

NO. A05-1887

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State of Minnesota  
In Court of Appeals

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SUSAN LEE,

*Appellant,*

v.

FRESENIUS MEDICAL CARE, INC.,

*Respondent.*

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**RESPONDENT'S BRIEF**

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## LEGAL ISSUE

1. Whether the district court properly concluded that Lee failed to create a genuine issue of material fact with respect to her claims for pay in lieu of unused vacation, where Fresenius' established policies, which governed Lee's employment, expressly state that employees terminated for misconduct are ineligible for pay in lieu of unused vacation.

***The District Court's Ruling:*** The district court held that, as a matter of law, Lee failed to create a genuine issue of material fact with respect to her claim that, following her termination for misconduct, she was entitled to pay in lieu of unused vacation, in light of the existence of an undisputed employment policy prohibiting payment in lieu of unused vacation to employees terminated for misconduct.

***Authority:*** *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn. App. 1994); *Tynan v. KSTP, Inc.*, 77 N.W.2d 200 (Minn. 1956); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 625-627 (Minn. 1983).

## STATEMENT OF THE CASE

Fresenius operates dialysis clinics in northern Minnesota and Wisconsin, where it treats patients with end stage renal disease. Susan Lee was employed by Fresenius as a dialysis technician, in its Superior, Wisconsin clinic from late-August 2000 until August 2002. Lee was employed at will and was subject to Fresenius' policies, which are contained in the Company's Employee Handbook and its Human Resources Policy Manual.

Fresenius' Employee Handbook states that employees who are terminated for misconduct are ineligible for pay in lieu of unused paid time off ("PTO"), unless required by state law. Shortly after her hire, in August 2000, Lee signed and returned to Fresenius an acknowledgment verifying her receipt of the Employee Handbook. In addition, The Human Resources Policy Manual, a copy of which was available to Lee, also states that employees who are discharged due to performance are ineligible for pay in lieu of unused PTO.

During her employment, Lee committed several violations of company policy and performance failures, which ultimately resulted in her termination. The documentation entered into Lee's personnel file reflects that her termination was for unsatisfactory performance.

Approximately two years after her termination, Lee brought an action against Fresenius in the Conciliation Court of St. Louis County, seeking to recover pay in lieu of

her accumulated unused vacation time.<sup>1</sup> Fresenius (which was not represented by legal counsel at the conciliation court proceeding) argued that the terms of Fresenius' policies, coupled with Lee's misconduct-based termination, barred Lee's claim. The conciliation court did not address Fresenius' contractual defenses in its Order, and instead awarded Lee vacation pay in the amount of \$5,053.80 and fees in the amount of \$55.00. Fresenius removed the case to St. Louis County district court and thereafter moved for summary judgment on Lee's claims, which motion was granted in its entirety. The district court found that a terminated employee is entitled to unused vacation pay only if he meets the eligibility requirements. The court further held that an employer's liability for vacation pay is wholly contractual, and that Fresenius' Employee Handbook, which included its policy regarding vacation pay, met the law's requirements to constitute a binding contract. Finally, the Court held that under the terms of that contract, Lee is not entitled to unused vacation pay.

Lee has now appealed. Her appeal is baseless, and the district court's order dismissing this case should be affirmed.

### **STATEMENT OF THE FACTS**

#### **I. OVERVIEW OF FRESENIUS' BUSINESS.**

Fresenius operates seven dialysis clinics located in northern Minnesota and Wisconsin to treat patients with end stage renal disease. (Appendix ["App.,"] at 23.)<sup>2</sup> Dialysis is an artificial means of cleaning a patient's blood. (App. at 23.) Many patients

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<sup>1</sup> Fresenius hereinafter uses the terms "vacation" pay and "paid time off" interchangeably.

<sup>2</sup> The Appendix cited herein is that which was submitted by Lee in conjunction with her appeal brief.

on dialysis use a procedure called hemodialysis, in which a machine cleans the patient's blood. *Id.* During hemodialysis, two tubes are attached to the body - usually to a person's arm or leg, and the blood travels out one of the tubes into the hemodialysis machine. *Id.* Blood in the machine passes through a filter that removes water and waste. *Id.* Cleansed blood returns to the body through the second tube. *Id.*

Kidneys are crucial to filtering harmful human waste such as excess water, nitrogen, and salt, from the blood. (App. at 24.) Patients with diseased or injured kidneys have suppressed immune systems and, as a result, must carefully watch their diets. *Id.*

**A. Fresenius' Relevant Policies.**

Fresenius maintains an employee handbook that details, among other subjects, the Company's policies governing the payout of unused Paid Time Off ("PTO" or "vacation pay"). (See App. at 25, 28-29, 33-35.) The Company's May 1999 Handbook, which was in effect at the time of Lee's hire, provides 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.**<sup>3</sup>

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<sup>3</sup> This provision remains in effect today. The only change to this policy occurred in July 2002, when Fresenius amended the language to state that employees who are terminated "for cause" are ineligible for pay in lieu of unused PTO. (App. at 25, 33-35.) In or around July 2002, Fresenius republished the Employee Handbook, which included the change noted above, as well

(App. at 25, 28-29.) Shortly after her hire, in August 2000, Lee signed and returned to Fresenius an acknowledgment of the May 1999 Employee Handbook. (App. at 25, 31.)

Fresenius also memorialized its policy regarding the eligibility requirements for payment of unused vacation in its Field Services Human Resources Policy Manual. (App. at 25, 37-39.) The provision entitled "Discharge Due to Performance" expressly states:

Employees who are terminated are not eligible for notice or pay in lieu of notice, re-employment or payment of unused accrued PTO time (unless mandated by individual state law).

*Id.* A copy of the Field Services Human Resources Policy Manual is kept at each of Fresenius' clinics, including the clinic where Lee worked, and it is available to employees upon request.

**B. Lee's Employment With Fresenius.**

Fresenius hired Lee, along with several other dialysis technicians, in approximately late-August 2000, when the Company purchased a number of dialysis units. (App. at 24.) At the time of the purchase, and throughout her employment at Fresenius, Lee was a Patient Care Technician (PCT) at the Company's Superior, Wisconsin facility. (*See* App. at 24.) Lee was an at-will employee.

As a PCT, Lee was responsible for the safety and well-being of Fresenius' patients, and she was obligated to comply with all Company policies. (App. at 25, 44-46.) Lee provided direct care to assigned patients under the supervision of a licensed

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as other revisions that are not material to this dispute. *Id.* Copies of the amended July 2002 Handbook were available to all employees, including Lee. Following their implementation, Lee continued to work under (and thereby accepted) the terms and conditions of the July 2002 Handbook.

nurse.<sup>4</sup> *Id.* She was responsible for accurately documenting information related to the patient treatment and assisting licensed nurses with pre and post dialysis patient assessments and their documentation. *Id.* In addition, Lee was required to report significant information or change in patient condition to her supervisor. *Id.*

**C. Lee Was Disciplined and Ultimately Terminated As A Result of Her Pattern of Misconduct and Lack of Concern for Patient Safety and Health.**

**1. June 6, 2002: Lee Breaks a Water Valve and Then Fails to Immediately Notify Her Supervisor of the Incident.**

On June 6, 2002, while in the “water room”<sup>5</sup> of the Superior, Wisconsin clinic, Lee tipped a barrel onto a water valve. (App. at 25, 48-49.) The valve broke and purified water began to spray from the line throughout the water room. *Id.* The leaking of purified water, which is used in the dialysis process to cleanse blood, created safety and patient care risks. *Id.* Rather than report the incident immediately to her supervisor, Director of Nursing Susan Kuukari, Lee took matters into her own hands. *Id.* First, Lee unsuccessfully attempted to locate the shut-off valve to the water tank. *Id.* After being unable to find the shut-off valve, rather than immediately report the incident to Kuukari. *Id.*

When Kuukari eventually learned of the still unresolved leak, she immediately went to the water room, where she observed that water was spraying from the water line

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<sup>4</sup> Between May 2002 and August 2002, Lee worked under the direction of Susan Kuukari, the Director of Nursing for the Superior, Wisconsin clinic. (App. at 24.)

<sup>5</sup> The water room is the area in the clinic where water is purified for use in the dialysis process. The purified water is run through the dialysis machine and mixes with other chemicals to remove waste products from a patient’s blood.

and the tank was almost empty. *Id.* Kuukari immediately issued instructions that all patients be removed from their hemodialysis machines in an emergency procedure. *Id.* After the emergency was resolved, Kuukari discussed the situation with Lee. *Id.* Lee's excuse for failing to notify of the dangerous water leak was that she "did not want to get yelled at." *Id.* Kuukari informed Lee that patient safety is always the most important issue in the unit and Lee needed to report such incidents to Kuukari or the charge nurse. *Id.* This incident was documented as a verbal warning to Lee. *Id.*

**2. July 22, 2002: Lee Fails to Properly Address Patient Health Issues.**

The following month, on July 22, 2002, a patient whom Lee was assisting complained that she was "cramping" while on a dialysis machine. (App. at 25, 50.) Lee informed the patient that she would notify the registered nurse of the situation. *Id.* Lee failed to do so, however, and instead merely wrote in the patient's chart that the patient's blood pressure had dropped. *Id.* Further, when Lee informed the registered nurse that the patient may need to be removed from the dialysis machine earlier than scheduled due to low blood pressure, Lee failed to mention or document the patient's cramping. *Id.*

After the patient complained about the nurse's inaction, Kuukari investigated the situation and learned that Lee had failed to notify the nurse of the cramping. *Id.* Lee had been trained to remove patients who were cramping from dialysis machines. When questioned by Kuukari, Lee offered no credible explanation for her disregard of her training and established protocol. Kuukari documented her discussion with Lee concerning this incident. *Id.*

**3. August 3, 2002: Lee Fails to Wear Personal Protective Equipment, As She Was Required To Do By Company Policy And Government Regulations.**

Fresenius takes several precautions to ensure the safety of dialysis patients, who have a suppressed immune system and are more susceptible to common colds than the general population.. (App. at 24.) For instance, to protect patients against the spread of common colds or other viruses and to protect staff from exposure to bloodborne pathogens, Fresenius staff is required by both internal and government regulations to wear personal protective equipment while performing direct patient care. *Id.* The staff is regularly trained on the use of personal protective equipment. Fresenius also maintains a Bloodborne Pathogen Exposure Plan and Infection Control Policy, which further details requirements in this regard. *Id.* As part of the staff training, employees is instructed to take precautions to prevent the spread of viruses. *Id.*

On Saturday, August 3, Lee was observed coughing at work without wearing a mask or using tissue. (App. at 25, 51-52.) Kuukari informed Lee that she needed to wear a mask or use tissues to cough into. *Id.* When Lee became argumentative and stated that she had been covering her mouth with her hand, Kuukari reminded Lee of the proper procedures to follow. *Id.* Despite this counseling, shortly afterwards Lee was again observed coughing without wearing a mask, without using tissue, and without even covering her mouth with her hand. *Id.* Kuukari again reminded Lee that she was required to wear either a mask or use tissue. *Id.* She also advised Lee that she had received a telephone call earlier in the day from a patient who was complaining of a sore throat and who suggested that she had contracted the cold from Lee. *Id.* Kuukari

counseled Lee concerning the use of personal protective equipment and issued Lee a verbal warning. *Id.*

**4. August 8, 2002: Lee Again Fails to Wear Personal Protective Equipment, is Rude to a Patient, and Exposes a Patient to a Hazardous Substance.**

On August 8, 2002, Lee was observed telling a patient, in a loud and brisk voice, "I'm only doing my job." (App. at 25, 53.) She was later observed putting a patient onto a dialysis machine without wearing her required personal protective equipment. (App. at 25, 54-56.) Kuukari once again advised Lee of the need to wear the personal protective equipment, to which Lee responded that she had failed to do so because it was "too hot." Kuukari documented the incident as a written warning. *Id.*

Later that same day, while Kuukari was taking patients off the dialysis machines, Lee yelled to Kuukari "I need help!" (App. at 25, 57-58.) When Kuukari was finished with another patient, she went to Lee's area to help her. *Id.* Lee had called Kuukari because a patient's fingers slipped while holding a needle stick. *Id.* Based upon Kuukari's questions of Lee and Kuukari's own observations, it was apparent that the situation was hardly urgent and that Lee had overreacted. *Id.* Kuukari reviewed the situation with Lee, and issued a written warning based on Lee's failure to meet performance expectations. *Id.*

Finally, towards the end of that day, Kuukari observed Lee offering a patient with a suppressed immune system a gallon-sized bag of wild mushrooms.<sup>6</sup> (App. at 25, 59-

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<sup>6</sup> There is no evidence that Lee has any expertise in distinguishing ingestible wild mushrooms from the poisonous varieties. Moreover, while the average, otherwise healthy person may be

60.) The patient accepted the wild mushrooms, and Lee informed the patient that she would put them in the clinic's refrigerator for the time being. *Id.* After learning about the wild mushrooms, Kuukari informed Lee that she was not to provide them to the patient. *Id.* Lee, who was upset at this news, responded abruptly, "fine, I won't give them to her." *Id.* Concerned by Lee's response and her failure to follow previous directives, Kuukari advised the patient not to accept Lee's wild mushrooms. *Id.* Based on this final event, which clearly demonstrated that Lee failed to grasp the considerable patient safety risks created by her behavior, Fresenius placed Lee on an administrative leave pending further investigation. *Id.*

On August 13, 2002, Lee met with Kuukari to discuss the events that had occurred over the past three months. (App. at 25, 61-62.) Although Lee was provided an opportunity to explain each of the incidents, she failed to provide acceptable responses for her conduct. *Id.* As a result, her employment with Fresenius was terminated due to her pattern of misbehavior and lack of concern for patient safety and health. *Id.* The documentation entered into Lee's personnel file reflects that her termination was for unsatisfactory performance. (App. at 25, 41-42.)

Approximately two years later, Lee brought an action against Fresenius in the Conciliation Court of St. Louis County, in which Lee, through her attorney, sought to recover pay in lieu of unused vacation. Fresenius (which was not represented by legal counsel at the conciliation court proceeding) argued that the terms of the Employee

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able to digest (non-poisonous) wild mushrooms without difficulty, patients with kidney problems have suppressed immune systems, and are therefore more likely to have adverse reactions to wild mushrooms.

Handbook, coupled with Lee's misconduct-based termination, barred Lee's claim. In its Order, the Court failed to address Fresenius' legal defenses, however, and instead awarded Lee vacation pay. Because the conciliation court award constituted legal error, Fresenius removed the instant matter to district court for a *de novo* review of Lee's claim and Fresenius' dispositive defenses. Fresenius thereafter filed a motion for summary judgment on Lee's claim, which the district court granted in its entirety. Lee then filed the instant appeal.

### LEGAL ARGUMENT

#### **I. THE STANDARD OF APPELLATE REVIEW AND SUMMARY OF THE ARGUMENT.**

Under Rule 56, in considering the evidentiary record, a district court "shall" dismiss a plaintiff's claims when:

The pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Minn. R. Civ. P. 56.03. To avoid summary judgment, Lee was obligated to present specific facts, by affidavit or otherwise, demonstrating that there is a genuine issue for trial. Minn. R. Civ. P. 56.05; *Borom v. City of St. Paul*, 289 Minn. 371, 184 N.W.2d 595 (1971). A non-moving party's mere beliefs, opinions, or speculation regarding potentially disputed issues are not sufficient to create an issue for trial. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). On appeal from summary judgment, the Court of Appeals must determine whether the district court erred

as a matter of law. *Wartnick v. Moss & Barnett*, 490 N.W. 2d 108, 112 (Minn. 1992). Construction and interpretation of contracts, such as the unilateral contract at issue here, are questions of law to be reviewed de novo. *Brown v. Tonka Corp.*, 519 N.W.2d 474, 477 (Minn. App. 1994) (citing *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853, 856 (Minn. 1986)). The language found in a contract is to be given its plain and ordinary meaning. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 67 (Minn. 1979).

**C. Lee Is Ineligible For Vacation Pay Under Fresenius' Policies Because She Was Terminated "For Misconduct."**

**1. Fresenius' Handbook Policy Concerning Payment of Unused Vacation Is An Enforceable Term That Bars Lee's Vacation Pay Claim.**

Consistent with established Minnesota case law, an employee handbook may create a binding contract where it is disseminated to employees. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 625-627 (Minn. 1983). To create a contract, the handbook language must be definite in form. *Id.* at 626. Further, to communicate the offer, the handbook must be communicated to the employee. *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 707 (Minn. 1992.) Fresenius' Handbook was definite in form. It stated unequivocally that employees who are terminated for misconduct (or, as amended, "for cause") are ineligible for payment of unused PTO. (App. at 25, 28-29, 33-35). Lee both received and acknowledged receipt of Fresenius' May 1999 Handbook, which contains clear language prohibiting the receipt of vacation pay when an employee is terminated for misconduct. (App. at 25, 28-29, 31.) As the district court properly held,

the Handbook created a binding contract, understood and accepted by Lee, which, due to her termination for unsatisfactory performance, prohibits her from receiving vacation pay.<sup>7</sup> *See Pine River State Bank*, 333 N.W.2d at 625-627.

Under established Minnesota law, an employer's liability for employees' vacation pay is wholly contractual.<sup>8</sup> *Brown*, 519 N.W.2d at 476 - 477 (*citing Tynan v. KSTP, Inc.*, 247 Minn. 168, 177, 77 N.W.2d 200, 206 (1956) (Minnesota courts have long recognized that an employer is obligated to provide vacation pay *only* when employees have met the vacation pay eligibility requirements.) *See also Kvidera v. Rotation Engineering and Manufacturing Co.*, 705 N.W.2d 416 (Minn. App. 2005)(explaining that pursuant to *Brown*, an employer's liability for vacation time is wholly contractual and an employer is obligated to provide vacation pay only when employees have satisfied the eligibility requirements). Both the May 1999 and the July 2002 versions of Fresenius' Employee Handbook contain clear and specific provisions barring payment of unused PTO to employees who are terminated "for misconduct" (under the May 1999 Handbook) or "for

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<sup>7</sup> While the Employee Handbook constituted a valid unilateral contract, Lee's employment undisputedly remained at will. Furthermore, the existence of an employee handbook that constitutes a valid unilateral contract, such as Fresenius' Employee Handbook, does not convert an "at-will" employee into one who can only be discharged for "cause." *See Pine River*, 333 N.W.2d at 628. Only an express or implied agreement, or a contract for a specific duration, will result in the imposition of a "for cause" standard. *See id.*; *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 372 N.W.2d 412, 414 (Minn. App. 1985) (employment contracts are ordinarily terminable at will if they "do not contain express provisions for duration or termination"), *review denied* (Minn. Oct. 18, 1985).

<sup>8</sup> Lee argues that this is a "statutory claim, pure and simple[.]" which involves interpretation of Minn. Stat. § 181.13 (*See Transcript of proceedings before the district court on the parties' cross-motions for summary judgment ["Tr.]" at 11.*) Lee fails to acknowledge, however, that while Minn. Stat. § 181.13 outlines the requirements for payment of wages upon termination, it does not require payment in lieu of unused vacation, nor does it define wages to include unused vacation. *See Minn. Stat. §181.13.*

cause” (under the July 2002 Handbook).<sup>9</sup> (App. at 25, 29, 35.)

Lee’s reliance on *Kohout v. Shakopee Foundry Co.* is inapposite and distinguishable on several grounds. *Kohout* involved a collective bargaining agreement that affirmatively provided for vacation pay; the primary issue in the case was the proper statute of limitations to be applied to plaintiffs’ claims for vacation pay. 162 N.W.2d 237, 238 (Minn. 1968). The *Kohout* Court did not analyze whether vacation benefits properly constitute wages, nor was it required to so in order to reach its decision. 162 N.W.2d 237, 238 (Minn. 1968). Indeed, the *Kohout* Court’s *only* reference to the subject at hand was in a footnote, when it cursorily cited a Second Circuit opinion for the proposition that vacation pay “has been held to be wages.”<sup>10</sup> *Id.* at 28 n.1. *Brown*, in

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<sup>9</sup> Lee claims that Fresenius is arguing that the terms of its employee handbook “waive” its statutory obligation to pay for earned but unused PTO. This argument is flawed. Because the entitlement to unused PTO is wholly contractual, entitlement to PTO is not a statutory “right” that can be “waived.” Rather, the terms of any applicable contract govern whether a terminated employee is entitled to pay in lieu of unused vacation. *See Brown*, 519 N.W.2d at 476- 477. Indeed, Fresenius’ Employee Handbook speaks directly to which former employees are eligible to receive pay in lieu of unused vacation, and which are not. (*See App.* at 25, 29, 35.) The vast majority of employees who leave the Company are eligible to be paid for unused PTO; it is only where an employee is terminated “for misconduct” or “for cause” (depending on whether the 1999 handbook or the 2002 handbook applies) that unused vacation is not paid out upon termination. (*See App.* at 25, 29, 35.)

Similarly, the district court determined that because vacation pay is wholly contractual, and Lee and Fresenius had entered into a valid unilateral contract that provided that employees terminated for misconduct would not receive vacation pay, and Lee was undisputedly terminated for misconduct, the terms of the unilateral contract (the Employee Handbook) applied and Lee was not entitled to unused vacation pay. (App. at 89-94.)

<sup>10</sup> Notably, even *Kohout*, on which Lee relies heavily, did not state that vacation pay *is* wages; it only noted that there are circumstances in which vacation pay *has been held* to be wages. *Id.* at 28 n.1. This is an unremarkable proposition – Fresenius does not dispute that there are circumstances where unused vacation *may be* treated as wages, such as, for example, where the employer’s policies so provide. The outcome is different, however, where (as is the case here)

contrast, was a subsequent case decided in Minnesota, and has clarified that vacation benefits *may be* treated as wages where the employer's policies provide for accrual of vacation benefits, do not otherwise distinguish between wages and vacation paid on termination, and contain no forfeiture provision. *Brown*, 519 N.W.2d at 476 - 477 (noting that Minnesota courts have long recognized that an employer is obligated to provide vacation pay only when employees have met the vacation pay eligibility requirements). Here, in contrast, by virtue of her termination for misconduct, Lee clearly did not meet Fresenius' expressed eligibility requirements, and none of the circumstances that obligate an employer to provide vacation pay exists here.

**2. Lee Cannot Demonstrate Any Defense to the Formation of a Valid and Enforceable Contract That Forecloses Her Claim.**

Lee cannot establish any defense to the formation of a valid and binding employment term, which plainly bars her claim for vacation pay. Fresenius never communicated to Lee any intent to revoke the vacation pay language at issue, and the handbook remained contractually binding throughout her employment. *See Feges*, 483 N.W.2d at 708. Accordingly, the prohibition against paying Lee her unused vacation due to her termination for unsatisfactory performance is binding and should be enforced.

Any argument by Lee that she failed to "accept" the minor language change contained in the July 2002 Employee Handbook concerning vacation pay must be rejected. As an initial matter, the change in the July 2002 Employee Handbook is immaterial; Lee's termination for "unsatisfactory performance" easily satisfies the "for

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the employer has a policy that expressly defines the circumstances under which an employee is eligible to receive unused vacation upon separation of employment.

misconduct” standard stated in the May 1999 Handbook, as well as the “for cause” standard contained in the July 2002 Handbook. (See App. at 25, 28-29, 33-35, 41-42, 48-62.) Nor does Lee’s failure to sign an acknowledgment after receiving the July 2002 Handbook constitute a rejection of the employment terms contained therein. As held in *Pine River State Bank*, 333 N.W.2d at 627, when “an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation.” Lee was, at all relevant times, employed at will, copies of the July 2002 Handbook were available to all employees, including Lee, and Lee’s continued employment following the July 2002 Handbook’s implementation constitutes acceptance of its terms. (App. at 24-25, 31); *see also Pine River State Bank*, 333 N.W.2d at 627. In any event, whether the Court gives effect to the language contained in the May 1999 Handbook (which Lee expressly accepted) or the nearly identical language contained in the July 2002 Handbook (which Lee impliedly accepted by continuing her employment), Lee’s termination for unsatisfactory performance bars her claim.

Lee’s pattern of misbehavior and her unsatisfactory performance and disregard of Company directives and patient safety led to her ultimate termination. Her termination was clearly performance-based, thereby easily satisfying the “for misconduct” standard contained in the May 1999 Handbook, as well as the “for cause” standard included in the July 2002 Handbook. (App. at 25, 29, 31.) Therefore, Lee is ineligible to receive pay in lieu of unused vacation time.

**D. 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.**

Attempting to save her failing case, Lee now seeks to broaden the scope of the Court's review beyond issues properly before this Court. First, she argues that there is a disputed issue of fact with respect to the reasons for her termination and whether she was terminated for cause. As the district court properly held, Lee has not previously disputed this issue. To the contrary, throughout the district court proceedings, Lee clearly staked out the position that the reasons for her termination play *no role* whatsoever in the resolution of her claim, which she presented as a "statutory claim, pure and simple." (Tr. at 11.) In particular, in response to Fresenius' motion for Summary Judgment, Lee argued the following: **"This case is not about the termination of Susan Lee's employment with Defendant. This case is not about whether there was just cause to terminate, or whether there was misconduct to justify termination."** (App. at 66.) Lee further defined the scope of her claim when arguing the following: "This case is not about the contract of employment, and **it is not about how the contract of employment ended.**" (*Id.*) At the hearing on Fresenius' motion, Lee's attorney stated: **"[W]e're not talking about the reasons for termination,"** (Transcript of Summary Judgment Hearing ["Tr."] at 16.)

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. (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). 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 this 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. Given Lee's decision not to take any of those steps, and her express waiver of any argument related to the reasons for her termination, this issue is not properly before the Court on appeal.

Even so, there is no evidence to rebut the fact that Fresenius deemed Lee's serious lapse in judgment to be "misconduct," such that she was deemed ineligible to receive vacation pay. (App. at 24-25, 48-62.) Lee's veiled attempts to establish a right to trial on the merits of the termination decision is inappropriate. The record unequivocally demonstrates that Fresenius' policy renders employees who are terminated for misconduct ineligible for vacation pay upon termination, and that Lee's termination was deemed to be for "misconduct." There is no record evidence on which to argue that Fresenius misapplied its policies when it terminated Lee for endangering patient safety by giving a sick patient wild mushrooms (which was the last of a series of serious policy violations involving patient safety and protocol). On the existing record, Lee's claims must fail.

**E. Lee's Unfounded Claim That Her Termination Was in Retaliation for Union Organizing Is Irrelevant, Untimely, And Preempted by Federal Labor Law.**

Lee's belated claim that her discharge was somehow in retaliation for participating in protected concerted activity under the National Labor Relations Act is improper and baseless. As an initial matter, this claim, like her attempt to create a fact dispute about the merits of her termination, was not raised at the district court level and therefore should not be considered by this Court. Moreover, Lee's attempt to convert this appeal into an unfair labor practice proceeding necessarily fails, since State courts are not the proper forum for adjudicating such charges. Under well-established Supreme Court precedent, "[w]hen an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). Lee's belated attempt to argue that her discharge was in retaliation for union activity amounts to a straightforward unfair labor practice allegation, which is squarely preempted. Moreover, as established at the summary judgment hearing before the district court, Lee *already filed* an unfair labor practice charge with the Labor Board over this exact issue, and that charge was considered and dismissed. (*See* Tr. at 23.) Even so, Lee has not put forth any evidence that anyone involved in making decisions regarding her employment was aware of her alleged efforts to organize a union. As Lee concedes, she has nothing more than her "strong belief and opinion" that her alleged involvement with attempting to organize a

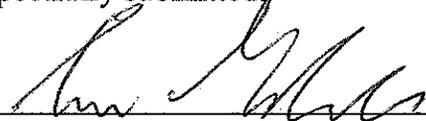
union played a role in her termination. (App. at 66.) Furthermore, by Lee's own admissions, "all of that does not matter in this case." (App. at 66.) As Lee concedes, this case is about nothing more than vacation pay, and the Court should not entertain Lee's improper attempts to broaden the scope of the Court's review.

### CONCLUSION

Lee's claims are factually and legally baseless. Lee was disciplined, and ultimately terminated, as a result of her pattern of misbehavior and persistent poor performance. Her established terms and conditions of employment with Fresenius governing the payment of unused vacation foreclose her claim for any vacation pay. For these reasons, the district court's Order dismissing Lee's Complaint should be affirmed.

Date: December 19, 2005

Respectfully submitted,



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