

Case No. A04-1691

STATE OF MINNESOTA

IN SUPREME COURT

Chris Nelson.)
)
 Petitioner,)
)
v.)
)
Productive Alternatives, Inc.,)
)
 Respondent.)
)
)

PETITIONER'S BRIEF AND APPENDIX

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ISSUES PRESENTED

1. Does the whistleblower statute preclude a common-law action for wrongful termination of employment based on a public-policy exception to the at-will employment doctrine?

The trial court determined a common-law action was precluded by the whistleblower statute, while the Court of Appeals found it was not precluded.

Apposite cases: Phipps v. Clark Oil & Refining Corporation, 396 N.W.2d 588 (Minn. App. 1986), *affirmed* 408 N.W.2d 569 (1987); Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990); McClure v. American Family Mut. Ins. Co., 223 F.3d 845, 856 (8th Cir. 2000)

2. If a common-law action is not precluded by the whistleblower statute, does Petitioner's Complaint against Respondent set forth a claim upon which relief can be granted?

The trial court and the Court of Appeals both held that the complaint does not set forth a claim upon which relief can be granted.

Apposite cases and statutory provisions: Davis v. State Dept. Of Corrections, 500 N.W.2d 134 (Minn.App. 1993), *review denied*; Bowman v. State Bank of Keysville, 229 Va. 534, 535 331 S.E.2d 797 (Va. 1985); Minn. Stat. Ch. 317A.

STATEMENT OF THE CASE AND FACTS

The Otter Tail County District Court, Seventh Judicial District, the Honorable Waldemar B. Senyk presiding, determined that a common law cause of action for retaliatory discharge did not survive the adoption of the Minnesota Whistleblower Act, Minn. Stat. § 181.932. The trial court granted Respondent's motion for judgment on the pleadings, ruling that the Complaint failed to state a claim upon which relief can be granted pursuant to Minn. R. Civ. P. 12.02(e). The Court of Appeals, in a decision by the Honorable Harriet Lansing, determined that a common law cause of

action for retaliatory discharge did survive the adoption of the Whistleblower Act, but found that Petitioner's Complaint failed to set forth a cause of action upon which relief could be granted, thereby affirming the trial court. Nelson v. Productive Alternatives, Inc., 696 N.W.2d 841 (Minn.App. 2005).

On November 3, 2003, Petitioner Chris Nelson was discharged from employment as Director of Rehabilitation by Respondent Productive Alternatives, Inc., a Minnesota non-profit corporation. Nelson then commenced this lawsuit alleging that he was wrongfully discharged from employment because of his actual and/or perceived actions as a member of the corporation. Petitioner's Complaint at Appendix A-1 and Affidavit of Chris Nelson at A-7 (submitted to the trial court with respect to a dispute over disclosure of documents as to which Respondent asserted attorney client privilege or protection from disclosure as attorney work product).

ARGUMENT

I. A COMMON LAW PUBLIC POLICY BASED ACTION FOR WRONGFUL DISCHARGE FROM EMPLOYMENT SURVIVED THE ADOPTION OF MINNESOTA'S WHISTLEBLOWER ACT.

In 1987 Minnesota adopted what is referred to as the Whistleblower Act, codified at Minn. Stat. §§ 181.931 through 181.935. Minn. Stat. § 181.932, Subd. 1, provides:

Prohibited action. An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(a) the employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official;

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

(c) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason; or

(d) the employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm.

The trial court held that the adoption of this statute codified the public policy exception to the "at-will" employment doctrine enunciated in Phipps v. Clark Oil & Refining Corporation, 396 N.W.2d 588 (Minn. App. 1986)(*Phipps I*), affirmed 408 N.W.2d 569 (1987)(*Phipps II*). The Court of Appeals found otherwise:

Because the legislature did not prescribe the Whistleblower Act as providing an exclusive remedy, or otherwise clearly indicate an

abrogation of common law, it did not displace the existing common-law action in tort for retaliatory discharge created by *Phipps I* and refined by *Phipps II*.

Nelson v. Productive Alternatives, Inc., 696 N.W.2d 841, 844 (Minn.App. 2005).

At the time the Court of Appeals decided *Phipps I*, the Whistleblower Act had not been adopted. In *Phipps*, the employee alleged he was discharged for refusing to violate the Federal Clean Air Act by pumping leaded gasoline into an automobile equipped to receive only unleaded gas. In addressing the issue of whether or not Minnesota law recognized a cause of action for wrongful discharge of an employee terminated for refusing to violate a law, the Court of Appeals analyzed the employment-at-will doctrine and the public policy exception:

The employer's absolute right of discharge has been tempered during the last 50 years. The majority of jurisdictions have adopted, and numerous commentators have advocated, exceptions to the employment-at-will doctrine. Three general exceptions have been judicially created to relieve employees from the strict application of the employment-at-will doctrine:

- (1) a contract cause of action based on implied-in-fact promises of employment conditions, generally derived from personnel manuals;
- (2) an implied covenant of "good faith and fair dealing" under both contract and tort theories; and

(3) a “public policy” exception, based in tort, which permits recovery upon the finding that the employer’s conduct undermines some important public policy.

Although the Minnesota Supreme Court has declined to imply a covenant of good faith and fair dealing into every employment contract, *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853 (Minn. 1986), it has followed the modern trend in recognizing exceptions to employment at will. *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 882-83 (Minn. 1986).

...

Among other states, the most widely adopted exception to the doctrine is the public policy exception. Simply stated, the exception provides that an employer becomes subject to tort liability if its discharge of an employee contravenes some well-established public policy. Although the adoption of this exception has not been addressed in Minnesota, the majority of jurisdictions recognize this exception to the employment-at-will doctrine. [Footnote omitted.]¹

¹ The lengthy footnote states that “[a]t least 25 jurisdictions have adopted the public policy exception,” and then sets forth numerous case citations from other jurisdictions where this public policy exception was recognized, concluding with reference to two leading articles on employment-at-will. Since *Phipps I*, there have been a myriad of cases and secondary sources adopting and/or discussing the public policy exception to the employment-at-will doctrine. See 24 COA2d 227, “Cause of Action for Termination of At-Will Employee in Violation of Public Policy”; see also 104 ALR5th 1, “Common-Law Retaliatory Discharge of Employee for Refusing to Perform or Participate in Unlawful or Wrongful Acts”, which updated an earlier annotation entitled

...

Courts have reached the public policy exception to accommodate competing interests of society, the employee, and the employer. The Illinois Court of Appeals stated:

With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic. In addition, unchecked employer power, like unchecked employee power, has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out.

Palmateer v. International Harvester Co., 85 Ill.2d 124, 129, 52 Ill.Dec. 13, 15, 421 N.E.2d 876, 878 (1981) (citation omitted).

"Modern Status of Rule that Employer May Discharge At-Will Employee for Any Reason", 12 ALR4th 544.

...

We find the reasoning of the cases adopting a public policy exception to be persuasive. An employer's authority over its employee does not include the right to demand that the employee commit a criminal act. An employer therefore is liable if an employee is discharged for reasons that contravene a clear mandate of public policy.

Phipps I, 396 N.W.2d at 590-592.

The Supreme Court's review of *Phipps I* came after adoption of the Whistleblower Act. *Phipps II*, 408 N.W.2d 569, 571. As a result of the statute's enactment, this Court wrote:

Therefore, we no longer have before us the policy question of whether or not Minnesota should join the three-fifths of the states that now recognize, to some extent, a cause of action for wrongful discharge. See Lopatka, *The Emerging Law of Wrongful Discharge – A Quadrennial Assessment of the Labor Law Issue of the 1980's*, 40 Bus.Law. 1, 1 (1984). The only question that remains is whether we should uphold the court of appeals' decision applying this public policy exception to the November 17, 1984, discharge of Phipps.

Id. The Supreme Court affirmed the Court of Appeals' decision, recognizing a public policy exception to the employment-at-will doctrine where an employee refuses to

violate a law. Nowhere in its decision, however, did this Court state the public policy exception was limited to such instances; the question becomes whether or not the Whistleblower Act contains such a restriction, explicitly or by implication.

As stated in Agassiz & Odessa Mutual Fire Ins. Co. v. Magnusson, 272 Minn. 156, 166, 136 N.W.2d 861, 868-69 (1965):

Ordinarily statutes are presumed not to alter or modify the common law unless they expressly so provide, *State ex rel. Boldt v. St. Cloud Milk Producers' Assn.*, 200 Minn. 1, 273 N.W. 603; *Braufman v. Hart Publication, Inc.*, 234 Minn. 343, 48 N.W.2d 546, 25 A.L.R. 2d 1030 Thus, in *State ex rel. Boldt v. St. Cloud Milk Producers' Assn.*, *supra*, which concerned the common-law right of stockholders to inspect the books of a corporation and the effect of a statutory enactment which partially defined such right, the court stated (200 Minn. 6, 273 N.W. 606):

'* * * The **statute** does not contain any clause repealing, restricting, or abridging the (**common-law**) rule then in effect. Such **statutes** are universally held **not** to abridge, restrict, or repeal, but to enlarge, extend, and supplement the **common-law** rule. * * *

'The conclusion is inescapable that the **common-law** right of inspection continues to exist, enlarged, extended, and supplemented by the provisions of section 7470 (2

Mason Minn.St. 1927, s 7470) in the cases to which it applies.'

In an analogous situation, the Minnesota Supreme Court has addressed the interplay of a claim under the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363.03², with a common-law based cause of action. Unlike the Whistleblower Act, the MHRA contains a preemption provision, codified at Minn. Stat. §363.11:

Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color, religion, sex, age, disability, marital status, status with regard to public assistance, national origin, sexual orientation, or familial status; but, as to acts declared unfair by section 363.03, the procedure herein provided shall, while pending, be exclusive.

In Vaughn v. Northwest Airlines, 558 N.W.2d 736 (Minn. 1997), this Court determined that the MHRA did not preempt a physically disabled passenger's negligence action against the airline premised on the airline's failure to provide the passenger assistance with her carry-on baggage. In making that determination, the Court referenced its decision in Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990), a case involving a lawsuit by an employee against her employer for sexual harassment, common-law battery and defamation:

² Renumbered as Chapter 363A in St. 2003 Supp.

Northwest argues that even if it owed Vaughn a duty, the Minnesota Human Rights Act preempts her cause of action. See Minn.Stat. § 363.03, subd. 3(a). . . .

Wirig [*v. Kinney Shoe Corp.*, 461 N.W.2d 374 (Minn.1990)] is the leading case on the preemptive scope of the MHRA. There, we held that the MHRA's prohibition against workplace sexual harassment did not preempt a factually parallel common-law battery claim. We emphasized that statutory abrogation of common-law claims must be accomplished by express wording or necessary implication, *Wirig*, 461 N.W.2d at 377-78, and that the MHRA serves a legislative purpose distinct from common-law battery, *id.* At 378-79.

Vaughn, 558 N.W.2d at 744-745.

The Whistleblower Act does not contain an exclusivity provision nor does it contain any express wording abrogating the common law or do so by necessary implication. The trial court nonetheless made a determination of preemption, citing Piekarski v. Home Owners Savings Bank, F.S.B., 956 F.2d 1484 (8th Cir. 1992), *cert. denied*, 506 U.S. 872, 113 S.Ct. 206, 121 L.Ed.2d 147; McClure v. American Family Mut. Ins. Co., 223 F.3d 845, 856 (8th Cir. 2000); Thompson v. Campbell, 845 F.Supp. 665 (D.Minn.1994); Bolton v. Department of Human Services, 527 N.W.2d 149 (Minn.App.1995), *rev'd on other grounds*, 540 N.W.2d 523 (Minn.1995); Williams v. St. Paul Ramsey Medical Ctr., Inc., 530 N.W.2d 852 (Minn.App.1995), *rev'd on other*

grounds, 551 N.W.2d 483 (Minn.1996); and Blanchard v. Northwest Publications, Inc., 2000 WL 54354 (Minn.App.Jan.25, 2000).

In Piekarski, the Eighth Circuit Court of Appeals determined that “Minnesota courts have not recognized a common law action for discharge based on refusal to violate the law that exists independently of the action under Minnesota Statute §181.932(1)(c).” 956 F.2d at 1493. As authority for the foregoing, the decision cites an unpublished Court of Appeals decision, Maida v. Maxi-Switch Co., No. CO-88-1344, 1989 WL 452, at *2 (Minn.App. Jan.10, 1989), which is not precedential, Minn. Stat. §480A.08, Subd. 3, and indicates “see also *Steinbach v. Northwestern Nat’l Life Ins. Co.*, 728 F.Supp. 1389, 1394 (D.Minn.1989)”. The Steinbach case, however, involved the dismissal of an employee’s common law claim for wrongful discharge that duplicated his MRHA claim. The Eighth Circuit utilized its Piekarski decision and the Steinbach case to come to the same conclusion in Thompson, 845 F.Supp. At 676, also cited by the trial court to support its finding of preemption. In both Piekarski and Thompson the common law claim of the aggrieved employee was disallowed because it duplicated a claim covered by either the Whistleblower Act or the MHRA; in the instant case, however, the claim of Petitioner as set forth in his complaint, Appendix A-1, is outside the scope of either statute.

The decision of the Eighth Circuit Court of Appeals in McClure underscores the distinction between the instant case and those relied upon by the trial court in determining the Whistleblower Act preempted Petitioner’s claim for relief. As stated in McClure:

Appellants also alleged that American Family had violated a Minnesota statute limiting the ability of insurance companies to terminate or penalize employees for contacting government agencies. At the time of their terminations a statute provided that:

An insurance company may not terminate or otherwise penalize an insurance agent solely because the agent contacted any government department or agency regarding a problem that the agent or an insured may be having with an insurance company.

Minn.Stat. §72A.20, subd. 20 (1994). Following the terminations of [the Appellants] but before the lawsuit was filed, the Minnesota legislature modified the statute specifically to include contact with the state legislature. [Footnote omitted.] The administrative law judge concluded that American Family had terminated [the Appellants] because of their lobbying activities, but he also concluded that American Family had not violated the statute because at the time it applied only to contact with executive departments. Appellants' contacts with the legislative branch were therefore not covered, and the amended statute could not be applied retroactively. . . . Appellants do not dispute these conclusions. Rather, they assert that the amended statute articulates a public policy

of the state that employees should not be retaliated against for petitioning the legislature and that the court should craft a common law remedy in order to enforce that policy for the period prior to the passage of the statute.

While Minnesota courts have had occasion to create judicial remedies for employment actions taken in violation of public policy, [FN5] we find that the circumstances required for the creation of such a remedy are not present in this case. Courts have authorized judicial remedies based on public policy only when statutory remedies were lacking. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 898-99 (3d Cir.1983); *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 571 (Minn.1987). Both before and after its amendment, Minn. Stat. §72A.20, subd. 20, provided a remedy that completely effected its stated purpose. "Once the Minnesota legislature has drawn the line between employment disputes that genuinely implicate public policy and are actionable and those that are not, it is not for courts to redraw the line." *Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1493 (8th Cir. 1992). Minnesota courts have consistently declined to create causes of action that duplicate statutory claims. See *Thompson v. Campbell*, 845 F.Supp. 665, 676 & n. 11 (D.Minn.1994); *Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F.Supp. 1389, 1394 (D.Minn.1989); see also *Blanchard v. Northwest Publications, Inc.*, 2000 WL 54354 at *3

(Minn.Ct.App. January 25, 2000)(unpublished opinion). Similar considerations weigh against the creation of retroactive judicial remedies that mirror non-retroactive statutory remedies.

223 F.3d at 855-856. Footnote 5 to the court's language in McClure above quoted actually acknowledges the underlying Minnesota case law supporting the public policy exception to the employment at will doctrine:

The Minnesota Court of Appeals recognized a public policy exception to the doctrine of at will employment in Phipps v. Clark Oil & Refining Corp., 396 N.W.2d 588 (Minn.Ct.App.1986), later codified at Minn.Stat. §181.932, subd.1 (1998), and the Minnesota Supreme Court ratified the court's decision to allow a wrongful discharge action before the subsequent passage of the statute. See *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 571 (Minn.1987). Following *Phipps*, this court interpreted the public policy exception to include wrongful wage discrimination as well as wrongful discharge. See *Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1493 (8th Cir.1992).

Id. at 856.

Petitioner Chris Nelson's claim does not mirror a statutory remedy set forth in the Whistleblower Act and, as such, should not be barred because of the passage of that statute. Such a determination is entirely consistent with the court's analysis in McClure.

The decision in Bolton, which was even quoted by the trial court, simply acknowledged that “[g]enerally, common law claims for retaliatory discharge have been displaced by the Whistleblower Act.” 527 N.W.2d at 154. Trial Court Memorandum of Law at Appendix A-19. Neither the quoted language nor any other part of the Bolton decision stand for the proposition that the public policy exception to the employee at will doctrine has been entirely preempted by adoption of the Whistleblower Act. In addition, the only arguably relevant language in Williams that “Minnesota’s Whistleblower Statute codified the public policy exception to the general rule of at-will employment”, 530 N.W.2d at 854, was not crucial to the issue in that case of whether or not a claim could be made under both the MHRA and the Whistleblower Act. As such, the Williams decision lacks any precedential value for purpose of determining the law applicable to Appellant’s claim in this action.

The last case cited by the trial court in support of its preemption analysis was Blanchard, an unpublished Court of Appeals decision which is not entitled to any precedential value under Minn. Stat. §480A.08, Subd. 3. Moreover, in concluding that “common law claims for retaliatory discharge have been displaced by the state Whistleblower Act”, Blanchard at *3, the opinion cites Thompson, Piekarski, Steinbach, and Bolton as authority, none of which compel the conclusion that a common law public policy based action for wrongful discharge from employment can no longer be maintained after adoption of the Whistleblower Act.

In Anderson-Johanningmeier v. Mid-Minnesota Women’s Center, Inc., 637 N.W.2d 270 (Minn. 2002), this Court wrote:

When we interpret a statute, we must “ascertain and effectuate the intention of the legislature.” Minn.Stat. §645.16 (2000); *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 209 (Minn. 2001).

Minnesota Statute §645.16 provides the following:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the law;
- (2) The circumstances under which it was enacted;
- (3) The mischief to be remedied;
- (4) The object to be attained;
- (5) The former law, if any, including other laws upon the same or similar subjects;
- (6) The consequences of a particular interpretation;
- (7) The contemporaneous legislative history; and
- (8) Legislative and administrative interpretations of the statute.

In the case of the whistleblower statute, adopted by the 1987 Minnesota Legislature as Chapter 76, the chief sponsor of the legislation in the House of Representatives was the Honorable Gil Gutnecht (House File No. 823). In his remarks on the proposed legislation to the House of Representatives Committee on Labor-Management Relations on April 1, 1987, Representative Gutnecht stated the following:

There are two concepts put into this bill. The first is the whistleblower concept. I don't believe that any employee should be required to break the law. And common law and some of the court cases which have been tested in the last several years are more and more saying that--no, people should not be required to break the law. And we think that there is some useful purpose in putting it right into the code. So the first part of the bill up through I think Section 3, deals with the whistleblower statute, which has been discussed for several years around here and I think it is time we do something about it. The second part says essentially that if an employee is terminated that the employer has to tell them why

Tape of Proceedings Before Labor-Management Relations Committee, April 1, 1987 (maintained at Minnesota Historical Society Library, Box 372, April 1, 1987, Tape 2). There is nothing in the remarks on this legislation, either in the House or the Senate (Senate File No. 701), that indicates the legislature intended, by its adoption, to

preclude a common law cause of action for wrongful discharge based upon a public policy exception to the employment-at-will doctrine. Tapes of Proceedings Before the House of Representatives, Floor Sessions, April 13, April 14 and May 2, 1987 (Box 328); Tape of Proceedings Before Senate Employment Committee, March 26, 1987 (Box 212); Tape of Senate Floor Session, April 29, 1987 (Box 207).

Petitioner's common law cause of action does not duplicate nor mirror any of the grounds for relief under the Whistleblower Act. The Whistleblower Act neither expressly nor by implication preempts a claim not covered by its provisions. There is nothing to support a conclusion that the legislature intended preemption by adoption of the Whistleblower Act. The decision of the Court of Appeals in this regard should be affirmed.

II. PETITIONER'S COMPLAINT AGAINST RESPONDENT SETS FORTH A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND SHOULD NOT HAVE BEEN DISMISSED

The standard a court is to follow when considering a motion for judgment on the pleadings is well established:

When considering a motion for judgment on the pleadings, the court must accept the allegations contained in the pleading under attack as true. *State ex rel. City of Minneapolis v. Minneapolis St. Ry. Co.*, 238 Minn. 218, 223, 56 N.W.2d 564, 567 (1952). All assumptions made and inferences drawn must favor the party against whom the judgment is entered. *Northern States Power Co. V. Franklin*, 265 Minn. 391, 396, 122 N.W.2d 26, 30 (1963).

Wessin v. Archives Corp., 581 N.W.2d 380, 383 (Minn.App.1998), *rev'd on other grounds*, 592 N.W.2d 460 (1999).

In deciding whether the trial court's order granting Respondent's motion for judgment on the pleadings can be sustained, the reviewing court is "limited to the facts asserted in the pleadings interpreted in the light most favorable to the [Petitioner]." Stephenson v. Plastics Corp. Of America, 276 Minn. 400, 150 N.W.2d 668 (Minn. 1967). "In reviewing a case dismissed under Rule 12 for failure to state a claim for which relief can be granted, the only question before us is whether the complaint sets forth a legally sufficient claim for which relief can be granted. Elzie v. Commissioner of Pub. Safety, 298 N.W.2d 29, 32 (Minn.1980)." Davis v. State Dept. Of Corrections, 500 N.W.2d 134 (Minn.App. 1993), *review denied*.

In his complaint against Respondent, Petitioner alleged that he was wrongfully discharged from employment "because of his actual and/or perceived actions as a member of the corporation." Appendix at A-2. It is Chris Nelson's position that Respondent did in fact violate "a clear mandate of public policy" when it discharged him for exercising his rights as a voting member of Respondent, a nonprofit corporation. Since the Whistleblower Act did not preempt a claim for wrongful discharge from employment based on public policy considerations, Petitioner's complaint does set forth a legally sufficient claim for which relief can be granted.

The importance of nonprofit organizations in today's society cannot be overstated:

Nonprofit Organizations now (in 1994) are second to no other kind of organizations in their importance in American (and increasingly in all modern/industrial) society. For many Americans they often are more essential to a decent life in a decent society than are business organizations; for the carrying on of much production and services and sources of paid employment often can be done by NPOs as well as (or better than) profit-businesses. In short, NPOs probably are the most important organizations in many aspects of human society today. NPOs now can (and do) provide the socio-economic legal vehicles for both capitalist-oriented and socialist-oriented management of human states or nations, in addition to being the main quality-of-life vehicles for most people. ...

Nonprofit associations benefit society through educating their members, setting professional standards, developing and disseminating information, informing the public, ensuring representation for private interests, exercising and supporting political choice, and stimulating and organizing volunteer efforts, while enriching the lives of their members....

...

Nonprofits are becoming the most important "social safety net" of the future. "Americans of all ages, all stations in life, and all types of disposition

are forever forming associations...religious, moral, serious, futile, very general and very limited, immensely large and very minute... Americans combine great individualism with an attitude towards community action that knows no counterpart in the world.” “Associations are formed for purposes of trade, and for political, literary and religious interests.” The Pilgrims’ *Mayflower Compact* of 1620 was a *contract* “to combine ourselves together into a civil body politic.” Today, too, membership in a nonprofit organization is basically *contractual* in nature.

Nonprofit Corporations, Organizations, & Associations, Oleck, Howard L. and Stewart, Martha E., 6th Ed. (1994), pp. 1-3 (footnotes omitted).

The laws of this state recognize the importance of the non-profit sector and attempt to insure nonprofit corporations serve their public purpose. Thus, the Attorney General is given the power set forth in Minnesota Statute §8.31 to supervise and investigate corporations under the Minnesota Nonprofit Corporation Act (Minnesota Statutes Chapter 317A) and to bring proceedings to secure compliance with its provisions. See also Minnesota Statutes §§501B.40 and 501B.41(investigatory authority over charitable trusts). In addition, Minnesota Statutes §8.31, Subd. 3a, gives any person injured by a violation of the Nonprofit Corporation Act the right to bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorneys’ fees, in addition to equitable relief.

The Minnesota Nonprofit Corporation Act contains extensive provisions governing membership rights and issues in a nonprofit corporation. Minn. Stat. §§ 317A.111, 317A.165 Subd. 2, 317A.401-.467. Minn. Stat. §317A.411, Subd. 1, specifically states that a member cannot be terminated “except pursuant to a procedure that is fair and reasonable and is carried out in good faith.” Minn. Stat. §317A.165, Subd. 2, provides:

At least 50 members with voting rights or ten percent of the members with voting rights, whichever is less, may bring an action against the corporation to enjoin the doing, continuing, or performing of an unauthorized act, contract, conveyance, or transfer.

The “right to share in the government of a corporation is a civil right which the law will protect . . .” Protestant Reformed Church of Edgerton v. Tempelman, 81 N.W.2d 839, 847 (Minn.1957).

Discharging a person for participating as a member of a corporation, particularly one organized for nonprofit, is contrary to the statutory scheme and allows an employer to penalize an individual for the rights afforded him or her by the corporation’s organizational documents and Minnesota statute. A Virginia case found such to be the case in the context of a for-profit corporation:

Virginia adheres to the common-law rule that when a contract calls for the rendition of services, but the period of its intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate the contract at will upon giving reasonable notice of intention to terminate. *Stonega Coal and Coke*

Co. v. Louisville and Nashville R.R. Co., 106 Va. 223, 226, 55 S.E. 551, 552 (1906). This appeal presents a unique situation under the foregoing employment-at-will doctrine.

...

Virginia has not deviated from the common-law doctrine of employment-at-will set forth in the *Stonega Coal case, supra*. See, e.g., *Wards Co. v. Lewis & Dobrow, Inc.*, 210 Va. 751, 756, 173 S.E.2d 861, 865 (1970); *Plaskitt v. Black Diamond Trailer Co.*, 209 Va. 460, 164 S.E.2d 645 (1968); *Title Ins. Co. V. Howell*, 158 Va. 713, 718, 164 S.E. 387, 389 (1932). [Footnote Omitted.] And we do not alter the traditional rule today. Nonetheless, the rule is not absolute. The unique facts of these cases require us to apply one of the recognized exceptions to the rule of terminability.

The courts of at least 20 states have granted exceptions to the strict application of the doctrine in favor of at-will employees who claim to have been discharged in violation of an established public policy. [Citations omitted.]

In the present cases, the retaliatory discharges were based on violations of public policy by the defendants. Code §13.1-32 conferred on these plaintiffs as stockholders the right to one vote, for each outstanding share of stock held, on each corporate matter submitted to a vote at a meeting of stockholders. This statutory provision contemplates that the right to vote shall be exercised free of duress and intimidation imposed on individual stockholders by corporate management. In order for the goal of the statute to be realized and the public policy fulfilled, the shareholder must be able to exercise this right without fear of reprisal from corporate management which happens also to be the employer. Because the right conferred by statute is in furtherance of established public policy, the employer may not lawfully use the threat of discharge of an at-will employee as a device to control the otherwise unfettered discretion of a shareholder to vote freely his or her stock in the corporation.

Consequently, applying a narrow exception to the employment-at-will rule, we hold that the plaintiffs have stated a cause of action in tort . . . for improper discharge from employment.

Bowman v. State Bank of Keysville, 229 Va. 534, 535, 539-540, 331 S.E.2d 797, 798, 800-801 (Va. 1985).

The Court of Appeals went through just this type of analysis in *Phipps I*. The conclusion arrived at in *Phipps I*, that an exception to the employment at will doctrine exists where an employee is discharged "for reasons that contravene a clear mandate of public policy," Vonch v. Carlson Companies, Inc., 439 N.W.2d 406, 408 (Minn.App.1989), is no less compelling, relevant or valid in the context of this case.

Just as membership in a nonprofit corporation generally cannot be terminated "except pursuant to a procedure that is fair and reasonable and is carried out in good faith", Minn. Stat. §317A.411 Subd. 1, public policy should not allow the discharge of a person solely because he exercised his membership rights. As a practical matter, one would expect employees and officers of a nonprofit to also be its members. In the instant case, the Affidavit of Chris Nelson at A-7 points out that approximately 40 of 55 members were employees of Productive Alternatives, and further states that Productive Alternative's Board adopted a resolution on October 31, 2003, just before Petitioner's discharge, that effective January 1, 2004, no employees could be members of the corporation. If Petitioner is not allowed a cause of action against Respondent for discharging him as a result of his actions as a member, thereby virtually kicking Petitioner out the door because he took a position he was entitled to take, there will be a chilling effect on members and employees of nonprofit organizations.

The Court should protect the voting rights of members of a non-profit corporation, granted by the Minnesota Nonprofit Corporation Act (see Minn. Stat. §§

317A.401 Subd. 4 and 317A.441), and not allow Productive Alternatives to retaliate against Petitioner for exercising those rights.

CONCLUSION

Petitioner has set forth a claim upon which relief can be granted, Respondent's motion for judgment on the pleadings should have been denied and the trial court's decision dismissing this action, affirmed by the Court of Appeals, should be reversed.

Dated: September 15, 2005

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