

**COURT OF APPEALS NO.: A10-1036  
STATE OF MINNESOTA  
IN COURT OF APPEALS**

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John Coursolle, Appellant,

vs.

EMC Insurance Group, Inc., an Iowa  
Corporation, Employers Mutual Casualty  
Company, an Iowa Corporation, and Michael  
L. Huttner, an individual, Respondents.

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**APPELLANT'S BRIEF  
(FILED UNDER SEAL)**

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## **STATEMENT OF THE CASE**

In late February of 2009, the Appellant, John O. Coursolle (a/k/a “Coursolle” or “Appellant”) commenced a lawsuit against Employers Mutual Casualty Company (a/k/a “EMCC” and collectively referred to as “Respondents” or “EMC”), and EMC Insurance Group Inc. (a/k/a “EMCI” and collectively referred to as “Respondents” or “EMC” ), and Michael L. Huttner (a/k/a “Huttner” or collectively referred to as “Respondents” or “EMC”), individually, for a whistle blower violation (Count I), reprisal under the whistle blower act (Count II), respondent superior (Count III), tortious interference with contract, (Count IV), breach of contract (Count V), negligent infliction of emotional distress (Count VI), and intentional infliction of emotional distress (Count VII). On or about September 14, 2009, four counts were dismissed by the district court, however, three counts remained including the whistle blower violation (including reprisal), the tortious interference with contract, and breach of contract. Respondents essentially denied any wrongdoing.

Respondents, filed their Memorandum in support of Summary Judgment on or about January 26, 2010. The Appellant responded in a timely manner and Respondents submitted a reply Memorandum.

On March 5, 2010, a Summary Judgment hearing was held before the Honorable Robert A. Blaeser. On April 14, 2010, the Honorable Robert A. Blaeser granted the Respondents’ Motion for Summary Judgment in its entirety. The district court stated that

the Appellant did not identify any federal or state law or rule that the Respondents violated or were suspected of violating and thus the whistle blower claim failed as a matter of law. The district court also stated that Appellant's breach of contract claim failed as a matter of law because the Appellant did not show that there was a binding employment contract. Lastly, the district court stated that the Appellant was not, as a matter of law, constructively discharged.

The Order and Memorandum of the Honorable Robert A. Blaeser was entered for judgment on April 14, 2010.

Appellant now respectfully requests that the Minnesota Court of Appeals reverse the Honorable Robert A. Blaeser's Order and Memorandum. The Appellant did identify a federal or state law or rule that the Respondents violated or were suspected of violating or at the very least he participated in a whistle blower investigation, and thus the whistle blower claim survives as a matter of law. In addition, Appellant's breach of contract claim does not fail as a matter of law because the Appellant did show that there was a binding employment contract, and that the Appellant was constructively discharged.

## **LEGAL ISSUES**

- I. Whether, when viewing the evidence in the light most favorable to the Appellant, the district court erred when it ruled that the Respondents did not violate the whistle blower statute as a matter of law.

The district court granted the Respondents motion for Summary Judgment on this issue stating that the “Plaintiff [now Appellant] has not identified any federal or state law or rule that EMC violated or is suspected of violating.”

Crawford v. Metropolitan Government of Nashville and Davidson County, 129 S.Ct. 846 (2009); Minn. Stat. § 181.932.

- II. Whether, when viewing the evidence in the light most favorable to the Appellant, the district court erred when it ruled that the Respondents did not breach an employment contract with Appellant.

The district court granted the Respondents motion for Summary Judgment on this issue stating that the “[b]ecause Plaintiff [now Appellant] did not have a unilateral employment contract with EMC, his breach of contract claim fails as a matter of law.”

Lee v. Fresenius Medical Care, Inc., 741 N.W.2d 117 (Minn. 2007); Ruud v. Great Plains Supply, Inc., 526 N.W.2d 369 (Minn. 1995); Fitzgerald v. Norwest Corp., 382 N.W.2d 290 (Minn. Ct. App. 1986); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

- III. Whether, when viewing the evidence in the light most favorable to the Appellant, the district court erred when it ruled that the Appellant was not constructively discharged.

The district court granted the Respondents motion for Summary Judgment on this issue stating that the Appellant was not constructively discharged.

Navarre v. S. Washington County Schs., 652 N.W.2d 9 (Minn. 2002); Pribil v. Archdiocese of St. Paul & Minneapolis, 533 N.W.2d 410 (Minn. Ct. App. 1995); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981); Cont’l Can Co., Inc. v. State, 297 N.W.2d 241 (Minn. 1980).

## FACTS

### I. Introduction and background.

That on or about November 1, 2006, Susan Day (a/k/a “Day”), a previous insurance adjuster for EMC, and whose direct supervisor was Huttner, filed an official complaint formally entitled “Formal Complaint Regarding Michael Huttner” against Huttner with Lisa Scaglione<sup>1</sup> (a/k/a “Scaglione”). (App. p. 124 - 131; see also App. p. 218 and 132 - 133). Huttner<sup>2</sup> became the manager of EMC regarding insurance adjusters in August of 2006. (App. p. 129; see also App. p. 268).

On November 1, 2006, Day, made a formal complaint against Huttner pursuant to the employee handbook stating specifically that Huttner’s conduct was harassing, intimidating, created a “hostile work environment”, and that Huttner’s conduct was also discriminatory, coercive and oppressive, and that he was violating “the Unfair Claims Practices Act and HIPPA.” (App. p. 124 - 133).

On November 1, 2006, Scaglione was made aware by Day that Huttner was running the department with fear and intimidation. (App. p. 224). It is the position of the Appellant that Day filed this complaint against Huttner in good faith<sup>3</sup>.

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<sup>1</sup>Scaglione worked at EMC as an employee relations consultant in 2005. (App. p. 217). Part of Scaglione’s job duties included addressing employee complaints within EMC. (App. p. 217).

<sup>2</sup>Currently Huttner is on “open ended” probation with EMC. (App. p. 272).

<sup>3</sup>Day stated in her deposition that she filed the formal complaint in good faith. (App. p. 126).

On or about November 7, 2006, Scaglione, an employee relations consultant for EMC, interviewed Neal Testin, Senior Claims Adjuster, Rick Gavin, Senior Claims Adjuster, Leonard Kron, Senior Claims Adjuster, Pat Gobel, Claims Adjuster, and the Appellant, a Senior Claims Adjuster, regarding the complaint filed by Day. (App. p. 134 - 138). On November 7, 2006, Scaglione, stated the following relating to what Appellant stated about Huttner:

When I explained to John [Coursolle] what I was calling about, he made some heavy sighs over the phone. **In my opinion it was like he was torn<sup>4</sup> with whether he should be honest with me or even comment.** I told him if it would be better to talk at a different time where he would have more privacy we could do that. I also told him that his name would be kept confidential and if for some reason I would have to use his name, I would call him first to let him know.

HR: **“Do you think Mike Huttner is a fair manager?”**

John: **“No, his management style is completely different then [sic] the prior manager. Mike told me he’s a ‘in your face kind of guy.’ Everyone looks over their shoulder – they are scared to death. He is a military guy and part-time cop. He’s very by the book. We are all stressed out and over worked.”**

HR: **“Do you think Mike Huttner is professional in his interactions with employees in the office?”**

John: **“Yes. Sometimes he will say something and say he’s kidding but you are never sure. No one appreciates it.”**

HR: **“Do you think Mike Huttner is intimidating in anyway?”**

John: **“Yes. It is his way or the highway....”**

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<sup>4</sup>Scaglione stated that Coursolle was initially reluctant to discuss Huttner in November of 2006. (App. p. 221).

(App. p. 135 - 136, emphasis added). The statements given by Coursolle on November 7, 2006, were stated when Huttner was only a manager for approximately three months.

On November 16, 2006, Scaglione, sent a "Response to formal complaint" to Day regarding her investigation, **and Huttner also received the investigation.** (App. p. 139 - 180 and App. p. 181 - 182, emphasis added). In Scaglione's report dated November 16, 2006, she stated:

HR contacted adjusters in the Minneapolis Branch and asked them specific questions about Mr. Huttner. The majority of responses said that Mr. Huttner is a fair manager. Most of the adjusters agreed that Mr. Huttner is professional with his interactions with the claims staff and that he is not intimidating. Some of the adjusters did say that he has a military background which may come across as intimidating, but in reality he's not. They all agreed that Mr. Huttner has a totally different personality then [sic] the prior manager. **One [Coursolle] adjuster doesn't think Mr. Huttner is fair as a manger because he has 'overworked them.'** **This adjuster [Coursolle] did state Mr. Huttner was professional, but felt he was intimidating because it is 'his way or the highway.'**

(App. p. 141, emphasis added).

It is important to note that on November 14, 2006, prior to Scaglione sending out the final report relating to Day's complaint against Huttner, **she sent the report via e-mail to Huttner for his review.** (App. p. 181 - 182, emphasis added). On November 15, 2006, Huttner e-mailed Scaglione his "thoughts" on her report. (App. p. 181). Upon taking into consideration Huttner's "thoughts" Scaglione sent the letter entitled "Response to formal complaint" to Day on November 16, 2006. (App. 139).

Scaglione stated that prior to her report being filed on November 16, 2006, Huttner reviewed the report regarding Day's formal complaint against Huttner. (App. p. 222; see also App. p. 139 - 182). Also prior to filing the report filed on November 16, 2006 and after Scaglione had contacted the claims adjustors regarding Huttner's conduct, Scaglione interviewed Huttner on November 8, 2006. (App. p. 222, see also App. p. 137 - 138). On November 8, 2006, Huttner stated to Scaglione, "Besides Susan [referencing Day], he [Huttner] knows that John Coursolle is not happy<sup>5</sup>. John was used to dumping a lot of the work on outside attorneys or independent adjusters and now Mike is making him do the work." (App. p. 222, see also App. p. 137 - 138).

In an e-mail from Scaglione to Huttner, dated November 14, 2006, the following was stated:

Attached is my response to Susan Day. She does not know that I am finished with my response. I want to share this with you first, have you read it and let me know if you have any comments, questions, suggestions, etc. I have referenced 7 exhibits in the response and what I plan to do is to overnight Susan Day the response including the exhibits (I will email her to let her know what I'm planning to do), as well as, mail both of you a copy, Rich Schulz and Todd Witke. Your 'mailed' copy will include the exhibits. Of course, I won't mail out anything until I hear back from both of you.

(App. p. 181 - 182).

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<sup>5</sup>Huttner stated that he told Scaglione that he knew Coursolle was an unhappy employee. (App. p. 269).

It is the position of the Appellant that Huttner knew, directly or indirectly<sup>6</sup> from Scaglione, that the Appellant was the adjuster who stated that Huttner was not a fair manager and that Appellant thought Huttner was intimidating. It is the Appellant's position that as a result of participating in Day's investigation conducted by Scaglione on November 7, 2006 regarding Huttner, Huttner retaliated against the Appellant in violation of the law and the employee handbook. It is Appellant's position that pursuant to the whistle blower law and EMC's employee handbook the Appellant was mandated to participate in the investigation relating to Day in November of 2006. (App. p. 183 - 192).

It is also important to note that during all relevant times Huttner was the claims manager of approximately seven (7) claims adjusters. (App. p. 53). It is the position of the Appellant that in the past four to five years, not including the Appellant, three other claims adjusters, out of approximately seven (7) claims adjusters, have officially complained about Huttner's illegal conduct (see section B, discussed below in detail). It is the position of the Appellant that Huttner has a history and pattern of illegal conduct with claims adjusters at EMC.

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<sup>6</sup>Cox v. Crown Coco, Inc., 544 N.W.2d 490, 497 (Minn. Ct. App. 1996) (Court stated that even though the complaint filed by the Plaintiff was confidential, the jury could have inferred from the evidence that the Defendant terminated the Plaintiff because the Defendant had good reason to believe that the Plaintiff filed the MN OSHA complaint).

**II. Other Complaints filed against Huttner by insurance adjusters since November of 2006, thus showing a pattern of harassing, coercive, intimidating, oppressive, and retaliatory conduct by Huttner.**

**A. Complaint filed by Susan Day.**

Day started her employment with EMC in approximately 1999, as an insurance adjuster. (App. p. 125). In approximately, September of 2006, Huttner started to criticize Day's work on a daily basis. (App. p. 125). Day stated that Huttner's conduct was harassing, intimidating, created a "hostile work environment<sup>7</sup>", and that Huttner's conduct was also discriminatory, coercive and oppressive. (App. p. 126 - 129).

As indicated above, on November 1, 2006, Day filed a formal complaint with Scaglione, a human resource person. (App. p. 126, see also App. p. 132 - 133). As a result of Day filing a formal complaint with human resources, EMC conducted an investigation of Huttner. (App. p. 126, see also App. p. 134 - 138).

Day stated in her e-mail to human resources, entitled "Formal Complaint Regarding Michael Huttner", the following:

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<sup>7</sup>Attorney Schiek: Okay. Would you describe the work environment at EMC as a hostile work environment? Answer Day: Not prior to Mr. Huttner taking over. Attorney Schiek: Okay. Once Mr. Huttner was the manager, in approximately August of '06, it became a hostile work environment? Answer Day: Yes. (App. p. 129).

But you must realize I'am [sic] working a **fear ridden work environment** at this time and when I call for support or guidance I'am [sic] out of control by what has happened and under extreme pressure. I do not believe a Claims Manager [referencing Huttner], should humiliation [sic] or emotional abuse [sic] to run a department and to reassign files to someone that knows less about the law than the assigned adjuster. This has affected my productivity and my health I have 20 days vacation and Iam [sic] afraid to use it what happen [sic] if I was gone a week when I was gone a ½ day and lost 20 files...Mr. Huttner used to be or may still be working as a part time Cop however at EMC we are not criminals that you can treat with no respect, bully and interrogate, we are insurance professionals and deserve respect. **Mr. Huttner has been trying to run this department like he was Adolph Hitler with fear and intimidation** not a professional claims manager and I do not believe that is what EMC would approve of and Iam [sic] not the only person in this department that feels this way.

(App. 132 - 133, emphasis added).

On or about November 16, 2006, Scaglione then made a formal response to Day's formal complaint. (App. p. 127 - 128, see also App. 139 - 180). Day stated that she believed that Scaglione informed Huttner of what Coursolle<sup>8</sup> stated in his interview with Scaglione on November 7, 2006. (App. p. 128, "Well, for one thing, if you read Lisa Scaglione's and Mike Huttner's depositions, they were going back and forth on a daily basis just the two of them."); see also App. p. 181 - 182; see also App. p. 280<sup>9</sup>).

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<sup>8</sup>Day also describe Coursolle as a competent claims professional. (App. p. 130).

<sup>9</sup>Attorney Fabian: When you spoke to Mr. Huttner about your investigation before you actually released the results of your investigations [referencing Day's investigation in November of 2006] to Ms. Day, did you tell him [Huttner] that there were other people in his office that have problems with his style of management? Answer Scaglione: **If I recall correctly, Mr. Huttner brought that up first. He mentioned John's [Coursolle] name before I ever said anything.** Attorney Fabian: **What did he [Huttner] say about Mr. Coursolle?** Answer Scaglione: **That he [Coursolle] was unhappy.** (App. p. 280, emphasis added).

Specifically, Day stated in her deposition the following relating to Coursolle's comments in Scaglione's investigation:

Attorney Schiek: And did you read what Mr. Coursolle [referencing now App. p. 135 - 136] said to Lisa [Scaglione]?

Answer Day: Yes.

Attorney Schiek: Okay. Would you describe Mr. Coursolle's portrayal of Mr. Huttner as a negative?

Answer Day: Yes.

Attorney Schiek: Okay. And Mr. Coursolle tells Lisa [Scaglione] that Mr. Huttner is intimidating?

Answer Day: Yes.

Attorney Schiek: **Do you believe that if Mr. Huttner saw this document [referring to now App. p. 135 - 136] that he would retaliate against Mr. Coursolle?**

Answer Day: Yes...

Attorney Schiek: Okay. Why do you believe that [the fact that Huttner would retaliate against Coursolle]?

Answer Day: Because it's a similar experience that I had with him [referring to Huttner]?

(App. p. 127, emphasis added).

As an example of Huttner's harassing and intimidating conduct, Day stated the following:

Answer Day: Show something that he [referencing Huttner] did quite a bit to me when I was in his office? He used to be a police officer.

Attorney Schiek: You are referring to Mr. Huttner?

Answer Day: Yes, and he's large. And he would get out of his chair and stand like this (indicating)?

Attorney Schiek: Let the record reflect the witness is standing with her arms in a folded position, go ahead?

Answer Day: And he was very intimidating to me at that time because that's what cops do when they try to arrest somebody or question them. And I was extremely intimidated by that, and I believe I wrote to the home office about it?

Attorney Schiek: Okay. His action caused reasonable fear in you?

Answer Day: Yes.

(App. p. 129). Day went on to state again that Huttner's conduct was personally offensive to her, that she considered his conduct threatening and intimidating. (App. p. 129). Day also stated that Huttner violated the rules set forth in EMC's employee handbook. (App. p. 129).

Respondents stated in their original memorandum filed in district court that the case brought by Day entitled Day v. EMC Insurance Group, Inc., et. al., was dismissed by Judge Rosenbaum on or about November 19, 2008. (App. p. 26 - 27). Day stated in her original complaint filed in district court that EMC violated the Minnesota whistle blower act, tortious interference with contract and for violations of the Minnesota Human Rights Act. (App. p. 26 - 27). However, it should be noted that Day never had an attorney

properly respond to the Respondents' memorandum of law for Summary Judgment. (App. p. 125).

**B. Complaint filed by Tim Skare.**

Tim Skare<sup>10</sup> (a/k/a "Skare") is a senior claims adjuster for EMC and started to work for EMC in November of 2006, and Huttner was Skare's manager at all relevant times. (App. p. 204).

On December 3, 2008 and December 10, 2008, Skare called Scaglione relating to complaints he had about Huttner. (App. p. 205; see also App. p. 214 - 215).

Skare stated to Scaglione in December of 2008, that Huttner was giving Skare negative comments on a daily basis. (App. p. 205, see also App. p. 214 - 215). Skare stated that Huttner, "was making the environment there very difficult for me to function in and work in...I might use micromanagement to the extreme as another explanation or definition of that. Harassment, I'm not sure it reaches to that level, but it's a word [harassment] you could certainly use [referencing Huttner's harassing actions]." (App. p. 206). Skare also stated that Huttner was intimidating. (App. p. 206).

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<sup>10</sup>Skare described Coursolle as a competent and knowledgeable claims adjuster. (App. p. 213).

Skare stated “Of course<sup>11</sup>”, when asked if he felt that Huttner would retaliate against him for making the compliant to human resources in December of 2008. (App. p. 206).

Scaglione stated the following in her memo<sup>12</sup> regarding Skare in December of 2008 relating to Huttner:

Three to four months ago he [Skare] feels that Mike [Huttner] has really ‘turned up the heat’ on him. Tim believes Mike told Karen Kerkow, Claims Supervisor, to do the same. I asked why he thinks that and Tim stated because recently Karen has been giving him a lot more criticism. He said Mike walks all over management including Karen...**Tim stated that he gets daily negative<sup>13</sup> comments compared to a year ago he did not receive as many. Tim stated he’s about the fourth employee to be treated like this by Mike.** I asked Tim who the other three employees were and he said Susan [Day], John [Coursolle] and Kitty<sup>14</sup> [Campbell]...Tim told me that he’s not the only one complaining. Karen Kerkow<sup>15</sup> told Tim that she is looking for another job...Tim stated that everyone is stressed who works under Mike. Tim is afraid to make decisions now. **He believes Mike is making the department a hostile environment<sup>16</sup>**...Mike told him not to raise

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<sup>11</sup>Attorney Schiek: Okay. Are you concerned that he [Huttner] might retaliate against you if he reviews Exhibit 1 [now App. p. 214 - 215]? Answer Skare: Of course. (App. p. 206).

<sup>12</sup>Skare stated that what Scaglione stated in her memo was fair and accurate. (App. p. 205).

<sup>13</sup>Skare stated in his deposition that Huttner criticized him on a daily basis. (App. p. 210).

<sup>14</sup>Kitty Campbell worked at EMC from approximately the spring of 2007 through the fall of 2007 as a claims adjuster, however, she was terminated in the fall of 2007. (App. p. 206 - 207).

<sup>15</sup>Skare stated that Karen Kerkow did state approximately 2 to 3 months before December of 2008 that she was looking for another job. (App. p. 209).

<sup>16</sup>Scaglione also stated that Skare told her that Huttner created a hostile work environment in December of 2008. (App. p 220).

his voice to him again and that he had the authority to fire people. (Mike actually snapped<sup>17</sup> his fingers and said, 'It's done'...)...**Tim is currently off work on STD<sup>18</sup> and he's worried about retaliation for being out.** Tim told me that he's never had to use counseling<sup>19</sup> before but he is going to and using medication for depression. Tim stated Mike uses his authority so no one will challenge him and he is rude to people.

(App. 214 - 215, emphasis added).

Skare stated specifically that Huttner treated Day, Coursolle, Kitty Campbell, Charity Leung<sup>20</sup>, and Rick Gavin in a negative fashion. (App. p. 208 - 210). After refreshing Skare's recollection of his document created by Scaglione in December of 2008, Skare stated, "He [referencing Huttner] made an uncomfortable work environment. If you want to define that has [sic] hostile, then it's hostile." (App. p. 210).

The following was stated at Skare's deposition regarding Huttner's intimidating and retaliating conduct:

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<sup>17</sup>Skare stated that Huttner's conduct during this encounter was intimidating. (App. p. 210).

<sup>18</sup>Skare stated that his back pain was a result of the way Huttner treated him at work. (App. p. 210).

<sup>19</sup>Skare stated in his deposition that he had to go on anti-depressants because of the work environment created by Huttner. (App. p. 211). Skare went on to state that he is still currently on anti-depressants because of the work environment at EMC. (App. p. 211).

<sup>20</sup>Charity Leung was a junior adjuster and she indicated to Skare that Huttner was intimidating and that he criticized her plenty. (App. p. 209).

Attorney Schiek: Okay. Did Mr. Huttner do anything else while you worked at the company that you would consider intimidating?

Answer Skare: Raised his voice, appear very angry and intimidating...

Attorney Schiek: Okay. You state that you felt that he [Huttner] was going to retaliate against you; is that correct?

Answer Skare: Yes.

(App. p. 210 - 211).

Skare also stated the following regarding retaliation by Huttner:

Attorney Schiek: **Okay. Are you concerned, as you sit here today, that Mr. Huttner will retaliate against you if he reads your deposition?**

Attorney Ella: Objection.

Answer Skare: **Yes.**

Attorney Schiek: Why's that?

Answer Skare: I'm more worried about subtle retaliation than overt direct retaliation. I think overt direct retaliation, probably not in the cards. Subtle, indirect retaliation is always possible. And I don't know whether it would happen or not.

Attorney Schiek: Why don't you think that there would be any direct consequences to you?

Answer Skare: Because if it was direct and obvious, I think he [Huttner] would understand that that wouldn't be tolerated at the company. So I don't believe it would be direct so that everyone would see it, or I would even – I believe it would not be direct because he would understand that that cannot be tolerated.

(App. p. 212).

**C. Complaint filed by Rick Gavin.**

Rick Gavin (hereinafter “Gavin”) has worked for EMC for 23 years, and while Huttner was his supervisor he was a senior claims adjuster. (App. p. 194).

On April 6, 2009, Gavin made a complaint to Deana Clark, who worked in the home office human relations department, who in turn made a memo of the complaint to Kristi Johnson, who is the head of the human relations department. (App. p. 197; see also App. p. 217). Gavin stated on April 6, 2009, that Huttner was intimidating, very abrasive and very confrontational. (App. p. 198; see also App. p. 201 - 202).

Gavin stated the following regarding retaliation by Huttner, “...I did not fear retaliation at that point, but that may have been – I think what this [referencing App. p. 201 - 202] was saying is I might have had a concern of taking a complaint or something further than this for fear of some retaliation....Again, I will say I was not at that point in time fearing retaliation, **I was only fearing retaliation if the situation worsened.**” (App. p. 199, emphasis added). Gavin also stated, “Mr. Huttner does not communicate with his employees on a regular basis unless there are criticisms to be stated.” (App. p. 200; see also App. p. 201 - 202).

Gavin stated in his complaint to human resources<sup>21</sup>, entitled “Employee Complaint”, on or about April 6, 2009, the following:

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<sup>21</sup>Gavin stated that what was described in Deanna Clark’s memo was fair and accurate. (App. p. 198).

This employee [Gavin] wanted to express concern regarding the Claims Manager, Michael Huttner...Huttner, just a belief that he has a very abrasive way of dealing with people. The employee stated that the Claims Manager [Huttner] is very confrontational...It was stated that there are 6 office adjusters currently and that 4 of them would leave tomorrow if the economy was in a better situation...This employee would like to work out his last years with more peace in the department and **does not want to make any waves due to the fear of retaliation....**It was stated that Mr. Huttner does not communicate with his employees on a regular basis unless there are criticisms to be stated.

(App. p. 201 - 202, emphasis added).

Gavin also stated the following relating to the statement given by Coursolle to Scaglione on November 7, 2006:

Attorney Schiek: Okay now, I would ask you to review the bottom of page bate stamp 208 and 209 [referencing Coursolle's statements to Scaglione on November 7, 2006, which is App. p. 136 - 137], have you read that?

Answer Gavin: Yes.

Attorney Schiek: And would you agree or disagree that Mr. Coursolle portrayed Mr. Huttner in a negative fashion in this statement?

Answer Gavin: Yes, yes. I would read it as a negative.

(App. p. 195).

Gavin stated the following regarding the relationship between Coursolle and Huttner, "...My sense was that John [Coursolle] felt that Mr. Huttner was making unrealistic demands upon him in terms of workload and job performance...So again, My best recollection is that I was aware that there was tension between Mr. Coursolle and Mr. Huttner.." (App. p. 196). Gavin also stated to Coursolle that there was a stressful situation between Coursolle and Huttner. (App. p. 197).

**III. Huttner denied that he harassed, coerced, intimidated, oppressed, retaliated, or that he created a hostile work environment thus creating genuine issues of material fact because four adjusters, out of approximately seven during the relevant time frame, stated to the contrary.**

Huttner denied intimidating or threatening or retaliating against any of the claims adjusters, which is in direct contradiction to what four other claims adjusters (see testimony of Day, Skare, Gavin, and Coursolle above) stated. (App. p. 273).

Huttner denied ever shaking a file in Coursolle's face<sup>22</sup>. (App. p. 270, 272).

Huttner denied stating to Coursolle that he had a target on his back. (App. p. 270).

Huttner denied pointing a finger at Coursolle or snapping his fingers. (App. p. 271).

Huttner denied ever yelling at an employee. (App. p. 272).

**IV. Coursolle was constructively discharged.**

It is important to note that the Appellant did not know why he was harassed and retaliated against by Huttner until after the Appellant was made aware of the fact that the confidential interview that Appellant gave to Scaglione on November 7, 2006 was shared with Huttner. (App. p. 232, 238 - 239).

Day, Coursolle, Gavin and Skare stated that Huttner's illegal conduct was occurring on a daily basis. (See App. p. 124 - 133, 193 - 215, 225 - 266, 274 - 277, emphasis added).

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<sup>22</sup>This is in direct contradiction to what Coursolle stated that Huttner shook a file in his face. (App. p. 225 - 266; see also App. p. 274 - 277).

In a letter dated December 1, 2008, to EMC, Coursolle outlines in detail how Huttner treated him differently after Coursolle was interviewed regarding Day's investigation in November of 2006. (App. p. 274 - 277; see also App. p. 39 - 40, see also App. p. 44 - 69; see also deposition of Coursolle, App. p. 225 - 266). Coursolle stated in a letter dated December 1, 2008, to EMC, "Let me say the last 6 months of my employment at EMC were absolutely devastating, I experienced **harassment, discrimination, intimidation, retaliation**, mental anguish, emotional distress and daily ongoing abuse....The disparate impact of the claim managers [Huttner] [sic] discrimination, harassment, intimidation, retaliation and abuse is clear." (App. p. 274, 277, emphasis added). Coursolle also stated in his deposition that he was harassed by Huttner on a daily basis. (App. p. 274 - 277; see also App. p. 39 - 40; see also App. 44 - 69; see also deposition of Coursolle, App. p. 225 - 266).

Coursolle also stated that prior to February of 2006 all of his performance evaluations were "exceeds standards", however after Huttner became Coursolle's manager his performance evaluations declined. (App. p. 275). Coursolle, much like the three other employees who worked as adjusters, stated that Huttner criticized and/or harassed and/or portrayed him in a negative fashion on a daily basis. (App. p. 274 - 277; see also App. p. 39 - 40; see also App. p. 44 - 69; see also deposition of Coursolle, App. p. 225 - 266).

Coursolle, like Skare, stated that as a result of Huttner's conduct he had to seek medical attention. (App. p. 274 - 277; see also App. 203 - 215). Coursolle stated in his letter dated December 1, 2008 to EMC the following:

The last six months of my employment was extremely hard on me. There has been and continues to be many sleepless nights. At one of my doctor visits, a physical exam, my blood pressure was at 140/94 and my doctor asked me about its elevated level. I am normally 107/72 and explained the stress at work and a recent memo I had received from my manager. I laid awake at nights worried about my job and how I was being treated. I worried about how I would support my family, how we would make it, if we could pay the bills and what to tell the kids. **I was afraid I was going to have a nervous breakdown or a heart attack and the health reasons were a huge concern.**

(App. p. 277, emphasis added).

Skare stated in his deposition that he had to go on anti-depressants because of the work environment created by Huttner. (App. p. 211). Skare went on to state that he is still currently on anti-depressants because of the work environment created by Huttner at EMC. (App. p. 211).

Coursolle suffered a constructive discharge because he was forced to work under hostile conditions.

**V. There was a contract between EMC and Appellant, which Appellant received and relied upon on April 10, 2000.**

Appellant relies on the employee handbook<sup>23</sup> of EMC (a/r/a “employee handbook”), regarding his breach of contract claim. (App. p. 183 - 192). The employee handbook of EMC was provided to the Appellant via Appellant’s second request for production of documents number 1, which stated, “Any and all handbooks, policies and procedures for the Defendants [now Appellant].” The employee handbook is the only employee handbook that was provided by EMC and most significantly Coursolle executed a document entitled “Employee Handbook Receipt” dated April 10, 2000. (App. p. 278). It is Appellant’s position that the employee handbook creates contractual claims.

On or about April 10, 2000, the Appellant was hired by the EMC, and at that time, and at all other relevant times the employee handbook, was the contract Appellant relied on for his breach of contract claims. Appellant entered into a unilateral contract with EMC, and his employment with EMC was his consideration.

The employee handbook<sup>24</sup> states the following:

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<sup>23</sup>Day also stated that EMC’s employee handbook was in full force in November of 2006. (App. p. 129).

<sup>24</sup>The specific handbook or specific language of EMC’s policies which the Appellant relied on were also disclosed in the Appellant’s third amended answer’s to Respondents’ Interrogatories. (App. p. 44 - 69).

Therefore, beyond strict compliance with legal rules, every covered person should act according to the highest standards of business integrity and honesty in all areas and in all facets or her facets of his or her relationship with the Companies....No one will be penalized for reporting in good faith a suspected violation, or for questioning a practice of the Companies. The Companies will take all such reports seriously, and each will be investigated accordingly. **Corporate policy prohibits any retribution or retaliation against covered persons for making such reports...**This Code is adopted effective immediately and applies to all employees, officers and directors of Employers Mutual Casualty Company, its operating subsidiaries and affiliated companies (collectively know and doing business as EMC Insurance Companies) and its down-stream publicly-held holding company, EMC Insurance Group Inc....The company will not retaliate against you for filing a complaint and will not knowingly permit retaliation by management employees or your co-workers...If you believe you have been harassed on the job, or if you are aware of the harassment of others, you should provide a written or verbal complaint to your immediate supervisor, location manager, senior management or the Human Resource Department [this is the procedure Day proceeded with] as soon as possible. Your Complaint should be as detailed [see Day's Complaint, App. p. 132 - 133] as possible, including the names of individuals involved, the names of any witnesses, direct quotations when language is relevant and any documentary evidence (notes, pictures, cartoons, etc.)...Applicable law also prohibits retaliation against any employee by another employee or by the company for using this complaint procedure or for filing, testifying, assisting or participating in any manner in any investigation, proceeding or hearing conducted by a governmental enforcement agency. Additionally, the company will not knowingly **permit any retaliation against any employee who complains of prohibited harassment or who participates in an investigation [this is exactly the conduct Coursolle states occurred, i.e. he participated in the investigation regarding Day and then later was retaliated against by Huttner]...**Any employee who engages in prohibited harassment, including any manager who knew about the harassment but took no action to stop it, may be held personally liable for monetary damages....**Workplace Violence Policy.** The company recognizes that violence in the workplace is a growing problem nationwide necessitating a firm, considered response by employers. The costs of workplace violence are great, both in human and financial terms. We believe that the safety and security of company employees is paramount. Therefore, the company adopts this policy regarding workplace violence. Acts of threats of physical violence, including intimidation, harassment, and/or coercion, that involve or affect the company or that occur on company property or in the conduct of company business off company property, will not be tolerated....**Workplace violence is any intentional**

**conduct that is sufficiently severe, offensive, or intimidating to cause an individual to reasonably fear for his or her personal safety or the safety of his or her family, friends, and/or property such that employment conditions are altered or a hostile, abusive, or intimidating work environment is created for one or several company employees...Rather, it [workplace violence] refers to behavior that is personally offensive, threatening or intimidating.**

(App. p. 183 - 192, emphasis added).

Coursolle stated the following regarding the language contained in EMC's employee handbook:

**Answer Coursolle:** Well, the first day of my hire, on April 10<sup>th</sup>, 2000, I signed for and was given an employee handbook [App. p. 183 - 192<sup>25</sup>], which outlines harassment, intimidation, discrimination, many things in it, and that I'm to cooperate with any type of home office investigation....

**Attorney Ella:** My question is, this is your assertion because it comes from your Complaint, right, paragraph 49? What is the basis for your assertion that EMC has a contractual obligation to protect you from unlawful and tortious actions of its employees?

**Answer Coursolle:** The basis of it is in their own employee handbook where they talk about it.

**Attorney Ella:** Are you claiming that the handbook creates a contract?

**Attorney Schiek:** Objection, calls for a legal conclusion. You can answer if you know.

**Attorney Ella:** Do you know?

**Answer Coursolle:** I don't know.

**Attorney Ella:** Do you have a copy of the handbook?

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<sup>25</sup>See also App. p. 278.

Answer Coursolle: **I did at one time.**

Attorney Ella: Did you look at a copy of the handbook before you filed this Complaint?

Answer Coursolle: I'm not sure.

Attorney Ella: So this is based on your memory of the handbook?

Answer Coursolle: Probably.

Attorney Ella: Why do you say probably, what else is it based on?

Answer Coursolle: Well, most handbooks are pretty much the same, I don't know if you want to use the term generic. But most of them have those protections for their employees in them.

Attorney Ella: So it wasn't so much your memory, but it was your assumption of what was in there, because all handbooks have these provisions, or most?

Answer Coursolle: I believe so. We did ask for it prior to this and never received it in the discovery.

Attorney Ella: When you say "I believe so" you're saying that you believe that the Complaint, Exhibit 1, that you filed was based on your assumption of what language was in the handbook?

Answer Coursolle: **And what I had read previously years ago.**

Attorney Ella: **And your memory?**

Answer Coursolle: **Yes.**

Attorney Ella: So as you sit here today you are able to tell me what specific language you're relying on for this Count 5?

Answer Coursolle: No. Because I just found out today that we just got that handbook yesterday or something.

Attorney Ella: But when you filed the Complaint on February 24, 2009, did you have – did you know that there was a handbook with this policy in it?

Attorney Schiek: Objection, asked and answered. This is getting repetitive.

Attorney Ella: But you didn't know the exact language?

Answer Coursolle: I didn't know the exact language.

Attorney Ella: And you think that the obligation is to protect you from unlawful actions of other employees?

Attorney Schiek: Objection, the document will speak for itself. You can answer if you know what the document says.

Attorney Ella: What document do you think your counsel is referring to?

Answer Coursolle: The employee handbook.

Attorney Ella: The one that you didn't consult before you – I'm concerned about what your Complaint says, Mr. Coursolle.

Attorney Schiek: Is there a question there, counselor?

Attorney Ella: You believe that the handbook states that EMC will agree to protect you from unlawful and tortious actions of other employees?

Answer Coursolle: I believe that's so, yes. Do you have a copy<sup>26</sup> of it, we can look at it right now?

Attorney Ella: And if that's the case, what did you do – if it's a contract what did you do to fulfill your terms of the contract?

Attorney Schiek: Objections, calls for a legal conclusion.

Answer Coursolle: To fulfill my obligation of the contract?

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<sup>26</sup>Attorney Ella never showed Coursolle a copy of the employee handbook. (App. p. 225 - 266).

Attorney Ella: Yeah. Did this contract require you to do anything?

Answer Coursolle: Certainly. To work hard, put in as much time as you can. I settled many cases, negotiated many settlements, had a lot of take down in huge reserves, I helped towards the profitability of the company. My record speaks for itself, six years prior to when this ever happened.

Attorney Ella: Do you claim that EMC breached the contract?

Attorney Schiek: Objection, calls for a legal conclusion.

Answer Coursolle: I believe they did.

Attorney Ella: And that's because they did not protect you from unlawful and tortious actions of other employees?

Answer Coursolle: **They did not protect me from the retaliation I experienced after giving the information to the human resources person, Lisa [Scaglione], about the Susan Day litigation.**

(App. p. 232, 238 - 239, emphasis added).

Coursolle, unequivocally stated that he had read the employee handbook the first day he was hired in April 10, 2000 and the employee handbook outlined that it was against EMC's policies to harass, intimidate, discriminate and/or not cooperate with an investigation. (App. p. 225 - 266; see also App. p. 278 and 183 - 192). When Coursolle filed his Complaint against EMC he relied on his memory of the employee handbook of when he was first hired by EMC in April of 2000. (App. p. 232, 238 - 239). In any event, the employee handbook confirms Coursolle's recollection of the contract, that during all relevant times, it was against EMC's policies to harass, retaliate, intimidate, discriminate and/or not cooperate with an investigation conducted by EMC. (App. p. 183 - 192).

Coursolle did not know the exact language contained in EMC's employee handbook, but Coursolle did know that generally the language contained in EMC's employee handbook protected him from any type of retaliation for being honest in a good faith investigation into Huttner's conduct. (App. p. 238 - 239). Coursolle also stated that he worked hard for EMC as consideration that EMC comply with their policies on harassment, retaliation, etc. (App. p. 225 - 266).

Day also stated the following relating to retaliation by management:

Attorney Schiek: Okay. So if Mr. Coursolle participated in an investigation, it would have been against the company's rules to retaliate against him for portraying Mr. Huttner in a negative light?

Attorney Ella: Objection.

Attorney Schiek: You can go ahead and answer that?

Answer Day: Yes.

(App. p. 128 - 129; see also App. p. 183 - 192). Day further stated that Huttner violated EMC's workplace violence policies. (App. p. 128 - 129; see also App. p. 183 - 192).

Scaglione also stated that EMC has a zero tolerance policy regarding harassment and discrimination. (App. p. 218; see also App. p. 139). Scaglione stated in response to the formal complaint filed by Day that:

This letter will serve as a response to the formal complaint made by Ms. Day on November 1, 2006. EMC Insurance Companies has implemented a Code of Corporate Conduct [App. p. 183 - 192] which addresses discrimination complaints, as well as other types of concerns. The Companies have zero tolerance for such conduct as that alleged by Ms. Day. All complaints, formal or informal, are investigated.

(App. p. 223 - 224; see also App. p. 139).

Scaglione stated the following regarding the company policy regarding retaliation:

Attorney Villaume: Okay. What is the retaliation policy of the company?

Answer Scaglione: “I don’t remember it [referencing the company policy on retaliation in the employee handbook], but it’s just basically that we don’t condone any type of retaliation.

Attorney Villaume: Okay. **Would it be against the company policy, as you understand it, for a manager to retaliate against an employee who’s made statements in an investigation that were not complimentary of the manager?**

Answer Scaglione: **Yes.**

(App. p. 224, emphasis added).

## STANDARD OF REVIEW AND LEGAL ARGUMENTS

### I. STANDARD OF REVIEW.

On appeal from summary judgment, the Minnesota Court of Appeals asks whether (1) there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990); see also Alsides v. Brown Institute, Ltd., 592 N.W.2d 468, 471 (Minn. Ct. App. 1999). The Minnesota Court of Appeals must view the evidence in the light most favorable to the party against whom judgment was granted. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). Summary judgment is appropriate when there are no genuine issues of material facts and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. However, when considering questions of law, a reviewing court is not bound by and need not give deference to a district court's determination. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

It is Appellant's position that he has established genuine issues of material facts that will affect the outcome of the case. When these facts and evidence are viewed in the light most favorable to the Appellant, he has established genuine issues of material facts which makes granting a Summary Judgment motion inappropriate.

**II. WHEN VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE APPELLANT, APPELLANT HAS STATED A CAUSE OF ACTION UNDER THE WHISTLE BLOWER ACT BECAUSE HE COOPERATED WITH AN INVESTIGATION AND DURING THE INVESTIGATION HE STATED THAT HUTTNER WAS AN INTIMIDATING MANAGER AND AFTER COURSOLE PARTICIPATED IN THE INVESTIGATION OF DAY HE WAS RETALIATED AGAINST BY HUTTNER.**

The Whistle blower statute, Minn. Stat. § 181.932, subd. 1 states:

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:

- (1) 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;
- (2) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry...

It is the position of the Appellant that the plain language of the whistle-blower statute prohibits an employer from retaliating against an employee who participates in an investigation of a complaint filed alleging a suspected violation or violation of state or federal law. Minn. Stat. § 181.932.

The whistle-blower law states that an employee may not be discharged for “report[ing] 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..the employee is requested by a public body or office to participate in an investigation hearing, inquiry.” Minn. Stat. § 181.932, subd. 1 (1) (2). The statute does not require an employee to make a report with an outside agency.

To establish a prima facie case a whistle blower claim under Minnesota Statute § 182.932, a plaintiff must show: 1) statutorily-protected conduct by the employee; 2) adverse employment action by the employer; and 3) a causal connection between the two. Hubbard v. United Press Int'l, 330 N.W.2d 428, 444 (Minn. 1983); see also Cox v Crown Coco, Inc., 544 N.W.2d 490, 496 (Minn. Ct. App. 1996). Generally, the threshold of proof necessary to establish a prima facie case of retaliation is minimal. Green v. Franklin Nat. Bank of Minneapolis, 459 F.3d 903 (8<sup>th</sup> Cir. 2006), rehearing and rehearing en banc denied.

The question of good faith is one of fact to be determined by the fact finder. Cokely v. City of Otsego, 623 N.W.2d 625, 630 (Minn. Ct. App. 2001); Barker v. Sharp, 38 N.W.2d 221, 223 (Minn. 1949); see also McDonald v. Stonebraker, 255 N.W.2d 827, 831 (Minn. 1977). There has also been no claim that Coursolle's statement made on November 7, 2006 was made for an improper purpose.

“For purposes of the whistle blower statute, it is irrelevant whether there were any actual violations; the only requirement is that the reports of state law violations were made in good faith.” Hedglin v. City of Willmar, 582 N.W.2d 897, 902 (Minn. 1998); see also Bohn v. Cedarbrook Engineering Co., 422 N.W.2d 534, 535 (Minn. Ct. App. 1988).

In addition, the employee does not need to identify a specific law at issue as long as the report implicates a violation of some law or rule adopted pursuant to law. Freeman v. Ace Telephone Association, 404 F.Supp. 1127, 1140 (D. Minn. 2005); see also Hedglin

v. City of Willmar, 582 N.W.2d 897, 901-02 (Minn. 1998); Gee v. Minnesota State Colleges & Univ., 700 N.W.2d 548, 556 (Minn. Ct. App. 2005); Abraham v. County of Hennepin, 639 N.W.2d 342, 345-55 (Minn. 2002). An actual violation of law is not necessary, but the reported conduct must at least implicate a violation of law. Obst v. Microtron, Inc., 614 N.W.2d 196, 200 (Minn. 2000).

Clearly, Coursolle was requested by EMC to participated into an “investigation” by EMC during the Day internal investigation. At the very least, the request by EMC was an “inquiry”. The fact that EMC conducted an “investigation” or “inquiry” into the Day situation is not disputed. Then after Coursolle participated in the whistle blower violation stated by Day he was treated in an adverse manner by Huttner. The whistle blower law specifically protects individuals like Coursolle. Coursolle engaged in statutorily protected conduct.

The original Complaint stated that the Appellant was retaliated against under the whistle blower statute for participating in the Day investigation. (App. p. 06 - 09). The Complaint also stated, “[t]hat during the course of the 2007 - 2008 work year Plaintiff made repeated good faith reporting of violations or suspected violations of laws in the workplace to EMC’s management, and specifically that Day had been harassed and intimidated by Huttner in violation of Minnesota law. As a result of Defendants’ [now Appellant] actions of complying with EMC’s investigation of Susan Day the Plaintiff [now Appellant] was constructively discharged.” (App. p. 6).

Second, Crawford<sup>27</sup> (a recent U.S. Supreme Court decision) held that the anti-retaliation protections extend to employees who speak out about harassment, not initiated by the employee's own initiative, but in answering questions during an employer's investigation of a co-worker's complaints. Crawford v. Metropolitan Government of Nashville and Davidson County, 129 S.Ct. 846 (2009).

Crawford brought a claim under Title VII of the Civil Rights Act which makes it unlawful for an employer to discriminate<sup>28</sup> against a person who has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. Crawford, at 848; see also 42 U.S.C. § 2000e-3(a). In Crawford, Metro (a local government agency) conducted an internal investigation into rumors of sexual harassment by the Metro relations director Hughes. Id. at 848. During the course of Metro's internal investigation Crawford stated that Hughes had sexually harassed her. Id. at 848. Shortly thereafter Crawford was terminated. Id. at 848.

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<sup>27</sup>As of the date of filing this Brief, no other cases in Minnesota have referenced the Crawford decision.

<sup>28</sup>This clause is almost identical to Minn. Stat. 181.932, which states, "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; the employee is requested by a public body or office to participate in an investigation, hearing, inquiry."

The U.S. Supreme Court held that anti-retaliation provision under Title VII<sup>29</sup> protect “an employee who speaks out about discrimination not on her own initiative, but in an answering questions during an employer’s internal investigation.” Id. at 848. This is very similar to what is occurred in Appellant’s situation. Appellant, during an internal investigation conducted by EMC, as a result of Day filing a formal complaint stating that Huttner violated certain laws, made statements that bolstered Day’s position that she was being illegally harassed in violation of Minnesota or Federal laws.

The Crawford decision went on to state, “an employee reporting discrimination in answer to an employer’s questions could be penalized with no remedy, [and thus] prudent employees [such as Appellant] would have a good reason to keep quiet about Title VII offenses.” Crawford, at 848.

It is the Appellant’s position that on November 1, 2006, Day, made a formal complaint against Huttner pursuant to the employee handbook stating specifically that Huttner’s conduct was harassing, intimidating, created a “hostile work environment”, and that Huttner’s conduct was also discriminatory, coercive and oppressive, and that he was violating the Unfair Claims Practices Act and HIPPA. Day stated that she filed the formal complaint in good faith. However, even assuming in arguendo that Day filed her

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<sup>29</sup>In several instances the Minnesota Human Rights Act, much like the Minnesota Whistle Blower Act, has been construed using principles developed in Title VII cases “[b]ecause of the substantial similarities in the language and purposes of the two statutes.” Hubbard v. United Press International, Inc., 330 N.W.2d 428, 441 (Minn. 1983).

complaint in bad faith, it is completely irrelevant because Coursolle would still be required to participate in the investigation conducted by EMC pursuant to the whistleblower statute and the employee handbook.

As a result of Day filing the formal complaint against Huttner, on November 7, 2006, Scaglione, interviewed four claims adjusters, including Coursolle.

Clearly, on November 7, 2006, Coursolle was reluctant to speak with Scaglione because he was fearful<sup>30</sup> that what he said to Scaglione regarding Huttner would be detrimental to his employment. Coursolle stated that people were scared to death of Huttner and that Huttner was intimidating. It is the position of the Appellant that Huttner knew on November 8, 2006 that Coursolle was unhappy and it is further the position of the Appellant that Huttner knew that Coursolle made negative comments about him as described in Scaglione's report dated November 16, 2006. In fact, Scaglione stated that Huttner brought up Coursolle's name before Scaglione stated anything regarding Coursolle.

Day specifically stated that if Huttner saw Coursolle's November 7, 2006 statement, Huttner would retaliate against Coursolle. Day, Skare, and Gavin were all afraid that Huttner would retaliate against them for filing their complaints.

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<sup>30</sup>The fact that Coursolle participated in an investigation and that was the violation of law reported was also disclosed ad naseum in Appellant's third amended Answers. (See App. p. 44 - 69).

Moreover, the fact that Day's original lawsuit was dismissed does not mean that Respondents' claims are validated, instead Day's assertions that Huttner's conduct constituted harassment<sup>31</sup>, intimidation, created a "hostile work environment", and that Huttner's conduct was also discriminatory, coercive and oppressive, bolsters Coursolle's claims. Day also stated that she worked in a fear ridden work environment and that Huttner's management qualities consisted on fear and intimidation. Day's assertions that Huttner's conduct constituted harassment, intimidation and retaliation are confirmed by adjusters Skare and Gavin via their formal complaints with EMC against Huttner, not to mention Huttner's conduct toward Coursolle.

Day stated that if Huttner reviewed the statement made by Coursolle on November 7, 2006, **Huttner would retaliate against Coursolle.** (Emphasis added).

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<sup>31</sup>Minn. Stat. § 609.749 (criminal harassment statute), states, "harass" means to engage in intentional conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated and causes this reaction on the part of the victim. Minn. Stat. § 609.72 (criminal disorderly conduct statute) states, whoever does any of the following in a public or private place, including on a school bus, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor: (1) engages in brawling or fighting; or (2) disturbs an assembly or meeting, not unlawful in its character; or (3) engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

Skare, another adjuster, described Huttner's conduct as harassing and intimidating. Skare specifically stated in December of 2008, that Huttner's conduct created a "hostile environment" and that Huttner gave negative comments or criticisms to Skare on a daily basis. Skare also stated unequivocally that he was fearful of retaliation by Huttner for being deposed as a result of Coursolle's litigation.

Gavin, another adjuster, stated on April 6, 2009, that Huttner was intimidating, very abrasive and very confrontational. Gavin stated that he was fearful of retaliation by Huttner. Gavin stated that Huttner only communicated with employees to criticism them.

Three insurance adjusters supervised by Huttner since November of 2006, not including the Appellant, have complained that Huttner's conduct created a hostile work environment and that Huttner did retaliate against employees. The employees also stated that Huttner's conduct was occurring on a daily basis.

Coursolle stated in a letter dated December 1, 2008, to EMC, "Let me say the last 6 months of my employment at EMC were absolutely devastating, I experienced **harassment, discrimination, intimidation, retaliation**, mental anguish, emotional distress and daily ongoing abuse." (Emphasis added).

The district court focused on the fact that the Appellant did not report any violations of State or Federal law or rule. (App. p. 302). It has been the position of the Appellant, from the beginning, that as a result of Appellant participating in the Day investigation he was retaliated against by Huttner. (App. p. 44 - 68). It is the Appellant's

position that Day filed a good faith whistle blower claim against EMC and that as a result of the employment contract and the whistle-blower statute EMC was mandated to conduct an internal investigation and Coursolle was mandated to participate in the investigation. On November 1, 2006, Day made a formal complaint against Huttner pursuant to the employee handbook stating specifically that Huttner's conduct was harassing, intimidating, created a "hostile work environment", and that Huttner's conduct was also discriminatory, coercive and oppressive, and that he was violating the Unfair Claims Practices Act and HIPPA. As a direct result of Day filing a formal complaint against Huttner Coursolle was interviewed by EMC.

During the internal investigation filed by Day, Coursolle essentially bolstered Day's position and Coursolle also portrayed Huttner in a negative fashion. It is the position of the Appellant that as a result of Appellant cooperating with the Day investigation, Huttner retaliated against him. It is the position of Coursolle that this is in fact a violation of the whistle blower statute. This was in fact a report made by Coursolle.

If the Minnesota Court of Appeals determines that there were no violations then an employee participating in an investigation, would be discouraged from providing honest statements, and essentially the employee would be penalized with no remedy, and employees such as Coursolle would have good reason to keep quiet relating to alleged violations or suspected violations of law reported by other employees. It would be an absurd result if a person who participated in an investigation and then was later

terminated or constructively discharged as a direct result of participating in a whistle blower investigation was not protected under the whistle blower act. Essentially, the person participating in a whistle blower investigation would have no legal remedy.

This was also stated extensively in Appellant's memorandum of law to the district court and in Appellant's interrogatories.

When these facts and evidence are viewed in the light most favorable to the Appellant, he has established genuine issues of material facts which makes a Summary Judgment motion regarding his whistle blower claim inappropriate.

**III. WHEN VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE APPELLANT, THE APPELLANT HAS SET FORTH SUFFICIENT FACTS TO SUSTAIN A CLAIM FOR BREACH OF CONTRACT AGAINST EMC BECAUSE EMC FAILED TO PROVIDE APPELLANT WITH A WORKING ENVIRONMENT THAT WAS FREE FROM HARASSMENT, RETALIATION, INTIMIDATION OR THEY DID NOT PROVIDE AN ENVIRONMENT WHICH PROHIBITED COOPERATION WITH AN INVESTIGATION THAT WAS MADE IN GOOD FAITH.**

The elements of a breach of contract claim are: (1) the formation of a contract; (2) performance by plaintiff of any conditions precedent; and (3) a breach of the contract by defendant. Industrial Rubber Applicators, Inc. v. Eaton Metal Prods. Co., 285 Minn. 511, 513, 171 N.W.2d 728, 731 (Minn. 1969) (whether based on express or implied contract). The usual employer-employee relationship is terminable at the will of either party. Cederstrand v. Lutheran Brotherhood, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (Minn. 1962).

Whether a party has breached a contract is a question for the trier of fact. Parkside Mobile Estates v. Lee, 270 N.W.2d 758, 761 (Minn. 1978). The existence and terms of a contract are for determination by a trier of fact. Minnesota Timber Producers v. American Mutual Insurance, 766 F.2d 1261, 1265 (8th Cir. 1985), rehearing and rehearing en banc denied, (Aug. 20, 198) (citing McEwen v. State Farm Mutual Insurance, 281 N.W.2d 843, 845-46 (Minn. 1979)). When the terms of an agreement are at issue, the parties to the contract should have an opportunity to present evidence to clarify or explain the terms. Donnay v. Boulware, 144 N.W.2d 711, 716 (Minn. 1966).

It is important to note that if employment contracts are at issue then person(s) drafting the document bear the burden that contract language is clear and any ambiguities are resolved in favor of the non-drafting party. Marso v. Mankato Clinic, Ltd., 153 N.W.2d 281, 289 (Minn. 1967) (clinic that drafted all employment contracts at issue bore burden of making contract language clear and court would resolve any ambiguity against the drafter). The rule is clear that when the meaning of an employment agreement is uncertain all doubts and ambiguities must be resolved against the one who prepared it. Id. Where ambiguity exists, and construction depends upon extrinsic evidence, the proper construction is a question of fact for the jury. Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn. 1979). Clearly, the employment contract was drafted by EMC and therefore any ambiguities must be resolved in favor of Coursolle.

“A promise of employment on particular terms, if in the form of an offer and if accepted by the employee for valuable consideration, may create a binding unilateral contract which will alter an at-will contract.” Quoting Ruud v. Great Plains Supply, Inc., 526 N.W.2d 369, 371 (Minn. 1995); citing Pine River State Bank v. Mettill, 333 N.W.2d 622, 626 (Minn. 1983); see also Larson v. Koch Refining Co., 920 F. Supp. 1000, 1007 (D. Minn. 1996).

The requirements for the formation of a binding unilateral employment contract are an offer, communicated to and accepted by the offeree (Coursolle), and consideration. Tobias v. Montgomery Ward Co., 362 N.W.2d 380, 381 (Minn. Ct. App. 1985); Larson v. Koch Refining Co., 920 F. Supp. 1000, 1007 (D. Minn. 1996) (holding that a binding unilateral employment contract is created when there is a “promise of employment on particular terms, if in the form of an offer and if accepted by the employee for valuable consideration.”); Ruud v. Great Plains Supply, Inc., 526 N.W.2d 369, 371 (Minn. 1995) (holding that statements made by employer to employee were too indefinite to form an offer for a unilateral contract), citing Pine River State Bank v. Mettill, 333 N.W.2d 622, 626 (Minn. 1983).

With a unilateral contract, the offeree is not bound to perform at all, and the offeror is not bound to perform until performance by the offeree; *but on performance by the offeree, the proposal of the offeror is converted into a binding promise and a valid contract is formed.* See Ellsworth v. Southern Minnesota Ry. Extension Co., 18 N.W.

822, 823 (Minn. 1884) (emphasis added). Whether a proposal is meant to be an offer for an unilateral contract is determined by the outward manifestation of the parties. Pine River State Bank, 333 N.W.2d at 626.

A. EMC made Clear and Definite Promises to Coursolle.

The offer must be definite in form and communicated to the offeree, and may come from the general policy statements. Pine River State Bank, 333 N.W.2d at 626; see also Lee v. Fresenius Medical Care, Inc., 741 N.W.2d 117, 124 (Minn. 2007) (The employer's employee handbook constituted an enforceable employment contract between employer and employee when the employee handbook at issue was received by the employee [similar to when Coursolle acknowledged receipt of the employee handbook of the Respondents], evidenced by the employee's acknowledgment that she received the handbook, and further, the employer retained the employee after the employee received the handbook and the employee continued on the job for almost two years).

An offer must be sufficiently definite to form the basis of a contract. See Cameron v. A. Booth & Co., 99 Minn. 513, 108 N.W. 514, 514 (Minn. 1906). If an offer is so indefinite as to make it impossible for a court to decide what it means and to fix exactly the legal liabilities of parties, its acceptance cannot result in an enforceable contract. See Holt v. Swenson, 252 Minn. 510, 90 N.W.2d 724, 728 (Minn. 1958); see also Ruud, 526 N.W.2d at 372 (holding that as matter of law statements made by employer to employee were too indefinite to form an offer for a unilateral contract).

EMC's employee handbook stated the company and/or any of their employees can not retaliate or harass an employee for participating in an investigation relating to employee misconduct. It is Appellant's position that the employee handbook creates contractual claims.

On or about April 10, 2000, the Appellant was hired by the EMC, and at that time, and at all other relevant times the employee handbook was the contract Appellant relied on for his breach of contract claims. Appellant entered into a unilateral contract with EMC, and his employment with the EMC was his consideration.

The employee handbook makes specific promises stating the following:

Additionally, the company will not knowingly permit any retaliation against any employee who complains of prohibited harassment or who participates in an investigation<sup>32</sup> [this is exactly the conduct Coursolle states occurred, i.e. he participated in the investigation regarding Day and then later was retaliated against by Huttner]...Workplace violence is any intentional conduct that is sufficiently severe, offensive, or intimidating to cause an individual to reasonably fear for his or her personal safety or the safety of his or her family, friends, and/or property such that employment conditions are altered or a hostile, abusive, or intimidating work environment is created for one or several company employees...Rather, it [workplace violence] refers to behavior that is personally offensive, threatening or intimidating.

(Emphasis added).

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<sup>32</sup>The district court stated that the Appellant did not identify a specific section of the Employee Handbook that he relied upon as an offer to form a unilateral contract and therefore the Appellant did not meet the first element of a unilateral contract. (App. p. 305). However, the Appellant maintains that this specific portion of the employment handbook was in fact breached because, when viewing the evidence in the light most favorable to Coursolle, Huttner was prohibited from retaliating against an employee who participated in an internal investigation and that policy never changed.

Coursolle, unequivocally stated that he had read the employee handbook the first day he was hired in April 10, 2000 and that the employee handbook outlined that it was against EMC's policies to harass, intimidate, discriminate and/or not cooperate with an investigation. When Coursolle filed his Complaint against EMC he relied on his memory of the employee handbook of when he was first hired by EMC in April of 2000 (he executed a document stating that he received the employee handbook). In any event, the employee handbook confirms Coursolle's recollection of the contract, that during all relevant times, it was against EMC's policies to harass, retaliate, intimidate, and/or not cooperate with an investigation with a good faith complaint. The language in the employee handbook is not discretionary, but is mandatory.

Day further stated that Huttner violated EMC's workplace violence policies and retaliation policies.

Scaglione also stated that EMC has a zero tolerance policy regarding harassment and discrimination. Scaglione stated the following regarding the company policy regarding retaliation:

Attorney Villaume: Okay. What is the retaliation policy of the company?

Answer Scaglione: "I don't remember it [referencing the company policy on retaliation in the employee handbook], but it's just basically that we don't condone any type of retaliation.

Attorney Villaume: Okay. **Would it be against the company policy, as you understand it, for a manager to retaliate against an employee who's made statements in an investigation that were not complimentary of the manager?**

Answer Scaglione: Yes.

(Emphasis added).

It is the position of the Appellant that a unilateral contract did in fact exist and that the policy that a manager could not retaliate against an employee for participating in an investigation never changed.

Based on the facts, Appellant asks, that as a matter of law, promises were made by EMC that were clear and definite on their face.

B. The promises made by EMC were accepted and relied upon by Coursolle and he performed adequate consideration to make the unilateral contract binding on EMC.

Further, a unilateral contract must be communicated to and accepted by the offeree (Coursolle), and consideration. Tobias, 362 N.W.2d at 381. A single performance may furnish consideration for any number of promises. Restatement (Second) of Contracts § 80 comment (1981); see Littell v. Evening Star Newspaper Co., 120 F.2d 36 (D.C. Cir. 1941); see also Pine River State Bank, 333 N.W.2d at 629. A definite promise in an employee handbook creates an offer for a unilateral contract, which employees can accept

by remaining at work. Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 - 27 (Minn. 1983).

Coursolle stated that he worked hard for EMC as consideration that EMC be held to comply with their policies on harassment, retaliation, etc.

Coursolle became aware of EMC's policies set out in their employee handbook in April of 2000, and he continued to work for EMC in reliance on EMC's promises that they would not retaliate and/or harass against the Appellant.

It is the position of the Appellant, that EMC's argument, at the district court level, that the Appellant was unaware of the employee handbook is completely disingenuous because the Appellant stated that he received the employee handbook on April 10, 2000, and that he did have a recollection of what the employee handbook stated before he filed a Complaint in district court. Appellant stated in his deposition that on April 10, 2000, he received a copy of the employee handbook and that from his recollection the employee handbook prohibited harassment, retaliation, intimidation, and that an employee had a duty to cooperate with an investigation conducted by EMC.

Coursolle respectfully requests, by and through counsel, for a determination that he formed a binding unilateral contract with EMC, which EMC breached.

- C. Coursolle complied with an investigation of Day filed in good faith, and then he was retaliated against by EMC, thus the Respondents breached their own employee handbook.

As discussed above, Coursolle has stated that Huttner breached the employee handbook because he retaliated and harassed Coursolle after he participated in the Day investigation.

- D. The specific policies stating that retaliation is prohibited by EMC trump the disclaimer provision in EMC's employee handbook.

It is clear that EMC's employee handbook allows the company the right to alter its policies. However, to accept EMC's argument that the disclaimer prevails under all circumstances, would lead to an absurd result because EMC could take any action it pleased and justify their actions with a disclaimer. The construction of EMC's employee disclaimer would render all provisions and its retaliation and/or harassment policies ineffectual.

In Fitzgerald the Minnesota Court of Appeals, while addressing an age discrimination claim allowed a breach of contract claim to proceed. Fitzgerald v. Norwest Corp, 382 N.W.2d 290, 292 (Minn. Ct. App. 1986) (language in employer's employee handbook relating specifically to discrimination issues outlined in the employee contract, raised issues of fact about whether it had become part of an employment contract). In Fitzgerald, the bank's employee handbook stated in part:

First Northwestern State Bank of Thief River Falls reaffirms its commitment to the staff and community that all employment policies and practices are without discrimination as to race, creed, religion, sex, color, age, national origin, handicapped, or to military veterans. We treat all applicants and employees without discrimination regarding hiring, training, compensation, promotion, transfer, education, opportunities, benefits, layoffs, tuition assistance, social and recreation programs. First Northwestern State Bank has developed an Affirmative Action Program approved by its Board of Directors to ensure that its commitment is more than just a statement but a strong and working program. We encourage all persons to seek employment with the Bank with the knowledge that this program is in effect. The administration of the program will be the direct responsibility of the designated Affirmative Action Coordinator. The Coordinator will be responsible for monitoring its efficiency and effectiveness. This individual will ensure that all employment policies and practices are based on our commitment as an Affirmative Action Equal Opportunity Employer.

Fitzgerald, 382 N.W.2d at 292.

Fitzgerald claimed that the statements in the employee handbook regarding affirmative action became a part of her employment contract. Id. However, the trial court found that these were only policy statements that the Bank would obey the law and therefore they could not be the basis for a breach of contract claim. Id.

The Minnesota Court of Appeals reversed the trial court and held:

The handbook provision here goes beyond merely stating that the Bank is an equal opportunity employer. The provision expressly indicates it is “more than just a statement.” It specifically refers to a strong and working program and encourages persons to seek employment with this knowledge. We believe that the handbook language is definite enough to raise legitimate fact questions about whether the provisions constituted an offer, and whether Fitzgerald’s subsequent actions constituted an acceptance such that the provisions became a part of the employment agreement and restricted the Bank’s right to terminate her employment. These questions are for a jury to resolve. Therefore, summary judgment on this issue was inappropriate.

Id. at 293.

In this case, EMC distributed a policy regarding retaliation and harassment that detailed the procedures an employee should follow consistent with common law and statutory law relating to retaliation and harassment and that policy never changed. EMC should not be allowed to avoid policies that are consistent with common and statutory laws regarding retaliation, otherwise, EMC could disclaim anything. In other words, a private company should not be allowed to retaliate and harass against an employee just because they have a disclaimer. To hold that EMC's disclaimer is sufficient would effectively undo provisions in their employee handbook that are specific enough to form the basis of a unilateral contract because it would make all such specific communications to employees meaningless and unenforceable.

The question of whether the employee handbook with its "disclaimer" provision, creates an implied contract of employment, are issues of fact for the trier of fact to decide.

At the very least, the Appellant has put forth genuine issues of material facts as to whether or not Coursolle relied on EMC's specific promises, that Coursolle gave valuable consideration, that the policies regarding EMC specifically prohibited any form of retaliation or harassment for being involved in an investigation, and clearly it is the position of Coursolle that EMC breached these policies because Coursolle was forced out of his employment.

**IV. WHEN VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE APPELLANT, APPELLANT HAS SET FORTH SUFFICIENT FACTS TO SUSTAIN A CLAIM FOR CONSTRUCTIVE DISCHARGE.**

“A constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination.” Navarre v. S. Washington County Schs., 652 N.W.2d 9, 32 (Minn. 2002) (quoting, Cont’l Can Co., Inc. v. State, 297 N.W.2d 241, 251 (Minn. 1980)). “The intolerable working conditions must have been created by the employer ‘with the intention of forcing the employee to quit.’” Pribil v. Archdiocese of St. Paul & Minneapolis, 533 N.W.2d 410, 412 (Minn. Ct. App. 1995) (quoting, Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981)); see also Neid v. Tassie's Bakery, 17 N.W.2d 357, 358 (Minn. 1945) (holding that “[a] discharge presumptively means that the employer no longer needs or desires the employee's services”).

The district court stated that, “No facts presented in this case show that EMC intended by any action or inaction to force Plaintiff to resign.” (App. p. 305). However, Day, Coursolle, Gavin and Skare stated that Huttner’s illegal conduct was occurring on a daily basis. (See facts discussed above).

In a letter dated December 1, 2008, to EMC, Coursolle outlines in detail how Huttner treated him differently after he was interviewed regarding Day in November of 2006.

Coursolle also stated that prior to February of 2006 all of his performance evaluations were “exceeds standards”, however after Huttner became Coursolle’s manager his performance evaluations declined. Coursolle, much like the three other employees who worked as adjusters, stated that Huttner criticized or harassed or portrayed him in a negative fashion on a daily basis.

Coursolle, like Skare, stated that as a result of Huttner’s conduct he had to seek medical attention. Coursolle stated in his letter dated December 1, 2008 to EMC the following:

The last six months of my employment was extremely hard on me. There has been and continues to be many sleepless nights. At one of my doctor visits, a physical exam, my blood pressure was at 140/94 and my doctor asked me about its elevated level. I am normally 107/72 and explained the stress at work and a recent memo I had received from my manager. I laid awake at nights worried about my job and how I was being treated. I worried about how I would support my family, how we would make it, if we could pay the bills and what to tell the kids. **I was afraid I was going to have a nervous breakdown or a heart attack and the health reasons were a huge concern.**

(Emphasis added).

Skare stated in his deposition that he had to go on anti-depressants because of the work environment created by Huttner. Skare went on to state that he is still currently on anti-depressants because of the work environment created by Huttner at EMC.

Coursolle suffered a constructive discharge because he was forced to work under hostile conditions as stated by Day, Coursolle, Gavin and Skare. The conditions created by Huttner were severe and pervasive. In short, there are sufficient facts in the record to raise genuine issues regarding whether Coursolle's working conditions led to his constructive discharge, thus making a summary judgment motion inappropriate.

### CONCLUSION

For all of the foregoing reasons and conclusions, the Appellant requests the Minnesota Court of Appeals to reverse the district court's decision. It would be inappropriate for the Minnesota Court of Appeals to grant Respondents' motion for summary judgment because when the evidence is viewed most favorably to the nonmoving party, Appellant has established genuine issues of material facts that the Appellant complied with an internal investigation thus filing a complaint, that there was a breach of an employment contract and that the Appellant was constructively discharged.

Respectfully Submitted,

Dated: July 12, 2010

**VILLAUME & SCHIEK, P.A.**



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COURT OF APPEALS NO.: A10-1036

STATE OF MINNESOTA  
IN COURT OF APPEALS

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John Coursolle,

Appellant,

vs.

**CERTIFICATE OF BRIEF  
LENGTH**

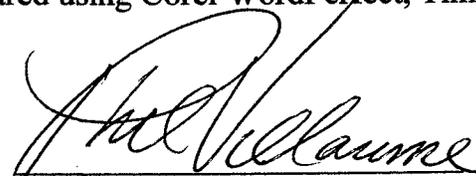
EMC Insurance Group, Inc., an Iowa  
Corporation, Employers Mutual Casualty  
Company, an Iowa Corporation, and Michael  
L. Huttner, an individual,

Respondents.

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I hereby certify that this brief conforms to the requirement of Minn. R. Civ. App.  
P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of  
this brief is 13,329 words. This brief was prepared using Corel WordPerfect, Times New  
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