William Mitchell Law Review

Volume 37 | Issue 2 Article 1

2011

Minnesota Supreme Court Finds In-house Lawyer not Protected by State Whistleblower Statute, but Could Be

Adam B. Klarfeld

MINNESOTA SUPREME COURT FINDS IN-HOUSE LAWYER NOT PROTECTED BY STATE WHISTLEBLOWER STATUTE, BUT COULD BE

Adam B. Klarfeld†

I. INTRODUCTION

In its highly anticipated and long-awaited decision, the Minnesota Supreme Court ruled by plurality that the state's whistleblower statute did not protect an in-house lawyer who was terminated after reporting unlawful activity to his employer.[1] By affirming the decision of the court of appeals, the court effectively overturned the plaintiff's $197,000 jury award, not inclusive of costs and attorney's fees.[2] Notably, an overwhelming majority of the court concluded that in-house attorneys—or, for that matter, any employee tasked with reporting illegal or suspected illegal conduct as part of her job—do deserve the protections of the Minnesota Whistleblower Act, section 181.932 of the Minnesota Statutes.[3]

† J.D., University of Minnesota; B.A., University of Pennylvania. Adam Klarfeld is an associate attorney with the law firm of Ford & Harrison LLP in Minneapolis, Minnesota, and primarily represents employers in employment litigation matters.

1. Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 231 (Minn. 2010).
2. *Id.* at 221.
3. *Compare id.* at 226–27, *with* Balla v. Gambro, Inc., 584 N.E.2d 104, 108–09 (Ill. 1991) (refusing to extend the tort of retaliatory discharge to in-house

Unfortunately, the plurality opinion leaves Minnesota courts and practitioners without a framework for analyzing whistleblower claims made by employees with these general job responsibilities.

II. BACKGROUND

Sybaritic, Inc. manufactures and sells spa equipment.[4] Plaintiff Brian Kidwell was hired as the company's in-house general counsel in July 2004.[5] In this capacity, Kidwell was broadly responsible for providing counsel "as to all corporate legal matters, and [for] the general legal administration of activities at Sybaritic."[6] He also worked directly on at least one litigation matter, serving as the counsel of record in the company's patent lawsuit against a competitor.[7] Concerned about the company's "pervasive culture of dishonesty" Kidwell wrote an e-mail to the company's management team titled "A Difficult Duty," outlining multiple instances of allegedly illegal conduct that he believed Sybaritic was failing to address.[8] In part, the e-mail addressed his concerns over his perceived discovery violations in the patent litigation.[9]

Kidwell concluded the e-mail by cautioning that, as the company's attorney, he would be obligated to send a report to the appropriate authorities if the company refused to comply with its legal obligations.[10] "[He] also sent a copy of the email [sic] to his father, a retired businessman" whose advice about the situation he had already sought.[11] Sybaritic's management team developed a plan with Kidwell the following day to resolve the issues in the e-mail.[12] Nevertheless, Sybaritic fired Kidwell three weeks later, citing, among other things, its distrust of him after discovering the e-mail to his father.[13]

attorneys).

4. *Kidwell*, 784 N.W.2d at 221.
5. *Id.*
6. *Id.* (quoting Plaintiff's employment agreement with the company).
7. *Id.* at 223.
8. *Id.* at 221–22.
9. *Id.* at 222.
10. *Id.* at 222–23.
11. *Id.* at 223.
12. *Id.*
13. *Id.* at 223–24. Sybaritic also claimed that it had "experienced a series of problems with Kidwell over the three-week period following receipt of the 'Difficult Duty' email [sic]," including failure to finish work after claiming the work was completed, and taking vacation time without completing a job task. *Id.* at 224.

This litigation ensued. Kidwell alleged that he was terminated in violation of the Minnesota Whistleblower Act.[14] "Sybaritic counterclaimed for breach of fiduciary duty based on Kidwell's forwarding the difficult-duty e-mail to his father."[15] The jury agreed with both parties, finding that Kidwell was fired because he engaged in protected conduct under the statute and that he had breached his fiduciary duty to the company.[16] The jury awarded Kidwell $197,000 in total damages and awarded the company nothing on its breach of fiduciary claim, concluding that the company did not suffer any damages as a result of the breach.[17] After the district court denied Sybaritic's post-trial motion for judgment as a matter of law, Sybaritic appealed.[18]

III. THE APPELLATE COURT'S DECISION

Agreeing with the majority of jurisdictions,[19] the Minnesota Court of Appeals concluded that Kidwell's claim was not "per se barred by the so-called attorney-client defense."[20] The company argued that an in-house attorney was precluded as a matter of law from bringing retaliatory discharge claims against an employer "on the premise that a lawsuit by an attorney against a former client would be inherently inconsistent with an attorney's duty to not reveal client confidences."[21] In rejecting Sybaritic's argument, the court of appeals recognized that the "majority view" permitted in-house attorneys to sue, provided that the claims "do not run afoul of the duty of confidentiality (a proviso that potentially could be applied as a bar)."[22] Nevertheless, the court of appeals held that Kidwell was barred from bringing a whistleblower claim because "he wrote and sent the difficult-duty e-mail to fulfill his job

14. Kidwell v. Sybaritic, Inc., 749 N.W.2d 855, 860 (Minn. Ct. App. 2008).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. The Minnesota Court of Appeals found that "[t]he majority view . . . appears to reject the attorney-client defense." *Id.* at 863–64. (citing Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 857, 863 (Tenn. 2002); Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 490 (Cal. 1994)). However, the court also pointed out that it found only one other case involving a statutory whistleblower claim to address the issue. *Kidwell*, 749 N.W.2d at 864 (citing Parker v. M & T Chem., Inc., 566 A.2d 215, 220–21 (N.J. 1989)).
20. *Kidwell*, 749 N.W.2d at 864.
21. *Id.* at 861.
22. *Id.* at 864.

responsibilities."[23]

IV. THE MINNESOTA SUPREME COURT'S DECISION

Rejecting the reasoning of the court of appeals, but approving its holding, the Minnesota Supreme Court ultimately sided with the company.[24] The plurality opinion explicitly noted that "[t]he whistleblower statute does not contain any limiting language that supports the blanket job duties exception the court of appeals crafted."[25] Nevertheless, the court stated that it would "not go so far as to hold that an employee's job duties are irrelevant in determining whether an employee has engaged in protected conduct."[26] Instead, the court stated that protected reports must be made in "good faith" as required by the statute.[27] In order for a report to have been made in "good faith," it must be "made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim."[28] The court reasoned that because the "'central question' is whether the report was made 'for the purpose of blowing the whistle, i.e. to expose an illegality,'" that an employee's job duties should be examined for purposes of determining whether the report was made in good faith.[29]

Relying on federal precedent interpreting the federal Whistleblower Protection Act (the "WPA"), the court held that "[a]n employee cannot be said to have 'blown the whistle' when the employee's report is made because it is the employee's job to investigate and report wrongdoing."[30] According to the plurality, an employee who has responsibility for investigating and reporting potentially unlawful behavior may still qualify for protection under the Minnesota Whistleblower Act, but "that employee will need something more than the report itself" to satisfy the good faith

23. *Id.* at 867 (noting that in the e-mail, Kidwell wrote "I cannot fail to write this e-mail without also failing to do my duty to the company and to my profession as an attorney."). At trial, Kidwell testified that he had to write the e-mail because he was "the person responsible for the legal affairs of the company." *Id.*

24. *See* Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 221 (Minn. 2010).

25. *Id.* at 226.

26. *Id.* at 227.

27. *Id.*

28. *Id.* (quoting Obst v. Microtron, Inc., 614 N.W.2d 196, 202 (Minn. 2000)).

29. *Id.* (quoting *Obst*, 614 N.W.2d at 202).

30. *Id.* at 228 (referencing Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1352 (Fed. Cir. 2001)).

requirement of the statute.[31] The court cited the examples in *Huffman* as "a non-exhaustive illustration of ways in which an employee's job duties could inform the question of 'good faith' under the whistleblower statute."[32]

With respect to Kidwell, the court evaluated the record and ruled that he was merely performing his general job duties in drafting the e-mail.[33] The plurality found "that as in-house general counsel he was 'responsible for providing advice on any legal affairs of the company.'"[34] According to the court, the text of the e-mail confirmed that Kidwell's intent was to warn his client about the potential liability arising from its actions, and that he was only raising some of his concerns in part as the "attorney of record" in the patent litigation.[35] Thus, according to the plurality, Kidwell's purpose in sending the e-mail "was not to 'expose an illegality,' but was to provide legal advice to his client."[36] Because Kidwell failed to show that he sent the report "for the purpose of *exposing* an illegality," he was not entitled to protection under the Minnesota Whistleblower Act.[37]

V. THE CONCURRING OPINION

Chief Justice Magnuson concurred in the result, but disagreed with the plurality's reasoning.[38] According to Chief Justice Magnuson, Kidwell was precluded from any recovery because he breached his fiduciary duty to his client.[39] He noted that attorneys

31. *Id.*

32. *Id.* at 228 n.7. Notably, the *Huffman* court provided examples in which an employee with investigatory responsibilities may garner the protection of the federal WPA, two of which are important here. First, an employee who reports the "wrongdoing outside of normal channels" is entitled to protection because the WPA's "core purposes are served by such a disclosure." *Huffman*, 263 F.3d at 1354. Second, the *Huffman* court permitted WPA protection for an employee who is obligated to report the wrongdoing, "but such a report is not part of the employee's normal duties or the employee has not been assigned those duties." *Id.*

33. *Kidwell*, 784 N.W.2d at 230.

34. *Id.* (quoting Kidwell's testimony).

35. *Id.* (quoting Kidwell's "Difficult Duty" e-mail). According to the plurality, Kidwell sent the "Difficult Duty" e-mail in an attempt to warn his client about possible federal law violations if the client did not conform to discovery obligations. *Id.*

36. *Id.*

37. *Id.* at 231.

38. *Id.* at 231–34 (Magnuson, C.J., concurring).

39. *Id.* at 232.

are permitted to bring whistleblower claims; however, any disclosure of client confidences must be made within "the fiduciary obligations imposed by the Rules of Professional Conduct."[40] Thus, an in-house attorney is afforded the protections of Minnesota's whistleblower statute, but she should only "reveal information *to the extent necessary* to establish her claim against her employer."[41] Finally, Chief Justice Magnuson stated that the jury's award of zero damages was irrelevant in the retaliation context since "'the client is deemed injured even if no actual loss results.'"[42]

VI. THE DISSENT

The three justices making up the dissent stated that the plurality opinion "imposes an artificial evidentiary hurdle on proving mental state and fails to give proper deference to the jury's determination of subjective intent."[43] More specifically, the dissent contended that the plurality's reliance on *Huffman* was misplaced because the plurality failed to establish why the WPA and the Minnesota Whistleblower Act should be treated similarly.[44] It asserted that other federal whistleblower statutes, such as Sarbanes-Oxley, provide support for in-house attorneys not needing to go beyond their normal job duties to garner protection from retaliation.[45] Notably absent from the dissent was any explanation of why the Minnesota Whistleblower Act should not be read similarly to these other whistleblower protection statutes.[46]

The dissent reasoned that juries are capable of determining whether an employee has the subjective intent to "blow the whistle," and therefore they are capable of determining whether the report was made in good faith, i.e., for the purpose of "exposing an illegality."[47] In the present case, the dissent concluded that the evidence supported the jury's determination that Kidwell "made a good faith report that was protected by the

40. *Id.* at 233.
41. *Id.* (quoting ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-424 (2001)).
42. *Id.* at 234 (quoting Perl v. Saint Paul Fire & Marine Ins. Co., 345 N.W.2d 209, 212 (Minn. 1984)).
43. *Id.* (Anderson, J., dissenting).
44. *Id.* at 236–37.
45. *Id.* at 237.
46. *Id.*
47. *Id.* at 237–39.

Minnesota Whistleblower Act."[48]

Finally, the dissent disposed of Chief Justice Magnuson's concurring opinion by arguing that the opinion "employs a narrow reading of Rule 1.6 of the Minnesota Rules of Professional Conduct" because the rule contemplates whistleblower claims after 2005.[49] Thus, the dissent concluded that although clients may terminate the attorney-client relationship, "this does not remove an in-house attorney's right to sue under some circumstances."[50]

VII. ANALYSIS

The most striking part of the *Kidwell* opinion is what the justices failed to address. All seven justices assumed, without discussion, that in-house attorneys may bring retaliation claims just like other employees.[51] Even without a majority opinion, this conclusion may constitute binding precedent.[52] Additionally, the plurality and the dissent agreed that Minnesota's Whistleblower Act does not create a "blanket job duties exception."[53] However, the dissent and plurality opinions agreed that examining the purported whistleblower's job duties is "helpful" in determining whether the report was made in good faith.[54]

Thus, the six justices comprising the plurality and dissent in *Kidwell* would seemingly disagree with the reasoning of the United States District Court in *Freeman v. Ace Telephone Ass'n*.[55] In *Freeman*,

48. *Id.* at 239.

49. *See id.* at 242–43 (noting that in 2005, the rule was modified to contain both "claims" and "defenses").

50. *Id.* at 243.

51. The dissent explicitly agreed with the plurality's conclusion that the state's whistleblower act does not create a "blanket job duties exception" and therefore does not prohibit an in-house attorney from bringing a claim under the act. *Id.* at 235. Without explicitly recognizing the principle, the six justices comprising the dissent and the plurality opinions seemingly rejected the Illinois Supreme Court's holding in *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991), that in-house attorneys were per se barred from bringing a tort claim for retaliatory discharge. *Id.* at 108–09.

52. *See, e.g.*, United States v. Spencer, 592 F.3d 866, 879 n.4 (8th Cir. 2010) (recognizing that with a plurality opinion, the precedent established becomes the narrowest holding garnering a majority of votes).

53. *Kidwell*, 784 N.W.2d at 226–27 (Gildea, J., plurality opinion), 235 (Anderson, J., dissenting); *see also id.* at 229 (Gildea, J., plurality opinion) (agreeing with dissent that a routine report may be protected when the plaintiff's contemporaneous intent in making the report is to blow the whistle).

54. *See id.* at 227 (Gildea, J., plurality opinion), 235 (Anderson, J., dissenting).

55. *See* Freeman v. Ace Tel. Ass'n, 404 F. Supp. 2d 1127, 1141 (D. Minn. 2005).

the plaintiff, the co-CEO of his company, claimed that he was terminated after and because he claimed the company's board of directors improperly sought mileage reimbursement for travel.[56] Notably, the plaintiff had provided notice to the board of other reimbursement issues in the same timeframe.[57] Part of his job was approving reimbursements, leading the court to conclude that his communications did not satisfy the "good faith" requirement of the Minnesota Whistleblower Act.[58]

The six justices comprising the plurality and dissent in *Kidwell* would seem to agree that, in *Freeman*, the sole fact that the plaintiff was carrying out his job responsibilities would be insufficient to deny him recovery under the Minnesota Whistleblower Act.[59] Although a plaintiff's job responsibilities are relevant to determine whether he or she intended to expose an illegality in order to satisfy the Act's "good faith" requirement,[60] an employee can use other evidence to show that his or her report was made to expose an illegality.[61]

Despite these agreed-upon principles, the *Freeman* court would still be on its own to determine whether the co-CEO created a fact question as to whether the purpose in his creating the report was to blow the whistle.[62] Whether the court followed the *Kidwell* plurality or the dissenting opinions would essentially determine whether summary judgment would ever be appropriate.[63] Following *Kidwell*'s plurality, the trial court could see from the facts that the plaintiff was carrying out his job duties and that he failed to meet the *Huffman* standards because the recipients of the report, namely the board itself, constituted "normal channels."[64] The *Kidwell* plurality would therefore agree that summary judgment was proper in *Freeman*.

56. *Id.* at 1132 (alleging that certain board members sought travel reimbursement for mileage incurred as a passenger in the vehicle, rather than the driver).

57. *Id.* at 1141.

58. *Id.*

59. *See id.* at 1131–32.

60. Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 227 (Minn. 2010) (Gildea, J., plurality opinion), 235 (Anderson, J., dissenting).

61. *See id.* at 228–29 (Gildea, J., plurality opinion), 237–41 (Anderson, J., dissenting).

62. *See id.* at 227 (Gildea, J., plurality opinion).

63. *See id.*

64. *See id.* at 228–29.

The *Kidwell* dissent seemingly would see a fact question as to the plaintiff's subjective intent.[65] With the dissent's lack of a framework, such as the one provided in *Huffman*,[66] a plaintiff could presumably always create a fact question at the summary judgment stage by claiming that he had the "contemporaneous purpose of 'blowing the whistle'" based on the plaintiff's self-serving subjective intent evidence.[67] Notably and generally, "intent is a fact question."[68] Thus, under the dissent's approach, summary judgment would rarely be granted unless the former employee surprisingly admitted that he did not intend to blow the whistle at the time of the report.[69] Presumably, the dissenting justices would

65. *See id.* at 234–43 (Anderson, J., dissenting).

66. The Federal Circuit Court in *Huffman* created a framework for federal courts to apply the basic holding in *Willis v. Dep't of Agric.*, 141 F.3d 1139 (Fed. Cir. 1998). *See* Huffman v. Pers. Mgmt., 263 F.3d 1341 (Fed. Cir. 2001). In *Willis*, the Federal Circuit Court "specifically held that an employee who makes disclosures as part of his normal duties cannot claim the protection of the WPA." *Id.* at 1352 (citing *Willis*, 141 F.3d at 1144). In explaining the phrase "normal duties," the *Huffman* court presented three scenarios that might take place. *Id.* at 1352–54. First, a federal employee who investigates and reports wrongdoing as part of his normal duties reports the wrongdoing "through normal channels." *Id.* In light of *Willis* and the purpose behind the WPA, the *Huffman* court concluded that this activity is not protected under the Act. *Id.* Second, an employee with the same assigned responsibilities as the first scenario may report the wrongdoing "outside of normal channels." *Id.* at 1354. The *Huffman* court suggested that an example of this situation could be a "law enforcement officer who is responsible for investigating crime by government employees who, feeling that the normal chain of command is unresponsive, reports wrongdoing outside of normal channels." *Id.* This activity, according to *Huffman*, is protected by the WPA. *Id.* Finally, the *Huffman* court recognized that an employee who is obligated to report the wrongdoing, but the report is not part of his normal duties or the employee was not actually assigned these duties, is also protected by the WPA. *Id.*

67. *Kidwell*, 784 N.W.2d at 239 (Minn. 2010) (Anderson, J., dissenting) (quoting Obst v. Microtron, Inc., 614 N.W.2d 196, 202 (Minn. 2000)); *see also id.* at 238 ("The plurality also encroaches on the well-established role of the jury in determining subjective intent.").

68. Cardot v. Synesi Group, Inc., No, A07-1868, 2008 LEXIS 1086, at *19 (Minn. Ct. App. 2008) (citing Sackett v. Storm, 480 N.W.2d 377, 379 (Minn. Ct. App. 1992), *review denied* (Minn. Mar. 26, 1992)).

69. *See id.* ("Summary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles." (quoting Pfizer, Inc. v. Int'l Rectifier Corp., 538 F.2d 180, 185 (8th Cir. 1976))); *see also* Cokley v. City of Otsego, 623 N.W.2d 625, 630 (Minn. Ct. App. 2001) ("Whether an employee made a report in 'good faith' is a question of fact, but the court may determine as a matter of law that certain conduct does not constitute a report for purposes of the Whistleblower Act.") (citing Rothmeier v. Inv. Advisers, Inc., 556 N.W.2d 590, 593 (Minn. Ct. App. 1996), *review denied* Rothmeier v. Inv. Advisers, 1997 LEXIS 148 (Minn. Feb. 26, 1997)).

agree that in certain fact situations the plaintiff's self-serving and subjective intent is not enough to cross this threshold.[70] Nevertheless, the dissent's reliance on the ability of juries to determine subjective intent and the good faith nature behind any report suggests that these justices do not feel comfortable deciding this area of the law.[71]

VIII. CONCLUSION

Unfortunately, the *Kidwell* decision leaves Minnesota courts and practitioners guessing at whether a plaintiff has created a fact question for juries in whistleblower claims where the employee's job responsibilities involved reporting the unlawful activity and the report was made within normal channels. Nevertheless, by rejecting the so called "job duties exception,"[72] six justices have at least implicitly, and finally, recognized that in-house attorneys may bring retaliation claims under Minnesota's Whistleblower Act.[73] Although many states have rejected the Illinois rule established in *Balla*,[74] Minnesota has now joined the growing list of states that treat attorneys like other corporate employees.[75] Whether this is good or bad for the legal profession as a whole is apparently a discussion the court is willing to have another day.[76]

70. *See, e.g.*, Greene v. Ill. Farmers Ins. Co., No. A05-598, 2005 LEXIS 550, at *12–13 (Minn. Ct. App. Dec. 6, 2005) (recognizing that intent is only one factor in determining residency and therefore summary judgment is still possible when the issue of an individual's subjective intent is raised).

71. *See Kidwell*, 784 N.W.2d at 242 (Anderson, J., dissenting).

72. *See id.* at 226–27 (Gildea, J., plurality opinion).

73. *See id.* at 239 n.4 (Anderson, J., dissenting) (citing Heckman v. Zurich Holding Co., 242 F.R.D. 606, 608–09 (D. Kan. 2007)).

74. *See* Balla v. Gambro, Inc., 584 N.E.2d 104, 108 (Ill. 1991) (noting that in-house counsel generally do not have a claim under the tort of retaliatory discharge).

75. *See Heckman*, 242 F.R.D. at 608–09 (collecting cases of states now permitting in-house attorneys to maintain retaliatory discharge claims under state law).

76. Presumably, the next fight in Minnesota involving in-house attorneys as whistle blowers will be over to what extent an attorney can use privileged or confidential information to support his or her claim. *Compare Heckman*, 242 F.R.D. at 611 (permitting in-house attorney to bring retaliation claim under Kansas law and authorizing attorney to "reveal confidential information under Rule 1.6(b)(3) to the extent necessary to establish such [a] claim"), *with* Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 490 (Cal. 1994) ("[W]e conclude that there is no reason inherent in the nature of an attorney's role as in-house counsel to a corporation that in itself precludes the maintenance of a retaliatory discharge claim, *provided* it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship.").