IN THE COURT OF APPEALS OF IOWA

No. 2-393 / 11-1784
Filed November 15, 2012

TERRI RIVERA,
Plaintiff-Appellant,

vs.

WOODWARD RESOURCE CENTER and STATE OF IOWA,
Defendants-Appellees.

Appeal from the Iowa District Court for Dallas County, Gregory A. Hulse, Judge.

Terri Rivera appeals from an order granting summary judgment and dismissing her action for wrongful discharge in violation of public policy. **REVERSED AND REMANDED.**

Bryan P. O'Neill and Jill Zwagerman of Newkirk Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Barbara Galloway, Assistant Attorney General, for appellees.

Heard by Eisenhauer, C.J., and Doyle and Tabor, JJ.

DOYLE, J.

Terri Rivera appeals from the district court's order granting summary judgment and dismissing her suit for wrongful discharge in violation of public policy. She contends the court erred in concluding the savings clause in the Iowa Tort Claims Act (ITCA), Iowa Code section 669.13(2) (2007), did not apply to her suit. The State argues the savings clause did not save Rivera's suit from dismissal, and it alternatively argues Rivera did not engage in any protected activity. We reverse and remand.

***I. Background Facts and Proceedings*.**

Rivera was hired as a residential treatment worker at the Woodward Resource Center in April 2006. Her employment was terminated on October 3, 2006. On September 26, 2008, Rivera sued the State for wrongful discharge from employment in violation of public policy, citing Iowa Code chapters 135C (health care facilities) and 235B (dependent adult abuse services—information registry).

On October 20, the State filed a pre-answer motion to dismiss, asserting her suit was premature because Rivera had not exhausted her administrative remedies. The district court dismissed the petition without prejudice on November 10, finding Rivera's "claim of wrongful discharge from employment is a tort claim . . . subject to the [ITCA]" and she had "not exhausted her administrative remedies under chapter 669." The ruling was not appealed.

On November 25, Rivera submitted her claim to the state appeal board by the mailing of a state appeal board claim form and affidavit. In a cover letter with the claim form, Rivera's attorney stated:

> It is our position that the nature of this claim does not fall within the [Iowa] Tort Claims Act because it is the termination of an employee from work and not based on personal injury. However the Attorney General believes it does fall under the Act and we are therefore submitting this claim.

The board denied the claim on June 16, 2009, and it directed Rivera to Iowa Code sections 669.4 and 669.13 if she wanted to "pursue this matter further." The denial did not state that the claim was time-barred.

On July 8, Rivera again filed a petition and jury demand alleging wrongful discharge from employment in violation of public policy. On July 30, the State filed an answer denying the allegations of the petition and raising affirmative defenses including the statute of limitations, failure to meet "administrative prerequisites" before bringing suit, and lack of subject matter jurisdiction.

More than two years later, on August 11, 2011, the State moved for summary judgment. The State alleged the suit was time-barred and the court therefore lacked jurisdiction. Alternatively, the State alleged Rivera did not engage in a protected activity, so her termination was not contrary to public policy. Rivera filed a resistance on August 26, arguing the suit was timely because the initial lawsuit triggered the six-month extension for filing as set forth in Iowa Code section 669.13(2).

The district court granted the State's motion and dismissed Rivera's petition. Following *Drahaus v*. *State*, 584 N.W.2d 270, 274-75 (Iowa 1998), the court noted the differences between the terms "suit" and "claim" in chapter 669 and concluded the terms were not used interchangeably. The court stated:

> Filing the suit is the action that takes place in the district court, while making the claim is the act of filing a claim with the state appeal board. The savings clause found in Iowa Code

> section 669.13(2) provides that the two-year period for making a claim and beginning a suit shall be extended for a period of six months if a court determines that the exclusive remedy is under chapter 669, but only if a claim has been made first. [Rivera] wants this court to find that a *suit* filed within two years from the date of accrual is a *claim* and satisfies Iowa Code section 669.13(2). However, chapter 669 sets forth a strict procedure to follow in order to allow the State to be sued. Filing a suit is not the same as making a claim as it was intended to be used. Because [Rivera] failed to file a claim, the statute of limitations bars [Rivera's] suit under the [ITCA].

Rivera then filed a motion to enlarge or reconsider, bringing to the court's attention a case filed just a week before the court granted the State's motion for summary judgment—*Furnald v. Hughes*, 804 N.W.2d 273, 276 (Iowa 2011) (considering the Iowa Code section 614.10 savings clause). The district court concluded the *Furnald* decision did not change its determination that Rivera's actions did not fall within the savings statute in section 669.13 and that her suit was time-barred.

Rivera appeals the district court's order granting summary judgment and dismissing her suit.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. *Koeppel v. Speirs*, 808 N.W.2d 177, 179 (Iowa 2011). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Koeppel*, 808 N.W.2d at 179. We review the record in the light most favorable to the party opposing the motion. *Koeppel*, 808 N.W.2d at 179.

III. Discussion.

A. Iowa Code Section 669.13.

Rivera's petition asserted an intentional tort claim of wrongful discharge from employment in violation of public policy. *See Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109 (Iowa 2011) (setting forth the elements necessary to establish "an intentional tort claim of wrongful discharge"). All tort claims against the State fall under the ITCA, now codified as Iowa Code chapter 669. *See Drahaus*, 584 N.W.2d at 272. The procedural requirements of chapter 669 are jurisdictional. *McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010); *see also Swanger v. State*, 445 N.W.2d 344, 347 (Iowa 1989). Pursuant to the procedures detailed in Iowa Code chapter 669, tort claims against the State must first be presented to the state appeal board before filing a petition in the district court. *Minor v. State*, 819 N.W.2d 383, 405 (Iowa 2012); *see also* Iowa Code § 669.5. "Improper presentment of a claim, or not presenting one at all, has been considered a failure to exhaust one's administrative remedies, depriving the district court of subject matter jurisdiction." *Id.* (quoting *In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996)). The district court does not acquire subject matter jurisdiction unless the administrative procedures required are exhausted. *McGill*, 790 N.W.2d at 118. "If a court lacks jurisdiction when a suit is filed, then the court must dismiss the suit." *Minor*, 819 N.W.2d at 405.

Iowa Code section 669.13(1) provides:

> Except as provided in section 614.8, a claim or suit otherwise permitted under this chapter *shall be forever barred*, *unless within two years after the claim accrued*, the claim is made in writing and filed with the director of the department of management under this chapter. The time to begin a suit under

> this chapter shall be extended for a period of six months from the date of mailing of notice to the claimant by the attorney general as to the final disposition of the claim or from the date of withdrawal of the claim under section 669.5, if the time to begin suit would otherwise expire before the end of the period.

(Emphasis added.) The relevant dates for application of section 669.13(1) in this case are as follows. Rivera's employment ended on October 3, 2006, and her claim accrued no later than that date. She filed her first petition in district court on September 26, 2008. On November 10, 2008, the district court granted the State's motion to dismiss her suit for failure to make an administrative claim under chapter 669, and it dismissed her suit without prejudice. On November 25, 2008, Rivera mailed her claim form to the state appeal board.

Applying section 669.13(1) to the relevant dates, Rivera's claim was "forever barred" because it was not made to the administrative agency within two years of its accrual in October 2006.[1] *See McGruder v*. *State*, 420 N.W.2d 425, 426 (Iowa 1988) (affirming denial of claim not made within two years after claim accrued). Consequently, the district court never acquired subject matter jurisdiction of her claim. *See McGill*, 790 N.W.2d at 118; *Swanger*, 445 N.W.2d at 349-50.

Be that as it may, Rivera argues the savings clause in section 669.13(2) saves the day for her. That clause provides, in relevant part:

> *If a claim is made or filed under any other law of this state and a determination is made by a state agency or court that this chapter provides the exclusive remedy for the claim*, the two-year period authorized in subsection 1 to make a claim and to begin a

[1] Rivera's subsequent lawsuit filed in July 2009, and dismissed by the district court in October 2011, was also "forever barred" under section 669.13(1) because the administrative claim was not made within two years of its accrual.

> suit under this chapter shall be extended for a period of six months from the date of the court order making such determination . . . .

Iowa Code § 669.13(2) (emphasis added). Under section 669.13(2), three requirements must be met before the savings clause is triggered: (1) a timely claim[2] has been made or filed; (2) the claim has been made or filed under any other law of the state (i.e., not made or filed under chapter 669); and (3) an agency or court has made a determination that chapter 669 is the exclusive remedy for the claim. *See id.* Once these three requirements are met, the time to make a claim and to begin suit under chapter 669 is extended for a period of six months from the date of the determination that chapter 669 is the claimant's exclusive remedy. *Id.* Rivera asserts all three requirements were met and thus the savings clause came into play and extended the two-year period to make her administrative claim by six months from the date of the determination.

1. "Claim."

Rivera argues the term "claim" is sufficiently broad to cover the filing of her 2008 suit in district court. The State insists "claim" does not include a suit filed in district court but applies only to an administrative claim improvidently filed with the wrong agency, as found by the district court. We agree with Rivera.

We acknowledge our supreme court has held "that various provisions of chapter 669 . . . draw a distinction between the terms *claim*, *action*, and *suit* . . . ." *Drahaus*, 584 N.W.2d at 275. But, the fact that distinctions exist between the terms does not automatically make them mutually exclusive. The purpose for distinguishing a claim and a suit in the *Drahaus* case was to identify *who* had

[2] A claim is timely if made or filed within two years after the claim accrues. Iowa Code § 669.13(1).

standing to bring a claim with the state appeal board versus *who* had standing to bring a lawsuit in district court. *See id.* In that context, the court concluded "that [Iowa Rule of Civil Procedure 1.210's] restriction concerning who may file a civil action on behalf of a minor ward applies only to *actions* brought in district court and does not apply to the filing of a claim with the appeal board under Iowa Code chapter 669." *Id.* at 274. In other words, for purposes of application of our rules of civil procedure, a claim filed with the state appeal board is not equivalent to the filing of a civil action and is therefore not subject to the rules of civil procedure. *See id.* at 275. However, *Drahaus* provides little guidance to the question presented here: Does the term "claim," for purposes of section 669.13(2), exclude an improvidently-filed action in district court? We think not.

We begin with the ITCA's definition of "claim," which means:

> a. Any claim against the state of Iowa for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee's office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damages, loss, injury, or death.
>
> b. Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee's office or employment.

Iowa Code § 669.2(3). The legislature's definition of "claim" as a claim is not particularly enlightening. Nevertheless, the statutory definition is consistent with the dictionary definition of "claim": "a demand for something due or believed to be due" or "a right to something." Webster's Seventh New Collegiate Dictionary 152 (1967). As the word "claim" appears throughout the provisions of chapter 669, its

connotation varies. In some instances it may be construed to mean a right or demand. For example, section 669.15 addresses attorney fees and refers to a "court rendering a judgment for a claimant" and for the attorney's services "rendered in connection with such claim" without any separate reference to a suit. In other instances it may be construed to mean an administrative claim. One must examine the context in which the word is used to discern its meaning relative to the specific provision in which it appears.

There is no qualification in section 669.13(2) restricting the use of the word "claim" to mean only administrative claims. It does not exclude suits or actions. *See* Iowa Code § 669.13(2). It broadly references all claims "made or filed" and contemplates that either a state agency or a court may determine if chapter 669 provides the exclusive remedy for the claim. *See id.* These references would certainly include a claim for damages improvidently filed as a lawsuit. *See id.* Furthermore, we note that service of a lawsuit or filing of a claim accomplishes the same purpose: notice upon the State of a claim. We conclude that Rivera's filing of her first lawsuit within two years of accrual of her claim constituted the filing of a claim within the context of section 669.13(2), and the first requirement was met. Accordingly, we conclude the district court erred as a matter of law in granting the State's motion for summary judgment on this issue. Because a dispute will likely arise on remand as to the remaining requirements, we choose to address them on appeal.

2. Chapter 669 or "Any Other Law of This State."

We next turn to whether or not Rivera's 2008 suit was made or filed "under any other law of this state" and not under chapter 669. Section 669.13(2)'s

language, "filed under any other law of this state," makes no distinction between procedural or substantive law. Rivera's 2008 suit was a "civil action" as defined in Iowa Code section 611.2 and was filed pursuant to applicable rules of civil procedure. Procedurally, the suit was not made or filed under chapter 669.

Rivera argues that when she filed her 2008 suit, she in good-faith believed her claim for wrongful discharge fell outside the parameters of chapter 669 and was therefore not governed by its provisions. She states she interpreted *Vrban v. Deere & Co.*, 129 F.3d 1008 (8th Cir. 1997), to stand for the proposition that claims for wrongful discharge in violation of public policy are founded in contract, not tort. Chapter 669 does not apply to interference with contract claims. *See* Iowa Code § 669.14(4) ("The provisions of this chapter shall not apply with respect to any claim against the State . . . arising out of . . . interference with contract rights.")

A claim for wrongful discharge does not seem to fit within the provisions of chapter 669. As noted above, the chapter's definition of "claim" references claims "for money only, on account of damage to or loss of property or on account of personal injury or death." *Id.* § 669.2(3)(a)-(b). A wrongful discharge claim does not appear to be a claim for loss of property or personal injury or death. *See Vrban*, 129 F.3d at 1010-11 (finding property damage and personal injury statute of limitations not applicable to wrongful discharge claim).

Additionally, the appearance that wrongful discharge claims do not fit is further reinforced by the state appeal board's claim form. The form sets forth two types of claims: general and tort. A wrongful discharge claim does not fall within

the category of general claims listed in Iowa Code section 25.2.[3] If a tort claim is selected on the form as the type of claim being submitted, the claimant must indicate an amount for one of the following three types of damages: property, personal injury, or wrongful death. Indicating an amount for wrongful discharge damages is not an option on the form.

The State suggests, in a rather circular fashion, that Rivera had to have filed her 2008 action under chapter 669 since "[i]ndeed, it could not be otherwise: absent the ITCA, the State is wholly immune from suits sounding in tort." However, the State puts the cart before the horse. As it turned out, the first suit was deemed improvidently filed because chapter 669 was found to be Rivera's sole remedy. It does not necessarily follow, as discussed above, that the suit was therefore filed under chapter 669. Additionally, the State's reliance on *Bensley v*. *State*, 468 N.W.2d 444 (Iowa 1991), is misplaced.

In *Bensley*, the estates of three individuals killed in an automobile crash filed tort claims with the state appeal board asserting the State was negligent in maintaining a highway. 468 N.W.2d. at 444-45. One day after filing their tort claims with the state appeal board, the estates sued the State in district court for the same deaths upon which their claims before the board were based. *Id.* at 445. At that time, their claims before the state appeal board had not been denied nor had the six-month waiting period to withdraw the claims passed. *Id.* at 446.

[3] These claims involve the following: Outdated sales and use tax refunds, license refunds, additional agricultural land tax credits, outdated invoices, fuel and gas tax refunds, outdated homestead and veterans' exemptions. outdated funeral service claims, tractor fees, registration permits, outdated bills for merchandise, services furnished to the state, claims by any county or county official relating to the personal property tax credit, and refunds of fees collected by the state. Iowa Code § 25.2(1)(a)-(m).

Their claims were denied about five months after being filed. *Id.* at 445. Almost two-and-a-half years later, the suit was dismissed for lack of jurisdiction because the estates had not exhausted their administrative remedies before filing the suit. *Id.*

Shortly after the first suit was dismissed, the estates re-filed their suit in district court, and the State thereafter moved for summary judgment based upon the statute of limitations under the statute. *Id.* at 444-45. The estates resisted, arguing their first suit was filed under "any other law of this state." *Id.* at 446. They contended "that when their first suit was filed, they were proceeding under chapter [669] as interpreted by *Charles Gabus Ford*, *Inc*. *v*. *Iowa State Highway Commission*, 224 N.W.2d 639 (Iowa 1974)." *Id.* Thus, the estates "believed the court could defer judgment on their suit until they had pursued and exhausted the administrative remedy available to them under chapter [669]." *Id.* The estates argued an Iowa Supreme Court decision in a companion case to their first suit "changed [the] interpretation of a court's ability to stay suits when a plaintiff has not exhausted administrative remedies available under chapter [669], in essence, creating new law." *Id.* at 446-47. The court did not find the estates' argument compelling and consequently found the estates' first suit was filed under the ITCA and the savings clause was therefore not applicable. *Id.* at 447.

The facts of *Bensley* are clearly distinguishable from the present case. Rivera makes no contention, unlike the *Bensley* plaintiffs, that she was proceeding under chapter 669 when she filed her first suit. We do not find the State's argument persuasive. If the State's interpretation of "any other law" is accepted, it would be hard to imagine any tort claim that would be saved by the

savings clause. The State also relies on *Furnald* for the proposition that savings clauses should provide a remedy that is "narrow and sharp, not broad and blunt." *See Furnald*, 804 N.W.2d at 283. But we cannot presume the legislature meant the remedy to be illusory or nonexistent. *See Janson v*. *Fulton*, 162 N.W.2d 438, 442 (Iowa 1968) (holding construction of any statute must be "sensibly and fairly made with a view of carrying out the obvious intent of the legislature enacting it"). We conclude Rivera's first suit was filed under "any other law of the state," and therefore the second requirement of section 669.13(2) was met.

***3. Determination Chapter 669 Is the Exclusive Remedy*.**

Finally, there is no question the district court did indeed rule that chapter 669 provides the exclusive remedy for Rivera's claim. Consequently, the third requirement of section 669.13(2) was met. Having concluded that Rivera met all three requirements of section 669.13(2), she is entitled to application of the savings clause. We must now turn to the State's alternative argument that Rivera did not engage in any protected activity and her termination was not contrary to public policy.

***B. Protected Activity*.**

The gist of the State's argument is that Rivera's report of suspected abuse to two supervisors, while desirable conduct, was insufficient to support a wrongful discharge tort. The issue was thoroughly briefed and argued to the district court, but not decided there. Our usual error preservation rules do not apply. The State was not obligated to request the district court to rule on the issue after the court dismissed the case on other grounds. *Jasper v. H. Nizam, Inc*., 764

N.W.2d 751, 774 (Iowa 2009). "As a successful party at trial, error was preserved by asserting the claim before the district court.

In April 2006, Woodward Resource Center hired Rivera as a resident treatment worker. Woodward Resource Center is an intermediate care facility providing health and rehabilitative services to children and adults with intellectual disabilities. It is licensed by the Iowa Department of Inspections and Appeals, and it operates under Iowa Code chapter 135C. Rivera asserts that while working at the facility she observed several incidents of her coworkers abusing residents. She reported these incidents of abuse to her supervisor on September 11, 2006. She also reported the incidents of abuse to her supervisor's supervisor. Less than a month later, Rivera was fired. As noted above, she then sued the State for wrongful discharge from employment in violation of public policy, citing Iowa Code chapters 135C (health care facilities) and 235B (dependent adult abuse services—information registry).

Rivera was an employee at will. Therefore, she could be fired "for any lawful reason or for no reason at all." *Lloyd v*. *Drake Univ*., 686 N.W.2d 225, 228 (Iowa 2004). However, a discharge is not lawful if it violates public policy. *Id.* Put another way; the employee must establish the discharge was caused by the employee's participation in an activity protected by a clearly defined public policy. *See Berry*, 803 N.W.2d at 109-10; *Jasper*, 764 N.W.2d at 761.

When "a protected activity has been recognized through the implementation of an underlying public policy that would be undermined if an employee were discharged from employment for engaging in that activity," an action for the tort of wrongful discharge exists. *Davis v*. *Horton*, 661 N.W.2d 533,

535 (Iowa 2003). An employee asserting a wrongful discharge claim based on a violation of public policy must establish:

> (1) existence of a clearly defined public policy that protects employee activity; (2) the public policy would be jeopardized by the discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason for the employee's discharge; and (4) there was no overriding business justification for the termination.

Jasper, 764 N.W.2d at 761; *see also Fitzgerald v*. *Salsbury Chem*., *Inc*., 613 N.W.2d 275, 282 n.2 (Iowa 2000).

"It is generally recognized that the existence of a public policy, as well as the issue whether that policy is undermined by a discharge from employment, presents questions of law for the court to resolve." *Fitzgerald*, 613 N.W.2d at 282. "On the other hand, the elements of causation and motive are factual in nature and generally more suitable for resolution by the finder of fact." *Id.* Thus, the "difficult task for courts is to determine which claims involve public policy and which claims involve private disputes between employers and employees governed by the at-will employment doctrine." *Jasper*, 764 N.W.2d at 761.

As our above discussion makes clear, the first step in determining whether a plaintiff has stated a cause of action for the tort of wrongful discharge in violation of public policy is to ascertain whether a clear, well-recognized public policy exists. *See Fitzgerald*, 613 N.W.2d at 282. "This important element sets the foundation for the tort and it is necessary to overcome the employer's interest in operating its business in the manner it sees fit. It also helps ensure that employers have notice that their dismissal decisions will give rise to liability." *Id.* (internal citations omitted).

In determining whether a clear, well-recognized public policy exists, our supreme court has "primarily looked to our statutes but [has] also indicated our Constitution to be an additional source." *Id.* at 283 (expressing a "reluctance to search too far beyond our legislative pronouncements and constitution to find public policy to support an action"). When relying on a statute as a source of public policy to support the tort, our supreme court explained that its wrongful-discharge cases finding a violation of public policy "can generally be aligned into four categories of protected activities: (1) exercising a statutory right or privilege; (2) refusing to commit an unlawful act; (3) performing a statutory obligation; and (4) reporting a statutory violation." *Jasper*, 764 N.W.2d at 762 (internal citations omitted). Most recently, the court declared administrative regulations are also a proper source for public policy "when adopted pursuant to a delegation of authority in a statute that seeks to further a public policy." *Id.* at 764.

Our legislature has chosen to regulate health care facilities under chapter 135C of the Iowa Code. "The purpose of this chapter is to promote and encourage adequate and safe care and housing for individuals who are aged or who, regardless of age, are infirm, convalescent, or mentally or physically dependent, by both public and private agencies by providing for the adoption and enforcement of rules and standards." Iowa Code § 135C.2(1). In order to further the public policy of protecting residents of health care facilities, such as Woodward, the legislature provided that a person may file "a complaint of an alleged violation of applicable requirements of this chapter or the rules adopted pursuant to this chapter" with the Department of Inspections and Appeal (DIA) or the resident advocate committee of the facility. *Id*. § 135C.37. Furthermore, "[a]

person alleging abuse or neglect of a resident with a developmental disability or with a mental illness may also file a complaint with the protection and advocacy agency designated pursuant to section 135B.9 or section 135C.2." *Id*. A section 135C.37 complaint triggers an investigation of the facility. *Id*. The statute expressly protects the specific employment activity from adverse employment consequences, providing "[a] facility shall not discriminate or retaliate in any way against . . . an employee of the facility who has initiated or participated in any proceeding authorized by this chapter." *Id.* § 135C.46. Furthermore, a person may report dependent adult abuse to the Department of Human Services (DHS). *Id*. § 235B.3. It is unlawful for an employer to "discharge, suspend, or otherwise discipline" an employee who reports as a mandatory reporter or who voluntarily reports dependant adult abuse to the DHS. *Id*. § 235B.3(11). Thus, reporting a violation of resident abuse to the DIA, or other appropriate body, is clearly a protected activity.

This brings us to the State's primary argument throughout the district court proceedings and on appeal: Since Rivera did not engage in any section 135C.37 or 235B.3 reporting, her conduct in reporting incidents of resident abuse to her supervisors was not subject to the public policy exception. Our supreme court has rejected the argument that an employee can only state a claim if a suspected violation by the employee is reported to the proper authorities. *See Jasper*, 764 N.W.2d at 767-68. In that case, the court's identification of public policy was based on the employee's refusal to engage in illegal activity. *Id.* at 768. But can Rivera find public policy support for internal complaints, where she has neither

been asked to engage in the allegedly unlawful behavior nor reported the allegedly unlawful activity to the proper authorities? We believe she can.

Some years ago, the Eighth Circuit Court of Appeals suggested that Iowa courts would recognize protection for internal whistle-blowing in certain circumstances. *See Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 902 (8th Cir. 2004). The Iowa Supreme Court has since responded:

> In *Kohrt* . . . , the court held [we] would recognize a wrongful discharge claim where an employee complains internally about safety issues to the employer. The court based its holding on the Iowa Occupational and Safety Health Act (IOSHA). *Kohrt*, 364 F.3d at 899. It noted that IOSHA declares the public policy of the state is "'to stimulate employers and employees to institute new and perfect existing programs for providing safe and healthful working conditions.'" *Id.* (quoting Iowa Code § 88.1 (2003)). The Eighth Circuit also noted Iowa Code section 88.9(3) provides protection against discharge for any employee who files a safety complaint under IOSHA. *Id.* at 899-900. The court held that although these statutes did not expressly provide protection from discharge for internal safety complaints, the public policy of encouraging employees "to institute new and to perfect existing safety programs" would be undermined if an employee could be discharged for doing what the policy encourages. *Id.* at 902.

Ballalatak v. All Iowa Agric. Ass'n, 781 N.W.2d 272, 277 (Iowa 2010). After acknowledging that "*Kohrt* and *Jasper* suggest internal whistle-blowing may be protected in certain circumstances," the court went on to state that

> all wrongful discharge claims must be based on a well-recognized and defined public policy of the state. In all cases recognizing a public-policy exception, this court has relied on a statute or administrative regulation. The use of statutes maintains the narrow public policy exception and provides the essential notice to employers and employees of conduct that can lead to tort liability.

Id. (internal alterations, citations, and quotation marks omitted).

In that case, Ballalatak was fired for his attempt to ensure his employer did not violate the statutory rights of other employees. *See id.* at 276 (construing all

inferences in Ballalatak's favor). The court concluded that although "the Iowa Legislature has exercised its authority in other circumstances to prohibit retaliation against employees who cooperate or report employer behavior by which they are not directly impacted,"[4] the court could not infer such under the workers' compensation code. *Id.* at 278. Consequently, Ballalatak's actions in expressing his concerns to his employer were not protected by a clearly expressed public policy. *Id.*

The case at hand parallels *Kohrt*, not *Ballalatak*. The *Kohrt* court held that "IOSHA presents a clear and well-recognized statement of public policy . . . to encourage employees to improve workplace safety." *Kohrt*, 364 F.3d at 899 (citing Iowa Code § 88.1). Similarly, Iowa's law concerning health care facilities, such as Woodward, presents a clear and well-recognized statement of public policy to promote and encourage adequate and safe care for residents. *See* Iowa Code § 135C.2(1). IOSHA provides:

> A person shall not discharge or in any manner discriminate against an employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by the employee on behalf of the employee or others of a right afforded by this chapter.

Iowa Code § 88.9(3)(a)(1).[5] Similarly, as noted above, section 135C.46 expressly prohibits discrimination or retaliation "in any way" against an employee

[4] The examples given by the supreme court include IOSHA, Iowa Code section 88.9; civil rights statutes, section 216.11; unpaid wages, section 91A.10(5); and complaints about health care facilities, section 135C.46. *See Ballalatak*, 781 N.W.2d at 278.

[5] Although renumbered since considered by the *Kohrt* court, the current statutory language is the same.

of a health care facility "who has initiated or participated in any proceeding authorized" by chapter 135C.

After considering *Fitzgerald*, the *Kohrt* court believed the Iowa Supreme Court "would find a clear statement of public policy in [Iowa Code section] 88.1 of encouraging employees to work toward high safety standards and a clear statement of public policy in [section] 88.9(3) against discharging an employee for complaining about safety issues." *Kourt*, 364 N.W.2d at 900. We reach the same conclusion regarding Iowa's law governing health care facilities. Iowa Code section 135C.2(1) makes a clear statement of public policy to encourage the adequate and safe care of residents. Section 135C.46 makes a clear statement of public policy against discharging an employee for complaining about issues that impact care of residents.

Additionally, we also determine that the public policy expressed in the health care facilities statute would be undermined if the State was permitted to discharge an employee for voicing concerns about abuse of residents. If employers were permitted to discharge employees for such conduct, then employees would be hesitant to articulate concerns because to do so would potentially put their jobs at risk. *See Kohrt*, 364 F.3d at 902.

We conclude a fact question was generated by Rivera concerning her claim that she engaged in a protected activity.

III. Conclusion.

Having concluded that Rivera met all three requirements of section 669.13(2), she is entitled to application of the savings clause. Furthermore, we find Rivera generated a fact question concerning her claim that she engaged in a

protected activity. We therefore reverse the ruling of the district court and remand for reinstatement of Rivera's suit and further proceedings.

REVERSED AND REMANDED.

Tabor, J., concurs, Eisenhauer, C.J., dissents.

EISENHAUER, C.J. (Dissenting)

I dissent. I disagree with the majority when it concludes the savings clause in section 669.13(2) applies. Rivera's September 26, 2008 petition alleged wrongful discharge in violation of public policy. Wrongful discharge is an intentional tort. *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109 (Iowa 2011). All tort claims against the State fall under the Iowa Tort Claims Act, now codified as Iowa Code chapter 669. *McGill v. Fish*, 790 N.W.2d 113, 117-18 (Iowa 2010). The procedural requirements of chapter 669 are jurisdictional. *Id.* at 118; *Swanger v. State*, 445 N.W.2d 344, 347 (Iowa 1989). "A tort claim against the State must first be presented to the state appeal board pursuant to the procedures detailed in Iowa Code chapter 669" before a lawsuit is permitted. *In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996); *see* Iowa Code § 669.5. "Improper presentment of a claim, or not presenting one at all, has been considered a failure to exhaust one's administrative remedies, depriving the district court of subject matter jurisdiction." *Voss*, 553 N.W.2d at 880. The district court does not acquire subject matter jurisdiction unless the administrative procedures required are exhausted. *McGill*, 790 N.W.2d at 118.

Iowa Code section 669.13(1) provides:

> Except as provided in section 614.8, a claim or suit otherwise permitted under this chapter shall be forever barred, unless within two years after the claim accrued, the claim is made in writing and filed with the director of the department of management under this chapter. The time to begin a suit under this chapter shall be extended for a period of six months from the date of mailing of notice to the claimant by the attorney general as to the final disposition of the claim or from the date of withdrawal of the claim under section 669.5, if the time to begin suit would otherwise expire before the end of the period.

Rivera's employment ended on October 3, 2006. Her claim accrued no later than that date. She filed her petition in district court on September 26, 2008. The State moved to dismiss the suit for failure to make an administrative claim under chapter 669. On November 10, 2008, the court granted the State's motion and dismissed the suit without prejudice.

On November 25, 2008, Rivera filed her claim with the state appeal board. Under section 669.13(1) her claim already was "forever barred" because it was not filed with the administrative agency within two years of its accrual in October 2006. *See McGruder v. State*, 420 N.W.2d 425, 426 (Iowa 1988) (affirming denial of claim not made within two years after claim accrued). Regardless of the agency decision on her claim in June 2009, her subsequent lawsuit, filed in July 2009 also was "forever barred" under section 669.13(1) because the administrative claim had not been made within two years of its accrual. The district court dismissed the second suit in October 2011. Under the statute, the court never acquired subject matter jurisdiction. *See McGill*, 790 N.W.2d at 118; *Swanger*, 445 N.W.2d at 349-50.

The majority finds the savings clause in section 669.13(2) applies because, even though the court ruling in her September 2006 lawsuit found "that plaintiff's claim of wrongful discharge from employment is a tort claim and is subject to the Iowa Tort Claims Act (Chapter 669)," it concludes her action was "made or filed under any other law of this state" and not under chapter 669. Section 669.13(2) provides:

> If a claim is made or filed under any other law of this state and a determination is made by a state agency or court that this chapter provides the exclusive remedy for the claim, the two-year period

> authorized in subsection 1 to make a claim and to begin a suit under this chapter shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by a state agency, if the time to make the claim and to begin the suit under this chapter would otherwise expire before the end of the two-year period. The time to begin a suit under this chapter may be further extended as provided in subsection 1.

However, because Rivera's 2008 petition alleged the tort of wrongful discharge in violation of public policy, which falls under Iowa Code chapter 669; it was not "made or filed under any other law of this state." Iowa Code § 669.13(2); *see Voss*, 553 N.W.2d at 880; *see also Bensley v. State*, 468 N.W.2d 444, 447 (Iowa 1991) ("By its terms, section [669].13 does not allow for an extension of the statute of limitations when the initial suit is filed under chapter [669]."). Even though the September 2008 petition cited Iowa Code chapters 135C (health care facilities) and 235B (dependent adult abuse services—information registry) as the claimed public policies violated by Rivera's discharge, the lawsuit was a tort claim, which falls under chapter 669. Therefore section 669.13(2) is not applicable to the facts of this case. Section 669.13(1) bars Rivera's suit. I would affirm the district court.