

No. A06-1137

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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John Grundtner,

Plaintiff/Appellant,

v.

University of Minnesota, and Michael Perkins,  
in his personal and professional capacities

Defendants/Respondents,

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APPELLANT'S BRIEF

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TABLE OF CONTENTS

**I. STATEMENT OF THE CASE.....1**

**II. STATEMENT OF THE LEGAL ISSUES.....2**

**III. FACTUAL STATEMENT.....3**

**IV. LEGAL ARGUMENT.....17**

**A. Standard of Review.....17**

**B. Defendants have not met the standard of proof to be entitled to summary judgment on the whistleblower claim.....19**

**i. The Whistleblower Statute protects employees, like Plaintiff who report suspected illegal behavior to their employer or a government agency .....19**

**ii. Defendants have no legitimate nondiscriminatory reason for plaintiff’s termination. Defendants’ reasons for termination are pretextual- a false justification alone is enough to prevent summary judgment.....34**

**C. The trial court had jurisdiction of the tort claims.....36**

**i. There was no “quasi-judicial” process surrounding either Plaintiff’s demotion or his termination.....36**

**ii. There is no jurisdictional basis to dismiss the defamation count or other torts.....38**

**iii. Intentional interference with a business advantage.....39**

**D. Defamation.....39**

**E. Intentional interference with an economic advantage.....41**

**i. Elements of tortious interference.....41**

**ii. Agents can be liable for tortious interference.....42**

F.	The court was in err when it ordered the return of documents to defendants plaintiff had been given on the basis of attorney-client privilege.....	43
V.	CONCLUSION.....	49

## TABLE OF AUTHORITIES

### **Minnesota Cases**

<i>Abraham v. County of Hennepin</i> , 639 N.W.2d 342 (Minn. 2002).....	24, 26
<i>Advanced Training v. Caswell Equipment Company Inc.</i> , 352 N.W.2d 1, 9 n.1 (Minn. 1984).....	40
<i>Anderson-Johanningmeier v. Mid-Minnesota Women’s Center, Inc.</i> , 637 N.W.2d 270, 273-274 (Minn. 2002).....	24
<i>Anderson v. Kammeir</i> , 262 N.W.2d 366, 372 (Minn.1977).....	40
<i>Anderson v. Hunter, Keith, Marshall &amp; Co.</i> , 417 N.W.2d 619 (Minn. 1988).....	36
<i>Becker v. Alloy Hard Facing &amp; Engineering Co.</i> , 401 N.W.2d 655, 661 (Minn. 1987).....	40
<i>Bersch v. Rgnonti &amp; Associates, Inc.</i> , 584 N.W. 2d 783 (Minn. App 1998) review denied.....	26
<i>Bolten v. Department of Human Services</i> , 540 N.W.2d 523 (Minn.1995).....	40
<i>Carter v. Peace Officers Standards and Training Board</i> , 558 N.W.2d 867 (Minn. App. 1997).....	25, 41, 42
<i>Clark v. Independent School District No 834</i> , 553 N.W.2d 443, 446 (Minn. App. 1996).....	38, 39
<i>Couillarde v Charles T. Miller Hosp. Inc.</i> , 92 N.W.2d 967 (Minn. 1958).....	18
<i>Cox v. Crown Coco, Inc.</i> , 544 N.W.2d 490 (Minn. App. 1996).....	25, 34
<i>Fazio v. Belem</i> , 504 N.W.2d 758, 761 (Minn. 1993).....	17
<i>F.T.C. v. GlaxoSmithKline</i> , 2001 WL 1262213 (D.D.C., Oct. 9, 2001).....	45
<i>Furlev Sales and Associates, Inc. v. North American Automotive Warehouse Inc.</i> , 325 N.W.2d 20, 25 (Minn. 1982).....	42
<i>Grabble v. Pioneer Press Co</i> , 25 N.W. 710 (Minn 1985).....	40
<i>Graham v. Special School District No. 1</i> , 472 N.W.2d 114, 119 (Minn. 1991).....	19, 37
<i>Guerdon Indus. v. Rose</i> , 399 N.W.2d 186, 187 (Minn. App.1987).....	41
<i>Hedglin v. City of Willmar</i> , 582 N.W.2d 897, 901-02 (Minn. 1998).....	24, 26
<i>Hubbard v. United Press International, Inc.</i> , 330 N.W.2d 428, 445 (Minn. 1983).....	33
<i>Janklow v. Minnesota Bd. of Examiners for Nursing Home Admr’s</i> , 552 N.W. 2d 711 (Minn. 1996).....	26
<i>Kall v. Minnesota Wood Specialty, Inc.</i> , 277 N.W.2d 395, 399 (Minn. 1979).....	44, 45
<i>Kobluk v. Regents of the University of Minnesota</i> , WL 297525 (Minn.App. 1998).....	36, 38, 43
<i>Larson v. New Richland Care Center</i> , 538 N.W.2d 915, 919 (Minn. App. 1995).....	36, 37
<i>Mahazu v. Becklund Home Healthcare</i> , WL 1751280 (Minn.App 2002).....	24, 25
<i>McGrath v. TCF</i> , 509 N.W.2d 365 (Minn. 1993) modifying 502 N.W.2d 801 (Minn. App. 1993).....	19
<i>Mead Data Central, Inc , v United States Dept. of Air Force</i> , 566 F.2d 242, 184 U.S.App. D.C. 350, 361 (D.C. Cir. 1977).....	45

<i>Morey v. Barnes</i> , 2 N.W.2d 829 (Minn. 1942),.....	40
<i>Nordling v. Northern States Power Company</i> , 478 N.W.2d 498 (Minn. 1991).....	41, 42
<i>Palmer v. Ramsey County</i> , WL 118107 (Minn. App. 1997).....	33
<i>Phipps v. Clark Oil</i> , 408 N.W.2d 569, 571 (Minn. 1987).....	19, 25
<i>Pierce v. Honan</i> , WL 682885 (Minn. App. 2001).....	37
<i>Rathbun v. W. T. Grant Co.</i> , 219 N.W.2d 641 (Minn. 1974).....	18
<i>Sauter v. Sauter</i> , 70 N.W.2d 351 (Minn. 1955).....	17
<i>Schwartz v. Weber</i> , 124 N.W.2d 489 (Minn. 1963).....	43
<i>Sentinel Management Co. v. Aetna Cas. And Sur. Co.</i> , 615 N.W.2d 819, 827 (Minn. 2000.).....	19
<i>State Ex rel. Schuler v. Tahash</i> , 154 N.W.2d 200 (Minn 1967).....	45
<i>State ex rel Humphrey v. Philip Morris, Inc.</i> , 606 N.W.2d 676 (Minn. App. 2000).....	46
<i>Stephens v. Board of Regents of Minnesota</i> , WL 1315809 (Minn.App. 2002).....	36
<i>Svensden v. State Bank of Duluth</i> , 65 N.W.2d 1086 (Minn. 1986).....	40
<i>Tretter v. Liquipak International, Inc.</i> , 356 N.W.2d 713, 715 (Minn. App. 1984).....	33
<i>Vonch v. Carlson Companies, Inc.</i> , 439 N.W.2d 406 (Minn.F. 1949).....	27
<i>Willis v. County of Sherburne</i> , 555 N.W.2d 277, 282-83 (Minn. 1996).....	38, 39
<i>Zahavy v. University of Minnesota</i> , 544 N.W.2d 32, 42 (Minn.App. 1996).....	36

## Foreign Cases

<i>Banks v. United States</i> , 204 F.2d 666 (8 <sup>th</sup> Cir. 1983).....	44
<i>Basset v. City of Mpls.</i> , 211 F.3d 1097 (8 <sup>th</sup> Cir. 2000).....	17
<i>Bituminous Casualty Corp v Tonka Corp</i> , 140 F.R.D. 381 (D.Minn. 1992).....	43
<i>Calvit v. Minneapolis Public Schools</i> , 122 F.3d. 1112 (8 <sup>th</sup> Cir. 1997).....	26, 31, 34
<i>Davis v. City of Sioux City</i> , 115 3d 1365, 1369 (8 <sup>th</sup> Cir. 1997).....	31
<i>Desert Palace, Inc. v. Costa</i> , 123 S.Ct. 2148(2003).....	35, 36
<i>Elliot v. Montgomery Ward</i> , 967 F.2d 1258 (8 <sup>th</sup> Cir. 1992).....	34
<i>Garfinkle v. Arcata Nat'l Corp.</i> , 64 F.R.D. 688, 690 (S.D.N.Y.1974).....	49
<i>Howell v. Jones</i> , 516 F.2d 53, 58 (5 <sup>th</sup> Cir. 1975).....	45
<i>Johnson v. Sea-Land Service, Inc.</i> , 2001 WL 897185, *4 (S.D.N.Y. 2001).....	46
<i>Kim v. Nash Finch Co.</i> , 123 F3d 1046, 1059 (8 <sup>th</sup> Cir. 1997).....	31
<i>Lewis v. UNUM Corp., Severance Plan</i> , 203 FRD 615, 2001 WL 394 895, *5 (D.Kan., April 4, 2001).....	45, 49
<i>Lumber v. PPG Industries, Inc.</i> , 168 F.R.D. 641 (D.Minn. 1996).....	43, 44
<i>McCoo v. Denny's, Inc.</i> , 192 F.2d 675, 683 (D.KAN, 2000).....	49
<i>Mills v. Healthcare Service Corp.</i> , 171 F.3rd 450, 458 (7 <sup>th</sup> Cir. 1999).....	19
<i>Minnesota Ass'n of Nurse Anesthetists v. Unity Hospital</i> , 59 F.3d 80, 83 (9 <sup>th</sup> Cir. 1995).....	33
<i>Opus v. International Business Machines</i> , 956 F.Supp. 1503 (D.Minn. 1996).....	44

<i>Petrosky v. Lommen, Nelson, Cole, Stageberg, P.A.</i> , 847 F.Supp 1437, 1447-1448 (D.Minn. 1994).....	26, 27
<i>Reeves v. Sanderson Plumbing Products, Inc.</i> , 530 U.S. 133, 150 (2000).....	18, 35
<i>St. Mary's Honor Center v. Hicks</i> , 509 U.S. 502, 508, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).....	18, 34, 35
<i>Thompson v. Campbell</i> , 845 F.Supp. 665, 675 (D.Minn. 1994).....	33
<i>United States v. Bartone</i> , 400 F.2d 459 (6 <sup>th</sup> Cir. 1969).....	44
<i>United States v. McCambridge</i> , 551 F.2d 865 (1 <sup>st</sup> Cir. 1977).....	45
<i>United States v. Pape</i> , 144 F.2d 778 (2 <sup>nd</sup> Cir. 1944).....	45
<i>U.S. v. United Shoe Machines Co</i> , 89 F.Supp. 357 (D.Mass. 1950).....	44
<i>Yurick ex rel. Yunick v. Liberty Mutual Ins. Co.</i> , 201 F.R.D. 465, 469 (D.Ariz. 2001)....	45
<i>Womack v. Monson</i> , 619 F.2d 1292, 1297 (8 <sup>th</sup> Cir. 1980).....	23

**Statutes**

Minnesota Statute § 181.932.....	20, 24, 25, 30
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## STATEMENT OF THE CASE

Plaintiff was the architect for the University of Minnesota. He was well-regarded and effective in his job. As such, he was given additional job duties. Mr. Perkins was hired into a position that made him Mr. Grundtner's supervisor. He had recommended the increased responsibilities for Mr. Grundtner and had made no complaints about any aspect of Mr. Grundtner's job performance to Mr. Grundtner.

The University had a project for a Student Center in Crookston, which had had no successful bids. Its budget was \$4.7 million and the low-bid \$7.5 million. Mr. Perkins decided to use the concededly illegal solution of just negotiating with the low bidder, what that bidder would do for the contract amount, thereby eliminating all other qualified bidders from bidding on the actual project. Mr. Grundtner would have to sign off on the project as the person with first line responsibility.

Mr. Grundtner told Mr. Denny, Mr. Perkins' decision was not legal. He also reported to the University attorney and to Mr. Perkins at a meeting of the involved parties on November 5, 2003, that this was illegal. Mr. Perkins became irritated and felt Mr. Grundtner was not a team player. The next day, November 6, 2003, Mr. Perkins demoted Mr. Grundtner and soon thereafter, took away his signing responsibility.

Mr. Grundtner, in February 2004, raised additional issues of financial improprieties with in-house counsel and the university auditor. The investigation substantiated some of his concerns. The next week he was told his contract would not be

renewed. Shortly thereafter, although months remained on his existing contract, he was removed from his office, had his e-mail disconnected, his phone calls screened and was banned from campus. After he left Defendants' employ, negative statements were made to future potential employers.

The trial court granted summary judgment, creating new Minnesota law contending that Mr. Grundtner was not protected under the Whistleblower Statute because he ultimately succeeded in stopping the University from fully effectuating its illegal decision, even though he was demoted and fired for it. The court also ruled it had no jurisdiction over Plaintiff's other torts.

#### **STATEMENT OF THE LEGAL ISSUES**

1. **DID THE TRIAL COURT ERR WHEN IT GRANTED DEFENDANTS SUMMARY JUDGMENT ON THE WHISTLEBLOWER CLAIM?**
2. **DID THE TRIAL COURT HAVE JURISDICTION OVER THE TORT CLAIMS?**
3. **DID THE TRIAL COURT ERR WHEN IT GRANTED DEFENDANTS SUMMARY JUDGMENT ON THE DEFAMATION CLAIM?**
4. **DID THE TRIAL COURT ERR WHEN IT GRANTED DEFENDANTS SUMMARY JUDGMENT ON THE INTENTIONAL INTERFERENCE WITH AN ECONOMIC ADVANTAGE?**
5. **DID THE TRIAL COURT ERR WHEN IT ORDERED THE RETURN OF DOCUMENTS TO DEFENDANTS PLAINTIFF HAD BEEN GIVEN ON THE BASIS OF ATTORNEY-CLIENT PRIVILEGE?**

## FACTUAL STATEMENT

The Plaintiff was a dedicated, hard-working employee for Defendants.

Plaintiff began working for Defendant University on May 24, 2000, as the University Architect. (Plaintiff's Exh. XX)(Grundtner Depo., p. 111.) Plaintiff was extremely qualified and performed the duties associated with his position with consistently superior performance. (Id., at p. 42.) As such, Plaintiff's responsibilities expanded.<sup>1</sup> (Id., at pp. 27-28)(Grundtner Depo., Vol. 2, pp. 22-23)(Plaintiff's Exhs. YY, ZZ.) The Plaintiff was placed in charge of design and construction. (Grundtner Depo., pp. 111-112.) The Plaintiff had architects reporting to him that assisted him during the design portion of projects. (Id.) The Plaintiff also had all of the project managers (also known as owners' representatives), who took care of budget, communication, contracts, third-party work force, user and end-user communications, that ran throughout each project. (Id.) The Plaintiff had further duties, including: State Designer Selection Board; design esthetic considerations; Board of Regents presentations for all schematic designs and pre-designs for all four campuses, the outreach stations, such as the Arboretum, Cloquet, the extensions services, the Rochester Medical Center, etc. (Id.) Plaintiff was universally well-regarded. Defendant Perkins never indicated to the Plaintiff that he was

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<sup>1</sup>When the Plaintiff was hired by Dan Hambrock, Mr. Hambrock stated to the Plaintiff that his contract was an automatically renewing contract. (Grundtner Depo., pp. 118-119.) The Plaintiff was told that, although the contract ran from year to year, once he was hired, unless he did something illegal, the contract was going to be renewed. (Id.) Numerous employees are at the University for many years in this capacity, including Defendant Perkins, whose contract is renewed every year in an essentially, invisible process. (Id.)(Perkins Depo., pp. 43-44.)

in any way unhappy with Plaintiff's work performance. (Grundtner Depo., p. 42.)

June 2003, Defendant Perkins becomes the Plaintiff's supervisor.

In about June 2003, Plaintiff's supervisor became Defendant Perkins. Defendant Perkins was hired by Defendants in June 2003, as the Associate Vice President for Capital Planning and Project Management. (hereinafter "AVP CPPM"). (Grundtner Depo., p. 27.) Just prior to being hired, Defendant Perkins had worked for Defendants as a consultant to prepare organizational management recommendations on addressing audit concerns that were raised by both internal audit and the Office of General Counsel. (Id.)(Perkins Depo., pp. 22-23.) As a consultant, Defendant Perkins recommended the creation of CPPM. (Grundtner Depo., p. 27.) While a consultant, Defendant Perkins determined and recommended that all design and construction responsibilities should be put under the University Architect's responsibility. This occurred in February 2003. (Grundtner Depo., Vol. 2, pp. 22-23)(Plaintiff's Exh. B.)

Defendants' illegal procurement method - the Crookston Project

Defendants had solicited bids for a student center project at its Crookston campus. The bids came in well over-budget. There were serious issues with how the local consulting architectural firm had performed its role. Mr. Grundtner felt a different consulting architectural firm was called for. The Defendants had 4.7 million dollars for the construction budget and the bid they received was for 7.5 million dollars. (Grundtner Depo., p. 29)(Plaintiff's Exh. BBB.) A great deal of time was spent trying to reach an

agreement with the consulting architect of record about how much the project was over budget. (Id.) This architect, however, was undermining their authority, not being consistent and not meeting set deadlines. (Id.) As a result, the project was being significantly delayed. (Id.) On or about October 30, 2003, the Plaintiff reported to Defendant Perkins, that the consulting architect for the project in Crookston (hereinafter the “Crookston Project”), should be changed<sup>2</sup> (Grundtner Depo., pp. 27-28, 71)(Perkins Depo., p. 85)(Plaintiff’s Exhs. N, Q, U.) Defendant Perkins informed the Plaintiff that a meeting would be held with the consulting architect to address these issues and, essentially, end the relationship. (Grundtner Depo., pp. 27-28, 71.)

The Plaintiff, who was unable to attend this meeting, spoke with Michael Denny<sup>3</sup> after the meeting and learned that, instead, Defendant Perkins and Mr. Denny had decided at this meeting to negotiate with the low bidder to get the project within budget, so that it could be awarded.<sup>4</sup> (Id., at pp. 28-29, 49, 65.) This would entail selectively negotiating just with one entity what they would do for the budgeted amount.

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<sup>2</sup>Defendants had already bid the Crookston Project once, and the only bid was received in July 2003. (Grundtner Depo , p 29)(Exhibit BBB )

<sup>3</sup>Michael Denny had become the Director of Development for Defendants. (Perkins Depo. pp. 115-116.) Mr. Denny has no degree of any kind. (Id.) The total of Mr. Denny’s contract from March 3, 2003 through June 2004 was \$233,232.00 (Plaintiff’s Exh. T.)

<sup>4</sup>The Plaintiff felt that he was being directed to participate in this scheme. (Grundtner Depo., p. 64.) As the Director of Design and Construction, the Plaintiff was responsible for choosing delivery methods and had the first level of sign-off on all orders to proceed. (Id., at p. 65.) Plaintiff had authorization up to \$250,000 and if the dollar amount increased, it required higher management approvals. (Id.) If, however, the Plaintiff refused to sign off, the documents would not go to any higher levels of management. (Id. , at pp. 65-66.)

The Plaintiff immediately informed Mr. Denny that this was an illegal procurement method and stated that it must not be utilized. (Grundtner Depo., pp. 29-30, 48)(Grundtner Depo., Vol. 2, p. 50.) In their summary judgment brief, Defendants conceded such an action would be illegal. Under procurement rules, Mr. Grundtner had first level sign-off, if he did not sign, it would go no further. (Grundtner Dep. pp. 65-66.)

The Plaintiff explained that state law requires that when there is a competitive bid, it can either be awarded or not awarded, it cannot be selectively negotiated with only some bidders. If the project has to be redesigned, then all qualified bidders must be allowed to participate. (Id.) The Plaintiff was aware that because state monies were being utilized in the Crookston Project, state procurement statutes must be followed.<sup>5</sup> (Id., at pp. 146-147.)

Mr. Perkins was well aware of Plaintiff's report of illegal conduct. Defendant Perkins testified:

I remember Mr. Grundtner indicating that we were talking about possibly talking with the low bidder, the only bidder, whatever. And as such, he said, you can't do that. That's illegal.

(Perkins Depo , p. 83.) Other than the Plaintiff, nobody else had told Defendant Perkins

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<sup>5</sup>The Plaintiff also reported to Sandra Martell, Associate General Counsel for Defendants, that this approach was not consistent with the law. (Martell Depo , pp 26-27.) Correspondence with in-house counsel directly bearing on this point, which Plaintiff received, was suppressed by the trial court as being attorney-client privileged. Similarly, numerous questions in depositions were not answered for the same reason

that he could not negotiate with the low bidder.<sup>6</sup> (Perkins Depo., p. 92.) Denis Larson and Chip Foster, however, indicated to Defendant Perkins that the Plaintiff's "observation of the situation was correct." (Id., at p. 95.) It was the Plaintiff who insisted Defendant Perkins could not go forward with his decision. (Id., at p. 98.) Mr. Perkins was upset by Mr. Grundtner's position.

November 5<sup>th</sup>, 2003, meeting.

On November 5, 2003, there was another meeting to discuss the Crookston Project delivery method for construction, with Defendant Perkins, Michael Denny, Steve Buffington, Denis Larson, Chip Foster and the Plaintiff in attendance. (Id., at pp. 30, 38-39, 71-72)(Buffington Depo. pp. 11-15, 23-30.) The Plaintiff reiterated the illegality of the Defendants' ongoing intent to negotiate only with one bidder. Both Defendant Perkins and Mr. Denny were visibly upset and unhappy at the meeting. (Grundtner Depo. pp. 39-40)(Buffington Depo. pp. 11-15, 23-30)(Klatt Dep. pp. 86-98.) Mr. Perkins and others raised their voices and were irritated by this issue. (Id.) It was stated that more teamwork was expected and that they had not heard the end of this matter. (Id.)

November 6<sup>th</sup>, 2003, meeting.

The very next day following the November 5<sup>th</sup> meeting, Defendant Perkins made clear the consequences of Mr. Grundtner reporting the law violation. He called the Plaintiff into his office and informed him that he was taking away the Plaintiff's project

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<sup>6</sup>The Plaintiff was the only one raising the illegality of the procurement method to Steve Buffington. (Buffington Depo. p. 25.)

management responsibilities and giving them to Gary Summerville.<sup>7</sup> (Id., at pp. 39-40, 117)(Perkins Depo , pp. 99-100)(Plaintiff's Exhs. O, P.) This removed Plaintiff from oversight of the bidding process. Other than having been an administrative aid in Ms. O'Brien's office, who essentially prepared paperwork, Defendant Perkins had no idea what Mr. Summerville's prior work experience had been when he gave him the Plaintiff's job duties. He was not an architect.<sup>8</sup> (Perkins Depo., pp. 72-73, 75, 112.)

When the Plaintiff told him that he thought that was a mistake, Defendant Perkins responded "tough," I'm doing it anyway." (Id., at pp. 39-40, 117.) Prior to this sudden change, Defendant Perkins had not identified a single concern and/or issue to the Plaintiff about his work performance, despite having ample opportunity to do so, if he really had any. Defendant Perkins could not identify a single thing that he ever asked the Plaintiff to do which the Plaintiff did not perform up to Defendant Perkins' standards. (Perkins Depo., p. 105.)(Perkins Depo., pp. 102-103, 105-107.)

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<sup>7</sup>Notably, less than 2 hours after receiving a letter from YHR, the architect of record for the Crookston project, wherein they refer to the previous day's discussion (November 5, 2003), and their disagreement with the position (that was propounded by the Plaintiff during the meeting), that the University cannot negotiate with the low bidder after the bids, all of the Plaintiff's responsibilities pertaining to the project management and delivery were taken away by Defendant Perkins and given to Gary Summerville. (Plaintiff's Exhs. N, O ) Mr. Summerville received a significant raise as a result. (Plaintiff's Exh. DD, Bates No . UM1404.)

<sup>8</sup>Nor did Defendant Perkins believe that Mr. Summerville had any prior construction experience. (Perkins Depo., pp. 72-73, 79). Despite this, Defendant Perkins assigned Mr. Summerville a large portion of the Plaintiff's job duties and given a position within the CPPM department. (Perkins Depo., pp. 108-109.) Naturally, this increased operating costs, as Mr. Summerville was now added as well. By the time of the Plaintiff's termination, Mr. Summerville's salary had gone up to about \$97,000.00. (Id., at p. 113 )

Saundra Martell, Associate General Counsel for Defendants, who was involved in Plaintiff raising these illegalities, testified that the Plaintiff's project management and delivery responsibilities were taken away from him by Defendant Perkins was because the Plaintiff "was not considered to be a team player." (Martell Depo., p. 24.) Ms. Martell also testified that she believes it is because the Plaintiff was not considered to be a "team player" by Defendant Perkins, that his contract was not renewed. (Id., at p. 25.) The only time being a team player arose, was in connection with Plaintiff's reports of illegal behavior.

#### December 2003

Defendant Perkins removed yet more responsibilities from the Plaintiff. Plaintiff's sign-off authority on proceed orders was removed and transferred to Mr. Summerville as well. (Plaintiff's Dep. Vol. 1 pp. 39-40; Vol. 2 pp. 33-34.)

#### January 2004.

In January 2004, the Plaintiff was contacted by Phil McDonald (chief of staff for Ms. O'Brien), and informed that the President of the University was putting together a blue ribbon commission to establish a formal University policy on sustainability. (Grundtner Depo., pp. 131-133.) As the Plaintiff had published the University document on sustainability at the time, he was invited to be a member of this blue ribbon committee, which he accepted.<sup>9</sup> (Id.) Defendant Perkins, however, prevented this from occurring.

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<sup>9</sup>In January 2004, the Plaintiff began teaching a course over in the School of Architecture on project management. (Id., at pp. 39-40.) This course was for both graduate and

(Id.) Defendant Perkins assigned Mr. Summerville to participate on this committee in place of the Plaintiff. (Id.)

February 23, 2004.

On February 23, 2004, the Plaintiff met with Sandra Martell and informed her of the hostile and retaliatory work environment created by Defendant Perkins that he was experiencing. (Grundtner Depo., pp. 41, 42, 58, 61-63, 90-91)(Martell Depo., pp. 10-14.) During this meeting, the Plaintiff also informed Ms. Martell of his concerns about the danger that Defendant Perkins was placing the University in with respect to the Crookston Project<sup>10</sup> and other violations by Defendant Perkins, including: Defendant Perkins giving out his password to others to allow them to approve University projects; Defendant Perkins' discontinuation of the small contracts program, whereby contractors were under contract to respond to any disasters that might befall the University; and Defendant Perkins' appointment of Mr. Summerville to take over the Plaintiff's project management responsibilities, without posting the position.<sup>11</sup> (Id.)(Martell Depo., pp. 25-26.) Ms. Martell believes that all of the Plaintiff's communications were made in good faith. (Martell Depo., pp. 25-26.)

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undergraduate students.

<sup>10</sup>The Plaintiff asked Ms. Martell to speak to Mr. Denny about the Crookston Project, which she did. (Martell Depo., p. 15.)

<sup>11</sup>Even prior to February 23, 2004, the Plaintiff had spoken to Ms. Martell about his concerns relating to the Defendants' Crookston procurement method and the placement of Mr. Summerville in charge of the project managers. (Grundtner Depo., p. 92.)

Ms. Martell asked the Plaintiff for permission to take notes of their conversation, which Plaintiff agreed, and, noting that his concerns warranted further investigation, instructed the Plaintiff to bring these issues to Gail Klatt, Vice President of Internal Audit, which he did on that same date. (Grundtner Depo., pp. 41, 42, 58, 61-63, 90-92.) After reporting his concerns about retaliation and irregularities in the department to Ms. Klatt, she informed the Plaintiff that there were about a half-dozen concerns that he had raised that warranted investigation. (Id., at pp. 90-91.) Ms. Klatt delegated the investigation of this matter to Scott Walker. The Plaintiff spoke to Gail Klatt on February 23, 2004, about his concerns of law/policy violations. (Klatt Dep. pp. 28-29.) Ms. Klatt instructed her staff to investigate these issues and a report was drafted. (Id., at pp. 43-44, 70-75, 84-85, 94-96; Plaintiff's Exhs. NN, MM.) Kathy O'Brien, Mr. Perkins' supervisor, was aware of the Plaintiff's concerns. (Klatt Dep. pp. 75-76, 109-110.) Specifically, in the handwritten notes of Scott Walker, a staff member of Ms. Klatt's, pertaining to his investigation of the Plaintiff's concerns, he "believes Linda and Kristen talked to Mike Perkins on several occasions..." (Plaintiff's Exh. NN.) Mr. Walker created a "status" report of the "Grundtner items." (Id.)(Plaintiff's Exh. OO.) Some of the concerns were validated, others were not able to be determined.

#### March 2004.

The next week, on March 1, 2004, Defendant Perkins called the Plaintiff into his office and informed him that he was eliminating his position and that his contract with

Defendants would not be renewed.<sup>12</sup> (Grundtner Depo. pp. 39-40) Up to this date, Defendant Perkins had not notified the Plaintiff in any way that there were any issues or concerns about his work performance. (Perkins Depo. pp. 127-128.) Despite Defendant Perkins' own report stressing the importance of the architect position, Defendant Perkins, the next day, called a staff meeting in which he announced a supposed reorganization, which would result in the elimination of other positions, including the Plaintiff's position <sup>13</sup> (Grundtner Depo. pp. 39-40)(Plaintiff's Exhs. E, X.)

In a step illustrating Perkins' hostility toward Plaintiff, within days of informing the Plaintiff that his contract, which ran through the summer, was not going to be renewed, Defendant Perkins informed the Plaintiff that he had only a matter of days to vacate his office. (Grundtner Depo., Vol.2, pp. 50-51.) Defendant Perkins informed the Plaintiff that he had a cubicle available for him on a lower floor. (Id.) The Plaintiff was further instructed by Defendant Perkins to immediately disseminate all of his files (Id.) Shortly thereafter, the Plaintiff learned that he had been banned from campus, his

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<sup>12</sup>Kristin Berns, from Defendants' Human Resources, also attended this meeting (Grundtner Depo. , p. 88.)

<sup>13</sup>Defendant Perkins claims that 6 employees were terminated in addition to the Plaintiff. (Perkins Depo. pp. 131-139.) This includes three contract employees the Plaintiff, Mr Turner and Mr. Anderson. (Id.) Mr. Turner, however, has continued to be employed by Defendants and Mr. Anderson decided to take advantage of an early out provision in the Defendants' compensation package. (Id.) Of the other employees, one was a civil service employee who took advantage of the early out options, and the final three employees, all of whom were union employees, continue to work for Defendants in other positions. (Id.) Therefore, only two other employees actually left the Defendants' employ as a result of Defendant Perkins' supposed reorganization, besides the Plaintiff. (Id.)

computer shut off and his phone calls intercepted - all at the direction of Defendant Perkins. (Id.) The Plaintiff still taught a class and had job duties, which ran through the end of his contract. Other employees, whose contracts were not renewed, were not treated in such a negative manner.

Defendant Perkins' new work "arrangement" for the Plaintiff.

In March 2004, Defendant Perkins informed the Plaintiff of a new working "arrangement" he had decided upon for the Plaintiff. (Grundtner Depo., pp. 82-84, 117.) Defendant Perkins stated that this new "arrangement" would relieve him of his responsibilities to be accountable for the Plaintiff's whereabouts.<sup>14</sup> (Id.) At this time, Defendant Perkins attempted to spin this arrangement as a convenience to the Plaintiff, whereby he wouldn't need to be on campus all of the time. (Id.) Defendant Perkins stated that this new "arrangement" would be put in writing and referred to it as a "telecommuting agreement." (Id.) After only one discussion about this new "arrangement," the telecommuting agreement showed up on the Plaintiff's workstation on March 17, 2004, and the Plaintiff signed it. (Grundtner Depo., pp. 77, 82.) The Plaintiff soon learned that, as a result of this agreement, Defendant Perkins had banned him from the University offices. (Plaintiff's Exh. Y.) Plaintiff was still teaching a class.

The written telecommuting agreement set forth a work plan with three tasks for the

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<sup>14</sup>During this same conversation, Defendant Perkins stated that if it were up to him, he would just send the Plaintiff home until his contract ran out. (Grundtner Depo., pp. 82-83.) Defendant Perkins referred to the written telecommuting agreement as a "cover." (Id.)

Plaintiff to complete.<sup>15</sup> (Grundtner Depo., p. 80.) In order to complete some of these tasks, however, the Plaintiff needed to obtain information, do research and conduct interviews on campus. (Id., at pp. 80-82, 84-85, 99.) Information needed by the Plaintiff to complete item number one of the work plan had to be provided by Defendant Perkins, who did not provide that information until after the deadline for the completion of the task. (Id., at p. 101.) Item number three of the work plan was completed by the April 5, 2004, deadline. (Id., at pp. 98-101.) Item number two of the work plan was completed while the Plaintiff was at home recuperating from surgery.<sup>16</sup> (Id.)

On March 23, 2004, the Plaintiff again met with Ms. Martell to follow-up on his concerns addressed in their February 23<sup>rd</sup> meeting, including Mr. Denney's authority from Defendant Perkins, as merely a consultant for the University, to sign off on projects. (Grundtner Depo , pp. 94-95.) Ms. Martell, who had prepared the rules of the delegation of authority for the University, had not conceived of a situation where a consultant would be given such authority, and, therefore, was revising the rules to ban such a situation from happening in the future. (Id., at pp. 95-96.) Defendant Perkins observed the Plaintiff going into Ms Martell's office on this occasion. (Id.)

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<sup>15</sup>Defendant Perkins' telecommuting arrangement only permitted the Plaintiff to physically be in the University office on one day - April 5, 2004, to complete his telecommuting "work plan." (Grundtner Depo., pp. 80-82.)

<sup>16</sup>Regardless of Plaintiff's performance on this "work plan", Defendant Perkins had already decided to terminate his contract in the November 2003 through early January 2004, time-frame (Perkins Depo. p. 128.)

The Plaintiff's University e-mail access was turned off and his incoming phone calls screened by Mr. Summerville and did not go to the Plaintiff's voice mail. (Grundtner Depo., p. 118.). (Id., at pp. 79, 117-118.) This impacted the Plaintiff's ability to communicate with the students in his class. (Id., at pp. 136-138.) After complaining to Mr. Perkins' superiors, it was ultimately turned back on. (Id.)(Plaintiff's Exh. Z.)

On March 30<sup>th</sup>, the Plaintiff met with Kathy O'Brien and detailed the retaliation he had been experiencing by Defendant Perkins, including discussing the work plan in the telecommuting agreement.<sup>17</sup> (Grundtner Depo., pp. 56-57, 101-102.) Despite the Plaintiff requesting Ms. O'Brien's assistance with these issues, he received no help. (Id.)

#### April 2004.

On April 1, 2004, the Plaintiff met with Kristen Berns from Defendants' Human Resources Department to discuss the fact that Defendant Perkins' treatment of the Plaintiff was causing his blood pressure to go up.<sup>18</sup> (Grundtner Depo., p. 102.)

#### May 2004.

Shortly after Plaintiff expressed interest in applying for the newly created job that his old job became, Mr. Perkins wrote a false and scathing review of Mr. Grundtner. He

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<sup>17</sup>Prior to March 1, 2004, the Plaintiff also informed Jim Litsheim, Sue Ward, who both reported to the Plaintiff, as well as Ron Holden, the head of the Building Code Department, that Defendant Perkins was retaliating against him. (Grundtner Depo., p. 74.)

<sup>18</sup>The Plaintiff was scheduled for surgery on April 6, 2004. In a presurgery physical, his high blood pressure was diagnosed and he was told that he could not have the surgery until his blood pressure was lowered. (Grundtner Depo , pp. 100, 102.) The Plaintiff, therefore, requested of Ms. Berns that he be on vacation until April 5<sup>th</sup>. (Id.)

criticized Mr. Grundtner for even being on campus, “Jack was not to be in the office unless invited. He violated this agreement several times.” (Plaintiff’s Exh. II.) He stated in the memo that was never sent to Mr. Gruntner, the falsely claimed:

Presence Within the Department: During his telecommuting term, Jack was not to be in the office unless invited. He violated this agreement several times during the agreement.

Let the record show that Jack violated or failed to comply with every aspect of the agreement except one. Jack’s behavior on and during the term of the Telecommuting Agreement only tend to reinforce the decision that Jack’s University of Minnesota work contract was not renewed

(Plaintiff’s Exh. II.)

Defamation Post-Employment of the Plaintiff by Defendants.

After Plaintiff’s employment ended, Defendants and their agents, representatives and employees, communicated and published defamatory, false, libelous, slanderous, and malicious statements about Plaintiff in his professional community. (Exhibit transcript of O’Brien voice mail to Plaintiff.) Many of the statements communicated and released by the Defendants constitute defamation per se, because they involve Plaintiff’s profession. These statements have had the effect of harming Plaintiff’s business and personal reputation and have placed Plaintiff in a false light.

Notably, Ms. O’Brien, who had agreed to be a reference for the Plaintiff, left a voice mail for the Plaintiff indicating what she had been stating about the Plaintiff to potential employers:

. . . I had a call from . . . the University of North Florida . . . when they asked why ,

ah, you left the University, I told them that . . . you . . . had, um, a conflict with our new director and that that's why you moved on. . .

(Plaintiff's Exh. RR.)

The University lost interest in Plaintiff. Defendants, in their brief and argument below, insisted there were no performance problems, simply a reorganization. This argument was central to Defendants' response to the retaliation claim.

In addition, the Plaintiff has been forced and will continue to be forced to tell potential employers about the circumstances of his termination, including the alleged "conflict with Defendant Perkins," thus, requiring Plaintiff to self-publish false and defamatory statements. (Grundtner Depo , pp. 164-166)(Grundtner Depo., Vol. 2, pp. 5-6, 9-10.)

## **LEGAL ARGUMENT**

### **I. STANDARD OF REVIEW.**

The facts admitted to in this case made summary judgment unavailable to the Defendants. Nonetheless, the trial court granted it by failing to apply the proper summary judgment standard and by misapplying Minnesota law. The burden of proof on a motion for summary judgment is on the moving party, and the non-moving party has the benefit of that view of the evidence most favorable to him or her. Fazio v. Belem, 504 N.W.2d 758, 761 (Minn. 1993); Basset v. City of Mpls., 211 F.3d 1097 (8th Cir. 2000); Sauter v. Sauter, 70 N.W.2d 351 (Minn. 1955).

In addition, all reasonable inferences and conclusions which may be drawn from

the stated facts are to be drawn in favor of the non-moving party. Rathbun v. W. T. Grant Co., 219 N.W.2d 641 (Minn. 1974); Couillarde v. Charles T. Miller Hosp. Inc., 92 N.W.2d 967 (Minn. 1958).

The U.S. Supreme Court, in Reeves v. Sanderson Plumbing Products, Inc., reminded us that in unjust termination cases at summary judgment “the court must draw all reasonable inferences in favor of the non-moving party and may not make credibility determination or weigh the evidence.” Reeves, 530 U.S. 133, 150 (2000).

Reeves was a case where defendant presented a compelling case of a non-discriminatory reason why plaintiff was fired. However, in reversing the lower court’s grant of summary judgment, the Supreme Court reiterated that **the trial court “must disregard all evidence favorable to the moving party that the jury is not required to believe.”** Reeves, *supra* at 151 (emphasis added).

At summary judgment, a plaintiff is not required to establish the wrongful motive or pretext. All that is necessary is that from the evidence, an inference of improper motive could be drawn. The summary judgment standard is different from the trial standard:

. . . [A]t summary judgment the plaintiff is not required to establish the pretext and provide evidence of a discriminatory motive by defendant, as the district court mistakenly apprehended. This level of proof is only required when a plaintiff’s case is submitted to a finder of fact. St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 508, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

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[F]or a plaintiff to prevail on a defendant's motion for summary judgment, he need not show "pretext plus," and "he must only 'produce evidence from which a rational trier of fact could infer that the company lied' about its proffered reasons for his dismissal . . . [i]f an inference of improper motive can be drawn, there must be a trial.

Mills v. Healthcare Service Corp., 171 F.3rd 450, 458 (7<sup>th</sup> Cir. 1999)(emphasis added).

On appeal of a grant of summary judgment, the standard of review is de novo.

Sentinel Management Co. v. Aetna Cas. And Sur. Co., 615 N.W.2d 819, 827 (Minn. 2000.)

## **II. DEFENDANTS HAVE NOT MET THE STANDARD OF PROOF TO BE ENTITLED TO SUMMARY JUDGMENT ON THE WHISTLEBLOWER CLAIM.**

### **A. The Whistleblower Statute Protects Employees, Like Plaintiff, Who Report Suspected Illegal Behavior to Their Employer or a Government Agency.**

The legal analysis for the whistleblower statute mirrors that of Title VII or the Minnesota Human Rights Act. McGrath v. TCF, 509 N.W.2d 365 (Minn. 1993) modifying 502 N.W.2d 801 (Minn. App. 1993); Graham v. Special School District No. 1, 472 N.W.2d 114, 119 (Minn. 1991).

The Minnesota Supreme Court recognized whistleblower protections for Minnesota workers in Phipps v. Clark Oil, 408 N.W.2d 569, 571 (Minn. 1987). In Phipps, no law violation occurred. A gas station attendant was fired for refusing to dispense leaded gasoline into a car using unleaded gasoline. The Supreme Court recognized that this refusal to go along with an illegal plan to circumvent the law was

protected behavior. The holding was based on common law. Subsequently, the legislature passed the Whistleblower statute.

Minnesota Statute § 181.932, often referred to as the Whistleblower statute, provides in pertinent part:

**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:

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

Minn. Stat. §181.932 (emphasis added). The Whistleblower statute protects an employee who makes a report of illegal behavior to the employer itself or to a governmental body from being retaliated against by the employer because of that report. It also protects an employee who refuses to go along with an illegal act for refusing to do so.

Defendant Perkins, while a consultant, recommended that Plaintiff, the University architect, be given the responsibility to oversee the owners representatives. This was part of the new reorganization plan. Defendant Perkins also recommended as part of that

plan, that Plaintiff's responsibilities otherwise be expanded. (Defendants' Exhibit D.) This was then effectuated in February of 2003, and expanded when Defendant Perkins was hired as an employee in June of 2003.

Until Plaintiff blew the whistle, Perkins was satisfied with these improvements. There is no document, e-mail, memo, note or any other record of any kind indicating any plan or thought to abandon this step of the reorganization before Mr. Grundtner raised the issue of the illegal shortcuts Mr. Perkins had agreed to do on the Crookston bid. Mr. Perkins was irritated that this slowed down his solution to a problem and promptly punished Mr. Grundtner accordingly.

Mr. Grundtner had first level sign-off responsibility. If he did not sign-off on the bid, it went no further. (T. 65.) It was not until the November 6<sup>th</sup>, 2003, memo (Defendants' Exhibit E), the day after the heated meeting in which Mr. Grundtner insisted and legal counsel confirmed that Mr. Perkins' stated solution was illegal, that Defendant Perkins suddenly stripped Plaintiff of his responsibilities in overseeing contracts and gave them to Mr. Summerville, who had no previous knowledge or experience in such a position, but had a long history of loyal service. Not only was Mr. Grundtner demoted, but his signature was no longer needed on bid documents.

The University was in a budget crunch at the time and CPPM was supposed to be reducing its budget. This move, however, did the opposite. Ms. O'Brien admitted the series of hefty raises Mr. Summerville received for shouldering these duties that Mr.

Grundtner had been doing, increased the budget of CPPM. The division, in essence, had almost \$100,000.00 in increased costs, just to get Mr. Grundtner out of the way.

The November 6<sup>th</sup> memo comes **the day after the November 5<sup>th</sup> meeting** where Defendant Perkins was irritated, frustrated, angry and upset that Plaintiff's action of objecting to the legality of Defendants' action of negotiating with just one bidder, would slow things down.

Even Defendants' own lawyer, Ms. Martell, believed Plaintiff was demoted and/or fired because Defendant Perkins felt Plaintiff was not being a team player.

No documented reason, other than annoyance at Plaintiff for opposing the decided on illegal action, has even been tendered for why Plaintiff was demoted. The best Defendants have done is to make the vague claim that the demotion was part of the reorganization. No specifics as to how or why it furthered the reorganization were given. This is particularly revealing in light of the fact that the reorganization plan itself emphasizes the exact opposite approach, indicating Plaintiff should perform these functions. By all accounts, Plaintiff did an excellent job and was well-regarded. The only real issue between the Plaintiff and Defendants was Plaintiff reporting suspected law violation and thereby frustrating Defendant Perkins' plan to speed ahead with the project in an illegal manner.

The trial court did not dispute this. It instead held that even if Plaintiff was demoted solely because of his insistence that his bosses agreed-upon actions were illegal,

that he is not protected, because after he refused to go along with the decision, reported it was illegal to his superiors, in-house counsel and raised it at a group meeting, the defendants did not proceed with this particular illegal action.

Here, after Plaintiff reported the illegality of the plan to Mr. Denny, it was not abandoned. It was only after multiple reports and a steadfast refusal to go along with it, that Defendants ceased their illegal activity and instead, punished the messenger, Mr. Grundtner.

The demotion of Plaintiff not only punished him, but also removed oversight from what Mr. Perkins was doing. Each of Mr. Perkins' subsequent actions further insulated him from oversight. Removing Plaintiff from his office, screening Plaintiff's phone calls, disconnecting his e-mail, banning him from campus, and terminating him, was sharply at odds with normal practice, but reduced Plaintiff's ability to observe and report illegal behaviors.

The purpose of the whistleblower statute is to protect employees from the very predictable irritation and anger that arises when one points out that they suspect certain behaviors of their superiors are illegal. The fact that people, when they are confronted about illegal behavior, often get irritated at the whistleblower, is exactly why the law prohibits retaliation. Feelings that the whistleblower's actions constitute not being a team player or are hindering the game plan, is not a legitimate, non-discriminatory reason for adverse action. Womack v. Monson, 619 F 2d 1292, 1297 (8th Cir. 1980). It is instead,

exactly what the statute prohibits.

Minnesota's Supreme Court has twice recently affirmed the importance and broad scope of the whistleblower statute:

We repeat here what we stated three years ago: "**We conclude that [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.**" Hedglin v. City of Willmar, 582 N.W.2d 897, 901-02 (Minn. 1998).

Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc., 637 N.W.2d 270, 273-274 (Minn. 2002). Furthermore:

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.

Id. at 275 (emphasis in original). In Abraham v. County of Hennepin, 639 N.W.2d 342 (Minn. 2002), the Supreme Court swept away many defendant-created defenses that some lower courts had accepted to whistleblower actions and made clear it is for the jury, not the court, to resolve all factual issues. See also Mahazu v. Becklund Home Healthcare, WL 1751280 (Minn.App. 2002), in which this Court reversed a lower court which dismissed a whistleblower action because the employee's complaint had been about another employee's illegal actions, thus, this Court and the Minnesota Supreme Court have assured that the law vigorously protects those who act to prevent law violations.

Under Minnesota's Whistleblower Statute, Minn. Stat. §181.932, Minnesota employees are protected from termination or other employment consequences for

reporting suspected violations of state and federal law and for refusing to disobey such laws. Phipps v. Clark Oil, 408 N.W.2d 569, 571 (Minn. 1987); Minn. Stat. §181.932. See also Cox v. Crown Coco, Inc., 544 N.W.2d 490 (Minn. App. 1996). Each of these is separately protected. Here, Plaintiff both reported the law violation and refused to go along with it.

At summary judgment on a whistleblower violation, a plaintiff need only show there is evidence which supports that 1) he engaged in protected activity; 2) there was an adverse employment consequence; and 3) there is a causal connection. Carter v. Peace Officers Standards and Training Board, 558 N.W.2d 867 (Minn. App. 1997); Mahazu v. Becklund Home Health Care, WL 1751280 (Minn. App. 2002). In this case, Plaintiff earned all three.

1. Plaintiff engaged in protected activity.

At footnote 116 at page 21 of their trial summary judgment brief, Defendants concede, **“The University for purposes of this summary judgment motion does not dispute it would be a violation of law for it to solicit bids and then negotiate with the low bidder.”** Defendants also concede that Defendants intended, nonetheless, to do exactly that and that plaintiff opposed these actions. Defendants do not dispute that the day after a heated discussion between Plaintiff, Mr. Denny and Defendant Perkins, at a meeting which others attended, Plaintiff again raised the illegality of the University’s decision to negotiate with the low bidder and Defendant Perkins became irritated,

Plaintiff was demoted.

Plaintiff had raised these issues repeatedly, including to in-house counsel, Defendant Perkins, Mr. Denny and others. Plaintiff's comments were both a report to a "governmental body" and a report to his employer. Bersch v. Rgnonti & Associates, Inc., 584 N.W. 2d. 783 (Minn. App. 1998) review denied.

This fully satisfies making a report under the statute. Calvit v. Minneapolis Public Schools, 122 F.3d. 1112 (8<sup>th</sup> Cir. 1997)(also a school contract non-renewal case), Janklow v. Minnesota Bd. of Examiners for Nursing Home Admr's, 552 N.W. 2d 711 (Minn. 1996), Abraham v. County of Hennepin, 639 N.W. 2d. 342 (Minn. 2002)

Under the state whistleblower statute, all that is required is the Plaintiff, in good faith, reports what they **suspect** is a violation of state or federal law, or regulation, or refuse to do an act based on such good faith belief, and as a result thereof Plaintiff is fired or suffers other adverse employment action.

There is no need that there be an actual violation of any law or regulation. "...for purposes of the whistleblower statute, it is irrelevant whether there were any actual violations; the only requirement is that the reports of state law violation were made in good faith." Hedglin v. City of Willmar, 582 N.W.2d 897(Minn. 1998).

The trial court's position.

The trial court sidestepped the fact that Plaintiff was demoted and ultimately terminated by misapplying a single foreign case, Petrosky v. Lommen, Nelson, Cole,

Stageberg, P.A., 847 F.Supp 1437, 1447-1448 (D.Minn. 1994), from a federal magistrate, not judge, to contend if an employee is fired because they successfully stopped an admitted law violation, they are not protected under the Statute, but, if they fail to protect the public and merely report a law violation after the fact, they are protected. This argument is silly and not even supported by the case cited. The Petrosky holding was heavily dependent upon Vonch v. Carlson Companies, Inc., 439 N.W.2d 406 (Minn.F. 1949), since overruled by the Minnesota Supreme Court in Abramson.<sup>19</sup>

#### Reports.

Mr. Grundtner made reports of several different law violations.

#### The bid.

Mr. Grundtner made numerous reports regarding the decision to obtain illegal bids. First, he reported to Mr. Denny and other responsible parties, then to in-house counsel, then to Mr. Perkins and the other involved employees. Each time he made clear, Mr. Perkins and Mr. Denny's decision on how to proceed regarding the Crookston situation

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<sup>19</sup>Defendants' brief on whistleblower was completely dependent upon Petrosky, which is of questionable and little value. The magistrate's decision catalogued a lengthy personality conflict between a partner in the law firm and its administrator. This longstanding conflict had little to do with any alleged law violation. The only supposed law violation was something that was mentioned in passing and quickly dropped and was not any part of the reason for the administrator's termination, which was based on an outside consultant's recommendation when the law firm merged with another law firm. The dicta from that decision offers no support for the claim that if an employee correctly reports that the employers decided upon intended action is illegal and is then demoted and removed from a position to be aware of illegal actions and terminated at the earliest opportunity to do so, simply because they reported and prevented the violation of law from going forward. Here, unlike in Petrosky, Defendants had decided to go forward with the illegal action and punished Plaintiff for preventing that from occurring.

was illegal. The day after the November 5<sup>th</sup> meeting where Mr. Perkins became irritated at Mr. Grundtner, he was demoted.

The auditor.

Mr. Grundtner also reported to University in-house counsel and at her direction, the auditor about other ongoing irregularities, including having people without the authority to do so, sign-off on financial matters. These actions had already occurred. Days after the investigation concluded, his contract was not renewed.

The trial court's new interpretation of the whistleblower statute that making a report that actions Defendants have decided to take are illegal, is not protected conduct would mean if an employee tells an employer repeatedly that it cannot go ahead with its plan to dump toxic waste, which will kill 10,000 people downstream, and that if it does, the employee will expose them for having done so and the employer finally relents, but says to the employee, "I am going to fire you for costing me the money it requires to properly disperse of the waste," and does so, the employee has no remedy

The Whistleblower Statute, quite to the contrary of the lower court's holding, is intended to protect people who report to their employer in good faith, suspected law violations regardless of whether they do so before or after the offense occurs. Here, Defendants had decided to go ahead with the illegal activity and only stopped because Plaintiff refused to go along with it.

Even if the court's position were true, it does not address that the Plaintiff also

made a second report of illegal activity when he went to the University auditor to complain about what he believed to be fiscal irregularities on the part of Defendant Perkins and Mr. Denny. In Exhibit LL, is catalogued a series of concerns about ongoing improper behavior.

The Audit Department investigated these concerns and found some had merit, others were inconclusive. In violation of normal summary judgment rules, Defendants do not provide the deposition of Ms. Klatt, who was deposed, but instead, provides an affidavit from her that she never disclosed Plaintiff's complaint. The likely reason Defendants did not use her deposition is that it reveals another individual, not Ms. Klatt, did the investigation and, thus, whether she disclosed anything is irrelevant, as the actual investigator investigated the matter was the person to do that. The record is clear that numerous witnesses were spoken to and Ms. O'Brien and Mr. Perkins provided information about what he did.

Within days of that investigation, Plaintiff was told his contract would not be renewed. He then reported this retaliation to Ms. Klatt, who refused to take any action.

Further underscoring that this termination was linked to Mr. Perkins' concerns about Plaintiff's reports of illegal behavior, Mr. Perkins removed Mr. Grundtner from his office, cut off his e-mail, screened his phone calls and banned him from campus, all in contravention of how employees with non-renewed contracts are usually treated.

Refusal to perform an illegal action.

Mr. Grundtner would have needed to sign-off on the illegal bid process as first level signer. (Grundtner Dep. pp. 65, 66.) When Mr. Denny informed Mr. Grundtner that Mr. Perkins had decided to proceed with the illegal bid process, that would require Mr. Grundtner to act in accordance therewith. Mr. Grundtner indicated it was illegal and repeatedly and forcefully objected to it. In Phillips, Minnesota's first whistleblower case, the Plaintiff refused to pump gas which was leaded in a car using unleaded gas. The illegal act did not occur. Nonetheless, our Supreme Court found that Mr. Phillips was protected under common law whistleblower protection.

Thus, Plaintiff reported past and present suspected law violations and made clear he opposed them triggering the protection of both Section A and C of the Statute and participated in the auditor's investigation, triggering the protections of Section B of the Whistleblower Statute. The trial court's interpretation of what is protected behavior under the Whistleblower Statute, dangerously and senselessly narrows the statute and must be reversed. Even if it were correct, Plaintiff would still have come under the statute's protection.

2. Plaintiff suffered adverse employment consequences.

The Whistleblower Statute forbids disciplining, threatening or otherwise discriminating against or penalizing an employee regarding compensation, terms, conditions, location or privileges of employment, as well as terminating an employee because of reports of suspected illegality. Minnesota Statute §181.932 subd. 1.

The trial court did not rest its decision on Plaintiff not suffering employment consequences. The court implicitly conceded he had. It instead rested its decision on its claim he had not engaged in protected behavior. The facts and case law make clear he did suffer adverse employment consequences.

As held in Calvit, the non-renewal of a contract of a teacher is an adverse action. So is a demotion, reassignment, loss of duties or any other tangible employment consequence. Here, Plaintiff lost important job duties, then his job and was ostracized from campus, had his computer and e-mail disconnected, but was still required to perform his job. A wide range of action can constitute reprisal, even being promoted if it is harmful in the long run. Davis v. City of Sioux City, 115 3d 1365, 1369 (8<sup>th</sup> Cir. 1997), Kim v. Nash Finch Co., 123 F3d 1046, 1059 (8<sup>th</sup> Cir. 1997).

After his first report, Plaintiff had his job responsibilities changed, was demoted and another person hired, despite a budget crunch, to do that part of his job. When he complained again, he was fired.

Other than his reports, nothing had happened to justify his termination, particularly in light of the consistently positive testimony about how he conducted his job. While he was fulfilling the remainder of his contract, his computer access and e-mail were cut off and he was evicted from his office. When he came back on campus, he was chastised.

### 3. Causal Connection

The trial court did not contend there was no causal connection between Plaintiff's

complaints and the adverse action, but as noted above, focused only on whether the report was or was not protected. The day after he confronted Defendant Perkins and Mr. Denny about the illegality of their decision to circumvent the bid laws, Plaintiff was demoted. Defendants have provided no explanation as to why the demotion occurred that day to rebut the obvious inference that it was because of Plaintiff's report. Anderson v. Hunter Keith Marshal, supra, teaches that such a fact standing alone can prove discrimination. Less than three months later, when Plaintiff's contract was not renewed just days after he reported suspected financial improprieties, he received notice of his non-renewal. The information he had reported, he obtained legitimately by being in the office and as part of his review of materials on the computer network. Despite the fact that when people are not renewed, they typically serve out their contract in their office and continue to perform their job, Defendant Perkins immediately insisted Plaintiff telecommute. Defendant Perkins removed Plaintiff from his office and became upset if Plaintiff came on campus. Naturally, telecommuting would make Plaintiff more dependent on the computer, nonetheless, Defendant Perkins personally assured that Plaintiff's computer access and e-mail access was terminated. Plaintiff needed to complain several times to Ms. O'Brien and human resources to get it restored.

This is not the response one would expect when a valued employee has simply been reorganized out of a job. It is, instead, the actions of someone who is angry and wants to make sure there is no more access to information.

As discussed in Anderson and Desert Palace, supra. Even if a Defendant proffers a truthful, non-discriminatory reason for its actions, it is still liable if even a discernable factor in its decision was an impermissible one. As such, summary judgment is not available to Defendants. Defendants' arguments are more in the nature of weak jury arguments than a basis for summary judgment. See Reeves, Mills, infra.

Minnesota law does not require extensive proof of causal connection. A causal connection can be established by the timing of the retaliation to the protected conduct alone. Even when several months pass between the protected conduct and the termination, there is a sufficient nexus to establish a causal connection. Tretter v. Liquipak International, Inc., 356 N.W.2d 713, 715 (Minn. App. 1984). (Six months between event and termination raise inference of retaliation). See also Minnesota Ass'n of Nurse Anesthetists v. Unity Hospital, 59 F.3d 80, 83 (9th Cir. 1995); Thompson v. Campbell, 845 F.Supp. 665, 675 (D.Minn. 1994); and Hubbard v. United Press International, Inc., 330 N.W.2d 428, 445 (Minn. 1983). Under Minnesota law, retaliatory motive may be inferred from a claim that soon after the reported violations, the adverse actions begin. Palmer v. Ramsey County, WL 118107 (Minn. App. 1997).

Defendants completely ignore Minnesota case law on this point and instead, make very selective references to a few federal cases. In the area of whistleblower, perhaps because there is no federal equivalent statute, federal interpretation of the Minnesota law has diverged significantly from both this Court, which the Federal Court says, it need not

follow and the Minnesota Supreme Court. In the face of the clear Minnesota case law on the point, the federal cases have very limited value. Minnesota law and federal law are not the same on this point, but, even if they were, neither law supports Defendants here.

Treatment of Plaintiff changed immediately, within one day, important job duties were taken away from Plaintiff and in less than three months, his contract was not renewed. Calvit, supra

The sparse cases Defendants cite are factually and legally dissimilar to the case at bar. Here, there is no compelling alternative reason to explain Defendants' rush to get Plaintiff out of his position and off campus. Any argument Defendants may have is for a jury to evaluate and not the proper basis of a grant of summary judgment.

Defendants have no objective basis for their termination of Plaintiff, nor any documentary support or progressive discipline leading up to it. Nothing shows Plaintiff's loss of duties or loss of job was related to an independent restructuring. Even if Defendants had such reasons, it would be for the jury to decide if the whistleblowing played a role in Defendants' action. Cox v. Crown CoCo, Inc., 544 N.W.2d. 490 (Minn. App. 1996); Elliot v. Montgomery Ward, 967 F.2d 1258 (8<sup>th</sup> Cir. 1992). Summary judgment is not available to Defendants.

**B. Defendants have no legitimate nondiscriminatory reason for plaintiff's termination. Defendants' reasons for termination are pretextual - a false justification alone is enough to prevent summary judgment.**

In St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d

407 (1993), the Supreme Court held that:

[R]ejection of the defendant's proffered reasons will **permit** the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is **required**,"

St Mary's, 509 U.S. at 511, 113 S.Ct. at 2749 (emphasis in original). In Reeves v.

Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105

(2000), the Supreme Court explained:

Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."

\* \* \*

[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."

Reeves, 530 U.S. at 147, 120 S.Ct. 2108 (citations omitted). A jury may well conclude

Defendants are not believable in its claims. Similarly, Defendants' other claims

are not supported by the record. There is no basis to grant Defendants summary judgment

on

these facts.

Whistleblower utilizes the mixed motive analysis.

Last summer the United States Supreme court in Desert Palace, Inc. v. Costa, 123 S.Ct.

2148(2003), reminded that:

An unlawful employment practice is established when the complaining party demonstrates that . . . [an impermissible factor]...**was a motivating factor for any employment practice even though other factors also motivated the practice.**

42 U.S.C. § 2000e-2(m). Costa also makes clear that the mixed-motive test applies equally to direct and indirect evidence cases. Desert Palace, Inc. v. Costa, 123 S.Ct. 2148 (2003).

Minnesota courts have also held that the McDonnell-Douglas test is the proper analysis for mixed-motive cases in the state of Minnesota. Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619 (Minn. 1988). Thus, only part of the reason for Defendants' action need be irritation about Plaintiff's whistleblowing.

In the face of this simple logic, Defendants attempt to escape culpability shotgunning an array of defenses. They are all without merit.

### **III. THE TRIAL COURT HAD JURISDICTION OF THE TORT CLAIMS.**

#### **A. There was no "quasi-judicial" process surrounding either Plaintiff's demotion or his termination.**

The demotion and subsequent termination of Plaintiff was solely the subjective decision of Mr. Perkins. Mr. Grundtner was given no input, nor was any type of hearing or process afforded him. Ignoring published decisions, the trial court cited only the Kobluk v. Regents of the University of Minnesota, WL 297525 (Minn.App. 1998), and Stephens v. Board of Regents of Minnesota, WL 1315809 (Minn.App. 2002), to support its dismissal of the tort claims. It did not address Zahavy v. University of Minnesota, 544 N.W.2d 32, 42 (Minn App. 1996).

Whistleblower.

Although there was no quasi-judicial proceeding regarding any of Defendants' decisions here, even if there had been there is no pre-emption. This argument has no bearing on the whistleblower claims. "The statutory language contemplates that a municipal employee has the right to bring a whistleblower action in district court without involving certiorari review." Larson v. New Richland Care Center, 538 N.W.2d 915, 919 (Minn. App. 1995). As Larson goes on to point out, both our Supreme Court and this Court have held an employee has "the right to bring a whistleblower retaliatory discharge claim in district court even though she had already challenged her termination before the school board" and the school board's evaluation of its own conduct was "self-serving and that the teacher was entitled to have her case heard before an objective trial court that could make factual determinations as to whether the whistleblower statute was violated." Larson Id. at 919, citing, Graham v. Special School District No. 1, 472 N.W.2d 114 (Minn. 1991) at 119-20). The Court held that the district court has subject matter jurisdiction of whistleblower actions.

A whistleblower claim is clearly a statutory cause of action. See Minn. Stat. § 181.932. Therefore, the exclusive remedy via certiorari is not applicable to the whistleblower claim. See Larson v. New Richland Care Center, 538 N.W.2d 915 (Minn. App. 1995); Pierce v. Honan, WL 682885 (Minn. App. 2001), see attached.

In fact, the trial court did not grant Defendants' motion on this basis for the

whistleblower count.

**B. There is no jurisdictional basis to dismiss the defamation count or other torts.**

Ignoring the teachings of the very case it cited, Kobluk, the district court found it lacked jurisdiction over the defamation count. This was error. The defamation that occurred, occurred after Plaintiff was terminated by defendants and when he applied for new positions at other universities.

The defamation was a post-termination event. Therefore, not connected in anyway to any “quasi-judicial” process or Plaintiff’s termination. It is not subject to certiorari as the sole remedy under Minnesota Statute § 606.01. See Clark v. Independent School District No. 834, 553 N.W.2d 443, 446 (Minn. App. 1996)(district court had jurisdiction to hear tort claims of breach of contract, defamation, and intentional infliction of emotional distress where the claims did not challenge the suspension or seek reinstatement); Willis v. County of Sherburne, 555 N.W.2d 277, 282-83 (Minn. 1996)(employee’s common law defamation claim was not limited to review by certiorari because trial court’s necessary inquiry into what defendant knew about the truth and falsity of the statements would not involve inquiry into board’s discretionary decision to terminate employee, as the defamation was separate and distinct from the termination of employment). Here, agents for Defendants in an effort to discredit Plaintiff and cover up their own mistakes, after Plaintiff’s termination, made knowingly false statements about the Plaintiff, including statement about him in his profession, which placed Plaintiff in a

false light and inhibited his ability to obtain subsequent employment. As Clarke, Willis and other cases make clear, there is no lack of jurisdiction for these claims.

**C. Intentional interference with a business advantage.**

This Count is solely against Mr. Perkins. Whether the University was within its rights or not to not renew Plaintiff's contract has nothing to do with whether Defendant Perkins personally and intentionally interfered with a business advantage. No quasi-judicial or other process at the University of Minnesota ever examined or considered this issue. If Mr. Perkins fired Plaintiff for his own reasons in an effort to hide or facilitate his illegal practices or to punish Plaintiff for opposing them, it is actionable.

**IV. DEFAMATION.**

Defamation has long been regarded as a vile and harmful tort as Shakespeare phrased it:

Good name in man and woman, dear my lord, is the immediate jewel of their souls; Who steals my purse steals trash; 'Tis something, nothing; 'Twas mine, tis his, and has been slave to thousands; But he who flices from me my good name Robs me of that which not enriches him and makes me poor, indeed.

(William Shakespeare, Othello, Act III, Scenez 3, line 153).

Plaintiff has established the basic elements of defamation.

Defendants' statements constitute defamation per se.

In this case, Defendants' statements constituted defamation per se. A statement is defamation per se when the statement:

1. Affects a person in his business trade of professions;
2. Imputes a loathsome disease;

3. Imputes lack of chastity; or
4. Alleges criminal behavior.

Anderson v. Kammeir, 262 N.W.2d 366, 372 (Minn.1977); Morey v. Barnes, 2 N.W.2d 829 (Minn. 1942), Advanced Training v. Caswell Equipment Company Inc., 352 N.W.2d 1, 9 n.1 (Minn. 1984). When the plaintiff establishes any one of these categories, the plaintiff is entitled to presumed damages without the need of showing any special damage. Advanced Training, supra. See also Becker v. Alloy Hard Facing & Engineering Co., 401 N.W.2d 655, 661 (Minn. 1987).

The Minnesota Supreme Court ruled that even stating that someone will “stab you in the back” comes within the ambit of defamation *per se* as it is impugning one’s business trade or professional reputation. The Supreme Court held “the terms contest the honesty of (the plaintiff) in the operation of his business affairs and thus are slander *per se*.” Anderson v. Kammeier, 262 N.W., 2d 366 (Minn. 1978)

The Supreme Court explained that if an alleged defamatory statement can be reasonably interpreted as reflecting negatively on someone’s professional abilities or reputation, it is defamation *per se*. This test has stood for many years since the Minnesota Supreme Court long ago found it defamation *per se* to call a lawyer a “shyster”. Grabble v. Pioneer Press Co., 25 N.W. 710 (Minn.1985); Svendsen v. State Bank of Duluth, 65 N.W.2d 1086 (Minn. 1986). See also Bolten v. Department of Human Services, 540 N.W.2d 523 (Minn.1995), rev’d on other grounds.

The lynchpin to Defendants’ summary judgment argument is that they merely had

a reorganization, which had nothing to do with any concerns about Mr. Grundtner. This argument was vigorously used to rebut Plaintiff's claim of whistleblower retaliation. However, after Mr. Grundtner had been terminated and had nearly secured a new job, Ms. O'Brien told the prospective employer regarding Mr. Grundtner, "that you ...had, um a conflict with our new director and that's why you moved on." Mr. Grundtner did not get the job. If, as Defendants claim, there were no conflicts, this was defamation, if the conflict referred to was over the decision to illegally bid the Crookston project, it was also further retaliation.

## **V. INTENTIONAL INTERFERENCE WITH AN ECONOMIC ADVANTAGE.**

### **A. Elements of tortious interference.**

The elements of tortious interference with business advantage are: (1) the existence of a actual or potential business or economic relationship; (2) the alleged tortfeasor's knowledge of the economic relationship or contract; (3) the intentional interference with the economic relationship or contract; (4) without justification; and (5) damages resulting from the interference. Nordling v. Northern States Power Company, 478 N.W.2d 498 (Minn. 1991); Oak Park Development Co., Inc., v. Snyder Brothers of Minnesota, Inc.; Guerdon Indus. v. Rose, 399 N.W.2d 186, 187 (Minn. App.1987); Carter v. Peace Officers Standards and Training Board, 558 N.W.2d 267 (Minn. App. 1997).

In this case, Plaintiff has pled tortious interference with business advantage. This claim does not require an actual contract, it is sufficient if the Defendant tortiously

interferes with business opportunities. Defendants here interfered with Plaintiff's prospective ongoing job.

In Carter, this Court reinstated a tortious interference claim which had been dismissed by the lower court. In Carter the tortious conduct claimed was when the at-will employee's supervisor made allegedly false claims about him to others in order to secure his termination. The court found that a defendant "acts without justification, if he does so in bad faith or motivated by "personal ill-will, spite, hostility, or a deliberate intent to harm" Carter, 558 N.W.2d at 273. (See also Nordling 478 N.W.2d at 505-07 (Minn.1991) (tortious interference claim will lie for at-will employment agreement when corporate officer acts outside of corporate duties)). Here, Mr. Grundtner, like Mr. Carter, provided ample evidence that Mr. Perkins demoted and then terminated him to prevent him from becoming aware of and preventing or reporting unlawful behavior on Mr. Perkins' part. It is for a jury to decide if this is what occurred.

**B. Agents can be liable for tortious interference.**

Agents can be liable for tortious interference with a business advantage. Furley Sales and Associates, Inc. v. North American Automotive Warehouse Inc., 325 N.W.2d 20, 25 (Minn. 1982). In Furley, the court held that there was sufficient evidence that an attorney, without justification, wrongfully interfered with plaintiff's contractual relationship with the corporation he represented. (See also Carter, supra, Board member who attempted to persuade other Board members to vote to terminate employee by false

statements raises jury question on claim of intentional interference with a contract ) The court's ruling at summary judgment was in error.

**VI. THE COURT WAS IN ERROR WHEN IT ORDERED THE RETURN OF DOCUMENTS TO DEFENDANTS PLAINTIFF HAD BEEN GIVEN ON THE BASIS OF ATTORNEY-CLIENT PRIVILEGE.**

The court required Plaintiff to return documents which were given to Plaintiff in the ordinary course of his job. Some of these documents were directly-related to the dispute at issue here. The court ordered the return because Defendants claimed they were attorney-client documents. Defendants' argument was, in essence, that anything an attorney requests from others is involved in or opines about is automatically protected by attorney-client privilege. The trial court, without discussing the pertinent case law or specifics of the documents, ordered their return.

In that the attorney-client privilege frustrates the search for the truth, it is a narrowly-construed concept. Lumber v. PPG Industries, Inc., 168 F.R.D. 641 (D.Minn. 1996). The full burden of proving each and every element of the privilege rests squarely upon the party asserting it. Bituminous Casualty Corp. v. Tonka Corp., 140 F.R.D. 381 (D.Minn. 1992); and Schwartz v. Weber, 124 N.W.2d 489 (Minn. 1963).

"The party resisting disclosure bears the burden of presenting facts to establish the privilege's existence." Kobluk v. University of Minnesota, 574 N.W.2d 436, 400 (Minn. 1998). Defendants must prove that a confidential communication between an attorney and the client occurred, which was made for the purpose of securing confidential legal

advice. **The information must have only been shared with those necessary to know the legal information**, and it must not be merely business related information. If the court is in doubt about whether the documents are entitled to the privilege, the Petitioners have failed to meet their burden and the documents should be disclosed. Lumber, supra.

A party cannot shield what is ordinary business information merely because an attorney was involved in preparing it or by processing the information through an attorney, nor can underlying facts be kept from the opposing side merely because they are contained in a communication with counsel. Lumber, supra. Any factual statements, particularly statements reflecting an intent to terminate an employee or that an employee was not an employee in good standing in Petitioners' eyes, are discoverable facts. Opus v. International Business Machines, 956 F.Supp. 1503 (D.Minn. 1996). See also Lumber, supra. Here, the trial court did no analysis of why any document should be suppressed. It just ordered their return.

The mere fact that a person is a lawyer does not make requests for advice from them privileged. When the advice sought is of a business nature, it is not privileged. United States v. Bartone, 400 F.2d 459 (6<sup>th</sup> Cir. 1969); and Banks v. United States, 204 F.2d 666 (8<sup>th</sup> Cir. 1983).

As the Court observed in U.S. v. United Shoe Machines Co., 89 F.Supp. 357 (D.Mass. 1950), a high percentage of communications passing to and from in-house counsel undoubtedly fall outside the privilege. See also Kall v. Minnesota Wood

Specialty, Inc., 277 N.W.2d 395, 399 (Minn. 1979).

Additionally, even if the attorney-client privilege applies, the reason for the consultation is not entitled to an attorney-client privilege. Howell v. Jones, 516 F.2d 53, 58 (5<sup>th</sup> Cir. 1975); and United States v. Pape, 144 F.2d 778 (2<sup>nd</sup> Cir. 1944).

Defendant must maintain the requisite confidentiality or no privilege can attach. If information is given to people who are not authorized to act for the corporation on the matter discussed, there is no privilege. Yurick ex rel. Yunick v. Liberty Mutual Ins. Co., 201 F.R.D. 465, 469 (D.Ariz. 2001); and Lewis v. UNUM Corp., Severance Plan, 203 FRD 615, 2001 WL 394 895, \*5 (D.Kan., April 4, 2001). In this case, the documents in question were distributed to Plaintiff and other employees. There has been no showing that any basis for after-the-fact confidentiality existed.

United States v. McCambridge, 551 F.2d 865 (1<sup>st</sup> Cir. 1977); and State Ex rel. Schuler v. Tahash, 154 N.W.2d 200 (Minn 1967).

In the case of a corporation, the privilege is waived if anyone not authorized to speak and act for the corporation has access to the information:

Rather, the test for determining the applicability of the privilege “is whether the [corporation] is able to demonstrate that the documents, and therefore the confidential information contained therein, were circulated no further than among those members ‘of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication.’” (Id.) (quoting Mead Data Central, Inc., v. United States Dept. of Air Force, 566 F.2d 242, 184 U.S.App. D.C. 350, 361 (D.C. Cir. 1977)).

F.T.C. v. GlaxoSmithKline, 2001 WL 1262213 (D.D.C., Oct. 9, 2001).

Additionally, the statements the trial court suppressed are not privileged if it reveals a position Defendant has taken in this litigation is fraudulent. That alone would require disclosure. State ex rel. Humphrey v. Philip Morris, Inc., 606 N.W.2d 676 (Minn. App. 2000).

Additionally, the subject matter under discussion is discoverable even if the advice given is not Johnson v. Sea-Land Service, Inc., 2001 WL 897185, \*4 (S.D.N.Y. 2001) “The privilege does not protect the client’s knowledge of relevant facts, whether or not they were learned from his counsel, or facts learned by the attorney from independent sources.” Id.

**The Documents in this Case are not Privileged.**

A review of the documents in question reveals that they are not privileged. (See Exhibit A.) Mr. Grundtner was an intended recipient of all the documents in question. He did not obtain any of them by artifice or stealth. They were part of materials given to him to perform and understand his work. He performed no lawyerly function for Defendants. He was not a decision-maker or witness regarding any litigation or legal dispute Defendants were involved in. Most of the documents were not even related to any real or anticipated litigation.

The documents the Court suppressed were mostly normal business documents that were distributed to mid-level management personnel. The Defendants have split the documents at issue into three different groups.

**A. The Documents Defendants Claim are Attorney-Client Documents.**

The Minnesota Supreme Court held, “The purpose of the privilege is to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client.”

Defendants do not claim Bates Stamp Nos. 444-46, 447-449, 450-453, (See Exhibit A) were created in, nor in anticipation of litigation. They present no facts contending any confidential information was given to the attorneys. They are merely business documents which outline what the appropriate bidding process is. Their relevance in this litigation is that Plaintiff’s case is that Plaintiff was fired in part for questioning why these memos were ignored in the awarding of bids. None of these documents resulted in a lawsuit with anyone and Plaintiff was not the representative of the University of Minnesota, the spokesperson for the University of Minnesota, nor a witness in anything regarding them. The fact that they discuss what the law and University rules establish are in the bidding process does not make them privileged. They are educational in nature and indicate little more than what appropriate bidding processes can be utilized.

If Defendants’ argument were to be accepted that they are privileged and subject to attorney-client privilege, then most all sexual harassment policies would be attorney-client privileged documents. Such policies are usually created by attorneys for the company and most say federal and state laws prohibit sexual harassment and then set out

the exact language of the statutes after directly citing them. So are employee handbooks dealing with FMLA leave, overtime rules, federally regulated pension plans, etc. This does not constitute a privileged document.

The rules Mr. Grundtner was personally told to follow are germane to this case and, even if attorney-client privileges otherwise might apply, it does not apply to his case which revolves around being fired for insisting the rules he was instructed on be followed. There is no attorney-client privilege as to what Mr. Grundtner was told by the University was the appropriate bidding process. Mr. Grundtner was following the University's bidding processes.

**The Two Reports Defendants Claim are Work-Product.**

The Court also suppressed the architects' reports as work product. Defendants admit that these two documents were not created by attorneys and have no legal advice from Defendants' attorneys in them. They are reports by architects discussing technical issues of what construction errors led to construction problems. On their face, they are not attorney-client documents. Such blanket claims that the work-product doctrine applies, does not satisfy the claimant's burden of proof and, thus, cannot support the privilege applies. McCoo v. Denny's, Inc., 192 F.2d 675, 683 (D.KAN, 2000).

Defendants do not claim Plaintiff was a decision-maker regarding any litigation or a witness in any lawsuit against anyone. These professional opinions were made in order to determine what scientifically had happened. Defendants do not even contend that they

were used in any lawsuit, nor that there even was a lawsuit of any kind regarding any matter discussed within the reports. If there were, these documents would have to be disclosed as expert opinions and would enjoy no protection whatsoever.

The trial court did not discuss why the work-product rule would apply. In Lewis v. Unum Corp. Severance Plan, 203 F.2d 615, 622-624, the Court explained:

Because litigation can, in a sense, be foreseen from the time of occurrence of almost any incident, courts have interpreted the Rule to require a higher level of anticipation in order to give a reasonable scope to the immunity . . . **The inchoate possibility, or even the likely chance of litigation, does not give rise to work product.** To justify work product protection, the threat of litigation must be “real and imminent.” To determine the applicability of the work product doctrine, the court generally needs more than mere assertions by the party resisting discovery that documents or other tangible items were created in anticipation of litigation . . . **The fact that litigation later resulted does not change the ordinary business nature of the attorney’s legal advice into advice rendered in anticipation of litigation.** Id. (citing Garfinkle v. Arcata Nat’l Corp., 64 F.R.D. 688, 690 (S.D.N.Y.1974)) Thus, the Court concludes that the pre-decisional advice and opinions of counsel set forth within the written Minutes of the December 13, 1999 Benefit Administrative Committee meeting- - as well as written communication sent to and received from in-house counsel, human resource representatives of the company and the Plan Administrator- - are not protected from discovery by the work product doctrine

There was no proper basis to suppress these documents.

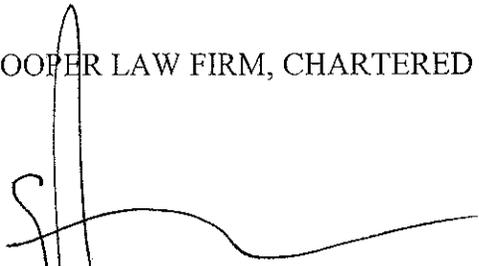
### **CONCLUSION**

Based on the foregoing, Plaintiff respectfully requests that the trial court’s decision be reversed.

Respectfully submitted.

THE COOPER LAW FIRM, CHARTERED

Dated: August 2, 2006

By: 

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No. A06-1137

STATE OF MINNESOTA

COURT OF APPEALS

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John Grundtner,

Plaintiff-Appellant,

v.

**CERTIFICATE OF BRIEF  
LENGTH.**

University of Minnesota, and  
Michael Perkins, in his personal  
and professional capacities,

Defendants-Respondents.

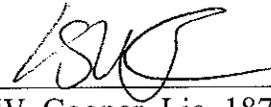
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, Subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 12,582 words. This brief was prepared using WordPerfect 10.

THE COOPER LAW FIRM, CHARTERED

Dated: August 2, 2006

By: \_\_\_\_\_



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).