

No. A06-1137

STATE OF MINNESOTA
IN COURT OF APPEALS

John Grundtner,

Plaintiff/Appellant,

v.

University of Minnesota, and Michael Perkins,
in his personal and professional capacities

Defendants/Respondents,

APPELLANT'S REPLY BRIEF

Stephen W. Cooper, #18788
Stacey R. Everson, #219277
The Cooper Law Firm,
Chartered
Loring Green East
1201 Yale Place, Suite A100
Minneapolis, MN 55403
(612) 338-3533

ATTORNEYS FOR APPELLANT

Brian J. Slovt, # 236846
Office of the General
Counsel
University of Minnesota
360 McNamara Alumni Center
200 Oak Street SE
Minneapolis, MN 55455-2006
(612) 624-4100

ATTORNEY FOR RESPONDENTS

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I. DEFENDANTS DO NOT APPLY THE SUMMARY JUDGMENT STANDARD.

There was no trial in this matter, the trial court granted summary judgment. In light of this, the law requires that the facts be viewed in the light most favorable to the non-moving party and that all reasonable inferences and conclusions be drawn in the non-moving party's favor. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000); Fazio v. Belem, 504 N.W.2d 758, 761 (Minn. 1993).

The Respondents ignored this standard in their brief, and instead set out the facts and then base their argument on construing all contested facts in their favor and draw all inferences in their favor. Their brief is more akin to a closing argument at trial, than to setting out why when taking the facts in the light most favorable to Plaintiff, Defendants must as a matter of law, still win.

II. PLAINTIFF ESTABLISHED A WHISTLEBLOWER CLAIM.

Defendants in this case attempt to trivialize the behavior Plaintiff Grundtner complained about. The complaint led to his termination. Defendant Perkins, on behalf of the University, decided to pursue an illegal bidding strategy. This was not merely idle chatter in the discussion of a wide range of options. It was instead, a decision that Defendants were in the process of implementing. "The University was pursuing a procurement method that was illegal and had agreed with the architect of record to proceed that way." (Gruntner Dep. p. 49.)

When Mr. Grundtner was informed of this decision, he immediately indicated it

was illegal. He was ignored. He reported to University of Minnesota Counsel and to Mr. Perkins, that this continuing course of action was illegal. (Grundtner Dep. pp. 29, 30, 49, 65.) Only because of Mr. Grundtner's insistence that the course of action was illegal, did Defendants change what they were doing.

Mr. Perkins was angry that Mr. Grundtner had reported this illegality and had slowed things down. Mr. Grundtner was, thus, no longer viewed as a team player. He was demoted the next day. The demotion had the immediate effect of taking away Mr. Grundtner's signing authority over projects such as the Crookston Project and thereby took him out of the loop for knowing what was happening on bidding. ". . . the responsibility was taken away from me before completion of this action. I do not have firsthand knowledge as to what ultimately the University of Minnesota did." (Grundtner Dep. p. 50.)

Defendants contend that after Mr. Grundtner was removed from his position, they stopped the illegal behavior and everything was fine. To the contrary, the architecture firm overseeing the project wrote in January 2004 (about two months after Mr. Grundtner's demotion), ". . . the selection process was arbitrary." "While the University of Minnesota sees itself as exempt from the public bidding laws, we think that by not interviewing Gast Construction, the selection process has become preferential and unfair." "We believe it is unfair to throw out selection criteria and then vote based on familiarity or some other arbitrary reason." (Exh. U.)

This is hardly a ringing endorsement of the University's subsequent actions.

In this case, Defendants conceded for purposes of summary judgment, that the bidding scheme they decided to pursue and Plaintiff complained about, was illegal. This is not in dispute for purposes of this appeal. This plan was ongoing at the time of Plaintiff's repeated complaints, this is also not in dispute. When the facts and inferences are construed in Plaintiff's favor, but for Plaintiff's actions, the University would have completed its illegal plan.

The cases Defendants cite in their brief are off-point. They deal with situations that the actions complained of, even if completed, were not illegal or where there was no report. Here, Defendants embarked on a course of action that they concede would have been illegal if completed. Defendants cite no case where admittedly illegal behavior is stopped by an employee's report and then the employee was punished, where any court held the employee was not a whistleblower.

The trial court ruled that because the illegal actions were interrupted and thereby not completed because of Mr. Grundtner's actions, he enjoyed no protection under the Whistleblower Statute. The court cited no cases which made such a strained reading of the Whistleblower Statute.

Defendants claim solely because they had not completed their illegal activity, Mr. Grundtner had not made a report of, "a violation or suspected violation of any. . .law." Of course he did. He told Defendants they were violating the law.

There is no language in the Whistleblower Statute which declares only reports of fully-completed law violations are protected. What is protected is reports of unlawful behavior, whether completed, in progress or planned.

Defendants would have us believe that if Plaintiff had waited until after Defendants had illegally bid out and built the student center, and then complained he would be protected, but if he achieved the Statute's intent of correcting and stopping illegal behavior, he is not.¹ Under Defendants' logic, if a supervisor reveals he has agreed to kill a competitor and an employee reports this and is fired for it, the employee is not entitled to whistleblower protection, but if he waits until after the killing and then reports it, he is.

Obviously in this case, if Defendants had corrected their actions and not punished Plaintiff by demoting him and not renewing his contract, there would have been no violation of the Whistleblower Statute. It was the vindictive action of killing the messenger by demoting and then letting Plaintiff go, which makes this a whistleblower case.

The February Report.

The report of the misuse of government money is whistleblowing. Hedglin v. City of Willmar, 582 N.W.2d 897 (Minn. 1998). Plaintiff reported, amongst other things, that

¹One wonders when Defendants feel a report is protected. Would it be when bid papers go out? When negotiations with the low bidder commence? When a new agreement is reached? When the building is completed? Defendants seek to inject an ambiguous and useless requirement not found in the statute, to when protection is afforded.

he suspected that people without the lawful authority to approve contracts were doing so by using Mr. Perkins password. (Exh. MM.)

Causation.

Defendant Perkins admits he was irritated when Mr. Grundtner raised the issue of his decided-upon action being illegal. Others testified that Mr. Perkins was upset and did not view Mr. Grundtner as a team player. The next day, without any previous record of any kind indicating an intent to do so, he was demoted. This was a targeted demotion. It removed Mr. Grundtner from being aware of how bids were handled.

Again, within a week of his raising issues about fiscal improprieties, his contract was not renewed without any previous document indicating there was any prior plan for this to happen. Defendant Perkins acted alone in demoting Grundtner and acted alone in not renewing his contract. Both actions occurred immediately after Mr. Grundtner's complaints of illegal behavior.

Further revealing Defendants' animosity was the way Mr. Grundtner was treated thereafter. In contravention of normal procedures, Mr. Perkins had him removed from his office, required him to telecommute from off-campus, had his computer e-mail access shut off and doctored his personnel file with a false and derogatory memo.

Defendants' supposed non-discriminatory reason does not entitle them to summary judgment.

As discussed in Plaintiff's opening brief, Defendants have not presented a legitimate, non-discriminatory reason for their action, nor established that Plaintiff's

reports were not a discernable factor in Defendant's negative actions toward Plaintiff.

The evidence is that prior to his complaint, Plaintiff was in good standing and was viewed as an asset. He complained of illegal conduct. Mr. Perkins got angry. The very next day Plaintiff was demoted, which caused Plaintiff to not be able to know if illegal conduct was ongoing. No document indicated such a change was in the works prior to the complaint. Defendants were under budget restraints and had to cut their budget. In direct contradiction of this, demoting Plaintiff cost Defendants \$60,000-\$100,000.00 in compensation for his replacement.

A few months later, Mr. Grundtner raised fiscal impropriety issues and within a week was told his contract would not be renewed. Defendants argue it is all a coincidence. They claim, with no documentary support, Plaintiff was demoted and then not renewed for unrelated reasons.

At trial, a jury can weigh whose explanation and inferences it believes, but at summary judgment, as Reeves makes clear, that judgment the trial court, "must disregard all evidence favorable to the moving party that the jury is not required to believe."

Reeves at 151.

III. THERE IS JURISDICTION OVER PLAINTIFF'S OTHER CLAIMS.

In this case, Plaintiff received no process at all. Mr. Perkins unilaterally decided to demote him. Mr. Grundtner had no notice, no opportunity to be heard, no basis for the decision. He was just demoted unilaterally by Mr. Perkins. Similarly, when his contract

was not renewed, he was given no opportunity to be heard, no hearing took place, no basis for the decision was given, Mr. Perkins just unilaterally did not renew him. Thus, there is no quasi-judicial process to appeal. There was no record to review or findings to consider from Mr. Perkins.

This Court is not a trial court with discovery and testimony taken. Thus, there was no ability to appeal to this Court. It is the trial court's responsibility to ferret out a record that this Court then reviews if necessary.

In contrast, a tenure review process is quasi-judicial with many procedures and hearings which lends itself to appellate review.

Even if a breach of contract claim were pre-empted, none of Plaintiff's claims would be.

IV. THE TORT CLAIMS SATISFIED SUMMARY JUDGMENT REQUIREMENTS DEFAMATION.

A post-termination defamation claim is not pre-empted. Clark v. Independent School District No. 834, 553 N.W.2d 443, 446 (Minn.App. 1996); Willis v. County of Sherburne, 555 N.W.2d 277, 282-83 (Minn. 1996).

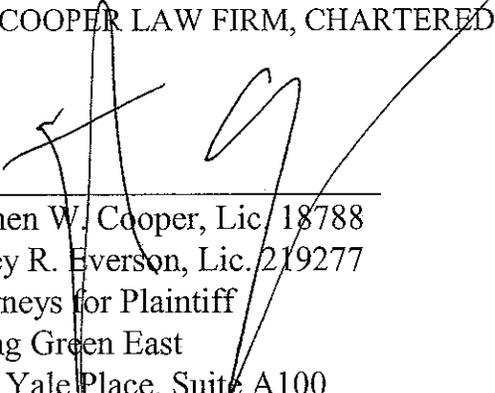
Plaintiff believes its opening brief fully supports the relief requested and that Defendants have failed to support their position.

CONCLUSION

The Appellant requests the lower court be reversed and this matter remanded for trial.

THE COOPER LAW FIRM, CHARTERED

Dated: September 18, 2006

By: 

Stephen W. Cooper, Lic. 18788

Stacey R. Everson, Lic. 219277

Attorneys for Plaintiff

Loring Green East

1201 Yale Place, Suite A100

Minneapolis, MN 55403

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**CERTIFICATE OF REPLY BRIEF
LENGTH.**

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, Subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 1,711 words. This brief was prepared using WordPerfect 10.

THE COOPER LAW FIRM, CHARTERED

Dated: September 18, 2006

By: _____

Stephen W. Cooper, Lic. 18788
Stacey R. Everson, Lic. 219277
Attorneys for Plaintiff
Loring Green East
1201 Yale Place, Suite A100
Minneapolis, MN 55403
(612)338-3533