

NO. A10-1036

State of Minnesota
In Court of Appeals

JOHN COURSOLLE,

Appellant,

vs.

EMC INSURANCE GROUP INC.,
EMPLOYERS MUTUAL CASUALTY COMPANY,
AND MICHAEL L. HUTTNER,

Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF LEGAL ISSUES

1. Was Appellant constructively discharged where he received a less favorable performance review and he was the subject of “criticism”?

Most Apposite Law: *Navarre v. S. Washington County Sch.*, 652 N.W.2d 9, 32 (Minn. 2002).

2. Can Appellant bring a claim against his supervisor for tortious interference when there is no allegation that his supervisor did anything outside of his job duties?

Most Apposite Law: *Young v. City of Monticello*, No. 04-4551 (DSD/JJG), 2006 U.S. Dist. LEXIS 12218 (D. Minn. Mar. 6, 2006).

3. Did Appellant engage in protected whistleblower activity by telling an HR representative that his boss was “intimidating,” and not “fair,” and that Appellant was “overworked?”

Most Apposite Law: *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000).

4. Can Appellant assert a unilateral contract claim based on an employee handbook with a contract disclaimer?

Most Apposite Law: *Roberts v. Brunswick*, 783 N.W.2d 226 (Minn. App. 2010).

STATEMENT OF THE CASE

This case involves a claims adjustor who worked in an office in Minnetonka, Minnesota. Appellant, John Coursolle (“Coursolle”) felt that his new supervisor was overly critical and bullying. The criticism was causing him a great deal of stress, so he provided two weeks’ notice and then quit. More than a year later, Coursolle sued his

former employer and supervisor for Tortious Interference, Whistleblower Retaliation, Breach of Contract, Retaliation, Respondeat Superior, and Negligent and Intentional Infliction of Emotional Distress. On or about September 14, 2009, the District Court dismissed Coursolle's Retaliation, Respondeat Superior and Negligent and Intentional Infliction of Emotional Distress claims. Respondents moved for Summary Judgment on the remaining claims, and on or about April 14, 2010, the District Court dismissed the remaining claims. This Appeal by Coursolle followed.

Even taking all of the facts in the light most favorable to Coursolle, he describes only a typical office environment with a demanding boss making his workplace no different than that of many other Minnesotans. As an at-will employee, Coursolle was free to resign from his employment, which he did. None of his claims come close to meeting the legal threshold, however, and the District Court's Order dismissing them on Summary Judgment should be affirmed.

STATEMENT OF FACTS

I. RESPONDENTS.

Respondent Employers Mutual Casualty Company ("EMCC") is an insurance company offering both commercial and personal lines of insurance. The company is headquartered in Des Moines, Iowa, and has 21 branch and service offices around the country, including one in Minnetonka, Minnesota, where the allegations in this case arise. EMCC was Coursolle's employer. Respondent EMC Insurance Group Inc. ("EMCI") is

a subsidiary of EMCC. A 00004.¹ Defendant Michael Huttner is an employee of EMCC and currently holds the position of Claims Manager in EMCC's Minnetonka, Minnesota office.

II. JOHN COURSOLE.

Coursolle worked for EMCC as a Senior Claims Adjustor in EMCC's Minnetonka office from approximately April 10, 2000, until he voluntarily quit after providing two weeks' notice on March 23, 2007.² *Id.* at 00004-00006. On or about August 1, 2006, Huttner became Claims Manager at the Minnetonka office, replacing Dennis Petrucelli, who retired. *Id.* at 00248. Once he took over, Huttner instituted new procedures and started enforcing certain existing policies, including restrictions on the use of outside adjustors and lawyers. *Id.* These changes represented a departure from the way things were done under Petrucelli, who had not enforced certain policies. *Id.* In late October 2006, Huttner warned Coursolle about discussing EMCC business information with Coursolle's contacts at other insurance companies. *Id.* at 00234.

On or about November 1, 2006, Coursolle received a phone call from Lisa Scaglione, an Employee Relations Consultant at EMCC's headquarters in Des Moines, Iowa. *Id.* at 00254. Scaglione said she was investigating some complaints about Huttner's management style³ and asked Coursolle some questions, which he answered.

¹ References are to Appellant's Appendix.

² EMCI was not Coursolle's employer.

³ Coursolle claims that former co-worker named Susan Day "reported good-faith violations and/or suspected violations of law to EMCC management including [sic] but not limited to Minnesota Statutes Chapter 72A." A 00005. He then relates that "Day started a lawsuit against EMCC stating claims for violations of the Minnesota

Id. at 00255. Coursolle said that Huttner was “not intimidating” to him but suggested that he could be seen that way by women. *Id.* at 00136. Coursolle also claims that he said Huttner was “condescending.” *Id.* at 00254. Coursolle did not tell Scaglione that Huttner was “harassing” anyone and testified during his deposition that he never used the word “harassment” in his conversation with Scaglione. *Id.* at 00242. About five months later, on March 23, 2007, Coursolle provided two weeks’ notice and resigned. *Id.* at 00242.

STANDARD OF REVIEW

On an appeal from a grant of Summary Judgment under Minn. R. Civ. P. 56, this Court must determine: (1) whether 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). While the appellate court views the evidence in the light most favorable to the nonmoving party, the burden still rests on the nonmoving party to present evidence sufficiently probative of all the claim’s essential elements to allow reasonable minds to reach different conclusions. *DLH, Inc. v. Russ*, 566 N.W.2d 60 (Minn. 1997). There is no genuine issue of material fact when “the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH*, 566 N.W.2d at 69 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). Furthermore:

[t]o forestall summary judgment, the nonmoving party must do more than rely on unverified or [conclusory] allegations in the pleadings or postulate

Whistleblower Act, Tortious Interference with Contract and violation of the Minnesota Human Rights Act.” *Id.* at 00006. Day’s claims were all dismissed. *Id.* at 00026-00027

evidence which might be produced at trial. The nonmoving party must present specific facts which give rise to genuine issues of material fact for trial.

W.J.L. v. Bugge, 573 N.W.2d 677, 680 (Minn. 1998); accord, *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001); *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (finding that the summary judgment standard of review requires that an opposing party provide more than mere speculation, general assertions, unverified and conclusory allegations, or promises to produce evidence at trial). Failure to produce sufficient evidence of a genuine fact issue on just one essential element of a claim means that the evidence on all of the other essential elements become immaterial, and summary judgment should be granted to the moving party on the claim. *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986)).

In the present case, as the arguments below makes plain, Coursolle failed to show genuine issues of material fact regarding his claims of Tortious Interference, Whistleblowing, or Breach of Contract.

ARGUMENT

I. COURSOLLE WAS NOT CONSTRUCTIVELY DISCHARGED.

As a starting point, Coursolle's claims all fail as a matter of law for the same reason—he did not suffer any adverse employment action. To counter this argument, Coursolle claims he was constructively discharged because of “intolerable working conditions at EMC” and therefore forced to quit. A 00006. Coursolle claims the conditions at EMCC were “intolerable,” yet he provided two weeks’ notice of his

resignation since he thought the “pressure would ease the last two weeks,” and he could still collect at least one more paycheck. *Id.* at 00241. In light of these facts, it is clear Coursolle resigned for his own reasons; nobody forced him to quit. Coursolle testified that he felt what he was being asked to do on some files at work was a “waste of time.” *Id.* at 00252-00253. He also told Scaglione that he thought his job was “tedious.” *Id.* at 00254. He feels that he is better off not working there. *Id.* at 00262. Unfortunately, the job market turned out to be worse than expected when he voluntarily quit. *Id.* at 00265.

When asked for a specific example of what he characterizes as “intolerable conditions,” Coursolle pointed to a “threat” by Huttner, during an incident in October of 2006 (*prior* to his interview with Scaglione and a full five months before he quit), when Huttner asked if he was giving out privileged information. *Id.* at 00234. Coursolle claims Huttner shook a folder and said “let this serve as a verbal warning.” *Id.* Even taking this allegation as true for the purposes of the summary judgment standard, it does not support a constructive discharge claim. Coursolle also says he was intimidated and “put under pressure constantly” when Huttner asked Coursolle to revise letters more than once. *Id.* at 00236. Another example of what Coursolle claims was “intolerable conditions” was the fact that he was receiving five to twelve inbox messages a day. *Id.* at 00234. “Inbox messages” in this context are computerized instructions on claim files, distinct from, but similar to, e-mails. If anything, five to twelve e-mail messages are probably below average for the typical worker and hardly a basis for constructive discharge.

In his answer to Respondents' interrogatory to Coursolle inviting him to state all reasons for his resignation, Coursolle provides only conclusions and forms of damages but no facts. A 00066. He states that he "experienced harassment, discrimination, intimidation, retaliation, mental anguish, emotional distress and daily ongoing abuse." *Id.* He goes on to assert in the passive voice that "threats were made," "folders were shaken," and "statements were made" without revealing what the threats were, who made them, when, or in what context. *Id.*

In his Appellate Brief, Coursolle relies on the fact that "his performance evaluations declined" and "Huttner criticized and/or harassed and/or portrayed him in a negative fashion on a daily basis." App. Brief at 20. Based on this, and nothing more, he concludes that he "suffered a constructive discharge because he was forced to work under hostile conditions." *Id.* at 21. These allegations, however, even taken together and assumed true, fall far short of meeting the test for constructive discharge under Minnesota law.

A constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination. *Navarre v. S. Washington County Sch.*, 652 N.W.2d 9, 32 (Minn. 2002). In order to establish constructive discharge, an employee must show that the employer created intolerable working conditions with the intention of forcing the employee to resign or that the employer could reasonably foresee that its actions would result in the employee's resignation. *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410, 412-13 (Minn. App. 1995). The test is objective, not subjective. In order to prove constructive

discharge occurred, the plaintiff must demonstrate that a *reasonable person* would find the working conditions intolerable. *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 797 (8th Cir. 1996) (emphasis added), citing *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981). A reasonable person would not find the conditions described by Coursolle to be intolerable.

Under Minnesota law, a claim of constructive discharge must be supported by “evidentiary facts” to avoid dismissal. *Navarre v. South Washington County Schls*, 633 N.W.2d 40, 57 (Minn. App. 2001), partially overruled on other grounds, 652 N.W.2d 9 (Minn. 2002). The Eighth Circuit Court of Appeals has held that “a feeling of being unfairly criticized” along with dissatisfaction with work assignments, and loss of pay is insufficient to constitute constructive discharge as a matter of law. *Tatom v. Georgia Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000). Here, Coursolle did not even suffer a reduction in pay and *a fortiori* his claim fails.

As the District Court found in this case, Coursolle’s constructive discharge case fails for a number of reasons. First, Coursolle’s description of events does not demonstrate intolerable working conditions at EMCC. A 0305. Second, Coursolle has not shown the existence of illegal discrimination. *Id.* Third, Coursolle has failed to provide any evidence that EMCC created intolerable working conditions with the intention of forcing him to resign. *Id.* In sum, Coursolle has failed to adduce any facts to support his claim that he was constructively discharged and all three of his employment claims must therefore be dismissed for lack of an adverse employment action.

II. COURSOLLE'S CLAIM OF TORTIOUS INTERFERENCE AGAINST HUTTNER WAS PROPERLY DISMISSED.

A. Coursolle's Tortious Interference Was Properly Dismissed.

In Minnesota, to establish a *prima facie* case of tortious interference with an employment contract, the plaintiff must show: (1) the existence of a contract; (2) knowledge of the contract by the alleged wrongdoer; (3) intentional procurement of the contract's breach; (4) absence of justification and (5) damages caused by the breach. *Kallok v. Medtronic*, 573 N.W.2d 356, 362 (Minn. 1998). Although Coursolle did not have a written employment contract or a contract for a set term of employment, in certain circumstances a tortious interference with employment contract claim may be asserted even where the employment relationship is "at-will." *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 505-06 (Minn. 1991). An actual breach of contract is an essential component of a tortious interference claim, however, and the claim should be properly dismissed where, as here, there has been no breach. *Bebo v. Delander*, 632 N.W.2d 732, 739 (Minn. App. 2001).

B. Huttner Acted Within The Scope Of His Duties At All Times.

It is black letter law that a party cannot be liable for interfering with its own contract. *Nordling*, 478 N.W.2d at 505. This means that "a corporate officer or agent cannot interfere with a contract that the company has entered into." *Ferguson v. Michael Foods, Inc.*, 74 F. Supp.2d 862, 874 (D. Minn. 1999). In other words, Huttner, as a manager and employee of EMCC, cannot be held liable for interfering with EMCC's at-will employment contract with Coursolle any more than EMCC itself can.

In order to survive dismissal of this count, therefore, Coursolle must show that Huttner acted “outside the scope of his . . . duties.” *Nordling*, 478 N.W.2d at 506. In this case, Coursolle admits that all of the actions of which he complains were performed by Huttner in his role as manager. Specifically, Coursolle admits that Huttner was in a direct line of supervision over him as Claims Manager, that they were both employed by EMCC, that Huttner was, in essence, his supervisor, and that any comments that Coursolle perceived as threats were made by Huttner because Huttner was concerned about what he perceived Coursolle was doing “as an employee.” A 00235. Huttner never stated a dislike of Coursolle “as a person.” *Id.* Huttner never took any action against Coursolle outside of work. *Id.* Coursolle complains that he was the subject of “accusations” but concedes that they were all “job related.” *Id.* at 00244.

When asked what Huttner did to “intentionally and with bad motive interfere with his employment contract,” Coursolle replied that Huttner “yelled [and] pointed fingers at different meetings.” *Id.* at 00236. Coursolle conceded, however, that when Huttner “yelled” about a reservation of rights letter, that Coursolle believed that Huttner sincerely “wanted to make sure” the letter was in the file. *Id.* Coursolle was only able to recall this single incident of finger pointing. Coursolle testified that Huttner never criticized Coursolle about anything that was not “work related.” *Id.* at 00254. In fact, Huttner never talked to Coursolle about anything other than work, except one comment about his son’s basketball team. *Id.* Coursolle testified that Huttner never used the “F word” with him. *Id.* at 00252. Huttner never threatened him with violence. *Id.* at 00254.

In response to an interrogatory asking him to explain what Huttner did to “intentionally and with bad faith motive” interfere with his employment contract, Coursolle stated that “Huttner threatened Plaintiff with probation” and “raised his voice.” *Id.* The balance of Coursolle’s response either refers to Lisa Scaglione or contains vague or conclusory occurrences stated in the passive voice which are not linked to Huttner. *Id.* (e.g. “threats were made,” “[Coursolle] was being treated materially adverse,” “It was a hostile work environment”). *Id.* Although given numerous opportunities to do so in the discovery process, Coursolle never pointed to any specific acts, beyond threatening probation or raising his voice, which interfered with Coursolle’s contract.

C. Huttner Is Entitled To A Privilege And Did Not Act With Malice.

Minnesota courts have held that a company officer, agent or employee is privileged to interfere with or cause a breach of another employee’s employment contract with the company if the person “acts in good faith, whether competently or not, believing that his actions are in furtherance of the company’s business.” *Nordling*, 478 N.W.2d at 507. This privilege “may be lost if the defendant’s actions are predominantly motivated by malice and bad faith, that is by personal ill-will, spite, hostility or a deliberate intent to harm the plaintiff-employee.” *Id.* When asked if Huttner was acting with “malice,” Coursolle testified that he “did not know.” A 00264.

In *Young v. City of Monticello*, No. 04-4551 (DSD/JJG), 2006 U.S. Dist. LEXIS 12218 (D. Minn. Mar. 6, 2006), the court held that once the defendant asserts privilege in a tortious interference claim, the plaintiff bears the burden of proving malice. *Id.* at *25. In that case, evidence the supervisor lied about the employee and his performance to

others and spread rumors about the employee was found to be insufficient to survive summary judgment when the employee did not allege that the reason the supervisor lied stemmed from personal animosity not related to the workplace. *Id.* In this case, *a fortiori*, there is no evidence of malice and the Court should affirm dismissal of the Tortious Interference claim.

III. COURSOLLE'S CLAIM UNDER MINNESOTA'S WHISTLEBLOWER ACT FAILS AS A MATTER OF LAW.

Minnesota's Whistleblower Act protects employees from discharge or retaliation when an employee reports a violation of any federal or state law in good faith. Minn. Stat. § 181.932 (2006); *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000) at 200. Plaintiff has the initial burden of establishing a *prima facie* case of retaliatory action. *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001).⁴

In this case, Coursolle never made a report. He admitted in his deposition that he did not "complain" to Scaglione. A 00255. He said that he only "answered her questions." *Id.* Coursolle did not make any "reports" to anyone else either. *Id.* at 00229. Most importantly, Coursolle testified under oath that he *never once used the word "harassment" in his discussion with Scaglione.* *Id.* at 00231. He said he does not know if what Huttner was doing was criminal harassment. *Id.* He never considered calling the

⁴ If a plaintiff meets this burden, the burden of production shifts to the defendant to articulate a legitimate, non-retaliatory reason for their actions. *Cokley*, 623 N.W.2d at 630. Once a defendant meets this burden of production, the plaintiff is required to demonstrate that defendant's articulated reasons are pretext for retaliation. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). The burden remains at all times with the plaintiff to establish retaliation by a preponderance of the evidence. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 445-56 (Minn. 1983).

police. *Id.* When asked what violation of law he reported as part of his whistleblowing claim, Coursolle could only point to the EMCC Employee Handbook. *Id.* at 00232. As discussed *infra*, however, the only policy Coursolle cites is a Handbook provision regarding protection from retaliation for making a complaint, which is a circular argument leading nowhere.

A. Coursolle Did Not Identify A Federal Or State Law.

To survive summary judgment, Coursolle must present sufficient evidence to show he engaged in protected activity by making a good faith “report” of a violation of any federal or state law, rule or regulation. Minn. Stat. § 181.932. Minnesota courts use a common sense definition of “report” in determining if and when an employee’s communication constitutes a protected activity. *Gee v. Minn. State Colleges & Univs*, 700 N.W.2d 548, 555 (Minn. App. 2005). Courts must decide whether the alleged conduct constitutes a report as a matter of law. *Cokley*, 623 N.W.2d at 630 (citing *Hubbard*, 330 N.W.2d at 444).

Coursolle alleged that he engaged in protected conduct under Minnesota’s whistleblower statute “when he reported violations of the laws and regulations and/or rules.” A 00007. From the inception of this litigation through this Appeal, however, Coursolle has never once identified what “laws...regulations and/or rules” he claims to have reported. His Complaint states “[s]pecifically,” Coursolle “engaged in statutorily protected conduct when he reported to upper management regarding Huttner’s conduct.” *Id.* But Coursolle’s Complaint is far from “specific.” Coursolle does not explain what “conduct” he reported. Reporting generalized “conduct” is not protected whistleblowing

activity. *See* Minn. Stat. § 181.932. Nor are Coursolle's Answers to Interrogatories any more specific. In response to an interrogatory which specifically asks Coursolle to identify each and every instance he reported any violation or suspected violation of "laws and regulations and/or rules," Coursolle does not refer to a single state or federal law, regulation, or rule. A 00057-00060.

Minn. Stat. § 181.932, Subd. 1(a) defines, in pertinent part, a protected employee as one who, in good faith, "reports a violation or suspected violation of any *federal or state law or rule* adopted pursuant to law to an employer[.]" (emphasis added). In Paragraph 15 of his Complaint, Coursolle alleges that he informed "Lisa Scaglione that Huttner was harassing and intimidating Susan Day and [that he] made other statements that portrayed Huttner in a negative manner."

In his deposition, however, Coursolle made it clear that he never actually used the word "harassment" and did not complain about anything, he just answered a few questions. *Id.* at 00230-00231. Coursolle's testimony under oath therefore contradicts the allegation in Paragraph 15 of his Complaint, and he does not have any other facts to replace this allegation in support of his claim.

In *Hedglin v. City of Willmar*, 582 N.W.2d 897, 901-02 (Minn. 1998), two terminated Willmar firefighters, Hedglin and Lundquist, pointed to a number of statutes which they argued were implicated in reports they made to their employer, specifically Minn. Stat. § 609.455 (a public employee who allows a demand which the employee knows to be false to be made on a government entity may be criminally sanctioned), Minn. Stat. § 609.465 (anyone who presents a claim for payment to a public body,

knowing the claim to be false and having the intent to defraud, is guilty of attempt to commit theft of public funds) and Minn. Stat. § 609.65 (applying primarily to notary publics, but also to public officers who falsely certify that an act was performed). In that case, the court held, the “reports of firefighters driving fire trucks while drunk clearly implicates Minn. Stat. § 169.121 (1996), which prohibits any person from driving a motor vehicle while under the influence of alcohol.” *Id.*

Relevant to the case at bar, however, the Minnesota Supreme Court in *Hedglin* went on to conclude that the vague reports made by Lundquist and Grove that some of the fire officers were showing up at fire calls while drunk were not protected by the Whistleblower Statute. *Id.* at 902. As the court noted, “[w]hile we find such conduct reprehensible, if in fact it did occur, we can find no statute or rule that is violated by such conduct, nor could Lundquist and Grove’s counsel point to any such statute or rule.” *Id.* (emphasis added). Similarly, to the extent Coursolle claims he reported that Huttner “harassed” or “intimidated” Day, such behavior, while possibly “reprehensible” does not violate the law. *See also Obst*, 614 N.W.2d at 205 (stating “[t]hus, it is clear that the report of a suspected violation of federal or state law must implicate **an actual federal or state law** and not one that does not exist.”)(emphasis added) and *Gee*, 700 N.W.2d at 556 (holding that “[n]either at summary judgment nor on appeal has Gee shown that the use of the funds implicated a violation of law or rule. Gee failed to meet her burden to establish a claim for whistleblower retaliation, and we affirm the dismissal of that claim”).

Most recently, the Minnesota Supreme Court explicitly reiterated that “a mere report of behavior that is problematic or even reprehensible, but *not* a violation of the law, is *not protected conduct* under the Whistleblower Act. *Kratzer v. Welsh Companies, LLC*, 771 N.W.2d 14, 22 (Minn. 2009) (citing *Obst*, 614 N.W.2d at 204.) *See also Nordling*, 478 N.W.2d at 504 (concluding that a report about behavior that is “distasteful” or “ill-advised” but not illegal is not protected under the Whistleblower Act).

In *Kratzer*, the Court noted that it has “cautioned against construing section 181.932 too broadly.” 771 N.W.2d at 22. The court also clarified that the Whistleblower Act does not protect reports based on an employee’s subjective notions of wrongdoing, but protects only “an action by a neutral—one who is not personally and uniquely affronted by the employer’s unlawful conduct but rather one who blows the whistle for the protection of the general public or at least some third person.” *Id.* In this case, Coursolle complains, at most, only of bullying behavior by Huttner against him. Although there need not be an actual violation, the *law* alleged to have been violated must exist. *Id.* at 22-23. A report about conduct that does not violate a state or federal law is not protected activity. *Id.* at 23.

B. Coursolle Has No Evidence of Causation

There is zero evidence in the record suggesting that Scaglione ever informed Huttner of what Coursolle said to her in the investigation. In other words, Coursolle cannot establish a link between what he told Scaglione and Huttner’s actions. Coursolle’s unsupported assertion, that it is “*Appellant’s position*” that Scaglione told Huttner what Coursolle said in the interview, is not evidence and cannot be used to

support his legal claim. *See* App. Brief at 8. A belief is not evidence to defeat summary judgment. *Celotex*, 477 U.S. at 324). Nor is Coursolle’s citation to Day’s belief on the matter, which apparently is based on Day’s reading of the depositions of Scaglione and Huttner. App. Brief at 10. The depositions conclusively indicate that no such communication between Scaglione and Huttner occurred. Similarly Day’s belief that “Huttner would retaliate against Coursolle,” or her opinion that Huttner violated EMCC policies is not evidence either. *Id.* at 11 and 28.

Appellant is also disingenuous when he misquotes Scaglione’s report, which refers to “one adjustor.” App. Brief at 6. Appellant inserted Coursolle’s name between the word “one” and “adjustor” and again after the word “adjustor” to make it look like Scaglione mentioned Coursolle by name in the report. *Id.* She did not, and Appellant’s deception should be disregarded.

Coursolle’s repeated citations to a letter he wrote to an EMCC Vice President in December of 2008 are also misleading. *Id.* at 20-21. Coursolle quit in March 2007, over a year and a half before he sent his letter. This letter cannot, therefore, be used as the basis of a retaliation claim.

C. Coursolle’s Reliance On *Crawford* Is Misplaced.

Coursolle points to the United States Supreme Court’s decision in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009) to support his whistleblower claim. But *Crawford* involved a claim under Title VII of the Civil Rights Act of 1964 (“Title VII”), not a claim under the Minnesota Whistleblower

statute.⁵ The plaintiff in *Crawford*, when interviewed as part of an investigation of another employee's complaint, complained that she too had been sexually harassed. She was fired as a result and the court held that she was protected by Title VII. Coursolle did not bring a claim under Title VII, however, or even the Minnesota Human Rights Act, and could not have done so because neither he nor Day has ever claimed sexual harassment or discrimination.

Even if one takes the broadest application of *Crawford* imaginable and posits that an employee who is interviewed about a possible illegality (as contrasted with affirmatively reporting the illegality) and who confirms or provides information regarding the illegality, should be protected from retaliation, Coursolle would still not be entitled to protection. By his own admission, Coursolle did not confirm or bolster a report of an illegal action. When interviewed about Huttner's management style he merely said Huttner was "condescending." A 00254. If an employee is interviewed as part of a whistleblowing investigation and, as part of his interview, he complains that his desk is too small, his boss is too grumpy, and the cafeteria food is too salty, he is not engaging in protected activity under Minnesota law.

Furthermore, the Minnesota Legislature has decreed that an employee who is "requested by a *public* body or office to participate in an investigation, hearing [or] inquiry" is protected from retaliation. Minn. Stat. § 181.932, Subdivision 1 (b) (emphasis added). It obviously could have defined participation in an internal investigation as

⁵ Coursolle also differs from the plaintiff in *Crawford* in that she was fired, whereas Coursolle voluntarily quit.

protected activity, but chose not to, and the legislative branch should be provided deference in this regard.

D. Coursolle Did Not Suffer An Adverse Action.

Coursolle's whistleblower claim also fails because he has not suffered any adverse action—he resigned of his own free will. Minnesota's Whistleblower statute provides that an employer shall not "discharge, discipline, threaten, otherwise discriminate against, or penalize an employee" regarding the employee's terms of employment for engaging in protected activity under the statute. Minn. Stat. § 181.932, Subd. 1. Coursolle has not alleged specific facts that constitute discipline, threats, discrimination or a penalty under the law. Coursolle felt that Huttner was a "bully" and a "bad manager." A 00233. But the Minnesota Whistleblower statute, like Title VII, is not meant to impose a "general civility code for the [Minnesota] workplace." *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 1002 (1998).

IV. COURSOLLE'S BREACH OF CONTRACT CLAIM WAS PROPERLY DISMISSED.

A. Coursolle Cannot Demonstrate Reliance.

Coursolle relies on the holding in *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) to argue that EMCC's Employee Handbook created a unilateral employment contract. His argument fails, however, for many reasons. First, in his deposition, Coursolle was unable to point to either a specific handbook or specific language within a given handbook upon which he relies. Coursolle testified that his contract claim is based not on language of the handbook, not even his *memory* of what

was in the handbook, but rather his “assumption” of what was in the handbook, since “most” handbooks have provisions to protect employees from unlawful and tortious actions of other employees. A 00239. Coursolle was unable to point to or describe the exact language of the provision he relied on when asked to do so in his deposition. *Id.*

In the course of written discovery, Coursolle was asked to “identify and describe the contract . . . including all the terms of the contract, when it was entered into, whether it is in writing, and the consideration provided by each party to the contract.” *Id.* at 00049-00050. In his Third Amended Answer to Interrogatory No. 6, Coursolle states:

Plaintiff relies on the Employee Handbook of the Defendants. Plaintiff specifically relies on EMC’s Bates stamps 472-570. The Employee Handbook of EMC was provided to the Plaintiff via Plaintiff’s second request for documents number 1, which stated, “Any and all handbooks, policies and procedures for the Defendants.” This is the only handbook that was provided by the Defendants. It is Plaintiff’s position that this is the handbook which he relies on relating to any of his contractual claims. On or about April 10, 2000, the Plaintiff was hired by the EMC, and at that time and ant all other relevant timers this was the contract Plaintiff relied on. Plaintiff entered into a unilateral contract with EMC and his employment with EMC was his consideration.

Id. (Coursolle’s answer goes on to quote the policies from the handbook). Notably, in Coursolle’s Third Amended Answer, he does not allege that he received a copy when he was hired or that he ever read any portion of the handbook before receiving a copy for the first time in response to his request for documents in this case. Coursolle’s breach of contract claim, therefore, fails.

Coursolle’s contract claim fails because neither Coursolle nor his counsel had a copy of any of these policies when they drafted and filed the Complaint. Coursolle testified in his deposition that he never looked up any policies in the Handbook in

response to what was happening to him at work. *Id.* at 00257.⁶ In fact, he had never looked at the Handbook between the day he was hired and the day he quit. *Id.* Coursolle is therefore unable to demonstrate reliance based on the terms of the policy being communicated to him, which is a critical element of a unilateral contract claim. *Pine River*, 333 N.W.2d at 626-627. *See also Tobias v. Montgomery Ward, Inc.*, 362 N.W.2d 380, 381-82 (Minn. App. 1985) (dismissing unilateral employment contract claim where policy in question was not distributed to or read by the plaintiffs even though it was “availabl[e]” to them).

Even if the policies were interpreted as contractual provisions, which they are not, Coursolle testified that he did not “complain” to Scaglione. A 00255. He also said that he never once used the word “harassment” in his discussion with Scaglione. *Id.* at 00231. The policy therefore does not apply to Coursolle or his interview with Scaglione, on its face. Furthermore, the language relied upon by Coursolle about non-retaliation for filing a “complaint” is limited to complaints about “discrimination” based on a protected class, not generalized complaints of any nature. *Id.* at 00189 (stating “[t]he company will not knowingly permit any retaliation against any employee who complains of *prohibited* harassment or who participates in an investigation.”) (emphasis added). *See also* A 00188 (listing “prohibited harassment on the basis of race, color, national origin,

⁶ Coursolle himself did not feel the need to comply with EMCC policies when they did not suit him. For example, he took confidential claims documents home, and kept them, without telling EMCC, in violation of company policy in order to “protect his livelihood.” A 00241. He also ate lunch at his desk in violation of office policy. *Id.* at 00245.

ancestry, religion, physical or mental disability, sexual orientation, marital status, medical condition, veteran status, age, or any other protected basis.”) No such discrimination is alleged in this case, and the policy is therefore irrelevant to Coursolle’s actions.

B. The Breach Of Contract Claim Is Barred by the Contract Disclaimer Language In The Handbook.

It is well settled that a contract disclaimer in an employee handbook may be relied upon by the employer to prevent an employee from claiming that its policies are contractually binding. *See e.g. Audette v. Northeast Bank of Minneapolis*, 436 N.W.2d 125, 127 (Minn. App. 1989) and *Michaelson v. Minnesota Mining & Manufacturing Company*, 474 N.W.2d 174, 180 (Minn. App. 1991) (affirmed with limitation, 479 N.W.2d 58 (Minn. 1992)). This principle was most recently reaffirmed in *Roberts v. Brunswick*, 783 N.W.2d 226 (Minn. App. 2010) at *9 (stating “**A disclaimer in an employment handbook that clearly expresses an employer’s intent will prevent the formation of a contractual right.**”) (emphasis added)

In this case, the EMCC Employee Handbook contains the following contract disclaimer:

This handbook is a guide for your general background and knowledge only. It does not constitute a contract.

The Employee Handbook has been prepared as a general statement of company policy and as a guide to provide basic information about your job and other company matters which may affect you and your job. It is not intended to cover every contingency or condition which may arise in your employment with EMC. From time to time this handbook will be updated. New policies and guidelines will be added and others revised. Employees will be notified of updates when they are posted to the intranet site. It is your responsibility to familiarize yourself with these updates.

As a guideline, this handbook is not intended to become expressly or implicitly a part of any agreement or contract of employment. The statements contained in this handbook do not limit the right of either the company or the employee to terminate employment at any time with or without cause.

Where reference is made to insurance policies and coverage, the express language of those insurance policies and endorsements provide control.

The company may modify the other terms and conditions pursuant to which it employs its employees (such as compensation, benefits, title, duties and discipline, if any, to be imposed) with or without notice and with or without cause.

This handbook takes precedence over all prior oral or written policies, rules and guidelines.

A 00075-00077. This was the language in effect as of March 23, 2007, when Coursolle quit. *Id.* at 00074. In fact, this disclaimer language was in effect the entire time Coursolle worked at EMCC. *Id.*

Similar language, including a statement that, “[t]he policies described herein are not conditions of employment and the language is not intended to create a contract between [employer] and its employees,” has been deemed to indicate an intent not to create an employment contract. *Audette*, 436 N.W.2d at 127. An employer may include such a contract disclaimer as a valid expression of its intentions. *Michaelson*, 474 N.W.2d at 180.

Coursolle’s only point of law in opposition to *Audette* and *Michaelson* is an earlier Court of Appeals decision, *Fitzgerald v. Norwest Corp.*, 382 N.W.2d 290, 292 (Minn. App. 1986). But the handbook in *Fitzgerald* did not include disclaimer language and provides no authority for Coursolle’s argument that disclaimers should be disregarded,

otherwise, they would render all provisions and its retaliation and/or harassment policies ineffectual. App. Brief at 48.

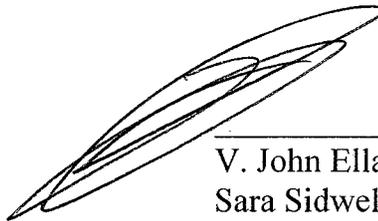
Finally, Coursolle cannot establish a breach of contract action because not only was there no contract, there was also no breach. *See Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2, 3 (Minn. App. 1994) (concluding that summary judgment is appropriate when a party who bears the burden of establishing an essential element of the claim cannot bear that burden). Coursolle quit and was not terminated, and there is no other evidence of retaliation.

CONCLUSION

For the reasons set forth, the decision of the Court below should be affirmed.

Dated: August 11, 2010.

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Case No. A10-1036

**STATE OF MINNESOTA
IN COURT OF APPEALS**

JOHN COURSOLLE,

Appellant,

vs.

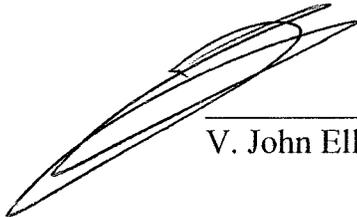
**EMC INSURANCE GROUP INC.,
EMPLOYERS MUTUAL CASUALTY COMPANY,
AND MICHAEL L. HUTTNER,**

Respondents.

I, V. John Ella, counsel for Respondent, hereby certify that the word count of the herewith-filed Respondent's Brief complies with the Minnesota Rules of Appellant Procedure. I certify that Microsoft Windows XP Professional software word count function was applied and that the Memorandum contains 6,428 words.

Dated: August 4, 2010.

JACKSON LEWIS LLP



V. John Ella (249282)