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Nos. A07-584, A07-788

State of Minnesota
In Supreme Court

Brian Kidwell,

Appellant,

v.

Sybaritic, Inc.,

Respondent.

BRIEF AND APPENDIX OF APPELLANT BRIAN KIDWELL

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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).

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STATEMENT OF THE LEGAL ISSUES

1. Does an employee engage in conduct protected by the Minnesota Whistleblower Act when the employee makes a good faith report of a violation or suspected violation of the law, while also fulfilling the employee's job duties?

The Court of Appeals held in the negative.

Apposite Authority:

Minn. Stat. § 181.932, subd. 1

Gee v. Minn. State Colleges & Universities, 700 N.W.2d 548 (Minn. Ct. App. 2005).

Michaelson v. Minn. Mining & Mfg. Co., 474 N.W.2d 174, 180 (Minn. Ct. App. 1991)

2. Under the rule articulated by the Court of Appeals, can an in-house attorney ever be protected under the Minnesota Whistleblower Act?

The Court of Appeals held that in-house attorneys are not per se barred from pursuing their whistleblower claims. The Court of Appeals' holding, however, creates a de facto bar to coverage under the Act.

Apposite Authority

Minn. Stat. § 181.932

Minn. R. Prof. Cond. 1.13 (c)

STATEMENT OF THE CASE

Brian Kidwell ("Kidwell") initiated this lawsuit alleging that he was terminated from his job as general counsel for Sybaritic, Inc. ("Sybaritic") in violation of the Minnesota Whistleblower Act, Minn. Stat. § 181.932. (App. 000009). Kidwell alleges that he was terminated only three weeks after sending an email entitled "a difficult duty" to Sybaritic's management. (App. 000007-8). In the email Kidwell expressed his concern that the company was engaging in unlawful and illegal activity. (App. 000007-8). Sybaritic filed five counterclaims against Kidwell alleging: conversion, defamation, breach of fiduciary duty, breach of the duty of loyalty, and unjust enrichment. (App. 000009).

Both parties moved for summary judgment, and both motions were denied by the district court, Hon. Kevin S. Burke, on July 25, 2006. (App. 000009). Kidwell also moved to amend his complaint to add a claim for punitive damages based on evidence that Sybaritic's managers knew that it was wrong to terminate an employee if the reason for doing so was that the employee was a whistleblower. (App. 000009). The court denied Kidwell's punitive damages motion on July 25, 2006. (App. 000009).

A jury trial was held from September 25, 2006 to October 3, 2006, in Hennepin County District Court before Judge Burke. (App. 000010). At the end of the trial, Sybaritic withdrew three of its counterclaims, choosing to move forward only on its conversion and breach of fiduciary duty counterclaims.

The jury concluded that: Kidwell engaged in protected conduct under the Whistleblower Act; that his report was made in good faith; and that his report was a motivating factor in Sybaritic's decision to terminate Kidwell. (App. 000011). The jury awarded Kidwell \$65,000 in back pay, \$120,000 in front pay, and \$12,000 in emotional distress damages. (Id.). On Sybaritic's counterclaims, the district court instructed the jury that Kidwell had breached his fiduciary duty to Sybaritic. (Id.). The jury concluded, however, that Sybaritic did not suffer any damages as a result of that breach. (Id.). Finally, with respect to the conversion claim, the jury found in favor of Sybaritic. (Id.). The counterclaims are not at issue in this appeal.

Sybaritic then brought a post-trial motion for judgment as a matter of law, or in the alternative for a new trial. (App. 000011). The district court denied Sybaritic's motion on February 2, 2007. (Id.). The district court issued findings of fact and conclusions of law and ordered judgment for Kidwell in the amount of \$197,000, plus attorneys' fees of \$138,418.50 and costs of \$9,916.40. (Id.). Kidwell then renewed his motion to add a claim for punitive damages. The motion was again denied. (Id.).

Sybaritic then appealed the district court's denial of its post-trial motion for judgment as a matter of law pursuant to Minn. R. Civ. P. 50.02. (Id.). In a divided decision, the Court of Appeals, Judges Johnson and Collins reversed the denial of Sybaritic's motion for judgment as a matter of law. (App. 000012-29). The Court of Appeals first concluded that an in-house attorney is not per-se barred from asserting a claim for whistleblower retaliation. (App. 000018). Nevertheless, the Court held that Kidwell was not protected under the Whistleblower Act. (App. 000022). The appellate

court assumed without deciding that Kidwell's report implicated a violation of law. (App. 000020). The court concluded however, that as a matter of law, Kidwell's report was made merely to fulfill his job duties and therefore the report was not in good faith. (App. 000020-24). Finally, the Court of Appeals rejected Sybaritic's argument that Kidwell's reports were not protected because Sybaritic already knew about the issues in the difficult duty email. (App. 000027-28).

Judge Lansing dissented. (App. 000030-33). Judge Lansing stated "the majority constructs an exception to the [Whistleblower] statute that strips an in-house attorney of whistleblower protection for exposing illegalities within the corporate structure. (App. 000030). Judge Lansing also noted public-policy considerations support the conclusion that in-house attorneys should be protected by the Whistleblower Act "because they face the same pressures as ordinary employees." (Id.). Ultimately, however, Judge Lansing based her dissent on statutory construction. (App. 000031-32). Judge Lansing asserted that the Whistleblower Act was unambiguous and therefore the Court of Appeals should apply the plain meaning of the statute. (Id.). The dissent states "[t]he majority concludes that Kidwell failed to prove his whistleblower claim because he had a duty as an in-house attorney to report illegal activity. But nothing in the statute supports this limitation." (App. 000032).

STATEMENT OF THE FACTS

Brian Kidwell is an attorney who began working for Sybaritic in July, 2004. (T. 178)¹. Prior to joining Sybaritic, Kidwell had work experience with multiple law firms and at an insurance company. (App. 000004). Sybaritic is a Minnesota company who manufactures and sells spa products, such as dermabrasion systems and skin-care treatments. Kidwell's responsibilities as general counsel included a broad range of assignments, including overseeing litigation issues, revising contracts, and providing legal assistance in the area of employment law. (T.181). Kidwell felt that he was responsible for Sybaritic's legal affairs. (T.242).

During his tenure, Kidwell learned of several improprieties occurring at the company. (See e.g, T.183-85, T187-88, T.200-05, T.210-13, T.224-28). As a result, when Kidwell learned about the improprieties he reported them to members of Sybaritic's management who were directly involved in the relevant issues, usually via written memoranda, e-mail or direct conversation. (See e.g, T.189-91, T.368). However, when Kidwell "blew the whistle" on Sybaritic via the April 24, 2005 e-mail entitled "A Difficult Duty," Kidwell went beyond the normal scope of his job responsibilities: he made a good faith report that the company was intentionally violating the law, and he threatened go to the authorities. (App. 000074-75).

The Difficult Duty E-mail

On Sunday, April 24, 2005, Kidwell sent several key members of Sybaritic's management team an e-mail entitled "A Difficult Duty." (App. 000074-75). In the e-

¹ Citations to "T." refer to the trial transcript on file with the Clerk of Appellate Courts.

mail, Kidwell made a good faith report that the company was engaging in tax evasion, the unauthorized practice of medicine, and obstruction of justice. (Id.). At trial, Steve Daffer, the owner and president of Sybaritic, admitted that Kidwell's e-mail was the first time that Kidwell reported these concerns. (T.514). Tony Daffer, CEO of Sybaritic, admitted that he was very surprised by the contents of Kidwell's e-mail. (App. 000092, Deposition of Tony Daffer at 65). George Mertikas and Steve Chesley also testified that Kidwell reported violations or suspected violations of law for the first time in his Difficult Duty e-mail. (T.303-04, T.613). Sybaritic's managers also admitted that Kidwell accused the company of engaging in illegal behavior in the e-mail. (T.297-98, T.528, T.582).

Tax Evasion

In the Difficult Duty e-mail, Kidwell accused Sybaritic of committing tax evasion. California law requires retailers doing business in the state of California to collect sales tax from its purchasers, and to remit those sales taxes back to the state. Cal. Rev. & Tax. Code § 6203; (T.205). Failing to do so is a misdemeanor. Cal. Rev. & Tax. Code § 6207. However, a retailer not doing business in the state of California, (i.e., one that does not maintain an office in the state) does not have to collect sales tax from its purchasers. Cal. Rev. & Tax. Code § 6203; (T.205).

In 2002, Sybaritic opened a branch office in San Francisco. In approximately 2004 or 2005, the San Francisco branch office became Sybaritic West LLC ("Sy West"), an independent legal entity, supposedly separate from Sybaritic, Inc. (T.362-63). Sy

West was formed as a separate legal entity from Sybaritic, Inc. so that Sybaritic, Inc. would not have to collect and pay California sales tax on its own California sales. (Id.)

Sybaritic, Inc. however, did not treat Sy West as a completely separate legal entity because, among other things, Sy West was listed as a branch office on Sybaritic's website. (T.204-05). As a result of not treating Sy West as a completely separate legal entity, Sybaritic should have collected and paid California sales tax on its California sales. Cal. Rev. & Tax. Code §§ 6203, 6207; (T.369). When Kidwell sent his Difficult Duty e-mail, Sy West was still listed as a branch office on Sybaritic Inc.'s website. (T.579).

Unauthorized Practice of Medicine

Kidwell also accused Sybaritic of engaging in the unauthorized practice of medicine. Mohammed Hagar is Sybaritic's medical director. (T.187). Mr. Hagar is not licensed to practice medicine in the state of Minnesota. Minn. Stat. §§147.02-03; (T.661). In or around the fall of 2004, Kidwell learned that Mr. Hagar was engaged in "test studies" on human subjects using various machines and medical devices sold by Sybaritic. (T.187-88). At around the same time, Kidwell also learned that Sybaritic identified Mr. Hagar as a medical doctor on its website. (T.188).

Minnesota law prohibits the practice of medicine without a license. Minn. Stat. § 147.081; (T.188). The practice of medicine is defined, in pertinent part, to include "offers or undertak[ings] to prevent or to diagnose, correct, or treat in any manner or by any means, methods, devices or instrumentalities, any disease, illness, pain, wound, fracture, infirmity, deformity or defect of a person." Minn. Stat. § 147.081. The practice

of medicine also includes “offers or undertak[ings] to perform...invasive or noninvasive procedures involving the use of a laser or laser assisted device, upon any person.” Id. It is unlawful for a non-licensed individual to use the designation of “doctor of medicine,” “medical doctor,” or “M.D.” in “the conduct of any occupation or profession pertaining to the diagnosis of human disease or conditions.” Id.

Concerned about Mr. Hagar’s offers and undertakings to practice medicine, as well as the company’s identification of Mr. Hagar as a medical doctor, Kidwell raised the issue several times with George Mertikas, Chief Operations Officer. (T.189; App. 000099-000107, Memorandum from Kidwell to Sybaritic Management dated January 17, 2005). However, despite Kidwell’s insistence that Mr. Hagar’s medical practices should be discontinued, neither Mr. Mertikas, nor anyone else at Sybaritic, assured Kidwell that Mr. Hagar’s practice of medicine would cease. (T.193-94).

Obstruction of Justice

In the Difficult Duty e-mail, Kidwell also accused Sybaritic of intentionally obstructing justice. The federal statute, 18 U.S.C § 1512, states that

Whoever corruptly—(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

At the time he sent the Difficult Duty e-mail, Kidwell believed that Steve Daffer, the President of Sybaritic, intended to destroy some potentially damaging e-mails related to a Sybaritic litigation then pending in federal court. (T.224, T.239). Mr. Daffer told

Kidwell that the opposing party “would have a hard time getting their hands on those e-mails.” (T.224). In addition, Tom Atmore, Sybaritic’s attorney of record in the federal lawsuit, told Kidwell that disks he had containing the damaging e-mails were retrieved by Sybaritic under questionable circumstances. (T.225-26) Fearing that Mr. Daffer had destroyed or intended to destroy the e-mails so that they could not be used in the litigation, Kidwell made a good faith report of Mr. Daffer’s conduct in his April 24th e-mail. (T.239-T247).

Sybaritic’s Response to the E-mail

Sybaritic’s response to Kidwell’s e-mail was immediate. On the morning of April 25th, various members of Sybaritic’s management team met with Kidwell; in addition, various members of Sybaritic’s management team met alone, without Kidwell. (T.248-49). Before the end of the day, it was decided that Steve Chesley should become Kidwell’s supervisor. (App. 00081, Tony Dafer Depo. at 21). Tony Daffer, CEO of Sybaritic, admitted that this decision was made as a direct result of Kidwell’s e-mail. (Id.) Steve Chesley testified that as a result of the e-mail, he and Tony Daffer spent a day or a day and a half to investigate Kidwell’s allegations. (T.621). Steve Daffer testified that he was personally upset by Kidwell’s e-mail and that it represented a breakdown of trust with someone he trusted. (T.529).

Only three weeks after Kidwell made his good faith report, he was terminated. (T.267). As demonstrated at trial, Sybaritic’s reasons for terminating Kidwell changed over time. For example, at his termination, Kidwell was told that “it’s clear you’re not

happy here at Sybaritic,” and that Steve Daffer was not happy with Kidwell. (T.267, T.637-37). Next, in Sybaritic’s interrogatories, the company stated that:

The decision to terminate Kidwell was made by Tony Daffer and Steve Chesley. The decision was made following Kidwell’s request for one week of vacation on less than one week’s notice. The request for a vacation was made because Kidwell stated he needed time to prepare for his daughter’s high school graduation. The vacation request coincided with previously scheduled depositions to occur in a pending arbitration involving Sybaritic, Inc. Kidwell was responsible for preparing case summaries prior to his vacation and failed to complete this assignment.

(App. 000108-18; T.546-47). Sybaritic’s interrogatories also stated that “Kidwell was terminated because Sybaritic, Inc. was not confident nor trusted that Kidwell was able to complete his duties as General Counsel in a satisfactory manner.” (Id.) At the trial, Sybaritic further asserted that Kidwell was terminated for performance reasons and because of his breach of fiduciary duty to Sybaritic (i.e., the fact that he sent a copy of the Difficult Duty e-mail to his father). (T.633, 649). However, a considerable amount of evidence established that Sybaritic’s reasons for Kidwell’s were pretextual:

- Steve Chesley testified that Kidwell’s vacation “had nothing to do with his termination,” in direct conflict with the interrogatories that he signed on Sybaritic’s behalf. (T.574; A.76-86). He also stated that he did not consider terminating Kidwell until after he learned that Kidwell breached his fiduciary duty by sending a copy of the Difficult Duty e-mail to his father, John Kidwell. (T.649).
- Steve Daffer admitted that when he was asked to state the reasons for Kidwell’s termination in his deposition, he did not mention breach of fiduciary duty as one of the reasons for his termination. (T.552). Yet, he also testified that Steve Chesley and Tony Daffer came to him seeking approval for Kidwell’s termination. (T.569).
- Tony Daffer admitted that when first asked in his deposition about why Kidwell was terminated, he failed to mention breach of fiduciary duty as one of the reasons for Kidwell’s termination. (T.761). Daffer also admitted that Sybaritic did not consider terminating Brian Kidwell immediately following the Difficult Duty

email, because the company needed Kidwell's support in the federal lawsuit for a few weeks to prepare for trial. (T.765-66).

- George Mertikas, one of the four managers that runs Sybaritic, testified he did not know about Kidwell's breach of fiduciary duty until well after Kidwell's termination. By the time of his deposition, Mertikas still did not know about Sybaritic's allegedly real reason for terminating Kidwell. (T.296-97).

Based on the evidence produced at the trial, the jury properly concluded that Brian Kidwell was terminated in violation of the Minnesota Whistleblower Act, because he made a good faith report of a violation or suspected violation of law. (A.25-27).

SUMMARY OF THE ARGUMENT

The Court of Appeals' holding judicially creates an exception to the Whistleblower Act that is not found in the plain language of the statute and that was not intended by the Minnesota Legislature. The cases the Court of Appeals relied on to create a job duties exception do not stand for the proposition that an employee who has a job duty to make reports of illegalities is not entitled to protection under the Act. Further, public policy counsels against such an exception because employers could craft handbook and job descriptions requiring every employee to report illegalities. Finally, the fact that Kidwell was an in-house attorney does not exclude him from protection under the Act.

ARGUMENT

I. Standard of Review

The denial of a motion for judgment as a matter of law presents a legal question subject to de novo review. Pouliot v. Fitzsimmons, 582 N.W.2d 221, 224 (Minn. 1998). But “[w]here JNOV has been denied by the trial court, on appellate review the [district] court must be affirmed, if, in the record, there is any competent evidence reasonably tending to sustain the verdict.” Id. (internal citation omitted). The jury’s verdict should not be set aside “[u]nless the evidence is practically conclusive against the verdict.” Id. “The evidence must be considered in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence.” Id.

II. Statutory Framework of the Whistleblower Act

The district court correctly concluded that Sybaritic was not entitled to judgment as a matter of law because Kidwell had established a prima facie case of whistleblower retaliation and demonstrated that his protected conduct was a motivating factor in his termination. The Whistleblower statute provides in pertinent part:

[a]n 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 law enforcement official.

Minn. Stat. § 181.932.

Minnesota courts follow the McDonnell Douglas analysis in retaliation cases. Cox v. Crown CoCo, Inc., 544 N.W.2d 490, 496 (Minn. Ct. App. 1996) (citing Hubbard v. United Press Int'l, 330 N.W.2d 428, 444 (Minn. 1983)). The employee has the initial burden to establish a prima facie case. Id. The burden then shifts to the employer to articulate a legitimate, non-retaliatory reason for its action. Id. Finally, the employee may demonstrate that the employer's articulated reasons are pretextual. Id.; Cokely v. City of Otsego, 623 N.W.2d 625, 630 (Minn. Ct. App. 2001). An employer does not escape liability merely because it offers a legitimate reason for the discharge, if an illegitimate reason also played a role in the discharge. McGrath v. TCF Bank Sav., fsb, 509 N.W.2d 365, 366 (Minn. 1993). Even if the employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason more than likely

motivated the discharge decision. Id. (citing Anderson v. Hunter, Keith, Marshall & Co. Inc., 417 N.W.2d 619, 627 (Minn. 1988)).

To establish a prima facie case under Minn. Stat. § 181.932, the plaintiff must establish: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. Cox, 544 N.W.2d at 496 (citing Hubbard, 330 N.W.2d at 444); Gee v. Minn. State Colleges & Universities, 700 N.W.2d 548, 555 (Minn. Ct. App. 2005). The burden of establishing a prima facie case is not onerous. Dietrich v. Canadian Pac. Ltd., 536 N.W.2d 319, 324 (Minn. 1995) (citing Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089 (1981)). The prima facie case may be established by direct evidence of a discriminatory motive or, when direct evidence is lacking, by indirect evidence through which a discriminatory motive may be inferred. Dietrich, 536 N.W.2d at 323; Sigurdson v. Carl Bolander & Sons, Co., 532 N.W.2d 225, 228 (Minn. 1995); Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 710 (Minn. 1992); Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986).

At issue in this appeal is whether Kidwell engaged in statutorily protected activity when his report of a law violation was also in furtherance of his job duties.

III. Kidwell Engaged in Statutorily Protected Conduct When He Sent the Difficult Duty Email.

The Court of Appeals held that a report made in the fulfillment of an employee's job duties is not statutorily protected conduct. The Court of Appeals holding should be reversed because: (1) the decision disregards the basic rule of statutory construction that

when a statute is unambiguous, the court should apply the statute's plain meaning; (2) there is no job duties exception in Minnesota case law; and (3) as a matter of public policy, a job duties exception would virtually eliminate the protections of the Whistleblower Act.

A. The Plain Language of the Whistleblower Act Does Not Contain a Job Duties Exception.

It is a well established rule of statutory construction that when a statute is unambiguous, a court should apply the statute's plain meaning. Minn. Stat. § 645.16 (2006). "The construction of a statute is a question of law, subject to de novo review" by the Supreme Court. State v. Wiltgen, 737 N.W.2d 561, 570 (Minn. 2007) (citing In re Estate of Palmer, 658 N.W.2d 197, 199 (Minn. 2003)). The goal of statutory construction is "to ascertain and effectuate the intention of the legislature." Id.; Minn. Stat. § 645.16 (2006). The creation of a job duties exception is inappropriate because this Court has "explicitly rejected" reading any additional requirements into the statutory language of the Act. Anderson-Johanningmeier v. Mid-Minn. Women's Ctr., Inc., 637 N.W.2d 270, 275 (Minn. 2002). As Judge Lansing correctly noted, "[t]he majority concludes that Kidwell failed to prove his whistleblower claim because he had a duty . . . to report illegal activity. But nothing in the statute supports this limitation." (App. 000032).

There is no ambiguity in the language of the Whistleblower Act regarding the requirements for statutorily protected conduct or the definition of employee. Therefore, this Court should only look to the statute's plain language. The plain language of the statute provides that an employee is protected under the act when: "the 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.” Minn. Stat. § 181.932; Cox, 544 N.W.2d at 496. As Judge Lansing recognized, the plain language of the statute provides: “[t]he report need only be made in good faith and report a violation or suspected violation of law.” (App. 000032). Nowhere in the plain language of the Act is there an exclusion for employees who make good faith reports as part of their job duties. Instead, the Act applies to all employees who make a good faith report of a violation or suspected violation of the law, regardless of whether the employee may also have a job duty to make such a report. Minn. Stat. § 181.932.

The Court of Appeal’s holding that employees who make a report that is furtherance of their job duties, creates a judicial exception to protection under the Whistleblower Act that was not intended by the legislature. This Court should reverse the Court of Appeals and reject the judicially created job-duties exception to the Whistleblower Act.

B. The Case Law Relied On by the Court of Appeals Does Not Support a Job Duties Exception.

The Minnesota state court cases cited by the Court of Appeals did not hold that the Act excludes from its coverage employees who make reports in fulfillment of their job responsibilities. Instead, the three cases the Court of Appeals relied on concluded that the communications at issue did not constitute reports as that term was defined by the Court of Appeals in Janklow v. Minn. Bd. of Exam’rs for Nursing Home Adm’rs, 536 N.W.2d

20, 23 (Minn. Ct. App. 1995). Janklow defined a report as either: (1) “[t]o make or present an often official, formal, or regular account of” or (2) “[t]o relate or tell about; present.” Id. As Judge Lansing noted, “[a]lthough the reports in these cases did involve the plaintiffs’ job responsibilities, the decisions all had one simple fact in common: the plaintiffs did not report illegal conduct.” (App. 000033-34).

1. Michaelson

The Court of Appeals relied on Michaelson v. Minn. Mining & Mfg. Co., 474 N.W.2d 174, 180 (Minn. Ct. App. 1991) for the proposition that an employee fulfilling his or her job duties is not making a report of protected conduct. (App. 00020-21). Michaelson involved an in-house attorney who investigated problems with the company’s employment practices and advised the company on how to resolve the problems. Michaelson, 474 N.W.2d at 180. However, at times the company did not follow the attorney’s advice. Id. The court held that the in-house attorney did not make a “report” because he was merely providing his supervisor “feedback, based upon his legal analysis, regarding proper proposed business decisions.” Id. The in-house attorney was not making a report for the purposes of exposing an illegality, but rather he was merely providing information to his supervisor. Michaelson did not make a report under the Act because he did not “blow the whistle” on any alleged illegality. Id.

The facts in Michaelson are readily distinguishable from the instant case where Kidwell unequivocally informed his employer that he thought Sybaritic was violating the law and that he would go to the authorities if necessary. (App. 000074-75). Kidwell stated “[i]t is my firm conviction that Sybaritic intends to continue to engage in [illegal

behavior]. Accordingly, it is my intention to advise the appropriate authorities of these facts.” (App. 000075). Kidwell was not simply providing feedback, he made his report for the purpose of exposing illegalities and even threatened to take the issue further and report the company’s conduct to the authorities. (Id.).

2. Grudtner

Nor does Grudtner v. Univ. of Minn., 730 N.W.2d 323 (Minn. Ct. App. 2007) support the creation of a job duties exception. In Grudtner an employee objected to his employer’s plan to negotiate a contract for a construction project in a way that would violate the law. Id. at 326. The University did not go forward with the project however. Id. The court concluded that the employee did not engage in statutorily protected conduct because he did not make a report. Id. The court held that reporting “[t]he mere suggestion of future improper conduct . . . did not amount to statutorily protected conduct,” because a proposal to violate the law in the future would not implicate a violation of law. Id. Admittedly, the court in Grudtner referenced the employee’s job duties, “[i]t was [Gundtner’s] job . . . to ensure that the university did not engage in improper procurement methods.” Id. at 330. But the holding in Grudtner was based on the fact that the employee did not report a violation of law, not because it was the employee’s job duty to make the report. Id.

Grudtner is inapposite to the instant case. Grudtner did not report a violation of law because he was discussing only “future improper conduct” which the University subsequently refrained from doing. In contrast, in the instant case, Kidwell’s difficult duty email reported that Sybaritic had already and was currently engaging in illegal

activities: tax evasion, unauthorized practice of medicine, and obstruction of justice. (App. 000074-75). Kidwell's difficult duty email was a report under Janklow unlike the employee's actions in Grundtner.

3. Gee

The Court of Appeals' reliance on Gee, for the proposition that there is a job duties exception to the Whistleblower Act is also misplaced. In Gee, the court concluded that the employee did not make a report because she did not suspect her employer of any illegality. Gee, 700 N.W.2d at 555. In fact the court noted, "[n]o evidence in the record indicates that Gee had any suspicion of illegal activity at the time of making the statement." Id. The issue in Gee was the employee's purpose in making the report. Because Gee made the report to contradict information provided by her supervisor, she did not make the report for the purpose of exposing an illegality. Id.

Kidwell's case is again distinguishable. In his difficult duty e-mail, Kidwell did not merely give information to his supervisors or fulfill his regular business duties. (A.42-43). Rather, Kidwell made an unambiguous report that Sybaritic was intentionally violating the law and he threatened to go to the authorities. (A.42-43). Under the Rules of Professional conduct, Kidwell had a duty to report the issue internally before taking his concerns to outside authorities. Minn. R. Prof. Cond. 1.13 (c). Kidwell made his report outside of regular business hours, on his own time, and not in the normal course of business. (T.405-09). Kidwell went beyond the scope of his job duties when he "blew the whistle" on Sybaritic's unlawful behavior and therefore this Court should reverse the Court of Appeals.

4. Other Jurisdictions

Other jurisdictions have likewise concluded that an employee may still have protection under a state's Whistleblower Act, even if their report was made as part of the employee's job duties. See e.g. Brown v. Mayor of Detroit, 734 N.W.2d 514, 518 (Mich. 2007) (analyzing state whistleblower act with nearly identical language to Minn. Stat. § 181.932, and concluding "there is no language in the statute that limits the protections of the [statute] to employees who report violations or suspected violations only if this reporting is outside the employee's job duties."); Rogers v. City of Fort Worth, 89 S.W.3d 265, 277 (Tex. Ct. App. 2002) (holding employee protected under state public employee whistleblower act even when reporting a violation of law in course of employment). This Court should follow these other jurisdictions and reject the argument that the Whistleblower Act does not apply to persons who make reports in the course of their job duties.

C. The Purposes of the Whistleblower Act Would Be Thwarted If This Court Adopts a Job Duties Exception.

The Whistleblower Act was enacted to protect employees from retaliation for exposing illegalities or suspected illegalities. Erickson v. City of Orr, 2005 WL 2277395, *4 (Minn. Ct. App. 2005). By excluding employees who have a job duty to make reports of illegalities from the Act's protection, the Court of Appeals leaves such employees no recourse if their employer takes adverse action against them. In most cases, the employees in a company who are the most likely to learn about and be aware of illegal activities are persons with access to high level information, such as executives, persons in

financial positions, human resources personnel, or attorneys in legal departments. The consequence of the rule articulated by the Court of Appeals is that employees will be less entitled to protection the higher the position they hold. Simply because an employee has access to materials that makes him or her more like to learn about illegalities should not remove them from protection under the Act.

Furthermore, if the Court of Appeals' holding is taken to its logical conclusion, the protections of the Whistleblower Act would be eviscerated. "All employees, to a lesser or greater extent, have a fiduciary relationship to their employers . . . with a duty to act in the interests of the employer and not as an adversary." State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 858 (Minn. 1985), cited in Powell v. Continental Machinery, 2006 WL 44339, *3 (Minn. Ct. App. 2006). Because of this fiduciary duty, every employee would have a duty to report illegalities to their employer, and therefore no employee would be entitled to protection under the Act. Likewise, if the Court of Appeals decision is allowed to stand, every employer could write a provision into their handbook and job descriptions making it an employee's duty to report illegalities. Such a result was not contemplated by the legislature when enacting the statute designed to protect all employees from whistleblower retaliation. The exception would swallow the rule. This Court should reverse the Court of Appeals and reject the application of a job duties exception to the Whistleblower Act.

D. An Employee Can Make a Report for More than One Purpose.

The Court of Appeals relied on a false dichotomy in reversing the district court. The Court of Appeals' holding assumes that if a person is making a report as a part of

their job duties, they are not making a report for the purpose of exposing an illegality. In reality, a person can make a report in the context of their job duties and nevertheless make the report to expose the illegality. Therefore, the fact that an employee makes a report in furtherance of their job duties does not mean that the employee is not making a report in good faith as a matter of law. If this Court concludes that an employee's job duties are relevant to good faith, it should not be an exception to the Whistleblower Act as a matter of law. Rather, it should simply be an additional element for the fact finder to consider in determining if the employee made the report in good faith.

E. Good Faith is a Question of Fact.

Even if this Court determines that the question of whether the employee makes a report in furtherance of their job duties is relevant to the element of good faith, good faith is a fact question that should be left to the jury.

In determining whether an employee's report was made in "good faith" within the meaning of the Act, courts look to the content of the report and to the reporter's purpose in making the report. Obst v. Microtron, Inc., 614 N.W.2d 196, 202 (Minn. 2000). The central issue is whether the employee made the report in order to expose an illegality. Id. Whether an employee's report was made in good faith is generally a question of fact. Borgersen v. Cardiovascular Sys., Inc., 729 N.W.2d 619, 624 (Minn. Ct. App. 2007) (citing Rothmeier v. Inv. Advisers, Inc., 556 N.W.2d 590, 593 (Minn. Ct. App. 1996)).

The fact that a report is made in the scope of an employee's job duties or pursuant to a reporting obligation may have some bearing on the employee's purpose in making the report. See e.g. Gee, 700 N.W.2d at 556 (noting that employee communicated

information to her co-workers to fulfill her job responsibilities but basing holding on fact employee did not suspect any illegal activity). However, the fact that an employee makes a report in the scope of his or her job duties should not bar him or her from seeking protection under the Act. The jury in this case made the decision that Kidwell made a report in good faith. The Court of Appeals should not have taken away this decision from the jury and concluded as a matter of law that Kidwell was not making a report for the purposes of exposing an illegality.

IV. In-House Attorneys Are Entitled to Protection Under the Whistleblower Act.

At the Court of Appeals, Sybaritic argued that Kidwell's Whistleblower claim was barred as a matter of law because an in-house attorney can never bring a whistleblower action against their former employer because a suit by an attorney against a former client is inconsistent with the attorney's duty of confidentiality. (App. 000012-13). The Court of Appeals stated that in-house attorneys are not per se barred from asserting a claim under the Whistleblower Act. (App. 000018). However, the court's holding creates a de facto prohibition on Whistleblower claims by in-house attorneys.

A. Under the Court of Appeals' Rule, an In-House Attorney Would Only Be Protected If They Made a Report to An Outside Authority.

The Minnesota Rules of Professional Conduct state that in-house attorneys have an ethical duty to report alleged illegal activity to others in the company before disclosing the information to an outside source. Minn. R. Prof. Cond. 1.13(c). Under the Court of Appeals' holding, if an in-house attorney complies with his or her ethical obligation to

report suspected violations of the law to their employers they are precluded from the Act's coverage because the report would be made within their job duties.

Between the Court of Appeals holding and an attorney's ethical obligations, an in-house attorney essentially would never be protected under the Whistleblower Act unless he or she reported the illegality to an outside authority. The plain language of the Whistleblower Act protects an employee who makes a report to an "employer *or* to any governmental body or law enforcement official." Minn. Stat. § 181.932 (emphasis supplied). The Whistleblower Act does not require an employee to make a report to an outside authority in order to receive protected status. Kratzer v. Welsh Companies, LLC, 2008 WL 1747607, *6 (Minn. Ct. App. 2008). Rather, the employee can make the report to *either* his or her employer or to an outside authority. Id. There is no limit in the Whistleblower Act that excludes attorneys from protection if the report is only made to the company and therefore this Court should reverse the Court of Appeals.

B. Nothing In the Whistleblower Statute Excludes Lawyers From Protection Under the Act.

As set forth *supra.*, the language of the Whistleblower Act is unambiguous and therefore this Court only has to look at the statute's plain meaning. The Act defines employee as "a person who performs services for hire in Minnesota for an employer." Minn. Stat. § 181.932, subd. 2. The Act does not contain any exclusion for in-house attorneys. The lower court's holding creates a de facto exclusion from the Whistleblower Act for in-house counsel, which is contrary to the plain language of the Act. Therefore, this Court should reverse the decision of the Court of Appeals.

**C. Other Jurisdictions Have Concluded That In-House Attorneys
Are Entitled to Whistleblower Protections.**

A majority of the jurisdictions to consider the issue have concluded that in-house attorneys are not prohibited from asserting retaliatory discharge claims. See e.g. Van Asdale v. Int'l Game, Tech., 498 F. Supp. 2d 1321, 1326 (D. Nev. 2007) (rejecting claim that ethical rules prohibited in-house attorney from asserting claim for retaliatory discharge under Sarbanes-Oxley Act and state tort law); Meadows v. Kinder-Care Learning Ctrs. Inc., 2004 WL 2203299, *2 (D. Or., Sept. 29, 2004) (refusing to dismiss as a matter of law a wrongful discharge tort claim for in-house attorney); Burkhart v. Semitool, Inc., 300 Mont. 480, 493-94, 5 P.3d 1031, 1039 (Mont. 2000) (rejecting exception to state whistleblower act for in-house attorneys); Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603, 608 (Utah 2003) (holding rules of professional conduct allowed in-house attorney to disclose certain client information in order to establish wrongful discharge claim); O'Brien v. StoltNielsen Transp. Group Ltd., 200, 838 A.2d 1076, 1084 (Conn. Super. Ct. 2003) (finding no persuasive per se rationale for barring wrongful termination suits by in-house attorneys); Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 857, 863-64 (Tenn. 2002) (ruling in-house counsel may sue for retaliatory discharge in violation of public policy); Willy v. Coastal States Mgmt. Co., 939 S.W.2d 193, 200 (Tex. App. 1996) (noting plaintiff's position as in-house counsel did not preclude wrongful termination claim if claim could be proved without violation of confidentiality obligation); GTE Prods. Corp. v. Stewart, 653 N.E.2d 161, 166-67 (Mass. 1995) (recognizing wrongful discharge claim for in-house counsel where claim respects

client confidences and secrets); Heckman v. Zurich Holding Co. of America, 242 F.R.D. 606, 608 (D. Kan. 2007) (denying motion to dismiss in-house attorney's state retaliatory discharge); Parker v. M & T Chemicals, Inc., 566 A.2d 215, 219 (N.J. Super. App. Div. 1989) (affirming denial of motion to dismiss in-house attorney's claim under state whistleblower act). This Court should follow these other jurisdictions and recognize that an in-house attorney can assert a claim for retaliatory discharge.

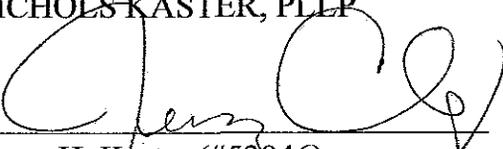
CONCLUSION

The jury properly found that Sybaritic violated the Minnesota's Whistleblower Act when Sybaritic terminated Kidwell for making a good faith report of a violation or suspected violation of law. This Court should not adopt the Court of Appeals job duties exception because there is no basis for such an exception in the plain language of the Act or in Minnesota case law. Further, public policy counsels against such a rule because it would virtually eradicate the protections the legislature intended in enacting the Whistleblower Act.

The Court of Appeals holding also creates a de facto exception for in-house attorneys because of the attorneys' ethical duties. There is no such exception in the plain language of the act and other jurisdictions have likewise rejected such a rule. This court should reverse the Court of Appeals and reject the judicially created job duties exception.

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