

**Case No. A04-1691**  
**STATE OF MINNESOTA**  
**IN SUPREME COURT**

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Chris Nelson.	)
	)
Petitioner,	)
	)
v.	)
	)
Productive Alternatives, Inc.,	)
	)
Respondent.	)
	)
	)

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**PETITIONER'S REPLY BRIEF**

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## ARGUMENT

### MINNESOTA COURTS DO AND SHOULD BE PERMITTED TO PROVIDE REDRESS FROM ACTIONS THAT CONTRAVENE CLEAR MANDATES OF PUBLIC POLICY.

The concept that courts will intercede to protect public policy is well established in our law:

Public policy 'requires that freedom of contract shall remain inviolate, except only in cases which contravene public right or the public welfare.' *Buck v. Walker*, 115 Minn. 239, 132 N.W. 205, 207, Ann.Cas. 1912D, 882.

'Public policy requires that the right to contract shall be preserved inviolate in ordinary cases. It is denied only when the particular contract violates some principle which is of even more importance to the general public.' *James Quirk Milling Co. v. M. & St. L. Ry. Co.*, 98 Minn. 22, 23, 107 N.W. 742, 116 Am.St.Rep. 336.

'It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene

public right or the public welfare.' *Baltimore & O. S. W. Ry. Co. v. Voigt*, 176 U.S. 498, 20 S.Ct. 385, 387, 44 L.Ed. 560.

The principle announced in the above cases is universally recognized; but there is some difference of opinion as to what contracts 'contravene public right or the public welfare' and therefore are excepted from the protection of the rule.

Weirick v. Hamm Realty Co., 179 Minn. 25, 28, 228 N.W. 175, 176 (Minn. 1929).

Also well established is the judicial branch's reluctance to declare what is or is not public policy based on some amorphous consideration of supposed public interests. As the United States Supreme Court wrote in W.R. Grace and Co. v. Local Union 759, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed. 298 (1983):

As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy. See *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 852-53, 92 L.Ed. 1187 (1948) . . . [I]n any event, the question of public policy is ultimately one for resolution by the courts. See *International Brotherhood of Teamsters v. Washington Employers, Inc.*, 557 F.2d 1345, 1350 (CA9 1977); *Local 453 v. Otis Elevator Co.*, 314 F.2d 25, 29 (CA2 1963), cert. denied, 373 U.S. 949, 83 S.Ct. 1680, 10 L.Ed.2d 705 (1963); Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 Colum.L.Rev. 267, 287 (1980). If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain

from enforcing it. *Hurd v. Hodge*, 334 U.S., at 35, 68 S.Ct., at 853.

Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."

*Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 451, 89 L.Ed. 744 (1945).

461 U.S. at 766, 103 S.Ct. at 2183.

The Minnesota Supreme Court summarized early Minnesota case precedent with respect to a public policy exception to the employment at will doctrine in Hedglin v. City of Willmar, 582 N.W.2d 897 (Minn. 1998) stating:

Traditionally, all employment was at will, meaning that an employer could fire an employee for any reason or for no reason at all. 82 Am.Jur.2d *Wrongful Discharge* § 1 (1992). Slowly, courts began to create exceptions to the general rule of at-will employment that allowed employees to recover for the tort of wrongful discharge. *Id.* § 8. One judicially-created and narrowly-construed exception was the public policy exception that allowed an employee to maintain a cause of action for wrongful discharge only if the protected conduct violated clearly mandated public policy. *Id.* §§ 11-12. For example, if an employee refused to obey an employer's command to violate a criminal law, that employee could recover for wrongful discharge if the employer tried to fire the employee in retaliation, because refusing to violate a criminal

law promotes a clearly mandated public policy for which the employee should not suffer harm. *Id.* § 14. On the other hand, violations of internal company policy or improprieties in private companies normally do not implicate public policy, but affect only the company; thus, reports of only internal policy violations or improprieties may not be protected by the public policy exception. *Id.* § 61.

In Minnesota, our court of appeals approved the public policy exception to at-will employment in *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 592 (Minn. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987). We granted the petition for review of *Phipps*, but before we issued an opinion, the Minnesota legislature enacted the whistleblower statute. See *Phipps*, 408 N.W.2d at 571. Thus, we did not resolve in *Phipps* “the policy question of whether or not Minnesota should join the three-fifths of the states that now recognize, to some extent, a cause of action for wrongful discharge.” *Id.*

582 N.W.2d at 901. In the briefs already submitted to the Court in this action, the parties have summarized the case law since *Phipps*<sup>1</sup>, culminating in the Court of

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<sup>1</sup> Respondent relies heavily on federal cases interpreting Minnesota law and unpublished Minnesota Court of Appeals decisions in its analysis. Such federal court decisions, unless emanating from the United States Supreme Court, are not binding on this Court, however. *State v. Employers Insurance of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002). *Accord, Capital Indemnity Corp. v. Haverfield*, 218 F. 3d 872, 875 (8<sup>th</sup> Cir. 2000); *Peterson v. U-Haul Company*, 409 F.2d 1174, 1177 (D Minn. 1969). Unpublished decisions of the Minnesota Court of Appeals are also not precedential. Minn. Stat. § 480A.08, Subd. 3(c). *Vlahos v. R & I Construction of Bloomington, Inc.*, 676 N.W.2d 672, 676 (2004).

Appeals decision that the Whistleblower Act “did not displace the existing common-law action in tort for retaliatory discharge created by *Phipps I* and refined by *Phipps II*.” Nelson v. Productive Alternatives, Inc., 696 N.W.2d 841, 844 (Minn. App. 2005).

The Court of Appeals further wrote:

[T]he Supreme Court, in *Phipps II*, restated the scope of the action and restricted the definition in *Phipps I*, which had included violations of both legislative and judicially recognized public policy, to include only refusal to participate in an activity that violates a law or promulgated rule or regulation.

696 N.W.2d at 845.

So limiting the public policy exception to the employment at will doctrine deprives it of any meaningful effect and abrogates the judiciary’s historic role in furthering a clear mandate of public policy. As acknowledged in Respondent’s Brief at page 9, “the scope of any Minnesota common law action for wrongful discharge is narrower than the action and remedies available under the Whistleblower Act.” No substantive purpose is served in having a common law public policy exception to the employment at will doctrine if it is narrower than the rights afforded by the Whistleblower Act. Depriving the courts of any ability to articulate and protect a clear mandate of public policy, except where an employee has refused to participate in an activity that violates a law, makes no sense and gives employers *carte blanche* authority to trample on other important, albeit unprotected, rights of their workers.

Petitioner is not advocating for a wide open public policy exception to the employment at will doctrine as Respondent suggests. Rather, there is ample guidance in Minnesota case law as to where courts should and should not look to articulate a public policy that is deserving of protection:

The legislature may set the public policy of the state through statute. *Giacomo v. State Farm Mutual Automobile Insurance Co*, 203 Minn. 185, 192, 380 N.W. 653, 657 (1938). In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. *Pye v. Grunert*, 201 Minn. 191, 193-94, 275 N.W. 615, 616 (1937). The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate power and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. *Hart v. Bell*, 222 Minn. 69, 76, 23 N.W.2d 375, 379 (1946).

United Steelworkers of America, Local 6115 v. Quadna Mountain Corp, 435 N.W.2d 120, 123 (Minn. App. 1989) *rev. denied*. “[C]ourts must focus not on the grievant’s conduct but on whether enforcement of the award would violate some well-defined and dominant public policy.” State v. Minn. Assoc. of Professional Employees, 504 N.W.2d 751, 757 (Minn. 1993). This Court has admonished trial courts to refrain from “reliance on ‘vague and uncertain’ notions of public policy,” Schmidt v. Midwest Family Mutual Insurance Co., 426 N.W.2d 870, 874 (Minn. 1988), stating “[h]owever,

in those rare instances when the existing circumstances surrounding the execution or enforcement of a contract term would result in complete frustration of the very essence of the public policy . . . courts may be justified in refusing to enforce the term.” Id.

Courts in other jurisdictions have been able to articulate and apply a limited public policy exception to the employment at will doctrine. See, for example, Bammert v. Don’s Super Valu, Inc., 254 Wis.2d 347, 646 N.W.2d 365 (Wis. 2002); Thibodeau v. Deisgn Group One Architects, LLC, 260 Conn. 691, 802 A.2d 731 (Conn. 2002); and 24 COA 2d 227, “Cause of Action for Termination of At-Will Employee in Violation of Public Policy.” The greatest danger is not that employers would be unable to “predictably assess, prior to taking action, whether their conduct is legally appropriate and could result in liability,” Respondent’s Brief at page 15, but rather, if Respondent’s position is adopted, that employers could make employment decisions beyond the restraints of and without considering articulated and well-defined public policies of the state.

The Minnesota legislature has made it clear that it is a strong public policy of this state to protect the rights and responsibilities prescribed by the Minnesota Nonprofit Corporation Act. See Petitioner’s Brief at pp. 21-22. If protecting members of a non-profit corporation from being fired for exercising their statutory rights is not a clear mandate of public policy, particularly in the circumstances of the

instant case<sup>2</sup>, then the practical and unfortunate result will be to render such a public policy exception hollow or meaningless to Minnesota employees. Courts should be able to hold employers accountable for actions that violate clear mandates of public policy.

### CONCLUSION

Respondent's motion for judgment on the pleadings should have been denied and the trial court's decision dismissing this action, affirmed by the Court of Appeals, should be reversed.

Dated: October 27, 2005

Respectfully submitted,  
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<sup>2</sup> In a footnote on page 10 of Respondent's Brief it is argued that Chris Nelson's Affidavit included in Petitioner's Appendix at A-7 should not be part of the record on appeal. Minn. Rules of Civil Appellate Procedure, Rule 110.01 provides: "The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minnesota Rules of Civil Procedure, Rule 12.03, provides: "If [on a motion for judgment on the pleadings] matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56." McAllister v. ISD No. 306 of Hubbard County, 276 Minn 549, 551, 149 N.W.2d 81, 83-84 (1967); *but see Johnson v. State*, 536 N.W.2d 328, 332 (Minn. App. 1995) (conversion of motion to dismiss into summary judgment motion is not necessary when court only considers authenticated copy of key document upon which complaint is premised), *rev'd on other grounds* 553 N.W.2d 40 (Minn. 1996).