

No. A05-1887

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STATE OF MINNESOTA  
IN SUPREME COURT

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

Petitioner,

v.

Susan Lee,

Respondent.

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**BRIEF OF AMICUS CURIAE**  
**MINNESOTA EMPLOYMENT LAW COUNCIL**

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## I. STATEMENT OF THE *AMICUS CURIAE*<sup>1</sup>

As more fully elaborated in its request to participate in these proceedings as *amicus curiae*, the Minnesota Employment Law Council (“MELC”) is a nonprofit association comprised of many of Minnesota’s largest employers. MELC is organized to present a single, thoughtful voice expressing the employer viewpoint on matters of significant public importance relating specifically to employment law policy in this State. Each of MELC’s members contributes the perspective of many years of experience dealing practically, as well as theoretically, with legal issues that arise in the workplace. The interest of MELC in these proceedings is therefore public in nature, insofar as MELC speaks to the broad implications of the important issues raised in this appeal. While MELC is familiar with the facts of this case, MELC’s focus will be on assisting the Court’s understanding of the larger impact its decisions in this matter may have.

## II. LEGAL ARGUMENT

This case arises under section 181.13 of the Minnesota Statutes, which provides that, in the event that an employer discharges an employee, “the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon demand of the employee.” This Court’s resolution of Ms. Lee’s request for payment of accrued but unused vacation under section 181.13 necessarily also will

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<sup>1</sup> Rule 129.03 Certification: This brief is wholly authored by the undersigned counsel for the *amicus curiae* Minnesota Employment Law Council. No counsel for any party authored this brief in whole or in part. No person or entity, other than the Minnesota Employment Law Council, its members, or its counsel, have made any monetary contribution to the preparation or submission of this brief.

impact future interpretation of section 181.14 which similarly provides that “[w]hen any such employee quits or resigns employment, the wages or commissions earned and unpaid at the time the employee quits or resigns shall be paid in full not later than the first regularly scheduled payday . . . .”

Neither statute defines “wages” or “earned.” However, it has been well-settled in Minnesota that wages, for purposes of these statutes, may include accrued but unused vacation.<sup>2</sup> See Brown v. Tonka Corp., 519 N.W.2d 474 (Minn. App. 1994). It has been equally well-settled that “liability as to vacation-pay rights is wholly contractual.” Tynan v. KSTP, Inc., 77 N.W.2d 200, 206 (Minn. 1956); see also, e.g., Brown, 519 N.W.2d at 477 (“An employer’s liability for employees’ vacation pay is wholly contractual.”); Simons v. Midwest Tel. Sales and Serv., Inc., 433 F. Supp. 2d 1007, 1011 (D. Minn. 2006). In other words, the courts have looked to the underlying contract between the parties to determine whether vacation benefits are “wages” which are “earned” and unpaid under these statutes.

In its decision below, the Court of Appeals initially acknowledged this basic rule, set out in Brown, “that an employer’s liability for employees vacation pay is wholly contractual . . . .” Lee v. Fresenius Medical Care, Inc., 719 N.W.2d 222, 224 (Minn. App. 2006). However, the Court of Appeals then stated that

“[a]lthough it is generally true that an employer’s liability for an employee’s vacation pay is wholly contractual, the district

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<sup>2</sup> Although employer paid time-off policies are known by many names (e.g., paid time-off, PTO, vacation, sick leave), for simplicity, the term “vacation” will be used herein to describe all such policies.

court's conclusion that Lee was not entitled to be paid for her unused vacation time under the terms of her contract fails to recognize the principle that a party cannot provided by contract what is prohibited by statute.”

Id. at 225 (internal quotations omitted). The Court ultimately concluded that “the provision in Lee’s contract that an employee who is terminated for misconduct is not eligible for payment of earned but unused vacation time can be given no legal effect.” Id. at 226.

On its face, the reasoning in the Court of Appeals decision appears highly circular. Although the Court acknowledges that employer liability for vacation benefits, and, accordingly, whether such benefits are “earned” “wages” under sections 181.13 and 181.14, is “wholly contractual,” the Court of Appeals then decides that a part of the contract setting out the vacation benefits nevertheless must be ignored because it would work as a forfeiture of wages. However, based on the existing precedent, such benefits can only be “earned” “wages” if the Court of Appeals already had determined to ignore that part of the contract which provides that vacation benefits are not payable in certain circumstances (such as a termination for misconduct).

In any event, the decision of the Court of Appeals below represents an unwarranted and unnecessary departure from established precedent dealing with employment liability for vacation benefits. The existing rule, that liability for vacation benefits is wholly contractual, allows employers and employees the freedom to arrange vacation benefits in the way most suitable to them, so long as the arrangement is clearly communicated between employer and employee. The departure advocated by the Court

of Appeals, on the other hand, deprives employers and employees of such freedom, unsettles the established expectations of parties to existing vacation policies, imposes upon Minnesota employers significant unanticipated liability for vacation policies formulated in good faith reliance on the existing framework, and creates significant disincentives to employers to create generous vacation policies in the first instance. For these reasons, MELC respectfully requests that this Court reverse the decision of the Court of Appeals and reestablish the basic rule that employer liability for vacation benefits is wholly contractual and left to negotiation between employer and employee.<sup>3</sup>

**A. Employers and employees should be allowed the freedom to arrange vacation policies suiting their individual needs.**

Vacation policies in Minnesota appear in almost limitless variety. Some vacation policies provide that an employee must use vacation during employment and that no compensation will be paid for unused vacation (so-called “use it or lose it” policies); other policies provide that an employee may receive partial or full compensation for unused vacation depending upon a variety of circumstances (*e.g.*, at the end of the year,

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<sup>3</sup> MELC seeks reversal of the Court of Appeals only with respect to its departure from the basic rule that employer liability for vacation benefits is wholly contractual. MELC takes no position and makes no argument with respect to whether Ms. Lee is entitled to compensation for her unused vacation under Fresenius Medical’s vacation policy. To the extent that this Court elects to affirm the result below on the grounds that the vacation policy at issue in this particular case may not preclude the payout to this plaintiff, the departure by the Court of Appeals from the basic rule regarding vacation liability nevertheless warrants repudiation. Employers need clarity in the legal rules surrounding compensatory policies so that they may understand the extent of the liability which they incur by implementing a particular compensation policy. The Court of Appeals’ decision injects unnecessary uncertainty into this area of Minnesota law, and MELC respectfully requests that this Court clarify, regardless of the outcome for this particular case, that employer liability for vacation benefits in Minnesota remains wholly contractual.

upon departure from employment for any reason, upon resignation with advance notice, upon termination without cause, etc.). Similarly, such policies vary widely in the rate at which vacation benefits accrue, in the total amount of vacation which may be allowed to accrue at any time (*i.e.*, accrual caps), and in the amount of accrual which may be carried over from year-to year. Under existing legal precedent, Minnesota employers have understood that all of these varied policies are lawful, provided that the contract between employer and employee (whether in a signed bilateral contract or in a handbook or other employment policy manual) is clear as to the circumstances of when and how an employee could expect to accrue vacation benefits and/or be paid (or not) for unused vacation accruals.

It is simply good policy to leave to employers and employees the freedom to create varied vacation policies suiting the individual circumstances of individual workplaces. In some workplaces, it may be of little concern to an employer that employees choose not to take vacation, and such employers may be more than willing to provide employees with additional compensation, in the form of payouts for unused vacation, in exchange for the added labor performed by employees declining to take vacation. On the other hand, in other workplaces, such as stressful or high-pace workplaces in which employee burn-out may be a serious concern, employers have a significant interest in seeing that employees take accrued vacation. Such employers, with good cause, may wish to impose disincentives upon employees not taking vacation (or, at a minimum, remove incentives, such as vacation payouts, to not taking vacation). Other employers may simply feel better able to afford granting additional time off than paying

out additional cash over the normal payroll. Maintaining a rule by which employers and employees remain free to establish vacation policies which best suit the individual circumstances of a variety of workplaces is both pragmatic and wise.

Similarly, although employers generally establish workplace vacation policies, employees do also have the power to affect employer vacation policies through individual or collective negotiation and, consequently, also have an interest in maintaining freedom of contract for vacation policies. An employee or group of employees who desire to obtain greater vacation benefit accruals (*e.g.*, faster rates of accrual, higher caps on accrual, or higher carry-overs) may be willing in their individual circumstances to negotiate away any right to receive payouts of unused vacation in order to receive more generous benefits for use during employment. (And, by the same token, an employer may be more willing to supply the greater vacation benefits accruals sought by such employees if it were assured that such benefits could not later be reduced to a demand for cash compensation.)

The Court of Appeals' departure from precedent without sound statutory basis deprives both employers and employees of their natural freedom to negotiate and contract for mutually agreeable compensation terms. In our free society, employers and employees generally have been left free to strike their own bargains in the workplace, subject only to broad limits clearly set by the legislature (*e.g.*, minimum wage, maximum hours, etc.). It is inappropriate for the Court of Appeals arbitrarily to determine to limit employer and employee freedom of choice on a matter as to which the legislature has never opined. The language of section 181.13 (as well as section 181.14) simply does not

compel, or even address, the result ordained by the Court of Appeals in this matter. Consequently, the Court of Appeals decision should be reversed, and employer/employee freedom of choice should be restored.

**B. The Court of Appeals' departure from precedent unsettles established expectations and imposes significant unanticipated liability for existing vacation policies.**

As noted above, employers utilize a very wide variety of vacation policies in Minnesota. A common thread to all such policies is that they were formulated in good faith reliance upon the well-established rule that in Minnesota employer liability for vacation benefits is wholly contractual. The Court of Appeals decision departs significantly from that well-established rule and greatly expands the liability to which Minnesota employers may be subject as a consequence of existing vacation policies. Although individual liability, such as Ms. Lee's approximately \$5,000 conciliation court recovery, may be small, the aggregate prospective liability for Minnesota employers is quite substantial.

In September 2006, Minnesota employment exceeded 2.8 million.<sup>4</sup> It may be assumed that most, although certainly not all, Minnesota employees have some sort of vacation benefit. Extrapolating Ms. Lee's recovery to each of the 2.8 million workers in Minnesota indicates potential aggregate liability for Minnesota employers of more than \$14 billion. Obviously, this is an extremely rough estimate and likely high insofar as Ms.

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<sup>4</sup> Minnesota employment data obtained from the U.S. Department of Labor Bureau of Labor Standards ("BLS"), Minnesota at a Glance – <http://stats.bls.gov/eag/eag.mn.htm> (visited November 16, 2006).

Lee's vacation accrual (181.86, or about 4½ weeks) presumably is higher than average. Further, not every Minnesota employee is covered by a vacation policy, and many employers already provide compensation for unused vacation as a matter of course. However, even assuming that the Court of Appeals decision results in expanded liability as to only half of the 2.8 million Minnesota employees, and assuming further an average vacation accrual of only one week and an average weekly wage of \$790,<sup>5</sup> aggregate liability for Minnesota employers still would exceed \$1.1 billion.

Clearly, employers should be held to the cost of compensation policies which they knowingly adopt. Typically, ambiguities in such policies are resolved against the employer. However, when employers reasonably have created a set of clear compensation policies based on one set of legal rules, it is unjust to change those rules after-the-fact, increasing the cost of employer compensation programs only after it is too late for the employers to do anything to contain the liability imposed by the new legal rules. If Minnesota's employers had been aware before-the-fact that they would be required to payout accrued but unused vacation to departing employees in all circumstances, many employers would have made adjustments to their vacation policies to contain the liability. By imposing this change after-the-fact, employers are deprived of that opportunity. Even if the Court of Appeals decision were appropriate or necessary (which it was not), applying that decision retroactively to well-established compensation policies is unfair. Any such fundamental change should be made only prospectively in

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<sup>5</sup> Minnesota wage data obtained from the BLS, Average Weekly Wages in Minnesota: Third Quarter 2005 – <http://www.bls.gov/ro5/qcewmn.htm> (visited November 16, 2006).

order to allow employers and employees to tailor vacation policies to both meet the new requirements and the needs and interests of the workforce.

Moreover, the detrimental effect of the uncertainty injected by the Court of Appeals decision also cannot be overstated. In its decision, the Court of Appeals determined that “the term ‘wages’ includes compensation for accrued vacation time accumulated under the terms of an employment contract . . . .” Lee, 719 N.W.2d at 225. Although the Court of Appeals decision deals expressly only with the effect of a policy provision limiting payout of vacation accrual upon termination, this language calls into question the legality of many common vacation policies which serve to limit the amount of vacation accrual an employee may maintain *during* employment.

For example, many vacation policies provide that vacation accrual may not be carried over from year-to-year or that only a limited accrual may be carried over. Any vacation which an employee has accrued but not used in excess of the limit is lost at the end of the year. Such provisions are crucial to employers, both to manage the amount of vacation liability to employees who fail to use accrued vacation and to assure the availability of needed workers. By defining “wages” to include “accrued vacation time accumulated under the terms of an employment contract,” the Court of Appeals calls into grave question *any* policy which results in an employee’s forfeiture of vacation accrual, whether the forfeiture occurs during employment or at the end of employment. In the absence of better guidance, employers will be forced to assume that such accrual limitation devices would not be permissible and, in the face of the penalties available under sections 181.13 and 181.14, will tailor their vacation policies to cabin liability in

other ways, most likely by curtailing the rate of vacation accrual or by placing caps on the amount of vacation which may accrue in the first instance.

**C. The Court of Appeals' departure creates significant disincentives to employers to create generous vacation policies.**

By depriving employers of the right to curtail vacation benefit liability through clear contractual limitations on vacation accrual carry-overs or on payments for accrued but unused vacation, the Court of Appeals leaves employers with few viable options to control the timing and amount of vacation plan expenses. Indeed, to maintain vacation plan expenses at anticipated levels and prevent employees from converting unused vacation accruals into large cash payouts upon departure from employment, employers will have little option, in light of the decision below, but to either reduce the rate of vacation accrual or restrict the amount of vacation which can be accrued. In the end, in order to limit liability to employees at the end of employment, employees simply will be left with less paid time-off to use at any time during employment. Such outcome would seem to serve no useful purpose.

Further, this disincentive to employers to provide generous vacation policies may have an extremely disadvantageous impact on certain employees who may need generous paid leave benefits to cover periods of sickness or injury. Many employers provide generous paid leave benefits which are designed to embrace sick leave entitlements and, in serious cases, provide a bridge to an employee's eligibility for long-term disability benefits. A significant accrual of paid time-off in many circumstances may be all that stands between a sick or injured employee and long periods without any compensation.

Whether termed PTO, vacation, sick leave, short-term disability or any of a number of other names, the Court of Appeals' decision naturally applies in equal measure to all paid time-off policies. If employers restrict the rate of paid time-off accruals or place caps on accruals, many employees may find themselves without any ability to store up sufficient vacation time to make it through periods of sickness or injury. This can only increase the likelihood that employees will become financially devastated by illness or injury and will become a burden on state social services. This is not good public policy, nor is it required. Under the existing legal rules, pursuant to which liability for vacation benefits is wholly contractual, employers may limit their liability for vacation benefits in a number of ways without limiting the rate of accrual or the total accrual. Because the Court of Appeals departure from the existing precedent is not required by the statute or by any prior precedent, it should be rejected.

**D. The Minnesota legislature, and not the courts, should make fundamental changes to existing employment compensation policy.**

As elaborated above, the Court of Appeals decision in this matter raises many significant problems for Minnesota employers. Further, the decision, sparse as it is, raises a host of unanswered questions concerning what employers may or may not do in crafting vacation policies to limit the potential liability which may be imposed upon them later by employees demanding cash compensation for unused vacation time. Can a vacation policy provide that vacation must be used during employment and will never be paid out upon termination? Can a policy place limits on the carry-over of vacation accruals from year-to-year, such that unused vacation accruals will be lost during

employment? Can a vacation policy place an upside limit on the total amount of vacation which may be accrued, such that once the limit is reached, an employee will accrue no more vacation until some of the accrual is used? Do the limitations imposed by the Court of Appeals apply to paid leave policies which are available only for limited purposes, such as illness or injury?

The existing rule – that liability for vacation benefits is wholly contractual – allows employers and employees to answer these questions for themselves through clearly communicated vacation policies customized to their circumstances. The Court of Appeals unsettled that recognized rule and unnecessarily introduced these ambiguities. Such departure from settled law, if taken, should not be made by the courts, but should come from the Minnesota legislature, which has the power and ability to hold hearings and take evidence in order to determine whether and to what extent fundamental changes to existing employment compensation policy are necessary. Moreover, the legislature would be able to address all of the open questions presented by this change in policy, while a court necessarily is limited to deciding only the case before it, leaving ambiguities for future resolution through the (expensive) litigation process. It is worth noting that at least two of the states which specifically require employers to pay out accrued but unused vacation on termination have done so through the legislative or executive process. See Cal. Lab. Code § 227.3; ND Admin. Code § 46-02-07-02(12).

### **III. CONCLUSION**

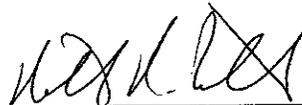
In its decision below, the Court of Appeals unnecessarily departed from the well-settled precedent that liability for vacation benefits in Minnesota is wholly contractual.

In so doing, the Court of Appeals unsettled established expectations and imposed significant unanticipated liability for existing vacation policies, it created significant disincentives to employers to create generous vacation policies, it deprived employers and employees of the natural freedom arrange vacation policies in such a way as to best address their individual needs, and it raised a host of unanswered questions concerning the limits of its new rule. Because the Court of Appeals decision was not required by either the statute or prior precedent, and because any significant change, such as this, in the employment compensation policies of this state should come from the legislature and not the courts, MELC respectfully requests that this Court reverse the decision of the Court of Appeals below and reestablish the basic rule that liability for vacation benefits in Minnesota is wholly a matter of contract between the parties thereto.

Dated: November 22, 2006

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