MINNESOTA STATE LAW LIBRARY

NO. A06-0710

State of Minnesota
In Court of Appeals

Svenn Borgersen,

Appellant,

vs.

Cardiovascular Systems, Inc.,

Respondent.

BRIEF OF RESPONDENT

Daniel E. Warner (#15295X)
WARNER LAW OFFICE
Blackberry Office Park
5774 Blackshire Path
Inver Grove Heights, MN 55076
(651) 455-0444

Attorneys for Appellant
Svenn Borgersen

David J. Duddleston (#139804)
Natalie Wyatt-Brown (#260757)
JACKSON LEWIS LLP
150 South Fifth Street, Suite 1450
Minneapolis, MN 55402
(612) 341-8131

Attorneys for Respondent
Cardiovascular Systems, Inc.

2006 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

TABLE OF CONTENTS

Page Nos.

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENT 6

I. INTRODUCTION 6

II. STANDARD OF REVIEW. 7

III. THE TRIAL COURT PROPERLY HELD BORGERSEN HAS NO VIABLE WHISTLEBLOWER CLAIM. 8

A. The Timing Of The Illegal Conduct Is Not Material To This Appeal. 8

B. The Trial Court Properly Held Borgersen Did Not Make A "Report" As Required Under Minnesota Law. 9

C. The Trial Court Properly Held Borgersen Did Not Make A "Report" in Good Faith 12

IV. BORGERSEN'S BREACH OF CONTRACT CLAIM IS LEGALLY INSUFFICIENT. 14

A. Multiple Documents Included in a Single Transaction Define The Agreement. 15

B. CSI Never Offered Borgersen More Than Employment "At-will." 18

C. The "For Cause" Language in the Employment Agreement Does Not Mean "Only For Cause;" It Does Not Restrict Right to Terminate "At-Will." 19

CONCLUSION 22

CERTIFICATION 24

INDEX TO APPENDIX **25**

TABLE OF AUTHORITIES

Page Nos.

Minnesota Cases

Abraham v. County of Hennepin, 639 N.W.2d 342 (Minn. 2002) 9, 11

Alpha Real Estate v. Delta Dental Plan, Minn., 664 N.W.2d 303 (Minn. 2003) 17

Anchor Cas. Co. v. Bird Island Produce, Inc., 82 N.W. 2d 48 (Minn. 1957)..... 16

Anderson v. Kammeier, 262 N.W.2d 366 (Minn. 1977) 17

Anderson-Johanningmeier v. Mid-Minnesota Women's Center, 637 N.W.2d 270 (Minn. 2002) 1, 11

Banbury v. Omnitrition Intl., Inc., 533 N.W.2d 876 (Minn. App. 1995) 1, 23

Cederstrand v. Lutheran Brotherhood, 263 Minn. 520, 117 N.W.2d 213 (1962) 20, 21

Cokely v. City of Otsego, 623 N.W.2d 625 (Minn. App. 2001)..... 10

Farrell v. Johnson, 442 N.W.2d 805 (Minn. App. 1989) .....*passim*

Fredrich v. Independent School Dist. No. 720, 465 N.W.2d 692 (Minn. App. 1991)..... 19

General Drivers, Local No. 346 v. Aitkin Cty Bd., 320 N.W.2d 695 (Minn. 1982) 21

Koch v. Han-Shire Investments, Inc., 273 Minn. 155, 140 N.W.2d 55 (Minn. 1966) 16

Lloyd v. In Home Health, Inc., 523 N.W.2d 2 (Minn. App. 1994) 7

Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732 (Minn. 2000) 20

Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174 (Minn. App. 1991)..... 10

Obst v. Microtron, Inc., 614 N.W.2d 196 (Minn. 2000)..... 1, 8

Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) 20, 22

Polk v. Mutual Serv. Life Ins. Co., 344 N.W.2d 427 (Minn. App. 1984) 23

Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936)..... 21

State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990)..... 7

Zappa v. Fahey, 245 N.W.2d 258 (Minn. 1976) 8

Eighth Circuit Cases

Martin v. Equitable Life Assurance Soc., 553 F.2d 573 (8th Cir. 1977) 21

Statutes and Rules

Minn. Stat. § 181.932 ..... 1, 8, 9

Minn. Stat. § 325E.37 19

Minn. Stat. § 80C.14 19

Minnesota Rule of Civil Procedure 56.03 1

Minnesota Federal District Court

Corum v. Farm Credit Services, 628 F.Supp. 707 (D. Minn. 1986) 18

Lee v. Sperry Corp., 678 F.Supp. 1415 (D. Minn. 1987) 21

Other Authorities

Elkouri & Elkouri, How Arbitration Works, Chap. 15.2.B.ii (6th ed. 2003) 19

STATEMENT OF THE ISSUES

1. Whether the trial court properly granted summary judgment on Borgersen's whistleblower claim where he never reported suspected violations of law to his employer and participated in the alleged unlawful conduct.

The trial court properly found Borgersen did not engage in conduct protected by the whistleblower statute.

Minnesota Rule of Civil Procedure 56.03;
Minn. Stat. § 181.932 et seq.;
Obst v. Microtron, Inc., 614 N.W.2d 196 (Minn. 2000); and
Anderson-Johanningmeier v. Mid-Minnesota Women's Center, 637 N.W.2d 270 (Minn. 2002).

2. Whether the trial court properly granted summary judgment on Borgersen's breach of contract claim where the offer letter stated he was an at-will employee and the employment agreement gave CSI the option of terminating him for cause.

The trial court properly found Borgersen was an at-will employee.

Minnesota Rule of Civil Procedure 56.03;
Farrell v. Johnson, 442 N.W.2d 805, 806 (Minn. App. 1989);
Marso v. Mankato Clinic, Ltd., 153 N.W.2d 281, 288-89 (Minn. 1967);
Banbury v. Omnitrition Intl., Inc., 533 N.W.2d 876, 880 (Minn. App. 1995).

STATEMENT OF THE CASE

Appellant Svenn Borgersen claims he was terminated in May 2004 for reporting illegal activity during his employment with Respondent Cardiovascular Systems, Inc. ("CSI") in violation of Minnesota's whistleblower statute and in breach of his employment contract. In fact, Borgersen never reported suspected violations of law, and he was at all times an at-will employee.

On February 27, 2006, the trial court dismissed Borgersen's claims in their entirety on Respondent's motion for summary judgment. On April 10, 2006, Borgersen appealed the trial court's order granting Respondent's motion for summary judgment.

STATEMENT OF FACTS

I. THE PARTIES.

A. Cardiovascular Systems, Inc.

CSI is a small, start-up medical device company. At the time of the events at issue in this litigation, it was developing a medical device to remove plaque from blocked coronary arteries. Res. App. 12 – 13. The company began in September 2002[1] with Michael Kallok as CEO. Res. App. 83.

CSI planned to pursue approval from the U.S. Food and Drug Administration ("FDA") to use the device in coronary arteries with stents. Res. App. 5 and 86. At the time, no similar device had been approved so CSI believed such a product would fill a market demand. Res. App. 23. Before medical devices may be sold in the U.S. market, the FDA must give approval. Approval involves numerous steps, including initial testing and submissions demonstrating the product is safe for human use, followed by clinical testing on people and ultimately final approval by the FDA. Res. App. 12 and 167. Res. App. 12 and 82.

B. Borgersen

Svenn Borgersen has a Masters and PhD in Civil Engineering, specializing in computer modeling. He is a Registered Structural Engineer. Res. App. 1. While

[1] CSI continued work on the device developed by a predecessor company. Res. App. 9

Borgersen worked for other medical device companies before CSI, he had never tested medical devices nor prepared submissions to the FDA. Res. App. 2, 4, 5, 14 and 16. Borgersen and Kallok first met when they worked at Medtronic and later at Boston Scientific. Res. App. 3 and 5. Kallok never supervised Borgersen's work at either company, but was generally aware of his computer modeling experience and engineering background. Res. App. 4, 6, 9,and 91.

Kallok hired Borgersen as Director of Engineering Analysis and Design beginning in January 2003. Res. App. 25. Borgersen was unemployed at the time, having been laid off from Boston Scientific a few months earlier. Res. App. 7 and 8. Borgersen's duties at CSI included overall responsibility for product development and design verification, such as developing test protocols, conducting laboratory testing (called "bench testing") and preparing test reports. Bench testing must be done before the device is tested on people. Res. App. 11 and 170. CSI was not satisfied with his work and terminated Borgersen around May 24, 2004. Res. App. 15 and 32.

C. Kallok

Michael Kallok has a PhD in Biomedical Engineering, and extensive experience developing medical devices and preparing submissions to the FDA. Res. App. 80 and 81. He worked at Medtronic as Director of Clinical & Regulatory Affairs, and held similar positions at other medical device companies in the Twin Cities area. Res. App. 81 and 82. Kallok was the first employee at CSI, hired when it was formed. Res. App. 84 and 85.

II. BORGERSEN'S HIRE.

Borgersen was one the first of nine employees hired by Kallok. Res. App. 12 and 84. In offering employment, Kallok emailed Borgersen an offer letter and an employment agreement. The offer letter stated:

> This letter and the enclosed Employment Agreement summarize our understanding of the terms of your employment and provide you the means to accept our offer as described. Upon acceptance of this offer and your active start of employment, you will become an "at-will" employee of Shturman Cardiovascular Systems, Inc. ... Acceptance of this offer acknowledges your understanding and acceptance of the "at-will" nature of your employment.

Res. App. 25 (emphasis added). The employment agreement also attached to the email stated CSI *may* terminate Borgersen for "cause":

> With Cause. Notwithstanding anything contained herein to the contrary, the Corporation, acting by and through its Board of Directors, shall have the right to immediately terminate Employee's employment under this Agreement for 'Cause,' which shall mean: (i) the willful and continued failure by Employee to substantially perform Employee's duties with the Corporation; or (ii) the willful engaging by Employee in conduct which is demonstrably and materially in the opinion of the Board injurious to the corporation, monetarily or otherwise.

Res. App. 25 (emphasis added).

III. BORGERSEN'S JOB PERFORMANCE AND TERMINATION.

For purposes of this appeal, the parties sharply dispute Borgersen's performance, but that is not material. CSI viewed Borgersen an employee who could handle specific finite projects but could overall, was unable to complete a number of his job duties in a timely, competent fashion.

Kallok and other company managers discussed terminating Borgersen over a

period of time. Res. App. 89. Kallok also was a member of CSI's Board of Directors, and discussed termination with the Board, who ratified the action. Res. App. 89. On or about May 24, 2004, Borgersen was terminated. Res. App. 32. Kallok described the reasons for the termination as follows:

> A. Our reasons were that he simply was either incapable or unwilling to do the responsibilities of the job that we hired him to do.
> Q. Anything else?
> A. Well, I had a fiduciary responsibility to the shareholders of the company to spend our dollars wisely. As far as I was concerned, that was not the case with Mr. Borgersen. We originally had to hire John Vanden Hoek as a consultant to do the work that Mr. Borgersen was not doing. And despite repeated attempts on my part to teach him and train him -- and I even encouraged other employees to help him -- he, for whatever reason, was not able to deliver all sorts of documents, ranging from product specifications to test protocols to test reports and so on.

Res. App. 90.

IV. FDA APPROVAL PROCESS.

As previously noted, receiving final FDA approval is a multi-step process and includes FDA involvement and "mini approvals" along the way. In March 2004, the FDA requested that bench tests be conducted to determine what would happen if the device made contact with a stent in a coronary artery. Res. App. 106 - 111. As previously noted, bench tests are done before testing the device on people. Another employee at CSI attempted to develop a test and one of his efforts resulted in a failure. Borgersen told CSI that information from this failed attempt to develop a bench test should be shown to the FDA. CSI disagreed, stating that the failure was not a test and did not need to be reported.

Despite his alleged concerns, Borgersen helped design the test that was ultimately submitted to the FDA. Res. App. 20, 160 and 172. In May 2004, Borgersen signed off on the test report sent to the FDA. App. 52 and Res. App. 46.[2]

Only after his termination, in July 2004, did Borgersen provide the FDA with the additional information he thought it should have been given. After this, the FDA inspected CSI and concluded Borgersen's concerns were not an important issue. The FDA took no action against CSI regarding Borgersen's reports.

As FDA approval wore on, CSI decided the costs were not worth the expected value of the product. The company decided to seek approval for using the device for other purposes and discontinued the approval in which Borgersen had been involved. Res. App. 183 – 186.

ARGUMENT

I. INTRODUCTION.

This case is not about whether or not CSI's device is safe for use in humans. Nor is this case about whether CSI could have or should have performed additional testing on its device at any point in time. Rather, the case is about whether Borgersen is entitled to protection under Minnesota's whistleblower statute where he merely raised a safety issue as part of his job duties and had responsibility for and participated in the allegedly illegal conduct. Borgersen never told CSI that failing to report certain information to the FDA

[2] This report was submitted to the FDA on May 14, 2004. Res. App. 100 – 158. Borgersen now claims a factual question exists because the test protocol was allegedly altered after he signed it and he disagrees with the contents of one of several pages of test results. (Appellant's Brief at 30). This does nothing to contradict the fact that he helped design the test and signed off on all of the documents submitted to the FDA.

was a violation of law, nor did he take any steps to try to ensure the information was provided while he worked there. The trial court properly held this was not conduct protected by the Whistleblower Act.

Borgersen also argues, contrary to established Minnesota precedent, that the trial court erred in considering the "at-will" language in the offer letter solely because there is an integration clause in the employment agreement the letter enclosed and modified. The trial court properly refused to accept Borgersen's novel view of the law, and this Court should do so as well.

II. STANDARD OF REVIEW.

The standard of review on a grant of summary judgment is *de novo*. This appeal raises two questions: (1) whether there are any genuine issues of material fact; and (2) whether the lower court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). "[S]ummary judgment on a claim is mandatory against a party who fails to establish an essential element of [a] claim, if that party has the burden of proof, because this failure renders all other facts immaterial." Lloyd v. In Home Health, Inc., 523 N.W.2d 2, 3 (Minn. App. 1994). A "material fact" is one which, given the substantive law of the case, could affect the legal outcome. Zappa v. Fahey, 245 N.W.2d 258, 259-60 (Minn. 1976). The trial court correctly found no material facts were in dispute and properly applied the law.

III. THE TRIAL COURT PROPERLY HELD BORGERSEN HAS NO VIABLE WHISTLEBLOWER CLAIM.

Minnesota's whistleblower statute makes it illegal to discharge an employee because that person in good faith reports a violation or suspected violation for federal or state law. Minn. Stat. § 181.932. The familiar McDonnell-Douglas test provides the foundation to determine whether a violation occurred. To make a prima facie whistleblower case, Borgersen must show (1) he in good faith reported a violation or suspected violation of federal or state law; (2) CSI took an adverse employment action against him; and (3) there is a causal connection between the adverse employment action and the conduct protected by the statute. Obst v. Microtron, Inc., 614 N.W.2d 196, 202 (Minn. 2000). Once established, the burden shifts to CSI to show it had a legitimate, non-discriminatory reason for the adverse action. Finally, the burden shifts back to Borgersen to show the proffered reason is pretextual.

While Borgersen need not identify a specific law or rule he believes has been violated, he must implicate a violation a federal or state law and allege "facts that, if proven, would constitute a violation of law or rule adopted pursuant to law." Abraham v. County of Hennepin, 639 N.W.2d 342, 354-55 (Minn. 2002); Obst, 614 N.W.2d at 204. The trial court properly found that Borgersen cannot establish a prima facie case because he never engaged in activity protected by Minnesota's whistleblower law.

A. The Timing Of The Illegal Conduct Is Not Material To This Appeal.

Borgersen and amicus curiae argue vigorously that the trial court erroneously held that where no unlawful activity has yet occurred, whistleblower protections do not apply.

This issue, however, is merely a red herring; the trial court never imposed such a requirement in reaching its decision. In support of his argument on this point, Borgersen cites to the first sentence of Conclusion of Law ¶ 26. When reviewed in its entirety, however, the finding does not support Borgersen's argument.

> No colorable basis exists to believe that, at the time Plaintiff made his alleged report, CSI had violated any federal/state statute or rule, because they [sic] had not. Fillipov's test was not a "bench test" but was an attempt to develop a bench test—and it was those tests (the bench tests) that the FDA wanted done.

App. 28. The trial court's decision was not based on *when* the allegedly illegal conduct occurred, but *whether* the conduct was illegal at all.

Regardless, there are sufficient alternate grounds on which to uphold the trial court's granting of summary judgment on the whistleblower claim as discussed below.

B. The Trial Court Properly Held Borgersen Did Not Make A "Report" As Required Under Minnesota Law.

To make out a prima facie case, Borgersen must demonstrate that he made a report in good faith for the purpose of exposing an illegality. Minn. Stat. § 181.932, Subd. 1(a), Obst, 614 N.W.2d 202. In order to determine when a "report" to an employer constitutes whistleblowing, courts generally require the following:

1. The report must be news to the employer
2. The report must not be made in the course of business as part of the plaintiff's job duties
3. The purpose of the report must be to expose illegality
4. The plaintiff must state that the conduct violates a law or regulation and/or;
5. Reports the conduct to agency during employment and the employer knows about it.

See, e.g., Obst, 614 N.W.2d 202 (employee who tells employer to report safety issue of

which it is already aware is not protected); Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174, 180 (Minn. App. 1991) (in house counsel's recommendations for how to deal with discrimination and harassment issues were made as part of his job duties and insufficient to establish retaliatory discharge claim), aff'd., 479 N.W.2d 58 (Minn. 1992); Cokely v. City of Otsego, 623 N.W.2d 625, 631 (Minn. App. 2001) (discussion of legal issues in memoranda prepared as part of employee's job and already known to employer not protected.); cf. Abraham v. Cty of Hennepin, 639 N.W.2d 342, 346 (Minn. 2002) (finding whistleblower protection applied to employees who complained to employer and the Safety and Health Division of MNOSHA about use of harmful chemicals); Anderson-Johanningmeier v. Mid-Minnesota Women's Center, 637 N.W.2d 270, 271 (Minn. 2002) (finding whistleblower protection applied where employees told employer conduct was illegal and that they reported it to Minnesota DOL);

Borgersen's conduct does not meet any of these standards. For his "report," Borgersen claims he expressed concern about the safety of the device and asked CSI to tell the FDA about the stent entanglement. First, Borgersen was not telling CSI something it did not already know. It was the FDA who initiated the questions about stent interactions, not Borgersen. Given CSI's knowledge that it needed to develop a test model for further evaluating its device, and especially given Borgersen's admitted involvement in such development, "on the facts presented here, [Borgersen] cannot be said to have been trying to expose what was so openly known and acknowledged by both [CSI and the FDA]." See Obst, 614 N.W.2d at 204.

Second, Borgersen admits he raised the safety concern because doing so was part

of his job and not for the purpose of exposing an illegality.

> Q. What was your purpose in raising these issues regarding safety with Mike Kallok and the other people at CSI during your employment?
> A. I'm an engineer. If I see a problem, I need to raise the issue. It's up to management to decide how to handle it.

Res. App. 23. It was Borgersen's responsibility to decide which tests should be conducted and write the reports describing those tests for submission. Res. App. 187. It was part of his job as a CSI employee to discuss design and safety issues; Borgersen participated in multiple meetings with coworkers to discuss such issues. App. 53. Even though he claims it should have been done, Borgersen did not prepare a report describing the entanglement, nor did he prepare reports involving other test models that he now claims were more appropriate. Instead, Borgersen designed the protocol and signed off on the report submitted to the FDA. Res. App. 20 and 46.

While Borgersen now claims that the trial court improperly made a credibility determination in finding that Borgersen cooperated with CSI in its submission, there is no dispute that he participated in preparing the report sent to the FDA. In support of his argument, Borgersen points to his testimony about a problem with a single page of the report, which contained measurements of scratches on the stents. App. 52. His testimony boils down to Borgersen's belief that the measurements are not accurate, but he does not dispute signing the document. App. 52-53. Also, while he claims that he signed off on the test protocol before it was finalized, he admits this was a common practice at CSI and regardless, this does not affect the fact that he designed it. App. 52. More importantly, he signed off on the actual report on May 14, 2004, and all the test results. Res. App. 46.

As much as Borgersen would now like to distance himself from his actions, there is no dispute that he was fully engaged in designing and reporting the test that was ultimately given to the FDA.

Finally, Borgersen does not claim he told anyone at CSI that it would be illegal not to report the entanglement to the FDA. He did not inform the FDA of his allegations until a month after his termination and CSI only learned of his report to the FDA through this lawsuit.

Therefore, Borgersen's actions simply do not constitute whistleblowing under Minnesota law. See Obst, 614 N.W.2d at 204 (just because the employee raises safety concerns does not mean he is reporting a violation or suspected violation of federal or state law).

C. The Trial Court Properly Held Borgersen Did Not Make A "Report" in Good Faith.

Borgersen cannot show he had a good faith belief that failing to submit information regarding the stent entanglement was a violation of law or regulation. In fact, he admits that during his employment at CSI, he was not familiar with FDA regulations and he had no prior experience with FDA submissions. Res. App. 188 – 189. While Borgersen now claims he knew about FDA regulations, the testimony he points to does not support his position:

> Q. Had you ever -- you've mentioned in your answers to interrogatories that there is a regulation that applies here. Have you read that regulation?
> A. Yes, I can't quote it to you verbatim, but I have read it.
> Q. Did you read it while you worked at CSI?
> A. I read it after I left CSI specifically because I wanted to know what to

do about this.

Q. Okay.

A. And we covered these kinds of things while we were at CSI, what the FDA expected to get. Gary Syring discussed it with us a number of times in different meetings. We did Meekas [ph.]. We had all kinds of discussions on how to rank the device problems or potential problems as far as safety were concerned, and there were a number of discussions of these things. So we were all aware of it, or should have been.

Res. App. 23 – 24. Borgersen admits he was not familiar with the regulation at issue until after he left, and the fact that CSI's FDA expert explained how to rank safety issues and 'these kinds of things" does nothing to refute this testimony. Therefore, Borgersen could not have had a good faith belief that CSI's decision to not report the entanglement violated a law or regulation.

To determine whether a report is made in good faith, courts look at the content and the reporter's purpose "at the time the report was made to ensure that the report that is claimed to constitute whistle-blowing was in fact a report made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim." Obst, 614 N.W.2d at 204 (emphasis added). Here, as the trial court properly found, the fact that Borgersen helped develop the final test model, and prepared and signed off on the test report and results shows that his whistleblower claim is merely an after the fact justification. A plaintiff may not engage in the activity he now alleges was unlawful and maintain a whistleblower claim.

In addition, while Borgersen now complains that CSI failed to conduct stent interaction testing earlier and argues this was a violation of FDA regulations, *he was in charge of testing at CSI.* Had he felt the testing was required, he should have conducted

it. He never claimed or showed any evidence that CSI prevented him from doing the testing, nor has he provided any explanation for his failure to do so. Further, FDA requests do not have the force of law—just because the FDA asks for certain information does not mean failing to provide it is illegal.

The evidence, viewed in the light most favorable to Borgersen, shows that it was *Borgersen's* responsibility to devise an appropriate stent interaction test. He did not do so until the FDA requested it for the third time. When the entanglement occurred, Borgersen brought it to his superiors' attention and the group discussed the appropriate course of action, just like they did with any other safety issue. When CSI decided to develop a different test model and disagreed with his request that the information be provided to the FDA, Borgersen acquiesced in the decision and participated in completing the testing that was provided to the FDA. This is not "blowing the whistle" by exposing an illegality—rather, Borgersen was merely performing his job duties by discussing safety issues with his supervisors and coworkers.

As Borgersen's "report" is insufficient as a matter of law, he has not established a prima facie case of whistleblowing and his claim was properly dismissed.

IV. BORGERSEN'S BREACH OF CONTRACT CLAIM IS LEGALLY INSUFFICIENT.

Undeniably, when offered employment, Borgersen received an email transmitting two documents: an offer letter and an employment agreement. Both documents define the terms and conditions of his employment:

> This letter and the enclosed employment agreement summarize our understanding of the terms of your employment and provide you the means

to accept our offer as described.

Resp. App. 25. Borgersen, however, claims the trial court erred because it found that both documents defined the relationship. Instead, Borgersen argues in this appeal, only the employment agreement should govern the terms of his employment. Appellant's Brief at 18. This makes no common sense and is not supported by basic contract interpretation principles.

A. Multiple Documents Included in a Single Transaction Define The Agreement.

As an initial matter, it is a well settled principle of contract law that multiple documents relating to the same transaction are construed together with reference to each other:

> [I]nstruments executed at the same time, for the same purpose, and in the course of the same transaction are, in the eyes of the law, one instrument and will be read and construed together *unless the parties stipulate otherwise*. Where several instruments are made part of one transaction, they will be read together and each will be construed with reference to the others, although the instruments do not refer to each other.

Marso v. Mankato Clinic, Ltd., 153 N.W.2d 281, 288-89 (Minn. 1967) (emphasis added). See also Anchor Cas. Co. v. Bird Island Produce, Inc., 82 N.W. 2d 48, 54 (Minn. 1957) (holding that "[i]t is well established that where contracts relating to the same transaction are put into several instruments they will be read together and each will be construed and with reference to the other.") (internal citations omitted); Koch v. Han-Shire Investments, Inc., 273 Minn. 155, 140 N.W.2d 55, 62 (Minn. 1966) (holding that "[i]t is a familiar doctrine that where instruments relating to the same transaction are executed at the same time and for the same purpose, they will be read together and each will be construed with

relation to the other unless the parties stipulate otherwise.") (emphasis added); Anderson v. Kammeier, 262 N.W.2d 366, 370-71 n. 2 (Minn. 1977) ("Contracts in several writings relating to the same transaction will be construed with reference to each other.") Because the offer letter and the employment agreement were provided contemporaneously to Borgersen, they are part of a single transaction and should be construed together.

1. The Parol Evidence Risk Does Not Apply to Contemporaneous Contracts.

Borgersen argues (Appellant's Brief at 19) that because the employment agreement contains an integration clause, the Court may not consider the offer letter. The purpose of an integration clause, however, is only to limit the introduction of parol evidence regarding the terms of a particular written agreement. See Farrell v. Johnson, 442 N.W.2d 805, 806 (Minn. App. 1989) ("A merger clause is usually conclusive in determining whether the agreement is completely integrated for purposes of the parol evidence rule.") The parol evidence rule "prohibits the admission of extrinsic evidence of ... *prior written agreements*, to explain the meaning of a document after the parties have reduced their agreement to an unambiguous integrated writing." Alpha Real Estate v. Delta Dental Plan, Minn., 664 N.W.2d 303, 312 (Minn. 2003) (internal quotations and citations omitted) (emphasis added). The integration clause, however, cannot be used to exclude provisions in other contemporaneous documents. Here, the offer letter is undisputedly a contemporaneous written agreement and its meaning must be given affect along with the employment agreement. Its consideration is not barred by the parol evidence rule.

2. Farrell v. Johnson is Directly at Point.

Finally, contrary to Borgersen's claim, Farrell—the only case to specifically address (and reject) Borgersen's argument—is directly on point with this case. In Farrell, the parties entered into a sales agreement to purchase a resort, which contained an integration clause. 442 N.W.2d at 806. On the same day, the parties executed a closing agreement, which incorporated the sales agreement by reference. Id. The court reversed the trial court's decision to rely solely on the sales agreement due to the existence of an integration clause:

> A merger clause is usually conclusive in determining whether the agreement is completely integrated for purposes of the parol evidence rule. But the parol evidence rule has no application here since appellants are not attempting to prove prior or contemporaneous oral negotiations. To the contrary, appellants are urging for consideration of a subsequent written document (the closing agreement). Therefore, section 16 should not be considered proof of whether the sales agreement contained the parties' full agreement.

442 N.W.2d at 806. The court found the fact that the parties expressly referred to the sales agreement in the closing agreement and incorporated the agreements into one another to be significant, in addition to the fact that the documents were executed the same day. Id. at 807.[3]

The facts are almost identical here—the offer letter expressly incorporates the employment agreement by reference and the two documents were provided to Borgersen at the same time. Therefore, Farrell applies.

Borgersen also argues that because he never "executed" the offer letter, he is not

[3] Also contrary to Borgersen's argument, the fact that the closing agreement was "subsequent" was not dispositive. See Farrell, 442 N.W.2d at 807.

bound by its terms. As the offer letter was a unilateral contract, it was executed when Borgersen signed the employment agreement and came to work. See Pine River, 333 N.W.2d at 626 (unilateral contract formed where terms are definite and only performance required for acceptance). This is consistent with the language in the letter, which instructed Borgersen to indicate his acceptance of the offer by signing and returning the employment agreement. That Borgersen said he paid no attention to the offer letter is of no consequence to a unilateral contract.

B. CSI Never Offered Borgersen More Than Employment "At-will."

Principles of contract formation demonstrate Borgersen was not offered job security beyond that of an at-will employee. "A contract of employment is governed by the same rules applicable to other types of contracts." Fredrich v. Independent School Dist. No. 720, 465 N.W.2d 692, 695 (Minn. App. 1991). Whether a statement constitutes an offer to enter into an employment agreement is a question of law to be resolved by the Court. Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 740 (Minn. 2000). To establish that an employment relationship is terminable only for cause, Borgersen must establish that CSI clearly intended to create such a contract. Corum v. Farm Credit Services, 628 F.Supp. 707, 713-14 (D. Minn. 1986), Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983). To make this determination, courts look to the objective manifestations, rather than the subjective intent, of the parties. See Cederstrand v. Lutheran Brotherhood, 263 Minn. 520, 117 N.W.2d 213, 221 (1962). The objective manifestations of CSI demonstrate a clear intent to establish an "at-will" relationship.

C. The "For Cause" Language in the Employment Agreement Does Not Mean "Only For Cause;" It Does Not Restrict Right to Terminate "At-Will."

In Minnesota, and 49 of the 50 states, the presumption is that an employer-employee relationship is terminable at the will of either party. This means the employer may summarily dismiss the employee, and the employee is under no obligation to remain at the job. Cederstrand, 263 Minn. 520, 117 N.W.2d at 221, citing Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936). The presumption of at-will employment is longstanding and strong. It may only be overcome by unambiguous language expressly limiting the employer's right to terminate. Cederstrand, 263 Minn. 520, 117 N.W.2d at 221 ("Unless [Cederstrand] can establish that she was to be dismissed ***only*** for cause by proving a contract to that effect, her employment could be terminated at any time and without cause.") (emphasis added).

1. At-Will Employment is Presumed.

While most employment relationships are at-will, not all are. For example, workers covered by collective bargaining agreements between labor organizations and employers have greater job security than at-will employees. Virtually all labor agreements restrict an employer's right to discipline or discharge for "cause only." Therefore, union employees are not "at-will."[4] See, e.g., General Drivers, Local No. 346 v. Aitkin Cty Bd., 320 N.W.2d 695 (Minn. 1982). Similarly, Minnesota's Sales Representative statute provides that businesses may not terminate an agreement "unless

[4] A widely respected treatise on labor arbitration indicates around 92% of unionized worker agreements are restricted to discharge for good cause only. Elkouri & Elkouri, How Arbitration Works, Chap. 15.2.B.ii (6th ed. 2003).

the person has good cause" and the sales representative was given an opportunity to cure. Minn. Stat. § 325E.37. Franchise agreements may not be terminated "unless" the party terminating has "good cause." Minn. Stat. § 80C.14. Also, employee handbooks can alter the "at-will" nature of the relationship by requiring additional procedures prior to termination. For example, in Pine River, the court held the statement, "If an employee has violated a company policy, the following procedure ***will apply***," provided a guarantee of contractual rights and the employer was not permitted to terminate employees "at-will." Id. at 632 (emphasis added).

Here, unlike in the situations discussed above, there is no explicit language in the "with cause" provision expressly limiting CSI's right to terminate Borgersen.

> With Cause. Notwithstanding anything contained herein to the contrary, the Corporation, acting by and through its Board of Directors, ***shall have the right*** to immediately terminate Employee's employment under this Agreement for 'Cause…'

App. 37 (emphasis added). Rather than stating that Borgersen may ***only*** be terminated for cause, the employment agreement provides that CSI ***has the right*** to do so. In the absence of cause, therefore, Borgersen may be terminated for no reason or any reason, with or without prior notice.

Minnesota courts have previously addressed this issue: where an agreement allows, but does not require, termination "at-will" and termination "for cause," then the relationship is "at-will." For example, where an employee signed an agreement providing termination at-will and for cause the court held:

> [The agreement] does not state that Omnitrition may fire . . . ***only*** for cause, but rather states that material violations ***may*** lead to termination. [The agreement]

> contains no language manifesting an intent that it constitute the exclusive basis for termination. Construing the contract as a whole, we hold that the distributorship contract allows for termination ***either*** at the will of a party upon 30 days' written notice ***or*** for cause effective immediately, but with a right to appeal.

Banbury v. Omnitrition Intl., Inc., 533 N.W.2d 876, 880 (Minn. App. 1995) (emphasis in original).

Just as in Banbury, the entire agreement (the offer letter and employment agreement) provides that Borgersen may be terminated either "with cause" or "at-will;" therefore, the agreement is terminable "at-will." See also Polk v. Mutual Serv. Life Ins. Co., 344 N.W.2d 427, 429-30 (Minn. App. 1984) (holding that where an employment contract provides both for termination at-will by either party and for termination for cause by employer, employer may terminate employee under at-will provision); Martin v. Equitable Life Assurance Soc., 553 F.2d 573, 575 (8th Cir. 1977) (applying Minnesota law, contract providing that party may terminate either at-will or for cause unambiguously reflects an intent to reserve the right to terminate at-will).

Finally, Borgersen cannot point to any authority supporting his argument that there is an inherent contradiction between a "cause" provision and an "at-will" clause, as none exists. In fact, employment handbooks frequently state employment is "at-will," and at the same time, provide for progressive discipline and other purported restrictions on termination. Minnesota courts consistently find that, far from creating an irreconcilable conflict, the net effect is that the employer has effectively disclaimed any intent to restrict its ability to terminate "at-will." For example, in Lee v. Sperry Corp., 678 F.Supp. 1415 (D. Minn. 1987), the employer's policies included an 11-page document setting forth

procedures governing employment termination, but that same document also stated that employment was at-will. Id. at 1418. Reading the two clauses together, the court concluded, "The explicit disclaimer and statement of employment-at-will here negates the existence of any contract or claim of breach thereof." Id.

The trial court's finding that Borgersen was an "at-will" employee was consistent with established Minnesota precedent and should be upheld.

As Borgersen never had a contract for anything other than at-will employment, his breach of contract claim fails. The trial court properly granted summary judgment on this issue.

CONCLUSION

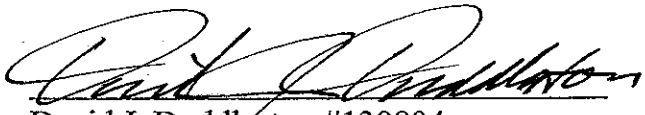
Ultimately, the outcome of cases is determined by this Court's common sense application of the law to undisputed facts. While Borgersen's arguments represent unique and convoluted interpretations of the Whistleblower statute and contract law, they fail when examined in the light of reality. It simply makes sense that an employee is not a whistleblower where not only reported safety issues as part of his job, but was responsible for, and participated in, the conduct he now claims is unlawful. Similarly, it makes sense to construe the language in the offer letter together with the employment agreement it enclosed and referenced, particularly where the "for cause" provision does not represent a restriction on CSI's ability to terminate Borgersen. For these reasons, this

Court should affirm the trial court's grant of summary judgment.

Respectfully submitted,

Date: June 23, 2006

JACKSON LEWIS LLP



David J. Duddleston #139804
Natalie Wyatt-Brown #260757
150 Fifth Street Towers, Suite 1450
150 South Fifth Street
Minneapolis, MN 55402
(612) 341-8131

ATTORNEYS FOR RESPONDENT
CARDIOVASCULAR SYSTEMS, INC.

CERTIFICATION

I certify that this brief conforms to Rule 132.01 of the Minnesota Rules of Appellate Procedure for a brief using proportional font of 13 point or larger. I further certify that, in preparation of this brief, I used Microsoft Office Word 2003, Professional Edition, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced brief contains 6,465 words.

Respectfully submitted,

Dated: June 23, 2006.

JACKSON LEWIS LLP

David J. Duddleston #139804
Natalie Wyatt-Brown #260757
150 Fifth Street Towers, Suite 1450
150 South Fifth Street
Minneapolis, MN 55402
(612) 341-8131

ATTORNEYS FOR RESPONDENT
CARDIOVASCULAR SYSTEMS, INC.

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).