

Shareholder-employees who report violations of their fiduciary duties may be protected whistleblowers.



By Dan Hall

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The shareholders of closely held businesses are often some of the key employees of those businesses. Unlike at-will employees, shareholder-employees are entitled to fiduciary duties. These heightened duties, which include duties of disclosure, candor and fairness, can present opportunities for shareholder-employees and problems for businesses when disputes arise. See *Gordon v. Consulting Radiologists, Ltd.*, No. A18-2079, 2019 WL 2495673, at *1

(Minn. Ct. App. June 17, 2019).

Along with the heightened fiduciary duties owed to them, the Minnesota Whistleblower Act provides an additional layer of protection for shareholder-employees. By statute, an employer cannot take an adverse employment action against an employee who “in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule.” Minn. Stat. § 181.932, Subd. 1(1). My colleague Randy Gullickson and I recently argued that a shareholder-employee who

reported violations of the fiduciary duties owed to him could be protected as a whistleblower. The district court agreed. See *Gordon v. Consulting Radiologists, Ltd.*, No. 27-CV-16-15092, 2017 WL 6627667, at *18

(Minn. Dist. Ct. Sep. 19, 2017) (finding that shareholder-employee’s report that other shareholders and directors “violated statutory and common law fiduciary duties” could support a whistleblower claim). To understand why a shareholder-employee’s report of fiduciary duty violations would be protected, it is helpful to understand the history of the Minnesota Whistleblower Act. Until 2013, “good faith” was defined by the courts to require that the employee’s report of a violation of law was “made for the purpose of blowing the whistle, i.e., to expose an illegality.” *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000). When an employee reported wrong doing that was already known, the Minnesota Supreme Court held that “it is difficult, if not impossible, to say that at the time the reports were made, [the employee’s] purpose was to expose an illegality as required for protection under our whistle-blower statute.” *Id.* Applying that reasoning, a shareholder-employee’s report of fiduciary duty violations would likely not be protected if the business and its directors were already aware of the alleged breaches of fiduciary duties.

That requirement, however, is no longer good law. A change to the statute added a definition of “good faith,” which now applies to a report unless it is made with knowledge that it is false or in reckless disregard of the truth. Minn. Stat. § 181.931, Subd. 4; Minn. Stat. § 181.932, Subd. 3. Following that change, the Minnesota Supreme Court revisited the “good faith” reporting requirement in *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162 (Minn. 2017).

The Minnesota Supreme Court held that the change in the law abrogated the holding in *Obst* and “eliminated the judicially created requirement that a putative whistleblower act with the purpose of exposing an illegality.” *Friedlander*, 900 N.W.2d at 166. Following *Friedlander*, a shareholder-employee who reports violations of fiduciary duties owed to that shareholder can be a protected whistleblower even if the company and its directors are already aware of the violation of those fiduciary duties.

The additional protection for shareholder-employee whistleblowers is consistent with a tradition of protecting shareholder-employees in Minnesota. Unlike most at-will employees, who can be fired for no reason or for any lawful reason, Minnesota courts recognize that for shareholder-employees, “employment is often a vital component of a close corporation shareholder’s return on investment and a principal source of income.” *Gunderson v. All. of Computer Professionals, Inc.*, 628 N.W.2d 173, 189 (Minn. Ct. App. 2001).

Accordingly, a shareholder-employee may have a reasonable expectation of continued employment that is protected. *Haley v. Forcelle*, 669 N.W.2d 48, 59 (Minn. Ct. App. 2003). Deciding whether there is a reasonable expectation of continued employment is a fact-intensive inquiry that depends on a number of factors. See *id.* Protecting shareholder-employees as whistleblowers when they report violations of the fiduciary duties they are owed is one more level of protection for those shareholder-employees.

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