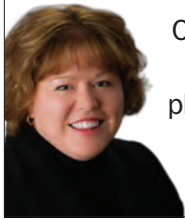


## ALL IN THE FAMILY



Case illustrates erosion of physical custody label

Page 2



## BAR BUZZ

Even in defeat, Dayton defends high court

Page 4



# MINNESOTA LAWYER

SAINT PAUL LEGAL LEDGER

August 14, 2017

MINNLAWYER.COM

Vol. 91 No. 23 | \$6.00



DEPOSIT PHOTOS

## Court blows the whistle loud and clear on good faith

By Barbara L. Jones  
bjones@minnlawyer.com

The Minnesota Supreme Court blew open the courthouse doors to whistleblowers on Aug. 9 by removing the requirement that the putative whistleblower act with the purpose of “exposing an illegality.”

Whistleblowers are now held to a good faith standard under the Minnesota Whistleblower Act.

It means that employees such as

James Friedlander who spoke to employers about violations of law may maintain a whistleblower lawsuit in situations where the employers were already aware that the disputed conduct was occurring.

“After many years in which whistleblowers were denied their day in court we have clear direction from our Supreme Court that will protect whistleblower’s rights,” said plaintiff’s attorney Clayton Halunen.

“Employers will now be held account-

able for illegal conduct and not be able to rely on technicalities to escape liability.”

David Pearson, attorney for the defendant, said only that his client was disappointed with the decision.

The result was not a complete surprise, said employment attorney Jeremy Robb. “You can see in the court’s decision that they felt constrained by the Legislature.”

Whistleblowers | Page 7

## Does an accident equal negligence?

Court of Appeals examines res ipsa loquitur doctrine

By Dan Heilman  
Special to Minnesota Lawyer

A broken picnic table has led to a dispute that made its way to the Minnesota Court of Appeals – only to be sent back down for a lower court to decide.

The appeal arose from a judgment regarding a personal injury suit filed by Craig DeWitt following an incident at the Tower Tap & Restaurant in the east-central Minnesota town of Kettle River. Tower Tap rented folding picnic tables from Duluth-based London Road Rental Center for use on Tower Tap’s property during Ma and Pa Kettle Days, an annual Kettle River festival, in August 2012. When taking delivery of the tables, a representative of Tower Tap signed a contract containing both exculpatory and indemnification clauses.

DeWitt visited Tower Tap on the evening of Aug. 11, 2012, and sat at one of the picnic tables. As he sat at the table, it collapsed, pinning DeWitt’s hips between the tabletop and the bench seat. DeWitt suffered serious injuries that required surgery to his left hip and aggravated pre-existing low back pain and a previous shoulder injury. Afterward, staff from both Tower Tap and London Road examined the table but weren’t able to determine what made it collapse.

DeWitt sued the two businesses,

Appeals court | Page 26

## Data practices commission is back in business

Capitol group dealing with data privacy, security, access was on hiatus

By Kevin Featherly  
kfeatherly@minnlawyer.com

After more than a year’s hiatus, the Legislative Commission on Data Practices was revived Aug. 8, with its

leaders promising the group will be “more dynamic” than in the past on issues like government data access, security and privacy.

“I am glad we are getting the commission back,” said Sen. Warren Limmer, R-Maple Grove, long-time privacy advocate and the group’s newly elected vice chair. “My intent is to make it a very active commission.”

Data | Page 28



Sen. Warren Limmer, R-Maple Grove (left) speaks to a testifier at an Aug. 8 meeting of the Legislative Commission on Data Practices. Limmer is the panel’s new vice chair. Its new chair, Rep. Peggy Scott, R-Andover, looks on.

STAFF PHOTO: KEVIN FEATHERLY

# Trump seeks further delay in labor fiduciary rule

By Elizabeth Dexheimer  
Bloomberg News

The Trump administration is moving to further delay part of an Obama-era rule to require brokers who offer retirement advice to put their customers' interests ahead of their own.

The U.S. Department of Labor said in a court filing Wednesday that it has submitted to the Office of Management and Budget a proposal to postpone parts of the so-called fiduciary rule for an additional 18 months. If approved, Wall Street firms would have until July 2019 to make adjustments to the most contentious parts of a rule that they say could open them up to a wave of lawsuits.

The Labor Department measure, the first major overhaul of retirement savings rules since the 1970s, was released last year over strong objections from the financial industry and Republican lawmakers. President Barack Obama's administration said at the time that requiring brokers to put customers first would help eliminate biased advice that costs retirement savers billions of



## The delay plan was disclosed in documents submitted by the Labor Department as part of a lawsuit filed in Minnesota.

dollars annually in high fees and commissions.

Financial firms and industry groups have argued that the new rules would prompt brokerages to drop clients with small amounts of savings and limit customers' investment options. The U.S. Chamber of Commerce and other groups have sued to overturn the fiduciary standard, which they've termed "deliberately unworkable." A delay could help financial firms by giving regulators time to make tweaks to the rule that the industry would like to see.

"While this delay was widely expected, it is a positive for the industry nonetheless," said Issac Boltansky, an analyst

at Compass Point Research & Trading. "This delay sets the stage for a substantial rewrite."

The industry fought especially hard to tweak what's known as the best interest contract exemption, which allows clients to join together in class-action lawsuits against financial firms.

President Donald Trump set his sights on the fiduciary rule early in his presidency by signing an executive order in February to delay its implementation. While Wall Street firms had hoped that action would lead to the rule being scrapped, Labor Secretary Alexander Acosta disappointed them earlier this year when he said the rule would be im-

plemented. As a result, the bulk of the provisions took effect in June. Others were delayed until January 2018 and now could be further delayed to July 2019.

"The regulation is already harming retirement savers," James Szostek, a vice president at the American Council of Life Insurers, said in a statement Wednesday. "The department needs to act as quickly as it can to reverse course to correct this regulation."

The delay plan was disclosed in documents submitted by the Labor Department as part of a lawsuit filed in Minnesota. Three provisions of the fiduciary rule, including the part permitting class-action suits, are currently set to take effect in January.

"Given the importance and implementation requirements, we recognize the regulated community will need time to make the changes necessary to be compliant with the remaining requirements," Laura Edling, a spokeswoman for Vanguard Group, said in a statement. She said Labor should delay the rule to allow a realistic timeframe for financial institutions to comply with the outstanding provisions.

## Whistleblowers

Continued from page 1

### Good faith

The court ruled in response to a certified question from the U.S. District Court of Minnesota: "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?'"

Yes, the court said in *Friedlander v. Edwards Lifesciences, LLC, et al.*

Since its enactment, the whistleblower act has prohibited an employer from discharging an employee who "in good faith" reports a violation of federal or state law. In *Obst v. Microtron*, the court held that good faith requires a putative whistleblower to act with the purpose of exposing an illegality. It followed that opinion in *Kidwell v. Sybaritic* in 2010.

In a January, 2017 article in *Bench and Bar*, attorney Stephen Premo, one of the plaintiff's attorneys, wrote, "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*. 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."

The Legislature amended the statute in 2013 to define good faith as reports that that are not knowingly false or made in reckless disregard of the truth of the matter asserted. The parties disagreed about the effect of the amendment, and the court adopted *Friedlander's* position — that the amendment abrogates the prior case law, leaving only the statutory definition of good faith.

### Content, not motives

*Friedlander* sued his former employers for a retaliatory discharge after he was fired after speaking about breaching customers' contracts.

*Friedlander* became aware that his employer allegedly was failing to offer price concessions to customers in violation of their contracts. *Friedlander* discussed this with management, who were already aware of it. He was then fired.

The defendants argued that he did not make his report in good faith, under the law, because

he did not report new information to expose an illegality.

U.S. District Court Judge Susan Nelson certified the question of the definition of good faith to the Supreme Court.

The court said in *Friedlander* that when it defined good faith it filled a gap in the statute, but after the Legislature provided its own definition, the court was obliged to adhere to the plain language of the definition and give effect to all parts of the amended act.

The statutory definition moves the meaning of good faith away from the motives behind the report to only the content of the report, the court said.

"Any other conclusion would, in effect, render the 'good faith' definition section of the 2013 amendment superfluous, and run afoul of our presumption that the Legislature intends to change the law when it amends a statute," the court said, in an opinion written by Chief Justice Gildea.

### Employers have to be nimble

Employers can expect an uptick in MWA claims, Robb said, adding that Minnesota now has one of the most plaintiff-friendly whistleblower statutes in the country.

Employers who are currently involved in whistleblower claims should consult their attorneys immediately to determine if they should change their litigation strategy, he said. "Employers have to be nimble."

His suggestions for employers are: Take employees' reports seriously by thoroughly investigating their reports; ensure that employees who make reports are not subject to retaliation; and when faced with the possible discipline of a whistleblower, engage outside counsel.

If they don't have policies in place, said Robb, managers should be establishing plans or mechanisms that allow them to effectively evaluate an internal report. Those plans should make sure that the claims are investigated and the employee is given feedback.

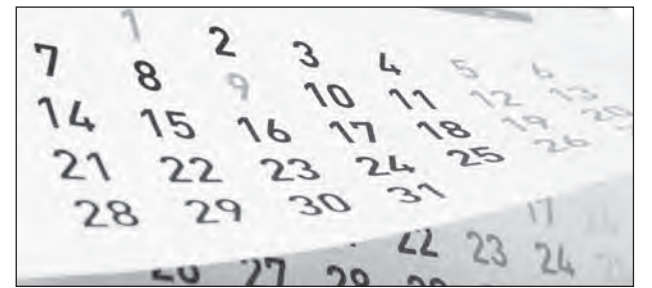
Such a plan guides the actions after a report is made and also helps establish and demonstrate an employers' good faith, Robb said.

It may be a good idea to have an investigation conducted by a third party depending on the circumstances, he said.

To mitigate the potential retaliation claims, Robb continued, every employer should have an anti-retaliation provision in a written policy or a handbook.

Timing is important if it is necessary to discipline a whistleblower, he continued.

"Courts are more willing to assume retaliation if the adverse action occurs quickly. After about two months the presumption of retaliation starts to diminish," Robb said.



DEPOSIT PHOTOS

## Calendar

Continued from page 4

### AUG. 22 TO AUG. 23

#### 2017 Criminal Justice Institute

Host: Minnesota CLE

Time: 8:45 a.m. Tuesday to 4:45 p.m. Wednesday

Location: Minnesota CLE Conference Center, 600 Nicollet Mall, Suite 370, Minneapolis

Cost: \$445 for MSBA members and paralegals, \$495 for non-members, \$345 for government lawyers and judges

Description: This conference offers 37 sessions taught by Minnesota's top criminal lawyers, judges and experts. Learn about the latest developments in criminal justice including annual reviews of U.S. Supreme Court and Minnesota criminal decisions, as well as legislative activity affecting criminal law practice. 11.75 CLE credits applied for.

Register: Online at minncle.org

### WEDNESDAY, AUG. 30

#### The Five Pillars of Smart Law Practice Management

Host: Minnesota State Bar Association

Time: 2 to 3 p.m.

Location: Information available online

Cost: Free for members and law students, \$25 for nonmembers

Description: This presentation will focus on the five essentials of smart law practice management. Learn how to focus your time on these pillars, how and why they are interdependent, and how technological advances have allowed practice management solutions to integrate them into a single solution that may simplify your practice. 1.0 standard CLE credit applied for.

Register: Online at mnbar.org

### FRIDAY, OCT. 6

#### Takings Conference

Host: Vermont Law School, Environmental Law Center; University of Minnesota Law School

Time: 8 to 5 p.m.

Location: Walter F. Mondale Hall, Room 25, University of Minnesota, 229 19th Ave. S., Minneapolis

Cost: \$500 for general public, \$250 for nonprofit and government employees, free for law faculty and students

Description: This 20th annual conference will explore the takings issue as it relates to land use, environmental rules and other forms of regulation. The 2017 U.S. Supreme Court decision in *Murr v. State of Wisconsin* will be examined. Deputy U.S. Solicitor General Edwin Kneeder will offer reflections on his experience arguing takings cases before the Supreme Court. Among other topics, the conference will focus on current takings issues specific to Minnesota. 7.25 standard CLE credits.

Register: Online at law.umn.edu