

Nos. A07-584, A07-788

State of Minnesota
In Supreme Court

Brian Kidwell,

Petitioner,

v.

Sybaritic, Inc.,

Respondent.

BRIEF OF AMICUS CURIAE

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, MINNESOTA CHAPTER

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I.
**STATEMENT OF THE *AMICUS CURIAE*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,
MINNESOTA CHAPTER**

The National Employment Lawyers Association (“NELA”) is a non-profit organization of lawyers who represent employees. NELA is headquartered in California and has approximately 3,000 members nationwide. For decades, NELA has appeared as *amicus curiae* before the United States Supreme Court and United States Courts of Appeals to support precedent-setting litigation affecting the rights of individuals and classes of employees in the workplace.

The Minnesota Chapter of NELA has participated as *amicus curiae* on many occasions before the Minnesota Supreme Court. *See, e.g., Ray v. Miller Meester Advertising, Inc.*, 684 N.W.2d 404 (Minn. 2004); *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002); *Anderson-Johanningmeier v. Mid-Minnesota Women’s Center*, 637 N.W.2d 270 (Minn. 2002); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998); *Williams v. St. Paul Ramsey Medical Center*, 551 N.W.2d 483 (Minn. 1996); *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555 (Minn. 1996); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991). The undersigned are members of Minnesota NELA and have been appointed by Minnesota NELA’s *amicus* committee to brief this Court on the legal

and policy issues presented by the appeal herein.¹ Minnesota NELA thanks the Minnesota Supreme Court for permitting it to appear here in the public interest.

II.

Legal Issue Of Concern to Minnesota NELA

Minnesota NELA is briefing the following legal issue:

Does the Minnesota Whistleblower Act Exclude Coverage for Employees Whose Job Duty Encompasses Reporting Suspected Violations of Law to Their Employer?

The Minnesota Court of Appeals in a 2-1 decision held that it does.

Minnesota NELA strongly disagrees with that holding, supports the dissent of Judge Lansing in the lower court opinion, and believes that the majority opinion is a radical departure from legislative intent that if upheld by the supreme court, will result in a denial of coverage for those most in need of the law's protection.

III.

DISCUSSION

A. The Text of The Whistleblower Act Contains No Job Duty Exclusion

The Appellant Brian Kidwell was an in-house lawyer who reported to the company he worked for that it was obstructing justice by withholding or destroying evidence demanded in a lawsuit against the company. For his courage

¹The undersigned counsel wholly authored this brief for the *amicus curiae* pursuant to Minn. R. Civ. App. P. 129.03. No counsel for any party authored, reviewed or approved this brief in whole or in part. In addition, no person or entity, other than Minnesota NELA, its members, and its counsel, have made any monetary contribution to the preparation or submission of this brief. Any duplication of Minnesota NELA's analysis by Appellant is purely coincidental.

in making the report, Mr. Kidwell got fired. Although a jury found in his favor, the court of appeals vacated the jury award and found him to be unprotected by the Whistleblower Act (Minn. Stat. §181.932, hereinafter “the Act”), reasoning that as an in-house lawyer, Mr. Kidwell had a job duty to report such violations of law to his employer and was therefore not covered by the Act.

The construction of a statute is a question of law which the supreme court reviews *de novo*. *Hedglin v. City of Willmar*, 582 N.W.2d 897, 901 (Minn. 1998). In the world of litigation where there are rarely simple answers, the Court’s *de novo* review of the statute here should provide a simple answer. The issue of whether Mr. Kidwell was covered by the Act or not is answered by the text of the Act itself, which contains no job duty exclusion. The Court need look no further than the definitions of “employee” and “employer” supplied by the legislature to understand the broad scope of its intended reach. This Court has long held that “[i]f the words of the statute are free from ambiguity, [it] will not disregard them.” *Id.*

The protected class under the Act is defined to include any “*employee* [who] in good faith reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer[.]” Minn. Stat. §181.932, subd. 1 (emphasis added). “Employee” for purposes of this law is defined as “a person who performs services for hire in Minnesota for an employer.” Minn. Stat. §181.931, subd. 2. “Employer” is defined as “any person having one or more employees in Minnesota and includes the state and any political subdivision of the

state”. Minn. Stat. §181.931, subd. 3. The legislature did not add or imply the phrase “except those whose job duty encompasses reporting suspected violations of law”.

This Court has previously upheld a broad reading of the definition of “employer” in the Act. *Janklow v. Minnesota Bd. of Examiners for Nursing Home Adm'rs*, 552 N.W.2d 711 (Minn. 1996). In *Janklow*, the Court addressed whether the government should receive statutory immunity from whistleblower claims brought by public employees. In rejecting immunity, this Court found that “[t]he Whistleblower Act was enacted to protect the general public[.]” *Janklow*, 552 N.W.2d at 717. The Court then held that to grant immunity would “contravene the legislature’s decision to include the state in the list of employers who must abide by the Whistleblower Act’s provisions.” *Janklow*, 552 N.W.2d at 718. The broad definition of “employer” and the strong legislative intent of protecting the general public trumped any interest the state had in immunity.

The alleged job duty exclusion is a similar unfounded effort to narrow the scope of who is protected by the law, contrary to the public interest. It represents an unwarranted exercise of judicial activism that improperly modifies an unambiguous statute. There is no need for a Court to read new limitations into the Act to effectuate the intent of the legislature. The scope of coverage under the Act is already self-limited by the explicit statutory requirements that the report be made in “good faith” and be a report of a suspected or actual violation of law. Minn. Stat. §181.932, subd. 1. This Court has previously found these

requirements to be clear and unambiguous and therefore in need of no interpretation. *Hedglin*, 582 N.W.2d at 903. Whether such a report was made and whether the reporter was in fact fired for making the report are the legitimate issues in a whistleblower case. The alleged job duty exclusion is not needed to deter unwarranted claims.

This Court has held that “when [it] interprets a statute, [it] must ‘ascertain and effectuate the intention of the legislature’”, not force its own unique interpretation on the legislature. *Anderson-Johanningmeier et al. v. Mid-Minnesota Women's Center, et al.*, 637 N.W.2d 270 (Minn. 2002) quoting *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 209 (Minn. 2001) and Minn. Stat. § 645.16 (2000). “We will not disregard the words of a statute if they are free from ambiguity.” *Id.* citing Minn. Stat. § 645.16 and *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 9 (Minn. 2001). With the text of the Act being clear in the comprehensive scope of its coverage, the court of appeals, as a matter of long-standing principles of judicial restraint, had no discretion to author its own vastly more restrictive definition of “employee”.

The supreme court therefore need go no further in its analysis. It is indeed destructive to do so. Legislating a job duty exclusion from the bench only invites employers to write job descriptions that make it everyone’s duty to report a violation of law, thus entirely eliminating any protected class. The law by its express terms covers all those who perform services for hire for an employer in the

State of Minnesota, regardless of job duty. The court of appeals interpretation of the Act is erroneous and must be reversed.

B. Legislative Intent and Public Policy Favor Coverage, Not Exclusion

If the Court does go further and examines legislative intent beyond the text of the statute, the analysis only furthers the provision of coverage to persons whose job duty it is to report suspected violations of law. There is a legislative presumption that rewards interpretation favoring the public interest over any private interest. Minn. Stat. § 645.17(5). The lower court's majority opinion does not follow that important precept. The lower court opinion radically changes the scope of the Act to cover only those unlikely to ever report, while excluding those most likely to report. In practical terms, the lower court has renamed the law the "Employer Protection Act".

The court of appeals decision creates the odd result that had Mr. Kidwell been a mere file clerk unschooled in the law violation he was reporting, he would have been protected by the Act, but as a lawyer who was an expert on the law itself, Mr. Kidwell was fair game for termination. The majority opinion effectively leaves unarmed those most likely to enter the arena, while shielding those with no real interest in the battle being waged. The public at large is harmed by this decision, which now discourages reporting by those who actually know what they are talking about in favor of those who may not.

The job duty distinction is artificial and meaningless. It is not the *duty* that gets the employee fired, it is the *report* itself. Put another way, an employee does not get fired for simply doing his or her job; he or she gets fired for making a report that the employer did not want to hear. The court of appeals emphasis on job duty is an unnecessary hurdle that simply makes no sense in the litigation scheme.

There is no public policy served by telling an employer that it is just fine to go ahead and fire its corporate lawyer because he told the president in good faith that he was obstructing justice. It is instead in the public interest to encourage the report by protecting the reporter. Mr. Kidwell, as an in-house lawyer, was in a unique position of enhanced credibility to report an obstruction of justice. He was more likely than anyone else in the company to convince the employer to actually fix the violation. The same is true of the bridge inspector who reports that the condition of gusset plates are illegally defective despite superiors who do not want to hear it, the building inspector who reports a violation of the building code by the mayor, the licensed boiler operator who reports a safety law violation the company may not want to fix, the human resource manager who opposes an employment practice that violates the law, the accountant who reports that a vice president is embezzling funds, or the engineer who tells the company it should have reported required product safety test results to the government.

Upholding the alleged job duty exclusion would greatly narrow the protected class of employees. The list of people with a job duty to report

violations of law is already very broad. For example, all state and local public employees are expressly covered by the Act (Minn. Stat. §181.931, subd. 3), but are also legally required by their mere status as public employees to report certain suspected violations of law. All employees of the Minnesota State Colleges and University Systems (MNSCU) are required by MNSCU policies “to report fraud or other dishonest acts when they have a reasonable basis to believe such an act has occurred.” MNSCU *Employee Code of Conduct*, Procedure 1C.0.1, Subp. C. (Addendum at 4-6). Any employee of a political subdivision or charter commission in the State of Minnesota who “discovers evidence of theft, embezzlement, unlawful use of public funds or property, or misuse of public funds by a charter commission or any person authorized to expend public funds . . . shall promptly report to law enforcement and shall promptly report in writing to the state auditor a detailed description of the alleged incident or incidents.” Minn. Stat. § 609.456, subd. 1. An employee of the State of Minnesota or the University of Minnesota who “discovers evidence of theft, embezzlement, or unlawful use of public funds or property” is also obligated by law to “promptly report in writing to the legislative auditor a detailed description of the alleged incident or incidents.” Minn. Stat. §609.456, subd. 2. Thus the appellate opinion would, if upheld by this Court, effectively exclude coverage for public employees whom the Act expressly says are covered. The legislature did not intend that result.

C. The Alleged Precedents Cited by the Court of Appeals are All Distinguishable or Non-Binding

The court of appeals reasoned that its decision was mandated by three of its own prior opinions: *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323 (Minn. App. 2007), *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548 (Minn. App. 2005), and *Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174 (Minn. App. 1991), *aff'd mem.*, 479 N.W.2d 58 (Minn. 1992). But Judge Lansing (who authored *Gee*), in her dissent in the instant case, distinguished all three as cases not involving a report of a suspected violation of law. They did not turn on the issue of any job duty exclusion.

The appeals court also cited to an Eighth Circuit Court of Appeals interpretation of the Act, which applied a job duty exclusion to the Act. *Skare v. Extencicare Health Servs., Inc.*, 515 F.3d 836 (8th Cir. 2008). This interpretation of a Minnesota statute by a federal court is both erroneous and clearly not binding on the Minnesota Supreme Court. The Eighth Circuit claims in *Skare* that its decision was mandated by the court of appeals decision in *Gee*, which as noted above did not create a job duty exclusion but was decide on other grounds.

The Eighth Circuit decision also sought to extrapolate a job duty exclusion from this Court's holding in *Obst v. Microtron Inc.*, 614 N.W.2d 196 (Minn. 2000). In *Obst*, however, this Court simply found that "Obst's failure to establish that his reports to Microtron implicated a violation or suspected violation of an actual law" meant he could not establish his claim. *Obst*, 614 N.W.2d at 204.

Obst never suggested a job duty exclusion. The Eighth Circuit decision is thin in its analysis of *Obst* and should properly be ignored by this Court.

Skare also relied upon a similarly non-binding interpretation of the Act found in *Freeman v. Ace Tel. Ass'n*, 404 F. Supp.2d 1127, 1141 (D. Minn. 2005). The rationale of fear expressed by one federal district court in *Freeman* that “to rule otherwise would open the door for all compliance discussions to be viewed as reports under the statute” has not been borne out by experience. Its fear of the proverbial litigation tsunami has simply never materialized in the twenty-one years since the passage of this law.

In the context of this case, Mr. Kidwell undoubtedly advised his employer on countless legal matters before his termination, only one of which he styled as a “difficult duty” email that he knew would put his job on the line. The proper question for the jury in his case should not be “was it his duty to report”? The key question for Mr. Kidwell is the same as in all whistleblower cases, regardless of job duty: “was he fired *because* he made a good faith report of suspected violation of law”? Here the jury said “yes” in a verdict that even the most ardent skeptics would have to agree embodies the intent and spirit of the Whistleblower Act. It would be hard to contend that Mr. Kidwell’s report of an obstruction of justice was not in the public interest. His termination for reporting an obstruction of justice is abhorrent to the conduct of the judicial system and must not be condoned by this state’s highest court.

IV.

CONCLUSION

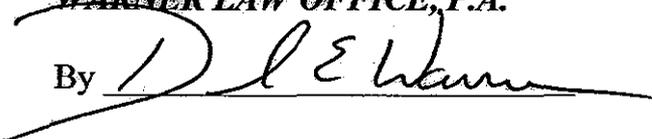
The text of the Whistleblower Act by itself mandates reversal of the court of appeals decision, as there is no job duty exclusion anywhere in the Act. Legislative intent and public policy further supports reversal of the decision. Finally, there is no binding precedent that required the court of appeals to hold as it did. This Court, for the reasons set forth above, should reject that ruling, hold that there is no job duty exclusion in the Whistleblower Act, and reinstate the jury verdict in favor of Mr. Kidwell.

Dated: September 24, 2008.

Respectfully Submitted,

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**WORD COUNT COMPLIANCE
CERTIFICATE**

Sybaritic, Inc.,

Respondent.

I, Daniel E. Warner, certify that the Brief of Amicus Curiae, National Employment Lawyers Association, Minnesota Chapter, complies with Rule 132.01, Subd. 3 of the Minnesota Rules of Civil Appellate Procedure.

I certify that in the preparation of this memorandum we used Microsoft Word 2003 and that this word processing program has been used in all text, including headings footnotes, and quotation in the following word count. I certify that the above referenced memorandum contains 2,690 words.

Date: September 24, 2008.

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