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In a recent decision, the Minnesota Supreme Court has confirmed its earlier opinions restricting the reach of the Minnesota Whistleblower Act. In *Kratzer v. Welsh Companies L.L.C.*, the court held that a report of behavior that may be problematic, even in the extreme, is not protected under the act if the behavior does not violate the law.

Minnesota Supreme Court Solidifies Whistleblower Law

By Holly Robbins

The Minnesota Supreme Court has confirmed its earlier opinions limiting the type of conduct that may underlie a Minnesota Whistleblower Act claim. In *Kratzer v. Welsh Companies, L.L.C.*, No. A06-2284 (July 30, 2009), the court again stated that “a mere report of behavior that is problematic or even reprehensible, but not a violation of the law, is not protected conduct under the Whistleblower Act.”

Background

In *Kratzer*, the plaintiff, Wayne Kratzer, was a real estate agent with Welsh Companies, L.L.C. (“Welsh”). Kratzer questioned the person to whom he reported, Peter Rand, about a commission agreement, stating that he believed Rand had committed illegal conduct in connection with a real estate deal where Rand represented John Hancock Investment Group (“John Hancock”) in the sale of a shopping center. Rand also represented a potential buyer, WelshInvest, an affiliate of Welsh, in the purchase of this shopping center, and he disclosed the dual representation to John Hancock. Initially, John Hancock rejected WelshInvest’s offer because of the conflict, but ultimately agreed to sell the property to WelshInvest. During the course of the negotiations, WelshInvest offered Rand an additional commission if he could convince John Hancock to lower the purchase price by \$1.5 million, which John Hancock ultimately agreed to do.

WelshInvest then decided to sell the property. Rand represented WelshInvest in the sale and assigned Kratzer to do the marketing. He instructed Kratzer not to advertise the sale to John Hancock because he did not want John Hancock to question the asking price, which was higher than the purchase price from John Hancock. Kratzer told Rand that he thought it would be illegal to exclude John Hancock from the marketing for the property. Kratzer also took his concerns to his supervisor and to Welsh’s CEO. Kratzer argued that the conduct implicated a real estate licensing statute and its regulations.

Welsh later terminated Kratzer’s employment for “lack of productivity and focus in the brokerage area.” Kratzer filed suit, alleging that his employment was actually terminated

because he made a report of illegal conduct. The district court dismissed the case, but the court of appeals reversed that decision and reinstated it, holding that Rand's conduct, as described by Kratzer, actually violated the law.

In reviewing the case, the Minnesota Supreme Court first determined that, contrary to the opinion of the court of appeals, the conduct Kratzer complained of did not violate either the statute or the regulations that Kratzer had cited. The court then turned to the issue of whether an actual violation of the rule was necessary, so long as the plaintiff suspected in good faith that the conduct violated the law. The court stated that, just as it had ruled on at least three previous occasions, it is not enough that a plaintiff subjectively believes the conduct is illegal. The conduct complained of must actually implicate a violation of the law to support a whistleblower claim.

The court found that the plaintiff and the dissenting justices misread a previous case, *Obst v. Microtron*, which stated: "While there need not be an actual violation of law, the reported conduct must at least implicate a violation of law." The court explained that this case referred "to the existence of the *facts* as reported, it does not stand for the proposition that the law the employee claims to have been violated need not to exist." Thus, the employee may have a claim even if he or she makes a good faith mistake about the facts, but he or she must base the claim on alleged conduct that, if true, would constitute an actual violation of the law.

What This Means for Minnesota Employers

With *Kratzer*, the Minnesota Supreme Court confirms the common sense restriction on the Minnesota Whistleblower Act that not every employee complaint can be the basis of a lawsuit. Nonetheless, employers should continue to be careful when disciplining, terminating employment, or otherwise taking adverse action against an employee who has recently made a complaint of conduct that might arguably violate the law. Even though a complaint may not implicate an actual legal violation, plaintiffs regularly file whistleblower claims based on conduct that is not actually illegal, as evidenced by the fact that the Minnesota Supreme Court has had to address this issue multiple times. Employers should listen carefully to employee complaints to determine whether they contain a hint of a complaint of illegal conduct and determine whether any underlying unlawful conduct exists. Employers should also follow up to determine whether the complaint has any validity or might actually implicate a violation of the law. Finally, preparing timely, detailed, and appropriate performance documentation, including evaluations and discipline, helps to minimize the risk of whistleblower litigation.

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