that the time away from work was the only adequate means of preventing further domestic violence. Most courts, however, have been very reluctant to protect employees who "do the right thing" absent a specific legal requirement.

The last type of public policy claim is termination for reporting illegal activity, or **whistleblowing**. Whistleblowers report activities engaged in by employers or their agents that are illegal or otherwise injurious to the public. The willingness of insiders to come forward is often critical to bringing corporate wrongdoing to light and enforcing the law. However, society's gratitude for this service is usually not matched by the reaction of employers. Whistleblowers are frequently subjected to retaliation. Whether reports of wrongdoing are raised internally or externally can affect the outcome of cases. Some courts have declined to protect internal reports, viewing them as more akin to internal policy disputes than to efforts to enforce public policy (at least in the absence of threats to go public if changes are not made).[44] Other courts require that internal reports occur before employees "go outside" the organization with their suspicions of wrongdoing. In either event, the subject of the report must be a matter that truly affects the public, rather than simply an alleged violation of company policy. This distinction is sometimes not so easily drawn. Courts have differed, for example, on whether hospital employees reporting problems with patient care are merely disputing internal hospital policies or reporting problems affecting public health.[45]

In the *Dorshkind v. Oak Park Place of Dubuque II* case that follows, the court considers whether termination for making an internal report of a failure to comply with nursing home training regulations falls within the public policy exception to employment at will.

Dorshkind v. Oak Park Place of Dubuque II
835 N.W.2d 293 (Iowa 2013)

OPINION BY JUSTICE WIGGINS:

In this appeal, we must decide if an internal complaint by an employee against an assisted living facility concerning forged training documents, which the state mandates, gives rise to a wrongful-termination action. * * * [W]e affirm the decision of the court of appeals (1) because the employer's retaliatory discharge of an at-will employee, who internally reported her employer's forgery of state-mandated training documents, violated public policy . . . * * *

Oak Park Place in Dubuque is an assisted living facility. Alternative Continuum of Care owns the Dubuque facility, as well as a network of other assisted living homes all named Oak Park. * * * Oak Park contains 131 beds and has fifty-five employees who provide patients with several different levels of care. * * * Oak Park is also certified as a dementia-specific assisted living program. This means the facility holds itself out as providing specialized care in a dedicated setting for patients with dementia . . . * * * Because Oak Park includes a special unit for its patients suffering from dementia, Oak Park is subject to the provisions in the Iowa Code and the Iowa Administrative Code which require direct care staff to complete dementia-specific training. Forgery of documents certifying completion of this training constitutes a violation of law. * * *

Dorshkind worked at Oak Park from April 10, 2006, to September 5, 2008. Dorshkind was hired as an at-will employee for the position of sales and marketing assistant. About six months later, Oak Park promoted her to marketing director. * * * For the first two years of her employment, Dorshkind's supervisor was Marthe Jones, the regional marketing director. Thereafter, in April 2008, Dorshkind began reporting to Tim Hendricks,

[44] *House v. Carter-Wallace, Inc.*, 556 A.2d 353 (N.J. Super. 1989), cert. denied, 564 A.2d 874 (N.J. 1989).
[45] *Wright v. Shriners Hospital for Crippled Children*, 589 N.E.2d 1241 (Mass. 1992) (report about patient care not protected); *Witt v. Forest Hospital*, 450 N.E.2d 811 (Ill. App. 1983) (report about patient care protected).

the housing director for Oak Park. Hendricks reported to Toni Carruthers, the regional director of operations. Carruthers, in turn, was supervised by Scott Frank, the CEO and majority owner of the Oak Park network.

During an unannounced inspection by the DIA [Iowa Department of Inspections and Appeals] on July 24, 2008, Dorshkind witnessed what she believed to be her supervisor, Hendricks, and the supervisor of the certified nursing assistants at Oak Park, Kristi Niemer, falsifying state-mandated training documents for the dementia program. Dorshkind testified that she witnessed Niemer making copies of test papers and then later saw Niemer with Hendricks in his office with some stacks of paper. Niemer was filling out answers to what appeared to be true or false questions. Hendricks had another pile of papers and was writing on them. A different stack of papers was stamped "post-test" at the top. Eyewitnesses testified that the two did not attempt to hide what they were doing. Instead, Hendricks and Niemer told other employees that their acts were going to "save the day for Oak Park."

Dorshkind left Hendricks' office and returned to her own. Pat True, the director of maintenance at Oak Park, later came by and said he had also seen Niemer and Hendricks forging training documents. * * * True told Hendricks he should at least use different colored pens to vary the signatures he was forging on the documents. Hendricks later laughed and recounted the comment to Denise Schiltz, the director of nursing at Oak Park, who also witnessed the incident. Schiltz told Dorshkind she had seen Hendricks and Niemer forging staff names on the dementia training documents. During testimony, Schiltz said that none of the training certified in the documents ever occurred. Schiltz realized Hendricks and Neimer's conduct constituted forgery and immediately submitted her resignation on July 24.

For obvious reasons, Dorshkind did not report these concerns to her then-supervisor, Hendricks. Approximately six weeks after the incident, Dorshkind called Jones, her former supervisor who was then working as the marketing director in Madison, which was not a supervisory position and did not involve human resources responsibilities. Jones described her relationship to Dorshkind as a coworker or peer. * * *

Dorshkind told Jones about the suspected forgery. During her testimony, Dorshkind explained her rationale for doing so as follows: "Well, my concern was, number one, for the residents. If tests had been falsified, I felt that meant that the staff hadn't had the training. My first concern was always the residents." Dorshkind was also concerned Oak Park would lose its license. While speaking with Jones, Dorshkind additionally communicated her belief that two employees, including her supervisor, were having an extramarital affair.

. . . Jones asked Dorshkind if she wanted Jones to talk to Tara Klun, the director of human resources for Oak Park at the Madison headquarters. Jones testified, "I said, Karen, I don't know what to do. Would you like me to go to human resources and talk to them and see what path you should take?" * * * Dorshkind believed the internal report was a collaborative effort, even though Jones said she was the first one to raise the question of whether it should be reported to Klun. * * *

Jones spoke with Klun on September 3. * * * During Jones's conversation with Klun, Jones reported, "Karen Dorshkind called me today" and said "Kristi and Tim were falsifying documents." Jones specifically stated that the "falsification that had occurred," as well as "an illicit personal relationship," "[wa]s reported by Ms. Dorshkind." Jones said, "[W]e [meaning Dorshkind and Jones] don't know what to do."

Klun informed the CEO of both allegations. * * * On September 4, 2008, Klun and Carruthers went to Oak Park to investigate the claims. Immediately when Klun arrived, Dorshkind approached her and said, "Tara, I'm glad you're here. Can I talk to you alone[?]" Klun responded, "not now . . . let's wait until we can talk in private." Klun never spoke with Dorshkind privately to inquire about what she knew regarding the allegation, which Klun admits, "that she reported." During her testimony, Klun explained her rationale for not approaching Dorshkind . . .: "I believe[d] that she would not have anything further than what Marthe Jones shared with me . . ." * * *

After conducting a two-day investigation, both Klun and Carruthers concluded there was no validity to Dorshkind's report of forgery and an affair. Klun later admitted that her investigation of the forgery allegations was "very poor." The following day, Oak Park terminated Dorshkind's employment. In a letter signed by Klun and Carruthers, the basis for the termination was stated as follows:

> *After a long 2 day and careful investigation, speaking with many individuals, ones you specifically mentioned, we have come to a conclusion that you have not been truthful. Upon the investigation we learned of several incidents where you have not been truthful; spreading rumors regarding a false relationship between two employees, malicious statements regarding forging of documents, and false statement [sic] to a Regional Director about move in numbers, all with in these two days. This is jeopardizing and affecting the working environment at Oak Park.*

> *Due to the above issues, we are at a point where we are unable to trust you. Therefore, it is in Oak Park's best interest to end the relationship effective immediately. . . .*

Jones was also fired.

On September 25 and 29, after receiving a complaint from Schiltz about the incident on July 24, the DIA conducted an on-site investigation at Oak Park. In its final report, the DIA concluded certain state-mandated documents relating to the dementia training program had been forged. Accordingly, the DIA imposed a civil penalty of $10,000 and barred the facility from admitting any new patients while under conditional certification status. * * *

Employment in Iowa is at will. Therefore, unless the employee has a valid contract of employment, "the employment relationship is terminable by either party 'at any time, for any reason, or no reason at all.'" Yet, the employer's right to discharge an employee under an at-will employment contract may be limited by public policy considerations. * * * Iowa follows the majority of states by carving out a public-policy exception to the general rule of at-will employment for wrongful-discharge claims. * * *

An employee seeking protection under the public-policy exception in his or her wrongful-discharge claim must prove the following elements:

(1) the existence of a clearly defined and well-recognized public policy that protects the employee's activity; (2) this public policy would be undermined by the employee's discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason the employer discharged the employee; and (4) the employer had no overriding business justification for the discharge. * * *

In Iowa, we have recognized many situations where the public-policy exception applies. * * *

[One] category of cases where we have said discharging an employee violates public policy is whistleblowing. * * * [In one of these cases, an employee] complained internally to the business owner that the company was not paying his insurance benefits as part of his promised wages. [The employee] claimed this failure to pay wages violated . . . the Iowa Code. * * * [W]e held public policy prohibited [the employee's] firing for making a wage claim, and the internal complaint satisfied this public policy. * * * [In another whistleblower case], a teacher's assistant claimed the school terminated her after she reported alleged child abuse to her supervising teacher and orally to the department of human services. * * * [W]e concluded the public policy of Iowa protects a person discharged by an employer because he or she makes a good faith complaint of child abuse. * * *

* * * The jury returned a verdict for Dorshkind. Thus, the jury resolved the factual issues in the third and fourth elements by finding Oak Park discharged Dorshkind because of her whistleblowing and that Oak Park had no overriding business justification for the discharge. Therefore, we need only address the first and second elements, which are legal questions—the existence of a clearly defined and well-recognized public policy that protects Dorshkind's activity and that Dorshkind's discharge from employment would undermine this public policy. * * *

We look primarily to our statutes to determine whether an implied or express public policy exists but such policies may also be found in our constitution. The court does not look only to statutes expressly mandating protection for at-will employees. "[W]e [also] look to other statutes which not only define clear public policy but imply a prohibition against termination from employment to avoid undermining that policy." However, we do not divine public policy from internal company policies or agreements. Administrative regulations are another source of public policy "when adopted pursuant to a delegation of authority in a statute that seeks to further a public policy." * * *

We cautiously identify policies to support an action for wrongful discharge under the public-policy exception. We do so because

> *[a]ny effort to evaluate the public policy exception with generalized concepts of fairness and justice will result in an elimination of the at-will doctrine itself. Moreover, it could unwittingly transform the public policy exception into a "good faith and fair dealing" exception, a standard we have repeatedly rejected.*

Thus, the exception is narrowly circumscribed to only those policies clearly defined and well-recognized to protect those with a compelling need for protection from wrongful discharge. The "well recognized and clearly defined" requirement ensures "employers have notice that their dismissal decisions will give rise to liability."

We have previously held that an employer cannot discharge an employee because he or she whistleblows if there is a public policy to protect the integrity and employment of those who uphold the law by reporting illegalities in the workplace. In other words, whistleblowing is an exception to the at-will

employment doctrine if the public policy of this state requires protection of the public by ensuring "infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare" are properly reported.

We find the Code and our administrative rules support a clearly defined and well-recognized public policy under the exception to the at-will employment doctrine. * * *

The legislature . . . [has] demonstrated a clearly defined and well-recognized public policy to make assisted living available throughout the state and to ensure the safety of persons residing in assisted living facilities. * * * Turning to the administrative rules, we find the legislature clearly authorized the elder affairs department to promulgate rules regarding the certification of assisted living facilities "to ensure, to the greatest extent possible, the health, safety, and well-being and appropriate treatment of tenants." * * *

At the time of Dorshkind's report and discharge, the administrative rules stated:

> *. . . All personnel employed by or contracting with a dementia-specific program shall receive a minimum of six hours of dementia-specific education and training prior to or within 90 days of employment or the beginning date of the contract.* * * *
>
> *. . . All personnel employed by or contracting with a dementia-specific program shall receive a minimum of two hours of dementia-specific continuing education annually.* * * *

We should not allow an employer to ignore the substance either of a statute or administrative regulation or the statement of public policy that it represents. * * *Accordingly, we find Dorshkind's whistleblowing, which involved reporting violations of law that jeopardized the health, safety, and welfare of dementia patients in an assisted living facility, is supported by a clearly defined and well-recognized public policy. Thus, we conclude Dorshkind's claim satisfies the first element of the public-policy exception.

. . . Under the second element, we must determine whether Dorshkind's discharge from employment undermines this public policy. * * * We consider the impact of the discharge on both the dismissed employee and other employees. "An essential element of proof to establish the discharge undermines or jeopardizes the public policy necessarily involves a showing the dismissed employee engaged in conduct covered by the public policy." If it can be shown the whistleblower engaged in conduct in furtherance of public policy and was dismissed for doing so, and that discharge will discourage other employees from engaging in the same conduct, then public policy is undermined.

Considering such factors, we conclude Dorshkind's discharge did undermine the public policy at stake. Dorshkind's conduct involved internally reporting what she believed were two coworkers forging state-mandated training documents pertaining to the care of dementia patients. Such an act advances a clear public policy. Moreover, the impact of the dismissal affected Dorshkind by punishing her for reporting conduct jeopardizing the health, safety, and welfare of dementia patients.

We next examine the impact of the discharge on other employees. Dorshkind's dismissal chills reporting by other employees for similar workplace illegalities. * * * [A]llowing employers to fire employees for whistleblowing effectively hangs a sword of Damocles over the heads of concerned employees like Dorshkind, forcing them to choose between protecting others and sacrificing their employment.

An additional consideration is that Dorshkind made her complaint internally. We believe such a claim for internal whistleblowing stands for a number of reasons. First, we have previously held internal reporting is actionable, even where an applicable statute describes a method for lodging the whistleblower's complaint externally. Second, whether the employee makes the complaint internally or externally does not change the public-policy considerations of our state. Third, discharging an employee for making an internal complaint still undermines the public policy. Fourth, the requirement of causation assures us the internal report was made to further the public policy of this state, rather than for other reasons. Finally, it makes more sense that an employee would first discover the problem and report it internally before lodging a complaint externally. Moreover, this allows the employer to correct the deficiency in a reasonably prompt manner. When the government becomes involved, the employer may take the position that the conduct does not violate a statute or rule to avoid sanctions. Then, the only resolution is a legal battle. By first bringing the problem to the attention of the employer without outside

intervention, the matter can be handled quickly and in a less costly manner. However, if the employer does not correct a perceived problem, then the authorities can intervene to determine the extent of the problem and its amelioration. * * *

DISSENTING OPINION BY JUSTICE MANSFIELD:

The majority opinion significantly and, in my view, ill-advisedly broadens the scope of Iowa's tort of wrongful discharge in violation of public policy. Under the majority opinion, any time a worker tells a coworker about an alleged violation of law related to health, safety, or welfare, the employer is at risk of litigation if the employer subsequently terminates that worker's employment. This decision is contrary to our precedents . . . [which] required an express or implicit legislative or administrative determination to protect internal reporting. The present expansion of the law eliminates that requirement and thereby erodes Iowa's long-standing doctrine of employment at will. For the reasons set forth herein, I would hold the plaintiff did not engage in protected activity under Iowa law. . . .

The tort require[s] both "the existence of a clearly defined and well-recognized public policy that protects employee's activity" and that "the employee engaged in the protected activity." In other words, the employee had to have engaged in the activity that the statute or regulation protected. In the whistleblowing context, this meant *the employee's activity (i.e., reporting)* had to be the subject of a clearly defined and well-recognized public policy, not merely that the employee *reported on* something that was the subject of such a policy. The clearly defined and well-recognized policy had to cover reporting itself.

* * * The majority now sweeps away that previously clear legal standard and replaces it with a series of platitudes about health, safety, and welfare. Thus, the majority eliminates any distinction between external reporting and internal reporting with the broad-brush statement, "[W]hether the employee makes the complaint internally or externally does not change the public policy considerations of our state." The majority also says, "We should not allow an employer to ignore the substance either of a statute or administrative regulation or the statement of public policy that it represents."

These are noble sentiments, but the upshot is: Whenever an employee speaks to a coemployee about a violation of some law or regulation that relates to health, safety, or welfare, the employer puts itself in legal jeopardy if it later discharges that employee. I recognize the employee still must prove the complaint was the reason for the discharge, but questions of causation are often disputed and difficult to prove or disprove. * * * [T]here are myriad laws and regulations relating to "health, safety, and welfare." There are also many types of violations, ranging from the serious to the trivial. This case falls somewhere in the middle. The nursing home's employees acted deceitfully in falsifying training records, but there is no indication that the care received by any resident was affected. Also, employees participate in workplace discussions all the time. If we make the tort available whenever employee brings an alleged health, safety, or welfare violation to the attention of a coemployee, we have truly changed the nature of that tort in Iowa.

Previously, we said on many occasions that the public-policy exception in Iowa is a "narrow" exception to employment at will. This is consistent with the basic policy in Iowa that employers who do not engage in discrimination and have not entered into collective bargaining or other express or implied contractual relationships with their employees should generally be free to hire and fire employees without fear of having those decisions second-guessed in court. The majority opinion, I respectfully submit, is inconsistent with this characterization. * * *

Dorshkind . . . did not complain to the DIA. Nor is there evidence she intended to complain to the DIA, or threatened to go to the DIA, or wanted her internal complaints passed along to the DIA. To the contrary, she was worried the state would find out and there would be repercussions for Oak Park. Additionally, there is no evidence that any of Dorshkind's actions even unwittingly led to the DIA investigation. In short, this not a case where an employee made, or intended to make, a statutorily recognized or protected complaint.

The majority notes accurately that Iowa has a strong statutory policy of protecting residents of assisted living homes. * * * But again, our precedents require a clearly defined and well-recognized public policy that protects the activity in question, i.e., internal reporting. Just because external reporting is the subject of a clearly defined and well-recognized statutory policy, it does not follow that internal reporting would be, at least when the employee's actions did not result in and were not intended to result in an outside report. * * *

CASE QUESTIONS

1. What were the legal issues in this case? What did the court decide?
2. This decision focuses on the first two elements of a public policy claim. Why does the court conclude that these were satisfied in this case?
3. Should it make any difference in terms of legal protection whether the "whistle is blown" internally within the organization or externally? Why or why not?
4. What arguments are made in Justice Mansfield's dissenting opinion? Do you agree that the effect of this opinion will be to make employers in Iowa potentially liable whenever they discharge employees who have expressed safety or other public policy related concerns to coworkers? Why or why not?
5. Do you agree with the court's decision in this case? Why or why not?

Whistleblower Protection Statutes

Whistleblowers also enjoy protection under a variety of statutes. Most states have whistleblower protection laws, although some of these statutes apply only to public sector employees. Some whistleblowers are protected under laws that pertain to specific safety-sensitive industries, including aviation and nuclear power. A variety of federal environmental laws incorporate whistleblower protections for employees reporting environmental violations by their employers. OSHA has been charged with enforcement of approximately twenty different federal whistleblower statutes.[46] Whistleblower protections for employees who bring to light financial wrongdoing in their companies have been the focus of recent enactments.

THE CHANGING WORKPLACE

Whistleblower Protection in an Age of Financial Scandal

Improper and illegal financial dealings are hardly a new story, but their frequency and scale seem to have increased in recent years. From the insider trading and savings and loan scandals of the 1980s, to the demise of Enron in 2001, to the Madoff Ponzi scheme and the near collapse of an investment banking system overexposed to home mortgages that could not be repaid, bank customers, investors, employees, and ultimately taxpayers have been repeatedly victimized by the financial machinations of banks, investment firms, and other companies. Government regulators have lacked the ability, will, or political support to vigorously monitor and control risky financial dealings. It is clear that if anyone has the information needed to prompt timely intervention and avert full-fledged financial scandals, it is the employees of these firms. Yet, particularly in the financial sector, persons willing to blow the whistle on the misdeeds of firms have been few and far between. That might be changing.

The **Sarbanes-Oxley Act (SOX Act)** was enacted in response to a wave of corporate scandals that included Enron's adventure in creative accounting. The law is intended to encourage the reporting of financial wrongdoing by protecting employees of publicly traded companies who disclose information, assist in investigations, file charges, testify, or otherwise assist in proceedings related to specified types of fraud, securities law violations, or other fraudulent acts against shareholders of publicly traded companies.[1] However, plaintiffs have encountered great difficulty in pressing Sarbanes-Oxley whistleblower claims.[2] One reason is that the law as initially written provided a very brief limitations period (ninety days). Also, courts ruled that the privately held subsidiaries of publicly traded companies were not covered by the law. The Supreme Court has only recently determined that SOX Act whistleblower protection extends to employees of privately held companies that are contractors or subcontractors

[46]U.S. Government Accountability Office. *Whistleblower Protection: Substantial Management Attention Needed to Address Long-standing Program Weaknesses.* GA0-10-722 (August 2010), 15–16.