



## Alerts

### In-House Attorney Not Protected by Whistleblower Statute Because Reporting Wrongdoing Was Part of His Job Duties

July 20, 2010

*Lawyers for the Profession® Alert*

*Kidwell v. Sybaritic, Inc.*, \_\_\_N.W.2d\_\_\_, 2010 WL 2517682 (2010)

#### Brief Summary

A plurality of the Minnesota Supreme Court held that when an in-house lawyer reports wrongdoing to the client in order to pull the client back into compliance, the purpose behind such reports is not to expose illegality and therefore such attorneys are not afforded whistleblower protection.

#### Complete Summary

An in-house attorney informed his company that he was convinced it was engaged in illegal and unlawful activities. The lawyer was terminated shortly thereafter. He subsequently sued under Minnesota's whistleblower statute, and a jury awarded him damages. The trial court denied the company's motion for judgment as a matter of law.

A plurality of the Minnesota Supreme Court, construing the evidence in the light most favorable to the attorney, held that there was no legally sufficient evidentiary basis for the jury to find that the lawyer had engaged in protected conduct. The Court focused on the fact that the attorney's admitted purposes in making the report were to fulfill his duty to provide the company with legal advice and to try to pull the company back into compliance, rather than to expose illegality.

The whistleblower statute, the Supreme Court noted, was intended to protect good faith reports of violations of state or federal law, and determining good faith requires examining the employee's purpose for blowing the whistle. Citing Federal Circuit precedent, the Court held that when an employee's duties involve investigating and reporting wrongdoing, it cannot be said that his or her purpose in reporting wrongdoing was to blow the whistle. But the Court noted potential exceptions to this rule when an employee's duty to report comes from outside the employee's normal job duties (e.g., a duty imposed by federal law), or when an employee reports wrongdoing "outside normal channels because the employee believes that the normal chain of command is unresponsive."

Justice Eric Magnuson concurred, stating that the attorney should be barred from recovery because he breached his duty of confidentiality by sending a copy of the report to a person outside the company (his father). Justice Magnuson argued that the policy considerations behind the whistleblower

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statute do not trump the duty of confidentiality to clients.

Three justices dissented, arguing that the plurality's reliance on Federal Circuit precedent was misplaced, and that the holding imposed an arbitrary evidentiary hurdle as to proving mental state. Regarding the latter, the dissent contended that it was illogical to assume that the channel through which a report is made is dispositive of the employee's mental state.

### **Significance of Opinion**

This opinion falls in the middle on an issue that has divided courts over the past 20 years. To the extent that this opinion denies whistleblower status to attorneys, it appears to fall within the minority of courts that have considered similar issues. But the opinion leaves open the possibility of obtaining whistleblower status when a report is made outside of a lawyer's normal job duties or channels of reporting.

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