

New Minnesota Law Loosens Criteria for Employee-Whistleblower Claims

Date: 6.20.2013

The Minnesota Legislature and Governor Mark Dayton have enacted amendments to the Minnesota Whistleblower Act that likely will widen the door to whistleblower claims against Minnesota employers. The Act (Minn. Stat. §181.932) prohibits employers, regardless of size, from taking adverse action against employees who, in good faith, report violations of any laws or regulations, are engaged in government investigations or hearings, or refuse to obey an illegal order. The amendments (House File No. 542), effective immediately, define a “good faith” report as anything other than one that is false or in reckless disregard for the truth. They also define a “report” of an alleged illegality to include a “planned” alleged illegality. Finally, under the amendments, adverse employment actions that “penalize” the employee include the employer’s post-termination conduct and conduct that “might” dissuade an employee to make a whistleblower report.

Background

Before the recent enactment, the law was clear: For an employee to state an actionable whistleblower claim, he or she had to report to his or her employer or to a law enforcement agency some illegality in which the employer was engaged that affected a third person or the public in general; the employee then was required to show the employer took adverse action against him or her because of the report. A report of an alleged illegality involving a third person or the public, that is, the making of a “good faith” whistleblower report, was the predicate for a viable whistleblower claim. It was integral to the passage of the original Minnesota Whistleblower Act.

As the Minnesota Supreme Court explained, the Act was *not* designed to be a sword to be used against employers for personal gripes an employee had over his or her treatment at the hands of an employer. *Kidwell v. Sybaritic*, 784 N.W.2d 220 (2010). Instead, as the Court had stated in *Phipps v. Clark Oil*, 408 N.W.2d 569 (1987), the case that spawned the Act, an employee was to be protected from adverse employment action because he or she reported an alleged illegality that endangered the public. In *Phipps*, the employee reported to his employer that a customer’s request to be sold leaded gas violated federal clean air laws. When the employer fired the employee for refusing to dispense the leaded gasoline to the customer, the Minnesota Supreme Court found the employee could base a wrongful discharge claim on his report because his report protected the public from a violation of law that caused air pollution.

The new law overrules decades of legal precedent.

Good Faith

The Act is amended to define “good faith” whistleblower reports to allow employees’ claims against employers based on reports of alleged illegalities that would *not* affect the general public or a third person and are not false or made in reckless disregard for the truth. An employee now may report alleged illegalities against only himself and state a viable whistleblower claim. This will open the door to more whistleblower claims. Employees complain more often about actions affecting themselves than those affecting third parties or the general public.

Report

In addition to overruling the Minnesota Supreme Court's interpretation of good faith under the Act, the definition of a "report" is expanded under the new law. It now includes not only an employer's actual or suspected illegal act, but also a "planned" act, even if it never takes place. Plans adopted but then discarded may fuel litigation under this regime. Employers who thought "almost only counts in horseshoes" may face an unpleasant surprise.

Penalize

Finally, while the Act had always provided that an employer may not "penalize" an employee for making a whistleblower report, the new law defines "penalize" to mean conduct, including an employer's post-termination conduct, that "might" dissuade a reasonable employee from making or supporting a report. Obviously, discharging or otherwise disciplining an employee may dissuade an employee from making a whistleblower report. However, employers now must contemplate the fact that a change in duties, a transfer to another position, or some other act taken for legitimate reasons "might" be perceived by an employee as an adverse action that dissuades an employee from making a whistleblower report. Employers, therefore, should consider carefully any action regarding an employee who has made a report of an actual, suspected, or planned illegality to ensure any personnel action is being done for legitimate business reasons, not because the employee has filed a whistleblower report.

If you have any questions about this or other workplace developments or need assistance in drafting policies or conducting training, please contact Kurt J. Erickson, at (612) 341-8131 or EricksonK@jacksonlewis.com, of our Minneapolis office, or the Jackson Lewis attorney with whom you regularly work.

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