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State of Minnesota
In Supreme Court

Susan Lee,

Respondent,

v.

Fresenius Medical Care, Inc.,

Appellant.

BRIEF OF *AMICUS CURIAE* MINNESOTA CHAMBER OF COMMERCE

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STATEMENT OF THE ISSUE

If there exists an employment policy or employment contract that determines whether a payment of money in lieu of unused vacation time has been "earned" by an employee, does that policy or contract govern the employee's claim for "wages and commissions actually earned" under Minnesota Statutes Section 181.13?

The court of appeals held in the negative.

Most apposite authorities:

Brown v. Tonka Corp., 519 N.W.2d 474 (Minn. App. 1994)

Holman v. CPT Corp., 457 N.W.2d 740 (Minn. App. 1990)

STATEMENT OF THE CASE

The Minnesota Chamber of Commerce ("the Chamber")[1] was granted leave to participate in this appeal as *amicus curiae* by this Court's Order of October 17, 2006.

The Chamber accepts the Statement of the Case as set forth in Appellant's Brief.

STATEMENT OF THE FACTS

The Chamber accepts the Statement of the Facts as set forth in Appellant's Brief.

ARGUMENT

This Court's "standard of review of a summary judgment award 'is limited to determining whether there are any genuine issues of material fact and whether the district

[1] The Chamber hereby certifies that (1) this *amicus* brief was not authored in whole or in part by counsel for any party and (2) no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution to the preparation and submission of this brief. *See* Minn. R. Civ. App. P. 129.03.

court erred in its application of the law.'" *Jorgensen v. Knutson*, 662 N.W.2d 893, 897 (Minn. 2003) (*quoting Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 383 (Minn. 1999)). The Court applies *de novo* review to statutory interpretations and the interpretation of contracts. *Id.* (*citing Doheny v. Allstate Ins. Co.*, 632 N.W.2d 598, 600 (Minn. 2001)). Thus, the district court's and court of appeals' interpretations of Minn. Stat. § 181.13 in this case should be reviewed *de novo*. *See Jorgensen*, 662 N.W.2d at 897.

I. The Court of Appeals Erred in Holding that Minnesota Statutes Section 181.13 Prohibits Employers from Establishing Limitations and Conditions on Employees' Entitlement to Vacation Pay Upon Termination.

In the decision below, the Minnesota Court of Appeals interpreted Minnesota Statutes Section 181.13 to require employers to pay employees, upon their termination, for their accrued, unused vacation, even if an employment agreement provides otherwise. *See Lee v. Fresenius Med. Care, Inc.*, 719 N.W.2d 222, 226 (Minn. App. 2006). The district court had held that the employee's right to vacation pay was governed by Appellant's employee handbook, which precluded employees from receiving vacation pay upon termination if they were terminated for misconduct. The court of appeals reversed the district court's decision, holding that the employee handbook provision governing eligibility for vacation pay was of "no legal effect." *Id.*

Prior to the court of appeals' decision in *Lee*, payments in lieu of accrued, unused vacation time (including paid time off, or "PTO") were regarded as being "wholly contractual." *See Brown v. Tonka Corp.*, 519 N.W.2d 474, 477 (Minn. App. 1994). Employers and employees could enter into contracts establishing whether, and under

what circumstances, accrued vacation time was to be paid to employees or terminated employees.

The court of appeals' decision below is a significant departure from *Brown.* The court, without reasoned explanation or precedent, construed Minnesota Statutes Section 181.13 to require employers to pay accrued vacation time regardless of the terms of an employer's contracts with its employees. In reaching its decision, however, the court of appeals failed to analyze the relevant language of Section 181.13, which provides that

> [w]hen any employer employing labor within this state 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. If the employee's *earned* wages and commissions are not paid within 24 hours after demand, whether the employment was by the day, hour, week, month, or piece or by commissions, the employer is in default.

Minn. Stat. § 181.13(a) (emphases added).

In the past, Minnesota courts have looked to the terms of the applicable policy or contract between an employer and an employee to determine whether the employee has "actually earned" the wages or commissions at issue. Thus, for example, in the context of sales commissions, the Minnesota Court of Appeals held that the question whether an employee has "actually earned" commissions is determined by the terms of the employer's compensation plan. For example, in *Holman v. CPT Corp.*, 457 N.W.2d 740 (Minn. App. 1990), the court of appeals said, "Since the term 'actually earned' is not defined by statute, the terms of CPT's own compensation plan may be considered in determining whether Holman had earned the . . . commissions." *Id.* at 743. Similarly, in

Sherwood v. Investors Bank Corp., No. CX-96-2370, 1997 WL 259980 (Minn. App. May 20, 1997), the court of appeals reasoned that "there was no conflict between the statute and Sherwood's employment contract because the statute requires commissions that were earned to be paid and the contract determines when a commission was earned." *Id.* at *2. Other Minnesota courts have followed this same approach with respect to other forms of compensation. *See, e.g., Rudolph v. U.S. Bank, N.A.*, No. 04-4581, 2006 WL 1579862, at *8 (D. Minn. June 2, 2006) (concluding that employee terminated for misconduct had not "actually earned" incentive pay where policy so provided); *Chambers v Metro. Prop. & Cas. Ins. Co.*, No. 00-2111, 2002 WL 1332797, *6 (D. Minn. June 13, 2002) (holding that where, under employer's compensation plan, employees were entitled to receive incentive pay only if employed on the last day of plan year and on date of bonus pay-out, employee who did not meet these conditions had not "actually earned" incentive pay), *aff'd*, 351 F.3d 848 (8th Cir. 2003).

In *Brown*, the Minnesota Court of Appeals followed the same approach in the context of vacation pay. The court looked to the terms of the contract between the employer and the employee to determine whether the employee had "actually earned" vacation pay. *See Brown*, 519 N.W.2d at 477 ("this case revolves around the provisions of [the] employment contract"). Under the contract in *Brown*, a terminating employee was entitled to "receive pay in lieu of any unused vacation allowance earned in the prior year," as well as "*pay in lieu of vacation time accrued during the current year provided the termination was due to . . . involuntary separation for other than cause*." *Id.* at 475 (emphasis in original). Noting that "an employer is obligated to provide vacation pay

when employees have met the vacation pay eligibility requirement," the court concluded that the employees were entitled to vacation pay for the prior year because they had accrued, unused vacation time from that year, and that they were entitled to vacation pay for the current year because they had been voluntarily terminated without cause. *Id.* at 477; *see also Berglund v. Grangers, Inc.*, C8-97-2362, 1998 WL 328382, at *4-5 (Minn. App. June 23, 1998) (holding that where right to vacation pay vested "upon completion of the benefit year," employee was entitled to payment because he had worked through last day of benefit year).

In each of the above-referenced decisions, the court considered the contractual conditions on the entitlement to payment for wages. Where an employee had met such conditions, he or she was determined to have "actually earned" wages under Minn. Stat. § 181.13 and, accordingly, was entitled to payment. Where an employee had not met the contractual conditions, he or she was determined to have *not* "actually earned" wages and, accordingly, was *not* entitled to payment.

Under the decision of the court of appeals below, however, employment policies and contracts become irrelevant. The court of appeals reasoned that because the condition at issue (that the employee not be discharged for misconduct) was not contained in Minn. Stat. § 181.13, it was "prohibited" by the statute. *See Lee*, 719 N.W.2d at 225. This was a fatal flaw in the court of appeals' analysis. The statute is silent about exactly when vacation pay is "earned." The statute's silence cannot be construed to be a prohibition on an employment policy or contract that is not inconsistent with the statute. *See Wallace v. Commissioner of Taxation*, 184 N.W.2d 588, 594 (Minn.

1971) (stating that words may not be added to statutes to "supply that which the legislature purposely omits or inadvertently overlooks"). Under the court of appeals' logic, each of the employees in the cases referenced above would have been entitled to a payment -- whether for sales commissions, incentives, or vacation pay -- because under the prohibition that the court of appeals engrafted onto the statute, none of the conditions at issue in those cases would have been permitted. Despite the court of appeals' purported reliance on *Brown*, it departed from that case and other similar cases, thus eliminating the long-recognized ability of Minnesota employers and employees to define by policy or contract when compensation is "actually earned."[2]

To make matters worse, the court of appeals reached its decision without supplying a clear and workable analysis for determining when vacation pay is "actually earned" under the statute. The court of appeals simply stated that, under Section 181.13, "any compensation for accrued vacation time *that the employee has earned*" must be paid to the employee. *See Lee*, 719 N.W.2d at 226 (emphasis added). But the court of appeals does not identify any criteria for answering the key question -- when wages or commissions are "actually earned." Thus, under the court of appeals decision, there is no clear guidance as to when, under the statute, wages and commissions are earned.

[2] Although the decision of the court of appeals below was limited to the issue of vacation pay, its reasoning may allow employees to argue for other forms of compensation, such as sales commissions and incentive payments, even when they have failed to meet contractual preconditions to the entitlement to those types of payments.

II. The Court of Appeals' Construction of Section 181.13 is Inconsistent with Other States' Construction of Similar Statutes.

The court of appeals' decision is inconsistent not only with prior Minnesota case law but also with decisions from other jurisdictions that have considered similar statutes. The decisions from other states reflect the proper analysis of this issue. Those courts consistently look to employer policies or contracts to determine whether an employee is entitled to vacation pay when the applicable statute is silent on the issue.

For example, Kansas law requires that "[w]henever an employer discharges an employee or whenever an employee quits or resigns, the employer shall pay the employee's *earned wages*." Kan. Stat. § 44-315(a) (emphasis added). In *Dillard Dep't Stores, Inc. v. State Dep't of Human Resources*, 13 P.3d 358 (Kan. Ct. App. 2000), the Kansas Court of Appeals explained that the determination whether accrued vacation pay constitutes "earned wages" under that statute "is *controlled by the employment contract and employer policies*." *Id.* at 362 (emphasis added).

Similarly, the Indiana Wage Payment Statute, Ind. Code § 22-2-5-1, requires that "employees, upon separation from employment, must be paid *the amount due them* at their next and usual payday." *Indiana Heart Assocs., P.C. v. Bahamonde*, 714 N.E.2d 309, 311 (Ind. Ct. App. 1999) (emphasis added). The Indiana courts have held that an employee is entitled to accrued vacation pay under the statute "provided no agreement or published policy exist[s] to the contrary." *Die & Mold, Inc. v. Western*, 448 N.E.2d 44, 48 (Ind. Ct. App. 1983). Thus, if an employer has a published policy declaring that an employee is not entitled to accrued vacation pay if terminated for "gross misconduct,"

and if the employee is terminated for "gross misconduct," he or she is not entitled to accrued vacation pay. *See Indiana Heart Assocs.*, 714 N.E.2d at 312.

The same is true in Louisiana, where an employer is obligated to pay an employee who is terminated or otherwise discharged "*the amount then due* under the terms of employment." La. Rev. Stat. Ann. § 23:631 (emphasis added). In *Huddleston v. Dillard Dep't Stores, Inc.*, 638 So. 2d 383 (La. Ct. App. 1994), a company policy provided that employees involuntarily terminated for cause were not eligible for vacation pay. The court held that "the right to be paid for unused vacation time does not vest in the employee until such time that the appropriate conditions prior to separation from employment are met." *Id.* at 385. Because the employee had been discharged for misconduct, his right to vacation pay under the company policy had not vested and, accordingly, he was not entitled to any relief under La. Rev. Stat. Ann. § 23:631. *See id.*

Likewise, the United States District Court for the District of Maryland reached a similar conclusion, applying Maryland law, in *Rhoads v. F.D.I.C.*, 956 F. Supp. 1239 (D. Md. 1997), *rev'd in part on other grounds*, 257 F.3d 373 (4th Cir. 2001). There, the court considered the Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. §§ 3-501 to 3-509, which requires prompt payment of "*compensation that is due* to an employee for employment" upon discharge, *see id.* § 3-501(c) (emphasis added). At the time of the plaintiff's termination, his employer's personnel policies stated that employees terminated for cause were not entitled to receive accrued vacation pay. Accordingly, the court concluded that the employee was not entitled to accrued vacation pay under the statute. *See Rhoads*, 956 F. Supp. at 1259.

As the foregoing examples illustrate, other courts that have considered statutes similar in purpose, language, and meaning to Minn. Stat. § 181.13 have concluded, as in the *Brown* decision, that eligibility for a statutorily required payment of unused vacation is a matter of policy or contract if the statute does not define eligibility. In accord with that conclusion, the other courts consistently have held that a terminated employee is not entitled to a payment for unused vacation pay if the payment is not permitted by employer policies or employment contracts. Thus, the court of appeals' decision below is not only a significant departure from prior Minnesota law but also is inconsistent with the reasoned decisions of other states' courts that have addressed the issue.

III. The Court of Appeals' Decision, if Allowed to Stand, Would Upset the Expectations of Minnesota Employers and Would Invade an Employer's Right to Determine Their Employees' Compensation.

The Chamber believes that nearly all of its members have policies or contracts governing payment for vacation time. In adopting those policies and negotiating those contracts, the members of the Chamber, and other Minnesota employers, relied on existing law as articulated in *Brown* and similar cases. The court of appeals' decision effectively rewrites all of those employment contracts and policies by providing that vacation time is deemed "earned" at some earlier time, regardless of any conditions to which the parties may have agreed. In doing so, the court of appeals essentially has taken away one aspect of an employer's traditional prerogative to set, either by policy or contract, a compensation structure for its employees.

The court of appeals' decision, if allowed to stand, would not only interfere with employers' freedom of contract and their freedom to adopt reasonable employment policies, but it also would result in substantial additional liability to employers who, until now, have conducted their business in accordance with the *Brown* decision. Section 181.13 provides not only for payment of wages but also for an additional penalty of as much as fifteen days' wages for failure to make prompt payment. Moreover, an employer who fails to pay wages promptly is liable for costs and attorneys' fees under Section 181.14. Thus, the court of appeals' decision exposes Minnesota employers to potential claims for vacation pay-outs, penalties, and costs and fees from an additional category of employees. The potential aggregate impact on Minnesota employers is very significant.

In addition, the court of appeals' decision creates disincentives for employers to develop beneficial employee-benefit policies. There is no requirement that employers adopt policies or enter into contracts that provide for *any* payments to employees in lieu of accrued vacation time. To avoid the pitfalls of the court of appeals' opinion, employers may think twice before providing for such payments in light of the potential increased costs. The result may be that fewer employers offer employees the termination benefit of receiving payment for accrued, unused vacation time. Employers also may reduce the amount of vacation time allotted to employees so as to reduce the costs of payments in lieu of accrued, unused vacation time. In either situation, Minnesota employees would face less advantageous vacation policies.

CONCLUSION

The court of appeals' decision represents an unwarranted departure from the well-settled law of this and other states. Moreover, it is likely to have a significant, negative impact on Minnesota employers. Accordingly, for the reasons set forth herein, the Minnesota Chamber of Commerce, as *amicus curiae*, respectfully urges the Court to reverse that decision.

Respectfully submitted,

Dated: Nov. 22, 2006

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01, subd. 3(c)(1) of the Minnesota Rules of Civil Appellate Procedure, counsel for *amicus curiae* Minnesota Chamber of Commerce hereby certify that this brief complies with the word count limitation set forth in the Rule. This brief was prepared utilizing Microsoft Word 2002 word processing software. All typed material, including all headings and footnotes, appear in at least 13-point Times New Roman font, which complies with the typeface requirements of the Rule. According to the automatic wordcount feature of the software, this brief, exclusive of pages containing the Table of Contents, Table of Authorities and this Certificate, contains 2,859 words.

Dated: November 22, 2006

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