

NO. A09-0949

State of Minnesota
In Supreme Court

Department of Employment and Economic Development,
Petitioner,

v.

Ronald J. Stagg,
Respondent,

and

Vintage Place, Inc.,
Respondent.

**RESPONDENT RONALD J. STAGG'S RESPONSE TO THE
DEPARTMENT'S APPEAL OF DECISION OF COURT OF APPEALS**

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EMPLOYMENT AND ECONOMIC
DEVELOPMENT

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STATEMENT OF THE ISSUES

- I. May Appellant-Department raise a new legal theory not presented to the Court of Appeals or addressed by the Unemployment Law Judge as a basis for reversing the Court of Appeals' decision to reinstate Respondent Stagg's unemployment compensation benefits?

List of Most Apposite Cases:

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

- II. Did the Court of Appeals err by following 26 years of precedent holding that, in cases where an employer provides a progressive disciplinary procedure for absenteeism or tardiness and there is no evidence that the employer gave notice to the employee that it intended to deviate from that policy, the employer must follow that procedure before an employee who is discharged can be properly denied unemployment compensation benefits?

List of Most Apposite Cases:

Hoemberg v. Watco Publishers, Inc., 343 N.W.2d 676 (Minn. Ct. App. 1984)

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

Neubert v. St. Mary's Hosp. & Nursing Ctr. of Detroit Lakes, 365 N.W.2d 780 (Minn. Ct. App. 1985)

List of Most Apposite Statutes:

Minn. Stat. § 268.095, subd. 6(a) (2008)

III. Does occasional absenteeism or tardiness constitute statutory unemployment misconduct—a serious violation of the standards of behavior that the employer has a right to expect—where an employer routinely allows employees to be tardy with no consequences?

List of Most Apposite Cases:

Reddman v. Kokesch Trucking, Inc., 412 N.W.2d 828 (Minn. Ct. App. 1987)

List of Most Apposite Statutes:

Minn. Stat. § 268.095, subd. 6(a) (2008)

STATEMENT OF THE CASE

This appeal arises from the employment discharge of Respondent Ronald J. Stagg (“Stagg”). Following his dismissal from Respondent Vintage Place Inc. (“Vintage”), Stagg applied for unemployment benefits. (RA. 13-14.) Appellant, the Department of Employment and Economic Development (the “Department”), determined Stagg was ineligible for unemployment benefits because Vintage had discharged him for employment misconduct. (R. 10-11.) Stagg appealed that determination to a Department unemployment law judge (“ULJ”). (R. 12.)

On April 1, 2009, a Department ULJ conducted a telephonic hearing. (A. 14.) Vintage’s night supervisor, Anthony Johnson, represented the employer and testified on its behalf. (T. 9.) Additional witnesses for Vintage were its president, Troy Johnson, and a second supervisor, Mikle Cline. (A. 14.) Mr. Stagg represented himself and was his only witness. (T. 9.)

The ULJ determined that Stagg’s tardiness and absenteeism constituted employment misconduct, making him ineligible for unemployment benefits. (A. 15.) Stagg requested reconsideration of that decision. (RA. 5) By Order dated April 30, 2009, the ULJ affirmed his findings of fact and conclusions of law. (A. 9-12.) Stagg then appealed the ULJ’s decision to the Minnesota Court of Appeals. (A. 3.)

The Court of Appeals reversed the ULJ’s decision, finding Stagg did not engage in employment misconduct and was therefore eligible for unemployment compensation. *Stagg v. Vintage Place Inc.*, No. A09-949, 2010 WL 2160902 (Minn. Ct. App. June 1, 2010) (A. 1-8.). The Department petitioned this Court for review of the Court of

Appeals' decision, which was granted on August 10, 2010. (RA. 88-93.) Stagg now responds to the Department's appeal.

STATEMENT OF THE FACTS

Vintage is a group home for troubled youth. (T. 16.) Stagg worked full-time as a counselor on the overnight shift, earning \$12.00 per hour. (T. 16.) His shift began at midnight. (*See, e.g.*, T. 18.)

Vintage's Employee Manual contains an absenteeism/tardiness policy and sets forth a progressive discipline procedure for violations ("Policy"). (R.Add. 1-2.) The Policy defines excessive absences as "more than six per rolling year" and requires employees to call in at least two hours before the start of a shift to be excused for an absence. (R.Add. 1.) The Policy further states:

Repeated occurrences of being tardy to work are cause for disciplinary action. . . . Excessive absences will result in counseling, up to and including termination, depending upon the severity of the problem. Please see the absenteeism/tardiness policy and procedure for more details. Should your supervisor . . . notice a pattern to your absences, counseling will result.

(*Id.*) In a separate section entitled "Discipline," the Policy states:

Upon returning to work from an unexcused absence, an employee must report to the Supervisor and disclose the reasons for the absence. If the reason is not acceptable, the employee may be disciplined in accordance with the following schedule:

First unexcused absence – oral warning.

Second unexcused absence – written warning.

Third unexcused absence – 3-day suspension.

Fourth unexcused absence – 10-day suspension.

Fifth unexcused absence – discharge.

(R.Add. 2.)

Stagg began working at Vintage on November 23, 2007. (T. 15.) Although Vintage claims Stagg had attendance problems during his first year of employment, no documentation was made of that fact, and no formal steps were taken, pursuant to Vintage's Policy, to address any attendance issues. Stagg's previous supervisor, Mikle Cline, testified that Stagg was late "several times," but did not specify when or for what reason. (T. 36.) Cline stated he only gave Stagg verbal warnings because Stagg was a "valued employee." (*Id.*) At Stagg's annual review in November 2008, poor attendance was not extensively discussed. (T. 39.) Cline never told Stagg that he could lose his job if he was late; he said only that if Stagg's attendance did not improve, "there could be further consequences." (T. 37.)

In practice, Vintage was relatively liberal with employees regarding absenteeism and tardiness, not just with Stagg but with its other employees as well. Its president, Troy Johnson, testified that "we do not fire a lot of people," and that the company "give[s] people a whole lot of chances." (T. 33.) Troy Johnson and Anthony Johnson both stated that poor attendance was an issue for many employees. (T. 33, 25-26.) Anthony Johnson put a group of employees ("a lot of people"), including Stagg, on "probation" in November 2008 for attendance issues but told Stagg the probation had nothing to do with him personally and not to feel singled out. (T. 26.) Stagg was allegedly placed on "probation" on November 27, 2008, after he arrived late for the

midnight start of his shift, due to illness. (T. 18, 42.) No written documentation was made of the alleged “probation” or its terms, and Stagg denies knowing or ever receiving notice he was put on “probation.” (T. 45.)

Stagg received his first written warning from Vintage on December 3, 2008, documenting two attendance-related incidents. (RA. 17.) The first was Stagg’s tardiness on November 27, 2008, discussed above. (*Id.*) The second documented incident occurred on December 1, 2008, when Stagg called in sick and notified Mr. Johnson that he was unable to work. (*Id.*) The December 3, 2008 warning notified Stagg that he would be placed on suspension should another incident occur. (*Id.*) Before he received that warning, however, Stagg arrived 45 minutes late for his midnight shift, and Anthony Johnson issued Stagg a second warning, placing him on a two-day suspension.¹ (RA. 18.) The second warning did not contain any comment with respect to what consequence Stagg would receive for another violation. (*Id.*)

Almost two months passed without further incident. (T. 42.) On January 28, 2009 Stagg overslept past his midnight start time. (T. 41.) When he called in to work at 12:30 a.m. to let his supervisor know he was on his way, Anthony Johnson told him to just stay home, and discharged Stagg the next day. (*Id.*)

In both his request for unemployment benefits (RA. 14) and at the April 1, 2009 hearing, Stagg stated that he did not know his job was at risk if he was tardy one more time. (T. 45.) He was familiar with the Policy outlined above, and knew the disciplinary

¹ Although the first warning is dated December 3, 2008, Johnson did not give Stagg the warning until he arrived late for his shift that day.

procedure called for an oral warning, a written warning, a 3-day suspension, and a 10-day suspension before discharge. (T. 45.) Because he had not received a 3-day or 10-day suspension, he did not know he could be terminated for a single further incident. (T. 45.) Vintage contended that the 2-day suspension issued on December 4, 2008, was actually a 3-day suspension, but admits that it did not issue a 10-day suspension. (T. 48.)

Moreover, Vintage never communicated to Stagg that he would be discharged for another violation. Anthony Johnson testified that Stagg was told at his November 2008 annual review that his job was at risk if he continued to be tardy (T. 20), but this testimony was rebutted by Mikle Cline, the supervisor who conducted Stagg's review. (T. 37.) When asked by the ULJ whether he told Stagg he could lose his job, Cline did not answer in the affirmative, but stated he told Stagg he could receive "further consequences." (T. 37.)

On April 3, 2009, the ULJ issued his findings of fact and decision. In that decision, he found:

Stagg claims that he did not believe that his job was at risk because Vintage did not follow the progressive discipline, particularly, that the 10-day suspension was skipped. However, Stagg had received multiple verbal and written warnings regarding his attendance and he did receive a three day suspension. Therefore, the fact that Vintage did not follow the progressive discipline policy to the letter is not a significant factor in determining whether his actions were employment misconduct. An employer can reasonably expect an employee to report to work when scheduled or properly notify the employer in the event of any variation. Stagg's actions displayed a serious violation of the standards of behavior Vintage had a right to reasonably expect.

(A.15 (emphasis added).) The ULJ went on to find that Vintage discharged Stagg for employment misconduct, making him ineligible for unemployment benefits. (*Id.*)

On appeal by certiorari to the Minnesota Court of Appeals, Stagg argued the ULJ erred in his determination of misconduct on two grounds. First, Stagg argued the law did not permit a finding of misconduct because Vintage failed to follow the progressive disciplinary policy set forth in the Policy. (RA. 40-61.) Second, Stagg argued substantial evidence in the record did not support the ULJ's misconduct finding. (*Id.*) In an unpublished opinion, the Court of Appeals agreed with Stagg's first argument, declined to address the second, and found Stagg did not engage in misconduct and was therefore eligible for unemployment compensation. (A. 1-8.) The matter is now before this Court on the Department's appeal.

SUMMARY OF ARGUMENT

The Department's appeal to reverse the unpublished *Stagg* decision is "much ado about nothing." The ULJ exceeded his authority by denying Stagg unemployment compensation despite finding that Vintage did not follow its progressive disciplinary policy and despite circumstances showing Stagg's tardiness did not seriously violate Vintage's reasonable expectations. Relying upon *Hoemberg v. Watco Publishers, Inc.*, 343 N.W.2d 676 (Minn. Ct. App. 1984), *pet. for rev. denied* (Minn. May 15, 1984), the Court of Appeals correctly reversed the ULJ's decision and restored Stagg's unemployment compensation. The Department is portraying the Court of Appeals' decision as something broader than it is. Even the Department concedes that for nearly 30 years, both it and the Minnesota Court of Appeals have been able to apply the

Hoemberg rule and “sidestep” it where the facts are distinguishable. (RA. 89.) The unpublished *Stagg* decision does nothing more than reaffirm what has been good law in Minnesota for nearly three decades.

Hoemberg stands for the narrow proposition that where an employer provides a progressive tardiness/absenteeism disciplinary procedure in an employment handbook, fails to follow it, does not issue a disclaimer or provide notice that it may deviate from said policy, and terminates the employee, the discharged employee has not committed “misconduct” sufficient to deny him his right to unemployment compensation benefits. The fact that *Stagg* is one of the few disciplinary policy cases since *Hoemberg* was decided in which the Department has not prevailed is not grounds for reversal. This Court declined to review *Hoemberg* 26 years ago and should not overturn it now.

The Department now asserts for the first time that this Court’s holding in *Auger v. Gillette Co.*, 303 N.W.2d 255 (Minn. 1981) cannot be reconciled with *Hoemberg* and the *Stagg* decision. Parties are precluded from raising new legal theories on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). The Department did not cite *Auger* below. (See RA. 22-39.) Nor did it argue to the Court of Appeals or the ULJ that *Hoemberg* should be overturned. (*Id.*) The Department merely argued why *Stagg* was distinguishable from *Hoemberg*. (RA. 34-35.)

There is also no legal or policy basis for reversing the unpublished *Stagg* decision. Employees should not be penalized for relying to their detriment upon an employer’s written disciplinary schedule. An employer can choose to follow its schedule or provide notice to its employee it intends to deviate from the schedule. The Department’s

assertion *Stagg* and *Hoemberg* cannot be reconciled with *Auger* because ULJs supposedly now have a responsibility to determine whether the employee was wrongfully terminated is without merit. In *Auger*, this Court stated, “[t]he test of whether activity constitutes misconduct for purposes of disqualification from unemployment compensation benefits is whether it is in willful disregard of an employer's interest and disregard of *standards of behavior* which the employer has a right to expect of his employee.” *Auger*, 303 N.W.2d at 257 (emphasis added). The *Hoemberg* rule is an objective test to determine what standards of behavior an employer has a right to expect.

Neither *Stagg* nor *Hoemberg* contradict *Auger*. In *Hoemberg*, the Court of Appeals applied the *Auger* rationale to circumstances involving an employee handbook and held that “[w]hile the violation of a work rule may well justify the discharge of an employee, such a violation *does not necessarily amount to misconduct for unemployment compensation purposes* [where] [] *there is evidence that the employees had notice of the disciplinary procedures in the handbook and had every right to expect the company would follow those procedures.*” *Hoemberg*, 343 N.W.2d at 679 (emphasis added). The rationale set forth in *Hoemberg*, which the Court of Appeals applied to decide *Stagg*, is consistent with *Auger*'s directive that the question of whether an employee was wrongfully terminated is not at issue for purposes of unemployment compensation.

The Department's asserted concern that *Hoemberg* (and now *Stagg*) create myriad problems for determining whether an employee is entitled to unemployment compensation benefits is disingenuous. The Department concedes that for nearly 30 years the Court of Appeals has been able to apply the *Hoemberg* rule and “sidestep” it

where the facts are distinguishable. (RA. 89.) To avoid this issue altogether, an employer need only follow its own written disciplinary policy or notify the employee, either verbally or in a written disclaimer, that it might not follow its policy.² See e.g., *Foix v. Clusiau Sales & Rental*, No. A09-728, 2010 WL 346401, at *3 (Minn. Ct. App. Feb. 2, 2010); *Krueger v. White Earth Reservation*, No. A09-736, 2010 WL 274518, at *3-5 (Minn. Ct. App. Jan. 26, 2010).

Moreover, even if Vintage was not obligated to follow its own disciplinary procedure (which it was), the record establishes that Vintage had a history of permitting its employees to be tardy without consequence, and Stagg did not receive notice sufficient to know that his job was at risk in the event he had a single additional tardy. Stagg's tardiness was conduct a reasonable employee at Vintage would have engaged in. Such conduct is excluded from the statutory definition of misconduct. The ULJ's finding that Stagg's tardiness was a serious violation of Vintage's reasonable expectations is

² In its argument to the Minnesota Court of Appeals, the Department presented two arguments why Vintage's failure to follow its own policy should not result in a finding that Stagg is eligible for unemployment benefits. First, it argued "there is nothing in the record that indicates that Vintage Place's employment manual constituted an employment contract," but acknowledged that nothing in the record shows that Vintage's policy is not a contract. (RA. 34.) The burden falls on the ULJ to develop relevant facts. Minn. Stat. § 268.105, subd. 1(b). Acknowledging that it was, of course, limited to the record before it, see *id.* § 268.105, subd. 7(d), the Court of Appeals correctly rejected Department's arguments that relied upon allegations of purely speculative facts. (A. 7.) Second, the Department argued the decision in *Thurner v. Philip Clinic, Ltd.*, 413 N.W.2d 537 (Minn. App. 1987), rather than *Hoemberg*, controls this case. (RA. 34-35.) The Court of Appeals rejected this argument as well, finding *Hoemberg*, not *Thurner*, controlled. (A. 8.) The Department's current appeal does not present either of the two arguments made to the Court of Appeals and thereby implicitly waives its right to appeal those determinations.

unsupported by substantial evidence. Accordingly, Stagg respectfully requests this Court affirm the Court of Appeals' decision finding him eligible for unemployment benefits.

STANDARD OF REVIEW

On appeal, a reviewing court may reverse or modify the decision of the unemployment law judge if:

the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d) (2008). Questions of law are reviewed *de novo*. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W. 2d 525, 529 (Minn. Ct. App. 2007). Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee committed the particular act at issue is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. Ct. App. 1997). But whether the act committed by the employee constitutes disqualifying misconduct is a question of law, which this Court reviews *de novo*. *Schmidgall*, 644 N.W.2d at 804. The applicable standard of review in this case is *de novo*.

ARGUMENT

I. THE DEPARTMENT'S CURRENT ARGUMENT WAS NOT RAISED TO THE COURT OF APPEALS AND IS THEREFORE NOT PROPERLY BEFORE THIS COURT.

In defending the ULJ's decision before the Court of Appeals, the Department argued that, although *Hoemberg* was good law, it did not control the outcome in this case. (See RA. 32-35.) Instead, the Department argued that a different case, *Thurner v. Philip Clinic, Ltd.*, 413 N.W.2d 537 (Minn. Ct. App. 1987), which distinguished itself from *Hoemberg*, controlled. (RA. 34-35.) Specifically, the Department relied upon language in Vintage Place's manual stating that "if the reason [for an employee's absence or tardiness] is not acceptable, the employee may be disciplined in accordance with the following schedule." (RA. 34 (quoting R.Add. 2).) Relying upon *Thurner*, the Department argued that the use of the word 'may' "proves critical," and distinguishes Respondent's case from the rule in *Hoemberg*. (RA. 34.) The Court of Appeals addressed and rejected this argument. (A. 8.)

The Department has now changed course. Instead of arguing that Stagg's case is distinguishable from *Hoemberg*, the Department contends for the first time that the 26-year old *Hoemberg* rule is irreconcilable with this Court's holding in *Auger*. (Appellant's Br. at 17-26.) This theory was never raised to the Court of Appeals. Indeed, *Auger* was not even cited to the Court of Appeals, by either party. (See RA. 22 -74.) Because the Department did not argue this theory below, it is not properly before this Court.

"A reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'"

Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (quoting *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982)). “It is elementary that on appeal a case will be considered in accordance with the theory on which it was pleaded and tried, and a party cannot for the first time on appeal shift his position.” *Urban v. Cont’l Convention & Show Mgmt. , Inc.*, 68 N.W.2d 633, 635 (Minn. 1955). This prohibition on raising new theories not argued below applies equally to unemployment compensation cases. See *Steinkraus v. Food & Drink Inc.*, No. A09-1266, 2010 WL 1440431, *1 n. 1 (Minn. Ct. App. April 13, 2010). Because the Department never presented its current argument to the Court of Appeals, it should not now be permitted to shift its position and raise this new theory to this Court. This Court may properly deny the Department’s appeal on this basis alone.

II. AS A MATTER OF LAW AND POLICY, THE COURT OF APPEALS’ DECISION SHOULD BE AFFIRMED; THE *HOEMBERG* RULE CORRECTLY SETS FORTH AN OBJECTIVE STANDARD TO DETERMINE AN EMPLOYER’S STANDARD OF CONDUCT AND WHETHER AN EMPLOYEE SUBSTANTIALLY VIOLATED IT.

A. Legal standard for determining misconduct.

An employee discharged for misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). In light of the humanitarian and remedial nature of unemployment laws, disqualification provisions are to be narrowly construed. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006); *Riley v. Transp. Corp. of Am., Inc.*, 462 N.W.2d 604, 607 (Minn. Ct. App. 1990). The question of misconduct for unemployment compensation purposes is

different from whether an employee's discharge was justified. *Id.* The law defines misconduct as:

[A]ny intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Minn. Stat. § 268.095, subd. 6(a) (emphasis added).

“For an employee's conduct to constitute employment misconduct, the ‘conduct must (1) be intentional and (2) disregard standards of behavior the employer has a right to expect or the employee's duties and obligations to the employer.’” *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. Ct. App. 2004) (quoting *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002)). Disqualification from unemployment benefits requires “a sufficient showing in the record that the employee intended to engage in, or actually engaged in, conduct that evinced an intent to ignore or pay no attention to the employee's duties and obligations or the standards of behavior the employer had a right to expect.” *Id.* (quotations omitted). “What is ‘reasonable’ will vary according to the facts and circumstances of each case.” *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. Ct. App. 1985). (See also Appellant's Br. at 14

(“statutory inquiries [into the reasonableness of an employer’s standard] are highly fact-specific”.)

B. The Court of Appeals correctly found Stagg’s tardiness was not employment misconduct because Vintage failed to follow its own disciplinary procedure for tardiness and absenteeism.

The Court of Appeals correctly found that Stagg did not engage in “employment misconduct.” In *Hoemberg*, the Minnesota Court of Appeals determined that provisions within an employee manual are “more than mere general statements of policy—they are conditions of employment” enforceable as part of the employment agreement. 343 N.W.2d 676, 678 (Minn. Ct. App. 1984). An employee can reasonably expect an employer to follow the provisions on discipline set forth in the employee manual. *Id.* Although an employee’s violation of a work rule may warrant his discharge, where an employer fails to follow its own discipline procedures for the violation, the violation does not rise to the level of misconduct. *Id.* at 679. This is because “allow[ing] the employer to call every violation of a work rule a serious infraction would circumvent the procedural protections of the employees’ handbook and make a mockery of the rights contractually granted to employees.” *Id.*

In *Hoemberg*, an employer terminated two employees after they left its premises without informing the manager, despite the fact the company had warned employees as a group both verbally and in writing that they were prohibited from doing so. *Id.* at 678. The employee handbook called for three steps of progressive discipline, and stated that employees would be told specifically when receiving discipline. *Id.* Because the group

warnings did not comply with the handbook provision requiring individual warnings, the employees' work-rule violation did not amount to misconduct. *Id.* at 679.

The Minnesota Court of Appeals has summarized the *Hoemberg* rule as follows:

If the provisions [of an employer's policy manual or handbook] are more than mere general statements of policy, the handbook becomes an enforceable part of the employment agreement. An employee has the right to expect that the employer will follow the disciplinary procedures outlined in the employee handbook. Furthermore, an employee's actions will not be considered misconduct if the employer failed to follow its own disciplinary provisions.

Jordan v. Leaf Indus., No. C2-92-1088, 1992 WL 350304, at *3 (Minn. Ct. App. Dec. 1, 1992) (citing *Hoemberg*, 343 N.W.2d at 678-79).

The Court of Appeals has applied *Hoemberg* on multiple occasions to reverse administrative findings of misconduct. *See, e.g., Eyler v. Minneapolis Star & Tribune Co.*, 427 N.W.2d 758, 761 (Minn. Ct. App. 1988) (citing rule in *Hoemberg* and remanding case to Employment Commissioner to determine whether employer followed its own progressive disciplinary procedures before discharging appellant); *Gerr v. Target-Fridley*, 382 N.W.2d 231, 235 (Minn. Ct. App. 1986) (reversing finding of misconduct for absenteeism where employer did not comply with its own published policy on absenteeism); *McCullough v. Bureau of Engraving*, No. C5-97-2061, 1998 WL 373055, *1 (Minn. Ct. App. July 7, 1998) (same). The Court has even gone so far as to find that an employee has good cause to resign where her employer substantially deviates from the progressive discipline policy contained in its manual. *Neubert v. St. Mary's Hosp. & Nursing Ctr. of Detroit Lakes*, 365 N.W.2d 780, 782-83 (Minn. Ct. App. 1985).

Vintage's Policy provides five progressive steps for discipline for excessive absenteeism or tardiness. (R.Add. 2.) It specifies what consequence an employee can expect; it is more than a mere general statement of policy. At the ULJ hearing, Vintage did not dispute Stagg was aware of the Policy. And Vintage offered no evidence to show it informed Stagg that it intended to deviate from the Policy. At best, the fact Vintage issued Stagg a two-day suspension indicated that, after not disciplining Stagg for tardiness for over one year, Vintage decided to start enforcing its Policy.

It is undisputed Vintage did not follow its progressive disciplinary procedure when it terminated Stagg. Without notice, and without explaining why it should be allowed to ignore its own Policy, Vintage skipped at least one significant disciplinary step and terminated Stagg for tardiness. Vintage asserts the two-day suspension issued on December 4, 2008, was actually a three-day suspension, and the ULJ agreed. But there is no dispute Stagg never received a ten-day suspension. The ULJ acknowledged this, but determined Vintage's failure to follow its own policy was not "a significant factor" in determining misconduct. (A. 15.)

Vintage was obligated and Stagg had the right to expect Vintage to follow its own Policy. *See Hoemberg*, 343 N.W.2d at 678. The ULJ erred by determining Vintage's deviation was "not a significant factor." (A. 15.) Because Vintage failed to comply with its disciplinary procedure for tardiness and absenteeism, the Court of Appeals correctly found Stagg's conduct did not, as a matter of law, rise to the level of misconduct under Minn. Stat. § 268.095, subd. 6(a). (A. 8.)

- C. **The *Hoemberg* rule rests on sound policy consistent with the narrow construction of disqualification provisions—an employer should be required to follow its own progressive disciplinary policy; its failure to do so vitiates the “heedless” aspect of an employee’s conduct.**

As a practical matter, it makes sense to require an employer to follow its own progressive disciplinary procedure for determining unemployment compensation. “The purpose of stated disciplinary procedures is to improve an employee’s conduct and diligence to further the employer’s interests. Violation by the employer of its own procedures vitiates the ‘heedless’ aspect of purported misconduct.” *Eyler*, 427 N.W.2d at 761. “[A]n employer has the right to establish and enforce reasonable work rules relating to absenteeism. However, an employer must also observe its own published policies and procedures.” *Gerr*, 382 N.W.2d at 235 (citations and quotations omitted). By 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. An employee should not be found to have engaged in misconduct where the employer never communicated the morphing standard to that employee.

When determining unemployment benefits, the law should (and does) require employers to follow their own disciplinary procedures, because those procedures communicate the expectations of the employer—a conclusion that flows from the remedial purpose of the unemployment compensation statute. *See Jenkins*, 721 N.W.2d at 289 (quoting *Prickett v. Circuit Science, Inc.*, 518 N.W.2d 602, 604 (Minn. 1994) (“the unemployment compensation statute is remedial in nature and must be liberally construed

to effectuate the public policy set out [therein]”). Whether an employee is entitled to unemployment benefits depends upon whether the employee has substantially deviated from an employer’s reasonable expectations. *See* Minn. Stat. § 268.095, subd. 6(a); *Vargas*, 673 N.W.2d at 206 (for purposes of unemployment compensation, misconduct is conduct that intentionally ignores “the standards of behavior the employer had a right to expect.”). If the standard of conduct an employee can reasonably expect is set forth in an employee handbook, and under the handbook policy an employee was not subject to termination, an employee should not be found to have substantially deviated from the employer’s expectations.

Vintage’s failure to follow its own policy is not an “excuse for misconduct,” as the Department suggests. Rather, it is the *reason* Stagg’s behavior was not misconduct at all. *See Eyley*, 427 N.W.2d at 761 (“Violation by the employer of its own procedures vitiates the ‘heedless’ aspect of purported misconduct.”). Vintage was required to follow its own progressive disciplinary policy for tardiness, because Stagg had the right to expect it to do so. *Hoemberg*, 343 N.W.2d at 678. As a matter of law and policy, the Court of Appeals correctly found that Vintage had an obligation to follow its own policy before it could claim that Stagg substantially deviated from its reasonable expectations.

D. For almost 30 years, the Department and the Court of Appeals have applied *Hoemberg* without problem and distinguished circumstances in which the rule does not apply.

The *Hoemberg* rule has appropriately been distinguished where an employer’s progressive disciplinary policy clearly notifies an employee that the employer may choose to terminate an employee without following the progressive disciplinary steps or

the policy does not squarely address the conduct at issue. *See Thurner v. Philip Clinic, Ltd.*, 413 N.W.2d 537 (Minn. Ct. App. 1987). The unpublished decision in *Behnke v. Pier Foundry & Pattern Shop, Inc.*, No. A05-1916, 2006 WL 1390565 (Minn. Ct. App. May 23, 2006) is one of many illustrating how the Court of Appeals and the Department seamlessly apply this distinction. *See Foix*, 2010 WL 346401 at *3 (handbook notified employees that failure “to maintain an acceptable attendance record will be subject to disciplinary action *and/or termination*” (emphasis added); *see also Krueger*, 2010 WL 274518 at *3-5; *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 775 (Minn. Ct. App. 2008); *Lee v. Japs-Olson Co.*, No. C6-99-1439, 2000 WL 343220, *2 (Minn. Ct. App. April 4, 2000) (finding employee did not engage in misconduct where he did not know his violation of a workplace rule would lead to dismissal). The *Behnke* court summarized the law in this area as follows:

When an employer does not follow the disciplinary procedures in the handbook and the employees had no knowledge that the provisions would not be followed, the employee did not commit misconduct and is qualified for benefits. *Hoemberg*, 343 N.W.2d at 678-79. But if the handbook indicates that disciplinary steps “may” be taken and the employee engaged in a more serious breach of duties than contemplated by the disciplinary procedures, the determination that the employee had engaged in disqualifying conduct was proper. *Thurner*, 413 N.W.2d at 541.

2006 WL 1390565 at *2.

Thurner is easily distinguishable from the facts at bar. Before the Court of Appeals, the Department focused almost exclusively on the use of the word “may” in the Policy, arguing *Hoemberg* did not control because the Policy’s use of the word “may”

made the progressive disciplinary steps optional. The Court of Appeals disagreed, finding the use of the word “may” meant “that Vintage is permitted but not required to discipline its employees for absenteeism.” (A. 8.) The Court of Appeals’ approach is correct—use of the word “may” in a disciplinary policy does not, by itself, change the underlying rationale for the *Hoemberg* rule that employees have the right to expect a company to follow its own procedures. *See Hoemberg*, 343 N.W.2d at 678. In light of the remedial and humanitarian purpose of the unemployment compensation scheme, the law should not allow an employer’s use of the word “may” to create a trap for the unwary employee. *See, e.g., Jenkins*, 721 N.W.2d at 289 (“[public] policy urges us to narrowly construe the disqualification provisions”); *Work Connection, Inc. v. Bui*, 749 N.W.2d 63, 70 (Minn. Ct. App. 2008) (“In order to effectuate [the public policy] purpose [of the unemployment program], provisions that disqualify a person for benefits are narrowly construed.”); *Garcia v. Alstom Signaling Inc.*, 729 N.W.2d 30, 33 (Minn. Ct. App. 2007) (interpreting ineligibility provision narrowly to effectuate public policy behind unemployment benefits).

Rather than looking solely at the use of the word “may,” the Court of Appeals appropriately considered whether Stagg’s conduct fell squarely within the conduct addressed by Policy and whether Vintage provided notice to Stagg that it might deviate from the Policy and terminate him for that conduct. There is no question Vintage’s multi-step Policy squarely addresses tardiness. In fact, the Policy states it applies *only* to unexcused absences and unexcused lateness. And 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. Thus, the Court of Appeals correctly found that an employee like Stagg should not be made to wonder what an employer's expectations are and how seriously an employer will treat a violation of those expectations, when they are so clearly set forth in the employer's own handbook.

E. No Conflict Exists Between *Hoemberg* and *Auger*.

The Department's assertion that *Hoemberg* and *Auger* cannot be reconciled is without merit. The Department has not cited—nor has Stagg found—any case in which the Department has previously raised this alleged conflict to the Court of Appeals or the Supreme Court. The two cases do not conflict with one another.

Auger stands for the proposition that the relevant inquiry for purposes of unemployment compensation is whether an employee committed misconduct—not whether an employer should have terminated the employee. *See Auger*, 303 N.W.2d at 257. *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. *See* 343 N.W.2d at 678. *Hoemberg* addresses the question of what *standard* an employer had the right to reasonably expect of its employees. And as the Department concedes, this is a fact-specific inquiry that depends on a particular employer. (Appellant's Br. at 14 (“[A]n employer is entitled to set its own standards, practices, and policies.”).)

The Department suggests the Court of Appeals found that Stagg was eligible for benefits because Vintage breached its contract with him. (*Id.* at 27-28.) The Department is mistaken. The Court of Appeals found that Stagg “could have reasonably expected Vintage to follow the disciplinary steps, and because Vintage skipped the fourth step of a ten-day suspension, [Stagg’s] absenteeism does not amount to employment misconduct.” (A. 8.) In other words, because Stagg’s tardiness was not a serious violation of Vintage’s reasonable expectations and did not demonstrate a substantial lack of concern for his employment, it was not misconduct.

To be clear, Stagg does not disagree with the Department that the relevant question for purposes of unemployment compensation is whether an employee engaged in misconduct—not whether the employer had a right to terminate an employee. Nor does Stagg contend that Vintage did not have a right to terminate him. The significance of Vintage’s failure to follow its Policy relates to the standard of conduct Vintage had a right to reasonably expect of its employees. By enacting the Policy, Vintage communicated the seriousness (or lack thereof) with which it viewed absenteeism and tardiness.

Viewed from any angle, an employer’s manual evidences the standard of conduct expected by the employer and provides notice to the employee of that standard. While an employer does not have authority under the unemployment statute to decide eligibility, an employer sets its own standards of expected workplace conduct, particularly on issues

such as tardiness or absenteeism, which are not misconduct per se.³ In this respect, an employer's compliance with its own progressive disciplinary policy provides an objective test by which a ULJ can determine the seriousness of an employee's deviation from that standard—a useful tool for a ULJ determining eligibility benefits.

Contrary to the Department's assertion, the *Stagg* decision will not require ULJs to make any sort of breach of contract analysis. The *Stagg* decision does not direct ULJs to gather any evidence or make any determinations beyond what they are already doing. Rather, the objective standard set forth in *Hoemberg*, and followed in *Stagg*, simplifies a ULJ's analysis regarding eligibility by making the standard more objective. If an employer communicates the seriousness with which it views tardiness or absenteeism in a written policy, and has not communicated through the policy or verbal notice that an employee can be terminated for a single additional tardy, an employee has not engaged in misconduct.

The Department's assertion that the *Stagg* decision violates Minn. Stat. § 268.069, subd. 2, which states that "any agreement between an applicant and an employer is not binding on the commissioner in determining an applicant's entitlement," is also without merit. Courts and ULJs consistently look to employment manuals to determine what

³ Rather than discussing the facts of this case, the Department exaggerates the holding in *Stagg* by arguing that it would require the Department to examine and be bound by an employer's policy with respect to obvious acts of misconduct, such as theft. For obvious reasons, an employee's act of theft, a criminal offense, is clearly distinguishable from acts of tardiness and absenteeism. Theft is clearly serious, whereas the seriousness of tardiness and absenteeism depend on the circumstances and expectations of a particular employer. The Court of Appeals did not indicate that its decision in *Stagg* would extend to such circumstances, nor has *Hoemberg* ever been interpreted in such a way.

standard of behavior an employer reasonably had the right to expect of its employees. *See e.g. Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. Ct. App. 1986). For purposes of determining whether an employee has engaged in misconduct, an employee is held to the standards set forth in the manual, as long as the standards are reasonable. It is only fair and just, particularly in light of the remedial nature of the unemployment compensation scheme, that an employee have the right to expect an employer will comply with its own policies.

An important factor courts consider in determining the seriousness of a violation is whether the employee had notice he could be terminated for the violation. *See Lee*, 2000 WL 343220 at *2. Here, Stagg had no notice he would be terminated for a single subsequent tardy, but expected—based on the standard communicated by his employer—that he would receive at least one additional disciplinary step before termination. Vintage’s failure to follow its own policy is highly relevant to the determination of whether Stagg’s tardiness “displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.” Minn. Stat. § 268.095, subd. 6(a)(1). Stagg reasonably expected Vintage to follow its own policy and did not have notice he could be terminated for a single additional tardy.

III. THE COURT OF APPEALS’ DECISION SHOULD ALSO BE AFFIRMED BECAUSE SUBSTANTIAL EVIDENCE SHOWS THAT STAGG’S CONDUCT DID NOT VIOLATE VINTAGE’S REASONABLE EXPECTATIONS.

Even assuming for the sake of argument the Court reverses the Court of Appeals’ determination that Vintage was obligated to follow its progressive disciplinary policy,

this Court should still affirm the Court of Appeals' decision that Stagg did not engage in misconduct. The ULJ's determination that Stagg's tardiness seriously violated Vintage's reasonable expectations is not supported by substantial evidence in the record. *See* Minn. Stat. § 268.105, subd. 7(d)(5).⁴

Minn. Stat. § 268.095, subd. 6(a) excludes from the definition of misconduct "conduct an average reasonable employee would have engaged in under the circumstances." The record unequivocally establishes that Vintage had a history of tolerating tardiness and an extremely spotty history of enforcing its attendance policy. (*See supra*, 5-7.) Such practices created a lax environment in which it was common, and therefore reasonable, for employees to arrive late to work. (*Id.*) In light of these

⁴ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moore Assocs., LLC v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. Ct. App. 1996) (citations and quotations omitted). In presenting this argument to the Court of Appeals, Stagg did not object to the ULJ's factual findings, but rather to the legal conclusion that his tardiness constituted misconduct. This conclusion is subject to *de novo* review. Finding Stagg did not engage in employment misconduct under *Hoemberg*, the Court of Appeals declined to address this alternative argument. (A. 8.) Should this Court reverse the lower court's reliance on *Hoemberg*, Stagg's alternative argument may now properly be considered.

circumstances, Stagg's occasional late arrival for his midnight shift could not constitute a serious violation of Vintage's reasonable expectations.⁵

A court determines reasonableness based on the facts and circumstances at an employee's particular place of employment, rather than some generic definition of reasonableness. *See Sandstrom*, 372 N.W.2d at 91. Thus, it is very important to consider the factual context of a discharged employee's conduct and what expectations an employer communicated to an employee in practice. *See McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721, 725 (Minn. Ct. App. 1991) (reversing a finding of misconduct because "the specific facts and circumstances of this case" showed that employee's frequent absences were not motivated by a "wanton disregard of her employer's interest or lack of concern for her job"); *Reddman v. Kokesch Trucking Inc.*, 412 N.W.2d 828, 830 (Minn. Ct. App. 1987) (affirming Commissioner's finding of no misconduct where an employee who was frequently tardy and left early was informed only once that her schedule was unsatisfactory).

⁵ In response to this argument before the Court of Appeals, the Department relied upon *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868 (Minn. Ct. App. 1986), for the proposition that an employer's selective enforcement of its rules is not a defense to a finding of misconduct. This response misses the point. The relevant question is whether Stagg's tardiness constituted misconduct in the first place—not whether a proven incident of misconduct should be excused because others engaged in the same misconduct without consequence. Stagg does not raise Vintage's failure to punish other employees as a defense to misconduct, but rather as evidence that, through extremely lax enforcement, Vintage created an environment tolerant of tardiness and therefore could not reasonably expect its employees to always be on time. How Vintage responded to the tardiness of other employees is highly relevant to determining what conduct was reasonable for its employees. Under these circumstances, Stagg's tardiness does not fall within the statutory definition of misconduct.

Stagg's tardiness falls into the category of conduct that an average, reasonable Vintage employee would (and did) engage in, which is specifically excluded from the definition of misconduct. *See* Minn. Stat § 268.095, subd. 6(a). Vintage admits that despite having a history of attendance problems with its employees, it did not fire people for tardiness or attendance issues. (T. 33, 25-26.) Thus, the two warnings Stagg received the same day for tardiness due to illness could not have had a significant effect on his perceptions of the work environment based on his more than one-year history of employment. Further, Vintage never notified Stagg that he would be terminated for an additional tardy. (T. 45.)

Given the fact Stagg's shift started at midnight, and a person might understandably oversleep past that night hour, Vintage apparently decided it would tolerate the occasional late arrival to keep Stagg and others in his position employed—a practice that created an environment in which it was acceptable for employees to arrive late. The two warnings issued to Stagg on the same day are not enough to change this environment—they are merely a blip in an otherwise loose practice.

Although many employers may not tolerate its employees arriving late, Vintage admits it did, though it did not state why. One can only imagine Vintage has a difficult time finding and retaining qualified employees—working an overnight shift with troubled youth is not an easy job. It is understandable Vintage would choose to engage in relatively loose practices with respect to requiring timely arrival of night-shift employees. But it is not the ULJ's role to decide whether Vintage should have been so lax. The relevant question is what standard of conduct Vintage could reasonably expect of its

employees. Based on the circumstances at Vintage, it was reasonable, and therefore not misconduct, for Stagg to arrive late to work.

CONCLUSION

Vintage's Employee Manual sets forth a progressive disciplinary procedure for excessive absences which Vintage failed to follow when it terminated Stagg for tardiness and absenteeism. Under *Hoemberg*, Stagg's conduct cannot, as a matter of law, rise to the level of misconduct that would otherwise preclude him from receiving unemployment benefits. The *Hoemberg* rule rests on sound policy. It does not, as the Department asserts, require unemployment law judges to decide breach of contract issues or otherwise violate the rule in *Auger* that a ULJ not decide whether an employee was wrongly terminated.

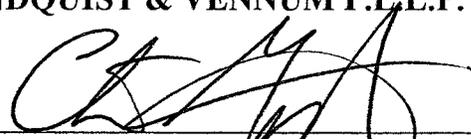
Finally, even if Vintage was somehow not obligated to follow its own progressive disciplinary policy, Stagg's tardiness did not seriously violate Vintage's reasonable expectations. The company had a long history of permitting tardiness and absenteeism of its employees without consequence. Accordingly, the Court of Appeals' determination that Stagg's absenteeism did not rise to the level of employment misconduct for purposes of unemployment compensation should be affirmed.

Respectfully submitted,

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