Whistleblower Law Update

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Introduction

Whether under Federal or State law, whistleblower claims generally follow the same analytical approach because whistleblower claims usually have the same key elements: (1) whether the plaintiff(s) engaged in protected activity; (2) whether the plaintiffs endured adverse action; and (3) whether a causal connection exists between the protected activity and the adverse action. To prevail on the ultimate claim, plaintiffs typically must also establish that the defendant(s) non-retaliatory reason(s) for taking adverse action are not credible or are otherwise pretext for retaliation.

I. State Legislative Amendments Significantly Expand The Scope Of Whistleblower Law

The Minnesota Legislature recently amended the State whistleblower law to revise the statutory definitions of "good faith," "penalize," and "report" and, consequently, to extend the reach of the law. To that end, the State whistleblower law also now protects employees who report "planned violation[s]" and violations of the common law. In addition, the amendments created a new cause of action for State government employees penalized for providing information to the Legislature or a constitutional officer, such as the Attorney General, concerning State services. The revised language is underlined below.

Section 1. Minnesota Statutes 2012, section 181.931, is amended by adding a subdivision to read as follows:

Subd. 4. **Good faith.** "Good faith" means conduct that does not violate section 181.932, subdivision 3.

Sec. 2. Minnesota Statutes 2012, section 181.931, is amended by adding a subdivision to read as follows:

Subd. 5. **Penalize.** "Penalize" means conduct that might dissuade a reasonable employee from making or supporting a report, including post-termination conduct by an employer or conduct by an employer for the benefit of a third party.

Sec. 3. Minnesota Statutes 2012, section 181.931, is amended by adding a subdivision to read as follows:

Subd. 6. **Report.** "Report" means a verbal, written, or electronic communication by an employee about an actual, suspected, or planned violation of a statute, regulation, or common law, whether committed by an employer or a third party.

Sec. 4. Minnesota Statutes 2012, section 181.932, subdivision 1, is amended to read as follows:

Subdivision 1. **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:

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

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

(3) 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;

(4) 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; or

(5) a public employee communicates the findings of a scientific or technical study that the employee, in good faith, believes to be truthful and accurate, including reports to a governmental body or law enforcement official.; or

(6) an employee in the classified service of state government communicates information that the employee, in good faith, believes to be truthful and accurate, and that relates to state services, including the financing of state services, to:

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(i) a legislator or the legislative auditor; or

(ii) a constitutional officer.

The disclosures protected pursuant to this section do not authorize the disclosure of data otherwise protected by law.

II. Federal And State Cases Regarding The Meaning Of Protected Activity For Purposes Of Triggering Whistleblower Protection

Dep't of Homeland Sec. v. MacLean[2]

After considering the Federal government's forceful national security argument, the United States Supreme Court took an expansive approach to retaliation claims in this high-profile case. In particular, the Court interpreted whistleblower law liberally even though the employee conduct at issue plainly violated a Federal regulation. The plaintiff was a Federal air marshal who publicly disclosed that the Transportation Security Administration decided, as a cost-cutting measure, to remove air marshals from certain long-distance flights in the face of reported national security threats. Although such disclosure by the plaintiff violated a regulation promulgated by the plaintiff's employer, the Federal Whistleblower Act (5 U.S.C § 2302) still protected the plaintiff because the disclosure in question was not "specifically prohibited by law." Although this case technically only applies to employees covered by Federal whistleblower law, the decision comports with a long-standing and ongoing trend of broadly construing and robustly enforcing anti-retaliation protections, whether under employment or civil rights statutes.

Ewald v. Royal Norwegian Embassy[3]

The Federal District Court held that the plaintiff, who wrote a letter to the plaintiff's supervisor complaining about evident misconduct, did not make a report in good faith within the meaning of the State whistleblower law. In reaching its decision, the Court reiterated that courts determine whether a report is made in good faith by looking at not only the content of the report, but also the intent of the reporter in order to ensure that the report is not "a vehicle, identified after the fact, to support a belated whistle-blowing claim." The Court emphasized that, while the employee called attention to unlawful pay disparities, the purpose of the plaintiff's letter was not to expose the illegality. Instead, the Court concluded "the evidence show[ed] that Plaintiff's purpose in writing the letter . . . was to obtain an explanation of her healthcare benefits and retroactive compensation." This case shows how courts continue to draw debatable distinctions to support dismissal of claims despite the recent legislative amendments.

Elkharwily v. Mayo Holding Co.[4]

The plaintiff alleged he made an oral report to a hospital administrative team that a fellow physician failed to admit a patient who was having a heart attack, an omission the plaintiff characterized as an act of "criminal negligence." The plaintiff also made several assertions after the plaintiff's separation that he had witnessed systemic fraud and malpractice and had been discharged for reporting the unlawful conduct. The Federal District Court granted summary judgment for the employer because plaintiff's allegations of criminal negligence were unsubstantiated and because reports made after the plaintiff's employment ended could not form the basis of a whistleblower claim. The Court so ruled despite the plaintiff's arguments that a fact question exists regarding whether the plaintiff's alleged report about the failure to admit a patient was in good faith and, further, whether the plaintiff had made reports about systemic fraud and other legal violations before separation.

Savoie v. Genpak, LLC[5]

The plaintiff reported apparent violations of health and safety laws by the plaintiff's supervisor, and the plaintiff lodged general grievances about the workplace. The employer investigated the plaintiff's claims and found them to be unsubstantiated. The employer obtained summary judgment because the plaintiff's reports amounted to little more than gripes against the plaintiff's supervisor,

according to the Federal District Court. Like *Elkharwily*, then, this case turns on a narrow interpretation of protected activity that typically prevailed before the Minnesota Legislature amended the State whistleblower law.

Weber v. Minnesota Sch. of Bus., Inc.[6]

The plaintiff, a dean at a for-profit university, reported to the employer's provost and vice president of corporate operations that the plaintiff believed the employer was violating the law by misleading prospective students through, among other tactics, inflating job placement statistics, promising the transferability of academic credits, and failing to inform students that felony convictions could disqualify them from externship and job opportunities. Shortly after making the reports, the employer discharged the plaintiff. A jury awarded the plaintiff $36,000 for past emotional distress, $36,000 for future emotional distress, attorney's fees, and litigation costs. The employer moved for judgment as a matter of law or a new trial. The Court denied the employer's motions, and the Minnesota Court of Appeals affirmed. Notably the Court rejected the employer's argument that the plaintiff's discussions about the plaintiff's concerns cannot constitute reports under the State whistleblower law given identification of issues within the plaintiff's program was one of the plaintiff's job duties. In short, this case further confirms that there is no blanket job-duties exception to the definition of a report under the State whistleblower law.

II. Cases Regarding The Meaning Of Adverse Action For Purposes Of Establishing A *Prima Facie* Whistleblower Case

Chavez-Lavagnino v. Motivation Education Training, Inc.[7]

The plaintiffs' supervisor directed the plaintiffs to forge signatures on documents, shred tax forms, falsify follow-up notes, and register applicants for the employer's services whom they knew to be ineligible for services. The plaintiffs complied at first, but then stopped because they knew such actions amounted to attempts to defraud the government and otherwise violated the law. Shortly after plaintiff Chavez-Lavagnino refused to comply, the employer discharged her. Shortly after plaintiff Yanez refused to comply, the employer discharged plaintiff Yanez as well – then offered plaintiff Yanez reinstatement, which plaintiff Yanez declined. A jury found in favor of the plaintiffs, and the employer moved for judgment as a matter of law. The Federal District Court denied the motion. On appeal, the Eighth Circuit held that, although the Minnesota Supreme Court had not interpreted the phrases "objective basis in fact" or "good faith" under the State whistleblower law, the Eighth Circuit need not decide precisely what the terms require because the plaintiffs' claims pass muster under any reasonable interpretation. The Court also held that the employer's discharge of plaintiff Yanez and subsequent offer of reemployment was a materially adverse employment action because it likely would have dissuaded a reasonable employee from engaging in protected activity. In other words, the Court's ruling here follows the liberal interpretation of anti-retaliation protections established by a long line of United States Supreme Court cases since *Burlington North and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Quam v. St. Francis Health Serv. of Morris d/b/a Trinity Care Center[8]

The plaintiff alleged that the employer discharged the plaintiff for engaging in protected activity. The employer, however, denied that it had even discharged the plaintiff. The Minnesota Court of Appeals sided with the employer, citing the various attempts made by the employer to return the plaintiff to work after exhaustion of leave under the Family and Medical Leave Act. In concluding the plaintiff had not experienced adverse action to support a whistleblower claim, the Court also noted that the plaintiff had not returned to work despite the

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employer's request to return and, moreover, that the plaintiff told the employer to communicate with the plaintiff's lawyer rather than with the plaintiff concerning all employment-related issues.

III. Precedent Regarding The Meaning Of Causal Connection Between Protected Activity And Adverse Action For Purposes Of Establishing A *Prima Facie* Whistleblower Case

Burrage v. United States[9]

Ever since *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), employers have been arguing that plaintiffs must prove the retaliatory motive is the "but for" cause of the adverse action being challenged. Strictly speaking, *Nassar* only concerned claims pursued under Title VII. Even if "but for" causation were the standard in whistleblower cases, however, "but for" causation is simply "the minimum concept of cause" according to *Burrage*, which originated from the Eighth Circuit. Although a criminal case, *Burrage* discussed in detail the meaning of "but for" causation and used *Nassar* as the starting point. Justice Antonin Scalia, who authored the decision in *Burrage* for the United States Supreme Court, used one of his typically colorful metaphors to describe more precisely what "but for" causation means: "the straw that broke the camel's back." Notably, the Minnesota Supreme Court has also recognized "but for" causation as a minimal evidentiary standard.[10]

Kirk v. State, Dep't of Transp.[11]

In the course of the plaintiff's employment with a public agency, the plaintiff made multiple reports of suspected violations of the law. The evident unlawful conduct included sex harassment of a coworker, wage-and-hour violations, co-workers improperly claiming mileage, the tolerance of workplace hazards, and a 50-gallon oil spill into a river. The plaintiff also sustained a work-related back injury that prevented the plaintiff from performing certain core job duties. When the employer could find no other position that would accommodate the plaintiff's restrictions, the employer discharged the plaintiff. The Minnesota Court of Appeals affirmed summary judgment for the employer because, although plaintiff had reported suspected violations of law, the plaintiff could not show that the personnel who discharged the plaintiff knew of the plaintiff's complaints. This case shows that the "unaware decision-maker" defense remains alive and well even after the recent legislative amendments.

Salscheider v. Allina Health Sys.[12]

The plaintiff reported apparent violations, and the employer discharged the plaintiff two months later. The plaintiff's supervisor learned about the plaintiff's protected activity much closer in time to the decision to discharge, and the plaintiff asserted a causal connection existed between the protected activity and discharge. The Minnesota Court of Appeals disagreed, stating that the issue is when the protected activity occurred rather than when the supervisor became aware of the activity and, furthermore, that the two months between the protected activity and discharge was too long to establish causation. Significantly, the temporal proximity doctrine cited by the Court here originated to enable plaintiffs to support their retaliation claims; as this case shows, however, employers now use the doctrine to defeat retaliation claims. The proverbial sword has been hammered into the proverbial shield.

IV. Precedent Regarding The Meaning Of Pretext For Purposes Of Proving Liability And Damages In Whistleblower Cases

Pedersen v. Bio-Med. Applications of Minnesota[13]

The plaintiff, a nurse, reported the mishandling of blood samples and a later cover-up by management. The employer subsequently discharged the plaintiff for purported performance problems. The Federal District Court granted summary judgment for the employer, and the Eighth Circuit affirmed. Without deciding whether the plaintiff presented a *prima facie* case that she engaged in statutorily protected activity under the State whistleblower

Correction

MAJ would like to clarify that the Employment Law article featured in the Winter Issue of this magazine was submitted without spelling or grammatical errors. Unfortunately in the magazine design process, we mistakenly replaced a quotation mark with a colon after the word 'employee' in the header "II. The Law Defines "Employee" in an Increasingly Broad Way for Enforcement Purposes" on page 31. We appreciate all submissions from our members and understand the great care they take in crafting the best legal writing in our state. We accept responsibility for this mistake and apologize to the author for the error.

law, the Court found that the employer's evidence of the plaintiff's alleged conduct was the true reason for discharge and, therefore, not was pretext for retaliation. Whether the employer discharged the plaintiff because of the plaintiff's reports about evident illegal conduct by management or, instead, because of the plaintiff's work performance would seem to turn on making credibility determinations and otherwise weighing the evidence. The United States Supreme Court recently reiterated that summary judgment should not be granted in such circumstances.[14]

***Sellner v. MAT Holdings, Inc.*[15]**

Although the plaintiff clearly possessed outstanding technical skills, the employer allegedly received an anonymous report that the plaintiff had made inappropriate comments toward subordinates. The employer discharged the plaintiff for engaging in misconduct; the plaintiff countered that the employer discharged the plaintiff for refusing to falsify reports to a customer in order to cover up defects in the employer's product. The Federal District Court granted summary judgment for the employer because the plaintiff raised no genuine issue as to retaliatory motive or pretext. Although it ultimately may not have mattered in this case, the prevailing analytical framework for whistleblower cases essentially requires plaintiffs to prove causation twice: first by showing a causal connection between the protected activity and the adverse action and second by showing the employer's rationale is pretext for retaliation. By contrast, First Amendment retaliation claims do not entail proving double causation.[16]

***Peterson v. HealthEast Woodwinds Hosp.*[17]**

The plaintiff sued the employer for violation of, among other statutes, the State whistleblower law. The employer removed the case to Federal court, which granted summary judgment for the employer on the plaintiff's claim under the Family and Medical Leave Act ("FMLA") and remanded the State law claims to State court. The State District Court granted summary judgment for the employer regarding the remaining claims, and the Minnesota Court of Appeals affirmed. The Court held that the plaintiff was collaterally estopped from "relitigating" whether the employer's rationale was the true reason for taking adverse action. Although the plaintiff's claims under the FMLA, the State whistleblower law, and State common law for wrongful discharge have different requirements for a *prima facie* case and different elements of proof, the Court reasoned that they all use the *McDonnell-Douglas* burden shifting test. That each claim raises the ultimate question of pretext, a question already supposedly

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decided under the FMLA, the Court ruled that the plaintiff could not take a second bite of the proverbial apple via the State whistleblower law. Given the decision in this case, it warrants highlighting that pretext is a fact-intensive inquiry, which generally should not be susceptible to summary judgment.

V. Other Developments In Whistleblower Law

Brodhead v. Knife River Corp.-North Central[19]

After being discharged, the plaintiff sued the employer under a number of theories, including reprisal via the Minnesota Human Rights Act ("MHRA") and a violation of the State whistleblower law. As the Federal District Court noted, and the plaintiff conceded, the exclusivity provision of the MHRA bars a plaintiff from proceeding under both the MHRA and the State whistleblower law based on the same facts. The plaintiff explained, however, that she did not intend to proceed on both claims; instead, the plaintiff insisted that she filed a claim under the State whistleblower law to preserve the plaintiff's rights in the event the MHRA claim failed. Accordingly, the Court denied the employer's motion for summary judgment as to the claim under the State whistleblower law. This case underscores the importance of plaintiffs pleading in the alternative or otherwise pursuing multiple theories to preserve rights to any relief to which they may be entitled.

Ford v. Minneapolis Pub. Sch.[20]

In considering what applies to the State whistleblower law, the two-year limitations period for intentional torts or the six-year limitations period applicable to statutory claims, the Minnesota Court of Appeals held that the six-year limitations period governs. The ruling turned on the fact that State courts did not recognize a common law claim for wrongful discharge before the Minnesota Legislature enacted the State whistleblower law. In short, retaliation claims prosecuted under the State whistleblower law concern rights created by statute, rather than under common law, so the six-year limitations period governing statutory claims is most applicable.

Conclusion

The recent legislative amendments at the State level, coupled with the consistently liberal interpretation of anti-retaliation law by the United States Supreme Court at the Federal level, offer great promise to whistleblowers. Unfortunately, some lower courts have not always adhered to the expansive approach established legislatively and through United States Supreme Court precedent. Instead, those courts have insisted on construing whistleblower protections and related liability in an unduly narrow fashion. Plaintiff counsel must be mindful of such judicial tendencies as they plead and prosecute whistleblower cases in order to be successful going forward.

[1]Materials prepared by the author for an October 2015 webinar on whistleblower law, which was produced by Minnesota CLE, form the basis of this article.

[2]135 S.Ct. 913 (2015).

[3]2 F.Supp.3d 1101 (D. Minn. 2014).

[4]2015 WL 468400 (D. Minn. 2015).

[5]2014 WL 6901783 (D. Minn. 2014).

[6]2014 WL 7011353 (Minn. Ct. App. 2014), *rev. denied* (Mar. 17, 2015).

[7]767 F.3d 744 (8th Cir. 2014).

[8]2014 WL 2565657 (Minn. Ct. App. 2014).

[9]134 S.Ct. 881 (2014).

[10]*See, e.g., Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367 (Minn. 2008) (reaffirming in a tort case that "proximate cause" is a higher standard than "merely a 'but for' cause," which is less than a "substantial factor.") (quoting *Kryzer v. Champlin Amer. Legion No. 600*, 494 N.W.2d 35 (Minn. 1992)).

[11]2015 WL 5200798 (Minn. Ct. App. 2015).

[12]2014 WL 3024290 (Minn. Ct. App. 2014).

[13]775 F.3d 1049 (8th Cir. 2015).

[14]*See generally Tolan v. Cotton*, 134 S.Ct. 1861 (2014).

[15]2015 WL 4661161 (D. Minn. 2015) – ____ *on appeal before the Eighth Circuit.*

[16]*See, e.g., Davison v. City of Minneapolis*, 490 F.3d 648 (8th Cir. 2007) (shifting the burden to the employer to prove that it would have taken adverse action even if the plaintiff had not engaged in protected activity).

[17]2015 WL 4523558 (Minn. Ct. App. 2015).

[18]*See generally Sigurdson v. Isanti County*, 386 N.W.2d 715 (Minn. 1986) (applying the Minnesota Human Rights Act in conformity with *Texas Dep't. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), which held that a plaintiff establishes pretext by showing the employer's rationale for adverse action is not credible).

[19]2015 WL 4429352 (D. Minn. 2015).

[20]857 N.W.2d 725 (Minn. Ct. App. 2014) – ____ *on appeal before the Minnesota Supreme Court.*