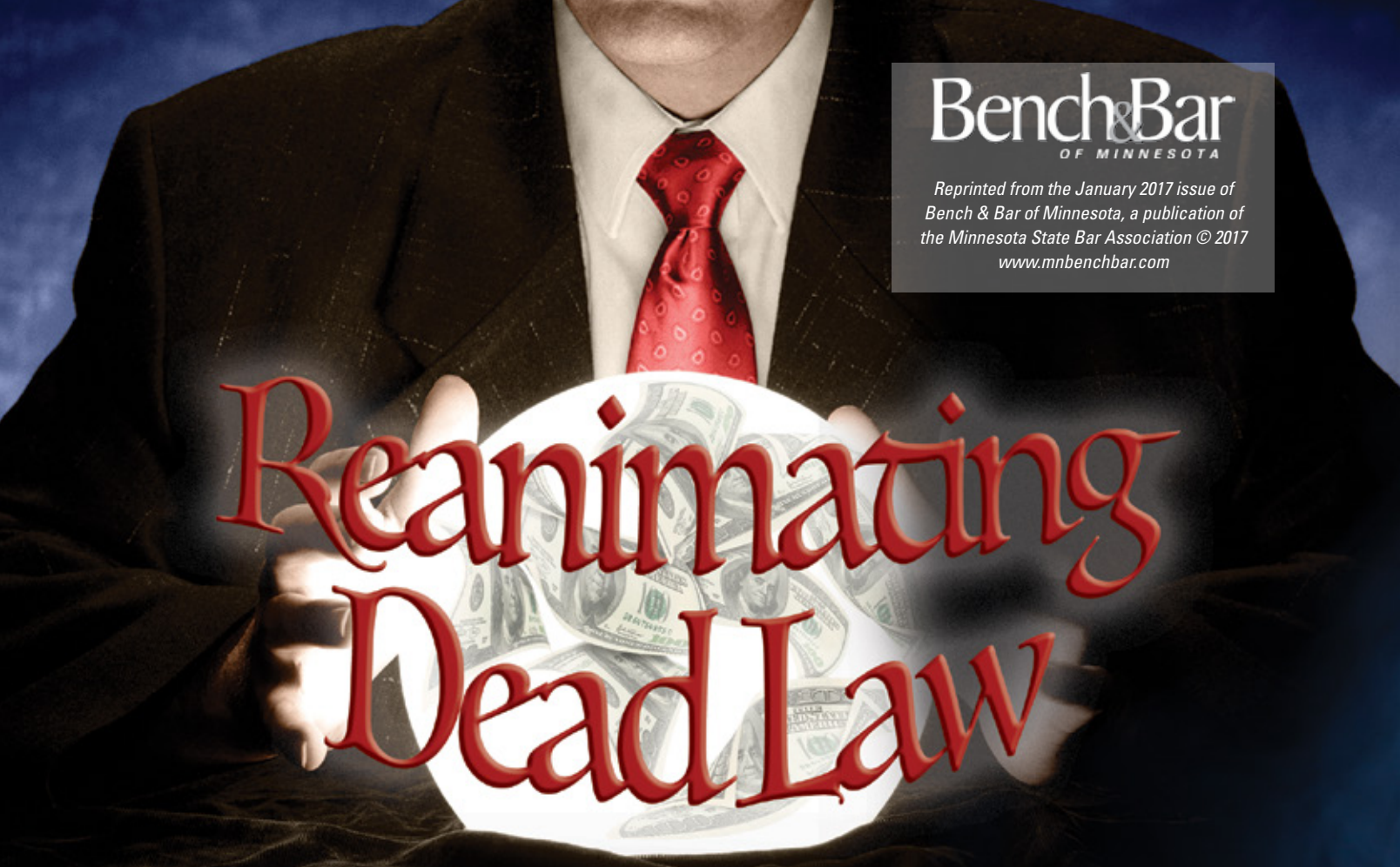

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Employer sorcery after the Minnesota Whistleblower Act amendments

In 2013, the Minnesota Legislature amended the Minnesota Whistleblower Act to expand the law's protections for employees. But many courts seem unaware of the amendments' existence or, when aware, wary of departing from years of precedent. In November 2016, a federal judge certified the question of the continuing validity of the expose-an-illegality rule to the Minnesota Supreme Court. This article discusses the impact of the 2013 amendments.

By Stephen M. Premo

The Minnesota Whistleblower Act prohibits employers from retaliating against employees under a variety of circumstances. The most well-known provisions are those that protect employees who report, or refuse to engage in, illegal conduct.

In 2013, the Minnesota Legislature amended the Minnesota Whistleblower Act to expand the law's protections for employees. Perhaps the most significant amendment was the provision defining *good faith*. Before 2013, the Legislature had not defined *good faith.* In the absence of a statutory definition, courts narrowly construed the term *good faith* to mean "for the purpose of exposing an illegality."[1] By contrast, the amendments provided a plain, motiveless definition of *good faith*. Now, a report is in good faith so long as it does not involve a statement or disclosure that is knowingly false or in reckless disregard of the truth.[2]

Immediately after enactment, commentators from both the defense and plaintiffs' bar agreed that the amendments abrogated years of precedent requiring a report to be made with the purpose of exposing an illegality.[3] Indeed, the plain and unambiguous language of the Act compels this conclusion. Members of the plaintiffs' bar noted that the law would even have retroactive application to cases involving pre-amendment conduct.[4]

That consensus has waned. Many courts seem unaware of the amendments' existence or, when aware, wary of departing from years of precedent. Employers have continued to argue that the expose-an-illegality rule is still good law. In a troubling development for employees, there is some indication courts are buying the argument.[5] Because no appellate court has issued a binding opinion on the continued validity of the expose-an-illegality rule, litigators continue to squabble over this small phrase, which is of tremendous significance to employers and employees alike.

That squabbling may soon end. In November 2016, a federal judge certified the question of the continuing validity of the expose-an-illegality rule to the Minnesota Supreme Court. The Minnesota Supreme Court is expected to give a definitive answer on this important issue of state law, perhaps giving the expose-an-illegality rule a final burial.

The broad purpose of the Minnesota Whistleblower Act

One federal court has questioned how the Legislature could have possibly abrogated a rule that required whistleblowers to expose an illegality in order to receive protection.[6] The court reasoned that this construction would subvert what the court believed to be the purpose of the Act: protecting individuals who expose violations of law.[7] However, this reasoning rests on an unduly narrow conception of the legislative intent behind the Whistleblower Act.

At its heart, the Minnesota Whistleblower Act protects organizational dissent and encourages the free flow of information to those capable of effecting change.

At its heart, the Minnesota Whistleblower Act protects organizational dissent and encourages the free flow of information to those capable of effecting change. One can observe this overarching theme in the statute's various provisions.[8] The Act protects public employees who, in good faith, communicate scientific or technical findings to government bodies or law enforcement officials. It protects employees who refuse to engage in conduct they believe to be unlawful. It also protects employees in the classified service of state government who, in good faith, communicate information that relates to state services. It even protects those employees who make no communications at all, but are simply asked by a public body or office to participate in an investigation, hearing, or inquiry.

In practice, the expose-an-illegality rule created a significant gap in the law's protections. Employees who reported actual, planned, or suspected violations of law with the purpose of *investigating*, *opposing* or even *stopping* unlawful activity of which the employer was already aware were largely unprotected under courts' definition of *good faith*.[9] This reading of the statute turned the statute on its head, permitting the most culpable employers—those complicit in, and perpetuating, unlawful activity—to terminate the most courageous employees with impunity. Such an application of the Whistleblower Act could potentially chill further opposition within the corporate structure and help facilitate continued unlawful activity.[10]

The amendments permit the Minnesota Whistleblower Act to achieve broad public policy objectives that prior case law stymied. Chief among these objectives is *to ensure society's compliance with laws*. Contrary to the Minnesota Supreme Court's pre-amendment reasoning, employees report unlawful activity for reasons other than simply exposing previously unknown illegal conduct. For instance, an employee may make a report *to voice her conscientious opposition* to violations of which the employer is well aware.[11] An employee may hope *to stop flagrant conduct* that is already exposed. The employee may *question the legality of an ongoing, illicit business practice*. The employee may *identify the legal conclusion*—for instance, deceptive trade practice violations—when the employer is aware of the conduct itself but unaware that it is unlawful. Regardless of the employee's motivations, a communication about unlawful activity may channel bad actors' conduct toward legal compliance, be it through shaming, moral appeals, or by bringing the prospect of civil or criminal liability to the forefront of the perpetrators' minds.[12]

Moreover, reporting conduct directly to the wrongdoer may be the most efficient means of ensuring compliance with laws: The wrongdoer is uniquely positioned to cease and cure unlawful conduct immediately without further transaction costs.[13] Protecting employees who make reports directly to the wrongdoer encourages employees to minimize costs to the employer and society at large while promoting the public interest in ensuring compliance with laws.

In any event, *whistleblower*—the term courts have used to justify circumscribing employee protections[14]—appears nowhere in the text itself. It is only a part of the popular title. Statutory titles "are of use only when they shed light on some ambiguous word or phrase.... [T]hey cannot undo or limit that which the text makes plain."[15] Here, the law gives protection to any employee who engages in the conduct described in the statute. And the conduct subject to protection is described in plain and unambiguous terms. It encompasses employee communications about, among other things, violations of law, so long as those communications are not knowingly or recklessly false.[16] Hence, resorting to the popular name of the statute oversimplifies the statute's protective reach.[17]

In sum, parsing an employee's subjective motivations for making a report detracts from a significant public policy objective of the Act.

Finally, the federal foundation of the expose-an-illegality rule has crumbled. The Minnesota Supreme Court developed the rule in heavy reliance upon Federal Circuit decisions interpreting the federal Whistleblower Protection Act of 1989.[18] These decisions excluded protection to reports involving (1) disclosures to the wrongdoer;[19] (2) disclosures made as part of an employee's normal job duties;[20] (3) and disclosures of information already known.[21]

Congress recognized that these decisions were "contrary to congressional intent" and "should have turned on the factual question of whether personnel action at issue in the case occurred 'because of' the protected disclosure."[22] Therefore, one year before the Legislature's amendments to the Minnesota Whistleblower Act, Congress enacted the Whistleblower Protection Enhancement Act (WPEA).[23] The WPEA, which amended the federal Whistleblower Protection Act of 1989 (WPA),[24] abrogated Federal Circuit decisions that had crafted their own expose-an-illegality rule.

Under the WPEA, a disclosure is no longer excluded from protection (1) because the disclosure was made to a supervisor or person participating in prohibited conduct; (2) because the disclosure revealed information that had been previously disclosed; (3) because of the employee's motives for making the disclosure; or (4) because the disclosure is part of the normal duties of an employee.[25] Because the Minnesota Supreme Court repeatedly relied on Federal Circuit decisions in crafting Minnesota's expose-an-illegality rule,[26] the WPEA weakens the foundation of state court precedent in ways a federal amendment might otherwise not.

In sum, parsing an employee's subjective motivations for making a report detracts from a significant public policy objective of the Act. In providing a motiveless definition of *good faith*, the Legislature has instructed courts to shift the focus from the reporting employee's subjective motivations back to the central inquiry: whether the employer has retaliated against an employee for communicating about actual, suspected, or planned violations of law.[27]

Arguments for the expose-an-illegality rule do not hold water

Employers have put forth several arguments for the continuing validity of the expose-an-illegality rule. None are persuasive.

"Statutes purporting to abrogate the common law must do so expressly or by necessary implication."

In at least one post-amendment case, the employer characterized the judicial definition of good faith as a "common law definition." Accordingly, the employer argued that the Legislature was required to indicate its intent to abrogate the prior definition expressly or by necessary implication.[28] Because the Legislature did not, the employer argued, the expose-an-illegality rule survived amendment.

This argument should not carry the day for two reasons. First, the expansive, motiveless statutory definition *does* appear to abrogate the prior, judicial interpretation of good faith by necessary implication. But second, the Minnesota Whistleblower Act amendments do not involve the abrogation of common law. Rather, they concern the abrogation of prior misinterpretation of a statutory term. These are different things.

Common law refers to the body of principles and rules deriving their authority from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts enforcing those usages and customs.[29] Judicial definitions that are solely the result of statutory construction do not fall strictly within the common law.

This distinction between common law and an interpretation of statutory law is important. In cases where courts have required a statute to abrogate a common law rule expressly or by necessary implication, the statute implicated a common law rule existing before, and independent of, any pertinent statute.[30] By contrast, legislation that implicates solely a judicial interpretation of statutory law need not show express or necessarily implied abrogation.[31]

The judicial definition of *good faith* under the Act has no relation to a common law definition or rule. Indeed, there was no common law rule at all governing good-faith reporting, because the common law did not recognize protections for employees who reported unlawful activity.[32] The definition of *good faith* in this context was solely the creature of the Minnesota Whistleblower Act, as interpreted by the Minnesota Supreme Court. Hence, courts need not consider whether the 2013 amendments abrogated the prior interpretation of *good faith* expressly or by necessary implication.

"The amendment merely clarified rather than changed the meaning of 'good faith.'"

Another argument employers have made is that the whistleblower amendments did not abrogate the expose-an-illegality rule, because the amendments were merely intended to clarify the statue, not abrogate prior case law.[33] But this is a false dichotomy. Contrary to what employers have argued, a clarifying amendment can clarify the Legislature's original intent *and* abrogate prior case law inconsistent with that intent.[34] For instance, in *Nardini v. Nardini*, the Minnesota Supreme Court found that the Legislature's enactment of a clarifying statute did not

reflect a substantive change in legislative policy but rather the Legislature's disagreement with, and correction of, a judicial interpretation.[35] In this sense, a clarifying amendment results in a change not in what the statute means, but rather in how it is to be interpreted.[36]

In most pending and future cases, there will be no need to determine whether the amendments are clarifying, and hence retroactive, or substantive, and hence prospective. Today, the overwhelming majority of pending and future cases will involve conduct occurring after the 2013 amendments. The distinction between clarifying statutes and substantive amendments is important only when retroactive or prospective application of the amendments could be dispositive. Either (1) the amendment clarified the Legislature's original intent regarding the definition of good faith, thereby abrogating prior case law inconsistent with that express definition, or (2) the amendment was a substantive change to the statute, thereby abrogating the prior definition of good faith. In either event, the plain language of the amended statute does not support the continued application of the expose-an-illegality rule.

■ "The expose-an-illegality rule survives as a component of the term 'report.'"

Employers have also argued that the expose-an-illegality rule is not dependent on the definition of *good faith*. Employers resort to several lower court and 8th Circuit cases that purportedly held that a report must be made "to expose an illegality" to be a *report*. Therefore, employers reason, the expose-an-illegality rule survived the amendments.

This is an inaccurate statement of law, the likely result of unfortunate, shorthand conflation of *report* and *good faith*. The two terms are and remain two separate components of whistleblowing activity. Even before the amendments, the Minnesota Court of Appeals had adopted the common meaning of the statutory term and concluded that *to report* meant (1) "to make or present an often official, formal, or regular account of" or (2) "to relate or tell about; present."[37] Courts were to consider the expose-an-illegality rule as a separate inquiry when determining whether the report was in good faith.[38] In *Obst v. Microtron, Inc.*,[39] and again in *Kidwell v. Sybaritic, Inc.*,[40] the Minnesota Supreme Court—the final arbiter of Minnesota law—clarified that the expose-an-illegality rule was rooted in the term *good faith*.

Obst and *Kidwell* aside, this employer argument fails for three more reasons. First, employers' understanding of *report* under the Act is contrary to the 2013 amendments. In addition to providing an explicit definition of *good faith*, the Legislature also added a plain and unambiguous definition of *report*. The statute's plain language cannot be squared with prior inconsistent (and incorrect) case law suggesting that a report is not a *report* under the statute unless it meets the expose-an-illegality requirement.

> The amendments permit the Minnesota Whistleblower Act to achieve broad public policy objectives that prior case law would not allow. Chief among these objectives is to *ensure society's compliance with laws.*

As with the term *good faith*, the plain and unambiguous definition of *report* is motiveless. It does not depend on employee's subjective motivations in making a communication. Under the amended statute, *report* now simply means a written, verbal, or electronic communication about a violation of law or regulation.[41] Hence, even if the cases upon which employers rely accurately stated the pre-amendment understanding of *report* (they do not), the decisions are no longer good law in light of the Legislature's decision to exclude references to an employee's subjective motivations in defining *report*.

Second, section 181.931 subdivision 1 of the Minnesota Whistleblower Act states that "the terms defined in this section [including *good faith* and *report*] have the meanings given them." Both *good faith* and *report* now have clear and unambiguous meanings that do not permit courts to continue imposing their own definitions under the pretext of pursuing the spirit of the law.[42]

Third, this employer argument relies on a superfluous reading of the statute. Courts must read statutes "as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held superfluous, void, or insignificant."[43] According to employers, a report is not a report unless it is made with the purpose of exposing an illegality. But a report must also be made in good faith, which (according to employers) means it must be made for the purpose of exposing an illegality. This proposed construction, in addition to being inconsistent with *Obst* and *Kidwell*, would render the prior definition of *good faith* superfluous and insignificant.

■ "Post-amendment cases have applied the expose-an-illegality rule."

Employers may point to post-amendment decisions to suggest that the expose-an-illegality rule survived. However, nearly all of those decisions involved underlying conduct *predating* the 2013 amendments. Those decisions that have applied the expose-an-illegality rule to conduct postdating the 2013 amendments are neither binding nor persuasive.

Generally, statutory amendments are presumably intended to be prospective—not retroactive—in their application.[44] To be sure, there is a strong argument that the whistleblower amendments merely clarified legislative intent and therefore have retroactive application.[45] However, in virtually all post-amendment cases involving pre-amendment conduct, the courts apparently assumed the amendments did not apply to the conduct at issue;[46] did not address the argument for retroactive application;[47] or, in one case, summarily rejected the argument without explaining the decision.[48] These cases are neither binding nor persuasive evidence that the expose-an-illegality rule survived the whistleblower amendments, particularly for cases involving post-amendment conduct.

Employers may note the existence of two cases that applied the pre-amendment case law to an employer's post-amendment conduct: *Jung v. City of Minneapolis*[49] and *Watt v. City of Crystal*.[50] However, employer reliance on these cases would again be misguided: In neither case did the court address the impact of the 2013 amendments on prior case law. The courts did not even acknowledge the amendments' existence, much less analyze their significance. Hence, they should lack persuasive value in future cases.

Of those few trial courts that have squarely addressed the abrogation argument, there is now a difference of opinion. In September 2015, one federal court held that the expose-an-illegality rule survived the amendments based on public policy grounds and the definition of *report* under the statute.[51] However, in a Hennepin County district court case, Judge Kathleen Sheehy concluded that the amendments did in fact abrogate the expose-an-illegality rule.[52]

In sum, none of the post-amendment cases applying the expose-an-illegality rule provide persuasive guidance to courts and practitioners. A federal court recently agreed. After reviewing these cases, federal District Court Judge Susan Richard Nelson concluded she was "unconvinced that the effect of the 2013 amendments was fully argued and considered."[53]

On November 28, 2016, the Minnesota Court of Appeals issued an unpublished decision in *Childs v. Fairview Health Services* addressing the effect of certain definitional amendments on prior cases.[54] The Minnesota Court of Appeals found that the addition of a statutory definition of good faith did not abrogate prior case law of what constitutes a statutorily protected report.[55] As a result, *Childs* applied the expose-an-illegality rule to post-amendment conduct.[56]

The reasoning in *Childs* is unsound. To start, the court answered whether the statutory definition of *good faith* abrogated the judicial interpretation of the term *report*. In fact, courts must determine whether the statutory definition of *good faith* abrogated the judicial definition of *good faith*. This apparent confusion presumably stemmed from the previously discussed conflation of *good faith* and *report*.

More importantly, the *Childs* court reasoned that the amendments were merely clarifying and therefore did not abrogate prior cases.[57] As explained above, this reasoning is problematic: It rests on the false dichotomy that a clarifying statute cannot abrogate prior case law. Finding solely that amendments are clarifying does nothing to determine the new, clarified meaning of a statute or the validity of prior case law. If anything, previous cases show such findings are indicative of prior cases' abrogation. Due to *Childs*'s unpersuasive reasoning and nonprecedential status, courts should decline to follow it.

Conclusion

The 2013 amendments to the Minnesota Whistleblower Act gave expansive definitions to terms that courts had narrowly construed. In providing a motiveless conception of *good faith*, the statute abrogates the expose-an-illegality rule. Nevertheless, employers have argued the

Notes

[1] *E.g.*, *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000).
[2] Minn. Stat. §§181.931 subdiv. 4, 181.932 subdiv. 3.
[3] *See, e.g.*, Kurt J. Erickson, *New Minnesota Law Loosens Criteria for Employee-Whistleblower Claims*, *jacksonlewis.com* (6/20/2013) ("The new law overrules decades of legal precedent"), (on file with author); Laua L. Myslis and Marissa K. Olsen, *Minnesota Whistleblower Act*, Gislason & Hunter Employment & Human Resources Newsletter 2–3 (2014) ("Now, the amendments explicitly state that good faith includes any statements or disclosures as long as the statements or disclosures are not knowingly false or made in reckless disregard of the truth. This vastly broadens the scope originally set by the courts."), *available at www.gislason.com/Media-Room/hr_newsletter_winter2014.pdf*; Steven Andrew Smith, David E. Schlesinger, and Eleanor Frisch, *The Canary Sings Again: New Life for the Minnesota Whistleblower Act*, Bench & Bar of Minn. (September 2013) ("The new definition abrogates prior judicial interpretations developing narrow definitions of 'good faith.'"), *available at http://mnbenchbar.com/2013/09/the-canary-sings-again/*.
[4] Schlesinger et al., *supra* note 3.
[5] *See, e.g.*, *Becker v. Jostens, Inc.*, Civil No. 14-5104 (JRT/BRT), 2016 U.S. Dist. LEXIS 131987, at *42 n.6 (D. Minn. 9/26/2016).
[6] *Id.*
[7] *Id.*
[8] *See* Minn. Stat. §181.932 subdiv. 1(1)–(6).
[9] *See Obst*, 614 N.W.2d at 200.
[10] *Cf.* Minn. Stat. §645.17 ("[T]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable; [and] the legislature intends to favor the public interest as against any private interest").
[11] Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. Mich. J.L. Reform 277, 277 n.3 (1983) (concluding after examining case studies that whistleblower employees are "people who found themselves troubled over some things their employer were doing" and spoke up in accordance with their conscience); Anthony Heyes and Sandeep Kapur, *An Economic Model of Whistle-Blower Policy*, 25 J. L., Econ., & Org. 157 (2009) ("Being complicit with an immoral activity corrupts the self and whistleblowers disclose because they dread living with a corrupted self more than they dread the other outcomes").
[12] *Cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 478 (1897) (encouraging his audience to understand the law from the perspective of the "bad man," who "cares only for the material consequences which such knowledge enables him to predict").
[13] *See* Norman D. Bishara, Elletta Sangrey Callahan, and Terry Morehead Dworkin, *Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 38, 39 (2013). (noting that intra-organizational whistleblowing can facilitate the correction of misunderstandings and wrongdoing without the financial and reputational risks associated with external exposure). *Cf. Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 478–79 (3rd Cir. 1993) (noting in the context of the Clean Water Act that internal reporting protections to whistleblowers facilitate voluntary remediation and compliance with the law).
[14] *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000) (quoting *Williams v. St. Paul Ramsey Med. Ctr., Inc.*, 551 N.W.2d 483, 484 n.1 (Minn. 1996)).
[15] *Bhd. Of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528–29 (1947).
[16] Minn. Stat. § 181.932 subdiv. 1(2).
[17] *Cf. Williams v. City of Burns*, 465 S.W.3d 96, 110 (Tenn. 2015).
[18] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at various sections of 5 U.S.C. (1994)).
[19] *Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed Cir. 1995).
[20] *Willis Dep't of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998).
[21] *Meuwissen v. Dep't of Interior*, 234 F.3d 9, 12–13 (Fed. Cir. 2000).
[22] S. Rep. No. 112-155, at 3–5 (2012).
[23] Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199.
[24] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at various sections of 5 U.S.C. (1994)).
[25] 5 U.S.C. § 2302 (f)(1)–(2).
[26] *See Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 227 (citing *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1352 (Minn. 2010); *Anderson-Johanningmeier v. Mid-Minn. Women's Ctr., Inc.*, 637 N.W.2d 270, 277 (Minn. 2002); *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000) (relying on *Wolcott v. Champion International Corp.*, 691 F. Supp. 1052, 1059 (W.D. Mich. 1987)), which in turn relied on a Federal Circuit decision, *Fiorillo v. U.S. Dep't of Justice*, 795 F.2d 1544 (Fed. Cir. 1986).
[27] *See* Minn. Stat. §181.932 subdivs. 1(1).
[28] Minnesota courts require any amendment purporting to abrogate the common law to indicate such intent expressly or by necessary implication. *See, e.g.*, *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 521 (Minn. 2005).
[29] Black's Law Dictionary 250–51 (1979).
[30] *E.g.*, *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 516 (Minn. 2005) (concluding that Minnesota recognized common law corporate of practice medicine doctrine and the legislature had not expressly or impliedly abrogated the doctrine); *State v. Anderson*, 666 N.W.2d 696, 700–01 (Minn. 2003) (concluding that the legislature's deletion of language codifying the common law felony-murder rule did not expressly or impliedly abrogate the common law rule); *Berreman v. West Pub. Co.*, 615 N.W.2d 362, 369 (Minn. 2000) (concerning whether the common law definition of a closely held corporation continued to exist *for the purpose of determining common law fiduciary duties*) .
[31] *E.g.*, *Isse v. Alamo Rent-A-Car*, 590 N.W.2d 137 (Minn. Ct. App. 1999) (abrogating a prior judicial interpretation with no finding of express or necessarily implied abrogation where the amendment of the statute corrected a judicial interpretation of a statutory provision); *Nardini v. Nardini*, 414 N.W.2d 184, 196 (Minn. 1987) (same); *Hoben v. City of*

expose-an-illegality rule survived amendment. And there is some indication they are succeeding. Many employee advocates seemed to have assumed that the import of the amendments is so obvious as to require little explanation. After all, the plain meaning of the statute must govern. However, employee advocates have made less headway than anticipated after the amendments. This suggests more pointed arguments for abrogation must be made. Employee advocates must forcefully argue that the amendments abrogated the expose-an-illegality rule, using canons of statutory construction, public policy arguments, and case law analysis. Given the weight of authority on the side of employee advocates, it is an argument they *should* win handily. ▲

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Employers may point to post-amendment decisions to suggest that the expose-an-illegality rule survived. However, nearly all of those decisions involved underlying conduct *predating* the 2013 amendments.

Minneapolis, 324 N.W.2d 161, 163 (Minn. 1982) (finding an amendment abrogated the abrogated previous decisions inconsistent with the amendment—no finding of express or necessarily implied abrogation).

[32] *Ford v. City of Minneapolis Pub. Sch.*, 874 N.W.2d 231, 233 (Minn. 2016) (recognizing that the whistleblower provisions protecting employees who report violations of law is a cause of action did not exist at common law).

[33] Respondent's Br., *Childs v. Fairview Health Servs.*, No. A16-0849 (Minn. Ct. App. 7/22/2016).

[34] *See, e.g.*, *Hoben v. City of Minneapolis*, 324 N.W.2d 161, 163 (Minn. 1982); Research Department for the Minnesota House of Representatives, *Retroactivity of Statutes*, at 4 (Updated Feb. 2016) ("A clarifying law corrects a previously enacted law to reflect that law's original, preexisting intent. These corrections are often made for the following reasons: . . . The courts have *misinterpreted the construction of the existing law*." (emphasis added)), *available at* http://www.house.leg.state.mn.us/hrd/pubs/retrostat.pdf.

[35] 414 N.W.2d 184, 196 (Minn. 1987).

[36] *Id.*; *Isse v. Alamo Rent-A-Car*, 590 N.W.2d 137, 139–40 (Minn. Ct. App. 1999).

[37] *Gee v. Minn. State Colleges & Univs.*, 700 N.W.2d 548, 555 (Minn. Ct. App. 2005).

[38] *E.g.*, *id.*

[39] 614 N.W.2d 196, 202 (Minn. 2000).

[40] 784 N.W.2d 220, 227 (Minn. 2010).

[41] Minn. Stat. § 181.931 subdiv. 6.

[42] Minn. Stat. § 645.16 ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law should not be disregarded under the pretext of pursuing the spirit.").

[43] *Jackson v. Mortg. Elec. Registration Sys.*, 770 N.W.2d 487, 496 (Minn. 2009).

[44] *Cf.* Minn. Stat. § 645.21 (providing that no law is to be "construed as retroactive unless clearly and manifestly so intended"); *Tompkins v. Forrestal*, 55 N.W. 813, 815 (Minn. 1893) (holding that statutes should be construed as prospective—not retroactive—in their scope and operation, unless the legislature clearly intended otherwise).

[45] *Cf. Carlson v.. Lilyerd*, 449 N.W.2d 185, 191–92 (Minn. Ct. App. 1999) (holding that a clarifying amendment was a corrective response to a judicial misinterpretation of a right-of-first-refusal statute); *Nardini v. Nardini*, 414 N.W.2d 184, 196 (Minn. 1987) (applying a clarifying amendment retroactively and abandoning prior judicial interpretations inconsistent with the amendment); *Hoben v. City of Minneapolis*, 324 N.W.2d 161, 162–63 (Minn. 1982) (holding that an amendment, which prohibited the stacking of insurance benefits, was clarifying a clarifying statute that abrogated the Minnesota Supreme Court's interpretation that permitted the stacking of insurance benefits).

[46] *Watt v. City of Crystal*, Case No. 14-cv-3167 (JNE/JJK) 2015 U.S. Dist. LEXIS 161673, at *49 (D. Minn. 12/2/2015); *Salscheider v. Allina Health System*, No. A13-2218, 2014 Minn. App. Unpub. LEXIS 691 (Minn. Ct. App. 7/7/2014) (unpublished case); *Weigman v. Everest Inst.*, 957 F. Supp. 2d 1102, 1105 (D. Minn. 2013); *McCracken v. Carlton Coll.*, 969 F. Supp. 2d 1118, 1127 (D. Minn. 2013) *Pedersen v. Bio-Medical Applications of Minn.*, 992 F. Supp. 934, 938 (D. Minn. 2014), *aff'd*, 775 F.3d 1049 (8th Cir. 2015) .

[47] *Ewald v. Royal Norwegian Embassy*, 2 F. Supp. 3d 1101, 1113 (D. Minn. 2014).

[48] Because the *Ewald* court did not explain why it applied expose-an-illegality rule to conduct predating the amendments, one is unable to conclude whether the Court concluded the amendments were (1) substantive and hence prospective, *cf. Thompson Plumbing Co. v. McGlynn Cos.*, 486 N.W.2d 781, 785–86 (Minn. 1992) (concluding that an amendment to Minnesota's mechanics' lien statute was a substantive change in legislative policy rather than a clarifying law and reversing the district court's decision to apply the amendment retroactively); (2) clarifying but not retroactive, *cf. Duluth Firemen's Relief Ass'n v. Duluth*, 361 N.W.2d 381 (Minn. 1985) (concluding that the statutory amendment was clarifying but finding it had only prospective application), or (3) clarifying but had no effect on the expose-an-illegality rule.

[49] *Jung v. City of Minneapolis*, Civil No. 14-3141 (DWF/LIB), 2016 U.S. Dist. LEXIS 62102, at *40 (D. Minn. 5/10/2016) (unpublished case).

[50] *See Watt v. City of Crystal*, Case No. 14-cv-3167 (JNE/JJK) 2015 U.S. Dist. LEXIS 161673, at *49 (D. Minn. 12/2/2015).

[51] *Becker v. Jostens, Inc.*, Civil No. 14-5104 (JRT/BRT), 2016 U.S. Dist. LEXIS 131987, at *41–42 n.6 (D. Minn. 9/26/2016).

[52] *Surescripts, LLC v. Theisen-Axelrod*, No. 27-CV-14-15850, 2015 WL 11252208, at *4–5 & n.23 (Minn. D. Ct. 1/6/2015) (unpublished case) (concluding that an employee no longer needs to show the report was made for the purpose of exposing an illegality); *see also Weber v. Minn. Sch. Bus.*, Court File No. 82-CV-12-2797, Trial Tr. (Day 6), at 819–20 (Minn. D. Ct. 8/12/2013) (on file with author) (finding that the amendments substantively changed the meaning of *good faith* and hence were not retroactive).

[53] Memorandum Opinion and Order, *Friedlander v. Edwards Lifesciences Corp.*, Case No. 16-cv-1747 (SRN/KMM), slip op. at 9 (D. Minn. 11/29/2016).

[54] *Childs v. Fairview Health Servs*, No. A16-0849, slip op. at 3–4 (Minn. Ct. App. 11/28/2016).

[55] *Id.* at 3.

[56] *Id.*

[57] *Id.* at 4.