

CASE NO. A06-0710
STATE OF MINNESOTA
IN COURT OF APPEALS

Svenn Borgersen,

Appellant,

vs.

Cardiovascular Systems, Inc.,

Respondent,

BRIEF OF *AMICUS CURIAE*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,
MINNESOTA CHAPTER

Leslie L. Lienemann (#230194)
Culberth & Lienemann, LLP
1050 Piper Jaffray Plaza
444 Cedar Street
St. Paul, Minnesota 554101
Telephone (651) 290-9300

Attorney for *Amicus Curiae*
National Employment Lawyers
Association, Minnesota Chapter

Warner Law Office, P.A.
Daniel E. Warner
Blackberry Office Park
5774 Blackshire Path
Inver Grove Heights, MN 55076

Attorneys for Appellant

Justin D. Cummins, #276248
Miller-O'Brien, P.L.L.P.
One Financial Plaza
120 South Sixth Street, Ste 2400
Minneapolis, Minnesota 55402
Telephone (612) 333-5831

Attorney for *Amicus Curiae*
National Employment Lawyers
Association, Minnesota Chapter

Jackson Lewis, LLP
David J. Duddleston
Natalie Wyatt-Brown
Suite 1450
150 South Fifth Street
Minneapolis, MN 55402

Attorneys for Respondent

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**I. STATEMENT OF THE *AMICUS CURIAE* NATIONAL
EMPLOYMENT LAWYERS ASSOCIATION, MINNESOTA
CHAPTER¹**

The National Employment Lawyers Association (“NELA”) is a non-profit organization of lawyers who represent employees. NELA is headquartered in California and has approximately 3,000 members nationwide. For decades, NELA has appeared as *amicus curiae* before the United States Supreme Court and United States Courts of Appeals to support precedent-setting litigation affecting the rights of individuals and classes of employees in the workplace.

The Minnesota Chapter of NELA has participated as *amicus curiae* on many occasions before this Court and the Minnesota Supreme Court. *See, e.g., Ray v. Miller Meester Advertising, Inc.*, 684 N.W.2d 404 (Minn. 2004); *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002); *Anderson-Johanningmeier v. Mid-Minnesota Women’s Center*, 637 N.W.2d 270 (Minn. 2002); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998); *Williams v. St. Paul Ramsey Medical Center*, 551 N.W.2d 483 (Minn. 1996); *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555 (Minn. 1996); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991).

¹ The undersigned counsel wholly authored this brief for the *amicus curiae* pursuant to Minn. R.Civ. App. P. 129.03. No counsel for any party authored this brief in whole or in part. In addition, no person or entity, other than Minnesota NELA, its members, and its counsel, have made any monetary contribution to the preparation or submission of this brief.

The undersigned are members of Minnesota NELA's *amicus curiae* committee and are qualified to brief this Court on the legal and policy issues presented by the appeal herein. The position that Minnesota NELA takes in this brief has not been drafted, approved, or financed by Appellant or Appellant's counsel. Any duplication of Minnesota NELA's analysis by Appellant is purely coincidental. Minnesota NELA thanks the Minnesota Court of Appeals for permitting it to appear here in the public interest.

II. THE PLAIN MEANING OF THE EXPRESS LANGUAGE OF THE WHISTLEBLOWER ACT DOES NOT LIMIT THE SCOPE OF PROTECTION TO REPORTS OF PAST LEGAL VIOLATIONS.

The Whistleblower Act's text – as set forth by the Minnesota Legislature and consistently construed by the Minnesota Supreme Court – requires that Minnesota courts protect employees who report in good faith suspected or actual legal violations. Yet, the District Court held the Whistleblower Act cannot apply to Appellant Sven Borgersen because his good faith report concerned illegal conduct by Respondent that happened after he made his report to Respondent. In so doing, the District Court legislated from the bench and, further, it did so in defiance of the Minnesota Supreme Court.

A. The District Court's Opinion Contravenes The Clearly Stated Language Of The Whistleblower Act.

The Minnesota Supreme Court has established a strict legal standard governing construction of the Whistleblower Act: “[w]e will not disregard the words . . . if they are free from ambiguity.” *Anderson-Johanningmeier v. Mid-*

Minnesota Women's Center, Inc., 637 N.W.2d 270, 273 (Minn. 2002) (citing Minn. Stat. § 645.16; *Group Health Plan, Inc. v. Phillip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001)).

Nonetheless, the District Court disregarded the unambiguous words of the statute by ruling whistleblower protection only covers reports of actual unlawful conduct that already occurred. In particular, the District Court opined that the Whistleblower Act cannot cover Mr. Borgersen's report about Respondent's imminent withholding of catastrophic test data because Mr. Borgersen lodged it before Respondent's legal violation actually became manifest.

As a threshold matter, the record shows that Mr. Borgersen reported an actual legal violation. At any rate, and at a minimum, the report concerned a suspected violation. The District Court necessarily read dispositive language out of the Whistleblower Act in order to hold that the statute cannot apply here. The statutory language makes clear that protection extends even to reports of suspected legal violations:

[a]n employer shall not discharge . . . an employee . . . because the employee . . . in good faith[] reports a violation or *suspected violation* of any federal or state law or rule adopted pursuant to law.

...

Minn.Stat. § 181.932, Subd. 1(a) (emphasis added).

Thus, the District Court reached a legally erroneous conclusion, and the grant of summary judgment must be reversed. See, e.g., *Anderson-Johanningmeier*, 637 N.W.2d at 273.

B. The District Court's Opinion Contravenes The Clearly Established Whistleblower Precedent Of The Minnesota Supreme Court.

As dictated by the plain language of the Whistleblower Act, the Minnesota Supreme Court has consistently ruled that a report need not concern an actual legal violation to be protected. *See, e.g., Hedglin v. City of Willmar*, 582 N.W.2d 897, 902 (Minn. 1998). Indeed, the Minnesota Supreme Court has emphatically reaffirmed this point of law:

[F]or purposes of the whistleblower statute, *it is irrelevant whether there were any actual violations*; the only requirement is that the reports of . . . violations were made in good faith.

Id. (citation omitted) (emphasis added); *see also Abraham v. County of Hennepin*, 639 N.W.2d 342, 355 (Minn. 2002).

In this case, Mr. Borgersen reported an actual violation of federal safety regulations – only he did so before Respondent filed its misleading report with the FDA omitting the catastrophic test results. At the very least, Mr. Borgesen's report concerned a suspected violation of law, so whistleblower protection must attach here.

The strikingly narrow, if not cavalier, approach in this case is especially troubling because the Minnesota Supreme Court has long placed a premium on protecting public safety when applying the Whistleblower Act. *See, e.g., Janklow v. Minnesota Bd. of Examiners for Nursing Home Adm'rs*, 552 N.W.2d 711, 717 (Minn. 1996) (“The Whistleblower Act was enacted to protect the general public. . .”). According to the Minnesota Supreme Court, then, Minnesota courts should

err on the side of public safety when interpreting the statutory language. See *Abraham*, 639 N.W.2d at 354; *Hedglin*, 582 N.W.2d at 902; *Janklow*, 552 N.W.2d at 717. Notably, other jurisdictions agree with the Minnesota Supreme Court's expansive understanding of the Whistleblower Act's language:

To require that an actual violation must occur for a whistleblower to gain protection leads to nonsensical results which are unjust, unreasonable, and contrary to the spirit of the statute and public policy. Under the trial court's interpretation of the statute, each whistleblower would have to become equal parts policeman, prosecutor, judge, and jury.

Fox v. City of Bowling Green, 668 N.E.2d 898, 902 (Ohio 1996) (emphasis added) (affirming the reversal of summary judgment for the employer); see also *Mello v. Stop & Shop Cos.*, 524 N.E.2d 105, 108 n.6 (Mass. 1988) (observing that a report based on a reasonable, good faith belief is protected even if that belief is false); see also *Sullivan v. MA Mut. Life Ins. Co.*, 802 F.Supp. 716, 725 (D. Conn. 1992) (holding that reasonable mistakes of fact and law are protected); *Melchi v. Burns Intern. Sec. Serv., Inc.*, 597 F.Supp. 575, 583-84 (E.D. Mich. 1984) (ruling for the plaintiff on the merits and holding that the Whistleblower Act protects reports of suspected violations of law regardless of whether the conduct was actually illegal).

Therefore, the District Court flouted both the unambiguous meaning of the statutory language and the well established precedent of the Minnesota Supreme Court in applying that language. The District Court's grant of summary judgment should be reversed for this reason as well.

III. THE DISTRICT COURT OPINION DISREGARDS THE POLICY OF PROTECTING PUBLIC SAFETY THAT IS THE PURPOSE OF THE WHISTLEBLOWER ACT

The District Court has essentially held that in order to be protected from retaliation under the Whistleblower Act, an employee must wait for an employer to actually violate the law before making a report. That holding requires an employee to knowingly place the safety of the public in jeopardy before reporting a suspected violation. To so hold would be to completely undermine the public policy purpose of the Whistleblower Act.

The public policy concepts underlying whistleblower causes of action are the "protection of lives and property" through encouraging employees to report violations of law, encouraging employees to refuse to participate in violations of law, and protecting them from retaliation when they have done so. *See Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 571 (Minn. 1987). Prior to the enactment of the Whistleblower Act, the Minnesota Court of Appeals recognized a common law cause of action for wrongful discharge when an employer discharges an employee "for reasons that contravene a clear mandate of public policy." *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 592 (Minn. Ct. App. 1986).

After this holding, the Minnesota legislature enacted the Whistleblower Act. When considering the Court of Appeals holding in *Phipps*, the Minnesota Supreme Court acknowledged the enactment of the Whistleblower Act, and found that because of the Act, "...we no longer have before us 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.” *Phipps*, 408 N.W.2d at 571. The Supreme Court then upheld the Court of Appeals and recognized a cause of action for wrongful discharge for employees who refuse to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law. *See Id.*

In so doing, the Supreme Court cited with approval to the Illinois Supreme Court, which wrote:

The protection of the lives and property of citizens from the hazards of radioactive material is as important and fundamental as protecting them from crimes of violence...

Phipps, 408 N.W.2d at 571, quoting *Wheeler v. Caterpillar Tractor Co.*, 108 Ill.2d 502, 509, 485 N.E.2d 372, 376-77.

This language resonated with the Supreme Court in *Phipps*, and the Court found that public policy required protection of Mr. Phipps for his refusal to violate the Clean Air Act “to protect the lives of citizens and the environment.” *Id.*

The Supreme Court and the Court of Appeals subsequently recognized that this tort for wrongful discharge stands in addition to the remedies provided by the Whistleblower Act. *See Abraham*, 639 N.W.2d at 350; *Nelson v. Productive Alternatives, Inc.*, 696 N.W.2d 841, 845 (Minn. Ct. App. 2005) *review granted* (Aug. 16, 2005). The public policy underlying the legislation, however, is the same public policy underlying the tort. *See Phipps*, 408 N.W.2d at 570-571.

The public policy concepts underlying both the tort and the statutory whistleblower causes of action are the "protection of lives and property" through encouraging employees to report violations of law, *before or after the violations occur* and protecting them from retaliation when they have done so. *See Id.*

The error of the District Court' decision is that it would carve out of the definition of "protected conduct" reports of employees who are trying to prevent violations from occurring, while including in "protected conduct" reports of violations that have already occurred. This contravenes the clear purpose of the Act.

The Act explicitly protects from retaliation employees who report actual or suspected violations of law and those who refuse to participate in conduct that, if it occurred, would violate the law. Those portions of the statute read:

An employer shall not discharge...an employee...because:... (a) the employee, or a person acting on behalf of an employee, ***in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law*** to an employer or to any governmental body or law enforcement official;...***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***....

Minn. Stat. § 191.932 Subd. 1(c)(emphasis added).

Further evidence that the Legislature intended the Act to apply to conduct that may not have already occurred is found in Subd. 1(d) of the Act, relating to the health care facilities, which protects employees who report a "situation" that

"potentially" could place the public "at risk" of harm. See Minn. Stat. §. 181.932, Subd. 1(d).

The Act is clearly meant to protect employees who report actual or suspected violations that have already occurred, and also employees who in good faith attempt to prevent the occurrence of a violation. To hold otherwise would diminish the public policy underlying the act, which is to prevent harm.

“The Whistleblower Act was enacted to protect the general public, surely, but through the medium of shielding from retaliation employees who ‘blow the whistle.’” *Janklow*, 552 N.W.2d at 717. In so ruling, the Minnesota Supreme Court reaffirmed the policy codified by the Minnesota Legislature via the Whistleblower Act: the promotion of public safety by encouraging employees to report what appears to them – as lay people – to be a legal violation. *Id.*; Minn. Stat. § 181.932, Subd. 1(a). This policy has been undermined by the District Court.

The Whistleblower Act protects employees from retaliation for the purpose of encouraging them to report illegal conduct. This same purpose forms the basis of other important federal and state anti-retaliation provisions. For this reason, the Eighth Circuit and Minnesota courts firmly hold that the underlying report of unlawful conduct need not be true for an employee to prove retaliation. *Peterson v. Scott County*, 406 F.3d 515, 524 n.3 (8th Cir. 2005) (citation omitted) (reversing summary judgment for the employer because “plaintiffs who reasonably believe that conduct violates [the law] should be protected from retaliation, even if a court

ultimately concludes that plaintiff was mistaken in her belief.”); *Wentz v. Maryland Casualty Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989) (citations omitted) (reversing the grant of summary judgment on the employee’s retaliation claims because the plaintiff need only show “a good faith, reasonable belief that the underlying challenged action violated the law.”); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146, 150 (8th Cir. 1981) (same); *Hearth v. Metropolitan Transit Commission*, 436 F.Supp. 685, 688 (D.Minn. 1977) (denying the motion for summary judgment on the employee’s retaliation claims because “[a]s long as the employee had a reasonable belief that what was being opposed constituted discrimination under [the law], the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of [the law].”); *see also Olchefski v. Star Tribune*, 1995 WL 70190, *3 (Minn. App. 1995) (citation omitted) (“[R]episal claims survive even if the underlying conduct which the plaintiff opposed was not illegal.”).

IV. CONCLUSION

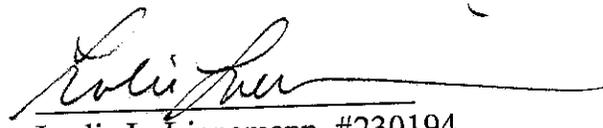
The District Court’s holding that Mr. Borgersen’s report to his employer that it was required to report negative test results to the FDA was not “protected conduct” ignores the plain language of the Whistleblower Act, as well as the firmly established compelling public policy underlying the Act. To hold that an employee must wait for a violation to occur before reporting it in order to have the protection of a whistleblower completely undermines the public policy purpose of the Act. For the foregoing reasons, Minnesota NELA respectfully requests that

the Minnesota Court of Appeals reverse the grant of summary judgment in this case.

Dated: May 26, 2006

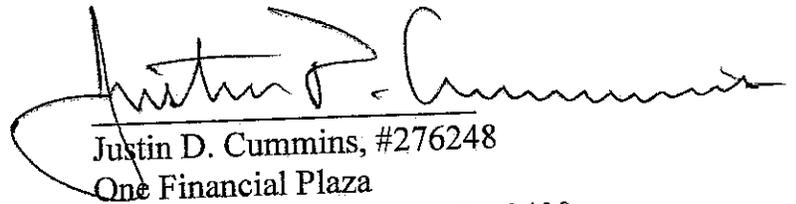
CULBERTH & LIENEMANN, LLP

MILLER-O'BRIEN, P.L.L.P.



Leslie L. Lienemann, #230194
1050 Piper Jaffray Plaza
444 Cedar Street
St. Paul, MN 55101
651-290-9300

Attorney for Amicus Curiae
National Employment Lawyers
Association, Minnesota Chapter



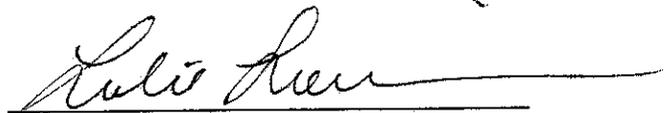
Justin D. Cummins, #276248
One Financial Plaza
120 South Sixth Street, Suite 2400
Minneapolis, MN 55402
612-333-5831

Attorney for Amicus Curiae
National Employment Lawyers
Association, Minnesota Chapter

CERTIFICATION

I certify that this brief conforms to Rule 132.01 of the Minnesota Rules of Appellate Procedure for a brief produced using proportional font, 13-point or larger. The length of this brief is 2,490 words. This brief was prepared using Microsoft Word.

Dated: May 26, 2006



Leslie L. Lienemann