

No. A09-949

---

State of Minnesota  
In Supreme Court

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,  
*Appellant,*

vs.

RONALD J. STAGG,  
*Respondent,*

and

VINTAGE PLACE,  
*Respondent.*

---

APPELLANT-DEPARTMENT'S REPLY BRIEF

---

LEE B. NELSON (#77999)  
AMY R. LAWLER (#0388362)  
MINNESOTA DEPARTMENT OF EMPLOYMENT  
AND ECONOMIC DEVELOPMENT  
1<sup>ST</sup> NATIONAL BANK BUILDING  
332 MINNESOTA STREET, SUITE E200  
ST. PAUL, MINNESOTA 55101  
(651) 259-7117  
*Attorneys for Appellant-Department*

VINTAGE PLACE  
984 ALBEMARLE STREET  
ST. PAUL, MINNESOTA 55117-5146  
(651) 488-6878  
*Respondent- Employer -Pro se*

PAUL A. BANKER (#256596)  
CHRISTOPHER A. GRGURICH (#327694)  
LINDQUIST & VENNUM PLLP  
80 SOUTH EIGHTH STREET, SUITE 4200  
MINNEAPOLIS, MINNESOTA 55402  
(612) 371-3211  
*Attorneys for Respondent*

---

## TABLE OF CONTENTS

<b>ARGUMENT .....</b>	<b>1</b>
1. THE DEPARTMENT’S ARGUMENT IS PROPERLY BEFORE THIS COURT. ....	1
2. RESPONDENT’S BRIEF MISCHARACTERIZES BOTH THE COURT OF APPEALS’ HOLDING AND THE STATUTORY DEFINITION OF MISCONDUCT. ....	4
<i>a. The standards of behavior an employer has the right to reasonably expect are wholly separate from any discipline that the employer might impose. ....</i>	<i>4</i>
<i>b. There is no intent requirement in the misconduct statute. ....</i>	<i>6</i>
3. NEITHER THE DEPARTMENT NOR MINNESOTA COURTS CAN APPLY THE HOEMBERG SCHEME ADOPTED BY THE COURT OF APPEALS IN STAGG. ....	8
<i>a. Neither Stagg nor Hoemberg can be reconciled with the statutory definition of misconduct. ....</i>	<i>8</i>
<i>b. The Stagg Court revived and expanded Hoemberg, improperly making the employer the arbiter of eligibility in many cases. ....</i>	<i>11</i>
<i>c. Stagg must find his remedy in contract law. ....</i>	<i>16</i>
<i>d. The Department has not “waived” its argument that, at minimum, this case would need to be remanded to get the entire handbook into the record. ....</i>	<i>18</i>
<b>CONCLUSION .....</b>	<b>19</b>

**TABLE OF AUTHORITIES**

CASES

*Auger v. Gillette Co.*, 303 N.W.2d 255 (Minn. 1981) ----- 1, 5, 11

*Eyler v. Minneapolis Star & Tribune Co.*, 427 N.W.2d 758 (Minn. App. 1988) ---7

*Hoemberg v. Watco Publishers, Inc.*, 343 N.W.2d 676 (Minn. App. 1984) -- 1, 2, 3,  
8, 9, 11, 12, 13, 16, 18

*Houston v. Int’l Data Transfer Corp.*, 645 N.W.2d 144 (Minn. 2002)-----7

*Jacobson v. U.S. Currency*, 728 N.W.2d 510 (Minn. 2007) -----3

*Jenkins v. American Exp. Financial Corp.*, 721 N.W.2d 286 (Minn. 2006)-----2, 3

*Lolling v. Midwest Patrol*, 545 N.W.2d 372, 376 (Minn. 1996)----- 17

*Sivertson v. Sims Security*, 390 N.W.2d 868 (Minn. App. 1986)-----2, 3

*Stagg v. Vintage Place, Inc.*, A09-949, at \*2 (Minn. App. June 1, 2010) 8, 9, 11, 12

*Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988) -----1

*Thurner v. Philip Clinic, Ltd.*, 413 N.W.2d 537 (Minn. App. 1987)- 2, 3, 11, 12, 13

*Vargas v. Nw. Area Found.*, 673 N.W.2d 200 (Minn. App. 2004)-----7

STATUTES

Minn. Stat. § 268.03, subd. 1(2009)----- 17

Minn. Stat. § 268.069, subd. 3 (2009)-----9

Minn. Stat. § 268.095, subd. 6(d) (2009) ----- 15

Minn. Stat. § 268.105, subd. 7 (2009)-----2

## Argument

In his responsive brief, Ronald Stagg concedes that this Court's holding in *Auger v. Gillette Co.* is good law, and that the misconduct statute allows no inquiry into whether an employee was properly terminated.<sup>1</sup> Stagg then goes on to argue that *Hoemberg v. Watco Publishers, Inc.*, is still good law, because it creates an objective test that can be reconciled with the statutory definition of misconduct.<sup>2</sup> But neither *Hoemberg* nor *Stagg* stand for what the respondent claims. *Hoemberg* and *Stagg* both held that there is a common-law exception to misconduct in situations where an employer fails to follow its disciplinary procedures. As the Department explained in its principal brief, this common-law exception cannot be reconciled with *Auger*, nor can it exist under the current, and exclusive, statutory definition of misconduct.

### 1. The Department's argument is properly before this Court.

Respondent's brief claims that the Department's arguments are not properly before this Court, and invokes *Thiele v. Stich*<sup>3</sup> to argue that the Department did not timely raise the arguments made in its principal brief. The Department did raise these arguments in its brief. Its responsive brief to the Court of Appeals was, of course, the Department's first and only opportunity to present a position, as the

---

<sup>1</sup> 303 N.W.2d 255 (Minn. 1981); respondent's brief, pp. 10, 23.

<sup>2</sup> 343 N.W.2d 676 (Minn. App. 1984); respondent's brief, pp. 10, 23.

<sup>3</sup> 425 N.W.2d 580 (Minn. 1988); *Thiele* addressed only the raising of arguments at the trial stage. As the Department was not a party at the hearing stage, it obviously could not have failed to broach factual issues, as contemplated by *Thiele*.

Department does not become a party to the proceedings until the Court of Appeals orders a writ of certiorari.<sup>4</sup> In its brief, the Department laid out the reasons that Stagg's chronic tardiness and absence constituted misconduct, and repeatedly argued that *Hoemberg* was not applicable to Stagg's case. The Department also cited *Sivertson v. Sims Security*,<sup>5</sup> and argued that courts have not required employers to enforce their disciplinary procedures to the letter, as "wrongdoing" on the part of the employer does not remove an applicant's behavior from the realm of misconduct.<sup>6</sup> It also argued in detail that Stagg committed misconduct because Vintage Place's standard of behavior – that Stagg arrive at work on time – was reasonable, and Stagg committed a serious violation of that standard, or showed substantial lack of concern for his employment.

It is true that the Department also devoted a large portion of its Court of Appeals brief to arguing that the exception laid out in *Thurner v. Philip Clinic, Ltd.* applied.<sup>7</sup> The Court of Appeals and the Supreme Court have consistently declined to reach any questions on the applicability of the *Hoemberg* line of cases - and indeed any cases applying principles of contract law to unemployment insurance proceedings - preferring instead to retain a number of common law cases, however nominally, and distinguish them. In *Jenkins v. American Exp. Financial Corp.*, for example, the Supreme Court entirely avoided the contract

---

<sup>4</sup> Minn. Stat. § 268.105, subd. 7.

<sup>5</sup> 390 N.W.2d 868 (Minn. App. 1986).

<sup>6</sup> Department's Court of Appeals brief, p. 10.

<sup>7</sup> 413 N.W.2d 537 (Minn. App. 1987).

question, which was thoroughly briefed, because it was unnecessary.<sup>8</sup> As long as *Hoemberg* and *Thurner* have not been specifically repudiated or rejected, the Department has both cited cases like *Sivertson* and urged the Court of Appeals to reach the proper result within the ill-fitting confines of the *Thurner* scheme.

Nonetheless, the Department is entitled to refine and develop its argument, and the fundamental issue – whether Stagg committed employment misconduct – is the same. The Department’s arguments are based on the same underlying set of facts, and the Supreme Court can properly address this issue. As the Supreme Court explained in reaching the appellant’s arguments in *Jacobson v. U.S. Currency*, “[w]hile Jacobson has refined the argument he made to the district court, we conclude that he is not raising a new argument on appeal. Further, we conclude that it is possible for us to evaluate this argument on facts already present in the record.”<sup>9</sup> The same is true here. The Department has always maintained that Stagg has committed misconduct, under a number of arguments, and has continued to develop and refine its arguments concerning the exclusive statutory definition of misconduct. The Court of Appeals did rule on the question of whether Stagg committed misconduct, although its broad holding made no mention of a number of the Department’s arguments. There are no looming factual questions that the Court is not equipped to consider.

---

<sup>8</sup> 721 N.W.2d 286 (Minn. 2006).

<sup>9</sup> 728 N.W.2d 510, 523 (Minn. 2007).

**2. Respondent's brief mischaracterizes both the Court of Appeals' holding and the statutory definition of misconduct.**

At its core, this case is about the Department's statutory obligation to apply an exclusive statutory definition of misconduct, using factfinding proceedings, regardless of any "wrongdoing" on the part of the employer. The exclusive statutory definition of misconduct inquires only into an employer's standards of behavior for its employees, and creates no exception to misconduct for situations in which an applicant should not yet have been discharged under the employer's disciplinary procedure, or did not appreciate that the offense would lead to his termination. This is the standard applied by lower-level Department clerks, who adjudicate the approximately 45,000 applications for benefits each year in which misconduct is raised as an issue. It is the standard that ULJs apply in the approximately 20% of these cases that are appealed to the administrative hearing stage. And it is the standard that Minnesota courts must apply on appeal. While Stagg's brief construes the Court of Appeal's decision as narrow and the statutory exceptions to ineligibility as broad, in fact the opposite is true. The *Stagg* decision has impermissibly broadened the scope of inquiry that Department clerks, ULJs, and Minnesota courts must apply.

- a. The standards of behavior an employer has the right to reasonably expect are wholly separate from any discipline that the employer might impose.**

At a fundamental level, Stagg argues that an employer, by communicating a disciplinary procedure, also conveys its behavioral expectations. Thus, Stagg

reasons, “[b]y notifying the employee of the procedure, the employer communicates its expectations and specifies a given consequence if that expectation is not met. By not following its policy, the employer unilaterally revises its expectations.”<sup>10</sup> But this conflates an employer’s behavioral *expectations* with any subsequent *discipline*. As *Auger* established, the Department is simply not concerned with whether an applicant should have been terminated.<sup>11</sup> *Auger* does not stand for the proposition that a wrongfully discharged applicant can never be found ineligible for benefits, nor does it stand for the proposition that a rightly discharged applicant can never be found eligible for benefits. The Department accepts that the applicant has been terminated, and then inquires into whether the termination was for conduct that amounted to misconduct under Minnesota unemployment insurance law.

Stagg’s analysis is fundamentally flawed in its underlying assumption that an employer’s standards of behavior and the disciplinary consequences that stem from violating the standards of behavior are the same thing. They are not. An employer may reasonably expect a standard of behavior, either because it is common sense or because it has been conveyed to its employees, be it in a manual, through training sessions, or through some other form of communication. An employer that establishes a dress code, restricts employees’ personal internet use, or informs its employees that they must arrive on time, has established a standard

---

<sup>10</sup> Respondent’s brief, p. 19.

<sup>11</sup> *Auger*, 303 N.W.2d at 257.

of behavior. Those standards are separate and distinct from any disciplinary consequences that might stem from a violation of those standards.

Thus, an employer that fails to follow its disciplinary procedure to the letter has not unilaterally revised its standards of behavior; it has only revised its disciplinary consequences. Such a change is not a “morphing standard” of behavior, as respondent’s brief suggests.<sup>12</sup> It is a change to the disciplinary procedure. An employer that disciplines its employee goes through a two-step process; it establishes its standards of behavior, and then it disciplines those who violate the standards of behavior. The Department, by statute, ignores that second step and does not defer to the first.

**b. There is no intent requirement in the misconduct statute.**

Respondent’s brief implies that the Court must consider the applicant’s notice of his employer’s disciplinary consequences in order to show that the applicant intentionally chose to violate his employer’s standards and invite his own discharge. To that end, Stagg’s brief cites several cases that he claims support the proposition that an applicant does not commit misconduct unless he intentionally commits a terminable offense. In his brief, Stagg cites a 1988 Court of Appeals decision in which the court concluded that “violation by the employer of its own procedures vitiates the ‘heedless’ aspect of purported misconduct.”<sup>13</sup>

---

<sup>12</sup> Respondent’s brief, p. 19.

<sup>13</sup> Respondent’s brief, p. 19; citing *Eyler v. Minneapolis Star & Tribune Co.*, 427 N.W.2d 758, 761 (Minn. App. 1988).

Respondent's brief also cites *Vargas*, citing *Houston*, for the same purpose, asserting that misconduct is "conduct that intentionally ignores" the employer's standards.<sup>14</sup>

But that analysis, carried out under the then-common law definition of misconduct, ignores the fact that there is no longer an intent requirement in the current, and exclusive, statutory definition of misconduct. While Minnesota courts have decided many misconduct cases under various iterations of the misconduct statute, since at least 2004, the law has been clear that an applicant can commit misconduct by being negligent or indifferent. As the Department explained at great length in its principal briefing to this Court, following this Court's decision in *Houston*, the legislature amended the statute to clarify that even negligent or indifferent conduct can constitute misconduct, rendering *Houston* obsolete.

In the hundreds of misconduct cases that Minnesota courts have decided since 2004, not one has invoked *Houston*, and a number of unpublished cases have specifically disclaimed it. Minnesota law is clear: there need not be a showing that an applicant's conduct was knowing, intentional, or "heedless." Moreover, the statute contains no clause establishing that an applicant commits misconduct only when he does something that he knows with certainty will lead to his discharge. Stagg, like thousands of applicants every year, knew that his conduct

---

<sup>14</sup> Respondent's brief, pp. 15 & 20, citing *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144 (Minn. 2002); *Vargas v. Nw. Area Found.*, 673 N.W.2d 200 (Minn. App. 2004).

violated his employer's standards. But he, also like thousands of applicants every year, simply did not appreciate that he would be fired for it. An applicant can still commit misconduct even if he did not realize that he was committing a terminable offense at the time; indeed, most misconduct issues that the Department addresses every year would fall into this category.

**3. Neither the Department nor Minnesota courts can apply the *Hoemberg* scheme adopted by the Court of Appeals in *Stagg*.**

**a. Neither *Stagg* nor *Hoemberg* can be reconciled with the statutory definition of misconduct.**

In his brief, Stagg claims that:

*Hoemberg* stands for the proposition that an employee has the right to expect its employer to follow the disciplinary steps set forth in its manual and, where the employer has not done so, the employee did not engage in misconduct because the employee's violation was not a serious violation of the standard the employer had the right to expect.<sup>15</sup>

While this is a creative attempt to force *Hoemberg* into the framework later established by statute, it is ultimately an attempt to fit a round peg into a square hole.

Neither the courts in *Hoemberg* nor *Stagg* concluded that the applicants did not commit a serious violation of the standards of behavior that the employer had the right to expect of them. They did not find that the employer's expectations were somehow irrevocably intertwined with its disciplinary procedures, such that the employer somehow vitiated or destroyed its behavioral standards when it

---

<sup>15</sup> Respondent's brief, p. 23.

failed to follow certain disciplinary steps. Instead, in both cases the Court created a common law exception to misconduct, one that does not exist within the language of the current statute. Such a common law exception, notwithstanding the exclusivity of the statute, is specifically prohibited by law.<sup>16</sup> Additionally, if the legislature had wanted to adopt the analysis in *Hoemberg* when it codified the definition of misconduct, it could have easily done so. But when the legislature enumerated the statutory exceptions to misconduct, it chose not to list an employer's failure to follow its disciplinary procedures as a factor that precluded ineligibility for benefits.

In *Stagg*, the Court of Appeals acknowledged that an employer generally has the right to expect that its employees show up on time, but found that “caselaw establishes that an act otherwise constituting employment misconduct is not employment misconduct when an employer fails to follow the applicable and enforceable disciplinary provisions in its employee handbook.”<sup>17</sup> In short, the employer's violation of its own disciplinary procedures did not somehow alter its behavioral expectations; the Court's decision was not rooted in the current misconduct statute, but in common law. As the legislature has made abundantly clear, the Court cannot create common-law entitlements to benefits.<sup>18</sup>

Respondent also indicates that it is appropriate for an employer to set its own policies, declare the reasonableness of the policies, and adopt a disciplinary

---

<sup>16</sup> Minn. Stat. § 268.069, subd. 3 (2009).

<sup>17</sup> *Stagg v. Vintage Place, Inc.*, A09-949, at \*2 (Minn. App. June 1, 2010).

<sup>18</sup> Minn. Stat. § 268.069, subd. 3 (2009).

procedure that “communicate[s] the seriousness (or lack thereof)” of the adopted policies.<sup>19</sup> But that is not the province of the employer. An employer is entitled to adopt any policy that it likes, spoken or unspoken, written or verbal, accompanied by a disciplinary procedure or not. In all of these situations, the Department ultimately considers whether the employer’s standards of behavior were reasonable. More importantly, even if a policy is reasonable, the Department still considers whether an applicant’s violation was serious, whether the applicant’s conduct was intentional, negligent, or indifferent, and whether the applicant falls under any other listed exception to ineligibility. Determining misconduct is an application of law. It is not for the employer to decide, but rather for the Department’s adjudicative clerks, and if appealed, the ULJ, and ultimately the Minnesota courts.

Let us take, for example, an unremarkable absence policy, in which an employer declares that employees must arrive at work on time, and that being more than five minutes late on more than three occasions will result in discharge. Under Stagg’s analysis, this seemingly reasonable disciplinary procedure would indicate that three unexcused tardies would be a serious violation of the employer’s policy. But that is not the analysis required by statute. Under the statute, the Department would first consider whether the policy itself was reasonable. It is likely that such an ironclad policy would not be reasonable, if it did not contain exceptions for individuals with valid excuses for tardiness, like

---

<sup>19</sup> Respondent’s brief, p. 24.

emergencies with sick children, or inclement weather that prevented safe passage to work. An employee would not commit misconduct under such circumstances, because an employer has no right to expect perfect attendance in such circumstances. In short, an employer's policy is the beginning of the Department's inquiry, but it is far from the end. The statute requires that the Department offer an individualized analysis to all applicants, and that is what the Department currently gives.

**b. The Stagg Court revived and expanded Hoemberg, improperly making the employer the arbiter of eligibility in many cases.**

Respondent's brief accuses the Department of being hyperbolic in its claim that the *Stagg* ruling revived and expanded the *Hoemberg* doctrine, and overstating the impact that it will have on Department decisionmakers. Namely, Stagg claims that the Court of Appeals did not broaden the *Hoemberg* ruling at all, but was simply in keeping with the past 30 years of case law, where the courts "have applied *Hoemberg* without problem and distinguished circumstances in which the rule does not apply."<sup>20</sup> But that is not what the Courts have done.

In every case in which the Court of Appeals cited *Thurner*, the courts could just as easily have cited *Hoemberg*. Instead, Minnesota courts have simply created an exception that swallowed the rule, in effect affirming *Auger* and implicitly overruling *Hoemberg* by declining to invoke it. The Court of Appeals, by

---

<sup>20</sup> Respondent's brief, p. 20.

declining to apply *Thurner* in *Stagg*, did not simply continue in its previous path (as respondent asserts) of applying *Hoemberg* when it applies and distinguishing it when it doesn't. Prior to *Stagg*, since the statutory definition became exclusive, the court has not invoked *Hoemberg* in order to remove an applicant's doings from the realm of misconduct. Every case that *Stagg* cites in his brief to argue that *Hoemberg* is still good law was decided before the legislature adopted an exclusive statutory definition of misconduct.<sup>21</sup>

*Stagg* changed how the Court of Appeals looks at the word "may." Prior to *Stagg*, "may" was the catch-all word that the Court used to invoke *Thurner* and avoid *Hoemberg* without specifically overruling it. And since some sort of permissive or "may" clause will almost invariably appear in every handbook or manual, the Court created an exception that swallowed the rule. For the first time in *Stagg*, the Court repudiated this broad exception, finding that "this interpretation would permit Vintage to discipline employees for absenteeism in any form and in any manner whatsoever, thus rendering the progressive-discipline steps meaningless."<sup>22</sup> In other words, the *Stagg* Court repudiated the broad brush of the *Thurner* exception, when in fact the broad exception is the only thing that has allowed Minnesota courts to avoid explicitly overruling *Hoemberg* since the legislature defined "misconduct" in 1997 and then made it exclusive in 1999.

---

<sup>21</sup> Respondent's brief, p. 20; every case was decided before 1999, when the legislature made the statutory definition of misconduct exclusive.

<sup>22</sup> *Stagg*, at \*4.

The broad *Thurner* exception has allowed Minnesota courts to avoid any effort to consider *Hoemberg* within the confines of the clear statutory language. Respondent's brief essentially argues that the *Hoemberg* analysis is sound because the employer's disciplinary procedure is a proxy used to define its behavioral expectations, and boldly claims that "*Hoemberg* addresses the question of what *standard* an employer had the right to reasonably expect of its employees."<sup>23</sup> But Stagg does not cite any language in *Hoemberg* to buttress that assertion, and indeed no Court has ever held that the disciplinary procedure sets the behavioral expectations of the employer. *Hoemberg* created an exception to the then-common law definition of misconduct, but it cannot be reconciled with the current statute.

An employer can adopt behavioral standards and disciplinary procedures, and follow them to a T. It can even assert that it has declared certain conduct to be a "serious" violation of its policies, perhaps by assigning more stringent penalties to conduct that it deems to be particularly serious. Respondent's brief urges the acceptance of these policies because they convey the seriousness of the conduct.<sup>24</sup> It even goes so far as to declare that *Hoemberg* creates an objective test or rule for determining what an employer's reasonable expectations are.<sup>25</sup>

But putting aside the fact that *Hoemberg* never claimed to create a rule or a test, much less an objective one, this analysis would improperly divest Department

---

<sup>23</sup> Respondent's brief, p. 23.

<sup>24</sup> Respondent's brief, p. 25.

<sup>25</sup> Respondent's brief, p. 10.

adjudicative clerks, the ULJs, and ultimately the Courts, of their statutory responsibility to decide whether an applicant's conduct was a serious violation of the employer's reasonable standards. Stagg admits that in at least some circumstances the Department should not award benefits even if the employer has failed to follow its own disciplinary procedure.<sup>26</sup> But Stagg also does not acknowledge that in many cases an employer's failure can work to the applicant's advantage; for example, in Stagg's case, he received more verbal warnings than he was entitled to under Vintage Place's handbook. Both examples underlie the Department's basic point: an employer cannot bind the Department or Minnesota courts to its own definition of misconduct, and the question of whether an employee should have been fired is wholly separate from the question of whether he was discharged for misconduct.

In his brief, Stagg does not argue that he did not know about the policy that he needed to come to work on time, or that such a policy was unreasonable. He does not dispute the ULJ's factual findings that he was warned repeatedly for being absent or tardy. Instead, he argues that "the Policy does not warn employees that Vintage might terminate them without engaging in each of the progressive steps, nor did Vintage ever warn Stagg that he might be terminated for a single additional tardy."<sup>27</sup> But the misconduct statute does not provide that an applicant commits misconduct only when he receives a final warning attached to an

---

<sup>26</sup> Respondent's brief, p. 25, n. 3.

<sup>27</sup> Respondent's brief, p. 22-23.

ultimatum. Indeed, the misconduct statute provides that an applicant can be ineligible due to misconduct even in situations where his conduct involved a single incident.<sup>28</sup> In such situations an employee would have received no warnings at all, much less a specific final warning. This is because the inquiry is not into whether the applicant was aware of the potential disciplinary *consequences* of his acts, but rather whether the acts violated the *standards* of behavior that his employer had the right to reasonably expect of him. The fact that Stagg didn't think he would be discharged does not change the fact that Stagg knew that his employer expected him to arrive at work on time, and chose to arrive late anyway. Stagg is like most applicants held ineligible for misconduct, in that he did not believe that he would be fired for his conduct.

Stagg contends that Vintage Place had previously accepted tardiness without discipline,<sup>29</sup> but at the same time acknowledges he received verbal warnings, a written warning, and a suspension about his tardiness, the last month before his discharge. It may be that Stagg is attempting to argue that Vintage Place did not actually expect its employees to show up on time. But there is nothing in the record to support that assertion, and the ULJ made factual findings to the contrary. Such an argument might have been successful if Vintage Place employees never arrived at a scheduled time, but simply came and went at whim, until one day Stagg was suddenly terminated. But here, Stagg had a schedule, and

---

<sup>28</sup> Minn. Stat. § 268.095, subd. 6(d).

<sup>29</sup> Respondent's brief, p. 11.

he was repeatedly warned that he needed to work the hours that he was scheduled. Stagg may argue that he didn't believe he would be fired after his last tardy, but he certainly cannot argue that he didn't know that Vintage Place wanted him to show up on time for his shift.

**c. Stagg must find his remedy in contract law.**

Respondent's brief contends that the Court of Appeals in Stagg did not "change the underlying rationale for the *Hoemberg* rule that employees have the right to expect a company to follow its own procedures."<sup>30</sup> Notably, respondent cites *Hoemberg*, but does not cite any corollary statutory provision. That is because there is none. An individual applicant's rights with respect to unemployment benefits are between the applicant and the Department, not between the applicant and the employer. Unemployment benefits are not paid by any individual employer, but instead by the public trust fund. Unemployment benefits are a creature of statute, not common law, and are payable only when the statute has created an entitlement to them.

When Stagg argues that we can simply "avoid this issue altogether" by having employers follow their disciplinary procedures or notify its employees that it will not follow them,<sup>31</sup> he shows a fundamental misunderstanding about the Department's obligations. The Department can never "avoid" the issue; from the very first instance in which an eligibility issue is raised, the Department must

---

<sup>30</sup> Respondent's brief, p. 22.

<sup>31</sup> Respondent's brief, p. 11.

concern itself with whether an applicant has committed misconduct under the statutory definition, regardless of whether the employer agrees. In the 45,000 misconduct cases that Department clerks adjudicate for eligibility each year, as well as in the 8-10,000 misconduct hearings that ULJs conduct in those cases that are appealed, the Department must undertake such considerations.

Unemployment insurance benefits are designed to provide “workers who are unemployed through no fault of their own a temporary partial wage replacement to assist the unemployed worker to become reemployed.”<sup>32</sup> They do not exist to provide an employee a remedy against an employer for breach of contract or wrongful termination. They also cannot be paid as damages to punish an employer who has not fully participated in the determination or hearing process,<sup>33</sup> just as they cannot not be paid to punish an employer that has not followed its disciplinary procedures. Under Stagg’s reasoning, the UI system would exist to pay benefits to those whose employers had breached an employment agreement. This could include, as the Department outlined in its principal brief, applicants who were fired for stealing tools, but who were improperly searched under the terms of their union contract.

But unemployment insurance is an economic security program, not a substitute for civil lawsuits. The rights an applicant has in an unemployment insurance proceeding are laid out by statute. An applicant who has been shorted

---

<sup>32</sup> Minn. Stat. § 268.03, subd. 1(2009).

<sup>33</sup> *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 376 (Minn. 1996).

\$10 on a paycheck may have a remedy at civil law, but she does not have a good reason to quit under the terms of the unemployment insurance statute, and is not eligible for benefits. An applicant who has been fired after being improperly searched under the union contract may have a remedy available in the form of a union grievance, but he has still committed misconduct by stealing from his employer and is not entitled to unemployment benefits. Respondent's brief does not explain why Stagg, if he has truly been terminated in violation of his employment contract, has not brought a civil action and been reinstated at Vintage Place. If Stagg has additional rights available to him in the arenas of civil or employment law, then he would certainly be entitled to seek his remedy there.

**d. The Department has not “waived” its argument that, at minimum, this case would need to be remanded to get the entire handbook into the record.**

Finally, respondent's brief asserts that the Department has waived its argument that this case would need to be remanded for an additional evidentiary hearing, should the Court somehow find that *Hoemberg* remains good law.<sup>34</sup> The Department has not done so, and indeed argued in its principal brief that if the Court should so rule, a remand for an additional evidentiary hearing would be necessary for the ULJ to take evidence on the complete contents of the Vintage Place employment manual.<sup>35</sup>

---

<sup>34</sup> Respondent's brief, p. 11.

<sup>35</sup> Department's principal brief, p. 11.

Stagg cannot be entitled to benefits simply because the ULJ did not receive the entire manual into the record at hearing. It is true that a ULJ has an obligation to develop the record at hearing, but as the Department discussed in its principal brief, there are no burdens of proof in unemployment insurance proceedings, beyond the applicant's disclosure obligations.<sup>36</sup> A ULJ may have a statutory obligation to develop the record, but this does not convert the obligation to a "burden," such that the failure to meet it could result in the payment of benefits. A ULJ's failure to obtain necessary evidence does not entitle an applicant to benefits, but rather necessitates a rehearing for additional factfinding.

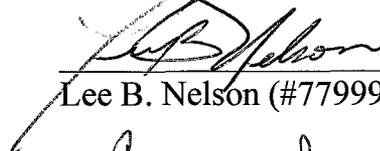
### **Conclusion**

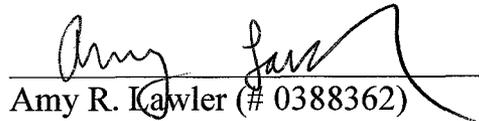
The decision of the Court of Appeals finding that Stagg is eligible for unemployment benefits should be reversed.

---

<sup>36</sup> Appellant's brief, p. 10.

Dated this 25<sup>th</sup> day of October, 2010.

  
\_\_\_\_\_  
Lee B. Nelson (#77999)

  
\_\_\_\_\_  
Amy R. Kawler (# 0388362)

Department of Employment and  
Economic Development  
1<sup>st</sup> National Bank Building  
332 Minnesota Street, Suite E200  
Saint Paul, Minnesota 55101-1351  
(651) 259-7117  
Attorneys for Respondent Department