ruled litigants have a right to a jury trial on their ICRA claims in federal court. *See, e*.*g*., *Bales v*. *Wal-Mart Stores, Inc*., 972 F.Supp. 483, 490 (S.D.Iowa 1997) (concluding "[t]he ICRA authorizes actual damages, as well as equitable remedies" and granting jury trial on ICRA claim). As McElroy points out, this has resulted in the odd situation that plaintiffs bringing ICRA claims in federal court may receive a jury trial, but those in state court will not. This has only further compounded the problems the dissent foretold.

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. . . As for the legislative-assent-from-silence argument, it should be noted that the majority in *Smith* ignored this very principle. The dissent in *Smith* correctly noted that in several cases before that case was decided claimants *were* afforded a jury trial under the ICRA. Indeed, historically Iowans were afforded the right to a jury trial under previous civil rights statutes. *Smith*, 456 N.W.2d at 388 (Carter, J., dissenting) (citing *Ayala v*. *Center Line*, *Inc*., 415 N.W.2d 603 (Iowa 1987); *Annear v*. *State*, 454 N.W.2d 869 (Iowa 1990)). Rather than attempt to divine legislative intent in this fashion, we must remember that legislation sometimes persists on account of "inattention and default rather than by any conscious and collective decision." Ronald Dworkin, *Law's Empire* 319 (1986).

For all the foregoing reasons, we overrule *Smith* and hold a plaintiff seeking money damages under the ICRA is entitled to a jury trial.

McElroy, 703 N.W.2d at 393-95 (footnotes omitted).

We acknowledge that our supreme court could similarly conclude that an action under section 70A.29 seeking only monetary damages is subject to a jury trial, if demanded. We also acknowledge that one jurisdiction has interpreted its state's whistleblower statute to be subject to a jury trial where the cause of action seeks only monetary damages. *See Abraham v. Cnty. of Hennepin*, 639 N.W.2d 348-354 (Minn. 2002).

But, unlike the ICRA and the Minnesota statute, section 70A.29 does not authorize an award of actual damages.[7] Rather, the statute allows "affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs." These forms of relief have been held to be equitable in nature. *See Channon v*. *United Parcel Serv., Inc*., 629 N.W.2d 835, 848 (Iowa 2001) ("In providing for front pay in

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[7] In contrast, the Minnesota Whistleblower Statute, Minn. Stat. § 181.935, provides:

> (a) In addition to any remedies otherwise provided by law, an employee injured by a violation of section 181.932 may bring a civil action *to recover any and all damages recoverable at law*, together with costs and disbursements, including reasonable attorney's fees, and may receive such injunctive and other equitable relief as determined by the court.
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> (c) If the district court determines that a violation of section 181.932 occurred, the court may order any appropriate relief, including but not limited to reinstatement, back-pay, restoration of lost service credit, if appropriate, compensatory damages, and the expungement of any adverse records of an employee who was the subject of the alleged acts of misconduct.

(Emphasis added.) In *Abraham*, 639 N.W.2d at 354, the Minnesota Supreme Court held "that an action brought in district court under the Whistleblower Act, Minn. Stat. § 181.935(a), and MOSHA, Minn. Stat. § 182.669, subd. 1, alleging the tort of retaliatory discharge and seeking only money damages, is a cause of action at law with a constitutional right to jury trial."

Title VII cases, courts often treated the remedy as equitable in nature. In doing so, the courts have relied on 42 U.S.C. § 2000e–5(g)(1) (providing that the court may order reinstatement "or any other equitable relief as the court deems appropriate")).

This interpretation is consistent with federal court decisions interpreting the whistleblower provisions of the Sarbanes-Oxley (SOX) Act of 2002, 18 US.C. § 1514A, prior to a 2010 legislative amendment specifically granting a right to a jury trial.[8] *See Schmidt v*. *Levi Strauss & Co*., 621 F. Supp. 2d 796, 802-06 (N.D. Cal. 2008) (concluding that "[b]ased on this court's review of the statutory text, purpose of the remedies, and overall statutory scheme, . . . the relief provided by § 1514A is equitable in nature, or otherwise intertwined or inextricably linked the equitable relief of reinstatement," there was no right to a jury trial for the plaintiff's SOX claim); *see generally Jones v*. *Home Fed. Bank*, 2010 WL 255856, at *7 (D. Idaho 2010) ("[T]here is little jurisprudence (including no Ninth Circuit decisions) regarding whether plaintiffs are entitled to a jury trial on whistleblower claims filed under SOX. Here, both parties agree there is no express right to a jury trial included in the statute. Further, the majority of cases that have decided the issue have held that no right to a jury trial exists."); *see also* Debra S. Katz, ALI-ABA Course of Study, *Whistleblower Litigation*, ST033 ALI-ABA 991, 1031 (Westlaw 2012) ("Section 922(c) of the Dodd-Frank Act explicitly provides SOX whistleblowers with the right to a jury trial in federal court. Previously, SOX did

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[8] *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, PL 111-203, Title IX, § 922 (124 Stat.) 1376 (July 21, 2010) (amending 18 U.S.C. § 1514A(b)(2) to add subsection (E), which states: "A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.").

not expressly provide for a jury trial, and courts generally agreed that no right to a jury trial existed under SOX 806 [per author, the whistleblower protection provision of the Sarbanes-Oxley Act] prior to the enactment of the Dodd-Frank Act." (citing *Schmidt*, 621 F. Supp. 2d at 801; *Walton v. Nova Info. Sys.*, 514 F. Supp. 2d 1031, 1034 (E.D. Tenn. 2007)).

In *McElroy*, 703 N.W.2d at 394, our supreme court cited the dissent in *Smith* in stating that any departure from a litigant's constitutional right to a jury trial should "require some express legislative directive." *See Smith,* 456 N.W.2d at 387 (Carter, J., dissenting). Unlike the ICRA, section 70A.29 specifically recites, "or any other equitable relief *the court deems appropriate*." (Emphasis added.) Because the determination of equity relief historically has been within the province of the court, the reference to "the court" making the determination may seem insignificant or mere surplusage. However, our supreme court has stated "each term is to be given effect," and we "will not read a statute so that any provision will be rendered superfluous." *Neal v. Annnett Holdings, Inc.*, 814 N.W.2d 512, 520 (Iowa 2012) (internal quotation marks and citations omitted). Accordingly, we find significance in the fact that the legislature specifically directed the determination of relief to be accorded to the court.

We also note that in *McElroy*, our supreme court observed that historically, claimants were afforded a jury trial upon their ICRA claims. 703 N.W.2d at 395. However, we have no similar historic basis upon which to rely in respect to section 70A.29 claims.

Finally, in *McElroy*, the court buttressed its decision by observing the "odd situation" that an ICRA claim filed in state court was not subject to a jury trial but, if the claim was filed in federal court, the claimant was entitled to a jury trial. *See id*. at 394. Although *Smith* determined a claimant in state court had no right to a jury trial, the right to a jury trial in federal court is a question of federal law and the pronouncement in *Smith* was held not to bind federal courts. *See Pickens v. Soo Line R.R.*, 264 F.3d 773, 779 (8th Cir. 2001). And because the ICRA authorizes actual damages as well as equitable remedies, under federal law the claimant is entitled to a jury trial. *See Bales v. Wal-Mart Stores Inc.*, 972 F. Supp. 483, 490 (S.D. Iowa 1997). However, section 70A.29 claimants may only seek equitable damages, and accordingly, the same incongruent results should not arise.

Because statutory interpretation and persuasive federal case law support the conclusion that section 70A.29 contemplates only equitable relief, and the statute expressly directs the court to make the determination of other equitable relief to be awarded, we find no error in the district court striking Zwanziger's jury demand.

B. Statute does not provide for pain and suffering or emotional distress damages. Zwanziger's second issue is her claim that the court erred in concluding that pain and suffering damages, and emotional distress damages, are not recoverable under section 70A.29. There is nothing in the statutory language of section 70A.29 (which is the only basis upon which Zwanziger sought relief) allowing for damages for emotional harm. *But see Niblo v. Parr*

Mfg., Inc., 445 N.W.2d 351, 355-56 (Iowa 1989) (recognizing that in a cause of action for wrongful discharge "emotional distress damages are recoverable for retaliatory discharge in violation of public policy"). Moreover, as we have observed, section 70A.29(3)(a) does not use the term "actual damages" as used in the ICRA.

C. No prejudice.

In any event, O'Brien claims Zwanziger was not prejudiced by any denial of a right to a jury trial because she failed to present sufficient evidence to establish a prima facie case. We agree. Because the district court found that Zwanziger failed to establish a prima facie case that she had a reasonable belief that mismanagement had occurred or that her disclosure of such alleged mismanagement was the reason for her employment discharge, even if she was entitled to a jury trial, the evidence would have been insufficient to submit the claim to the jury. *See Vaughn v*. *Ag Processing*, *Inc*., 459 N.W.2d 627, 637 (Iowa 1990) ("After reviewing all the evidence in the record before us in a light most favorable to plaintiff and for the reasons discussed above, we believe that had the claim of outrageous conduct been tried to a jury, there would have been insufficient evidence to submit that claim.").

For the reasons stated, we affirm.

AFFIRMED.