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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-385**

Wayne R. Joyce,
Appellant,

vs.

State of Minnesota,
Department of Corrections,
Respondent.

**Filed January 11, 2011
Affirmed
Huspeni, Judge***

Chisago County District Court
File No. 13-CV-08-905

Paul O. Taylor, Taylor & Associates, Ltd., Burnsville, Minnesota (for appellant)

Lori Swanson, Attorney General, Gary R. Cunningham, Anna E. Jenks, Assistant
Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Huspeni,
Judge.

UNPUBLISHED OPINION

HUSPENI, Judge

On appeal from the dismissal of his complaint alleging that he was denied a
promotion in violation of Minnesota's whistleblower statute, Minn. Stat. § 181.932

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

(2008), appellant argues that the district court erred by concluding that he had not engaged in protected conduct under the statute because his reports of security concerns at the facility where he worked were part of his job duties as a security officer. Because we conclude that appellant did not engage in protected conduct under the whistleblower statute, we affirm.

FACTS

Appellant Wayne Joyce has been employed by respondent Minnesota Department of Corrections (DOC) since July 23, 1999. In May 2003, he was assigned to a security officer position with Health Services at the DOC facility in Rush City.

Appellant alleged that on several occasions from 2005 through 2007, he discovered that pharmacy doors were not secured properly, making it possible for inmates to access narcotics and other controlled substances. He also allegedly discovered surgical carts containing surgical instruments and medical devices that were not properly secured, making them accessible to inmates who could use them as weapons. The complaint alleged that these oversights were violations of DOC regulations, rules, and standards. Appellant alleged that he made several oral complaints about these issues to one of his supervisors. In April 2007, he made the same complaint to his immediate supervisor; he also raised these issues with his union president, and a union steward allegedly brought the concerns to Captain Wilmes at the facility in May 2007. Appellant alleged that because of these activities he was discriminated against in the form of being denied a promotion.

In his brief on appeal, appellant also refers to other reports that he made, and that after no action was taken upon reports made to the captain, he raised the same issues with the warden of the facility in a personal meeting.¹

Respondent moved to dismiss the complaint under Minn. R. Civ. P 12.02(e) for failure to state a claim upon which relief can be granted, arguing that appellant's conduct was not protected under the statute because the conduct occurred in furtherance of his job responsibilities. In support of its motion to dismiss, respondent submitted a "Position Description" for appellant's job with the DOC which detailed his job duties. Appellant, in opposing respondent's motion, submitted an affidavit that included additional allegations that he made reports to the warden as well as assertions that his job duties did not include the sort of reporting that he engaged in. Along with the affidavit, appellant also submitted a document that he claimed was his actual job description. This document was titled "Class Specification," and was less detailed than the Position Description offered by respondent. The district court granted the motion to dismiss, finding that appellant's reports were not protected conduct under the whistleblower statute because the actions were part of appellant's job responsibilities and were not for the purpose of exposing illegality. The court quoted language from the Position Description in its order granting respondent's motion to dismiss.

An appeal was filed and subsequently stayed pending the Minnesota Supreme Court's decision in *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (Minn. 2010). Upon filing

¹These reports were not alleged in appellant's complaint, but instead come from an affidavit submitted by appellant in opposition to respondent's motion to dismiss.

of that opinion, this court dissolved the stay. Appellant relies on *Kidwell* in urging reversal of the district court judgment.

DECISION

Generally, when deciding a motion to dismiss, a district court is limited to review of the complaint as a whole, and may not consider extrinsic evidence. *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). But Minn. R. Civ. P. 12.02 provides that “[i]f, on a motion [to dismiss for failure to state a claim], matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment.”

The district court did not reject the affidavit and job description offered by appellant; nor did it reject the Position Description submitted by respondent. The court cited to the Position Description in its order, notwithstanding that this document was not referenced anywhere in the complaint. Though not specifically cited to in its order, the affidavit and job description submitted by appellant may have been considered by the district court in its decision. Because matters outside the pleadings were presented to and not excluded by the district court, we will review the district court’s dismissal under a summary-judgment standard.

On appeal from summary judgment, this court reviews de novo whether any genuine issues of material fact exist and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of

material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008).

Minnesota's whistleblower statute provides that an employer shall not "discharge, discipline, threaten, otherwise discriminate against, or penalize an employee," because the employee, "in good faith, reports a violation or suspected violation of any federal or state 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) (2008). To establish a prima facie case under the whistleblower statute, an employee must "demonstrate statutorily protected conduct by the employee, an adverse employment action by the employer, and a causal connection between the two." *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555 (Minn. App. 2005).

In concluding that appellant had not engaged in protected conduct, the district court relied on a so-called "job duties exception" developed by Minnesota courts. Citing this court's decision in *Kidwell v. Sybaritic, Inc.*, 749 N.W.2d 855 (Minn. App. 2008), *aff'd*, 784 N.W.2d 220 (Minn. 2010), the district court stated that "[a]n employee is not engaging in protected conduct under the Whistleblower Act when an employee is making a report in fulfillment of his job duties." Appellant argues that the district court's decision must be reversed because the job-duties exception has now been laid to rest by the Minnesota Supreme Court's decision in *Kidwell*. But we believe that appellant is asking this court to read *Kidwell* more broadly than is reasonable.

Kidwell involved a former employee who was terminated as in-house general counsel and who then brought a claim alleging a violation of the whistleblower statute. 784 N.W.2d at 221. A jury found in favor of the employee on the whistleblower claim, but this court reversed, holding that the employee had not engaged in protected conduct because his report to his employer was in fulfillment of his job duties. *Id.* at 225. The supreme court affirmed. In doing so, however, that court rejected “the blanket job duties exception the court of appeals crafted” as being “too broad.” *Id.* at 226-27. But the supreme court also refrained from announcing a major change in the law, stating that “[a]lthough we hold that the whistleblower statute does not contain a job duties exception, we do not go so far as to hold that an employee’s job duties are irrelevant in determining whether an employee has engaged in protected conduct.” *Id.* at 227.

The *Kidwell* court directed that the inquiry into whether an employee has engaged in protected conduct should focus on the statute’s requirement that reporting be done in “good faith,” and that “[a]n examination of the employee’s job duties could be helpful in answering this central question.” *Id.* Therefore, the fact that reporting is in fulfillment of an employee’s job duties does not preclude a whistleblower claim as a matter of law, but the employee’s job duties remain relevant in determining whether the reporting constitutes statutorily protected conduct.

The *Kidwell* court also offered guidance for deciding close cases, stating that an employee whose job duties include investigating and reporting wrongdoing would “need something more than the report itself” to show that his or her conduct is protected under the statute. *Id.* at 228. Such an employee could be found to have engaged in protected

conduct “depending upon to whom the report is made.” *Id.* The court stated that where an employee “submits a report documenting wrongdoing outside normal channels, because the employee believes that the normal chain of command is unresponsive, that employee could be viewed as engaging in protected conduct.” *Id.* The court also made a distinction between general employment obligations, such as an obligation shared by all employees to report fraud and waste, and specifically assigned job duties. *Id.* at 229. The court stated that “a reasonable fact-finder could, depending on the evidence, infer that an employee who makes a report based on an employment-related obligation, but not as part of an assigned job duty, was doing so in order to expose an illegality.” *Id.* at 229.

Applying the principles set forth in *Kidwell* to the facts of this case, we must determine whether a rational trier of fact, considering the record as a whole, could find for appellant. *See Frieler*, 751 N.W.2d at 564. As the supreme court’s opinion in *Kidwell* makes clear, there is no blanket job-duties exception to the whistleblower statute. Therefore, we must inquire more extensively than did the district court when it determined as a matter of law that appellant could not satisfy the first element of the prima facie case because, “[w]hen an employee is making a report in fulfillment of his job duties, the conduct is not protected.” This bright-line rule was precisely what the *Kidwell* court rejected, announcing instead a more nuanced approach to determine whether an employee’s report was made in good faith, “for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim.” *Id.* at 227 (quoting *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000)).

The district court did not have the benefit of the supreme court's *Kidwell* decision. Nevertheless, we conclude that application of the principles announced in *Kidwell* results in affirmance of the district court. The fact that reporting unsecured pharmacy doors and surgical equipment falls squarely within appellant's ordinary job duties no longer suffices to preclude his claim under the whistleblower statute. But the supreme court cautioned in *Kidwell* that an employee whose job duties require reporting illegal behavior "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 (quoting *Obst*, 614 N.W.2d at 200). Careful review of the facts in this case, viewed in the light most favorable to appellant, causes us to conclude that he failed to provide the "something more than the report" required by *Kidwell*.

Appellant's employment duties required him to ensure that the Health Services area of the DOC facility was secure. The document that appellant offered as his job description gives an example of his work: "[c]onduct[] security inspections, patrol[] halls or cell-blocks, grounds, shops, etc." Appellant fails to explain why conducting security inspections and patrolling halls would not also include ensuring that pharmacy doors are locked and surgical carts are secured, and, if necessary, reporting any potential security problems. Moreover, this job description is not a comprehensive statement of appellant's duties. The document contains the heading "Class Specification," and specifically states in its examples of work that "[a] position may not include all the work examples given, nor does the list include all that may be assigned." The Position Description document offered by respondent contains a far more detailed description of job duties, and it may be

read in conjunction with the document offered by appellant. This Position Description was signed by appellant and states that

all employees are expected to be alert at all times and to report or intervene immediately according to institution policies and procedures in any behavior or activity which could affect our collective responsibility to protect the public, maintain security and/or control of the institution or provide for the safety of staff, visitors and offenders.

The specific tasks listed in the Position Description include, “[e]nsure that all tools, medications, weapons, keys, manuals, supplies, property, and equipment are accounted for,” as well as “[r]eport and/or act upon any potential safety/health hazards, needed equipment, or physical plant repairs.” Appellant was also required “[t]o give and receive information in an accurate, timely and dependable manner, so that information can be evaluated and appropriate action initiated,” which included “[p]rovid[ing] information to supervisory staff when appropriate.”

Appellant does not seem to dispute that the Position Description reflects an accurate description of his job duties. Rather, he argues that his job duties did not include reporting violations of DOC rules and standards. This argument is not persuasive. Appellant’s job duties required him to identify and report potential security problems. Whether or not these security problems were also violations of DOC rules and standards, as appellant alleges they were, does not change the conclusion that appellant was acting within his job duties when he made the reports. The substance of appellant’s reports seems to be that there were security concerns in the facility, and perhaps secondly, that the security concerns may have amounted to violations of DOC rules. Appellant must

show that his purpose in making the reports was to blow the whistle on the alleged violations. The fact that the unlocked pharmacy doors and unsecured surgical carts may have also been a violation of DOC rules cannot be used as “a vehicle, identified after the fact, to support a belated whistle-blowing claim.” *Obst*, 614 N.W.2d at 202.

Finally, appellant argues that in addition to reporting his concerns to supervisors and others within the normal chain of command, he also made reports “outside normal channels,” citing specifically communication with the warden. We cannot agree that a rational trier of fact could conclude that appellant, a DOC employee, in communication with the warden of a DOC facility, went outside normal channels, thus indicating a purpose to expose an illegality.

Viewing all the evidence submitted to the district court, we conclude that appellant has not alleged additional facts that would show that his communications were meant to expose illegality rather than simply fulfill his job duties. Appellant reported these concerns to his supervisors and others within the normal chain of command. The reports were regarding security concerns within the area appellant was responsible for as a security officer, and there are no additional facts that might support the conclusion that appellant was engaging in protected conduct under the whistleblower statute.

Affirmed.