



## Legal Alert: Minnesota Supreme Court Finds In-House Lawyer Not Protected by State Whistleblower Law

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The Minnesota Supreme Court, in a 5 to 4 decision, ruled on Thursday that an in-house lawyer, who was terminated after reporting unlawful activity to his employer, was not protected by the state's whistleblower statute. By affirming the Court of Appeals, the Court effectively overturned the plaintiff's \$197,000 jury award, not inclusive of costs and attorney's fees. See *Kidwell v. Sybaritic, Inc.*, Case Nos. A07-584, A07-788 (June 24, 2010).

### **Background**

While working as the in-house general counsel of defendant Sybaritic, Inc., the plaintiff, Brian Kidwell, wrote an e-mail to the company's management bemoaning the company's "pervasive culture of dishonesty." In the e-mail, Kidwell outlined multiple instances of allegedly illegal conduct that he believed Sybaritic was failing to address. Kidwell concluded the e-mail by cautioning that he would send a report to the appropriate authorities if the company refused to comply with its legal obligations. He also sent a copy of the e-mail to his father, a retired businessman, whose advice about the situation he had already sought.

Sybaritic's management team developed a plan with Kidwell the following day to resolve the issues in the e-mail. Nevertheless, Sybaritic fired Kidwell three weeks later, citing its distrust of Kidwell after discovering the e-mail to his father.

Kidwell subsequently brought his action in Minnesota state court, alleging a violation of Minn. Stat. § 181.932, Minnesota's whistleblower statute. Whistleblower statutes protect an employee from reprisal for raising a concern to the employer or an appropriate government entity about conduct he or she believes in good faith to be unlawful.

### **The Court's Decision**

Siding with the employer, the Court held that an employee "cannot be said to have 'blown the whistle' when . . . it is the employee's job to investigate and report [the] wrongdoing." The Court ruled that because Kidwell had sent the e-mail as part of his normal job duties as in-house counsel, the in-house attorney did not meet the statute's "good faith" requirement in making the report. Relying on earlier precedent, the Court stated that in order for the employee to have made the report in "good faith," the purpose behind the e-mail must be to "expose an illegality." Because the purpose behind

Kidwell's e-mail was to satisfy his normal job duties, he was not entitled to protection under the statute.

The Court concluded that an employee who routinely investigates potentially unlawful activity may still garner protection under the statute; however, he or she must report the wrongdoing "outside normal channels." The Court reasoned that when a report is sent outside the normal channels, a judge or jury can reasonably infer that the purpose behind the report was to expose an illegality rather than to simply carry out his or her job.

The Court reigned in the lower court's opinion that had broadly exempted anyone with job duties to investigate claims from protection under the whistleblower statute. The Court reasoned that the statute itself did not expressly exempt employees with such job duties. The Court concluded, however, that an employee's job duties are still relevant in demonstrating whether the report was made within the employee's assigned responsibilities and thus whether the report was made in "good faith."

### ***What This Means for Employers***

The Court's opinion in *Kidwell* makes it difficult but not impossible for employees who investigate potentially unlawful activity, such as in-house attorneys and compliance officers, to garner protection under Minnesota's whistleblower statute. These employees, however, may now be more inclined to raise their concerns directly to government authorities or to other persons outside of their "normal chain of command." Prudent employers will continue to adequately and fairly evaluate the reports of those tasked with investigating and reporting potential wrongdoing, not only to prevent reprisal lawsuits under the statute, but also to ensure that their employees raise any concerns to the appropriate, and internal, authority. Ford & Harrison will continue to monitor this area of developing law in Minnesota.

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