IN THE COURT OF APPEALS OF IOWA

No. 2-640 / 11-2100
Filed October 17, 2012

KAREN DORSHKIND,
Plaintiff-Appellee,

vs.

OAK PARK PLACE OF DUBUQUE II, L.L.C.,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

Defendant Oak Park Place of Dubuque II, L.L.C. appeals following an adverse jury verdict in a wrongful discharge action brought by former at-will employee Karen Dorshkind, contending the district court erred in denying its motion for directed verdict. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Thomas D. Wolle of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, and Thomas R. Crone of Melli Law, S.C., Madison, Wisconsin, for appellant.

Mark L. Zaiger and Drew Cumings-Peterson of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellee.

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

DOYLE, J.

Defendant Oak Park Place of Dubuque II, L.L.C. (Oak Park) appeals following an adverse jury verdict in a wrongful discharge action brought by former at-will employee Karen Dorshkind. Oak Park contends the trial court erred in determining it is against public policy to discharge an employee for reporting to a co-employee, rather than the Department of Inspections and Appeals, the falsification of documents relating to required training for individuals providing care to persons with dementia, and in submitting punitive damages. We affirm in part, reverse in part, and remand.

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

The business of providing assisted-living and dementia care services is regulated by the State of Iowa in Iowa Code chapter 231C (2009). Among the requirements for assisted-living/memory care facilities is that staff receive appropriate dementia-specific education and training. *See* Iowa Admin. Code r. 321-25.34 (2008).[1]

Oak Park is an assisted-living and memory care facility in Dubuque, Iowa. It is one of a number of similar facilities branded with the Oak Park name. Scott Frank is the CEO and majority owner of the Oak Park companies and their management company, Alternative Continuum of Care. Corporate offices are located in Madison, Wisconsin.

[1] The Iowa Administrative Code rules concerning assisted-living programs have been restructured since 2008 and are now located under the Department of Inspections and Appeals (agency 481) rules in chapter 69. *See* Iowa Admin. Code rs. 481-69.1–.38 (2012). All further references to the Iowa Administrative Code herein are to the 2008 Iowa Administrative Code.

Karen Dorshkind was employed as the marketing director at the Oak Park facility in Dubuque from April 2006 to September 2008. She was an at-will employee. For two years her direct supervisor was Marthe Jones, regional marketing director, at the Madison corporate offices. In April 2008, Dorshkind was advised she would no longer report to Jones, but instead would report to Tim Hendricks, the housing director at the Dubuque facility. Hendricks reported to Toni Carruthers, regional director of operations for alternative continuum of care, at the Madison offices. Carruthers, in turn, reported to Scott Frank.

During a state inspection of the Dubuque facility in July 2008, Dorshkind witnessed what she believed to be two co-employees falsifying state-mandated training documents related to the care of dementia patients. She told two other co-workers of the suspected forgery of documents. About six weeks later, on September 3, 2008, Dorshkind called Jones, her former supervisor. Dorshkind told Jones she witnessed two co-employees falsifying training documents and that she believed the two were having an affair. Jones immediately reported the conversation to the human resources director Tara Klun, who reported the situation to CEO Scott Frank.

Klun and Carruthers were directed to go to Dubuque to investigate the allegations. They conducted their investigation on September 4 and 5 by talking to employees, including Dorshkind, and reviewing documents. On their return trip to Madison, Klun and Carruthers concluded there was no validity to the rumor of an affair. Klun said she found nothing to substantiate the allegation of forged documents. On September 5, Oak Park terminated Dorshkind's employment. The termination letter, signed by Klun and Carruthers, stated Dorshkind had not

been truthful in several respects: "spreading rumors regarding a false relationship between two employees, malicious statements regarding forging of documents, and false statement to a Regional director about move in numbers."

In late September 2008, the Department of Inspection and Appeals (DIA) conducted an on-site investigation at Oak Park of a complaint that certain training records had been forged.[2] The DIA's final report concluded that certain training documents had indeed been forged, for which Oak Park was sanctioned.

Dorshkind filed suit in 2010 against Oak Park alleging her employment was wrongfully terminated. She claimed she was terminated because she complained of her co-employees' attempt to evade the requirements of Iowa Administrative Code rule 321-25.34(3). Oak Park responded that there was no well-defined public policy that protected Dorshkind's activity, and dismissal for Dorshkind's activity did not jeopardize any public policy. Further, Oak Park asserted there was an overriding business justification for Dorshkind's termination.

At the close of the six-day trial, Oak Park made a motion for directed verdict. Oak Park argued the administrative rule, relied upon by Dorshkind, was not one which is a well-recognized and defined public policy. Oak Park also argued Dorshkind's internal complaint to a co-employee was not in furtherance of public policy. The district court denied the motion, and the case was submitted to the jury. The jury awarded Dorshkind compensatory and punitive damages.

Oak Park now appeals.

[2] The complaint was made by a former employee of Oak Park, not Dorshkind.

II. Scope and Standards of Review.

The district court's denial of a motion for directed verdict is reviewed for corrections of errors at law. *Summy v. City of Des Moines*, 708 N.W.2d 333, 343-44 (Iowa 2006). We view the evidence in the light most favorable to the nonmoving party and take into consideration all reasonable inferences that could be fairly made by the jury, regardless of whether that evidence is contradicted. *Slocum v. Hammond*, 346 N.W.2d 485, 494 (Iowa 1984). "If substantial evidence in the record supports each element of a claim, the motion for directed verdict must be overruled. . . . On appeal our role is to determine whether the trial court correctly determined there was sufficient evidence to submit the issue to the jury." *Easton v. Howard*, 751 N.W.2d 1, 5 (Iowa 2008).

III. Discussion.

A. Internal Whistle-Blowing Complaint.

Dorshkind 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 v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109-10 (Iowa 2011); *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761 (Iowa 2009).

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 the 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 assisted-living programs under chapter 231C of the Iowa Code. The legislature has found "that assisted-living is an important part of the long-term care continua in this state." Iowa Code § 231C.1(1). One of the purposes of establishing an assisted-living program is "[t]o encourage the establishment and maintenance of a safe and homelike environment for individuals . . . who require assistance to live independently . . . ." *Id.* § 231C.1(2)(a). The legislature clearly delegated authority to the DIA to promulgate specific rules "to ensure, to the greatest extent possible, the health, safety, and well-being and appropriate treatment of tenants," *Id.* § 231C.3(1)(a), and regulations have been promulgated to foster safe environments for residents of assisted-living facilities. *See* Iowa Admin. Code rs.

321-25.1–.43. Iowa Administrative Code rule 321-25.34(3), in place at times relevant to the lawsuit, set forth the continuing education requirements of persons who work with Iowans with dementia:

> All personnel employed by or contracting with a dementia-specific program shall receive a minimum of two hours of dementia-specific continuing education annually. Direct-contact personnel shall receive a minimum of six hours of dementia-specific continuing education annually.

As the trial judge succinctly stated during arguments on the motion for directed verdict: "There is a defined public policy to protect residents in assisted-living facilities, particularly those who suffer from dementia. Toward that end, the state requires training to ensure that people with dementia receive proper care and are not abused in any manner. That is the purpose of the regulation."

In order to further the public policy of protecting dementia patients, the legislature provided that a person "with concerns regarding the operations or service delivery of an assisted-living program may file a complaint with the [DIA]." Iowa Code § 231C.7. The statute expressly protects the specific employment activity from adverse employment consequences, providing "[a]n assisted-living program shall not discriminate or retaliate in any way against . . . an employee of the program who has initiated or participated in any proceeding authorized by this chapter." *Id.* § 231C.13. Thus, reporting a violation of Iowa Administrative Code rule 321-25.34(3) to the DIA is clearly a protected activity.

This brings us to Oak Park's primary argument throughout the district court proceedings and on appeal: Since Dorshkind did not initiate or participate in a chapter 231C proceeding, her conduct in discussing falsification of training documents with co-employees was not in furtherance of a "clearly defined public

policy" and not protected because "there is no statute or administrative code section that extends the prohibition against retaliation to 'internal complaints' made by an employee to her employer, much less discussions among her co-workers." 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 Dorshkind 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 citations, quotation marks, and alterations 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,"[3] 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 assisted-living programs presents a clear and well-recognized statement of public policy to

[3] 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.

encourage the establishment and maintenance of safe environments for tenants. *See*, *e.g.*, Iowa Code § 231C.1(2)(a). 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).[4] Similarly, as noted above, section 231C.13 expressly prohibits discrimination or retaliation "in any way" against an employee of an assisted-living program "who has initiated or participated in any proceeding authorized" by chapter 231.

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 assisted-living programs. Iowa Code section 231C.1(2)(a) makes a clear statement of public policy to encourage the establishment and maintenance of a safe environment for tenants. Iowa Administrative Code rule 321-25.34(3) implements that public policy by requiring training to ensure that people with dementia receive proper care and are not abused in any manner. Section 231C.13 makes a clear statement of public policy against discharging an employee for complaining about issues that impact the safety of tenants.

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

Additionally, we also determine that the public policy expressed in the assisted-living programs statute would be undermined if Oak Park were permitted to discharge an employee for voicing concerns about falsification of training documents. 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.

For all the above reasons we conclude the district court did not err in denying Oak Park's motion for directed verdict and in submitting Dorshkind's claim to the jury.

B. Punitive Damages.

Oak Park next argues the district court erred in submitting the issue of punitive damages to the jury. Our review is for correction of errors at law. *See McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000).

Punitive damages may be awarded in an action for wrongful discharge from employment in violation of public policy, when "committed with either actual or legal malice." *Jasper*, 764 N.W.2d at 773. However, "when the grounds for the discharge have been recognized for the first time in the instant case to be in violation of public policy," our supreme court has refused to permit punitive damages in that action. *Id.* This is because "an employer cannot willfully and wantonly disregard rights of an employee derived from some specific public policy when the public policy has not first been declared by the legislature or our courts to limit the discretion of the employer to discharge an employee at the time of the discharge." *Id.*

The legislature has made it clear that retaliating against an employee for initiating or participating in any chapter 231C proceeding is prohibited. But, there has been no specific declaration by our courts or legislature that internal whistle-blowing may be protected under certain circumstances. We therefore conclude the district court erred in denying Oak Park's motion for directed verdict on Dorshkind's punitive damages claim. *See id.*; *see also Lara v*. *Thomas*, 512 N.W.2d 777, 782 (Iowa 1994) ("[P]unitive damages should not be awarded when a new cause of action for retaliatory discharge is recognized."). We thus reverse the award of punitive damages and remand for entry of judgment accordingly.

***IV*. *Conclusion*.**

Upon our review, we find no error in the district court's submission of Dorshkind's wrongful discharge claim in violation of public policy. However, because we conclude the district court erred in denying Oak Park's motion for directed verdict as to Dorshkind's punitive damages claim, we reverse the punitive damages award and remand for entry of judgment in accordance with our opinion. Costs on appeal shall be assessed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.