

The 9 Most Important Whistleblower Cases – and What They Mean to Your Clients

2019 Employment Law Institute

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Whistleblower Statutes

- Minnesota Whistleblower Act (MWA)
- Federal:
 - Whistleblower Protection Act, False Claims Act, Sarbanes-Oxley Act, Occupational Safety and Health Act, Affordable Care Act, Clean Air Act, Dodd-Frank Act Wall Street Reform and Consumer Protection Act, Safe Water Drinking Act, and Toxic Substance Control Act.
 - Title VII, ADA, ADEA Anti-Retaliation Provisions.



MWA

- **Who is covered?**

- **Employee** — “Employee” means a person who performs services for hire in Minnesota for an employer. Employee does not include an independent contractor.
- **Employer** — “Employer” means any person having one or more employees in Minnesota and includes the state and any political subdivision of the state.

MWA

- 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, 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;

What is “Good Faith”

- **“Good faith”** means conduct that does not violate section 181.932, subdivision 3, which provides:
 - “This section does not permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth.”
 - **Thus, a report is in good faith unless it is knowingly false or made in reckless disregard of the truth.**

What is a “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.

“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.

MWA: Other Prohibited Actions

- While the most commonly litigated MWA claim is one in which an employee alleges she was retaliated against for making a good faith report, Minn. Stat. § 181.932 protects employees who engage in the following five actions.

MWA: Other Prohibited Actions

- (1) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry.

MWA: Other Prohibited Actions

- (2) 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;

MWA: Other Prohibited Actions

- (3) 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;

MWA: Other Prohibited Actions

- (4) 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

MWA: Other Prohibited Actions

- (5) 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:
 - a legislator or the legislative auditor; or
 - a constitutional officer.

MWA: 2013 Amendments

- The MWA was amended in 2013 to provide whistleblowers additional protection. For example:
 - The definition of “penalize” was amended to eliminate the requirement that a whistleblower prove a “material change in the terms or conditions of her employment.”
 - The definition of “report” was broadened to include almost any type of communication.
 - The definition of “report” was amended to include language providing that employers may be liable for violations committed by third parties.
 - The definition of “good faith” was amended to eliminate the requirement that whistleblowers act “with the purpose of exposing an illegality.”
 - The MWA was amended to permit whistleblowers to report good faith violations of common law, in addition to state and federal law.

Federal Whistleblower Laws

- More than 20 federal statutes contain whistleblower protections.
- Each law applies only to covered employers and contains specific reporting procedures.
- Title VII, ADA, and ADEA contain anti-retaliation provisions that prohibit employers from retaliating against employees who oppose practices made unlawful under these laws.

Nine Important Whistleblower Cases.

- The following cases highlight important aspects of whistleblower practice.
- Note, however, that whistleblower law is rapidly changing, especially as courts continue to interpret the 2013 MWA amendments.

Case 1: *Cokley v. City of Otsego*

- 623 N.W.2d 625 (Minn. Ct. App. 2001).
- ***Cokley* is the most commonly cited case articulating the framework within which whistleblower cases are analyzed.**
- Facts:
 - Plaintiff was employed as a business/finance director for the City of Otsego. Plaintiff observed several city practices she believed violated the FLSA and OSHA.
 - She complained to council members and prepared memoranda documenting her concerns, but the city took no action.
 - Later, a new mayor and city councilmembers were elected. Plaintiff wrote a letter to the mayor requesting an opportunity to discuss her concerns. Soon after, the city council voted to eliminate Plaintiff's position.

Case 1: *Cokley v. City of Otsego*

- **Holding:** MWA claims are subject to the following *McDonnell Douglas* analysis:
 - The employee must show (1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two.
 - Next, the burden of production shifts to the employer to articulate a legitimate, non-retaliatory reason for its action.
 - Last, the employee may demonstrate that the employer's articulated reasons are pretextual.

Case 1: *Cokley v. City of Otsego*

- Under this test, the court held Plaintiff failed to state a claim under the MWA because Plaintiff failed to prove:
 - (1) she engaged in statutorily protected conduct; and
 - (2) her complaints caused elimination of her position.

Case 2: *Friedlander v. Edwards Lifesciences, LLC*

- 900 N.W.2d 162 (Minn. 2017).
- Facts:
 - Plaintiff reported to his supervisors and others within the company that his supervisors engaged in breach of contract and breach of fiduciary duty, among other violations of law.
 - **Employer already knew about the allegations.**
 - Employer then terminated Plaintiff.

Case 2: *Friedlander v. Edwards Lifesciences, LLC*

- Employer argued that Plaintiff did not make a “good faith” report because he reported an illegality of which employer was already aware.
- Federal court asked Minnesota Supreme Court to answer whether 2013 amendment to MWA eliminated the requirement that an employee “act with the purpose of exposing an illegality.”

Case 2: *Friedlander v. Edwards Lifesciences, LLC*

- **Holding:**

- Under the amended MWA definition of “good faith,” a whistleblower is no longer required to “act with the purpose of exposing an illegality.”
- Instead, whistleblowers act in good faith if their report is “not knowingly false or made with reckless disregard of the truth.”

Case 2: *Friedlander v. Edwards Lifesciences, LLC*

- **Why it matters:**

- Before *Friedlander*, courts examined a whistleblower's intent to determine whether she or he sought to expose an illegality.
- Employers are no longer protected from liability when:
 - (1) the employer already knew of the complained-of conduct; or
 - (2) where investigating or reporting unlawful conduct was part of the employee's job, such that reporting was the conduct was done to perform job duties rather than expose an illegality.

Case 3: *Scarborough v. Federated Mut. Ins. Co.*

- 2019 U.S. Dist. LEXIS 54244 (D. Minn. Mar. 29, 2019).
- **Facts:**
 - Plaintiff worked as a regional marketing manager. Plaintiff suspected that a manager had been falsifying expense reports. Plaintiff told others of his suspicions as Defendant investigated the matter. Plaintiff also allegedly reported he thought these actions were illegal.
 - Defendant suspected Plaintiff was involved in the fraudulent activity, but Plaintiff any involvement.
 - Soon after, Defendant demoted and then terminated Plaintiff, alleging among many reasons that Plaintiff knew about the fraudulent activity before he reported it and recommended others engage in the activity.

Case 3: *Scarborough v. Federated Mut. Ins. Co.*

- **Holding:**

- (1) Plaintiff made a report under the newly articulated *Friedlander* test, which analyzes good faith by looking only to the content of the report; but ...
- (2) Plaintiff failed to prove a causal connection between his reports and his termination.

Case 3: *Scarborough v. Federated Mut. Ins. Co.*

- **Why it matters:**

- This case provides insight into how courts may analyze MWA claims after *Friedlander*.
- Plaintiff's claim likely would have failed to show a good faith report pre-*Friedlander*, but the court ignored earlier precedent in holding Plaintiff made a good faith report.
- This case shows, however, that a plaintiff must still make a strong showing to prove a causal connection, and that a plaintiff's involvement in the alleged wrongful conduct may prevent a successful MWA claim.

Case 4: *Kratzer v. Welsh Cos., LLC*

- 771 N.W.2d 14 (Minn. 2009).
- **Facts:**
 - Plaintiff worked in various capacities for Defendant, a real estate firm. Following a sale of commercial property in which Plaintiff's supervisor represented the seller and buyer, Plaintiff reported to his supervisor and the CEO that the supervisor's actions may violate state licensing statutes and regulations.
 - Defendant then terminated Plaintiff.
- **Issue:**
 - What must a whistleblower allege to "report a violation of law" under the MWA?

Case 4: *Kratzer v. Welsh Cos., LLC*

- **Holding:**

- A whistleblower must allege facts that, if true, constitute a violation of law or rule adopted pursuant to law.

Case 4: *Kratzer v. Welsh Cos., LLC*

- **Why it matters:**
 - Under *Kratzer*, a whistleblower's report must implicate a violation of an actual state, federal, or (since 2013) common law.
 - Under this rule, there need not be an actual violation of law.
 - A good faith mistake as to the facts supporting the violation is okay as long as the law allegedly violated actually exists.

Case 5: *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*

- 637 N.W.2d 270 (Minn. 2002).
- Facts:
 - Plaintiffs were two employees who worked for a shelter for abused women and children.
 - Defendant's executive director told one Plaintiff not to approve an employee's request for vacation time. Believing this to be illegal, the Plaintiff called the Minnesota Department of Labor and Industry, who verified Plaintiff's belief.
 - When the executive director began acting hostile toward both Plaintiffs, they submitted complaints about several issues, including the vacation pay dispute. Soon after, Defendant terminated Plaintiffs.

Case 5: *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*

- **Issue:**
 - Does the MWA apply even if the conduct alleged does not violate public policy?
- **Holding:**
 - Yes. The MWA does not contain a public policy requirement. Rather, the MWA applies to “any state or federal law or rule or regulation adopted pursuant to law.”

Case 5: *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*

- **Why it matters:**
 - Eliminated the judicially-created requirement that MWA reports implicate public policy.
 - Plaintiffs in retaliatory discharge claims often rely on the public policy exception to the at-will employment rule.
 - But, plaintiffs in MWA claims need not show their report implicates public policy.

Case 6: *Nelson v. Productive Alternatives, Inc.*

- 715 N.W.2d 452 (Minn. 2006).
- **Facts:**
 - Plaintiff was an employee and voting member of Defendant, a nonprofit.
 - After Plaintiff voted as a member of Defendant, Defendant terminated Plaintiff's employment.
 - Plaintiff brought a *Phipps* wrongful discharge claim, alleging he was terminated for exercising his voting rights.
 - NOTE: *Phipps* claims generally refer to wrongful discharge actions premised on violations of public policy.

Case 6: *Nelson v. Productive Alternatives, Inc.*

- **Issue:**
 - Does MWA preclude common law wrongful discharge claims?
- **Holding:**
 - No. The MWA does not preclude common law wrongful discharge claims.
 - But, Plaintiff's wrongful discharge claim fails because termination for exercising member voting rights did not violate public policy.

Case 6: *Nelson v. Productive Alternatives, Inc.*

- **Why it matters:**
 - This decision clarifies the interaction between MWA claims and wrongful discharge claims.
 - Because these claims are often brought together, it is important to note the different requirements applicable to these related causes of action.

Case 7: *Ford v. Minneapolis Pub. Sch.*

- 874 N.W.2d 231 (Minn. 2016).
- **Facts:**
 - Plaintiff worked in the English Language Learners department at the Minneapolis Public Schools.
 - Plaintiff reported to school administrators unethical and illegal activities in the ELL department. About 17 months later, MPS informed Plaintiff her position was being eliminated at the end of the year. Plaintiff then made various reports of financial improprieties, disability discrimination, and retaliation.
 - Plaintiff did not file suit under the MWA until more than two years after she was informed her position was being eliminated.

Case 7: *Ford v. Minneapolis Pub. Sch.*

- **Issue:**

- What is the statute of limitations on a claim under Minn. Stat. § 181.932, subd. 1(1)?

- **Holding:**

- Six years.
- But, the court suggested without deciding that claims under subd. 1(3) in which an employee refuses an employer's order to perform an illegal act may be subject to a two-year statute of limitations.

Case 8: *Martinson v. Mahube-Otwa Cnty. Action P'ship*

- 2019 U.S. Dist. LEXIS 38533 (D. Minn. Mar. 11, 2019).
- **Facts:**
 - Plaintiff worked for Defendant, a non-profit providing services to low-income families. Plaintiff managed enrollment for the Defendant's Head Start program, a federally-funded program that promoted school readiness for children in low-income families.
 - Plaintiff's supervisor instructed Plaintiff to enroll applicants who Plaintiff believed were ineligible under federal law. Plaintiff reported these concerns to Defendant's executive director, filed a grievance with human resources, and reported the matter to Defendant's Board of Directors.
 - In response, Plaintiff alleged she was retaliated against and ultimately terminated.

Case 8: *Martinson v. Mahube-Otwa Cmty. Action P'ship*

- Procedure:
 - Plaintiff filed a claim in Minnesota state court. Defendant removed the claim to federal court, arguing federal jurisdiction existed because Plaintiff alleged violations of federal law.
- Issue:
 - Can federal courts exercise subject matter jurisdiction over MWA claims with embedded federal issues?

Case 8: *Martinson v. Mahube-Otwa Cnty. Action P'ship*

- **Holding:**

- No. While the MWA covers actions based on violations of federal law, permitting federal subject matter jurisdiction over all MWA claims with embedded federal issues would “risk tilting the balance of employment-law litigation toward the federal courts in a way that is at odds with [28 U.S.C.] § 1331.”
- The court thus remanded the case to state court.

Case 8: *Martinson v. Mahube-Otwa Cmty. Action P'ship*

- **Why it matters:**

- In many MWA claims, the employer receives federal funds or is subject to federal regulation. In other MWA claims, the whistleblower alleges violations of federal law.
- The court's analysis and holding suggest MWA claims with embedded federal issues cannot always trigger federal jurisdiction.

Case 9(a): *Digital Realty Trust, Inc.* *v. Somers*

- 138 S. Ct. 767 (2018).
- **Facts:**
 - The Dodd-Frank Wall Street Reform and Consumer Protection Act includes anti-retaliation protections for employees who report alleged misconduct to the Securities and Exchange Commission (SEC).
 - Plaintiff reported several possible securities law violations to his employer, rather than the SEC.
 - Plaintiff was terminated, and initiated several state and federal law claims, including under the Dodd-Frank Act.
 - The federal circuits were split as to whether a plaintiff's complaints to his or her employer, rather than the SEC, are protected under Dodd-Frank whistleblower provisions.

Case 9(a): *Digital Realty Trust, Inc.*
v. Somers

- **Holding:**

- The U.S. Supreme Court unanimously held that the whistleblower protections apply only after an employee reports the misconduct to the SEC.

Case 9(a): *Digital Realty Trust, Inc.* *v. Somers*

- **Why it matters:**

- Employees reporting Dodd-Frank violations and seeking protection against retaliation must now report to the SEC, rather than follow internal reporting procedures.
- Dodd-Frank’s anti-retaliation provision is more specific than many other federal whistleblower statutes.
- Nonetheless, employees seeking whistleblower protections must strictly comply with statutory requirements rather than assume internal complaints will trigger protection.

Case 9(b): *Univ. of Texas Sw. Med. Ctr. v. Nassar*

- 570 U.S. 338 (2013).
- **Background:**
 - For many years, courts applied a “motivating factor” causation test in Title VII retaliation claims. This lenient standard also applied in discrimination claims requires only that a plaintiff prove an employer’s discrimination or retaliation was a motivating factor in the plaintiff’s adverse action.
- **Facts:**
 - In 2013, Plaintiff, a professor, sued Defendant for racial discrimination and retaliation under Title VII after he was denied a position for which he applied.

Case 9(b): *Univ. of Texas Sw. Med. Ctr. v. Nassar*

- **Holding:**

- A “but-for” test applies to Title VII retaliation claims. Under this test, a plaintiff must prove “that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”

Case 9(b): *Univ. of Texas Sw. Med. Ctr. v. Nassar*

- **On the other hand:**

- This case does not hold that the “sole reason” for an employer’s actions need be discriminatory but rather, discriminatory or retaliatory intent is necessary to find liability. Application of a “but for” standard that is defined as “sole reason” would not only be unworkable, it is inconsistent with the MHRA and the case law interpreting the MHRA

Case 9(b): *Univ. of Texas Sw. Med. Ctr. v. Nassar*

- **Why it matters:**

- From the defendant’s perspective, this case heightens a plaintiff’s burden when asserting retaliation claims under Title VII.
- Defendants argue plaintiffs now must satisfy different standards for discrimination and retaliation claims in Title VII and ADEA claims.
- But again, plaintiffs argue *Nassar* does not hold that the “sole reason” for the employer’s actions need be discriminatory or retaliatory to find liability but rather discriminatory or retaliatory intent is necessary to find liability.

QUESTIONS?

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