

APPELLATE COURT CASE NUMBER A05-1887

STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

SUSAN LEE,

Appellant,

vs.

FRESENIUS MEDICAL CARE, INC. ,

Respondent.

APPELLANT'S BRIEF

Don L. Bye
Attorney Registration Number 13924
Attorneys for Appellant
314 West Superior Street, Suite 1000
Duluth, Minnesota 55802
(218) 733-0745

Shelly M. Marquardt
Attorney Registration Number 21193X
Attorney for Appellant
314 West Superior Street, Suite 1000
Duluth, Minnesota 55802
(218) 726-0707

Sandro Garafalo
Attorney Registration Number 0333335
Marko J. Mrkonich
Attorney Registration Number 125660
LITTLER MENDELSON, P.C.
Attorneys for Respondent
33 South Sixth Street - Suite 3110
Minneapolis, Minnesota 55402
(612) 630-1000

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LEGAL ISSUES

- I. Whether there is a genuine issue of material fact or law which must be determined by the trier of fact which precludes summary judgment in an action for award of wages in the form of earned but unused Paid Time Off following termination of an employee by her employer?**

The District Court held that there was no genuine issue of material fact and granted Summary Judgment in favor of the Respondent.

Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853 (Minn. 1986)
Michealson v. Minnesota Mining and Manufacturing, Co., 474 N.W.2d 174 (Minn.App. 1991), *aff'd*, 479 N.W.2d 58 (Minn. 1992)
Wagner v. Schwegmann's South Town Liquor, Inc., 485 N.W.2d 730 (Minn.App. 1992)
Wartnick v. Moss & Barnett, 490 N.W.2d 108 (Minn. 1992)

- II. Whether the District Court erred in failing to have a trial on the issues of whether the Respondent/Employer's refusal to pay the Appellant/Employee for earned but unused Paid Time Off was a violation of Minnesota Statute Sections 181.13 and 181.171?**

The District Court held that the Respondent/Employer's refusal to pay Appellant/Employee earned but unused vacation PTO was not a violation of Minnesota Statutes.

Brown v. Tonka Corp., 519 N.W.2d 474 (Minn.App. 1994)
Kohout v. Shakopee Foundry Co., 281 Minn. 401, 162 N.W.2d 237 (1968)

- III. Whether Appellant/Employee is entitled to a trial on the question of whether the language of the Employer's Employee handbook can unilaterally deprive an employee of her right to earned wages or vacation time in violation of Minnesota Statute Sections 181.13 and 181.171?**

The District Court held that there was no triable issue of fact or law.

Brown v. Tonka Corp., 519 N.W.2d 474 (Minn.App. 1994)
Kohout v. Shakopee Foundry Co., 281 Minn. 401, 162 N.W.2d 237 (1968)
Teamsters Local Union 688 v. John J. Meier Co., 718 F.2d 286, 289 (8th Cir. 1983);
In re Wil-Low Cafeterias, 111 F.2d 429 (2d Cir. 1940)

STATEMENT OF THE CASE

The Appellant/Employee Susan Lee commenced an action in the St. Louis County Conciliation Court, Duluth, Minnesota, the Honorable Gerald Maher presiding, seeking payment of her earned but unused Paid Time Off (hereinafter "PTO") plus penalties, costs and attorney's fees. The Conciliation Court found in favor of the Appellant/Employee in the amount of \$5,052.80.

The Respondent/Employer appealed the Conciliation Court Judgment to the St. Louis County District Court, Duluth, Minnesota, the Honorable Heather Sweetland presiding. The Appellant/Employee was represented before the District Court by Don L. Bye, Attorney at Law through the Volunteer Attorney Program. The Respondent/Employer was represented in District Court by Sandro Garafalo and Marko J. Mrkonich, LITTLER MENDELSON, P.C.

As part of the District Court action, the Respondent/Employer filed a Motion For Summary Judgment, and a Memorandum in Support of Summary Judgment. The Respondent/Employer claimed that the language of its employee handbook waived the Employer's obligation under Minnesota Statute Section 181.13 to pay the Appellant/Employee for earned but unused PTO after the Respondent/Employer had terminated the Appellant/Employee.

Appellant/Employee filed a Motion for Denial of the Respondent/Employer's Motion For Summary Judgment and a cross motion for Summary Judgment in favor of the Appellant/Employee and a Memorandum in Support of the Appellant/Employee's position. Appellant/Employee Susan Lee reasserted her claim for earned but unused PTO under Minnesota Statutes and Minnesota Case Law.

Following oral arguments by counsel, the Honorable Heather Sweetland, St. Louis County District Court, granted Summary Judgment in favor of the Respondent/Employer denying all the claims of the Appellant/Employee. The District Court held that the Respondent/Employer's unilateral handbook language was sufficient to deprive the Appellant/Employee of her right to earned but unused Paid Time Off contrary to Minnesota Law.

The Appellant/Employee Susan Lee commenced this appeal.

STATEMENT OF THE FACTS

The Appellant/Employee Susan Lee started working for Miller Dwan dialysis center in Duluth, Minnesota in 1991. Ms. Lee performed at the same job at Miller Dwan dialysis center without disciplinary action from 1991 to June 2002. Appendix pp. 70-71. Miller Dwan sold the dialysis center portion of its operation to Fresenius Medical Care, Inc. in or about August 2000. Appendix p. 24. At that time, Ms. Lee became an employee of the Respondent/Employer. On or about August 31, 2000, the Respondent/Employer had Ms. Lee sign an acknowledgment stating that Ms. Lee had received a copy of the Respondent/Employer's "Fresenius Employee Handbook". The handbook stated in relevant part:

"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."**

(Emphasis added.) Under the language of the Fresenius explanation of calculations of Paid Time Off an employee earns 8.08 hours of Paid Time Off for each per two week pay period for a three-quarter (3/4) time employee. Appendix pp. 70, 74.

In 2002, Ms. Lee worked in the Respondent's Superior, Wisconsin facility. Prior to June 2002, Ms. Lee's employee evaluations rated her as highly skilled, motivated and doing an excellent job. Appendix pp 70, 71. Prior to June 2002, Ms Lee had consistently received the highest ratings and compliments for her work. Appendix pp. 70, 71. Ms. Lee earned \$16.56 per hour. Appendix pp. 70, 77.

In 2002, Ms. Lee became involved in trying to organize a union for her work group at the Respondent's dialysis center in Superior, Wisconsin where Ms. Lee was currently assigned. Appendix p. 71. In June 2000, the Respondent began to harass Ms. Lee charging her with half a dozen disciplinary actions in June and July of 2002. Appendix pp. 71. On or about August 13, 2002, the Respondent fired Ms. Lee ostensibly for bringing a bag of mushrooms as a gift for a dialysis patient. *Id.* The dialysis patient had given Ms. Lee a container of fresh strawberries the week before. Appendix p. 59. The Respondent provided no written Fresenius policy or state or federal regulation prohibiting Ms. Lee from offering mushrooms to a patient. However, when Ms. Lee's supervisor objected to the gift of Chanterelle mushroom, Ms. Lee did not give the mushrooms to the patient. Appendix pp. 59, 71.

At the time of her termination on or about August 13, 2002, Ms. Lee had earned, but not used, 181.86 hours of PTO. Appendix p. 77. On or about August 12, 2004, Ms. Lee demanded in writing that the Respondent pay her for her earned but unused 181.86 hours of PTO worth \$3,011.60. Appendix pp. 70-73, 76, 78.

The conciliation claim, civil district court action and appeal followed.

STANDARD OF REVIEW

On appeal from summary judgment, the Court of Appeals of the State of Minnesota must determine whether there is any genuine issue of material fact and whether the district court erred as a matter of law in granting summary judgment in favor of the Respondent. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108 (Minn. 1992). In reviewing a summary judgment motion all factual disputes must be determined in favor of the non-moving party. *Wagner v. Schwegmann's South Town Liquor, Inc.*, 485 N.W.2d 730 (Minn.App. 1992).

The construction and interpretation of a contract are questions of law which the Court of Appeals of the State of Minnesota reviews *de novo*. *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853 (Minn. 1986); *Michealson v. Minnesota Mining and Manufacturing, Co.*, 474 N.W.2d 174 (Minn.App. 1991), *aff'd*, 479 N.W.2d 58 (Minn. 1992)

ARGUMENT

- I. **There is a genuine issue of material fact or law which must be determined by the trier of fact which precludes summary judgment in an action for award of wages in the form of earned but unused Paid Time Off following termination of an employee by her employer.**

The matter must be remanded for trial because there is a genuine issue of material fact. Where it appears that there is a dispute over the existence of an issue of fact which affects or determines what law will apply, the matter must go to trial. *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965). The District Court claimed in its order for Summary Judgment that Ms. Lee does not dispute that she was terminated for cause. This is incorrect. Ms. Lee in her Affidavit and in oral arguments for Summary Judgment stated that she was discharged for her union activity and that prior to her union activity she had an exemplary employment

history. Appendix p. 71. The only evidence supplied to show that Ms. Lee was performing below an acceptable level were incidents that the Respondent alleges occurred on June 6, 2002, July 22, 2002, August 3, 2002 and August 8, 2002, after Ms. Lee began actively attempting to unionize her work group. Appendix pp. 47-62. The Respondent provided no incidents of misconduct occurring before Ms. Lee began attempting to unionize her work group. The Respondent does not dispute the fact that Ms. Lee performed at the same job without disciplinary action from 1991 to June 2002. Appendix p. 71. The Respondent does not effectively deny the fact that Ms. Lee was targeted for termination because of her unionizing activities. In Ms. Lee's Memorandum in opposition to Respondent's Motion for Summary Judgment, Ms. Lee argues

"It is very strange that there were so many things to criticize about Plaintiff's employment during the months of June, July and August, 2002, right after supervisor Kerry and higher-level supervisor Roth took over at Fresenius. Plaintiff had an excellent work record with Miller Dwan and with this Defendant. Plaintiff was working at the very same facility, performing the very same work for which she was trained and qualified and had performed for 11 years. Why would she all of the sudden drop to such level to cause a half a dozen acts of discipline in two months culminating in termination? Why would Plaintiff be terminated because she exhibited the kindness of giving a patient a bag of fresh mushrooms, which most of us would consider a delicacy? Since there was no rule against doing so, since it was common practice and since she was only reciprocating to the same patient who had brought her home-grown strawberries the week before, it does not seem to be the kind of event that would trigger termination of a long-time employee. As indicated in her affidavit, Ms. Lee is of the strong belief and opinion that it had more to do with her being actively involved in attempting to organize a union for her and her co-workers at or about that same time. However, all of that does not matter in this case."

Appendix p. 66. This creates a fundamental issue of fact as to whether Ms. Lee was terminated for misconduct or to prevent her from successfully unionizing her work group. The factual positions of the parties as to whether Ms. Lee was terminated for cause are diametrically

opposed. There is a genuine issue of material fact which can only be determined by the trier of fact following a full trial on the merits. Therefore, the decision of the District Court must be reversed and the matter remanded for trial.

The Order for Summary Judgment must be reversed because there is a genuine issue of material fact which must be determined at trial. The attorney for Ms. Lee alleged that Ms. Lee was terminated for her union activity and not for cause at oral arguments on Summary Judgment creating a genuine issue of material fact. At oral arguments, counsel for Ms. Lee disputed the Respondent's allegations that Ms. Lee was terminated for "misconduct" or "cause" when counsel argued:

"I guess there was involvement, an attempt to form a union and dispute as to whether that was the grounds of termination, ...there was involvement and representation there and I think there were NLRB [National Labor Relations Board] proceedings. I don't know, I wasn't involved in any of that.
But at least the dispute was there."

Transcript pp. 11-12 . Counsel for Ms. Lee further argued at oral arguments on Summary Judgment:

"As soon as they say misconduct, Your Honor, then we're into a whole barrel of facts – of facts for determination. We're not going to sit and agree that somebody can get fired because they'd tried to give somebody a sack of Chanterelle mushrooms. We're not going to sit and talk about whether somebody should have reported something to his supervisor or not.

* * *

But that's what they are inviting as soon as they say misconduct. You cannot just decree misconduct. In fact, I believe he said in his opening argument, in the eyes of us it's misconduct. Well, it's the eyes of the Court, if that's what you're going to get to, and we'd be back in a full factual hearing. I don't think we were there."

Transcript pp. 16 . The Respondent provided only self created documents purporting to show

alleged misconduct by Ms. Lee after she began her union activity. The Respondent never denied that Ms. Lee was involved in attempting to unionize her work group. Nor did the Respondent provide any information showing that Ms. Lee had any disciplinary problems before she began working to unionize her group. In reviewing a summary judgment motion all factual disputes must be determined in favor of the non-moving party. *Wagner v. Schwegmann's South Town Liquor, Inc.*, 485 N.W.2d 730 (Minn.App. 1992). It is a genuine issue of material fact whether Ms. Lee was terminated for her union activity or for actual misconduct as claimed by the Respondent. Therefore, the Order For Summary Judgment must be reversed and the matter remanded for trial.

The Respondent bases its entire case on handbook language that excuses payment of earned but unused PTO if an employee is terminated for misconduct. The misconduct contended at the time of Ms. Lee's termination supposedly all occurred within a two month time period including three (3) instances of alleged instances of misconduct on August 8, 2002. Appendix pp. 47-62. The Respondent claims that the ultimate act of alleged misconduct which resulted in Ms. Lee's termination was Ms. Lee bringing a sack of Chanterelle mushrooms to work with the intention of giving them to a dialysis patient. *Id.* The supervisor allegedly informed Ms. Lee that it was violation of employer policy to give Chanterelle mushrooms to a dialysis patient. Although Ms. Lee disagreed with her supervisors allegation that the gift of Chanterelles violated employer rules or state and federal regulations, Ms. Lee followed her supervisor's instructions and did not give the mushrooms to the patient. At no point has the Respondent/Employer produced copies of any employer policies, state regulations or federal regulations supporting the Respondent/Employer's allegation that a gift of Chanterelle

mushrooms was a violation of policy or a danger to the patient. If there was no violation of policy or regulation and Ms. Lee followed her supervisor's instruction not to give the mushrooms to the patient, the alleged incident cannot support a claim of misconduct on the part of Ms. Lee. This creates an issue of fact and law which must be determined at trial. Therefore, the Order of the District Court must be reversed and remanded for trial.

The Order for Summary Judgment must be dismissed because the Respondent did not prove that Ms. Lee committed misconduct. There was no showing of rule or policy violation. After the fact, the Respondent complained of several minor incidents that occurred over the prior two months, some of which were complained of at the time and some of which were not, and some resolved. At the termination conference Ms. Lee asked when she would get a chance to explain her view of what had transpired but she was not given an opportunity to do so. In order to prevail on its contended theory, and avoid statutory requirements the Respondent must show that there was in fact "misconduct" or "cause". Knowing that the 2002 edition of the Employee Handbook had not been shown to have been published to Ms. Lee, Respondent alternates his argument between claiming termination "for cause" language of the August 2002 employee handbook and "misconduct" as referenced in the 2000 employee handbook. Either way the facts of Ms. Lee's employment performance are necessarily at issue as soon as either "cause" or "misconduct" is contended. The Respondent cannot just decree "misconduct" or "cause" and make it so. In Respondent's Affidavit in Support of its Motion for Summary Judgment, Respondent alleges that Ms. Lee was terminated "due to unsatisfactory performances which was 'for cause'" pursuant to the Employer's policies. Appendix 24. The Respondent never submitted the Employee Handbook portion defining "misconduct" or "cause". A dictionary

definition of "misconduct" is:

"to manage badly or dishonestly; unlawful, bad or dishonest behavior; willfully improper behavior."

(Webster New Word Dictionary, 2nd Ed.) There is no evidence in the record to show that Ms. Lee's action in bringing a gift to a patient was willfully improper behavior or dishonesty in this case. The existence of misconduct or cause is an issue of material fact that must be determined through production of evidence at trial. Therefore, the Order for Summary Judgment must be reversed and the matter remanded for trial on the merits.

II. The District Court erred in failing to have a trial on the issues of whether the Respondent/Employer's refusal to pay the Appellant/Employee for earned but unused Paid Time Off was a violation of Minnesota Statute Sections 181.13 and 181.171.

An employee is entitled to accrued but unused vacation pay because he has a "vested right" in the accrued but unused vacation pay and does not forfeit that right. *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994), citing, *Hagen v. Bismarck Tire Center*, 234 No.W.2d 224 (N.D. 1975). In *Tynan v. KSTP, Inc.*, 247 Minn. 168, 77 N.W.2d 200 (1956) the Supreme Court of Minnesota held:

"It is beyond dispute that an agreement to pay vacation pay to employees made to them before they perform their services, and based upon length of service and time worked, is not a gratuity but is a form of compensation for services, and when the services are rendered, the right to secure the promised compensation is vested as much as the rights to receive wages or other form of compensation."

In *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994), the Court of Appeals of Minnesota affirmed a District Court award of payment of the employees' earned but unused vacation time following termination. The Court of Appeal held that by working the required

time to earn the vacation time, the employees had a vested right in being paid for earned but unused vacation time in the same way as an employee has a vested right to payment for hours worked. *Id* at 477 and 478. In the present case, the Respondent/Employer's formula states that an employee earns 8.08 hours of PTO for every two week pay period work. Appendix pp. 70, 74. Paid Time Off is earned by the employee by working the previous two week pay period. The employee is vested in the earned PTO by completion of the two week pay period. At the time of her termination, Ms. Lee had worked enough pay periods have earned and be vested in 181.86 hours of PTO. Ms. Lee's right to be paid for her vested PTO is legally the same as her entitlement to be paid for wages earned. The Respondent cannot deprive Ms. Lee of wages already earned. By refusing to pay Ms. Lee for her earned by unused PTO time, the Respondent deprived Ms. Lee of earned income in violation of Minn. Stat. Sec. 181.13. Therefore, the Order For Summary Judgment must be reversed and Ms. Lee awarded payment for her earned and vested PTO.

Minnesota Statute Section. 181.13 requires an employer to pay an employee unpaid wages. Earned but unused vacation pay (PTO) is classified as wages for the application of Minn. Stat. Sec. 181.13. *Brown v. Tonka Corporation*, 519 N.W.2d 474 (Minn.App. 1994); *Kohout v. Shakopee Foundry Co.* 281 Minn. 401, 162 N.W.2d 237 (1968). Ms. Lee had accrued but not used PTO (vacation time) of 181.86 hours which is reimbursable at her normal hourly pay rate of \$16.56. Ms. Lee demanded payment of her earned but unused PTO. For every two week pay period worked, Ms. Lee earned 8.08 hours of Paid Time Off. By completing the requisite period of employment Ms. Lee became entitled to payment for the earned but unused PTO either through time off with pay or cash buy out of the earned PTO. The Respondent cannot deprive

Ms. Lee of wages already earned. By refusing to pay Ms. Lee for her earned but unused PTO time, the Respondent deprived Ms. Lee of earned income in violation of Minn. Stat. Sec. 181.13. The Respondent/Employer failed to pay Ms. Lee her earned but unused PTO pursuant to the requirements of Minnesota Statute and the employer's handbook.

III. Appellant/Employee is entitled to a trial on the question of whether the language of the Employer's Employee handbook can unilaterally deprive an employee of her right to earned wages or vacation time in violation of Minnesota Statute Sections 181.13 and 181.171.

Ms. Lee is entitled to payment for her earned but unused Paid Time Off under Minn. Stat. Sec. 181.13 and Minnesota Case Law. Vacation benefits, or paid time off, are compensation for work already performed. *Teamsters Local Union 688 v. John J. Meier Co.*, 718 F.2d 286 (8th Cir. 1983). Paid vacation time is additional wages. The consideration for the paid vacation time is the employee's work performed to accrue the paid time off. *Teamsters Local Union 688 v. John J. Meier Co.*, 718 F.2d 286, 289 (8th Cir. 1983); *In re Wil-Low Cafeterias*, 111 F.2d 429 (2d Cir. 1940); *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994), citing, *Hagen v. Bismarck Tire Center*, 234 N.W.2d 224 (N.D. 1975); *Tynan v. KSTP, Inc.*, 247 Minn. 168, 77 N.W.2d 200 (1956). Absent specific contract language defining paid time off in another manner, paid time off is consideration for past services rendered. *Id* at 289. Earned but unused paid time off is due and payable upon termination in the same manner as wages. *Id* at 289. Minnesota Statute Section 181.13 requires an employer to pay a terminated employee all wages earned for all past services rendered within 24 hours of demand. Since paid time off is earned for past services rendered it is also due and payable under Minn Stat. Sec. 181.13. The Respondent/Employer cannot deprive Ms. Lee of her earned paid time off in violation of Minn. Stat. Sec. 181.13 any

more than the Respondent/Employer could deprive her of wages earned for services already rendered. The Respondent/Employer acknowledged that their ability to deprive an employee of earned paid time off was limited by Minnesota Law. The Respondent/Employer's Employee Handbook specifically states:

“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.**”

(Emphasis added.) Minnesota Statute Section 181.13 requires wages to be paid within 24 hours of demand following termination. Minnesota Statute Section 181.13 treats paid time off earned for services rendered as wages. *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994). Minnesota Law prohibits an employer from unilaterally depriving an employee of earned wages through unilateral contract language. The Respondent/Employer admitted that it cannot deprive an employee of earned wages or paid time off in violation of Minnesota Law by including the language of “**unless required by state law**” (emphasis added) in the employee handbook. Therefore, the decision of the District Court was erroneous and must be reversed. The matter must be remanded for trial.

Minnesota Statute Section 181.13 and 181.171 specifically impose penalties and costs on employers who fail to pay employees wages and paid time off earned for past services rendered. In *Brown v. Tonka Corp.*, the Minnesota Court of Appeals held that the employees were entitled to payment for vacation time that had been earned through completion of the requisite past work

period. 519 N.W.2d at 478. In this case, Ms. Lee completed sufficient past employment period to accumulate 181.86 hours of Paid Time Off. Having worked the requisite pay periods to earned the Paid Time Off, the Respondent cannot unilaterally deprive Ms. Lee of wages or paid time off already earned. Unilateral language in the Respondent's Employee Handbook cannot abrogate Minnesota Law and deprive Ms. Lee of earned wages. The decision of the District Court was erroneous as a matter of law and the matter must be reversed and remanded to the District Court.

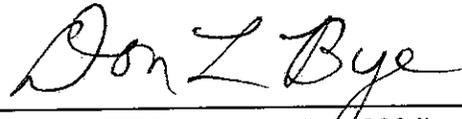
CONCLUSION

Ms. Lee has denied at every stage that she was discharged for cause. The issue of whether Ms. Lee was discharged for cause is a fact issue which can only be determined after a full trial on the issue. Accordingly, the decision of the District Court must be reversed and the matter remanded.

Minnesota Statutes Section 181.13 and applicable case law require the Respondent to pay Ms. Lee for her earned but unused Paid Time Off. At termination the Respondent/Employer was required to pay all earned but unpaid wages including Paid Time Off. Respondent failed to do so even after demand for payment had been made pursuant to Minn. Stat. Sec. 181.13 Respondent failed to pay Ms. Lee as required by law. Having failed to pay Ms. Lee within 24 hours of her demand, the Respondent is now also liable for penalties and all attorney's fees and costs associated with this action under Minn. Stat. Sec. 181.171. For this reason the Order of the

District Court must be reversed and decision in favor of Ms. Lee granted.

Dated: Nov 16, 2005



Don L. Bye (Atty. Reg. No. 13924)
Attorney for Appellant
314 West Superior Street, Suite 1000
Duluth, Minnesota 55802
(218) 733-0745