NO. A16-1916

State of Minnesota

In Supreme Court

James Friedlander,

Plaintiff - Appellant,

vs.

Edwards Lifesciences, LLC,
Edwards Lifesciences Corporation, and
Matthew Borenzweig,

Defendants - Respondents.

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION – MINNESOTA CHAPTER, EMPLOYEE LAWYERS ASSOCIATION OF THE UPPER MIDWEST, AND MINNESOTA ASSOCIATION FOR JUSTICE

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I. STATEMENTS OF *AMICI CURIAE*[1]

Amici are organizations dedicated to securing enforcement of state, federal, and local laws, regulations and ordinances that have been enacted for the purpose of protecting workers in the area of wages, hours, and working conditions, as well as ensuring working environments are free from unlawful discrimination. *Amici* strive to protect the rights of their members' clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. Together, *Amici's* members litigate daily in Minnesota's state and federal courts, and regularly counsel clients on issues of employment law. *Amici*, therefore, have a unique perspective on how the principles announced by the courts in employment cases apply in practice and in the workplace. The *Amici* organizations are described below.

A. The National Employment Lawyers Association—Minnesota Chapter.

The National Employment Lawyers Association-Minnesota Chapter ("MN-NELA") is a local affiliate of the National Employment Lawyers Association ("NELA"), a non-profit organization founded in 1985 with a membership of approximately 3,000 employment-law practitioners nationwide. MN-NELA is a member-based organization comprised of Minnesota attorneys, law students, and other legal professionals who certify that more than fifty percent of their employment-related legal representation is on behalf

[1] The position that the *amici curiae* organizations take in this Brief has not been drafted or approved by any party or their counsel. The undersigned counsel wholly authored this Brief for the *amici curiae* pursuant to Minn. R. Civ. App. P. 129.03. In addition, no person or entity other than the *amici curiae* organizations, their members and their counsel has made any monetary contribution to the preparation or submission of this Brief.

of employees. MN-NELA's purpose is to aid attorneys in the State of Minnesota in protecting the rights of employees against the greater resources of their employers and the defense bar. It has appeared as *amicus curiae* in many significant employment cases before the Minnesota Supreme Court and the Minnesota Court of Appeals.

B. The Employee Lawyers Association of the Upper Midwest.

The Employee Lawyers Association of the Upper Midwest ("ELA-UM") is a regional affiliate of NELA. ELA-UM is a member-based organization comprised of attorneys practicing in the Upper Midwest who certify that more than eighty percent of their own employment law practice, as well as that of their law firm, is on behalf of employees. The purpose of ELA-UM is to provide assistance to attorneys in the Upper Midwest in protecting the rights of employees against the greater resources of their employers and the defense bar, and to advance the law through advocacy within the court system and within the legislative branches.

C. Minnesota Association of Justice.

The Minnesota Association for Justice is a non-profit Minnesota corporation whose members are trial lawyers in private practice who devote a substantial portion of their efforts to representing individuals who seek enforcement of their legal rights in Minnesota courts. MAJ's goals include the protection of the rights of civil litigants, the promotion of high standards of professional ethics and competence, and the improvement of the many areas of law—including employment law--in which its respective members regularly practice. With respect to the issue presented to this court in this case, MAJ is concerned that the law be interpreted so it is clear, precise, and capable of uniform

enforcement—to the benefit of employees and employers alike.

***

The Court's holding regarding the issues presented by this case may have a major impact on *Amici's* members and their Minnesota clients. Given their members' extensive experience litigating these issues, MN-NELA, ELA-UM, and MAJ are uniquely positioned to provide the Court with a thorough and legally accurate treatment of the issues, which should be of benefit to the Court in deciding the merits.

II. ARGUMENT

The plain language of the Minnesota Whistleblower Act defines a "good faith" report to be one that is not knowingly false or recklessly made. Because its meaning is unambiguous, no judicial interpretation is needed. The Court may not require any additional showing of good faith. This reading of the law is supported by its original text, as well as its amended text and the public policy underlying the Act.

A. Statutory Construction Dictates a Plain Reading of the MWA's Definition of "Good Faith."

Minn. Stat. §645.16 states, "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 shall not be disregarded under the pretext of pursuing the spirit." Further, the Legislature has stated,

> "[I]n ascertaining the intention of the legislature, the courts may be guided by the following presumptions:
>
> (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
>
> (2) the legislature intends the entire statute to be effective and certain;

…

(5) the legislature intends to favor the public interest as against any private interest."

Minn. Stat. § 645.17.

The Minnesota Supreme Court has repeatedly rejected efforts to second-guess the Minnesota Legislature's intent when manifested by the unambiguous language of employment statutes like the MWA. *See, e.g.*, *Taylor v. LSI Corp.*, 796 N.W.2d 153, 156 (Minn. 2011) (citing Minnesota Supreme Court precedent and affirming reversal of summary judgment for the employer because "the plain meaning of the statute's words controls our interpretation of the statute"); *Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc.*, 637 N.W.2d 270, 273 (Minn. 2002) (reversing judgment for the employer because "[w]e will not disregard the words of a statute if they are free from ambiguity"). This Court "must 'presume that [the] legislature says in a statute what it means and means in a statute what it says in there.'" *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755, 758 (Minn. 2010) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

Under the 2013 legislative amendments to the MWA, the term "good faith" is clearly and unambiguously defined by the statute. The statute provides that "good faith means conduct that does not violate section 181.932, subd. 3." Subdivision 3, in turn, states: "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." Therefore, a report is made in "good faith" if the statements or disclosures are not knowingly false or

in reckless disregard of the truth. This is a clear and unambiguous statutory definition of good faith; no further analysis is needed.

This conclusion is supported by the fundamental canons of statutory interpretation, which prohibit courts from analyzing a statute beyond its own unambiguous language. *City of Brainerd v. Brainerd Invs. P'ship*, 827 N.W.2d 752, 757 (Minn. 2013) ("We do not resort to extrinsic sources when interpreting a statute unless the statute is ambiguous.") (citing Minn. Stat. § 645.16.). When the Legislature provided a clear and unambiguous definition of "good faith," it abrogated any prior, judicially-created definitions.

The canons of statutory construction also assume that the legislature intends the entire statute to be effective and certain. Minn. Stat. § 645.17, subd. 2. Continued application of judicially created, pre-amendment definitions impermissibly adds unwritten conditions to the term "good faith" that are unwarranted by the plain language of the text.

For example, using the current statutory language, an employee who makes a report of illegal activity that is not knowingly false or in reckless disregard of the truth is protected under the unambiguous statutory definition of good faith, even if that employee's job duties include making reports of unlawful conduct. The addition of pre-amendment judicial definitions to that same employee deprives that employee of protections the unambiguous statutory definition provides. *See Kidwell v. Sybartic, Inc.*, 784 N.W.2d 220, 227 (Minn. 2010) (excluding an honestly-made report from protection if it was part of the employee's job duties and not made for the purpose of protecting the

general public). Since the post-amendment statute is unambiguous and certain as written, there is no legitimate legal basis for retaining the pre-amendment, judicially created, definitional requirements.

Continuing to apply both the old, judicially-created definitions of "good faith," and the definition contained in the 2013 amendments is also confusing, contradictory and very difficult for courts to apply or for ordinary employees to understand. Courts would be left with multiple definitions of the same term, leading to confusion about which definition is applicable. An ordinary citizen who reads the MWA would have good reason to believe her report of illegal conduct was protected from retaliation so long as it was not knowingly false or in reckless disregard of the truth—but her understanding could be wrong, depending on which definition(s) a court applied. This is inconsistent with Minnesota law requiring a statute be construed as it is plainly written and to be effective and certain.

B. The 2013 MWA Amendments Restored the Statute's Original Meaning.

From its inception, the MWA included a provision stating, "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." Minn. Stat. 181.932, subd. 3 (1987). This provision is consistent with the Legislature's definition of "good faith" in many other chapters of the Minnesota Statutes.

For example, for the chapter governing business corporations, "good faith" means honesty in fact in the conduct or the act or transaction concerned. Minn. Stat. § 302A.011, subd. 13. Similarly, under Minnesota's adaptation of the Uniform

Commercial Code, "good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. Minn. Stat. §§ 336.1-201(20). For nonprofit corporations, "good faith" means honesty in fact in the conduct of an act or transaction. Minn. Stat. § 317A.011 subd. 10; *see also In re Healy's Estate*, 76 N.W.2d 677 (Minn. 1956) (equating "good faith" with "honest belief" in the estate context). The Legislature's original inclusion of subdivision 3 expressly excluding false or reckless reports from MWA protection, is consistent with its definitions of "good faith" throughout the Minnesota Statutes.

Prior to 2013, Minnesota courts ignored subdivision 3, and held the Legislature had not defined the term "good faith." *See, e.g.*, *Kidwell*, 784 N.W.2d at 227; *Biffert v. Nick Devries State Farm Ins.*, 2013 Minn. App. Unpub. LEXIS 81, *13-14 (Minn. Ct. App. 2013) (holding employee's report was not made in good faith because it was not made on behalf of a third party). With no regard for Subdivision 3, courts constructed several doctrines diminishing the MWA's scope—including the "purpose of exposing an illegality" doctrine at issue here. In 2000, this Court stated:

> In order to determine whether a report of a violation or suspected violation of law is made in good faith, we must look not only at the content of the report, but also the reporter's purpose in making the report. The central question is whether the reports were made for the purpose of blowing the whistle, i.e., to expose an illegality.

Obst v. Mictotron, Inc., 614 N.W.2d 196, 202 (Minn. 2000) (internal citations omitted). For this proposition, the Court in *Obst* cited only to Section 181.932, subd 1(a)[2] and did

[2] There is no Section 181.932, Subd. 1(a). Presumably the Court was referencing Minn. Stat. Section 181.932, Subd. 1(1).

not consider Subdivision 3. *Id.* at 202. Section 181.932 subd. 1(1) does not support the Court's conclusion. It says only the following:

> **Subdivision 1. Prohibited action.** 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;

Minn. Stat. § 181.932, Subd. 1(1).

Nowhere in the text of the MWA did the Legislature make an employee's purpose in reporting a legal violation a relevant inquiry. To the contrary, the Legislature included broad language, carving out only reports that were knowingly false or made recklessly. Minn. Stat. § 181.932, Subd. 3.

Nevertheless, relying on *Obst*, Minnesota courts began expanding this newly-created, judicial definition of "good faith" by creating sub-doctrines. As a result, more and more employee conduct was excluded from protection under the Act, despite a lack of any supporting legislative authority. For example, the Court of Appeals held that a showing of "good faith" required the implication of public policy, despite prior Minnesota Supreme Court decisions holding the opposite. *Compare Cokely v. City of Otsego*, 623 N.W.2d 625, 631 (Minn. Ct. App. 2001) ("To qualify as a report under the statute, a report must 'blow the whistle' by notifying the employer of a violation of law this is a clearly mandated public policy.") (cititions omiited), *with Hedglin v. City of*

Willmar, 582 N.W.2d 897, 902 (Minn. 1998) ("W]e need not decide whether the public policy requirement applies to the whistleblower statute."), and *Anderson-Johanningmeier v. Mid-Minnesota Women Center, Inc*., 637 N.W.2d 270, 277 (Minn. 2002) ("[W]e reject the importation of a public policy requirement into the whistleblower statute and hold that the protections of section 181.932, Subd. 1(a), are not limited to reports that implicate public policy.").

These judicial restrictions limiting the protections of the MWA flowed from the courts' erroneous interpretation of the term "good faith." Consequently, the 2013 amendment to the definition of "good faith," which specifically references the original Subdivision 3 to define "good faith," was intended to correct this misinterpretation and restore protections to employees under the MWA.

C. The Legislature Intended to Abrogate the Judicial Definitions of "Good Faith."

When a statute is clear on its face, the Court need not look further and consider legislative history. Minn. Stat. § 645.16. The Legislature's amendment is unambiguous in its definition of the term "good faith," and the Court should look no further. *See Molloy v. Meier,* 679 N.W.2d 711, 723 (Minn. 2004) (holding when the meaning of a statute's language is clear, courts must interpret the language according to its plain meaning without resorting to further construction).

Furthermore, "[t]he adoption of an amendment raises a presumption that the legislature intended to make some change in the existing law." *Western Union Telegraph Co. v. Spaeth*, 44 N.W.2d 440, 442 (Minn. 1950) (citing *State ex rel. Verbon v. County of*

St. Louis, 12 N.W.2d 193, 196 (Minn. 1943)). The only "change in the existing law" that the Legislature could have intended is changing the judicially-created definition of "good faith." Put another way, Respondents' and their *amici's* argument that the amended definition of "good faith" did not affect the judicial definition of "good faith" requires the Court to conclude that the Legislature intended nothing by its amendment. That is a conclusion this Court cannot reach in light of the Legislature's presumed intent to have meant something when it enacted an amended definition of "good faith."

Even if the Court did look to the legislative history, however, the legislative history indicates the intent was to reject the various doctrines developed by Courts as definitions of "good faith," in favor of the definition of good faith that was always contained in Subdivision 3. The language of Subdivision 3 is consistent with the Legislature's definition of the term "good faith" in other chapters of the state's statutes, and the Legislature's intent can be inferred from this consistency. *See supra* Part II(B).

The discussion of the Senate Judiciary Committee reflects that the amendment was proposed in order to bring the definition of "good faith" in line with the original intent. In response to a question by Senator Limmer, attorney Lawrence P. Schaefer testified as follows:

> In terms of just looking at these three different areas where the definitions and the clarity is needed [] I think that … that particularly when you look at what the legislative intent of the Minnesota Whistleblower Act has been, and has been really since 1987 when the law was enacted, [] the "good faith" component of … of … what needs to be shown in making a report ought to be triggered by the language that's already in the statute, that you can't make a report that either disregards the facts or is in reckless disregard of the facts….

Hearing on S.F. 443 before the S. Comm. on the Judiciary, 2013 Leg., 88th Sess. (May 21, 2013 at 2:06:15 P.M.) Shortly after Mr. Schaefer's testimony, the Senate Judiciary Committee voted to approve the amendment, and the Legislature adopted the amendment.

The Legislature's express definition of "good faith" renders the previous judicial definitions of "good faith" obsolete. This Court should not continue to apply these obsolete definitions. *See, e.g., Riverview Muir Doran, LLC v. JADT Development Group, LLC*, 790 N.W.2d 167, 172 (Minn. 2010) (holding court could continue to apply prior case law when the legislative amendment did not render its previous definitions obsolete).

Minnesota courts have rejected efforts by litigants to avoid application of a clear definition in favor of alternative definitions. *See, e.g., Vee v. Ibahim*, 769 N.W.2d 770, 772-775 (Minn. Ct. App. 2009) (holding that legislative amendment providing clear definition of "motor vehicle" showed that legislature intended to abrogate prior judicial definitions). This Court should continue to do so here.

D. Minnesota's Public Policy Requires a Broad Reading of the MWA Rather than the Narrow Doctrines Imposed by the Old, Judicial Definitions.

In addition to the plain language of the amendment, the canons of statutory construction and legislative history, public policy supports Plaintiff's position. Prior to the 2013 amendments, courts developed a definition of good faith in the perceived absence of a statutory definition. The result of *Obst*, *Kidwell* and their progeny has been to greatly restrict the scope of the MWA and add confusion about the rights and

responsibilities of both employees and employers statewide. Under this line of cases, employees could be fired for honestly reporting violations of their own rights to their supervisor or to state agencies such as the DOL. *See, e.g.*, *Biffert v. Nick Devries State Farm Ins.*, 2013 Minn. App. Unpub. LEXIS 81, at *13-14 (Minn. Ct. App. 2013) (holding that a complaint of wage law violations to a supervisor or the DOL that does not implicate a third party does not qualify as a "good faith" report).

Likewise, employees who are most likely to learn of potential unlawful conduct, such as attorneys, product safety quality control workers, human resources employees, or accountants could all be terminated for truthfully reporting unlawful conduct so long as an employer claimed that such reporting was a part of their "job duties." Of course, any sophisticated employer would simply define "reporting suspected unlawful conduct" a "job duty" for all employees and thus evade the reach of the MWA entirely. This is inconsistent with a public policy that favors bringing known or suspected unlawful conduct to light, and preventing illegal activities. The judicial definitions of "good faith" would likely create a dramatic chilling effect on employees most likely to report unlawful conduct.

The 2013 amendments restored the scope of the Act to its original intent, which strikes an important balance between providing a safe environment for employees to raise concerns of illegal activities, and allowing an employer to terminate employees who make purposefully or recklessly untrue reports. Employees are protected against retaliation for honest execution of their important job duties when they witness and report unlawful activities. On the other hand, employers are permitted to terminate an employee

who makes a knowingly false report, or a report that recklessly ignores the truth. Employees can feel safe making honest, legitimate reports of unlawful activity, regardless of whether those reports are intended to "expose an illegality," are part of the employee's "job duties," or serve third parties.

Moreover, the amendments provide necessary clarity to the law. Prior to the 2013 amendments, employers and employees struggled to understand the contours of the MWA. Would an accountant be protected if she reported tax fraud to her CEO as part of her job? Would she be protected if she reported it to the IRS? Could an employer terminate a human resources consultant who complained about OSHA violations as part of her job? Did her report include concerns only about herself, or concerns about herself and her co-workers? The answers to these questions have been unclear to employers, employees, and their attorneys for years. The amendments simplify the analysis: if the employee's report is not knowingly false or in reckless disregard of the truth, she is protected. If the employee's report *is* knowingly false or in reckless disregard of the truth, she is not protected and an employer may safely terminate her employment. This is the extent of the good faith analysis for both the employee and the employer. The clarity provided by the amendments is beneficial for all.

III. CONCLUSION

An affirmative resolution of the certified question supports the clear language of the statute, the legislative intent and the public policy the MWA was intended to serve. Employers, employees, attorneys, and courts have struggled to understand the contours of the "good faith" requirement of the MWA, causing difficulty, unpredictability, and

inconsistency in the application of the statute. The clear definition found within the statute allows employers and employees to understand their rights and responsibilities under the MWA. To hold otherwise would create situations in which an employee meets the statutory definition of good faith, but not the judicially-created definitions of good faith, thereby continuing the confusion these amendments were designed to eliminate.

Dated: February 2, 2017

Respectfully submitted:

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CERTIFICATION OF COMPLIANCE

The undersigned, *amicus curiae*, certifies that this brief complies with the following requirements:

1. This brief was drafted using Microsoft Word 2016 word-processing software;
2. The brief was drafted using Times New Roman, 13-point font, compliant with the typeface requirements; and
3. There are 3,568 words in this brief.

Dated: February 2, 2017

s/ Phillip M. Kitzer
Phillip M. Kitzer (No. 390441)

STATE OF MINNESOTA
IN SUPREME COURT

James Friedlander

Appellant,

v.

Edwards Lifesciences, LLC,
Edwards Lifesciences Corporation,
and Matthew Borenzweig,

Respondents.

Appellate File No.: A16-1916

AFFIDAVIT OF SERVICE

State of Minnesota)
) ss.
County of Hennepin)

Aimee Jacobson, being first duly sworn on oath, deposes and states that on the 2nd day of February, 2017, she served **Brief of Amici Curiae National Employment Lawyers Association-Minnesota Chapter, Employee Lawyers Association of the Upper Midwest and Minnesota Association for Justice** upon Respondents counsel and Appellants counsel of record listed below, via the Minnesota Court of Appeals E-MACS system and by sending via U.S. Mail directed to counsel as follows:

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Aimee Jacobson

Subscribed and sworn to before me
This 2nd day of February, 2017

Notary Public

JEREMY STEVEN REICHENBERGER
Notary Public
State of Minnesota
My Commission Expires
January 31, 2019