

If a Whistleblower is Just Playing the Same Old Tune, Does the Law Protect Him?

August 21, 2017 – Dorsey Work Watch

by Jack Sullivan

Some of the trickiest employment decisions can involve employees who have made accusatory complaints against the company they work for. Many state and federal laws protect “whistleblowers” who try to bring to light illegal behavior by their employers. But in many instances employers legitimately wonder whether the complaint was made in “good faith,” or just to stir up trouble, or even to give a soon-to-be-fired employee who was about to be fired for some other reason, an excuse to bring a lawsuit.

So, is the employee’s complaint of employer wrongdoing really whistleblowing if the company already knows about the alleged wrongdoing? How can the employee really “blow the whistle” if someone else has blown it already?

An opinion issued by the Minnesota Supreme Court on August 9, 2017, answers this question favorably to the employee, expands the type of complaints that will be regarded as good faith whistleblowing, and may become the basis for more lawsuits by employees accusing employers of retaliating against them for reporting alleged wrongdoing.

Previously, under Minnesota’s Whistleblower Act, Minn. Stat. §§ 181.931-.935 (2016), an employee terminated for making a complaint of illegal conduct had to demonstrate that his complaint had been made in good faith, which meant not only that the employee believed in the report he was making, but also that his purpose was to “expose an illegality.” Since the you can’t “expose” something which is already known, Minnesota law did not protect employees who complained of illegal (or allegedly illegal) conduct that the employer already knew about.

But in 2013, the Minnesota Legislature amended the statute to provide a specific definition of “good faith,” which focused on the employee’s belief that his report was true, but said nothing about intending to expose an illegality. In *Friedlander v. Edwards Lifesciences, LLC, et al.*, A16-1916 (Minn. Aug. 9, 2017) (“*Friedlander*”), the Minnesota Supreme Court held that the Legislature intended to get rid of the requirement of exposing an illegality, and that whistleblowing activity is protected even if it is just the

Related People

- Jack Sullivan

Related Capabilities

- Labor & Employment

same old tune that the employer had heard before.

Although the statute was amended in 2013, until *Friedlander* it was not clear whether the “expose an illegality” requirement remained part of the law, as that mandate did not appear in the text of the 2013 Whistleblower Act. In *Friedlander*, an employee sued his former employer in the federal court under the Minnesota Whistleblower Act, claiming that his superiors had been engaged in legal violations, which the employee had reported directly to the superiors prior to his termination. The employer moved to dismiss the lawsuit, arguing that because the employer reported the allegedly wrongful conduct to people who already knew about the conduct, he had not “exposed” the allegedly illegal conduct to anyone. The success of the employer’s motion therefore turned on whether the 2013 amendments eliminated the Whistleblower Act’s “expose an illegality” requirement. Because no court had yet addressed that issue, the Minnesota District Court referred the question to the Minnesota Supreme Court, which ruled unanimously in favor of the employee. In *Friedlander*, the Minnesota Supreme Court concluded that the 2013 amendments eliminated the “expose an illegality” requirement. Following *Friedlander*, a whistleblower’s report is made in “good faith” if the report is “not knowingly false or made with reckless disregard of the truth.”

Friedlander therefore simplifies what an employee has to prove in order to sue under the Whistleblower Act. It serves as a reminder to employers that firing an employee who has complained about possibly illegal activities at the company must be addressed with care. It remains perfectly legal to fire such employees for other, legitimate reasons, but not because their whistleblowing. Employers should therefore take care to ensure that any termination, demotion, pay cut, or other personnel action being considered for an employee who has reported actual or suspected illegal conduct is taken for legitimate business reasons, not because of the employee’s report.