

NO. A05-1887

State of Minnesota
 In Supreme Court

Bio-Medical Applications of Minnesota, Inc.
 d/b/a Fresenius Medical Care, Inc.,

Petitioner,

vs.

Susan Lee,

Respondent.

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

Respondent Susan Lee has failed to demonstrate that she is entitled to vacation pay under Fresenius' policies or under Minnesota law. In her opposition brief, Lee ignores key facts and legal principles in her haste to establish a claim for unused paid time off ("PTO) benefits. In a selective reading of Fresenius' Employee Handbook, for example, Lee contends that because she worked a specified number of hours, she earned a vested right to payment of unused PTO time at the end of her employment, regardless of the reasons for her termination. Lee ignores the Employee Handbook's clearly stated condition precedent relating to PTO benefits, which provides that employees who are discharged for misconduct are ineligible to receive payment for unused PTO. Because Lee was terminated for misconduct-based reasons, which Lee has failed to contest, the plain terms of Fresenius' Employee Handbook render her ineligible to receive payment of unused PTO benefits. Under well-settled Minnesota law, which dictates that eligibility for vacation pay is wholly contractual, Lee did not "actually earn" the PTO benefits within the meaning of Minnesota Statutes, Section 181.13.

Although Lee attempts to avoid this inescapable result, a number of her arguments – and the authorities cited in her brief – acknowledge the well-settled rule that employers in Minnesota may establish conditions precedent to the payment of vacation benefits at the time of termination. Neither Lee's opposition brief, nor the Court of Appeals' decision in this matter, provides any persuasive basis for refusing to give legal effect to the terms of Fresenius' Employee Handbook. The requirement that an employee not be discharged for misconduct in order to receive payment of unused vacation time is no

different from the myriad conditions precedent relating to vacation (and other employee) benefits that are commonly found in employer policies and handbooks. These include “use it or lose it” policies, caps on vacation accrual, and the requirement of continued employment at the time a vacation benefit, commission, or other incentive payment is distributed. Lee can point to no legal authority in support of her contention that the eligibility requirements contained in Fresenius’ Employee Handbook should not be enforced.

Further, Lee has failed to establish any triable issue of fact concerning the performance-based reasons for her discharge. Fresenius has presented substantial evidence, including the sworn testimony of Lee’s supervisor and Lee’s lengthy, well-documented, disciplinary history, establishing that Lee was discharged for engaging in misconduct. Lee failed to present any rebuttal evidence, maintaining instead throughout the District Court proceeding that the reasons for her discharge were irrelevant to the resolution of her statutory claim. For the first time on appeal, Lee belatedly contended that she is entitled to a trial as to the reasons for her termination. Because the District Court properly found that there is no genuine dispute of material fact as to the grounds for Lee’s discharge, summary judgment in favor of Fresenius should be affirmed.

II. LEGAL ARGUMENT

A. Lee Acknowledges, As She Must, That Eligibility for Unused Vacation Pay Upon Termination Is Wholly Contractual and Dependant Upon the Terms of the Governing Employment Policy or Handbook.

Although taking care to avoid stating so directly, Lee’s arguments – and the authorities she cites – acknowledge the well-recognized principle that under Minnesota

law an employer's liability for an employee's vacation pay is wholly contractual. *See Respondent's Brief* at 7-10 (acknowledging that employers' guidelines determine right to vacation pay and that employees only "earn" vacation pay when all conditions precedent are met); *see also Brown v. Tonka Corp.*, 519 N.W.2d 474, 476-477 (Minn. App. 1994) (*citing Tynan v. KSTP, Inc.*, 77 N.W.2d 200, 206 (1956)) (noting employer is obligated to provide vacation pay *only* when employees have met all vacation pay eligibility requirements); *Kvidera v. Rotation Engineering and Manufacturing Co.*, 705 N.W.2d 416 (Minn. App. 2005) (same).

Indeed, while Lee's claim in this matter is premised on Minnesota Statutes § 181.13, the statute itself does not create an obligation for employers to pay any amount of vacation. Rather, § 181.13 requires only that an employer pay to terminated employees all "wages . . . actually earned and unpaid at the time of discharge." Minn. Stat. § 181.13(a). Because the statute does not define when wages are "actually earned," -- or even whether vacation payments are wages -- Minnesota courts have uniformly looked to the terms of the employer's compensation plan to determine when wages are "actually earned." *See Holman v. CPT Corp.*, 457 N.W.2d 740, 743 (Minn. App. 1990). As a result, an employee's right to recover unused vacation at the time of termination, if any, is governed by the terms of the contract creating the employee's right to vacation pay in the first instance.

B. Lee Further Acknowledges the Well-Settled Principle that Employers May Place Conditions Precedent on Employees' Ability To Earn Wages, Including Vacation Pay.

Consistent with this principle, the Minnesota Court of Appeals has affirmed, and

Lee has acknowledged, that an employer may place conditions precedent upon an employee's right to earn vacation benefits and other forms of compensation, thereby limiting the employer's obligation to pay such compensation upon termination. *Bergland v. Grangers, Inc.*, 1998 Minn. App. LEXIS 724, C8-97-2362, *11-12 (Minn. App. June 23, 1998); *Respondent's Brief* at 8. Lee appears to misunderstand, however, what a condition precedent is or how it may place limits on contractual rights and obligations. In so doing, Lee utterly fails to come to grips with the condition precedent contained in Fresenius' PTO policy, which expressly conditions an employee's entitlement to unused vacation pay at the time of termination on the employee not being terminated for misconduct.

Throughout her opposition brief, Lee presumes without discussing, or providing any legal authority supporting her interpretation, that she "earned" her requested vacation pay at the time she completed the work permitting its accrual under Fresenius' policy. *See Respondent's Brief* at 8. Lee's argument in this regard relies solely on a select portion of the Fresenius Employee Handbook, which Lee attempts to interpret in a vacuum, without reference to the remaining applicable portions of the handbook. Lee cites to the provision of the Fresenius handbook which provides that PTO, or vacation, is earned by employees at a specified rate. *Respondent's Brief* at 4-5 & 8. Lee incorrectly presumes that because the word "earned" is used, her analysis is over, and that this provision need not be read in conjunction with the remaining provisions of the Fresenius Employee Handbook – which go on to state that an employee will "not be eligible for ... payment of earned but unused PTO" if the employee is terminated for misconduct. (App.

at 51.) In complete disregard of this latter provision, Lee contends that in working the hours upon which her vacation time is calculated, she somehow was bestowed an immediate vested right to receive payment for unused vacation time, regardless of the manner in which her employment ended. *Respondent's Brief* at 5 & 8.

To the contrary, Lee's eligibility for pay in lieu of unused vacation time at termination must be determined by looking to *all* of the relevant provisions of Fresenius' Employee Handbook. The provisions relating to vacation accrual, which Lee seeks to read in isolation, must be considered in connection with the remaining (and equally binding) portions of the Employee Handbook that preclude an employee from receiving vacation payment when terminated for misconduct. It is beyond dispute that a contract in Minnesota must be interpreted in a manner that gives meaning to *all* of its terms. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995) (citing *Ind. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co.*, 123 N.W.2d 793, 799-80 (Minn. 1963)). "A Court should not adopt a construction that neutralizes one provision if an alternative construction exists . . ." *Landico, Inc. v. Am. Family Ins. Co.*, 599 N.W.2d 438, 441 (Minn. App. 1997).

C. The Express Condition Precedent Contained in Fresenius' Handbook - Which Renders Lee Ineligible for Payment in Lieu of Unused PTO Due to Her Discharge for Misconduct -- Must be Given Legal Effect.

When all of the provisions of the Fresenius Employee Handbook are given effect, it is readily apparent that Lee was ineligible to receive vacation pay at the time of her termination because of her discharge for misconduct. As explained in further detail in Fresenius' main brief, the contract between Lee and Fresenius is unequivocal --

employees terminated for misconduct are not eligible to receive payment for unused vacation upon termination of employment:

An employee who gives proper notice, as described above, is eligible to be paid for earned but unused Paid Time Off (PTO). Unless otherwise required by state law, if you do not give acceptable notice, you may not be paid for earned but unused PTO, and you may not be considered eligible for re-employment. **In addition, if your employment is terminated for misconduct, you will not be eligible for pay in lieu of notice or payment of earned but unused PTO unless required by state law.**

(App. 51) (emphasis added.). Lee's interpretation of her contract with Fresenius improperly ignores this provision. Minnesota law is clear, however, that all of the provisions of the handbook must be given effect. The above-quoted handbook provision is a condition precedent that sets limits on an employee's right to receive vacation pay. These two provisions together ultimately define an employee's entitlement to vacation pay. Fresenius' Employee Handbook reflects the determination (which Minnesota employers have the prerogative to make) that employees terminated for misconduct have not performed work sufficient to "actually earn" vacation pay upon termination.

Lee's argument that Fresenius' Handbook somehow divested her of a vested right to vacation pay is circular and untenable. In concluding that she has a right to vacation pay regardless of the reasons for her termination, Lee fails to give effect to all the terms of the Handbook, which define her right to vacation pay. *See Respondent's Brief* at 10. Under the express terms of the Fresenius Employee Handbook, the employee's right to vacation pay at termination does not vest until the employee departs his or her

employment for reasons other than employee misconduct – this provision may not simply be read out of the agreement because, in retrospect, Lee would prefer to ignore it. Under the Fresenius policy, where, as here, an employee is terminated for misconduct, the right to vacation pay is not “earned” within the meaning of section 181.13 because the employee has not met the express condition precedent to its payment under the contract. Lee’s semantic quibbling to the contrary is not supported by the terms of her entire agreement with Fresenius, or long-standing Minnesota law.

D. Lee Has Not Provided Any Legal Authority Supporting Her Argument That the Limits Placed on Her Ability To Earn Vacation Pay Under Fresenius’ Handbook Are Contrary to Minnesota Law.

In its opening brief, Fresenius presented substantial legal authority establishing the validity of limits placed by employers on an employee’s right to receive payment for unused vacation upon termination of employment. *See, e.g., Simons v. Midwest Telephone Sales and Service, Inc.*, 433 F. Supp. 2d 1007 (D. Minn. 2006); *Rudolph v. U.S. Bank National Association*, 2006 U.S. Dist. LEXIS 36776, 04-4581 (ADM/JJG) (D. Minn. June 2, 2006). In her responsive brief, Lee either ignores or fails to effectively distinguish these authorities.

1. The *Simons* Decision, Which Lee Fails to Distinguish, Demonstrates that an Employer May Establish Conditions Precedent Limiting an Employee’s Entitlement to Unused Vacation Benefits at Termination.

As noted in Fresenius’ opening brief, the court in *Simons* dismissed a claim for unpaid vacation under Minn. Stat. § 181.13 where the plaintiff had not met the conditions precedent to earning the vacation under the terms of the employer’s plan. *Simons*, 433 F.

Supp. 2d at 1011. Contrary to Lee's argument, it was central to the court's holding that the policy at issue required employees to be employed at least one week after their vacation in order to receive payment for any vacation days not used prior to termination of employment. *Id.* The court stated that "[t]he plain language of the contract supports the argument that Simons is not entitled to compensation for any vacation days not taken before her termination because she would not be employed by [the defendant] after those days." *Id.* The plaintiff had, therefore, not "earned" and was not entitled to payment of unused vacation benefits because she could not meet the condition precedent of remaining employed at least one week after her vacation. *Id.*¹

Simons is indistinguishable from this case. Just as the plaintiff's failure in *Simons* to remain employed for the requisite time period precluded her receipt of unused vacation benefits, so did Lee's discharge for misconduct render her ineligible for unused PTO. Minnesota law is clear that employees' right to receive payment of unused vacation upon termination of employment is a simple matter of contract interpretation. *Brown*, 519 N.W.2d at 476-477 (citing *Tynan*, 77 N.W.2d at 206 (1956)) (Minnesota courts have long recognized that an employer is obligated to provide vacation pay *only* when employees have met vacation pay eligibility requirements.) Therefore, where, as here,

¹ Lee seeks to carve out and rely on selective portions of the *Simons* decision, which she suggests are supportive of her case, while dismissing those that she does not like as non-binding dicta. See *Respondent's Brief* at 15. Lee's piecemeal reading of *Simons* is unavailing, and a review of the decision in its entirety makes apparent that Minnesota employers may establish policies limiting eligibility for unused vacation benefits at the time of termination. While *Simons* was decided by the U.S. District Court for the District of Minnesota and is not binding precedent on this Court, it is certainly a well-reasoned decision that is consistent with established Minnesota law and provides persuasive authority, which this Court may consider.

the employee does not meet the conditions precedent (or, as stated in *Brown*, the “eligibility requirements”) for receipt of payment for unused vacation, the vacation is not “earned,” and the employer is not obligated to pay the same. *See Simons*, 433 F. Supp. 2d at 1011.

The court’s analysis in *Simons* further debunks Lee’s spurious argument that her mere use of certain vacation days prior to termination somehow establishes that she had a vested right to receive payment for any unused vacation days at the time of her termination. *See Respondent’s Brief* at 8. As explained by the court in *Simons*, it is not uncommon for employers to permit employees as a matter of practice to use vacation days that have not yet technically been “earned” under the employer’s policy. *See Simons*, 433 F. Supp. 2d at 1011. Employers may do so for a variety of reasons, including the recognition that employees eventually will earn the vacation through continued service. This approach is consistent with M.S. § 181.13, which only governs the payment of wages actually earned at the time of termination, and does not purport to address how vacation benefits are administered during the course of the employment relationship. The mere use of vacation days while employed is irrelevant to the determination of how much, if any, vacation time is “actually earned” upon termination of employment for purposes of M.S. § 181.13.

2. The Court’s Analysis in *Rudolph*, Which Lee Also Fails to Distinguish, Demonstrates that Minnesota Employers May Limit Employee Eligibility for Other Forms of Compensation Based on The Circumstances of the Employment Termination.

In accordance with these principles, courts also have routinely upheld the right of

employers and employees to contract in a manner that places conditions precedent on an employee's right to receive other forms of compensation. Only when all such conditions precedent are met has the employee "actually earned" the compensation within the meaning of Minn. Stat. § 181.13. These well-reasoned contract-based principles apply equally to vacation pay eligibility claims as they do to other forms of compensation upon termination.

In *Rudolph*, 2006 U.S. Dist. LEXIS 36776, a Minnesota federal district court dismissed a claim under M.S. § 181.13 for unpaid incentive payments where the plaintiff did not meet the eligibility requirements to receive the disputed incentive payout, in part, because of the circumstances of his termination. Lee argues that the plaintiff in *Rudolph* was not entitled to the challenged incentive payment merely because he was not employed at the time the distribution was paid, thereby failing to satisfy the employer's policy requirement that employees be employed in good standing at the time of the incentive payment distribution. See *Respondent's Brief* at 13 (citing *Rudolph*, 2006 U.S. Dist. LEXIS 36776 at *21-21). While Lee's characterization is accurate insofar as it goes, Lee ignores other portions of the employer's policy upon which the court relied in concluding that the plaintiff was not entitled to the incentive payout. These aspects of the *Rudolph* holding – that Lee overlooks – demonstrate that an employer may limit an employee's entitlement to payment for unused vacation based on the circumstances of his or her termination of employment

The court in *Rudolph* noted that the employer's incentive plan provided that incentive payments were considered earned on the date of distribution and that, in order

to participate in the incentive program, the employee must be employed in good standing. The incentive plan further stated that “[i]n the event a participant’s employment is involuntarily terminated for reasons other than position elimination, no award is paid.” *Id.* at *22. Quoting this language and other aspects of the incentive plan, the court found that the plaintiff – who was involuntarily terminated for violating the employer’s workplace violence policy – was not entitled to any incentive payout. *Id.* at *21-22. Accordingly, based at least in part on the circumstances of his termination, the plaintiff did not meet the conditions precedent to earning the incentive payment under the employer’s plan. *Id.* Notably, as the court further found, the employee’s failure to meet the eligibility requirements under the compensation plan also was determinative as to whether the incentive payments were “actually earned” prior to the plaintiff’s termination for purposes of Section 181.13. *Id.* (citing *Holman.*, 457 N.W.2d at 743).

3. Lee Either Fails to Distinguish or Address other Relevant Authorities That Bar Lee’s Claim for Vacation Pay.

Lee’s discussion of *Chambers v Metropolitan Property & Casualty Ins. Co.*, 2002 U.S. Dist. LEXIS 11075, 00-2111 (ADM/SRN), *16 (D. Minn. June 13, 2002), *aff’d* 2003 U.S. App. LEXIS 25208 (8th Cir. Dec. 15, 2003), similarly misses the mark. *See Respondent’s Brief* at 12. In *Chambers*, the plaintiff claimed he was entitled to payment of incentive pay following the termination of his employment under Minn. Stat. § 181.13. *Id.* Consistent with well-recognized legal principles, the court looked to the terms of the employer’s compensation plan to determine whether the claimed incentive pay was “actually earned” and found that the employee was only entitled to receive incentive pay

if the employee was employed on the last day of the plan year and on the date of the bonus pay out. *Id.* The plaintiff, however, did not meet these conditions, and was therefore ineligible for the incentive pay, and his § 181.13 claim was dismissed. *Id.*

Lee seeks to distinguish *Chambers* by arguing that, unlike the plaintiff in *Chambers*, she had a vested right to receive a vacation payout at the time of her termination. Lee contends that the express language of the Fresenius Handbook stating that she was not, in fact, eligible for this payment because she was terminated for misconduct should simply be ignored because (according to Lee) it would unlawfully divest her of “earned” wages. *See Respondent’s Brief* at 12. Lee offers no legal support for her novel approach to contract interpretation, according to which certain aspects of an employee handbook are given effect, while others are not. Contrary to Lee’s repeated and unfounded refrain, completing the specified hours of service was not the *only* condition precedent to Lee’s receipt of vacation pay upon termination. The Handbook’s other provision, which Lee conveniently ignores, states that Lee is ineligible for payment of unused vacation upon termination if she is discharged for misconduct. As Lee was terminated for repeated misconduct, she did not meet the express condition precedent to earning pay in lieu of unused vacation. Under the express terms of the Handbook, Lee was ineligible to receive vacation pay following her termination; accordingly, it follows that she could not be “divested” of any purported right to such benefits.

Interestingly, Lee has failed to address the Minnesota Court of Appeals decision in *Sherwood v. Investors Bank Corp.*, 1997 Minn. App. LEXIS 584, CX-69-2370 *4-5 (Minn. App. May 20, 1997) (discussed at pp. 17-18 of Fresenius’ opening brief), which

specifically addressed and rejected the argument that § 181.13 provides some independent right to wages “actually earned,” which can be ascertained without looking to the employer’s compensation plan. *Id.* In doing so, the court specifically noted that there was no conflict between the plaintiff’s compensation plan and the statute because the compensation plan defined when the commissions were earned for purposes of Minn. Stat. § 181.13. *Id.* (citing *Holman*, 457 N.W.2d at 743); see also *Lapadat v. Clapp-Thompson Co.*, 397 N.W.2d 606, 609 (Minn. App. 1986) (noting that parties’ agreement defined when commissions were generated or earned by employees and when such commissions must be made to terminating employees); *Friedenfield v. Winthrop Resources Corp.*, 2003 Minn. App. 457, C5-02-1606, *10-11 (Minn. App. Apr. 22, 2003) (same).

E. As Supported By the Amicus Briefing, the Court of Appeals’ Decision Is Incorrect on the Merits, and Constitutes a Drastic, Unsupported Departure from Established Law.

Prior to the Court of Appeals’ decision below, Minnesota law had never placed limits on the ability of employers and employees to contract regarding the employer’s obligation to provide vacation or pay out the same upon termination of employment. In an about-face from this established position, the Court of Appeals’ extraordinary decision invalidates *any* contractual employment arrangement that does not require the pay-out of unused vacation upon termination of employment, supposedly on the theory that to provide otherwise in an employment agreement is an attempt to accomplish by contract what is allegedly prohibited by Minn. Stat § 181.13. (App. 150-51.) As noted in Fresenius’ main brief, and as supported in the well-reasoned amicus briefing of the

Minnesota Chamber of Commerce and the Minnesota Employment Law Council, not only is this decision a dramatic departure from Minnesota law regarding the payment of wages under Section 181.13, as well as basic tenets of contract law, but it also creates substantial and unanticipated liabilities for virtually every Minnesota employer without providing any guidance as to how this unwarranted change in the law might be administered.

Neither the Court of Appeals nor Lee has presented any persuasive or applicable legal authority supporting the appellate court's decision. Rather, the Court of Appeals decision rests almost entirely on *Winnetka Partners Ltd. P'ship v. County of Hennepin*, 538 N.W.2d 912, 914 (1995), a case regarding the retroactive application of property tax assessments that is not applicable, even by analogy, to the relevant issues.

Likewise, Lee offers no tenable argument in support of the appellate court's decision. Lee merely argues that the right of an employer and employee to contract regarding vacation pay should be limited based on the often disparate resources between employers and employees. *See Respondent's Brief* at 17. Courts have routinely rejected this argument when analyzing employment contracts, finding that although resources vary, employees and employers may still freely contract regarding the terms of employment. *See Bond v. Charlson*, 374 N.W.2d 423, 428 (Minn. 1985) (noting that employee may be motivated by economic stress to enter into contract with employer, but employer's superior bargaining power does not render contract unenforceable); *see also Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1455 (D. Minn. 1996) (noting that superior bargaining power of employer did not invalidate arbitration

agreement between employer and employee). *See Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 609 n.10. (a reviewing court is limited to considering only those issues presented and considered by the district court); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)(matters not argued and considered in the district court will not be considered by appellate courts).

Lee's arguments also miss the mark insofar as they assume, without support or analysis, that employers have a legal obligation to pay out unused vacation benefits at the time of termination in the same way as unpaid wages. In fact, however, vacation is not the legal equivalent of "wages," rather, vacation is time off from work with pay. In accordance with this distinction, Minnesota courts have recognized that *if* an employee becomes eligible for vacation pay under an employer's policy at the time of termination, failure to pay the employee for such vacation time may be treated as nonpayment of wages. *See Employment in Minnesota: Guide to Employment Laws, Regulations and Practices*, (2005) Matthew Bender & Company, 1-4, § 4-2(j) (citing *Tynan and Brown*); *Brown*, 519 N.W. 2d at 477 (concluding that because the applicable employer policy entitled employees to payment for unused vacation at termination, nonpayment of accrued vacation was treated as a failure to pay wages.)

In other words, before the lower Court of Appeals' decision in this matter, it had always been the employer's and employee's prerogative, in the first instance, to determine by employment agreement whether unused vacation benefits are payable at termination. If so, and if all eligibility requirements for such payment were met, the employer's nonpayment of unused vacation benefits was equivalent to a failure to pay

unpaid wages. Minnesota law does not dictate, as Lee suggests, that all unused vacation must be paid out automatically at the time of termination.² There is good reason for this rule. An employee's use of paid time off provides a benefit to the employer and employee alike. The employee benefits from receiving rest with compensation, while the employer may benefit from a reinvigorated workforce, enhanced employee morale, and increased productivity. Conversely, when an employee elects not to use vacation benefits and obtains payment for those benefits at the time of termination, the employee receives a benefit, while the employer does not. Eligibility to use accrued vacation benefits during the employment relationship, therefore, is not equivalent to a right to be paid for unused vacation benefits upon termination. The separate and distinct right to receive pay for unused vacation at the end of employment has been determined, until now, by looking to the eligibility requirements contained in the relevant employment agreement.

The central issue presented in this appeal is whether employers and employees may continue to contract freely over an employee's right to payment of unused vacation time at termination. Consistent with substantial controlling Minnesota authority, this question must be answered in the affirmative, and the Court of Appeals decision must be reversed.

² As noted in the amicus brief filed by the Minnesota Employment Law Counsel, in jurisdictions where employers are required to pay out accrued but unused vacation on termination, the rule has been established by the state legislature. MELC Amicus Br. at p. 12.

F. Lee's Attempt to Argue for The First Time on Appeal That There Is A Disputed Fact Issue With Respect to The Reasons for Her Termination Must Be Rejected.

Lee's belated argument that there is a disputed issue of fact with respect to the reasons for her termination was not raised at the trial court level, and therefore should not be considered on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (matters not argued and considered in the district court will not be considered by appellate courts). In any case, the record evidence establishes that Lee was terminated for well-documented performance reasons, which Lee failed to rebut. Accordingly, the trial court properly granted summary judgment in Fresenius' favor.

Lee attempted to argue for the first time on appeal that she was not terminated for misconduct, and that her discharge was somehow in retaliation for union organizing activity. As noted in Fresenius' opening brief, however, Lee repeatedly maintained throughout the district court proceedings that the reasons for her termination played *no role* whatsoever in the resolution of her statutory claim for unpaid wages. *See Fresenius' Brief* at 24-25 and the record excerpts cited therein; *see also* Lee's summary judgment brief at App. at 88, wherein she argues "[t]his case is not about whether there was just cause to terminate, or whether there was misconduct to justify termination." (Emphasis added.) Based on these representations at the trial court level, the district court properly held that the performance-based reasons for Lee's discharge were not in dispute. (App. at 112.)³

³ Notably, Lee concedes in her affidavit that she was discharged after bringing a bag of mushrooms to a patient. (App. at 93.) Other than her own conclusory allegations of

Arguments not raised before the district court are not reviewable on appeal. *See Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 609 n.10. If Lee felt that her termination was unlawful or in breach of her employment contract, she could have litigated that issue. Instead, she chose to bring the underlying action, which is expressly limited to the issue of vacation pay. Furthermore, even at the district court level, Lee could have sought to conduct discovery to determine whether her termination was consistent with Fresenius' policies and past practices. Lee took none of these steps, and she can point to no genuine factual dispute on the existing record that would preclude summary judgment. Instead, Lee contends that summary judgment is inappropriate based on her "strong belief and opinion" that her discharge had "more to do with" her alleged union activity than her misconduct. (App. 88; *Respondent's Brief* at 20.)⁴

The party adverse to summary judgment "may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. A plaintiff's beliefs, opinions, speculations regarding potentially disputed issues or an employer's motivations are not sufficient to create an issue for trial. *See Bob Useldinger & Sons, Inc., v. Hangsleben*, 505 N.W.2d 313, 328 (Minn. 1993).

In contrast to the absence of any record evidence presented by Lee in support of

pretext, Lee has presented no evidence that the reasons for her termination were retaliatory or otherwise unlawful.

⁴ In support of her position that summary judgment is inappropriate at this stage, Lee also cites extensively to arguments made by her counsel at the summary judgment hearing, and claims that these arguments "create a genuine issue of material fact." *See Respondent's Brief* at 21. The arguments of Lee's counsel are not evidence, and therefore do not raise any material fact issues.

her after-the-fact retaliation claim, Fresenius submitted a sworn affidavit from Lee's supervisor, as well as a complete copy of Lee's lengthy history of disciplinary documentation reflecting the performance and misconduct-based reasons for her termination. (App. at 45-84.) There is no evidence to rebut the fact that Fresenius deemed Lee's serious lapse in judgment to be "misconduct," such that she was ineligible to receive vacation pay. (App. 46, 81-84.) Further, for the reasons set forth in Fresenius' opening brief, Lee's union retaliation claim was already considered and rejected by the National Labor Relations Board, and in any event, is preempted by federal labor law. *See Fresenius' Brief* at pp. 26-27; Supplemental Appendix at 176.⁵ On the existing undisputed record, Lee's claim fails and the trial court's summary judgment ruling in favor of Fresenius should be affirmed.

III. CONCLUSION

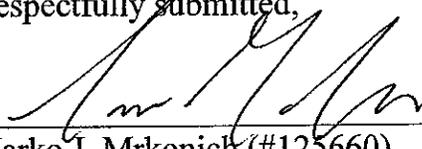
Lee was terminated for repeated misconduct. Under well-settled Minnesota law, the unequivocal terms of Fresenius' Employee Handbook govern the payment of unused vacation benefits at termination. According to the Employee Handbook, Lee's discharge for misconduct renders her ineligible for payment in lieu of unused vacation time. The Court of Appeals' ruling disregards the terms of the Employee Handbook and established Minnesota precedent. The effect of the appellate court's ruling is to eliminate the ability of Minnesota employers to define in handbooks or other employment policies when

⁵ Lee has never disputed the fact that her union filed an unfair labor practice charge on her behalf with Region 18 of the National Labor Relations Board, protesting her discharge; nor has Lee disputed the fact that the Region investigated her charge and dismissed it after finding insufficient evidence of a violation.

vacation benefits are “actually earned” under M.S. § 181.13. There is no sound basis for the Court of Appeals’ dramatic departure from well-settled law. Accordingly, Petitioner Fresenius Medical Care respectfully requests that the Court of Appeals’ decision be reversed, and the District Court’s Order dismissing Lee’s Complaint be affirmed in its entirety.

Date: January 2, 2007

Respectfully submitted,



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