In-House Counsel as Whistleblower, Kidwell vs. Sybaritic, Inc.

The Minnesota Supreme Court finally has ruled on *Kidwell v. Sybaritic, Inc.*, Nos. A07-584 and 788 (June 24, 2010), the "in-house counsel as whistle-blower" case that was pending before it for more than 18 months. Unfortunately, the Court's ruling has not brought clarity to this area of the law.

I previously discussed this case in a Blog entry in August 2008 (to see the earlier analysis, go to my employment law Blog, www.QuirkyEmploymentQuestions.com, and use the "View by Topic" bar to scroll down to "Retaliation"; go to Quirky Question # 50). My analysis of the latest pronouncement from the Minnesota Supreme Court is set forth below.

Kidwell vs. Sybaritic, Inc.

The Background Facts

As previously described, Kidwell was the General Counsel for Sybaritic, Inc. (Sybaritic), a company that manufactures and sells equipment and spa products to spa and medical-spa industries. Kidwell was hired in July 2004. Sybaritic fired him less than one year later, in May 2005.

Kidwell claimed that he had been fired because he had engaged in conduct protected by the Minnesota Whistleblower statute, Minn. Stat. § 181.932. Specifically, Kidwell pointed to the fact that just three weeks before his termination, he had sent the key executives of Sybaritic an email memorandum he had entitled, "A Difficult Duty." In his Difficult Duty memo, Kidwell stated, "I write to you with deep regret, but I cannot fail to write this email without also failing to do my duty to the company and to my profession as an attorney. That I cannot do." In the email, Kidwell pointed to the "pervasive culture of dishonesty" at the company, including the company's failure to investigate dishonest salespeople, the company's allowance of a staff member to engage in the unauthorized practice of medicine, and the company's failure to pay taxes in California. Despite the seriousness of those allegations, Kidwell characterized them as outside the scope of his responsibility and focused his Difficult Duty memo on his concern that "smoking gun" emails relating to a lawsuit in which Sybaritic was then involved and for which he was responsible, were being concealed or destroyed. Kidwell contended both that Sybaritic had included false allegations in its pleadings and that it had disregarded discovery orders. He concluded that the company was exposed to Rule 11 sanctions, charges of obstruction of a court order, and charges of obstruction of justice.

Kidwell stated that he intended to report his concerns – tax evasion, unauthorized practice of medicine, and obstruction of justice – to appropriate authorities. He ended his memorandum with the observation, "I regret that I see no other course of action available." Kidwell explained at trial that he hoped he "could pull this company back into compliance by enlisting some of the other members of management, and as the person responsible for the legal affairs of the company, that's what I had to do."

In what proved to be an error fatal to his case, Kidwell also sent a copy of the Difficult Duty memo to his father, because he previously had sought his father's advice on this "ethical

dilemma" and wanted his father's guidance and support. Kidwell also researched Minnesota whistleblower law to ascertain his rights.

In response to the Difficult Duty memo, Sybaritic initially changed Kidwell's supervisor. The company also worked with Kidwell to develop a framework for resolving the issues he raised. Three weeks later, however, Sybaritic fired Kidwell. The company claimed it fired him because of performance deficiencies (uncompleted tasks and failure to pay certain invoices to outside counsel). Sybaritic further pointed out that when it investigated whether the invoices from outside counsel had been paid, which required a review of Kidwell's emails, it discovered that he had sent the Difficult Duty memo to his father. The company concluded that he no longer could be trusted and terminated his employment.

The Decisions of the Trial Court and Court of Appeals

Kidwell sued as a whistleblower. Sybaritic counterclaimed for breach of fiduciary duty and conversion. The case was tried to a jury, which awarded him damages of $197,000, plus attorneys' fees and costs. As to the counterclaims, the trial court found as a matter of law that Kidwell had breached his fiduciary duty to Sybaritic and instructed the jury on damages. The jury, however, found that Sybaritic had not been damaged as a result of this breach. On the conversion count, the jury awarded Sybaritic $2000.

The trial judge denied Sybaritic's motion for judgment as a matter of law and the case was appealed. The intermediate appellate court reversed, holding that Kidwell did not engage in conduct protected by the Minnesota Whistleblower statute "because he was fulfilling the responsibilities of his position of employment when he reported a suspected violation of law." The Court of Appeals did not find that Kidwell was *per se* barred from bringing a whistleblower claim simply because he is an attorney, as courts in some other jurisdictions have held. But, as noted, the intermediate appellate court concluded that Kidwell's Difficult Duty memo concerned matters within the scope of his job duties and, therefore, was not a protected report under the Whistleblower statute.

Kidwell appealed to the Minnesota Supreme Court. Sybaritic conditionally cross-appealed, seeking review of three inter-related issues. The Minnesota Supreme Court accepted review of all four issue but, as explained below, reached only one.

The Decision of the Minnesota Supreme Court

The issues presented by the *Kidwell* case divided the Court. Three judges voted to affirm the Court of Appeals decision, though on different grounds, one judge concurred in the plurality's decision, but based his concurrence on an entirely separate analysis, and three judges dissented, concluding that the jury's verdict should have been sustained. From a practical perspective, the four judges who decided to affirm the Court of Appeals' result ended Kidwell's litigation against his former employer and zeroed him out all damages. But, given the alignment of the judges and the different rationales offered by the majority for the affirmance, the decision may not have clarified whistleblower jurisprudence in Minnesota.

The three judges who concurred in their decision to affirm the Court of Appeals decision focused on the language of the Minnesota Whistleblower statute and the specific facts of the case. The first question considered by the Minnesota Supreme Court was the scope of the protected conduct under the Whistleblower statute. The Minnesota Court of Appeals had concluded that a report made in fulfillment of an employee's job duties does not constitute statutorily-protected conduct. Minnesota's high court, however, did not find support for this interpretation in the statute itself. "The whistleblower statute does not contain any limiting language that supports the blanket job duties exception the court of appeals crafted. We therefore reject as too broad the court of appeals' conclusion that, as a matter of law, 'an employee does not engage in protected conduct under the whistleblower act if the employee makes a report in fulfillment of the duties of his or her job.'"

Having rejected the intermediate appellate court's statutory interpretation, however, the Minnesota Supreme Court emphasized, "we do not go so far as to hold that an employee's job duties are irrelevant in determining whether an employee has engaged in protected conduct. We have explained that the whistleblower statute 'protects the conduct of a neutral party who "blows the whistle" for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower.'" Here, relying on its earlier whistleblowing cases, Minnesota's high court stressed that the statutory requirement of "good faith" meant that the report must be "made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim." The court noted that when examining the purpose for which the whistleblowing report was made, it is important to examine the employee's job duties.

Thus, "an employee cannot be said to have 'blown the whistle' when the employee's report is made because it is the employee's job to investigate and report wrongdoing. When an employee responsible for investigating and reporting illegal behavior makes a report of such behavior, that employee will need something more than the report itself to support the conclusion that the employee is making the report as a 'neutral party' who is intending to 'blow the whistle.'"

Relying on an arguably analogous federal court decision, interpreting the federal Whistleblower Protection Act, the court then provided two examples of how an employee might be able to demonstrate that the report was made for legitimate whistleblowing purposes even when the employee's job responsibilities encompass the investigation and reporting of wrongdoing. First, the employee could demonstrate that it was necessary to go outside the chain of command because the normal chain of command was unresponsive. "[I]n such a situation under our whistleblower statute, because the report was made outside the employee's chain of command, a reasonable fact-finder could, depending on the evidence, infer that the employee's purpose was to expose an illegality." Second, if an employee – even one charged with investigating and reporting wrongdoing – made a report that was outside of his/her assigned job duties, the conduct could be protected. "[U]nder our whistleblower statute, a reasonable fact-finder could, depending on the evidence, infer that an employee who makes a report based on an employment-related obligation, but not as part of an assigned job duty, was doing so in order to expose an illegality."

With that analytical framework, the Minnesota Supreme Court then examined the specific facts of the *Kidwell* case. Even construing the evidence in the light most favorable to Kidwell, as it

was obligated to do in light of the jury verdict, the court rejected the jury's findings and affirmed the Court of Appeals' reversal of the jury verdict. Simply put, the court concluded that Kidwell's emails and his trial testimony regarding those emails confirmed that his purpose in communicating about the alleged wrongdoing within Sybaritic was not to "expose an illegality" but was to provide legal advice to his client (the company). "Kidwell did not offer any other evidence from which the jury could conclude that his purpose in sending the email was anything other than the performance of his assigned responsibilities as in-house counsel."

In his role as General Counsel, Kidwell was responsible for all of the legal affairs of the company. He was responsible for investigating and reporting on illegal activities within Sybaritic. He wrote his Difficult Duty memo to, as he characterized it, "pull this company back into compliance . . .." The individuals to whom he provided his Difficult Duty memo were the executives of the company with whom he had interacted and to whom he reported on various legal issues confronted by Sybaritic. And, while he threatened to go outside the normal reporting channels and report the problems to those involved in law enforcement, he never did so. Indeed, the only person to whom Kidwell reported outside the company was his father, and he did so solely to obtain guidance regarding the "ethical dilemma" he confronted. Based on these facts, the plurality of the Minnesota Supreme Court found that there was no evidence to support the jury's conclusion that Kidwell had engaged in conduct protected by the Minnesota Whistleblower statute.

As referenced above, however, only three of the seven judges on the court agreed on the analysis described above. The deciding vote was cast by Chief Judge Magnuson, who recently resigned from the court. Chief Judge Magnuson grounded his concurrence in the result on an entirely different reason – the fact that Kidwell had breached his fiduciary duty to Sybaritic by providing a copy of the Difficult Duty email to his father. Chief Judge Magnuson concluded that Kidwell's breach of fiduciary duty barred his claim. While the Chief Judge acknowledged that the statute did not bar whistleblower claims by attorneys, he emphasized, "A lawyer may bring a whistleblower claim, but he or she is not thereby relieved of the fiduciary obligations imposed by the Rules of Professional Conduct, either before or after the claim is brought. Any disclosures of client confidences must be within the strict confines of the Rules of Professional Conduct. I would therefore hold that when a lawyer breaches his or her fiduciary duty to the client, the client has an absolute right to terminate the attorney-client relationship. And that right cannot be burdened by any claim from the lawyer for compensation or other damages." Because Kidwell had breached his fiduciary duties to Sybaritic, Chief Judge Magnuson concluded that he had "forfeited his right to recovery."

The three dissenting judges rejected both the plurality opinion and the concurring opinion.

Practical Guidance

So, where does the Kidwell decision leave Minnesota practitioners and their clients? What lessons can be drawn from the decision?

First, Minnesota has not joined the states that absolutely bar whistleblowing claims by in-house counsel.

Second, the Minnesota Supreme Court rejected the analysis of the Court of Appeals, which parallels other state court whistleblowing decisions, that there is a blanket 'job-duties' exception to Minnesota's Whistleblower statute. (The dissenting judges also rejected that part of the lower court's decision.) The court did not find support for that analysis in the statutory language.

Third, although the Court rejected an all-encompassing job-duties exception, there likely will be a high burden for an employee responsible for investigating and reporting wrongdoing to bring a whistleblower claim. At a minimum, this employee will likely have to establish that the whistleblowing report was somehow outside the scope of his/her normal job duties or that it would have been futile to make the report internally given the individuals involved in the wrongful conduct. (Other potential fact patterns that would diminish the relevance of the employees' job duties were addressed by the dissent.)

Fourth, the federal Whistleblower Protection Act may, or may not, provide useful precedent for interpreting the Minnesota statute. Three judges found it to be a relevant parallel statute and found the opinions interpreting that statute informative; three judges found that the differences in the statutory schemes should have led the court to conclude that the federal statute was irrelevant to interpreting Minnesota's Whistleblower statute.

Fifth, one judge found the breach of fiduciary duty to be an absolute bar to the plaintiff attorney's claims. Three judges rejected that analysis and three were silent on that issue. In any event, that factual component of the *Kidwell* decision should inform other potential plaintiffs and defendants. For example, if Kidwell had communicated his concerns to his own counsel, rather than his father, and had not done so via the company's email system, this issue presumably would not have arisen.

Sixth, as the Supreme Court decision in *Kidwell* illustrated, and as the plurality emphasized, these cases are going to turn largely on their individual facts.

Seventh, while the opinion provides some guidance on the Whistleblower statute, the opinion is not definitive. While it rejected the Court of Appeals' job-duties exception analysis, the judges were evenly divided on other critical parts of the statutory interpretation. Moreover, because Kidwell did not bring a claim under Minnesota's common law whistleblower theory, the decision does not address that alternative cause of action.

Finally, the Minnesota Supreme Court did not focus its analysis on the ethical issues emanating from the fact pattern of the case or the Minnesota Rules of Professional Responsibility. But, these issues are front and center in any case in which an attorney elects to initiate a whistleblower claim, whether based on statute or common law.