Case No. A16-1916

STATE OF MINNESOTA

SUPREME COURT

James Friedlander,

Plaintiff - Appellant,

vs.

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

Defendants - Respondents.

BRIEF OF *AMICI CURIAE* UNITED STATES CHAMBER OF COMMERCE AND MINNESOTA CHAMBER OF COMMERCE

Clayton D. Halunen (#219721)
Kaarin Nelson Schaffer (#386919)
Stephen M. Premo (#393346)
HALUNEN LAW
1650 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 605-4098

Steven Andrew Smith (#260836)
Matthew A. Frank (#0395362)
NICHOLS KASTER, PLLP
4600 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 256-3200

Attorneys for Appellant

David P. Pearson (#084712)
Thomas H. Boyd (#200517)
Reid J. Golden (#393118)
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street
Suite 3500
Minneapolis, Minnesota 55402
(612) 604-6400

Attorneys for Respondents

Marko J. Mrkonich (#125660)
Holly M. Robbins (#260381)
Joseph D. Weiner (#0389181)
LITTLER MENDELSON, P.C.
1300 IDS Center
80 South 8th Street
Minneapolis, MN 55402.2136
(612) 630-1000

Attorneys for Amici Curiae United States Chamber of Commerce and Minnesota Chamber of Commerce

Frances E. Baillon (#028435X)
BAILLON THOME JOZWIAK & WANTA, LLP
100 South Fifth Street, Suite 1200
Minneapolis, MN 55402
(612) 252-3570

Attorneys for Amicus Curiae National Employment Lawyers Association – Minnesota Chapter

Leslie L. Lienemann (#230194)
CULBERTH & LIENEMANN, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
(651) 290-9300

Attorneys for Amicus Curiae Employee Lawyers Association of the Upper Midwest

Justin D. Cummins (#276248)
CUMMINS & CUMMINS, LLP
1245 International Centre
920 Second Avenue South
Minneapolis, MN 55402
(612) 465-0108

Attorneys for Amicus Curiae Employee Lawyers Association of the Upper Midwest

Phillip M. Kitzer (#390441)
Brian Rochel (#391497)
Douglas A. Micko (#299364)
TESKE MICKO KATZ KITZER & ROCHEL, PLLP
222 South Ninth Street, Suite 4050
Minneapolis, MN 55402
(612) 746-1558

Attorneys for Amicus Curiae National Employment Lawyers Association – Minnesota Chapter

Sharon L. Van Dyck (#0183799)
VAN DYCK LAW FIRM, PLLC
310 Fourth Avenue South
Suite 5010
Minneapolis, MN 55415
(612) 708-4244

Attorney for Amicus Curiae Minnesota Association of Justice

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

PAGES

Cases

TABLE OF AUTHORITIES
CONTINUED

PAGES

TABLE OF AUTHORITIES
CONTINUED

PAGES

Statutes

Other Authorities

STATEMENT OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Minnesota Chamber of Commerce represents more than 2,300 business locations throughout Minnesota, which employ hundreds of thousands of employees statewide. As the voice of Minnesota businesses on statewide policy issues, the Minnesota Chamber's main goal is to make Minnesota's business environment competitive relative to other states and nations. Employment laws and employee protection are critical components to a successful business environment. Therefore, a focal point of the Minnesota Chamber's work is ensuring Minnesota businesses operate in an environment where the interests of employers and employees are properly aligned to maintain a competitive environment and a level playing field for Minnesota companies and national and international companies doing business and seeking to do business in Minnesota.

[1] Pursuant to Minnesota Rule of Civil Procedure 129.03, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici curiae*, their members, and their counsel have made any monetary contribution to the preparation or submission of this Brief.

ARGUMENT

The Minnesota Whistleblower Act ("MWA"), Minn. Stat. § 181.931 *et seq*., is intended to protect the public by encouraging employees to report illegal acts. To that end, the MWA prohibits employers from taking adverse employment actions against an employee because the 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).

As the Minnesota Supreme Court has previously held, a critical component of the MWA is that an employee is protected only when he or she makes the report "for the purpose of exposing an illegality." *Obst v. Microtron, Inc.,* 614 N.W.2d 196, 202 (Minn. 2000). This requirement protects legitimate whistleblowers who act in the public interest, and at the same time prevents employees from abusing the statute by transforming every disagreement with their employers into a statutorily protected act.

Plaintiff argues that the statutory definition of good faith in the 2013 amendments to the MWA abrogates the requirement that the report be made "for the purpose of exposing an illegality." That is incorrect. The requirement that putative whistleblowers act with the purpose of exposing an illegality is not based simply on the requirement that they act "in good faith." It is rooted in the plain meaning of the term "whistleblower."

Further, the text and history of the 2013 amendments demonstrate that the requirement remains a critical aspect of the MWA. Plaintiff's interpretation would extend protection to "reports" of conduct that the employer is already aware of and has

taken steps to address, and to individuals whose job duties include responsibility for monitoring and addressing the alleged wrongdoing. The Legislature expressly disclaimed any intent to alter the substantive scope of the statute in this way.

If adopted by this Court, Plaintiff's interpretation would have a detrimental effect on employers throughout Minnesota. Plaintiff's expansive interpretation of the MWA makes virtually all employees who voice a concern into legally protected whistleblowers. This would facilitate after-the-fact whistleblower claims by underperforming employees and would erode the doctrine of at-will employment, as employers would be forced to defend the legitimate, non-retaliatory reasons for any employment decision.

I. THE MINNESOTA WHISTLEBLOWER ACT REQUIRES THAT THE PUTATIVE WHISTLEBLOWER ACT WITH THE PURPOSE OF EXPOSING AN ILLEGALITY.

Minnesota courts have long held that in order to be protected under the MWA, an employee must make a report for the purpose of exposing an illegality and protecting the general public or a third party. A brief history of the development of the law before the 2013 amendments makes clear that these elements have been critical to the purpose of the statute from its inception and that their contours have been largely undisputed.

In *Williams v. St. Paul Ramsey Med. Ctr., Inc.*, 551 N.W.2d 481, 485 n.1 (Minn. 1996), the Minnesota Supreme Court held that in order to state a claim under the MWA, one must "blow the whistle." The Court based this requirement on the title of the Minnesota Whistleblower Act itself. The Court explained, "The popular title of the Act connotes an action by a neutral—one who is not personally and uniquely affronted by the employer's unlawful conduct but rather one who 'blows the whistle' for the protection of

the general public or, at the least, some third person or persons in addition to the whistleblower." *Id.* Without this requirement, the Court noted that "every allegedly wrongful termination of employment could, with a bit of ingenuity, be cast as a claim" under the MWA. *Id.*

The Court reiterated this interpretation in 2000. In *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000), the Court explained:

> Under the whistle-blower statute, establishing that an employee reported violations or suspected violations of law to his or her employer does not end the inquiry. The critical question of whether those reports were made in good faith must also be answered. 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 at 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.

Id. at 202. The Court equated blowing the whistle with exposing an illegality. When knowledge of the alleged wrongdoing is widespread, the employee cannot claim protection under the MWA because "it would seem that there [is] no whistle to blow." *Id.* at 203.

Several years later, the Court added that an employee's job duties may be helpful in determining whether a report is made for the purpose of blowing the whistle or exposing an illegality. *See Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 228 (Minn. 2010). The Court explained that "when it is the employee's job to report illegality, there is no basis to infer from the mere fact of a report that the employee's report was made to 'blow the whistle.'" *Id.* at 228. Accordingly, "[w]hen an employee responsible for investigating and reporting illegal behavior makes a report of such behavior, that

employee will need something more than the report itself to support the conclusion that the employee is making the report as a 'neutral party' who is intending to 'blow the whistle.'" *Id.* at 228.

II. THE 2013 AMENDMENTS DO NOT ALTER THE REQUIREMENT THAT THE PUTATIVE WHISTLEBLOWER ACT WITH THE PURPOSE OF "EXPOSING AN ILLEGALITY."

The vast majority of courts have continued to apply the expose an illegality rule since the enactment of the 2013 amendments.[2] These courts are correct. This Court has "long followed the presumption that statutory law is consistent with common law." *Wirig v. Kinney Shoe Corp*., 461 N.W.2d 374, 377 (Minn. 1990) (citing *In re Shetsky*, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953).) "If statutory enactment is to abrogate

[2] *See, e.g., Childs v. Fairview Health Services, Case No.* A16–0849, 2016 WL 6923709, at *1 (Minn. Ct. App. Nov. 28, 2016); *Kirk v. State, Dept. of Transp.*, Case No. A15–0253, 2015 WL 5200798 at * 4 (Minn. Ct. App. Sept. 8, 2015); *Weber v. Minnesota School of Business, Inc.*, Case No. A14–0831, 2014 WL 7011353 at *2 (Minn. Ct. App. Dec. 15, 2014); *Childs v. Fairview Health Services*, Case No. 27-CV-14-19589, 2016 WL 4039970 at *11-12 (Minn. Dist. Ct. Mar. 25, 2016); *Sweeney v. Merchandising Services Group, Inc.*, Case No. 27-CV-12-17492, 2013 WL 6916659 at * 22-23 (Minn. Dist. Ct. Oct. 16, 2013); *Quam v. St. Francis Health Systems of Morris*, Case No. 9-HA-CV-12-3235, 2013 WL 6631099 at * 6-7 (Minn. Dist. Ct. June 5, 2013); *Chavez-Lavagnino v. Motivation Education Training, Inc.*, 767 F.3d 744, 748 (8th Cir. 2014); *Becker v. Jostens, Inc.*, __ F. Supp. 3d __, 2016 WL 5402189 at *13 (D. Minn. 2016); *Ewald v. Royal Norwegian Embassy*, 2 F. Supp. 3d 1101, 1122-23 (D. Minn. 2014); *McCracken v. Carleton College*, 969 F. Supp. 2d 1118, 1132-33 (D. Minn. 2013); *Weigman v. Everest Institute*, 957 F. Supp. 2d 1102, 1106-07 (D. Minn. 2013); *Johnson v. U.S. Bancorp*, Case No. 15-1922 (DSD/TNL), 2016 WL 2733408 at * 3 (D. Minn. May 10, 2016); *Wetzel v. Axis Clinicals LLC*, Case No. 15-cv-3122 (JNE/SER), 2016 WL 81795 at *1 (D. Minn. Jan. 7, 2016); *Watt v. City of Crystal*, Case No. 14-cv-3167 (JNE/JJK), 2015 WL 7760166 at * 16 (D. Minn. Dec. 2, 2015); *Schwab v. Altaquip LLC*, Case No. 14–CV–1731 (PJS/JSM), 2015 WL 5092036 at * 3-4 (D. Minn. Aug. 28, 2015); *Savoie v. Genpak, LLC*, Case No. 13–1228 (DWF/SER), 2014 WL 6901783 at *7-8 (D. Minn. Dec. 5, 2014); *Romano v. ING ReliaStar Life Ins.*, Case No. 12–CV–0137 SRN/JJK, 2013 WL 3448079 at * 10-11 (D. Minn. July 9, 2013).

common law, the abrogation must be by express wording or necessary implication." *Id.*; *see also Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). The 2013 amendments do not expressly or implicitly abrogate the common law. There is no conflict between the requirement that a putative whistleblower act with the purpose of exposing an illegality and the requirement that a putative whistleblower not make statements "knowing that they are false or that they are in reckless disregard for the truth." Minn. Stat. § 181.932, subd. 3.

The history of the 2013 amendments confirms that the Legislature did not intend to reverse a quarter century of consistent judicial interpretation of the MWA.

A. The Legislature Amended the Act to Extend Whistleblower Protection to Certain State Employees.

The primary purpose of the 2013 amendments was to extend whistleblower protections to state employees. On February 13, 2013, Senator Barbara Goodwin introduced S.F. No. 443. This bill added protections for any employee "in the classified service of state government [who] communicates information that the employee, in good faith, believes to be truthful and accurate, and that relates to state services, including the financing of state services to: (i) a legislator or the legislative auditor; or (ii) a constitutional officer." S.F. No. 443 (Feb. 14, 2013 (as introduced)).

The Senate Counsel and Research summary of the bill states in full:

> Section 1 [Prohibited Action] adds a category of employee action that is protected from employer retaliatory action. Specifically, this section prohibits employers from taking specified retaliatory actions against an employee in the **classified service** of state government because the employee, in good faith, communicates information to a legislator, the

> legislative auditor, or a constitutional officer, that the employee, in good faith, believes to the (sic) truthful and accurate, and that relates to state services, including the financing of state services.

Office of Senate Counsel, Research, and Fiscal Analysis, Feb. 22, 2013 (emphasis added). This initial draft of the bill did not define "good faith." In its initial form, the only purpose of the bill was to expand whistleblower protection for state employees.

The House introduced identical language on February 13, 2013 including the same description and purpose as its Senate companion bill. H.F. No. 542 (Feb. 13, 2013 (as introduced)). Both chambers passed a First Engrossment on February 28, 2013, and the Senate referred the bill to the Judiciary Committee. S.F. No. 443 (Feb. 28, 2013 (1st Engrossment)); H.F. No. 542 (Feb. 28, 2013 (1st Engrossment)). Following the First Engrossment, the House Research Bill Summary provided this description for the amendment:

> Under the current "whistleblower" law in Minnesota Statutes, section 181.932, an employer is prohibited from taking specified actions against an employee because the employee has engaged in certain acts, such as reporting a violation or suspected violation of law. This section adds a prohibition against taking these employment actions against a **classified state employee** because the employee communicates information that the employee, in good faith, believes to be truthful and accurate, and that relates to state services (including financing of state services) to a legislator, the legislative auditor, a legislative employee, or a constitutional officer.

(House Research Bill Summary, Feb. 28, 2013) (emphasis added). Neither the full House nor any House committee held any further hearings on this amendment. The House expressed no intent to overrule decades of judicial precedent, and the language to create a

statutory definition of good faith did not appear in the bill until a Senate Judiciary hearing on March 21, 2013.

B. The Senate Judiciary Hearing Testimony Disclaimed Any Intent That the Definition of Good Faith Overrule Precedent.

At the March 21, 2013 Senate Judiciary hearing, Senator Goodwin introduced an amendment to S.F. No. 443. She explained to the committee that the amendment "defines good faith, it defines penalized, and it basically defines what a report means. So this will **clarify** some issues that have come up in court at different times that made the statute a little difficult to read." Hearing on S.F. No. 443 before the S. Comm. on the Judiciary, 2013 Leg., 88th Sess. (the "Judiciary Hearing"), 2:05:47, Mar. 21, 2013, available at, http://www.tinyurl.com/mwa-senate-committee-hearing (emphasis added). During the discussion of this amendment, the Senators described the amendment as a "clarification" twenty separate times. *See generally*, *id.* Larry Schaefer, representing the plaintiff's bar, testified on behalf of the amendment, stating "the definitional clarifications are necessary and they are just that – they're clarifications." *Id.*, 2:06:28.

Judiciary Chairman Senator Latz asked if "there were specific cases that have interpreted the terms penalized, and reports in good faith that has led to this ambiguity?" *Id.*, 2:07:38. The answer to this question cited no case on "good faith" and only one on "penalize." *Id.*, 2:07:54. The Senators then insisted that the proposed language should only "bring[] clarity in a neutral manner, not [] give advantage to any party in the courtroom." *Id.*, 2:13:52. When they asked Senate counsel whether that would be the case, counsel responded, "Yes. I mean on its face, I have not read the cases, so I don't

know what the underlying issues have been in the case law, but on its face." *Id.*, 2:14:03. The Senators expressed significant concern, even seeking legal counsel, to ensure that the amendments did not overrule existing law.

The most instructive portion of the testimony on this fact comes from Chairman Latz. In discussing substantive changes regarding the scope of the statute, he noted "the second question by Senator Limmer was whether or not the proposed language is simply a neutral description of the existing law to provide some clarity or whether it in some way changes the law **substantively** by expanding the protections of the whistleblower statute." *Id.*, 2:25:20 (emphasis added). Chairman Latz acknowledged that clarifications and substantive changes are mutually exclusive. Here, the Legislature intended a neutral description of existing law and not a substantive change.

Not a single document, piece of evidence, or portion of hearing testimony contains an express or implied declaration of a desire to abrogate this Court's precedent, and the statutory language is silent on this issue. It strains credulity that after the Senators took such pains to ensure the amendment did not substantively change the law, they really intended to overrule decades of precedent.

III. PLAINTIFF'S INTERPRETATION WOULD HARM EMPLOYERS IN MINNESOTA.

A. Plaintiff's Interpretation Leads to Unreasonable and Absurd Results.

A "whistleblower" is defined as a "person who informs on a person or organization engaged in an illicit activity." Oxford English Dictionary U.S. Online (available at https://en.oxforddictionaries.com/definition/us/whistle-blower, last accessed

on March 20, 2017). A "whistleblower act" is defined as a "federal or state law protecting employees from retaliation for properly disclosing employer wrongdoing such as violating a law or regulation, mismanaging public funds, abusing authority, or endangering public health or safety." *Black's Law Dictionary* 1984 (10th ed. 2014). As these definitions make plain, the requirement that an employee expose illegal activity is inherent in the plain meaning of "whistleblower."

For this Court to hold that a good faith report requires only that an employee believe her report is true would be unreasonable in light of the common understanding of whistleblower. Mark Felt was a whistleblower not because he believed President Nixon violated the law, but because he exposed that illegality to protect the public. Plaintiff's interpretation of the MWA contradicts the definition of whistleblower.

A purely subjective good faith requirement would lead to absurd results by extending statutory protection to all manner of potential violations, for example, my co-worker talks too loud (nuisance); there is a spill in the break room (negligence); my boss raised her voice at me (assault). Any time an employer takes an unrelated employment action involving those employees, a purely subjective construction of good faith would expose these employers to expensive litigation for what amounts to everyday workplace interactions. *See Williams*, 551 N.W.2d at 485 n.1. This would further exacerbate the MWA litigation inundating the courts since the 2013 amendment. A Courthouse News search of the three and a half years prior to the 2013 amendment returned 56 Complaints that asserted a MWA claim. That number increased over 35% to 76 Complaints in the

three and a half years since the amendment went into effect. That substantial increase would skyrocket even further without the expose-an-illegality rule.

In ascertaining the intent of the legislature, the Court should not create a result "that is absurd . . . or unreasonable." Minn. Stat. § 645.17. Doing away with the requirement that putative whistleblowers act with the purpose of exposing an illegality would lead to such unreasonable and absurd results.

B. Plaintiff's Interpretation Would Make Minnesota an Outlier Nationally in Whistleblower Protection.

This Court's precedents have long comported with similar requirements imposed in other jurisdictions under state whistleblower and wrongful discharge statutes. For example, in *Dahlberg v. Lutheran Soc. Servs.*, 625 N.W.2d 241, 254-55 (N.D. 2001), the North Dakota Supreme Court analyzed the Court's decision in *Obst* and held under the North Dakota Whistleblower statute that the protected activity must be "made for the purpose of blowing the whistle to expose an illegality, and the reporter's purpose must be assessed at the time the report is made." *Id.* (quoting *Obst*, 614 N.W.2d at 202). Many other states have similar requirements. *See, e.g., Lafond v. Gen. Physics Servs. Corp.*, 50 F.3d 165, 175 (2d Cir. 1995) (no protection under Connecticut whistleblower statute when purpose of report was employee's own self-interest); *Gammon v. Crisis & Counseling Centers, Inc.*, 762 F. Supp. 2d 165, 183 (D. Me. 2011) (holding good faith under the Maine whistleblower act means having "purpose of exposing illegal or unsafe practices"); *Albright v. City of Philadelphia*, 399 F. Supp. 2d 575, 596 (E.D. Penn. 2005)

(Pennsylvania whistleblower act only protects reports made without consideration of personal benefit).

Plaintiff's construction would create a statute nearly unrecognizable compared to the rest of the country, calling into question the very nature of at-will employment. Abrogating the case law would place employers in the untenable position of potentially litigating every employment termination in court based on nothing more than quotidian workplace interactions devoid of any intent to expose an illegality or protect the public. The courts would become super-personnel departments examining practically every employment decision. The resulting litigation costs would have a negative impact on the viability, growth, and survival of businesses operating in Minnesota.

CONCLUSION

This Court has developed a robust and reasoned body of case law on the MWA that has been followed in other jurisdictions and that continues to be followed by Minnesota courts in the wake of the 2013 amendments. The definition of good faith in the 2013 amendments to the MWA does not abrogate this Court's requirement that putative whistleblowers act with the purpose of exposing an illegality, and this Court should answer the certified question "No."

Dated: March 20, 2016

s/ Joseph D. Weiner

Marko J. Mrkonich (#125660)
Holly M. Robbins (#260381)
Joseph D. Weiner (#0389181)
LITTLER MENDELSON, P.C.
1300 IDS Center
80 South 8th Street
Minneapolis, MN 55402.2136
(612) 630-1000

Attorneys for Amici Curiae United States Chamber of Commerce and Minnesota Chamber of Commerce

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01 subd. 3, the undersigned hereby certifies, as counsel for Amici Curiae United States Chamber of Commerce and Minnesota Chamber of Commerce, that this Brief complies with the type-volume limitation as there are 3,376 words of proportional space type in this Brief.

This Brief was prepared using Microsoft Word 2010.

Dated: March 20, 2016

s/ Joseph D. Weiner
Marko J. Mrkonich (#125660)
Holly M. Robbins (#260381)
Joseph D. Weiner (#0389181)
LITTLER MENDELSON, P.C.
1300 IDS Center
80 South 8th Street
Minneapolis, MN 55402.2136
(612) 630-1000

Attorneys for Amici Curiae United States Chamber of Commerce and Minnesota Chamber of Commerce

Firmwide:145992030.5 083637.1002