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Everybody Likes a Tattletale?: The Minnesota Supreme Court's Elimination of the "Public Policy" Requirement for Whistleblower Protection in *Anderson-Johanningmeier*

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**EVERYBODY LIKES A TATTLETALE?:
THE MINNESOTA SUPREME COURT’S ELIMINATION
OF THE “PUBLIC POLICY” REQUIREMENT FOR
WHISTLEBLOWER PROTECTION IN
ANDERSON-JOHANNINGMEIER**

Neal T. Buethe[†]

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I. INTRODUCTION

Whistleblower cases are complicated, protracted and difficult to resolve since they inevitably involve complex and contradictory perspectives. To the employee, whistleblower protection is a “shield” against an adverse employment action if he or she reports an employer’s suspected violation of law. To the employer, a whistleblower suit is often viewed as a “sword” used by poor performing employees to avoid termination. To the legislature and courts, whistleblower protection is “public policy” since it safeguards the public from corporate misconduct by protecting insiders who report illegalities. It is from this public policy perspective that the Minnesota Supreme Court made an important change in whistleblower law in the 2002 term. However, it is a change that is unlikely to make Minnesota whistleblower cases any less complicated, shorter or easier to resolve.

Whistleblower protection, an exception to the general rule of at-will employment, has been in effect in Minnesota since 1987. Since that time, a body of case law has developed, chiefly at the court of appeals level, that has provided the employer with a useful defense—the “public policy” requirement. Under this requirement, a plaintiff invoking whistleblower protection needed to prove that the reported violation was not a minor illegality or internal issue, but one involving “public policy”; i.e., a reported violation that implicates the broader interests of society—the public’s “morals, health, safety and welfare.”¹ Many Minnesota whistleblower cases have been dismissed or settled due to the public policy requirement.

The Minnesota Supreme Court has now eliminated the public policy requirement. In *Anderson-Johanningmeier v. Mid-Minnesota Women’s Center, Inc.*,² the court peeled back layers of somewhat conflicting case law and looked to the actual language of the state whistleblower statute, which says nothing about a public policy requirement. The court applied standard canons of construction to overturn the line of cases that had established the requirement.

This article examines the *Anderson-Johanningmeier* decision in light of the history of the public policy requirement in Minnesota and its previous effect on whistleblower litigation. It offers some

1. Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A., 586 N.W.2d 811, 814 (Minn. Ct. App. 1998).

2. 637 N.W.2d 270 (Minn. 2002).

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reflections on how *Anderson-Johanningmeier* fundamentally changes the very concept of whistleblower protection—assuming the court’s holding is not undone by the Minnesota Legislature. This article concludes with predictions concerning the case’s potential impact on the practical realities of whistleblower litigation and employment counseling.

II. WHISTLEBLOWER PROTECTION AND THE PUBLIC POLICY REQUIREMENT PRIOR TO *ANDERSON-JOHANNINGMEIER*

A. *The Minnesota Whistleblower Statute*

Although there have been whistleblowers since Adam told on Eve, whistleblower protection did not arrive in Minnesota until 1987 when it came into existence due to the almost simultaneous passage of the state whistleblower statute,³ which codified the right, and issuance of the appellate decision in *Phipps v. Clark Oil & Refining Corp.*, which began its judicial interpretation.⁴ Since no common law right existed prior to the passage of the statute, whistleblower law in Minnesota has been a matter of statutory interpretation.

By adopting the whistleblower statute, the Minnesota Legislature recognized a cause of action for wrongful discharge and an exception to at-will employment. The statute, in essence, prohibits an employer from retaliating against an employee who refuses to commit an illegal act or who, in good faith, reports the employer’s violation or suspected violation of any federal or state law.⁵

Although prominent in employment law practice, the statute is not easy to find. It is buried deep in the general state employment law chapter under the bland and rather misleading title “Disclosure of Information by Employees.” In pertinent part, the statute provides:

Subdivision 1. Prohibited action. An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because:

3. MINN. STAT. § 181.932 (2000) (amending MINN. STAT. § 181.932 (1999)).

4. 408 N.W.2d 569 (Minn. 1987).

5. See MINN. STAT. § 181.932.

(a) the employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official;

(b) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry;

(c) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason; or

(d) the employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm.

* * * *

Subd. 3. False disclosures. This section does not permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth.⁶

The section of the statute at issue in almost all whistleblower litigation is subdivision 1(a), providing protection for an employee who reports a suspected violation of law. It is in the context of subdivision 1(a) cases that the public policy requirement has been most often applied.

Since the statute's adoption, the Minnesota Legislature has made three subsequent revisions to the law, none substantial and none directly addressing a public policy requirement.⁷ As discussed below, the fact that the legislature has not substantially revised the

6. *Id.*

7. In 1988 language was added to subdivision 1, clause (c) of the statute regarding protection of employees asked to do illegal acts. 1988 Minn. Laws 915. The second amendment of subdivision 1 occurred in 1997 when the legislature added a new clause to the subdivision regarding health care institutions. 1997 Minn. Laws 2737. Finally, in 1999, the legislature recently revised subdivision 2 of the whistleblower statute which deals with government disclosures and the identity of the whistleblower. 1999 Minn. Laws 1615. Other than these minor or peripheral revisions, the statute has remained in tact since 1987.

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statute was of great significance to the *Anderson-Johanningmeier* court's elimination of the public policy requirement.

B. The Emergence of the Public Policy Requirement in Case Interpretation Prior to Anderson-Johanningmeier

The “public policy” requirement for general whistleblower protection emerged from a series of court interpretations of the public interest meant to be enforced by the whistleblower statute. To appreciate the implications of *Anderson-Johanningmeier* for Minnesota employment law, it is necessary to review this rather uncertain case history.

The public policy requirement first appeared in *Phipps v. Clark Oil & Refining Corp.*,⁸ a simple case of an employee being told to do something illegal, a situation now covered by subdivision 1(c) of the Whistleblower Act. Phipps was employed at a self-service gas station when a customer asked him to illegally pump leaded gasoline into her car.⁹ When his manager ordered him to do it, Phipps refused and was immediately fired.¹⁰ The trial court dismissed Phipps's challenge to the legality of his termination on the basis that Minnesota law did not recognize a public policy exception to at-will employment.¹¹

The Minnesota Court of Appeals reversed the trial court and found that a cause of action existed for illegal termination by virtue of the common law nature of the at-will employment doctrine and the broad acceptance of the whistleblower protection in other common law jurisdictions.¹² Since whistleblower protection was widely adopted in other states, the court of appeals effectively created a Minnesota whistleblower or “public policy exception” to the employment-at-will doctrine, making an employer liable at common law if it discharges an employee for “reasons that contravene a clear mandate of public policy.”¹³ From the phrase “clearly mandated public policy,” the public policy requirement was born.

Between the court of appeals' decision in *Phipps* and its review by the Minnesota Supreme Court, the Minnesota legislature

8. 396 N.W.2d 588 (Minn. Ct. App. 1987).

9. *Id.* at 589.

10. *Id.*

11. *Id.* at 590.

12. *Id.*

13. *Id.* at 592.

enacted the whistleblower statute. While this made the supreme court decision somewhat anticlimactic, the court did uphold the court of appeal's decision citing with apparent approval its "clear mandate of public policy" language.¹⁴ Because the right was now statutory, the supreme court's analysis of the nature and scope of the tort was abbreviated. As it turns out, what was left unsaid became quite important over time.

Although it may have seemed at the time that the legislature's enactment of the whistleblower statute superceded the potential impact of the *Phipps* decisions, these decisions significantly affected the development of whistleblower law by their "clear mandate of public policy" concept. The idea that whistleblower protection should be accorded to only those employees who reported violations that involved the "clear mandate of public policy" came to mean that there was a basis to distinguish reports with whistleblower protection from reports without whistleblower protection. The public policy requirement became a part of the fabric of the ongoing interpretation of the statute. It evolved early on in a line of cases that has now been overturned by *Anderson-Johanningmeier*.

The public policy requirement first fully appeared in *Vonch v. Carlson Companies, Inc.*,¹⁵ two years after *Phipps* and the passage of the statute. In *Vonch*, the plaintiff, an employee in the defendants' security department, reported that his supervisor was committing theft and fraud through his expense account.¹⁶ Management assured the plaintiff that the matter would be properly investigated.¹⁷ The investigation confirmed the allegations but the employer took no action against the supervisor since no significant loss resulted from the actions.¹⁸

Subsequently, *Vonch* was informed that his department would be eliminated.¹⁹ He was offered two different positions with significant pay cuts, both of which he rejected, believing that the employer wanted him to reject these offers and quit, which he did.²⁰ He then brought suit claiming wrongful discharge and

14. *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 572 (Minn. 1987).

15. 439 N.W.2d 406 (Minn. Ct. App. 1989).

16. *Id.* at 407.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

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violation of the Whistleblower Act.²¹ The trial court granted the employer summary judgment.²² The court of appeals upheld the dismissal on the basis that the public policy exception to at-will employment was established to protect the *general public* from injury due to a company's illegal acts and not applicable when there is no *general public interest* in enforcement of the violation reported:

The public policy exception to at-will employment was carved out to protect the *general public* from injury due to a company's neglect or affirmative bad act. Here, the public interest in having Carlson's chief *corporate* security officer charged with corporate travel and expense improprieties is minimal, at best. The public does not have an interest in a business's internal management problems. If actions are allowed when the public interest is only marginally affected rather than where it is “clearly mandated,” the law of at-will employment will be seriously jeopardized, and the public policy “exception” to at-will employment will become the rule.²³

Thus, from the common law concept of the public policy *exception* in at-will employment came the public policy *requirement* that state whistleblower protection law does not apply to cases where the public's interest was “marginal.”²⁴ Seen another way, the analysis of the public's interest in cases such as *Phipps* in which an employee was *asked* to do something illegal became part of the analysis of cases in which an employee *reported* illegal employer misconduct as in *Vonch*.

The Minnesota Supreme Court appeared to acknowledge the validity of the public policy requirement in *Williams v. St. Paul Ramsey Medical Center, Inc.*²⁵ Plaintiff Williams was employed as a pharmacy technician and claimed that a superior became interested in her and repeatedly asked her out.²⁶ When she continually rebuffed his advances, he became openly hostile.²⁷ Williams met with her supervisor to report this behavior.²⁸ The employer's sexual harassment coordinator investigated the claims

21. *Id.* at 407-08.

22. *Id.* at 407.

23. *Id.* at 408.

24. *Id.*

25. 551 N.W.2d 483 (Minn. 1996).

26. *Id.* at 484.

27. *Id.*

28. *Id.*

and concluded they were meritless.²⁹

At the same time, her superior submitted reports to the employer concluding that the plaintiff's workplace conduct had been inappropriate and her performance poor.³⁰ This report was supported by other employee complaints about her attitude.³¹ She was then fired for inadequate performance, failure to improve work quality, and for disruptive behavior.³² She then brought suit, claiming retaliation under the whistleblower statute.³³ While the Minnesota Supreme Court disposed of the claim on other grounds,³⁴ in a lengthy footnote the court noted that the image suggested by the whistleblower statute's very name—that of an officer blowing a whistle—underscores the point that the statute was designed to protect employee actions taken for the protection of the public and not actions taken for an employee's self-interest:

The popular title of the Act connotes an action by a neutral—one who is not personally and uniquely affronted by the employer's unlawful conduct but rather one who "blows the whistle" for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower. Were it otherwise, every allegedly wrongful termination of employment could, with a bit of ingenuity, be cast as a claim pursuant to Minn. Stat. § 181.932 (1994). Because this case was tried and decided on the basis of exclusivity, we have no occasion to rule on the validity of the cause of action asserted as a whistleblower's claim in Williams' complaint, but we could, in the alternative, have ruled that no such cause of action exists here.³⁵

To the employment law bar, the public policy requirement appeared to be endorsed by the Minnesota Supreme Court.³⁶

As recently as 1999, a reported appellate whistleblower case upheld the requirement. In *Donahue v. Schwegman, Lundberg,*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 485-86.

35. *Id.* at 484 n.1.

36. For a survey and discussion of the several unreported Minnesota Court of Appeals cases that enforced the public policy requirement see David J. Hoekstra, *Blowing the Whistle*, 1995 MINN. BENCH & BAR, Feb. 1995, at 17.

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Woessner & Kluth, P.A.,³⁷ the plaintiff, an associate at a law firm, learned that her firm attached a surcharge to the cost of all long distance phone calls made from the firm which was automatically deducted from employee paychecks without disclosure.³⁸ She demanded that the firm disclose the billing and deduction payroll practice to all employees and even hired independent counsel, whose investigation concluded that the practice was likely illegal and unethical.³⁹ In response, the firm implemented new long distance procedures.⁴⁰

Following these incidents, the plaintiff was placed on an alternative compensation plan, which reduced her minimum billing goal and part of her salary unless she achieved the original yearly billing goal.⁴¹ She left the firm and brought suit under the whistleblower statute, alleging that her report of the unlawful long distance surcharge led to her discharge.⁴² The trial court dismissed the claim, concluding that there was no public interest in the law firm's billing and payroll deduction practices.⁴³ The court of appeals affirmed, holding that her report concerning an internal payroll deduction procedure failed to implicate public policy.⁴⁴

Donahue had argued that since *all* statutes are designed to protect the public, her report necessarily involved the public interest and thus met the public policy requirement.⁴⁵ The court of appeals rejected this argument and concluded that the public policy requirement is not met by just reporting any illegality, but only by reporting illegal acts that implicate the broader interests of society:

[A]lthough the legislature intended the whistleblower statute to bring sweeping protection to employees who report wrongdoing by employers, we do not believe the intent was to obliterate employment at-will. Instead, both the common-law public policy exception and the whistleblower statute only protect employees who expose violations of law designed to promote the public's morals,

37. 586 N.W.2d 811 (Minn. Ct. App. 1998).

38. *Id.* at 812.

39. *Id.* at 813.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 812.

44. *Id.* at 814.

45. *Id.*

health, safety and welfare.⁴⁶

The *Donahue* court's reasoning presents a "horn book-like" application of the public policy requirement and has had the air of a discussion of settled law, but as *Anderson-Johanningmeier* would prove, the issue was far from settled.

C. *The Recent Emergence of Counter-Precedent*

Even before the court of appeals issued the *Donahue* decision, the Minnesota Supreme Court had signaled trouble for the continued existence of the public policy requirement in *Hedglin v. City of Willmar*.⁴⁷ Here, the plaintiff and other former firefighters brought an action under the whistleblower statute alleging the fire chief and the city had violated the statute by retaliating against them after they reported the falsification of fire department roll call sheets and drunken driving by firefighters.⁴⁸ The trial court dismissed the claim, concluding that such matters were only internal management issues that did not implicate public policy, and thus were not protected by the whistleblower statute.⁴⁹ But the court of appeals reversed, concluding that the falsification of roll call sheets was an illegal taking of public funds, and thus protected under the statute.⁵⁰

On further appeal, the Minnesota Supreme Court acknowledged the common law public policy exception to the employment-at-will doctrine, but declined to extend this requirement to the whistleblower statute.⁵¹ The court concluded that because the reports of roll sheet falsifications and of firefighter intoxication implicated possible state law violations, the whistleblower statute provided protection.⁵² The court did not accept the defendant's argument that the statute requires the reports to implicate a mandated public policy.⁵³ However, it declined to determine whether the public policy requirement is the law of the state because it found that the misconduct reported by the plaintiffs did in fact implicate mandated public policy:

46. *Id.*

47. 582 N.W.2d 897 (Minn. 1998).

48. *Id.* at 899.

49. *Id.* at 900.

50. *Id.* at 900-01.

51. *Id.* at 901.

52. *Id.* at 902.

53. *Id.*

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[W]e conclude that we need not decide whether the public policy requirement applies to the whistleblower statute because here the misconduct reported did implicate clearly mandated public policy. Grove reported that firefighters were driving fire trucks while drunk. The firefighters were allegedly driving city vehicles on city streets while under the influence of alcohol and could have caused substantial damage to other drivers, pedestrians, or property. This conduct certainly implicates public policy. Hedglin and Lundquist reported that the city paid Schroeder for fire calls that he did not attend because someone falsified the roll call sheets. Courts from other jurisdictions have concluded that public policy is implicated when the reported violation implicates the government or public funds.⁵⁴

While the holding of *Hedglin* was narrow, the supreme court took the opportunity to analyze the whistleblower statute and precedent in such a way as to alert the state employment law bar (and, as the Court would state in *Anderson-Johanningmeier*, the state legislature) that it saw no reason to believe that the public policy requirement should be part of whistleblower statute interpretation:

When we interpret statutes, we must ascertain and effectuate the intention of the legislature. If the words of the statute are free from ambiguity, we will not disregard them. Therefore, any statutory construction must begin with the language of the statute. The whistleblower statute protects reports made in good faith of a violation or suspected violation of *any* federal or state law or rule adopted pursuant to law. We conclude that this language clearly and unambiguously protects reports made of a violation of any federal or state law or rule adopted pursuant to law.⁵⁵

At the very least, *Hedglin* did not bode well for the public policy requirement. However, the requirement had not vanished. In deciding a 2000 whistleblower case that turned on questions of good faith and violation of law, the supreme court summarized Minnesota whistleblower protection as follows:

When interpreting the whistleblower statute, we have suggested that it protects the conduct of a neutral party who blows the whistle for the protection of the general

54. *Id.* at 903.

55. *Id.* at 901-02 (internal citations and quotations omitted).

public or, at the least, some third person or persons in addition to the whistleblower.⁵⁶

Given such language in a supreme court case, as well as the endorsement of the public policy requirement by the court of appeals in *Donahue*, the impact of *Hedglin* on the public policy requirement was open to question.

Yet the potential influence of *Hedglin* can be seen in *Bertagnoli v. Carlson Marketing Group, Inc.*, an unpublished 1998 court of appeals decision from a different court panel than the *Donahue* Court.⁵⁷ Plaintiff Bertagnoli was an at-will employee working on projects for a particular customer.⁵⁸ She alleged that her employer had manipulated the number of hours employees had worked on the customer's accounts and fraudulently inflated the bills.⁵⁹ She told her supervisor that she believed the practices were illegal and unethical.⁶⁰ Subsequently, the employer informed the plaintiff they had lost confidence in her and they were terminating her employment for poor work performance.⁶¹ She filed a complaint under the whistleblower statute, alleging that her employer terminated her for reporting violations of state and federal law.⁶² The trial court granted summary judgment in favor of the employer, concluding that the plaintiff had failed to make a report as required under the statute, and that the illegal billing practices failed to implicate public policy, as required by the statute.⁶³

The court of appeals reversed, however, determining that Bertagnoli's statements to her supervisor constituted a report under the statute.⁶⁴ It also declined to read the public policy requirement into the whistleblower act, since the plain language of the statute does not require that a clearly-mandated public policy be implicated in the employee's report.⁶⁵ In reaching this conclusion, the court relied on *Hedglin* for the proposition that the whistleblower statute should be read according to its plain language:

56. *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000) (internal citations and quotations omitted).

57. No. C6-98-541, 1998 WL 665085, at *4-5 (Minn. Ct. App., Nov. 17, 1998).

58. *Id.* at *1.

59. *Id.*

60. *Id.*

61. *Id.* at *2.

62. *Id.*

63. *Id.* at *2-4.

64. *Id.* at *5.

65. *Id.* at *4-5.

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The Supreme Court in *Hedglin* declined to read an additional requirement into the whistleblower act, and we decline to do so as well. Because the plain language of the whistleblower act does not require that a clearly mandated public policy be implicated in an employee’s report of wrongdoing, the district court erred in granting summary judgment against Bertagnoli on the ground that she had not shown such a policy to be implicated in this case.⁶⁶

Thus the implications of *Hedglin* for the public policy requirement were unfolding, and would play themselves out fully in *Anderson-Johanningmeier*.

D. The Practical Realities of the Public Policy Requirement Before Anderson-Johanningmeier

As seen in the cases described above, prior to *Anderson-Johanningmeier*, the public policy requirement was a part of Minnesota whistleblower law, but its status was becoming uncertain, and its place in whistleblower law was far from settled. In practice, it was very useful to employers in cases where an employee’s report arose from routine wage or workplace disputes that could be correctly characterized as internal matters. Of course, in cases in which important laws were involved the defense was not employed.

In cases where the employees’ report involved solely internal matters, the public policy requirement was particularly problematic to employees because it was a threshold requirement and a question of law. As such, it was a common basis for early summary judgment motions. The public policy requirement avoided the necessity of litigating questions of fact about the employee’s intent and the causal link between the report and the adverse employment action. In this way, it was a force for early and modest settlement of many lawsuits.

The doctrine was, undeniably, a “rule of practice” in Minnesota employment law for over fourteen years—even though its validity had a growing uncertainty, especially in light of *Hedglin*. However, even after *Hedglin*, its tenuous existence was perhaps less apparent to Minnesota practitioners than it might otherwise have been given the requirement’s consistency with the common

66. *Id.* at *5.

interpretation of whistleblower protection in federal law⁶⁷ and in surrounding jurisdictions.⁶⁸

Thus, prior to *Anderson-Johanningmeier*, the public policy requirement was useful to defendants and did not appear to be unique to Minnesota law. The only problem was that it existed nowhere in the text of the Minnesota whistleblower statute.

67. There is no general federal whistleblower law. But various federal statutes provide protection against retaliation for whistleblowers as an adjunct to the specific statutes' principle objectives and, thus, by their own terms have a "built-in" "public policy" requirement. That is, they do not involve unspecified illegal acts, as does the Minnesota whistleblower statute, but specific misconduct for which the important public policy being protected is part of the statute. For a list of federal whistleblower laws see Elletta S. Callahan & Terry M. Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 103 n.28 (2000).

68. The public policy requirement in Minnesota law was consistent with limits of whistleblower protection accorded employees in surrounding states, which can be summarized as follows:

Iowa: Iowa courts recognize an exception to the employment at-will doctrine where the discharge violates a well-recognized and defined public policy. *Fogel v. Trustees of Iowa Coll.*, 446 N.W.2d 451, 454-55 (Iowa 1989).

North Dakota: North Dakota also has a whistleblower statute; it applies to both public and private employers. N.D.C.C. §34-01-20 (2002). This statute provides a terminated employee a cause of action to bring a civil action for injunctive relief or damages for a retaliatory discharge. N.D.C.C. §34-01-20 (4) (2002). Courts have recognized that North Dakota's statute is similar to Minnesota's whistleblower statute. *Dahlberg v. Lutheran Soc. Serv. of N.D.*, 625 N.W.2d 241, 253 (N.D. 2001).

South Dakota: South Dakota does not have a whistleblower statute, but case law provides common law protection for whistleblowers when there has been a report of an alleged violation of substantial public policy. *Peterson v. Glory House of Sioux Falls*, 443 N.W.2d 653, 654 (S.D. 1989) (citing *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 227 (S.D. 1988)). This public policy exception to at-will employment is narrow and turns upon whether a termination is found to violate a clear mandate of public policy. *Dahl v. Combined Ins. Co.*, 621 N.W.2d 163, 167 (S.D. 2001).

Wisconsin: Wisconsin recognizes a public policy exception to at-will employment. *Strozinsky v. Sch. Dist. of Brown Deer*, 614 N.W.2d 443, 452 (Wis. 2000). Wisconsin courts have made clear that the exception to the general rule is a very narrow one. *Id.* at 453 (citing *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840-41 (Wis. 1983)). The employee has the burden of proving that the discharge violated a clear mandate of public policy. *Id.* To obtain relief, a plaintiff must: (1) first identify a fundamental and well-defined public policy in their complaint sufficient to trigger the exception to the employment-at-will doctrine; and (2) then demonstrate that the discharge violated that fundamental and well-defined public policy. *Id.*

III. ELIMINATION OF THE PUBLIC POLICY REQUIREMENT

A. *The Holding of Anderson-Johanningmeier*

In *Anderson-Johanningmeier* the Minnesota Supreme Court unequivocally eliminated the public policy requirement from state whistleblower law. Precedent establishing the requirement was overturned, and Minnesota law is in an important way different from federal whistleblower protection or that of surrounding states in that *any* reported violation of rule or law triggers whistleblower protection.

In *Anderson-Johanningmeier*, plaintiffs were employees of a women’s shelter whose jobs were eliminated after two female staff workers raised a comparatively minor and quite internal labor law violation with the executive director.⁶⁹ The executive director had instructed the plaintiff not to pay the vacation time of another employee.⁷⁰ This employee had first submitted a vacation request that was approved by the executive director and then submitted her resignation, taking effect soon after she returned from vacation.⁷¹ One of the staff workers contacted the Minnesota Department of Labor and inquired whether the executive director’s instruction was appropriate.⁷² A labor department employee replied that it was not and that the vacation pay needed to be given.⁷³ After the incident, the two staff workers claimed that the work atmosphere turned hostile.⁷⁴ Five months later, a staff restructuring occurred, eliminating the positions held by the two staff workers who had earlier confronted the executive director.⁷⁵

The women filed suit against the shelter alleging, among other claims, that the shelter violated Minnesota’s whistleblower statute.⁷⁶ A jury found for the women and specifically awarded the two staff workers a total of \$88,000.⁷⁷ However, the district court reversed the jury on a JNOV motion, reasoning that the illegality reported

69. *Anderson-Johanningmeier v. Mid-Minnesota Women’s Ctr., Inc.* 673 N.W.2d 270, 271 (Minn. 2002).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 272.

75. *Id.*

76. *Id.*

77. *Id.*

did not implicate public policy and, therefore, no whistleblower statute violation occurred.⁷⁸ The court of appeals affirmed on the basis that the appellants did not demonstrate that what they reported implicated public policy.⁷⁹

The Minnesota Supreme Court reversed, finding explicitly that a plaintiff alleging a violation of the Minnesota whistleblower statute does not need to establish that the reported law violation implicates public policy.⁸⁰ As precedent, the court primarily relied on its holding in *Hedglin* and the legislature's failure to modify the statute thereafter.⁸¹

The majority opinion did not delve into the theory of public policy requirement, review the history of whistleblower protection in the development of the public policy exception law, acknowledge the presence of the requirement in other jurisdiction's whistleblower laws, or rebut concerns that the integrity of the at-will employment doctrine would be diminished without the requirement.⁸² Rather, its analysis rested exclusively on statutory construction.⁸³ The court appeared to acknowledge that the case precedent was confusing and contradictory, especially when comparing the language of its *Hedglin* decision with the court of appeal's subsequent *Donahue* decision—for which the supreme court had not exercised discretionary review. Nonetheless, the court found that its reading of the law in *Hedglin* was such as to put the legislature on notice that it did not regard the public policy requirement as a legitimate part of whistleblower construction.⁸⁴ Since the 1999 legislature amended the statute after the 1998 *Hedglin* case without including a public policy requirement, the supreme court concluded that its analysis of the statute in *Hedglin* had withstood legislative scrutiny.⁸⁵ Thus, the elimination of the public policy requirement was consistent with legislative intent: "Because section 181.932, subd. 1(a), clearly and unambiguously protects reports made of a violation of any federal or state law or rule adopted pursuant to law, *we will not look beyond its text to search*

78. *Id.* at 273.

79. *Id.*

80. *Id.* at 277.

81. *Id.*

82. *Id.* at 273-77.

83. *Id.*

84. *Id.* at 276.

85. *Id.*

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*for an unexpressed public policy requirement.”*⁸⁶

The court’s proposition that that the legislature’s silence in response to *Hedglin* truly was consent to its dicta regarding the public policy requirement may give one pause. It is, nonetheless, undeniable that the plain language of the statute provides no “hook” for the public policy requirement “hat.”⁸⁷

Thus, after fourteen years, the public policy requirement in the *Phipps*, *Vonch* and *Williams* line of cases has come to an end. Indeed, the losing plaintiff’s argument in *Donahue*, that all laws are by definition clearly mandated public policies, proved prescient.

B. The Chief Justice’s Concurring Opinion

Although the court’s opinion was a straightforward exercise in reading the plain language of the statute—and a somewhat more complicated exercise of distinguishing conflicting precedent—there is more to the decision. Chief Justice Blatz filed a concurring opinion to specifically address the problems she foresees if the public policy requirement were to be re-established by statute.⁸⁸ She focused on the common argument that failure to recognize a public policy exception will lead courts to serve as “super-personnel departments,” deciding mere internal dispute matters that would now easily be filed as a whistleblower claim.⁸⁹ To the Chief Justice, the more critical public policy concern is raised by maintaining a public policy requirement by which individual courts must determine which violations qualify as a “clear mandate of public policy” and which do not.⁹⁰ Indeed, the concurrence contains separation of powers undertones:

Recognizing that much legislation is hotly contested, are the courts to sit as a “super legislature” to pass muster on the worthiness of a law? And in divining what laws in fact do not embody public policy, will the courts become an unwitting partner with a minority of legislators who were unsuccessful in their attempts to block a bill’s passage? These concerns—in conjunction with an appreciation that what one court may view as “pork” may be gruel in the eyes of legislators working on behalf of their

86. *Id.* (emphasis added).

87. *See* MINN. STAT. § 181.932 (2000).

88. *Anderson-Johanningmeier*, 637 N.W. 2d at 277 (Blatz, C.J., concurring).

89. *Id.*

90. *Id.*

constituents—give me great pause.⁹¹

In short, the Chief Justice's concurrence takes *Anderson-Johanningmeier* beyond pure statutory construction to a weighing of equities and constitutionality. By pointing to the uncertainties and subjectivity involved in implementing the requirement in a case-by-case basis, the Chief Justice was implicitly taking into account the questionable realities of practice—the search for the “right” court.⁹² Indeed, the concurrence reads like advice to the legislature. It is, perhaps, a harbinger of how the court will regard the constitutionality and enforceability of the public policy requirement were it to be re-established by statutory amendment. It also may be a tacit acknowledgment that it is a bit of a stretch to conclude that the legislature's silence in immediate response to *Hedglin's* dicta confirmed the legislature's intent regarding the public policy requirement. The concurrence seems to anticipate that the topic is now much more likely to come front and center before the state legislature.⁹³

C. The Immediate Implementation of Anderson-Johanningmeier in Abraham v. County of Hennepin

Just one month after *Anderson-Johanningmeier* was decided, the supreme court reaffirmed the elimination of the public policy requirement in *Abraham v. County of Hennepin*.⁹⁴ In *Abraham*, two employees of a print shop were fired for allegedly improper work behavior.⁹⁵ This occurred after they had complained to their supervisors that fumes in the workplace were making them ill and one of them sent a written complaint to the Safety and Health Division of the Minnesota Department of Labor and Industry.⁹⁶

The issues on appeal were complex and resulted in a holding that a constitutional guarantee to a trial by jury exists for whistleblower cause of actions.⁹⁷ For purposes of this article, the case is noteworthy since the supreme court applied its month-old

91. *Id.*

92. *Id.*

93. *See id.*

94. 639 N.W.2d 342, 346 (Minn. 2002).

95. *Id.*

96. *Id.*

97. *Id.* at 345-46. *See* Russell Pannier, *Abraham's Theory of Constitutional Interpretation*, 29 WM. MITCHELL L. REV. 265 (2002) for a persuasive critique of this holding.

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holding in *Anderson-Johanningmeier* and reaffirmed that a whistleblower claim need not implicate a clearly mandated public policy:

The county argues that appellants' claims reflect only appellants' self-interest and do not implicate clearly mandated public policy. In our recent decision in *Anderson-Johanningmeier v. Mid-Minnesota Women's Center*, we held that the protections of Minn. Stat. § 181.932, subd. 1(a), are not limited to reports that implicate public policy. Accordingly, we hold that the provision of the Whistleblower Act that prohibits employer retaliation for an employee's report of a violation or suspected violation of federal or state law or rule adopted pursuant to law, Minn. Stat. § 181.932, subd. 1(a), does not require that an employee's report of a violation or suspected violation of law or rule adopted pursuant to law implicate public policy.⁹⁸

Indeed, the Court concluded that not only need there be no showing that the reported violation implicated public policy, but the plaintiff need not even plead that a specific law or rule was reported as violated, as long as such a law or rule exists:

A whistleblower claim need not identify the specific law that the employee suspects has been violated, so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employee's complaint, the employee reported the violation or suspected violation in good faith, and the employee alleges facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.⁹⁹

In short, an employee whose complaint “implicates” a state or federal law, the enforcement of which serves only the employee's interest, can claim whistleblower protection.¹⁰⁰ Again, the basis for this further liberalization of the whistleblower statutes' application is the plain language of the statute itself. Thus, within a month, the supreme court eliminated the public policy requirement in *Anderson-Johanningmeier* and demonstrated the effect of this elimination in *Abraham*.

98. *Id.* at 354 (internal citation omitted).

99. *Id.* at 354-55.

100. *See id.*

IV. IS *ANDERSON-JOHANNINGMEIER* A SEA CHANGE OR JUST A RIPPLE IN THE POND?

Anderson-Johanningmeier settles the law in a way that affects the very concept of whistleblower protection and impacts the practical realities of employment litigation and counseling. However, the long-term effect may not be as great as it may initially seem, especially since the plain language of the statute provides fundamental defenses that limit abuse of whistleblower protection.¹⁰¹

A. *A Philosophical Change in Minnesota Whistleblower Law*

From a conceptual point of view, *Anderson-Johanningmeier* is intriguing since it alters the “three-part” perspective of traditional whistleblower analysis. Minnesota whistleblower law now operates on the general premise that the unfettered and unretaliated reporting of any law is, by definition, in the public interest. The perspectives of the employer, employee, and public are all still in the analysis, but the weight now given to the public’s interest in corporate compliance with the law is in one sense heightened and in another sense diminished. It is heightened in so far as every law, no matter whether its violation has a real impact on the public at large, can trigger whistleblower protection. But it also seems diminished in that there is no longer any real analysis of the public’s actual interest in the particular violation. There is no consideration given as to whether the underlying controversy affected the rights or interests of anyone other than the employee. In that sense, there is no *real* weighing of the public’s interest in enforcing the violation reported, since protection against the reporting of *any* violation of the law is *presumed* to be in the public interest. This results in an absolute correlation between legality and public policy. Looked at in this way, the three-part interests of the employer, employee and public collapse into just the interests of the employer and employee.

In other words, the traditional requirement that the employee was acting like a police officer who “blows a whistle” to stop a criminal in order to protect the interests of others is gone. In whistleblower cases where the reported violation involves only the legal interests of the employee, it is reasonable to ask if the “public

101. MINN. STAT. § 181.932 (2000); *see infra* Part IV.C.

interest” being protected is purely a legal construct.

But what is the alternative? As the Chief Justice points out, implementation of the public policy requirement entails ongoing judicial determinations of which specific laws actually implicate public policy considerations. Implicit in the assumption is the premise that not all laws have a public policy dimension—a premise that seems counterintuitive. Moreover, if an employer can discharge an employee simply because a court decides that a reported violation involves a purely internal matter, what does that mean for subsequent employees who report the same violation? The protection of *future* employees from being subject to the same illegal conduct could be reasonably regarded as a “clearly-mandated public policy,” since it involves the interests, or potential interests, of persons other than just the employee.

Also, significant separation of powers concerns are inherent in the requirement, since it calls upon a court to determine whether a particular law is a “clearly mandated public policy” and its enforcement important to protect the public “morals, health, safety, and welfare.” Prior to *Anderson-Johanningmeier*, practitioners knew that success in using the public policy requirement as a defense turned in large part upon having the “right” judge assigned to the case. Even if the public policy exception winnowed out foolish or wasteful claims, its intrinsic subjectivity in all probability cost many plaintiffs who reported employee misconduct out of a sense of duty their day in court or caused them to devalue their claim in settlement.

Finally, is it unfair or bad public policy to protect employees who report illegal employer conduct that relates solely to internal matters? Acting to correct such “internal illegalities” as overtime violations, workplace safety violations, or denial of statutorily-required leave means little if the employee can be immediately discharged or disciplined for reporting such infractions.

B. The Practical Impact of Anderson-Johanningmeier on Whistleblower Litigation

Beyond such theoretical considerations is the practical impact of *Anderson-Johanningmeier*. The case, of course, has no relevance in serious cases where there is no reasonable basis to question that the underlying reported violation has a public policy dimension. But unquestionably, *Anderson-Johanningmeier* takes away a common defense in cases in which a court could look upon the reported

offense as solely an “internal” matter. As a result, such cases, and there are many, will take longer to resolve. Thus, in all probability, *Anderson-Johanningmeier* will foster more whistleblower claims in Minnesota. The settlement costs for these claims will be higher because the risk of judgment can no longer be cut off by a motion to dismiss based on the public policy requirement.

In addition, *Anderson-Johanningmeier* now differentiates Minnesota whistleblower protection from the protection provided by the laws of surrounding states and federal whistleblower laws. Practitioners cannot simply apply the same analysis to Minnesota whistleblower claims that they apply to out-of-state or federal claims. Since Minnesota’s whistleblower law is now more liberal in its protection of the employee, conflict of laws considerations may be quite important in Minnesota-related cases brought outside the state.

C. *The Increased Importance of the Remaining Statutory Defenses*

All this being said, the impact of *Anderson-Johanningmeier* on the practical realities of Minnesota whistleblower law may prove to be less dramatic if the remaining statutory defenses “step up to the plate” now that the public policy requirement has been kicked out of the game—or at least placed on the disabled list.

Following the protocol of *Anderson-Johanningmeier* and looking strictly at the plain language of the statute, there are clear statutory requirements that there be a good faith report of a suspected illegality and a causal connection between the report and any adverse employment action. These statutory requirements provide traditional defenses that remain and should safeguard against opening the floodgate to the unjust expansion of whistleblower protection, even if post-*Anderson-Johanningmeier* whistleblower litigation tests their strength.

According to the plain language of the statute, protected conduct only exists when “the employee . . . reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.”¹⁰² This is a critical threshold requirement. For example, if a terminated employee reported only a violation of internal handbook or workplace policies, there would be no statutorily protected conduct because no actual illegality was

102. MINN. STAT. § 181.932, subd. 1(a).

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involved. No matter what internal consternation such a report might cause—indeed, even if the report was undeniably the reason for termination and the employer’s conduct seems retaliatory and morally unfair—such situations provide no whistleblower protection. Thus, many actions that employees may assume are protected are actually unprotected. This statutory requirement that the report involve a suspected violation of a federal or state law is an effective defense to potential whistleblower claims and remains good law.

There is also a statutory good faith requirement. The statute provides protection only when “the employee . . . in *good faith*, reports a violation or suspected violation.”¹⁰³ The statute “does not permit an employee to make statements or disclosures knowing that they are in reckless disregard of the truth.”¹⁰⁴

In *Obst v. Microton, Inc.*, the Minnesota Supreme Court defined this good faith analysis as looking at not only the content of the violation alleged, but also at the employee’s purpose in making the report:

Under the whistle-blower statute, establishing that an employee reported violations or suspected violations of law to his or her employer does not end the inquiry. The critical question of whether those reports were made in good faith must also be answered. In order to determine whether a report of a violation of suspected violation of law is made in good faith, we must look not only at the content of the report, but also at the reporter’s purpose in making the report. The central question is whether the reports were made for the purpose of blowing the whistle, i.e., to expose an illegality. We look at the reporter’s purpose at the time the reports were made, not after subsequent events have transpired. In part, the rationale for looking at the reporter’s purpose at the time the report is made is to ensure that the report that is claimed to constitute whistle-blowing was in fact a report made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim.¹⁰⁵

Defined as such, the good faith requirement is a meaningful concept and a significant limiting factor in potential whistleblower

103. *Id.*

104. *Id.* at subd. 3.

105. 614 N.W.2d 196, 202 (Minn. 2000) (internal citations omitted).

cases. Indeed, the pure self-interest that characterized an “internal” report that failed to meet the public policy requirement may be just as serviceable as evidence in support of a good faith defense.

While the good faith requirement alone may not eliminate the possibility that opportunistic employees will abuse whistleblower protection, there is also the statute’s requirement of a causal connection between the report and challenged discipline or discharge. This is, at least in theory, an ultimate failsafe to such abuse. Usually, establishing legitimate reasons for an employee’s termination that are wholly unrelated to the employee’s report is an employer’s best defense to a whistleblower claim. The statute explicitly requires this causal connection:

An employer shall not discharge, discipline, threaten, or otherwise discriminate against, or penalize an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because:

(a) the employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.¹⁰⁶

This requirement of a causal connection between report and employment action should prohibit whistleblower protection from becoming a cloak of immunity for poor performing employees. But in the realities of practice, proving that there is no causal connection is difficult and costly, because, in all likelihood, it is a question of fact for a jury. Nevertheless, advising employers to do what is necessary to establish the defense before discipline or discharge is even more critical now that the public policy requirement has been eliminated.

D. The Impact on Employment Counseling with the Elimination of the Public Policy Requirement

In light of *Anderson-Johanningmeier*, Minnesota employment lawyers, whether they counsel employees or employers, will need to make some adjustments to the advice they give their clients regarding whistleblower protection. For attorneys counseling an employee who is contemplating reporting an employer’s suspected

106. MINN. STAT. § 181.932, subd. 1(a).

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violation of law, it is no longer necessary to take into account the qualitative nature of the violation reported. As long as the report is made in good faith, whistleblower protection exists. Moreover, an employee who has been disciplined or terminated no longer needs to be counseled that his or her ability to bring a claim depends on the nature of the illegality reported.

For the attorney counseling the employer, *Anderson-Johanningmeier* underscores the critical importance of the client having solid, demonstrable proof that there was no causal connection between an employee's report of a suspected illegality and a subsequent discipline or termination decision. This may require more penetrating questions by counsel regarding the client's motivation for the proposed employment action than asked before and, perhaps, less-than-welcome advice about the timing and risks involved in disciplining or discharging such an employee. It certainly requires solid, contemporaneous documentation and possibly the establishment of “firewalls” between supervisors who are dealing with a reported violation and supervisors who are dealing with work performance issues. In short, the elimination of the public policy requirement ought to cause defense lawyers to be somewhat more conservative in their advice.

V. CONCLUSION

Over the years, the public policy requirement was read into the Minnesota whistleblower statute as a way to limit the law's applicability. The requirement had a reasonable basis and was consistent with whistleblower protection of surrounding states and federal law. However, it was a construction of common law found nowhere in the plain language of the statute. As such, it had uncertain parentage and questionable validity.

In *Anderson-Johanningmeier*, the Minnesota Supreme Court took a hard look at the statute—and the inconsistent case law interpreting the statute—and found no statutory basis to continue to recognize the requirement. Beyond a simple application of the canons of construction, the supreme court, through the concurrence, also offered substantive criticism of the public policy requirement's reliance on subjective judicial determinations as to which reported violations of the law are worthy of whistleblower protection.

As Chief Justice Blatz recognized in her concurrence, the Minnesota Legislature could, of course, amend the statute to re-

introduce the defense. This may happen because the unequivocal *Anderson-Johanningmeier* holding is much more noteworthy than the somewhat-equivocal *Hedglin* holding. That is, *Anderson-Johanningmeier* is more likely to cause the legislature to revisit the question of whether it intends Minnesota whistleblower protection to be significantly more comprehensive in its protection of employees than that provided under federal law and the common law of other states. Of course, this is all yet to unfold. The Legislature will determine whether *Anderson-Johanningmeier* is really the final chapter for the public policy requirement in Minnesota whistleblower law.¹⁰⁷

107. There was no proposed amendment to the Minnesota Whistleblower Statute introduced in either house of the Minnesota Legislature during the 2002 legislative session.