Friedlander and Minnesota Whistleblower Claims - New Cases and Strategies

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2018 RETALIATION UPDATE – THE EFFECT OF KEY FEDERAL AND STATE CASES[1]

MINNESOTA WHISTLEBLOWER ACT

I. Introduction

In May 2013, the Minnesota legislature made significant amendments to the text of the Minnesota Whistleblower Act ("MWA"). At the time of their enactment, defense and plaintiffs' lawyers acknowledged that the amendments likely abrogated significant precedent surrounding the employee reporting requirements under the Act. However, in the years that followed, courts were reluctant to either recognize the amendments or to stray from the years of defined whistleblower precedent in Minnesota.

On November 29, 2016, the Federal District Court for the District of Minnesota recognized the competing interpretations of the MWA, as amended, and certified the issue to the Minnesota Supreme Court. *Friedlander v. Edwards Lifesciences, LLC*, No. 16-cv-1747 (SRN/KMM), 2016 WL 7007489 (D. Minn. Nov. 29, 2016). The case addressed the then-unresolved question of whether the "exposing an illegality" requirement of the MWA was still good law, or whether the 2013 amendments altered the established interpretation of "good faith" to merely require a report not be knowingly false or made in reckless disregard for the truth. *See id.*, 2016 WL 7007489, at *1.

Thereafter, on August 9, 2017, the Minnesota Supreme Court held that the 2013 amendments to the MWA abrogated its prior interpretation of "good faith," and that it is bound by that legislative directive. *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162, 163, 166 (Minn. 2017) (internal citation omitted). Specifically, the Minnesota Supreme Court opined that the statute requires courts to look only to the content of the report, instead of looking additionally to the reporter's purpose or intent, as had been previously the practice. *Id.* at 166.

The decision in *Friedlander* should pave the way for a new era in the way MWA claims are litigated and analyzed, with the focus shifting from whether a valid report has been made to a more "traditional" focus in reprisal/retaliation claims: causation.

II. Amendments

A. Summary of Amendments

The amendments added statutory definitions of "good faith," "penalize," and "report." In addition, the Act now protects employees who report "planned violation[s]" and violations of the common law. Finally, the amendments created a new cause of action for state government employees who are penalized for providing information related to state services to the legislature or a constitutional officer.

1 Materials by Lindsey Krause. Presented by Cynthia A. Bremer and Steven Andrew Smith.

B. Text as Amended

CHAPTER 83–H.F.No. 542

An act relating to state government; providing additional whistleblower protection to state employees; amending Minnesota Statutes 2012, sections 181.931, by adding subdivisions; 181.932, subdivision 1.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

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

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:

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:

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:

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:

(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.

EFFECTIVE DATE. This section is effective the day following final enactment.

Presented to the governor May 21, 2013

Signed by the governor May 24, 2013, 2:07 p.m.

III. Statute of Limitations on MWA

The Minnesota Supreme Court affirmed the Court of Appeals finding that the statute of limitations for the cause of action created by subdivision 1(1) of the Minnesota Whistleblower Act (MWA), Minn. Stat. § 181.932 (2012), which prohibits employment discrimination based on a good-faith report of a violation of law, is the 6-year limitations period in Minn. Stat. § 541.05, subd. 1(2) (2014), as the cause of action is statutory and has no counterpart at common law. The Court acknowledged that there will now be different statutes of limitations depending on what subdivision of the MWA the employee sues under, but noted that addressing this discrepancy was a job for the legislature.

- *Ford v. Minneapolis Pub. Sch.*, 874 N.W.2d 231 (Minn. 2016). Petitioner Ford sued her former employer, Minneapolis Public Schools ("MPS"), for retaliation in violation of the Minnesota Whistleblower Act. Ford allegedly reported unethical and illegal activities in her department to her employer. On April 22, 2008, MPS informed Ford that her position would not be renewed at the end of the school year. Ford brought suit over two years later under subdivision 1(1) of the MWA, alleging that MPS retaliated against her for reporting violations of the law. If her claim was governed by a six-year statute it would be timely; if it was governed by a two-year statute of limitations it would be untimely.

MPS argued that the applicable statute of limitations that should apply was two years claiming that the tort of wrongful discharge fell under Minn. Stat. § 540.07(1), which provides a two-year statute of limitations for "tort[s] resulting in personal injury." Ford argued that the statute of limitations should be six years, arguing that wrongful discharge falls under Minn. Stat. § 541.05 subd. 1(2), which provides a six-year statute of limitations for "a liability created by statute."

The Minnesota Supreme Court, referencing its 2013 case, *Sipe v. STS Manufacturing, Inc.*, held that the two-year statute of limitations in Minn. Stat. § 541.07(1) was "limited to common law causes of action not created by statute," such as libel, slander, assault, and battery. The Court further analyzed whether a claim for wrongful discharge under subdivision 1(1) of the MWA was created in common law or created by statute. The Court determined that Ford's claim qualified as "a liability created by statute" because while there was a common law cause of action for wrongful discharge for an employee's refusal to violate the law, there has never been a common law cause of action for an employee who reports violations of the law. Therefore, Ford's claim fell under the six-year statute of limitation.

IV. The Final Word: *Friedlander v. Edwards Lifesciences, LLC*

Friedlander, an employee of Edwards Lifesciences, LLC ("Edwards"), was terminated in July 2015 after a lunch expense over the individual limit allowed by company policy was charged to his corporate account. However, Friedlander maintained that Edwards's reasoning for terminating him was merely pretext, as he had been in vocal opposition to Edwards's decision to secretly withhold price concessions to certain healthcare facilities in direct violation of the contract and California's Unfair Competition Law, among other things.

Friedlander brought suit in Hennepin County District Court alleging retaliation in violation of the MWA. Edwards removed the case to U.S. District Court and eventually moved for judgment on the pleadings, arguing that Friedlander's alleged report was not protected under the MWA because he did not make it for the purpose of exposing an illegality because he made it to people who already knew about the potential violations. Friedlander's main argument in opposition to the motion was that the 2013 amendments to the MWA obviated the need for him to make his report for the purpose of exposing an illegality. Edwards, in turn, argued that the 2013 amendments merely supplemented the definition of "good faith" adopted in *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000).

On November 29, 2016, United States District Court for the District of Minnesota certified the issue of whether the MWA requires whistleblowers to act with the purpose of "exposing an illegality" to the Minnesota Supreme Court. *Friedlander*, 2016 WL 7007489, at *1. Specifically, the District Court posed the following question to the Minnesota Supreme Court: "Did the 2013 amendment to the Minnesota Whistleblower Act defining the term 'good faith' to mean 'conduct that does not violate section 181.932, subdivision 3' eliminate the judicially created requirement that the putative whistleblower act with the purpose of 'exposing an illegality?'" *Id.*, at *5. In August 2017, the Minnesota Supreme Court answered the question affirmatively, concluding that the 2013 amendment abrogated the court's prior interpretation of "good faith." *Friedlander*, 900 N.W.2d at 163.

The District Court thereafter relied upon the Minnesota Supreme Court's opinion to determine that Friedlander adequately pleaded that he engaged in protected conduct under the MWA when he made his report, and that plaintiffs need not plead that their purpose was to expose an illegality in order to be protected by the MWA. The court denied Edwards' motion for judgment on the pleadings. *Friedlander v. Edwards Lifesciences LLC*, Case No. 0:16-cv-01747 (SRN/SMM), 2017 WL 4443431, *4 (D. Minn. Oct. 5, 2017).

V. The Effect of *Friedlander* on Post-Amendment Case Law

A. Definition of "Good Faith"

In order to receive the Act's protections, employees have to show that they made their reports of violations of the law "in good faith." *Friedlander* confirmed that the statutory definition of "good faith" abrogated numerous holdings that narrowly interpreted the "good faith" requirement. This includes *Obst*'s holding that in order for a report to be "in good faith," the report must have been "made for the purpose of blowing the whistle, i.e., to expose an illegality." 614 N.W.2d at 202. The Minnesota Supreme Court in *Friedlander* was explicit that *Obst*'s definition is in contravention of the 2013 amendments. 900 N.W.2d at 166.

The amendments, and thereafter *Friedlander*, clarified that a report is made in "good faith" as long as the reporter does not violate § 181.932, subd. 3, which effectively denies protection for statements or disclosures that are made by an employee "knowing that they are false or that they are in reckless disregard of the truth." This provision means that employers' knowledge and employees' job duties and motivations for reporting are no longer part of the "good faith" requirement.

Relevance of job duties. In *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (Minn. 2010), a plurality of the Minnesota Supreme Court declared that an employee's job duties were highly relevant to the good faith requirement. Specifically noting that "the legislature did not define 'good faith' in the whistleblower statute," the court determined that the MWA only "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," and who reports "for the purpose of exposing an illegality." Since Kidwell's primary job duty was to provide legal advice and ensure compliance with the law, the court determined that his report was not made "for the purpose of exposing an illegality" and therefore was not protected.

Claims have been dismissed in other cases based on the notion that employees reported as a part of their job duties, rather than "for the purpose of exposing an illegality." *See, e.g.*, *Freeman v. Ace Tel. Ass'n*, 404 F. Supp. 2d 1127, 1140-41 (D. Minn. 2005), *aff'd*, 467 F.3d 695 ("Even though [the plaintiff] implicated violations of the law when he made his communications, this was part of his job.").

While the statutory definition of "good faith" should have immediately ensured that job duties are no longer relevant to whether a report is made "in good faith;" Minnesota courts continued to ignore the 2013 amendments in favor of reliance on pre-amendment case law. *See, e.g.*, *Scarborough*, 2017 WL 440244, at *4 (citing *Freeman v. Ace Tel. Ass'n.*, 404 F. Supp. 2d 1127, 1139 (D. Minn. 2005), *aff'd sub nom. Freeman v. Ace Tel. Ass'n.*, 467 F.3d 695 (8th Cir.

2006)) ("An employee is not entitled to whistleblower protection when the report is part of his job duties."). However, as *Friedlander* specifically indicated that reports need not be made "for the purpose of exposing an illegality" to be protected under the statute, this argument no longer passes muster.

Subjective intent to "blow the whistle." In *Chial v. Sprint/United Management Co.*, 569 F.3d 850 (8th Cir. 2009), the Eighth Circuit held that, for an employee to make a report in good faith—i.e. for "the purpose of exposing an illegality"—the employee must "subjectively believe the conduct is unlawful at the time she makes the report and she must make the report because the conduct is unlawful." Since, in this case, the plaintiff did not realize the company's conduct was illegal until *after* she reported it, the court found the good faith requirement had not been met. *See also Obst*, 614 N.W.2d at 202 ("We look at the reporter's purpose at the time the reports were made, not after subsequent events had transpired."); *McCracken v. Carleton College*, No. 11-3480 (MJD/JJK), 2013 WL 4516333, at *10 (D. Minn. 2013) (same). However, the statutory definition, with *Friedlander*'s definitive guidance, now means that an employee's subjective motivation for reporting is no longer relevant to whether a report is made "in good faith," as long as the employee did not *know* the reported facts were false or in reckless disregard of the truth.

Prior awareness or general knowledge of violations. Before the amendments, courts had also rejected the notion that an employee reports in "good faith" when employees' "reports" of suspected legal violations concerned conduct that the employer was already aware of or had already acknowledged. *E.g.*, *Wood v. SatCom Mktg., LLC*, 705 F.3d 823, 829 (8th Cir. 2013) (noting that "[a]t some point, [the court] must simply declare the whistle blown" and finding a plaintiff's complaint cannot meet the good-faith requirement when plaintiff had "raised her concerns [earlier,] repeatedly in various for a and to numerous parties"); *Hitchcock v. FedEx Ground Package Sys., Inc.*, 442 F.3d 1104, 1106 (8th Cir. 2006) (finding plaintiff "had no whistle to blow because she reported to [defendant] only what it already knew"); *Fjelsta v. Zogg Dermatology, PLC*, 488 F.3d 804, 808 (8th Cir. 2007) (affirming summary judgment for defendant because defendant "was well aware of the alleged violation before [plaintiff] wrote the [report]").

Now, since an employer's awareness or general knowledge of a violation is not relevant to whether the employee reported knowingly false facts or reported in reckless disregard of the truth, these factors are no longer be relevant to whether a report is made "in good faith." Though, after the passage of the 2013 amendments, Minnesota courts initially refused to grant whistleblower protection to those employees who report what an employer may already know, *see Scarborough*, 2017 WL 440244, at *5 (internal citation omitted), *Friedlander* ostensibly moots this argument – at least in the context of determining what constitutes protected activity – for defendants in future MWA cases.

Neutral party requirement. Prior to the amendments, courts were hesitant to extend protection to employees who "blow the whistle" for their own personal benefit. While the Minnesota Supreme Court made it clear in 2001 that a whistleblower's report of a violation need not implicate public policy, *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270, 277 (Minn. 2002), the court later held that the statute only protects an employee 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." *Kidwell*, 784 N.W.2d at 227. Thus,

whistleblowers who made reports for their own personal benefit have not been protected. *See, e.g.*, *Harnan v. Univ. of St. Thomas*, 776 F. Supp. 2d 938, 948 (D. Minn. 2011) (finding employee who reported supervisor's request that she work "off the clock" was not protected because it was done for her own personal benefit).

The definition of "good faith" appears to have abrogated the "neutral party" requirement. In *Kidwell*, for example, the Minnesota Supreme Court grounded the "neutral party" requirement in the "good faith" language of the statute. *See Kidwell*, 784 N.W.2d at 227 ("The legislature's purpose in confining protection to 'a neutral party' is reflected in the requirement that the report must be made in 'good faith.'"). The same interpretation was made in the recent federal case *Becker v. Jostens, Inc.*, where the District Court recognized and applied precedent holding that "a report is not made for the purpose of exposing an illegality if the reporter acted merely to 'protect' his or her job, and 'not to protect the public.'" *Becker*, 210 F. Supp. 3d 1110, 1127 (D. Minn. 2016) (quoting *Obst*, 614 N.W.2d at 202).

In an earlier pre-amendment case, however, the court suggested the requirement was an inherent component of any "whistleblowing" claim, and grounded its interpretation in the popular title of the act. *Williams v. St. Paul Ramsey Med. Ctr., Inc.*, 551 N.W.2d 483, 485 n.1 (Minn. 1996) ("The popular title of the Act connotes an action by a neutral—one who is not personally and uniquely affronted by the employer's unlawful conduct but rather one 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.") The language in *Williams* and dicta from other cases might suggest the court is willing to read the neutral-party or other good-faith requirements into the statute simply based on its popular name; however, the court has explicitly cautioned against such an interpretation. *Anderson-Johanningmeier*, 637 N.W.2d at 275 ("We [have] explicitly rejected reliance on . . . *Williams* to 'read any additional requirement into the whistleblower statute.'").

With the "expose an illegality" requirement off the books, it is difficult to predict if courts will continue to enforce the neutral party requirement and in what context, as it is clear that they will be unable to tie such a requirement to the definition of "good faith."

B. Definition of "Report"

In order to establish that they engaged in protected conduct under § 181.932 subd. 1(1), an employee must prove that he or she "report[ed]" within the meaning of that provision. In the past, courts have limited the types of communications that could constitute a "report."

The 2013 amendments added a definition for "report"; "report" now 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." Although the statutory definition is somewhat incongruous in that the word "report" appears most often in the statute as a verb, while the definition clearly defines a noun, the legislature's intent is fairly clear. The statutory definition had two potential significant effects: (1) ensuring that the prior good-faith-type requirements are not transplanted into the requirement that the employee made a "report," and (2) clarifying that a "report" under the MWA need not be formal or official in character.

Despite the legislature purposefully separating the "good faith" and "report" requirements through crafting separate definitions, courts continue to muddy the waters by lumping the "expose an illegality" requirement into evaluating the validity of the report itself. For example, in *Childs v. Fairview Health Services,* 2016 WL 6923709, at *2-3 (Minn. Ct. App. Nov. 28, 2016), the Appellate Court determined that an employee's email and letter were not protected reports for purposes of the MWA because the motives behind the correspondence was not to report an illegality. The Appellate Court did not make any reference to the amended statute's definition of "report," which makes no reference to the "expose an illegality" requirement. *Id.* Contrast this with *Becker v. Jostens*, 210 F. Supp.3d at 1127 n. 6. Here, the court, in a footnote, explicitly tied the definition of "report" to the requirement that a plaintiff must make a report for the "purpose of blowing the whistle," as failing to do so would mean the plaintiff was not making a report "about an actual, suspected, or planned violation of [the law]" as required by the statute's definition. *Id.*

Recent case law, however, shows that the tide is shifting. In *Feinwachs v. Minnesota Hospital*, the court held that, by its plain terms, a "report" post-2013 amendments "simply needs to be 'about' a violation – it need not 'expose' one." 2017 WL7238130, *8 (D. Minn. Nov. 15, 2017). The *Feinwachs* court confirmed that the amendments, and specifically the Legislature's new definition of "report," changed the state of the law in Minnesota.

Motivation for reporting. While the requirement that reports be made "for the purpose of exposing an illegality" first appeared in *Obst* and was clearly originally grounded in the "good faith" requirement, other courts seem to have considered it an implicit part of the definition of "report" as well. Thus, some courts have found that the good-faith considerations—including an employee's motivation or purposes for reporting and an employee's job duties—are equally relevant to whether an employee made a "report" within the meaning of the MWA. *See Skare v. Extendicare Health Servs., Inc.*, 515 F.3d 836, 840-41 (8th Cir. 2008) (finding that, when evaluating whether complaint is a "report" under the MWA, "[r]elevant considerations include complaint's content and purpose").

Asking questions, providing feedback, or expressing dissatisfaction about a potential legal violation have also been held not to constitute "reports." *See Hayes v. Dapper*, A07-1878, 2008 WL 4301018, at *3 (Minn. Ct. App. Sept. 23, 2008) (listing cases); *Lenzen v. Workers Compensation Reinsurance Ass'n*, 843 F. Supp. 2d 981, 995 (D. Minn. 2011), *aff'd*, 705 F.3d 816 (finding question was "just a question" and could not be a report); *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555 (Minn. Ct. App. 2005) (finding employee's query cannot be a report under the statute).

Regardless of whether the "purpose of exposing an illegality" requirement is rooted in the "good faith" language or is viewed as part of the meaning of "report," the amendments disposed of it entirely, since the legislature has now provided unambiguous definitions of *both* terms. Additionally, courts since *Friedlander* have explicitly rejected the "purpose of exposing an illegality" requirement as it relates to "good faith," and have not tethered the same requirement to the definition of "report."

Employer's or general knowledge of violations. Similarly, courts have occasionally found that a communication does not qualify as a "report" if the report was to an employer who

already knew about and had already acknowledged the suspected violation, or if the presumably unlawful conduct was general knowledge. *See Hayes*, 2008 WL 4301018, at *3 (listing cases); *Harnan*, 776 F. Supp. 2d at 948 ("With respect to the complaints about food and housing violations, these are not reports as a matter of law because . . . those violations were general knowledge . . . ."); *Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A.*, 586 N.W.2d 811, 813 (Minn. Ct. App. 1998) ("[T]he mere mention of a suspected violation already acknowledged by one's employer does not constitute a 'report' under the whistleblower statute."). With the statutory definition, these holdings, which also seem to touch on the "purpose of exposing an illegality" requirement, should no longer be good law. However, as recently as February 2017, courts have still recognized this as part of the requirements of a "report." *See Scarborough*, 2017 WL 440244, at *5. Even if, subsequent to *Friedlander*, courts begin to separate employer or general knowledge from the requirements of protected activity, it is likely that defendants will attempt to incorporate employer knowledge into its arguments against the existence of sufficient causation.

Formality requirement. In addition, the statutory definition of "report" likely means that even informal communications could suffice. In the past, some courts had held that a "report" must be official or formal in nature to constitute protected whistleblowing activity, *Buytendorp v. Extendicare Health Servs., Inc.*, 498 F.3d 826, 834 (8th Cir. 2007), although other courts refused to read such a requirement into the statute, *e.g.*, *McCracken*, 2013 WL 4516333, at *10; *Hayes*, 2008 WL 4301018, at *3. The statutory definition should bury the formality requirement completely.

VI. Whistleblower Cases Post-*Friedlander*

A handful of opinions have been handed down since the Minnesota Supreme Court answered the certified question in *Friedlander*. These cases offer some limited insight into the future of MWA claims now that the question of whether a report is made in "good faith" will no longer be the central issue in most cases.

- *Ugrich v. Itasca County, Minnesota*, 2017 WL 4480092 (D. Minn. Oct. 6, 2017). Decided the day after the District Court issued its opinion in *Friedlander*, *Ugrich* specifically acknowledges that "[g]ood faith under the statute requires only that the report was not made in knowing or reckless disregard of the truth." *Id.* at *5 (internal citation omitted). However, the court ultimately determine that the plaintiff's claim failed because he did not engage in protected conduct, as his report was not made to "an employer or to any governmental body or law enforcement official," he did not suffer an adverse employment action, and he could not show a causal connection. *Id.* (internal citation omitted).
- *Warmbold v. MINACT, Inc.*, 2017 WL 4838752 (D. Minn. Oct. 24, 2017). *Warmbold* previews the expected shift in MWA litigation after *Friedlander*, turning away from extended discussion on the protected conduct itself and focusing on causation. Here, the court rejected the defendant's arguments that the plaintiff's report did not constitute protected activity due to his job duties and the fact that the defendant had knowledge of the reported conduct. *Id.* at *4. The court affirmed that the plaintiff's report was sufficient, as he communicated a suspected violation of the law and did so believing that the report was true. *Id.* at *5. The focus then turned to causation, where the court

determined that, while a fact question existed with respect to temporal proximity, it was not material. *Id.* at *6. The court additionally opined that the plaintiff's arguments with respect to retaliatory animus, shifting reasons for plaintiff's termination, comparators, and the sufficiency of the defendant's investigation did not warrant a finding of causation. *Id.* at *7. Ultimately the court determined that the plaintiff failed to meet his burden of establishing a prima facie case of retaliation and that, even assuming that he had done so, his evidence of pretext was also insufficient. *Id.* at*8. The plaintiff appealed the court's ruling granting summary judgment, and the case is currently pending before the 8th Circuit.

- *Feinwachs v. Minnesota Hospital Association*, 2017 WL 7238130 (D. Minn. Nov. 15, 2017). In *Feinwachs*, the court affirmed that the 2013 amendments to the MWA altered the law with respect to what constitutes a "report" under the MWA. Specifically, the court acknowledged that prior precedent required that an employee "expose" a suspected violation, and that reporting what an employer already knows is not protected activity. In contrast, the amendments removed the "expose" requirement, and clarified that a "report" simply needs to be "about" a violation. *Id.* at *7-*8. Though the *Feinwachs* opinion produced helpful language solidifying the controlling nature of the 2013 amendments in light of *Friedlander*, the court ultimately held that the changes implemented through the amendments do not apply retroactively, and thus did not apply to the plaintiff based on the timing of his report.

VII. Whistleblower Claims as an Afterthought

Whistleblower claims are often brought in conjunction with a litany of other claims including but not limited to: defamation claims, harassment claims, intentional or negligent infliction of emotional distress claims, discrimination claims, First Amendment claims, and Non-Title VII Federal law. When a whistleblower claim is included as an afterthought, courts tend to treat it accordingly.

- *Watt v. City of Crystal*, 2015 WL 7760166 (D. Minn. Dec. 2, 2015). Watt, a police officer, was having marital problems and was disciplined for using police intelligence to track down the address of an individual having an affair with his wife. The police department suspended Watt for 12 hours without pay after the City concluded that Watt's use of police intelligence was unlawful because it lacked a specific law enforcement purpose. Watt complained to HR about the suspension. He stated that others had done the same thing and not been disciplined. He also mentioned that while he had been disciplined to "protect the city," he felt the police department was only interested in protecting itself from "looking biased against minorities," and referenced a complaint filed against the City by a Hispanic family who claimed their home had been unlawfully dispossessed. Several days later, Watt was placed on administrative leave for leaving his sidearm unattended in a squad room. As a result, Watt was required to take anger management classes for his "issues of distrust to superiors" and provide periodic written reports to human resources. Watt, through his union counsel, refused to have reports from his counseling sessions sent to the City and filed a race discrimination charge against Crystal with the Equal Employment Opportunity Commission (EEOC) and the Minnesota Department of Human Rights (MDHR).

After speaking with a psychologist who had worked as a consultant for the City, Watt was placed on home assignment until further notice. He was expected to be available by phone from 9 a.m. to 5 p.m. Watt received no assignments while on home assignment. Watt sent a signed statement to the city council that complained about the discipline he had received, and concluded that his discipline was retaliation for his complaints of misconduct by police management. The City, in response, requested that Watt authorize direct communication with his private therapist. Watt refused. The City gave Watt a deadline for when his therapist's status report was due. Watt submitted a letter from his therapist three days after the deadline. The City said the letter was insufficient and requested more detailed information. Watt refused. He was given a longer deadline and eventually complied with the City's request. The report said that Watt was fit for duty. One week later, the Crystal Police Chief recommended to the City Manager that Watt be terminated. Watt was not terminated at that time. Instead, by letter, Watt was directed to return to work in a modified assignment and prohibited from carrying a gun. Less than three weeks later, Watt was suspended for 15 days for violations that occurred during his home assignment. The City found that Watt had not been available by phone on two days, as instructed. When Watt returned to work he was informed that his next therapy report was soon due. Watt told the chief that he did not intend to submit the report. Watt was again placed on leave by the City pending a second psychological evaluation. A few days before the evaluation, Watt informed the City Manager that he had documentation from his therapist stating he completed therapy. The City's attorney notified Watt's union counsel that Watt was expected to attend the evaluation. Watt did not attend the evaluation and was terminated.

Watt brought disability discrimination and reprisal claims under the MHRA, a First Amendment claim and a MWA claim. All were dismissed. The court held that his emails were not protected speech under the First Amendment, as the motivation for his speech was furthering his private interests rather than to raise interests of public concerns. The Court further held that there was no retaliation related to the EEOC filing as the adverse actions taken by the employer were too remote in time to establish a causal link. Lastly, Watt's MWA claim failed because he referenced already known information and did not make a "report" within the meaning of the statute.

VIII. Conclusion

The 2013 amendments to the MWA, conclusively interpreted by the Minnesota Supreme Court in *Friedlander*, have significantly broadened whistleblowing protection in Minnesota and abrogated the previous strict requirements related to "good faith," adverse action, and what constitutes a "report." The result of both the 2013 amendments and *Friedlander* will likely be a shift in the trend of how MWA cases are litigated. Despite this new-found clarity, it is probable that some of defendants' arguments previously tied to the "good faith" requirement – such as employer knowledge or the relevance of one's job duties – will still appear in response to other elements of an MWA claim, such as determining whether causation exists.