

# Employment Edge 103rd Edition—Minnesota Supreme Court Confirms: Whistleblower Statute Only Protects Employees Who Report Conduct That Violates a Statute or Rule

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In a July 2009 decision (*Kratzer v. Welsh Cos., LLC*), the Minnesota Supreme Court held that Minnesota's whistleblower statute (Minn. Stat. § 181.932) does not protect employees who report inappropriate conduct to their employers unless the conduct violates a federal or state statute or rule. This decision should be helpful for employers in defending against whistleblower claims or demands by employees based on reports of alleged misconduct by the employer that, though improper, is not specifically prohibited by law.

The employee/whistleblower in *Kratzer* worked for a real estate brokerage firm and had participated as a subordinate in helping to arrange the sale of a shopping center. The brokerage firm/employer had a "dual agency" relationship in the transaction, which meant that it was representing both the buyer and the seller. (Under existing Minnesota law, a dual agency relationship did not violate public policy.) The seller of the shopping center had agreed in advance to pay the brokerage company a 2.5 percent commission on the purchase price if the property were sold. Later, the prospective buyer worked out a deal with the company's key broker handling the transaction under which the broker (Rand) was promised extra commission if he could induce the seller to reduce the purchase price by at least \$1.5 million. The seller ultimately agreed to lower its purchase price by this amount, the sale was completed, and Rand was paid a substantial additional commission by the buyer for securing the price reduction.

*Kratzer* later reported to the brokerage company's management his concern that Rand had not disclosed to the seller before the closing the commission arrangement he had made with the buyer. The brokerage firm terminated *Kratzer's* employment a short time after he made this report.

The district court in the case threw out *Kratzer's* whistleblower claim, accepting the brokerage firm's argument that its failure to disclose Rand's commission arrangement to the seller did not violate any statute or rule. *Kratzer* appealed and argued that Rand's activities violated a Minnesota administrative rule that requires knowing consent to dual agency relationships in real estate transactions. The Court of Appeals agreed with *Kratzer* and reversed the dismissal of the whistleblower claim, holding that Rand's commission

arrangement with the buyer was a "material fact" and that without having disclosed this fact to the seller, the seller could not have given the knowing consent to dual representation that is required by the Minnesota rule. In interpreting the language of the rule, the Court of Appeals had relied on the common law precepts that a real estate broker owes a fiduciary duty to its principal and that one subject to such a duty must disclose material facts to its principal.

In its opinion, which reversed the Court of Appeals, the Supreme Court first observed that the language of the whistleblower statute refers to protecting an employee who "in good faith, reports [to his employer] a violation or suspected violation of any federal or state law or rule." The key issue thus was whether Rand's failure to inform the seller of his commission agreement with the buyer violated any statute or rule. The Supreme Court held that it did not, and therefore agreed with the district court that the whistleblower claim should be dismissed.

Kratzer had argued to the Supreme Court that his report was within the scope of the whistleblower statute because it implicated a Minnesota statute relating to the licensing of real estate brokers (which authorizes revocation of their licensure if they engage in any fraudulent, deceptive or dishonest practice) and a related rule that defines as a fraudulent, deceptive, or dishonest practice acting on behalf of "more than one party to a transaction without the knowledge and consent of all parties." The Court, however, held that the "plain language" of the statute and rule required only that the broker disclose the fact of his dual agency (which had occurred) and did not require disclosure of the special commission arrangement. Based on its finding that the terms of the statute and rule were clear, the Supreme Court rejected the Court of Appeals' reliance on common law standards to reach a different result. In summary, the Court ruled that because the language of the statute and rule on which Kratzer relied did not expressly require that Rand disclose the terms of his commission agreement to the seller, Kratzer's report that Rand failed to do so did not implicate a violation of law, and thus Kratzer did not have a valid whistleblower claim.

The Supreme Court also rejected Kratzer's argument that he stated a valid claim based on the language of the whistleblower statute that protects employees who report even "suspected violations" of law. On this point, the Supreme Court observed that it had held in a series of recent cases "that a mere report of behavior that is problematic or even reprehensible, but not a violation of the law, is not protected conduct." As to the "suspected violation" language in the whistleblower statute, the Court declared that the proper standard to be applied in determining whether a claim is stated based on this language is "to assume that the facts have occurred as reported and then determine ... whether those facts constitute a violation of law or rule." (If it later turns out that the facts are not as the employee reported them in good faith to be, the conduct is "protected activity" under the whistleblower statute so long as the facts, if they had been true, would be a violation of the law.) In Kratzer's case, though, the Court rejected the "suspected violation" argument because, as the Court had already decided, Kratzer's report did not implicate a violation of any



law or rule.

A dissenting opinion in the case, authored by Justice Helen Meyer and joined by Justice Alan Page, asserted that "limiting an employee's report under the whistleblower statute to conduct that actually violates the law" was "too narrow an interpretation," and observed that the Court majority "appears to be following a developing trend" toward more narrow interpretation of the whistleblower statute.

If you have any questions about the Minnesota whistleblower statute or other employment law issues, please contact a member of the Gray Plant Mooty Employment Law practice group.

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