

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 BRIEF

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I. STATEMENT OF THE LEGAL ISSUE

1. Whether the Court of Appeals erred in reversing and remanding the decision of the District Court, which held that Respondent Susan Lee failed to assert a valid claim for pay in lieu of unused vacation, where Lee was terminated for misconduct and Petitioner Fresenius Medical Care's Employee Handbook states that employees terminated for misconduct are ineligible for pay in lieu of unused vacation.

The District Court's Ruling: The district court correctly held that Lee's right, if any, to pay in lieu of unused vacation upon separation of employment with Fresenius depended on the terms of Fresenius' Employee Handbook. Because Lee was terminated for misconduct, and the Employee Handbook prohibits payment in lieu of unused vacation to employees terminated for misconduct, the district court ruled that Lee's claim failed as a matter of law.

The Court of Appeals' Ruling: Although purporting to recognize that eligibility for unused vacation is "wholly contractual" under Minnesota law, the Court of Appeals reversed and remanded the district court's decision, and held that Fresenius' Employee Handbook provision governing eligibility for earned but unused vacation pay had no legal effect. The Court of Appeals interpreted Minnesota Statutes Section 181.13 to say, in effect, that if there is a vacation account balance, it must be paid at termination even if the relevant policy or employment agreement creating the account states otherwise. In so ruling, the Court of Appeals departed from governing law and has substantially undermined the ability of Minnesota employers to set contractual conditions for vacation pay, and, by extension, other employee benefits in a broad range of circumstances.

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).

II. 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 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. (App. 35, 38.)

Fresenius' Employee Handbook states that employees who are terminated for misconduct are ineligible for pay in lieu of earned but unused paid time off ("PTO"), unless required by state law. (App. 29.) Shortly after her hire, in August 2000, Lee signed and returned to Fresenius an acknowledgment verifying her receipt of the Employee Handbook. (App. 31.) Fresenius' 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 accrued PTO. (App. 38.)

During her employment, on several occasions Lee violated company safety rules and patient care procedures; these incidents ultimately led to her termination. The documentation entered into Lee's personnel file reflects that her termination was for "unsatisfactory performance." (App. 42.)

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, or “paid time off.”¹ Fresenius 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 and her fees. (App. 4.)

Fresenius removed the matter to the district court for *de novo* review. Fresenius and Lee filed motions for summary judgment. On July 27, 2005, the district court issued its Order and Memorandum, in which it correctly noted that an employer’s liability for vacation pay is wholly contractual. The district court further noted that: (1) Fresenius prepared and distributed a handbook which provided that employees are ineligible for vacation pay when they are terminated for misconduct; (2) Lee acknowledged receipt of the same; (3) Lee’s continued employment was sufficient consideration to render the handbook enforceable; and (4) Lee did not dispute that her termination was for performance reasons. Accordingly, Lee’s claim was dismissed in its entirety. (App. 89-95.)

Lee filed an appeal. The Court of Appeals reversed and remanded the district court’s decision, holding that Fresenius’ Employee Handbook had no legal effect insofar as it attempted to limit the payment of Lee’s accrued and unused vacation balance upon her termination. The Court of Appeals ostensibly based its ruling upon M.S. § 181.13, concluding that the statute requires an employer to pay a discharged employee wages that are actually earned and unpaid at the time of discharge, and that parties cannot provide otherwise by contract. In so ruling, the Court of Appeals failed to address the fact that

¹ Fresenius uses the terms “vacation pay” and “paid time off” interchangeably.

M.S. § 181.13 states only that *if* wages (or unused vacation amounts) are determined to be owed, they must be paid at termination. The statute does not speak to whether vacation pay is owed; it merely describes when, if owed, vacation amounts are to be paid. While purporting to defer to contract-based principles, the lower court substituted its own judgment to hold that the employment agreement between Fresenius and Lee had no legal effect. The Court of Appeals' ruling obliterates the rule in *Brown* that employers and employees can define by contract when vacation amounts are earned. Accordingly, Fresenius petitioned this Court for review.

III. STATEMENT OF THE FACTS

A. Overview of Fresenius' Business Operations.

Fresenius operates seven dialysis clinics located in northern Minnesota and Wisconsin to treat patients with end stage renal disease. (App. 23.)² Dialysis is an artificial means of cleaning a patient's blood. (App. 23.) Many patients 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. 24.) Patients with diseased or injured kidneys

² The Appendix citations herein refer to the Appendix that Lee filed with her appeal, a copy of which was submitted with Fresenius' Petition for Review.

have suppressed immune systems and, as a result, must carefully watch their diets. *Id.*

B. Fresenius' Relevant Policies.

Fresenius maintains an employee handbook that details, among other subjects, the Company's policies governing the pay-out of unused paid time off ("PTO"). (*See* App. 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.**³

(App. 25, 28-29.) (Emphasis added.) Shortly after her hire, in August 2000, Lee signed and returned to Fresenius an acknowledgment of the May 1999 Employee Handbook. (App. 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. 25, 37-39.) The provision entitled "Discharge Due to Performance" expressly

³ 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. 25, 33-35.) In or around July 2002, Fresenius republished the Employee Handbook, which included the change noted above, as well 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.

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.

C. 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. 24.) At the time of the purchase, and throughout her employment at Fresenius, Lee was a Patient Care Technician (PCT), employed at-will. (See App. 24.)

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. 44-46.) Lee provided direct care to assigned patients under the supervision of a licensed nurse.⁴ *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, such as equipment failures or changes in a patient's condition, to her supervisor. *Id.*

⁴ Between May 2002 and August 2002, Lee worked under the direction of Susan Kuukari, Director of Nursing. (App. 24.)

D. Lee Is 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”⁵ of the clinic, Lee tipped a barrel onto a water valve. (App. 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, Lee then attempted to contact a co-worker for assistance, 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 and the tank was almost empty. *Id.* Kuukari 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 Kuukari 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

⁵ 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.

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. 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. 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 are 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. 25, 51-52.) Kuukari informed Lee that she needed to wear a mask or cough into a tissue. *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. 25, 53.) She was later observed putting a patient onto a

dialysis machine without wearing her required personal protective equipment. (App. 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. 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.⁶ (App. 25, 59-60.) 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

⁶ 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 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.

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. 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. 25, 42.)

E. Rulings By the District Court and the Court of Appeals.

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. (App. 1.) Fresenius (which was not represented by legal counsel at the conciliation court proceeding) argued that the terms of the Employee 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. (App. 4.) 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. Specifically, the district court held that Lee's discharge for misconduct rendered her ineligible, as a matter of law, for pay in lieu of unused vacation, in light of the unequivocal Employment Handbook provision prohibiting payment in lieu of unused vacation to employees terminated for misconduct.

Lee initiated an appeal. On August 8, 2006, the Court of Appeals reversed and remanded the decision of the District Court. The Court of Appeals acknowledged that eligibility for vacation pay is wholly contractual under Minnesota law. Nevertheless, the Court of Appeals concluded, without a reasoned explanation – or any support in case law or statutory language – that Fresenius' handbook provision regarding PTO had no legal effect because it attempted to provide by contract what was allegedly prohibited by M.S. 181.13(a). The Court of Appeals did not attempt to distinguish Fresenius' PTO provision from other accepted contractual limitations imposed by employers on the use of vacation pay, such as "use it or lose it" policies, or policies limiting the amount of vacation that can be accrued from year-to-year. Due to the Court of Appeals' departure from well-settled Minnesota law, Fresenius petitioned this Court for review.

IV. LEGAL ARGUMENT

A. Standard of Appellate Review.

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 reviewing court 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)).

B. Under Firmly Established Minnesota Law, Eligibility for Unused Vacation Pay Upon Termination Is Wholly Contractual.

Minnesota has long permitted employers and employees to freely negotiate the terms of their relationship, including defining the employee's right to vacation and other forms of compensation. Indeed, it is well-settled that an employer's liability for employees' vacation pay is wholly contractual.⁷ *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 vacation pay eligibility requirements); *see also Kvidera v. Rotation*

⁷ No provision in Section 181.13, or elsewhere in Minnesota law, requires employers to provide for vacation, whether paid or not.

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). Therefore, to determine what right, if any, employees may claim to recover unused vacation pay at termination, the terms of the contract creating the employees’ right to vacation pay must be examined.

C. In Applying the Established Rule that Eligibility for Vacation Pay Is Contractual, Minnesota Courts Consistently Have Analyzed Claims for Vacation Benefits Under Section 181.13 By Looking to the Terms of the Governing Employment Policy or Handbook.

Minnesota Statutes § 181.13 requires that an employer pay to terminated employees all “wages . . . actually earned and unpaid at the time of discharge.” Minn. Stat. § 181.13(a). The statute does not, however, define the term “actually earned.” Rather, Minnesota courts have consistently looked to the terms of the employer’s compensation plan to determine when employees have “actually earned” the wages at issue. *See Holman v. CPT Corp.*, 457 N.W.2d 740, 743 (Minn. App. 1990). Moreover, the Minnesota Court of Appeals has expressly acknowledged that employers may place conditions precedent on an employee’s ability to earn vacation benefits and other forms of compensation and, therefore, limit an employer’s obligation to pay such compensation upon termination. Indeed, in discussing *Brown*, the seminal case in Minnesota holding that vacation benefits are wholly contractual, the Court of Appeals stated:

Although the policy in *Brown* specifically provided that employees terminated other than for cause could receive pay in lieu of vacation time accrued during the year of termination, we construe the case to hold, as a matter of law, that *absent an additional condition precedent*, the right to

vacation benefits attaches as soon as an employee has performed the work for which the benefits constitute consideration.

Berguland v. Grangers, Inc., 1998 Minn. App. LEXIS 724, C8-97-2362, *11-12 (Minn. App. June 23, 1998). The court further noted that it would not imply a condition precedent “absent unequivocal contract language.” *Id.* at *12.

It is clear that employers may place conditions precedent upon an employee’s ability to earn vacation and other forms of compensation. This rule is a straightforward application of basic contract principles, which dictate that a document that creates a right, can also impose limits on that right. Those limitations, in turn, define the right.

Thus, in *Simons v. Midwest Telephone Sales and Service, Inc.*, 433 F.Supp. 2d 1007, 1011 (D. Minn. 2006), the court recently dismissed a claim for unpaid vacation under Minn. Stat. § 181.13 where the plaintiff had not met the conditions precedent to earn the vacation under the terms of the employer’s plan. *Id.* The court analyzed the contract’s provision stating that “[v]acations are earned, when applicable, at the rate of 25% per employed quarter of the calendar year,” along with the contract’s statement that “[p]ayment is based on present and continued employment. You must be employed at least one (1) week after your vacation.” *Id.* In applying these provisions, the court found that the plaintiff had not, as she had argued, “earned” any vacation at the beginning of her last quarter of employment. Rather, the court noted that, although vacation benefits accrued quarterly under this plan, the plaintiff was not entitled to payment of unused vacation benefits because she could not meet the condition precedent for receipt of these benefits, because in terminating her employment she could not be employed at least one

week after the vacation. *Id.* The court then went on to note that the employer's interpretation that the vacation accrued at the end of each quarter, and not at the beginning as the plaintiff argued, was the proper application of the contract in any event. Therefore, the plaintiff was not entitled to any unpaid vacation upon her termination. *Id.*

D. Applying Similar Reasoning, Minnesota Courts Have Long Upheld an Employer's Right to Define In Its Policies or Handbook the Circumstances In Which Other Forms of Compensation Are "Actually Earned" Under Section 181.13.

Consistent with this principle, courts have also 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 well as claims for other forms of compensation upon termination.

For example, in *Rudolph v. U.S. Bank National Association*, 2006 U.S. Dist. LEXIS 367756, 04-4581 (ADM/JJG), *21-22 (D. Minn. June 2, 2006), a Minnesota federal district court recently dismissed a claim under Minn. Stat. § 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. *Id.* 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, and no award is paid to

employees involuntarily terminated for reasons other than position elimination. *Id.* at *22. As the plaintiff was involuntarily terminated prior to any incentive pay out, he did not meet these conditions, and had not, therefore, earned the incentive pay under the terms of the employer's plan. *Id.* at *21-22. The employee's failure to meet the eligibility requirements under the compensation plan was also 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).

Similarly, the Minnesota Court of Appeals applied basic contract interpretation principles to an employee compensation plan to determine whether the plaintiff had "actually earned" and was, therefore, entitled to payment of commissions on loans that were being processed but had not yet closed at the time of his termination. *Sherwood v. Investors Bank Corp.*, 1997 Minn. App. LEXIS 584, CX-69-2370 *4-5 (Minn. App. May 20, 1997). The court found that the terms of the contract were clear that the employee was not entitled to the commissions sought. *Id.* In doing so, the court also specifically rejected the plaintiff's argument that Minn. Stat. §181.13 rendered his compensation plan ambiguous. *Id.* at *5. The plaintiff argued that the standard for determining whether his commissions were "actually earned" was different under Section 181.13 than it was under his compensation plan. *Id.* The court rejected this argument, noting that there was no conflict between the 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).

In *Sherwood*, the court further determined that the plaintiff was not entitled to receive unpaid bonus payments. The plaintiff's contract with his employer stated that the plaintiff would receive a bonus payment of \$55,557.00 in five equal installments on January 31 of each of the following five years. *Id.* at *9. However, the contract also stated that the employee would not be entitled to receive any further bonus installments in the event that his employment terminated. *Id.* Accordingly, even though the plaintiff had previously negotiated this compensation, because he was terminated before the second installment became due under the contract, the plaintiff was not entitled to that bonus payment or any further bonus payments under the contract. *Id.*

Similarly, in *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), the plaintiff claimed that he was entitled to payment of incentive pay following the termination of his employment under Minn. Stat. § 181.13. *Id.* 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 Minn. Stat. § 181.13 claim was dismissed. *Id.*

Likewise, in *Johnson v. U.S. Bancorp*, 2003 U.S. Dist LEXIS, 02-799, *9 (PAM/SRN) (D. Minn. May 28, 2003), the court reached the identical conclusion. The plaintiffs sought commissions on deals that closed before the plaintiffs terminated their employment. *Id.* The contract governing the plaintiffs' right to commissions provided that employees voluntarily terminating their employment prior to the date of the actual payment were ineligible for compensation unless approved by a direct report of the Chairman and Chief Executive Officer. *Id.* Accordingly, because the plaintiffs voluntarily terminated their employment prior to the distribution of the challenged commissions, the plaintiffs were not entitled to them. *Id.*

E. Under Controlling Minnesota Law, Lee Is Not Entitled to Vacation Pay Under Fresenius' Policies Because She Failed to Fulfill the Eligibility Requirements By Being Terminated For Misconduct.

As noted, Minnesota decisions holding that an employer may define when vacation pay and other forms of compensation are "earned" are legion. Under the weight of this substantial and controlling body of law, resolution of Lee's claim in Fresenius' favor should have been a straightforward matter, given the express handbook provision that barred her right to vacation pay. The contract between Lee and Fresenius is unequivocal -- employees terminated for misconduct are not entitled to receive payment for unused vacation upon termination of employment. Similar to the many decisions discussed above, Fresenius' Employee Handbook provision creates a right to vacation pay, and then goes on to set limits on that right, which ultimately define entitlement to vacation pay. Fresenius' Employee Handbook merely 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.

There is no dispute that the Employee Handbook meets the requirements of a binding unilateral contract under governing Minnesota law. In Minnesota, 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, 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.⁸ (App. 25, 28-29, 31.) As the district court properly held, the Handbook created a binding contract as to vacation pay issues, understood and accepted by Lee, which, due to her termination for unsatisfactory performance,⁹ prohibits her from

⁸ Lee has never presented a 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.

⁹ 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. 25, 29, 31.)

receiving vacation pay.¹⁰ *See Pine River State Bank*, 333 N.W.2d at 625-627.

F. The Court of Appeals' Decision Is Incorrect on the Merits, and Constitutes a Drastic, Unsupported Departure from Established Law.

In her appeal, Lee argued that she was entitled to payment of her unpaid vacation notwithstanding her discharge for misconduct. Lee essentially argued that she had a vested right in her unused vacation that Fresenius could not divest by operation of its Employee Handbook. In its opinion, the Court of Appeals took Lee's argument one step further and essentially held that *any* contract with respect to vacation pay that does not require the pay-out of unused vacation upon termination of employment can be given no legal effect because it supposedly attempts to provide by contract what is allegedly prohibited by Minn. Stat § 181.13. *See Lee v. Fresenius Medical Care, Inc.*, 719 N.W.2d 222 (Minn. App. 2006).¹¹

In so ruling, the appellate court dramatically departed from established Minnesota law regarding the payment of wages under Section 181.13, as well as basic tenets of

¹⁰ 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 as to compensation and benefit provisions, 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. Lee has never challenged that her employment was anything other than at will.

¹¹ The sheer breadth of the Court of Appeals' new pronouncement of law is starkly illustrated in footnote 3 of the decision, wherein the court states: "But it is not necessary to conduct a trial for the purpose of interpreting the provisions in the employee handbook because if the handbook ... makes her ineligible for payment [of unused vacation], the provision has no legal effect, and Lee is entitled to payment in spite of the provision." *Lee*, 719 N.W.2d at 224, n. 3. Thus, in one fell swoop, and without any persuasive supporting analysis, the Court of Appeals effectively has eliminated the ability of Minnesota employers to contract over the right to vacation benefits, and by extension, all other forms of pay.

contract law. At the same time, the lower court created substantial and unanticipated liabilities for virtually every Minnesota employer, yet failed to provide any guidance as to how this unwarranted change in the law might be administered.¹²

Minnesota law regarding vacation pay is of vital importance to all employers and employees in the state. Virtually every employer offers some form of vacation or paid time off policy. Until the Court of Appeals' decision in this matter, vacation pay was regarded as a matter of contract. *Brown, supra*, 519 N.W.2d 474. This meant, as a practical matter, that employers could provide for policies that defined to what extent existing vacation or PTO balances were to be paid out at termination. To the extent that a vacation balance was to be paid, as a matter of contract, Minn. Stat. 181.13 set forth when payment was due. That statute, however, applied only *after* the contract was reviewed, and it was determined that the vacation pay was in fact owed as "wages ... actually earned." As noted above, the statute does not define what makes something earned, nor does it prohibit employers and employees, by contract, from defining what makes vacation pay (or any other form of wage) earned.

Rather, as the above-cited case law establishes, it has long been the rule in Minnesota that employees and employers may contract freely with regard to the employee's right to vacation benefits, and it is this contract which will determine when vacation and other benefits are "actually earned" for purposes of Minn. Stat. § 181.13. While the lower court's decision pays lip service to the well-recognized principle that an

¹² The unfortunate, but realistically likely effect of the Court of Appeals' decision, if allowed to stand, is that many employers will simply eliminate vacation balance programs for fear of incurring unintended and unpredictable liability.

employee's right to vacation in Minnesota is wholly contractual, the court's decision wholly divests employers of the ability to place any limitations on the payment of unused vacation upon termination of employment. The contract between the employer and employee that creates the right to vacation and other benefits must also be able to limit and define the right; if not, it is a legal fiction to say that the parties may contract for such benefits. The logical extension of the appellate court's ruling is that vacation benefits in Minnesota are no longer contractual, but, rather, subject to a special carve out requiring payment of any unused vacation upon termination of employment. Turning contract principles on their head, the Court of Appeals' decision effectively legislates mandatory terms in vacation policies and agreements, even where the parties have negotiated something completely different. This has never been the law in Minnesota.

Significantly, the Court of Appeals did not distinguish Fresenius' PTO policy from other previously accepted contractual limitations imposed by employers, such as "use it or lose it" policies, or policies limiting the amount of vacation that can be accrued from year to year. It is hardly apparent from the appellate court's decision whether such policies governing vacation benefits for current employees are still valid. Nor is it clear whether this new rule is intended to apply only to vacation pay, or whether it also supposedly applies to other forms of compensation.

Despite the dramatic departure from established law, and the resulting equally dramatic impact on Minnesota employers, the Court of Appeals failed to cite any persuasive or applicable legal authority supporting its decision. Rather, the court rested its ruling almost entirely on *Winnetka Partners Ltd. P'ship v. County of Hennepin*, 538

N.W.2d 912, 914 (1995), an inapposite case regarding the retroactive application of property tax assessments. *Winnetka Partners* is not applicable, even by analogy, to the salient issues presented in this case. To the contrary, neither the *Winnetka Partners* decision, nor the scant analysis in the lower court's opinion comes to grips with the central questions raised in the appeal: Whether an employee's eligibility to vacation pay in Minnesota remains wholly contractual, and whether employers may continue to place conditions precedent on an employee's right to payment of unused vacation time at termination. Consistent with substantial controlling Minnesota authority, these questions must be answered in the affirmative, and the Court of Appeals decision must be reversed.

G. Any Attempt By Lee to Argue That a Fact Dispute Exists Concerning The Reasons for Her Termination Must Be Rejected.

In her appeal, Lee improperly sought to broaden the scope of review by presenting new issues that were not raised at the trial court level. In reaching its result, the Court of Appeals found it unnecessary to address Fresenius' objections to these new arguments and issues. In the event, however, that Lee attempts to revive these arguments again before this Court, they should be rejected. Specifically, Lee argued for the first time on appeal 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, however, Lee previously did not dispute this issue. To the contrary, throughout the district court proceedings, Lee clearly staked out the position that the reasons for her termination played *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. 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’ summary judgment 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 the underlying action, which is expressly limited to the issue of vacation pay. Given Lee’s express waiver of any argument related to the reasons for her termination, this issue is not properly before this 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. 24-25, 48-62.) Lee’s veiled attempt 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 clinical protocol). On the existing record, Lee's claims must fail.

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

On appeal, Lee also attempted to raise for the first time a claim that her discharge was somehow in retaliation for participating in protected concerted activity under the National Labor Relations Act. Although not addressed in the appellate court's decision, to the extent Lee raises this argument again before this Court, it must be rejected as procedurally barred and baseless on the merits. As an initial matter, because this claim, like her attempt to create a fact dispute about the merits of her termination, was not raised at the district court level, it was waived and therefore should not be considered.

Moreover, Lee's attempt to convert her case through the appeal process 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. Further, 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. 66.) Furthermore, by Lee’s own admissions, “all of that does not matter in this case.” (App. 66.) As Lee concedes, this case is about nothing more than vacation pay, and the Court should not entertain any belated attempts by Lee to broaden the scope of review.

V. 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. Applying well-settled Minnesota law, the district court correctly held that the clear and enforceable terms of Fresenius’ Employee Handbook controlled the payment of unused vacation and foreclosed Lee’s claim for vacation pay. In disregard of the employment agreement, and substantial controlling Minnesota precedent, the Court of Appeals erroneously reversed the district court’s ruling. In so doing, the Court of Appeals drastically altered the legal landscape regarding eligibility for vacation and other wages under Section 181.13 by eliminating the ability of Minnesota employers to define in handbooks or other employment policies when such compensation is “actually

earned.” The Court of Appeals’ decision is an unsupported and unwarranted departure from well-settled law. For all these reasons, 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: November 16 2006

Respectfully submitted,



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