IN THE IOWA SUPREME COURT
No. 22–2021

TODD P. HALBUR,

Appellee/Cross-Appellant,

vs.

STEPHEN LARSON, Administrator of the Alcoholic Beverages Division in his Official Capacity,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court
For Polk County, LACL146501
Hon. David Nelmark, District Judge

APPELLANT'S PROOF REPLY BRIEF

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I. Halbur's statements were not "disclosures," but routine workplace communications that were part of his normal duties and made through normal channels.

Whistleblower statutes are "designed to protect employees who risk their own personal job security for the benefit of the public." *Willis v. Dept. of Ag.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998). They do not shield employees who "took no such risk"—who do nothing to shine a public light on misconduct. *Id.*

Halbur took no such risk. Instead, Halbur shared with Larson "his opinion as Comptroller that the ABD's use of buyouts" was improper, and "his opinion that the contract had not been properly procured." Appellee Br., at 18, 25. Giving these opinions were Halbur's primary compensated duties. (10/3/22 Tr. 51:5-12); Ex. E, Vol. IV App. 13. Halbur then urged *Larson* to disclose ABD financial information to outside entities; to notify the Auditor and the Governor about ABD's markups. Appellee Br., at 19, 34. But Halbur did not go to the Auditor himself because he believed reporting to the Auditor was Larson's job, and Halbur did not "think [it was his] role to go outside the chain of command." (10/4/22 Tr. 149:25–150:21).

So Halbur never stepped out of line—never risked the consequences of flouting the chain of command to disclose what he believed were illegal actions. Conveying your opinions within the

proper internal channels and hoping leadership does something in response is not whistleblowing.

Halbur's theory chills the kinds of communications that good-government statutes like Iowa's whistleblower-protection statute seek to promote. "Discussion among employees and supervisors concerning various possible courses of action is healthy and normal in any organization. It may in fact avoid a violation." *Reid v. Merit Sys. Prot. Bd.*, 508 F.3d 674, 678 (Fed. Cir. 2007).

Public officials who lead state agencies should not be discouraged from asking employees to review internal practices or solicit data on whether practices comply with state laws and regulations. And, in turn, merely responding to such compliance inquiries, or performing routine compliance functions, should not shield underperforming employees from corrective action, nor remove them from the sphere of at-will employment, until the temporal-inference period lapses. *See Lissick v. Anderson Corp.*, 996 F.3d 876, 883–84 (8th Cir. 2021) (discussing when terminating an employee close in time to protected conduct can give rise to an inference of causation).

Still, Halbur argues that he "disclosed" information to a public official and thus should have been shielded from termination. The parties agree that "disclose" requires affirmatively revealing what was hidden and not previously known. Appellee Br., at 33–34;

Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1349–50 (Fed. Cir. 2001). But Halbur did not disclose any information or practice that was hidden and not previously known to Larson.

First, Halbur argues that he "had a meeting with Larson in which he disclosed to Larson the mechanism that caused ABD to overcharge for alcohol to the tune of more than $8 million and his assessment that the overcharge was an illegality that should be reported to the governor's office and state auditor." Appellee Br., at 34. Yet this was not new information.

The permissible scope and legality of ABD's markups had been reviewed time and again, dating back to 2013. Ex. 25, Vol. III App. 15. Larson had tasked other employees previously with reviewing the practice. (10/6/22 Tr. 62:11–16). In 2017, ABD hired a consulting firm, Accenture, to review its practices, including markups. (10/4/22 Tr. 171:19-23). And the Accenture report identified greater ABD revenue under the markup scheme. (10/3/22 Tr. 63:19–64:23); (10/4/22 Tr. 172:14–25).

As well, the $8 million sum came at the express direction of Larson, who instructed Halbur to perform additional financial analysis and report his findings. (10/6/22 Tr. 60:3–61:6, 69:10–71:25). So far from raising this issue for the first time, Larson was well aware of the questions surrounding ABD's markups. Larson just disagreed that the practice was unlawful.

And second, Halbur argues that whether the BMI contract was lawfully entered "was not information Larson had considered." Appellee Br., at 35. But that is not true. Larson recruited the head of procurement at DAS—Karl Wendt—to help with the service agreement. (10/5/22 (Part II) Tr. 102:19-24). He wanted to know "what I can and cannot do" because he was "looking into doing some kind of pilot program." (10/5/22 (Part II) Tr. 103:11-17). He "reached out to Karl" because he "didn't want to get, you know, in trouble" when putting the agreement together. (10/5/22 (Part II) Tr. 104:1-3). After discussion, he viewed the agreement as a "sole source" contract, which is not subject to competitive bidding. (10/5/22 (Part II) Tr. 103:25); Iowa Admin. Code r. 11-118.7. Again, far from raising the issue of legality for the first time to Larson, Larson was aware from the beginning of the need to lawfully contract with BMI and the importance of complying with procurement laws. Larson just disagreed that the contract was unlawful.

Giving full meaning to the word "disclosure," and thus requiring employees to affirmatively tell someone other than the alleged wrongdoer, does not rewrite the statute, as Halbur suggests. *See* Iowa Code § 70A.28(2). Rather, "inherent in the meaning of the words chosen by the legislature is the concept that the claimant intended to expose wrongdoing that was otherwise

concealed." *Pennyrile Allied Cmty. Services, Inc. v. Rogers*, 459 S.W.2d 339, 345 (Ky. 2015).

Other courts have recognized this point and stressed the importance of disclosing to a person or entity other than the alleged wrongdoer. *See, e.g.*, *Verfuerth v. Orion Energy Sys., Inc.*, No. 14-C-352, 2016 WL 4507317, at *5 (E.D. Wis. Aug. 26, 2016) ("[A] typical whistleblower reports conduct by person X to agency Y, which then investigates the matter. It does not make sense, however, to report conduct by person X *to* person X. X cannot be expected to investigate itself. Here, Verfuerth was merely telling the Board about his opinions as to its disclosure obligations. Both logically, and as a matter of statutory interpretation, this means the reported misconduct has to involve someone *other* than the supervisory person who receives the report. Otherwise, all we have is simply a run-of-the-mill job-related dispute."); *Bogart v. Univ. of Ky.*, 235 F. Supp. 3d 864, 867 (E.D. Ky. 2017) (holding "claim under the Act fails as a matter of law because he did not seek to disclose his supervisor's alleged misconduct . . . to anyone other than his supervisor"); *Manavian v. Dep't of Justice*, 239 Cal. Rptr. 3d 710, 725 (Cal. Ct. App. 2018) ("Manavian's communications did not qualify as protected disclosures because the communications were part of his normal duties through normal channels.").

Finally, Halbur offers a hypothetical to show why Larson's interpretation of "disclosure" fails. But his hypothetical supports Larson. Halbur posits the following scenario: "An employee makes a disclosure regarding illegalities to his 'public official' supervisor and implores the supervisor to report the illegality to the state auditor's office. The supervisor then immediately terminates the employee before the employee has an opportunity to report the conduct to the auditor himself." Appellee Br., at 42. Under these facts, the employee asks someone else to be a whistleblower, and declines to himself contact the Auditor and report illegalities both before and after his termination. Nor, in this scenario, is the supervisor the one alleged to have engaged in the illegality being reported.

Halbur continues to overlook the two critical facts in his case: his opinions only concerned Larson's decision-making, and he disclosed his opinions only to Larson. So, like the hypothetical above, Halbur never stepped out of line and engaged in the protected conduct of exposing Larson's alleged misconduct. And unlike the hypothetical above, Halbur only reported the alleged misconduct to the very person he believed was acting illegally. Significantly, Halbur never said he would report Larson to the Auditor himself, nor does he allege he was fired to prevent him reporting to the Auditor. Rather, Halbur testified that he never

intended to contact anyone outside of ABD about these matters, as notifying the Auditor was Larson's job, not his. (10/4/22 Tr. 149:25–150:21). Again, conveying your opinions within the proper channels with the goal of influencing leadership decision-making is not whistleblowing. *Manavian*, 239 Cal. Rptr. 3d at 725.

To invoke the substantial protections of the whistleblower protection statute, employees must engage in the substantial conduct of actually disclosing an illegal act. Here, Halbur's suit brought whistleblower claims based solely on communications to his supervisor about his supervisor's decision-making. Because such internal discussions could never be "disclosures" under section 70A.28, Halbur could not bring a colorable whistleblower claim and this suit should have been dismissed.

II. The crux of Halbur's communications were notifying Larson of his opinions on Larson's practices, and the whistleblower protection statute provides a comprehensive scheme for dealing with this specified kind of dispute.

Initially, Halbur brought both a statutory whistleblower claim and an additional common law wrongful-discharge claim. Am. Pet. ¶¶ 27–35, Vol. I App. 15. The district court dismissed the common law claim. Order (May 4, 2020), Vol. I App. 52. Larson agrees that Halbur preserved error and that questions of statutory interpretation are reviewed for correction of errors at law.

"Where the legislature has provided a comprehensive scheme for dealing with a specified kind of dispute, the statutory remedy provided is generally exclusive." *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996) (quoting 1A C.J.S. *Actions* § 14 n.55 (1985)); *cf. Goebel v. City of Cedar Rapids*, 267 N.W.2d 388, 392 (Iowa 1978) ("[W]here there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group.").

In *Ferguson*, this Court considered the interplay between statutory causes of action and common law wrongful-discharge claims. *Ferguson v. Exide Techs., Inc.*, 936 N.W.2d 429, 434 (Iowa 2019). When deciding whether to recognize a wrongful-discharge claim, we ask "if we had not adopted the common law doctrine in *Springer* would we choose to adopt it faced with a statute like" section 70A.28, "which provides for a civil cause of action?" *Id.* As in *Ferguson*, the answer here is "no." *Id.*

The specified kind of dispute at issue is Halbur's belief that Larson violated the law when contracting with BMI, and Halbur's communications to Larson expressing this opinion. Halbur tries to separate his wrongful-discharge claim from his whistleblowing allegations by arguing he was not only disclosing an illegal act, but also simultaneously refusing to participate in that same illegal act. Appellee Br., at 47.

The district court correctly recognized that, for statutory preemption purposes, this is slicing too thin. "If Plaintiff was refusing to commit an unlawful act, Plaintiff was doing so because he believed it was a 'violation of the law' . . . or 'a violation of law or rule, mismanagement, a gross abuse of funds, and/or an abuse of authority . . . both of which Plaintiff alleges he communicated to Larson." Order, at 7–8, Vol. I App. 58-59. The common law claim is unnecessary because "legislature has weighed in on the issue raised in Counts I and II," setting "the parameters of the governing public policy and provid[ing] the remedies available." Order, at 8, Vol. I App. 59.

Halbur points to *Fitzgerald* and *Jasper* to sustain his claim, but neither case provides support. *See Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 286 (Iowa 2000) (extending claim to employee who intended to testify truthfully against employer); *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 767 (Iowa 2009) (extending claim to fired daycare employee who repeatedly informed employer that proposed staffing changes could violate staff-to-child ratio regulations). In both cases, this Court extended wrongful-discharge claims to private employees whose communications did not implicate Iowa's whistleblower protection statutes (or any other comprehensive remedial scheme). *See* Iowa Code §§ 70A.28 (whistleblower protections for state employees);

70A.29 (whistleblower protections for municipal employees). So, unlike here, the wrongful-discharge claim stepped in to ensure that private employees who testify to or identify illegal conduct are protected.

Where the crux of the communication is a specified kind of dispute for which the legislature has already crafted a statutory scheme, the statutory scheme should control. Nor does not follow that Halbur is entitled to a wrongful-discharge claim simply because his whistleblower claim fails. Instead, if the legislature has stepped in and created remedies for the "specified kind of dispute" then a claim must rise and fall within those parameters. *Van Baale*, 550 N.W.2d at 156.

The district court thus properly recognized that Halbur intended to communicate to Larson that Larson was engaging in an illegal act, so section 70A.28 is Halbur's sole path for seeking relief.

CONCLUSION

This suit should have been dismissed because Halbur's claim is not colorable under Iowa Code section 70A.28. And the district court correctly disallowed Halbur's duplicative wrongful-discharge claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 2,197 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Christopher Deist
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CERTIFICATE OF FILING AND SERVICE

I certify that on November 27, 2023, this Reply Brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ Christopher Deist
Assistant Attorney General