



NO. A11-1481

**State of Minnesota
In Court of Appeals**

Jane Kay Dukowitz,

Appellant,

vs.

Hannon Security Services, Inc.,

Respondent.

APPELLANT'S BRIEF & ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Statement of the Issues

1. **Is Minnesota’s public-policy exception to the at-will employment rule limited only to those situations where the employee refuses to violate the law or does it also apply in those situations where the employer discharges an employee “for reasons that contravene a clear mandate of public policy?”**

How the Issue was Raised in the Trial Court: Appellant’s complaint (App.-2–App. 5) and Respondent’s motion for summary judgment (App. 11–12 & App. 20–36).

The Trial Court’s Ruling: The Trial Court granted Respondent’s motion for summary judgment, concluding that Minnesota’s public-policy exception to the at-will employment rule is limited solely to those situations where the employee is terminated for refusing to violate the law (Tr. Ct.’s Order & Memo., p. 1 & p. 9 (Addendum 2 & 10)).

How was the Issue Preserved for Appeal: Appellant responded to Respondent’s motion for summary judgment, arguing that Minnesota’s public-policy exception extends not only to those situations where the employee is discharged for refusing to violate the law, but also where the termination “contravenes a clear mandate of public policy” as established by statute (App. 103–111)

Cases and Authority: *Phipps v. Clark Oil & Ref.*, 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff’d*, 408 N.W.2d 569 (Minn. 1987); *Freidrichs v. Western Nat. Mut. Ins. Co.*, 410 N.W.2d 62 (Minn. Ct. App. 1987); *Nelson v. Productive Alternatives*, 715 N.W.2d 452 (Minn. 2006); *Kozloski v. Am. Tissue Servs. Foundation*, 2006 WL 4037589 (D. Minn. 2006) (attached at App. 229–App. 236).

2. **If Minnesota’s public-policy exception includes those situations where the employer discharges an employee “for reasons that contravene a clear mandate of public policy,” are Minnesota’s unemployment compensation statutes “a clear mandate of public policy?”**

How the Issue was Raised in the Trial Court: Appellant’s complaint (App. 2–5) and Appellant’s response to Respondent’s motion for summary judgment (App. 103–111).

The Trial Court's Ruling: Minnesota's public-policy exception to the at-will employment rule is limited solely to those situations where the employee refuses to violate the law (Tr. Ct.'s Order & Memo., p. 1 & p. 9 (Addendum 2 & 10)).

How the Issue was Preserved for Appeal: Appellant's complaint (App. 2–5) and Appellant's response to Respondent's motion for summary judgment (App. 103–111).

Cases and Authority: *Phipps v. Clark Oil & Ref.*, 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987); *Freidrichs v. Western Nat. Mut. Ins. Co.*, 410 N.W.2d 62 (Minn. Ct. App. 1987); *Fiumetto v. Garret Entr.*, 749 N.E.2d 992 (Ill. Ct. App. 2001); *Lara v. Thomas*, 512 N.W.2d 777 (Iowa 1994); MINN. STAT. §§ 268.03 and 268.192.

3. Do Minnesota's unemployment compensation statutes provide an implied private right of action?

How the Issue was Raised in the Trial Court: Appellant's Complaint (App. 2–5) and Appellant's response to Respondent's motion for summary judgment (App. 103–111)

The Trial Court's Ruling: No. (Tr. Ct.'s Order & Memo., p. 9–14 (Addendum 10–15)).

How the Issue was Preserved for Appeal: Appellant's response to Respondent's motion for summary judgment (App. 111–114)

Cases and Authority: *Flour Exch. Bldg. Corp. v. State*, 524 N.W.2d 496 (Minn. Ct. App. 1994); *Counties of Blue Earth v. Minn. Dept. of Labor and Indus.*, 489 N.W.2d 265, 268 (Minn. Ct. App. 1992); *Fiumetto v. Garret Entr.*, 749 N.E.2d 992 (Ill. Ct. App. 2001); MINN. STAT. §§ 268.03 and 268.192; Restatement (Second) of Torts § 874A.

Statement of the Case

Appellant (Dukowitz), an at-will employee, brought a claim against her former employer (Hannon) for wrongful termination in contravention of public policy. Dukowitz alleged that when Hannon reduced her work hours it threatened to terminate her if she applied for unemployment benefits. When Dukowitz did apply for those benefits, Hannon did terminate her.

In *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 592 (Minn. Ct. App. 1986), the Court held that an employee can properly assert a claim for wrongful termination when she is discharged “for reasons that contravene a clear mandate of public policy.” Our Legislature has specifically identified the “public policy” of our unemployment compensation statutes: to alleviate “economic insecurity” and promote the “public good.” Hannon’s actions contravene this “clear mandate of public policy.”

Hannon brought a motion for summary judgment, claiming that Minnesota does not recognize a public-policy exception to the at-will employment rule, or if it does it is extremely narrow. The Trial Court—the Honorable Mary B. Maher of the Seventh Judicial District, Stearns County—agreed, ruling that Minnesota’s public-policy exception applies only when the employee is discharged for refusing to violate the law. The Trial Court’s order indicates that it dismissed Dukowitz’s complaint pursuant to Minn. R. Civ. P. 12.

Statement of Facts

Respondent (Hannon) employed Appellant (Dukowitz) as a Security Officer over a three-year period. (App. 134, 137, 141, 148, 155, 156). The employment relationship was “at will.” (App. 178, 185). Dukowitz’s job duties included, among other things, patrolling the buildings and grounds of facilities where Hannon had contracts, examining security entrances, inspecting equipment and machinery for tampering, and warning violators of rule infractions. (App. 133).

Initially, Dukowitz started at a security post at the Golden Plump facility in Cold Spring and later Hannon transferred her to the Fingerhut facility in St. Cloud. (App. 137, 148, 158). Nancy Gessell and Rick Kammer were Dukowitz’s supervisors. (App. 160, ¶¶ 8 & 10; App. 139, 154, 157 & 158).

In July 2008, Dukowitz learned that a temporary day-shift position was opening at Fingerhut for the fourth-quarter holiday season. (App. 159, ¶ 4; App. 137–140). The position was known as “Building or Post 26.” (App. 159 ¶ 4; App. 137). Dukowitz was working the night shift at the time and was interested in the day-shift position so she could spend time with her husband. (App. 135, 137, 138, 139, 140, 148). Hannon informed Dukowitz that the day-shift position may become permanent after the holiday season (Christmas), but there was no guarantee. (App. 160, ¶ 5; App. 137–140, 146).

At no point did Hannon tell Dukowitz that she would be laid-off or terminated if the position did not remain open. (App. 160, ¶ 6).

In fact, Dukowitz worked that same temporary position during the fourth quarter of the previous year. (App. 160, ¶ 6). When the holiday season ended that year, Hannon transferred Dukowitz back into another full-time position. (App. 160, ¶ 6).

On July 18, 2008, Dukowitz informed Rick Kammer that she would take the day-shift position once it opened. (App. 137, 139). Kammer approved it with Dukowitz's other supervisor, Nancy Gessell. (App. 139). Dukowitz ultimately obtained the day-shift position, but before doing so Kammer made Dukowitz sign an email, acknowledging that she wanted the position and that she would take the chance that it would stay open after the Holiday season, like it did the year before. (App. 160, ¶ 7, App. 137, 139).

Dukowitz started the day-shift position at Building 26 on September 3, 2008, and she successfully served in that capacity. (App. 15, 137; App. 160, ¶ 7). In fact, on October 18, 2008, Hannon gave Dukowitz an annual performance appraisal, awarding her performance measurements of "very good" to "outstanding." (App. 157). Indeed, throughout her tenure Hannon consistently gave Dukowitz good employment evaluations. (App. 147, 148–154, 157, 158).

In early December 2008, Dukowitz learned that Building 26 would in fact close at the end of the holiday season. (App. 160, ¶ 8). Dukowitz called her Supervisor, Gessell, and asked what would occur with her hours. (App. 160, ¶ 8). Gessell stated that Hannon anticipated terminating two employees and that Dukowitz could absorb their hours. (App. 160, ¶ 9).

Several days after Dukowitz's phone conversation with Gessell, she called Dukowitz into her office. (App. 140; App. 160, ¶ 10). Kammer, the other supervisor, was also present. (App. 140; App. 160, ¶ 10). Gessell told Dukowitz that Hannon would be reducing her hours and that her last day at Building 26 would be December 23, 2008. (App. 134, 135, 137, 140, 141; App. 160, ¶ 10). In turn, Dukowitz stated that she would have to file for unemployment benefits in order to make ends meet financially. (App. 160, ¶ 10). Gessell then turned to Kammer and stated, "should we term her," meaning should we terminate her. (App. 160, ¶ 10). Upset by Gessell's statement, Dukowitz left the room. (App. 140, App. 160, ¶ 11).

Hannon has a policy forbidding insubordination of supervisors. (App. 182, ¶ 22). "Failure to follow the directives [of the supervisor] is subject to disciplinary action up to and including termination." (App. 182, ¶ 22) (alteration added).

Five minutes later Dukowitz returned to Gessell's office, begging Gessell not to terminate her as she needed the job. (App. 136, 140; App. 160, ¶ 11). She asked

Gessell whether there were any flex hours she could work until a full-time position came open. (App. 138, App. 160, ¶¶ 8 & 11). Gessel said she would look into it. (App. 160–161, ¶ 11). Dukowitz was then placed on a part-time floating schedule. (App. 134–136, 138; App. 160–161, ¶ 11).

On December 21, 2008, after Building 26 closed, Dukowitz was forced to apply for unemployment benefits due to her reduction in hours. (App. 161, ¶ 12; App. 143, 145). Once Dukowitz established an account for benefits, from that point forward Hannon allowed her to pick up only one spot shift: an overnight on New Year’s Eve at Golden Plump. (App. 160–161, ¶ 11; App. 134–136, 138, 141). Yet, Dukowitz later learned that Hannon had a number of positions available. (App. 138–139).

Once Dukowitz applied for benefits, Hannon effectively eliminated her hours; it also appealed her eligibility for unemployment benefits. (App. 142, 145). Hannon must have been upset that Dukowitz applied for benefits, given the fact that she signed an email acknowledging that the day-shift position at Building 26 may not become permanent. (App. 141, 146). Indeed, Hannon claimed that Dukowitz should be ineligible for benefits because she took a temporary position so she could spend time with her husband. (App. 146).

Hannon later acknowledged that it had no legal basis to appeal Dukowitz’s benefits in the first place. (App. 132, ¶ 16). Indeed, Dukowitz did not “quit,” nor was

she discharged for “employment misconduct”—the two legal bases that render one ineligible for unemployment benefits. In fact, Hannon still employed Dukowitz, albeit on a part-time, as-needed basis. Despite filing an appeal, Hannon did not even appear at the appeal hearing. (App. 145, ¶ 4).

Dukowitz later learned that Hannon hired another employee for the Fingerhut post after Building 26 closed. (App. 137–138). In addition, after Hannon placed Dukowitz on a floating schedule, and after she filed for unemployment benefits, Hannon hired a number of employees. (App. 167–168). Between December 19, 2008 and March 23, 2009 (the relevant time period between Dukowitz informing Hannon that she would apply for benefits and shortly after her termination) nine Hannon employees resigned or were terminated. (App. 167–168). In that same period Hannon hired five employees. (App. 167–168). Yet, Hannon did not give those positions or absent shifts to Dukowitz despite the fact that she was on a floating schedule, seeking hours.

On March 2, 2009, the Department upheld Dukowitz’s award of unemployment benefits. (App. 144–145). Following the Department’s ruling, Hannon discharged Dukowitz effective March 13, 2009, and made her return her uniform. (App. 141, 155, 156). Dukowitz has since filed for bankruptcy. (App. 238, ¶ 9). Her home is in foreclosure. (App. 238, ¶ 9).

Argument

In any civilized employer-employee relationship, there is an implicit recognition that not every act of insubordination or misconduct ethically justifies an employer in firing the employee The problem is to make this implicit recognition explicit by stating it in the form of legally enforceable principles.

—*Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 616 (Pa. 1980) (quoting *Resilient Floor & Decorative Covering Workers, Local Union 1179 v. Welso Mfg. Co.*, 542 F.2d 1029, 1033 (8th Cir. 1976)) (internal quotes omitted))

A. STANDARD OF REVIEW

Dukowitz appeals the trial court’s order and entry of judgment, dismissing Dukowitz’s complaint. (Addendum. 1 & 2). The Trial Court captioned its Order as an “Order granting defendant’s *motion for judgment on the pleadings pursuant to Minn. R. Civ. P. 12.*” (*Id.*) (emphasis added). Yet, the body of the Order states: “Defendant’s motion for summary judgment is granted.” Thus, there is some confusion as to whether the Court issued its Order pursuant to Rule 12 or Rule 56 (summary judgment) of the Minnesota Rules of Civil Procedure.

Under Rule 12, the standard of review is “whether the complaint sets forth a legally sufficient claim for relief.” *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn.1980). Under that standard, “[i]t is immaterial to [the Court’s] consideration [] whether or not the plaintiff can prove the facts alleged.” *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 670 (Minn. 1955) (alteration added). Under Rule 56, the standard of review

would be de novo. *See Losen v. Allina Health System*, 767 N.W.2d 703, 707–09 (Minn. Ct. App. 2009) (stating that on appeal from summary judgment the court reviews de novo whether the court erred in its application of the law).

Under either reviewing standard it is clear, based on the Trial Court’s accompanying memorandum, that it did not assess the parties’ alleged facts to determine whether there were any material factual disputes. Rather, the Trial Court based its Order for Judgment solely on its analysis of the legal issues presented.

As to those legal issues, respectfully the Trial Court erred in concluding that Minnesota’s public-policy exception to the at-will employment rule is limited solely to those situations where the employee is terminated for refusing to violate the law. In addition, the Trial Court erred in concluding that Minnesota’s unemployment compensation statutes do not provided an implied private right of action.

B. MINNESOTA RECOGNIZES A CLAIM FOR WRONGFUL DISCHARGE WHEN THE EMPLOYER TERMINATES THE EMPLOYEE IN “CONTRAVENTION OF A CLEAR MANDATE OF PUBLIC POLICY.”

1. The Public-Policy Exception to the At-will Employment Rule

The at-will employment rule allows an employer to terminate an employee for any reason or no reason at all. *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872, 877 (Minn. 1936) (applying the at-will rule in Minnesota and stating that the employment relationship “may be terminated by either party at any time, and no action can be

sustained in such case for a wrongful discharge”); Blades, *Employment at Will vs. Individual Freedom: On limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV 1404 (1967). Nearly “two-thirds of the American work force is governed by” the at-will rule. *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 590 n.1 (Minn. Ct. app. 1986). Understanding this harsh reality, courts as far back as 1959 began recognizing an exception to the rule. *Peterman v. Intern. Brotherhood of Teamsters*, 344 P.2d 25 (1959). “[T]he exception provides that an employer becomes subject to tort liability if its discharge of an employee contravenes some well-established public policy.” *Phipps*, 396 N.W.2d at 591; *see also* Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3, 4 (2001). To that end, the public-policy exception seeks harmony between “the employer’s interest in operating a business efficiently and profitably, the employee’s interest in earning a livelihood, and society’s interest in seeing its public policies carried out.” *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 867, 878 (Ill. 1981).

2. A State-by-State Survey of the Public-Policy Exception

Approximately 45 states and the District of Columbia recognize some form of the public-policy exception. LITTLER & MENDELSON, *THE NATIONAL EMPLOYER*, vol. I, chapt. 7 (2009–10). What constitutes public policy varies, however, state by state. For example, in Illinois the policy must “strike at the heart of a citizen’s social rights, duties,

and responsibilities.” *Palmateer*, 421 N.E.2d at 878-89. In Vermont, public policy is “the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like.” *Payne v. Rozendaal*, 520 A.2d 586, 588 (Vt. 1986). Other states require that the public policy benefit the public as a whole, rather than the employee’s personal interest. See *Stevenson v. Superior Court*, 941 P.2d 1157, 1170 (Cal. 1997) (stating that the public policy should “inure[] to the benefit of the public rather than serving merely the interest of the individual”); *LoPresti v. Rtuland Reg’l Health Servs. Inc.*, 865 A.2d 1102, 1112 (Vt. 2004) (similar). In New Hampshire, a jury decides what is public policy. *Cilley v. New Hampshire Ball Bearings*, 514 A.2d 818, 821 (N.H. 1986). Yet other states require that the policy be “sufficiently concrete” and “so widely regarded as to be evident to employers and employees alike.” *Rocky Mtn. Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996), *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 718 (W.Va. 2001), respectively. Under these principles, states have recognized public-policy exceptions in three general situations: when the termination is based on the employee (1) refusing to violate the law, (2) exercising some legal right or privilege, or (3) reporting the employer’s criminal conduct. *Sorenson v. Comm Tek, Inc.*, 799 P.2d 70, 74 (Idaho 1990) (identifying these situations).

The “Fifty-State Survey of the Public Policy Exception” found at Addendum-17 highlights each state’s position, as extracted from LITTLER & MENDELSON, *supra*, at vol. I, chapt. 7. The states and the District of Columbia can be broken into five categories: (1) no public policy, meaning the state does not recognize the public-policy exception; (2) public policy codified by statute, meaning that a statute allows the public-policy exception; (3) public policy limited to whistleblowing or refusing to perform an illegal act; (4) broad public policy, meaning that public policy can be found by constitution, statute, regulations, or common law, among other things; and, (5) limited public policy, meaning that public policy is limited to certain circumstances, such as exercising a right or privilege.

Under category (1), there are five states that refuse to recognize a public-policy exception: Alabama, Georgia, Louisiana, Maine, and Rhode Island. However, two of those states—Louisiana and Maine—have been leaning toward recognition of the exception. LITTLER & MENDELSON, *supra*, § 7.3.19(b), p. 507 & § 7.3.20(b), 509, respectively.

Two states fall within category (2) (Arizona & Montana), in that they recognize a public-policy exception as codified by statute. LITTLER & MENDELSON, *supra*, § 7.3.3(b), p. 449 & § 7.3.27(b), p. 532. MONT. CODE ANN. § 39-2-904(1)(a) (2001) allows a wrongful termination claim if “it was in retaliation for the employee’s refusal to violate

public policy or for reporting a violation of public policy.” ARIZ. REV. STAT. § 23-1501 (2001) allows a claim where the employer violates a statute and the statute does not provide a remedy to the employee.

Under category (3), eight states limit the public-policy exception to whistleblowing or where the employee is terminated for refusing to violate the law. Those states are Alaska, Florida (by statute), Massachusetts, Mississippi, Missouri, New York (by statute), Texas, and Wisconsin. LITTLER & MENDELSON, *supra*, § 7.3.2(b), p. 446–47; § 7.3.10(b), p. 478; § 7.3.22(b), p. 516; § 7.3.25(b), p. 527; § 7.3.26(b), p. 529; § 7.3.33(b), p. 549; § 7.3.44(b), p. 589–90; § 7.3.50(b), p. 612–14.

Twenty-nine states and the District of Columbia fall under the broad category (4). Generally these states allow or identify a wrongful termination claim where the employer’s actions violate or contravene a “clear mandate” of public policy as found in the state’s constitution, statutes, regulations, or common law. These states are: Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. LITTLER & MENDELSON, *supra*, § 7.3, pp. 443–617.

Five states fall within the limited category (5). These states recognize a public-policy exception but generally limit it to situations where the employee is terminated for exercising an important right or privilege. The five states are Indiana (exercising statutory right), Kansas (same), Maryland (exercising right or refusing to violate the law), Michigan (exercising statutory right), and Nevada (whistleblowing and filing workers' compensation claim). LITTLER & MENDELSON, *supra*, § 7.3.15(b), p. 498; § 7.3.17(b), p. 502; § 7.3.21(b), p. 512; § 7.3.23(b), p. 519; § 7.3.29(b), p. 538.

In sum approximately 36 states allow, whether by common-law or statute, a wrongful termination claim outside the context of whistleblowing. Eight (8) states limit their public-policy exception strictly to whistleblowing or where the employee refuses to violate the law. One additional state falls in this category, but also allows a claim where the employee files for workers' compensation (Nevada). Finally, five states do not recognize any form of the public-policy exception.

3. Minnesota's Recognition of the Public-Policy Exception to the At-will Employment Rule

In *Phipps v. Clark Oil & refining Corp.*, 396 N.W.2d 588, 591 (Minn. Ct. App.), the Court stated that "Minnesota has followed the modern trend in recognizing exceptions to employment at will." To that end, Minnesota does or should fall in line with the other 36 states that recognize a claim for wrongful discharge outside the context of

whistleblowing and when the termination “contravenes a clear mandate of public policy.” Here, MINN. STAT. §§ 268.03 & 268.191 are clear expressions of public policy.

a. ***Phipps v. Clark Oil & Ref.*, 396 N.W.2d 588 (Minn. Ct. App. 1986)**

Phipps v. Clark Oil & Ref., 396 N.W.2d 588 (Minn. Ct. App. 1986), first recognized a common-law claim in Minnesota for wrongful discharge in violation of public policy. Mark Phipps, a gas-station tenant, refused his employer’s demand to dispense leaded gasoline into a customer’s car, which was equipped only for unleaded fuel. *Id.* at 589. Phipps believed his actions would violate the Clean Air Act. *Id.* Regulations of that Act did state that no retailer or employee shall dispense leaded gas into a vehicle marked unleaded gas only. *Id.* at 594 (citing 40 C.F.R. § 80.22(a) (1984)). Thus, his actions would constitute a violation of the law. Upon Phipp’s refusal to dispense the leaded fuel, his employer terminated him. *Id.*

Phipp’s Complaint alleged, among other things, that Clark Oil wrongfully terminated him for refusing to violate the law. *Id.* In turn, Clark Oil filed a Rule 12 motion, seeking judgment on the pleadings. *Id.* The Court granted Clark Oil’s motion, finding that under the at-will employment rule Clark Oil could terminate Phipps for “any reason or no reason at all.” *Id.* at 590. Upon appeal, one of the main issues was whether Minnesota would recognize a claim for wrongful termination where an employer discharges an employee for the employee’s refusal to violate the law. *Id.* at 590.

The Court answered that question in the affirmative and ruled that Minnesota would follow the majority of states and recognize a public-policy exception. At the outset, the Court identified three categories of the at-will exception: (1) a narrow rule allowing a wrongful discharge claim when a statute specifically prohibited the discharge; (2) a moderate rule recognizing a claim where the discharge violated a statutory expression of policy; and, (3) a broad rule permitting a claim even in the absence of statutory expression. *Id.* at 591. Ultimately, the Court adopted the moderate public-policy exception, stating that “[a]n employer therefore is liable if an employee is *discharged for reasons that contravene a clear mandate of public policy.*” *Id.* at 592 (emphasis added). The Court acknowledged that a majority of states recognize a public-policy exception to the at-will rule where the discharge contravenes “some well-established public policy.” *Id.* at 591.

In reaching its conclusion, the Court stated that it found the reasoning of several other courts persuasive, one of which “recognized [that] the proper balance must be maintained among the employer’s interest in operating a business efficiently and profitably, the employee’s interest in earning a livelihood, and society’s interest in seeing its public policies carried out.” *Id.* at 592 (citing *Palmateer*, 421 N.E.2d at 878) (alteration added). The Court further stated: “Permitting a cause of action for wrongful discharge in a case such as this is not contrary to the policies expressed in the Act, since,

in sanctioning the wrongful discharge, we will be advancing an already-declared legislative public policy.” *Id.* at 594–94.

b. *Phipps v. Clark Oil & Ref.*, 408 N.W.2d 569 (Minn. 1987)

The Minnesota Supreme Court ultimately reviewed the Court of Appeals’ decision of *Phipps*. At the time of appeal, the Minnesota Legislature adopted the Whistleblower Act, which provided that an employer shall not discharge an employee who “refuses to participate in any activity that the employee, in good faith, believes violates any state or federal law.” *Id.* at 571 (citing MINN. STAT. § 181.932, Subd. 1(c) (1987)). Because the Act was not in place at the time Phipps filed his claim, the Supreme Court had to decide whether to affirm the Court of Appeals’ decision, recognizing a common law cause of action for wrongful discharge in violation of public policy. *Id.* The Court ultimately decided that Minnesota would allow such a claim. *Id.* In so doing, the Court upheld the Court of Appeals’ decision, which found that a wrongful discharge claim exists when an employee is terminated “for reasons that contravene a clear mandate of public policy.” *Phipps v. Clark Oil & Ref.*, 396 N.W.2d 588, 592 (Minn. Ct. App. 1986), *aff’d*, 408 N.W.2d 569 (Minn. 1987).

An unresolved issue remains, however, as to whether the Supreme Court watered down the Court of Appeals’ holding. In its decision, the Supreme Court stated: “we hold that an employee may bring an action for wrongful discharge if that employee is

discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law.” *Id.* at 571. In other words, was Minnesota’s public-policy exception limited to those situations where the employee refuses to violate the law, or does it also include situations where the employee is terminated “for reasons that contravene a clear mandate of public policy,” as stated by the Court of Appeals?

c. ***Freidrichs v. Western Nat. Mut. Ins. Co.*, 410 N.W.2d 62 (Minn. Ct. App. 1987)**

The Minnesota Supreme Court affirmed the Court of Appeals’ decision of *Phipps* on June 26, 1987. *Id.* Approximately six weeks later (August 11, 1987), the Court of Appeals had the opportunity to revisit Minnesota’s public-policy exception. *Freidrichs v. Western Nat. Mut. Ins. Co.*, 410 N.W.2d 62 (Minn. Ct. App. 1987).

Freidrichs worked as a pressure vessel inspector for Western National Mutual Insurance Company. *Id.* at 63. On March 3, 1982, Western terminated Freidrichs. *Id.* Freidrichs claimed his termination was in retaliation because he reported pressure-vessel violations between October 1981 and February 1982. *Id.* Since *Phipps* was not decided when Freidrichs initiated his complaint, he sought a claim for wrongful termination in violation of public policy. *Id.* He premised his public-policy claim on MINN. STAT. §§ 183.59–.60, which provides criminal penalties for inspection of boilers. *Id.* at 63–64.

The Trial Court ultimately dismissed Freidrichs’ Complaint because, at that time, *Phipps* was not in the common law. In the interim, both the Court of Appeals and the

Supreme Court published their decision in *Phipps*. Accordingly, when Freidrichs reached the Court of Appeals, the Minnesota Supreme Court had already decided its review of *Phipps*.

Upon appeal, Western argued that, in determining public policy, the Court must look at the statute in effect at the time the employee was discharged. *Id.* at 65. Since Western discharged Freidrichs in March 1982, it claimed that the 1980 version of MINN. STAT. §§ 183.59 and 183.60 controls, not the amended versions that became effective approximately a month after Freidrichs' discharge (April 1982). *Id.*

Western's argument was imperative because the 1980 version of the statutes did not mention "pressure vessels"—the type of vessels Freidrichs inspected and issued violations for. *Id.* at 64–65. The 1980 version of the statutes made it a misdemeanor to falsely certify a *steam boiler* or knowingly deliver a defective *steam boiler*. *Id.* (citing MINN. STAT. §§ 183.59 and 183.60 (1980)). The 1980 statutes failed to mention "pressure vessels," and accordingly there could be no criminal violation as it relates to those units. *Id.* at 64–65. Rather, the term "pressure vessel" did not appear in the statutes until the 1982 amendment, which took effect one month after Western terminated Freidrichs. Accordingly, Western claimed that Freidrichs' wrongful termination claim must fail because there could be no violation of the law at the time Freidrichs was discharged or at

the time he reported his violations. *Id.* at 66. In other words, technically Freidrichs' reports did not and could not identify a violation of the law at the time they were made.

The Court disagreed with Western. *Id.* at 65. It stated, “[a]lthough we must look to the statute in effect at the time of discharge to discern the applicability of the public policy exception, we do not believe the absence of any reference to ‘pressure vessels’ in the 1980 statutes is fatal to Freidrichs’ claim.” *Id.* The Court recited its statement in *Phipps* that an employee has a claim for wrongful discharge when that discharge is “for reasons that contravene a clear mandate of public policy.” *Id.* at 64 (citing *Phipps*, 396 N.W.2d at 592). The Court stated, after reviewing the 1980 version of MINN. STAT. §§ 183.375–183.62, that “[u]nderlying all these statutes is an emphasis on public safety.” *Id.* at 65. “This emphasis on public safety and protection of citizens in this state is a ‘*clearly mandated public policy.*’” (emphasis added).

In effect, the Court emphasized that the employee need not report a violation of the law in order to have a valid wrongful termination claim in contravention of public policy. Rather, the underlying policy upon which the claim is premised must be “clearly mandated public policy.” Indeed, despite the fact that there was no violation for “pressure vessels” under the 1980 version of the statutes, which were in effect at the time Freidrichs made his report and Western discharged him, the Court concluded Freidrichs’ complaint

nonetheless “sufficiently allege[s] facts to support [an] action for wrongful discharge.” *Id.* at 66 (alteration added).

d. *Nelson v. Productive Alternatives*, 715 N.W.2d 452 (Minn. 2006)

Nineteen years later, the Minnesota Supreme Court reviewed the contours of a claim for wrongful discharge in violation of public policy. *Nelson v. Productive Alternatives*, 715 N.W.2d 452 (Minn. 2006). The first issue in *Nelson* was whether the Whistleblower Act precluded this common law claim. *Id.* at 453. The Court held that the Act did not, since the Legislature failed to specifically exclude the common law claim in the statute. *Id.* The next issue was whether a common law claim is limited to “situations in which an employee is fired for refusing to violate the law”—as in the Supreme Court’s version of *Phipps*—or can a claim be premised on a clearly articulated public policy—as in the Court of Appeals’ version of *Phipps*. *Id.* at 454. The Court never fully answered that question because Nelson’s claim failed to articulate a clear public policy. *Id.* at 456.

Nelson claimed that he was discharged for exercising his voting rights as a member of a nonprofit corporation. *Id.* at 455. Nelson cited Chapter 317A of the Minnesota Statutes as his source of public policy. *Id.* at 456. Yet, as the Court determined, nothing within that chapter evidences a clear policy upon which to base a wrongful discharge claim. *Id.* The Court noted that “those courts that have undertaken the difficult task of judicially delineating a general public-policy exception to the at-will

doctrine have required that the public policy at issue be clear in order to justify a common-law cause of action.” *Id.* (citing *Gantt v. Sentry Ins.*, 824 P.2d 680, 684 (Cal. 1992) (“[T]he [public] policy must be fundamental, substantial and well established at the time of the discharge.”) (internal quotations omitted; alterations in original). Since Nelson failed to premise his claim upon a clearly established public policy, the Court did not answer the larger question, that being whether a common law claim is limited to “situations in which an employee is fired for refusing to violate the law.”

e. *Deciphering Phipps, Freidrich, & Nelson*

Our Supreme Court’s decision in *Phipps*, 408 N.W.2d at 574, did not explicitly overrule the Court of Appeals’ decision of *Phipps*; rather, it affirmed it. *Phipps*, 396 N.W.2d at 592, *aff’d*, 408 N.W.2d at 574. There, the Court of Appeals’ held that “[a]n employer [] is liable if an employee is discharged for reasons that contravene a clear mandate of public policy.” *Phipps*, 396 N.W.2d at 592. It did not specifically limit its holding to situations where the employee is terminated for refusing to violate the law.

Moreover, in addressing the issue presented, the Supreme Court stated:

[W]e no longer have before us the policy question of whether or not Minnesota should join the three-fifths of the states that now recognize, to some extent, a cause of action for wrongful discharge. The only question that remains is whether we should uphold the court of appeals’ decision applying this policy exception to the November 17, 2984, discharge of Phipps.

Phipps, 408 N.W.2d at 571 (internal citations omitted). In other words, the Supreme Court acknowledged that Minnesota would follow the majority of other states and accept the at-will exception. The only issue was whether it would uphold the Court of Appeals' ruling, which it did. To that end, the Supreme Court even described the Clean Air Act—the underlying public policy—as “a clearly mandated public policy.” *Id.* at 571.

The Court of Appeals further elaborated that, “A public policy exception can be reasonably defined by reference to clear mandates of legislative or judicially recognized public policy.” *Id.* at 593. Indeed, the Court of Appeals' burden-shifting test indicated as much:

[T]he employee should have the burden of proving the dismissal *violates a clear mandate of public policy, either legislatively or judicially recognized*. Once the employee has demonstrated that the discharge may have been motivated by reasons that *contravene a clear mandate of public policy*, the burden then shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee.

Id. Nothing within that test requires the employee to establish that he or she was discharged for failing to violate the law.

As to whether it is proper for the judiciary to determine public policy, the Court of Appeals stated: “The at-will doctrine is a creation of common law. Other exceptions to the doctrine have been considered and adopted or rejected by the courts. The judiciary may properly extend or limit a judicially created doctrine.” *Id.* at 593. Furthermore, requiring that the public policy be “clear” or “substantial” removes concern over judicial

policymaking, since it is the legislature that enacted the policy in the first instance. *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1054 (Cal. 1998). To this end, the Court of Appeals stated: “Permitting a cause of action for wrongful discharge in a case such as this is not contrary to the policies expressed in the Act, since, in sanctioning the wrongful discharge, we will be advancing an already-declared legislative public policy. *Phipps*, 396 N.W.2d at 593–94.

Keeping in mind that *Freidrichs* was decided after the Supreme Court’s decision of *Phipps*, if Minnesota’s public-policy exception were limited to only those situations where the employee is terminated for refusing to violate the law, the Court’s decision of *Freidrichs* would have been different for two reasons. First, there was no violation of the law under the 1980 version of MINN. STAT. §§ 183.59–.60—the statutes that applied at the time Freidrichs made his report and at the time of his discharge. Second, and more importantly, Freidrichs did not allege that he was terminated for refusing to violate the law, which a narrow reading of the Minnesota Supreme Court’s decision of *Phipps* would require. Nonetheless, the Court allowed Freidrichs’ claim to proceed because MINN. STAT. §§ 183.375–.62 identify “clearly mandated public policy.” *Id.* at 65.

This position is in line with later statements from the Court. For example, in *Stowman v. Carlson Companies, Inc.*, 430 N.W.2d 490 (Minn. Ct. App. 1989), the Court stated “[t]ort principles will not be applied unless the employee can demonstrate that the

employer contravened some clear mandate of public policy recognized either judicially or legislatively.” (citing *Phipps v. Clark Oil & refining Corp.*, 396 N.W.2d 588, 592 (Minn. Ct. App. 1986), *aff’d* 408 N.W.2d 569 (Minn. 1987)). *Stowman* was a case decided after the Supreme Court’s decision in *Phipps*. If Minnesota’s public policy exception applied only to situations where the employee is terminated for refusing to violate the law, then the Court would not have quoted the language above. Instead, if a narrow interpretation of the public-policy exception applied, the Court would have stated that tort principles will not apply unless the employee is discharged for refusing to violate the law.

Finally, in *Nelson* the Court could have ended its inquiry by simply finding that Nelson failed to allege that he was terminated for refusing to violate the law, as set forth by *Phipps*. Instead, the Supreme Court went on to address the public policy Nelson asserted. The fact that the Supreme Court reviewed the policy indicates the Court’s willingness to allow a common law wrongful discharge claim so long as there is a “clearly mandated public policy.”

f. *other persuasive authority*

Against this backdrop, *Kozloski v. Am. Tissue Servs. Foundation*, 2006 WL 4037589, *6 (D. Minn. 2006) (attached to Neal Supp. Aff.), recognized the Court of Appeals’ holding in *Phipps* and determined that an employee has a cognizable claim for wrongful discharge when he or she is terminated “for a reason that *clearly* violates public

policy.” (emphasis in original). According to the Federal Court, “it is the clarity of the violation of public policy that defines the existence of the common law claim.” *Id.* at *7. There, the Court determined that plaintiffs stated a claim for wrongful termination when they were allegedly discharged for notifying their employer and the FDA of quality control violations. *Id.* The court stated that, unlike the plaintiff in *Nelson*, the plaintiffs here did identify a clear public policy, that being “FDA regulations concerning the safe transfer of tissues from cadavers for use in live patients.” *Id.* The regulations, according to the Court, “encompass clear public policy regarding the public’s safety.” *Id.* (emphasis in original).

It further elaborated:

[T]he Court rejects Defendant’s hyper-technical reading of the available state cases in an effort to limit the public policy exception to at-will employment *to only those terminations that are in retaliation for an employee’s refusal to violate the law. The Court finds Defendant’s position misinterprets both the spirit and intention of the Supreme Court’s decisions in the Nelson and Phipps decisions.*

Id. at *8 (emphasis added). Interestingly, the Court also rejected the defendant’s position that a “specific representation by the Legislature that a statute is intended as clear public policy is required for the statute to support a claim under Minnesota’s common law regarding wrongful termination.” *Id.* at *8. “No such explicit statement is necessary,” according to the Court. *Id.*

In sum, a claim for wrongful discharge in violation of public policy exists in Minnesota. It is not necessary for the plaintiff to establish that she refused to violate some law. Rather, she must articulate a *clearly mandated* public policy that the employer contravened in terminating her. For the reasons that follow, Dukowitz respectfully requests that the Court find that the statutory scheme of Minnesota’s unemployment-benefit statutes, and in particular MINN. STAT. §§ 268.03 & 268.192, are clear expressions of public policy.

4. Minnesota’s Unemployment Compensation Statutes, specifically §§ 268.03 & 268.192, are clear expressions of public policy

In *Nelson*, 715 N.W.2d at 456, the Court acknowledged that “[t]hose courts that have undertaken the difficult task of judicially delineating a general public-policy exception to the at-will doctrine have required that the public policy at issue be clear in order to justify a common-law cause of action.” In this respect, Minnesota’s unemployment compensation laws meet this threshold.

a. *The Unemployment Compensation Scheme in General*

During the New-Deal era of 1935 Congress established the unemployment insurance program to provide the “first line of defense” against economic hardship. RICK MCHUGH, ET AL., NAT. EMPL. L. PROJ. (NELP) & JOBS NOW COALITION, FINANCING AN EFFECTIVE UNEMPLOYMENT SYSTEM: PROTECTING WORKING FAMILIES, OUR COMMUNITIES & MINNESOTA’S ECONOMY, p. 1 (2003), *available at*

http://nelp.3cdn.net/fdaca9395c515ee282_tum6bn48x.pdf. Around that same time, Minnesota passed its first unemployment compensation legislation in order to alleviate economic distress from the Great Depression. *Bucko v. J. F. Quest Foundry Co.* 38 N.W.2d 223, 227 (Minn. 1949) (citing Ex. Sess. L. 1936, c. 2). *See also Nordling v. Ford Motor Co.* 42 N.W.2d 576, 581 (Minn. 1950) (“Unemployment compensation statutes were enacted during a period of distress and were designed to relieve the hardship caused by unemployment due to no fault of the employee.”).

The public purpose of unemployment insurance is two-fold: (1) “to pay adequate weekly benefits so that jobless workers and their families can maintain essential family spending” and, (2) to “boost[] our economy by maintaining consumer spending during a recession.” *Id.* (alteration added). Workers or former workers receiving unemployment benefits spend most if not all of their benefits on basic necessities, such as housing, food, gas, medicine, and utility bills. *Id.* This in turn ensures “a floor on consumer spending.” *Id.*

During our current economic climate, these public purposes are intensified. During the relevant time period of Hannon’s underlying actions, Minnesota experienced a 110% spike in applications for unemployment compensation. MINNESOTA DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT, *Unemployment Insurance Claims*

(Sept. 14, 2011), <http://www.positivelyminnesota.com/Data_Publications/Data/Current_Economic_Highlights>.

b. *Statistics on Unemployment Insurance*

To highlight the public purpose behind unemployment compensation, McHugh, et al., reference a 1999 study by the Department of Labor, finding that for every \$1.00 of unemployment benefits paid produces \$2.15 in gross-domestic-product growth. *Id.* at p. 1–2 (citing LAWRENCE CHIMERINE, ET AL., UNEMPLOYMENT INSURANCE AS AN ECONOMIC STABILIZER: EVIDENCE OF EFFECTIVENESS OVER THREE DECADES, U.S. DEPT. OF LAB. & TRAINING ADMIN. (1999), *available at* <<http://workforcesecurity.doleta.gov>>). Accordingly, the last five recessions were “15 percent milder and had fewer layoffs than would otherwise have occurred but for [unemployment insurance’s] contribution to consumer spending.” RICK MCHUGH, ET AL., *supra*, p. 2. During the 2001 and 2002 recession, unemployment benefits pumped over \$1 billion into Minnesota’s economy, helping stabilize our local economy. *Id.* at p. 2–3.

Beyond the economy, “[r]igorous research has documented how [unemployment insurance] prevents poverty, thwarts hunger, prevents foreclosures and enables workers to retain hard-earned savings.” *Id.* at p. 3 (alteration added). McHugh, et al., also reference a study by MIT Economist Jonathan Gruber, which finds that unemployment

insurance reduces mortgage foreclosures by half. *Id.* (citing GRUBER, UNEMPLOYMENT INS., CONSUMPTION SMOOTHING, AND PRIVATE INS.: EVID. FROM THE PSID AND CEX, (Advisory Council on Unemployment Ins. Background Papers, vol. 1 (1995)). Another cited study found that unemployment insurance reduced poverty from 70% to 40%. RICK MCHUGH, ET AL., *supra*, p. 3 (citing CORSON, ET AL., EMERGENCY UNEMPLOYMENT COMPENSATION: THE 1990S EXPERIENCE, MATHEMATICA POLICY RESEARCH, U.S. DEPT. OF LAB., UNEMPLOYMENT INS. OCCASIONAL PAPER 99-4 (1999)). Also, the temporary wage replacement allows laid-off workers to search for a job within their skill range, which one study found increases “reemployment wages by as much as 80%.” RICK MCHUGH, ET AL., *supra*, p. 3 (citing Ehrenberg & Oaxaca, *Unemployment Insurance, Duration of Unemployment, and Subsequent Wage Gain*, 66 THE AM. ECON. REV. 5, 754–66 (1976). This in turn benefits the overall economy and society as a whole.

c. MINN. STAT. §§ 268.03 & 268.192

These same public purposes are embodied in Minnesota’s unemployment compensation laws. In *Ackerson v. Western Union Telegraph Co.*, 48 N.W.2d 338, 341 (Minn. 1951), the Court declared: “Suffice to say that it is the *declared public policy* of our state, as shown by the legislative declaration of public policy in the act, s 268.03, that benefits are intended to extend to those who are unemployed through no fault of their own.” (emphasis added).

MINN. STAT. § 268.03 specifically sets forth the public-policy behind our unemployment compensation system. It states:

The *public purpose* of this chapter is: Economic insecurity because of involuntary unemployment of workers in Minnesota is a subject of general concern that requires appropriate action by the legislature. The public good is promoted by providing workers who are unemployed through no fault of their own a temporary partial wage replacement to assist the unemployed worker to become reemployed. This program is the 'Minnesota unemployment insurance program.'

MINN. STAT. § 268.03 (emphasis added). Thus, the plain language of § 268.03 states that the purpose of the act is to assist the unemployed through economic insecurity, which according to the legislature is of general public concern to our state. Furthermore, by allowing a temporary replacement wage it promotes the "public good." Accordingly, the purpose of the statute is not necessarily for personal benefit, but rather to promote the general public as a whole. Moreover, the Legislature specifically states in the statute that unemployment compensation is a public policy of our State.

This legislative end is further promoted by MINN. STAT. § 268.192. That section states, in relevant part: "No employer may directly or indirectly . . . *in any manner obstruct or impede an application or continued request for unemployment benefits.*" *Id.* (emphasis added). Knowing the benefits unemployment compensation provides to our State and the country as a whole, the Legislature saw fit to prohibit employers from thwarting or interfering with those benefits.

Notably, the Court in reaching its decision in *Nelson* stated, “since it is undisputed that the actions Nelson attributes to Productive Alternatives are not among the various practices prohibited by chapter 317A, we must conclude that the legislature has implicitly reserved these actions to the discretion of Productive Alternatives.” *Id.* at 457. However, unlike chapter 317A, MINN. STAT. § 268.192 specifically prohibits Hannon’s actions: its attempt to impede Dukowitz’s application for benefits by threatening to terminate her. Indeed, when an employer threatens to terminate an employee for applying for benefits or continued benefits, and follows through on that threat, as Hannon did here, that employer has impeded the employee’s application for benefits. Moreover, contesting the employee’s application for benefits without a basis in fact or law, as Hannon did here, also acts as an impediment to the employee’s application for benefits. In turn these actions have a chilling effect on other employees with knowledge of the event(s) such that it indirectly impedes their future application for benefits. This in turn impedes the public purpose of our unemployment compensation statutes. To that end, the situation is analogous to the Court of Appeals’ statement in *Phipps*: “Permitting a cause of action for wrongful discharge in a case such as this is not contrary to the policies expressed in the Act, since, in sanctioning the wrongful discharge, we will be advancing an already-declared legislative public policy. *Phipps*, 396 N.W.2d at 593–94. Added to this is the fact that Minnesota’s unemployment statutes are remedial in nature and must be

construed liberally. *Smith v. Employers' Overload Co.*, 314 N.W.2d 220, 221–22 (Minn.1981) (“[W]e have stated on numerous occasions that the unemployment compensation statute is remedial in nature and must therefore be liberally construed to effectuate the public policy.”); *see also Nordling v. Ford Motor Co.*, 42 N.W.2d 576, 582 (Minn. 1950) (stating, in the context of unemployment compensation, that “[i]t is a general rule that a liberal construction is usually accorded statutes which are regarded by courts as humanitarian or which are grounded on a humane *public policy*.”) (emphasis added).

Indeed, these exact same or similar statutory provisions were sufficiently clear policy upon which to base a wrongful termination claim under Iowa law, *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994); Pennsylvania law, *Highhouse v. Avery Transportation*, 660 A.2d 1374, 1377–78 (Pa. 1995); Illinois law, *Fiumetto v. Garrett Entr.*, 749 N.E.2d 992, 997–998 (Ill. Ct. App. 2001); and Connecticut law, *Lavacca v. & K Assocs.*, 1996 WL 62656 (Conn. 1996). As stated before, statutes are primary sources of public policy. *See generally Collins v. Rizkam*, 652 N.E.2d 653, 657 (Ohio 1995).

Finally, it is worth noting that while Minnesota’s public policy exception to the at-will rule appears to require only the establishment of a clearly mandated public policy, other states require that the policy at issue be not only clear, but that the legislature must also indicate that it applies to the employment context. *Kohrt v. MidAmerican Energy*

Co., 364 F.3d 894, 899 (8th Cir. 2004). Even under that more exacting standard, MINN. STAT. §§ 268.03 & 268.192 would qualify. They are not only clear expressions of public policy as articulated by the legislature, but the legislature specifically states that an *employer* may not prohibit the activity at issue.

5. The overwhelming majority of cases from other jurisdictions have found a cause of action under their unemployment statutes

Five of the six states that evaluated this same issue have found a public-policy exception where the employee is terminated or the employment is otherwise adversely affected because he or she filed for unemployment benefits. *Fiumetto v. Garrett Enterprises, Inc.*, 749 N.E.2d 992 (Ill. Ct. App. 2001); *Lara v. Thomas*, 512 N.W.2d 777 (Iowa 1994); *M.C. Welding and Mach. Co. v. Kotwa*, 845 N.E.2d 188 (Ind. 2006); *Highhouse v. Avery Transp.*, 660 A.2d 1374 (Pa. 1995); *Smith v. Troy Moose Lodge No. 1044*, 645 N.W.2d 1352 (Ohio 1994); *Lavacca v. & K Assocs.*, 1996 WL 62656, *2–3 (Conn. 1996). Each of these states fall within the same public-policy category as Minnesota: they recognize or identify a public-policy exception where the employer's actions contravene a clear mandate of public policy. LITTLER & MENDELSON, *supra*, § 7.3, pp. 443–617 (summarized in Addendum 17-22). Even under a more limiting category, namely those states that recognize a claim only where the employee has exercised some statutorily conferred right, a public-policy claim would still lie: applying for unemployment benefits is a statutorily conferred right.

Accordingly, all of these cited cases allowed a claim for retaliation or wrongful discharge premised on the public policy of that state's unemployment laws. Most of those states have similar unemployment provisions as MINN. STAT. §§ 268.03 & 268.192.

For example, the public policy found in Pennsylvania's statutes states: "Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the Commonwealth. *Highhouse*, 660 A.2d at 1377-78 (citing Unemployment Compensation Law, Act of Dec. 5, 1936, P.L. [1937] 2897, art. I, § 3, 43 P.S. § 752). Likewise, the public policy in Iowa's statutes provides: "Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. *Lara*, 512 N.W.2d 777, 782 (citing IOWA CODE § 96.2). Similar to Minnesota's statutes, Iowa's also states: "No employer shall directly or indirectly make or require . . . any waiver of any right hereunder." *Id.* (citing Iowa Code § 96.15(1). The public policy in Illinois' statutes also provides: "[T]he public policy of the State is declared as follows: Economic insecurity due to involuntary unemployment has become a serious menace to the health, safety, morals and welfare of the people of the State of Illinois." *Fiumetto*, 749 N.E.2d at 949 (citing 820 ILCS 405/100 (1996)). Each of these cases utilized these statutory statements in finding a public-policy exception. These statutes evidenced "clearly mandated public policy" of each state. These same

public-policy statements are contained in and in line with MINN. STAT. §§ 268.03 & 268.192.

The only state that has considered this issue and ruled against it was Missouri. *Kosulandich v. Survival Tech.*, 997 F.2d 431 (8th Cir. 1993). There, the *Kosulandich* Court failed to uphold a claim because Missouri law regarding wrongful discharge applies only where the employee is terminated for refusal to perform an illegal act or for reporting illegal activity. *Id.* at 433 (citing *Petersime v. Crane*, 835 S.W.2d 514 (Mo. Ct. App. 1992)). As discussed above, that is not the law with regard to Minnesota under *Phipps*, *Freidrichs*, and *Nelson*.

In sum, five of the six states to address this issue have found in favor of allowing the claim to proceed. Dukowitz respectfully asks the Court to side with the majority.

C. AN IMPLIED PRIVATE CAUSE OF ACTION SHOULD EXIST UNDER MINN. STAT. §§ 268.03 & 268.192

Dukowitz's private-right-of-action claim is largely premised on the same principles and reasoning as her public-policy claim. Under Minnesota common law, a statute otherwise silent as to a remedy may provide a private right of action if: (a) the "plaintiff belongs to the class for whose benefit the statute was enacted"; (b) "the legislature indicated an intent to create or deny a remedy"; and (c) "implying a remedy would be consistent with the underlying purpose of the legislative enactment." *Flour Exch. Bldg. Corp. v. State*, 524 N.W.2d 496, 499 (Minn. Ct. Ap. 1994) (citing *Cort v.*

Ash, 422 U.S. 66, 78 (1975)). An analysis of these three factors suggests that a private right of action should exist under MINN. STAT. §§ 268.03 & 268.192.

As background, the Court in *Fiumetto v. Garrett Entr.*, 749 N.E.2d 992, 997–998 (Ill. Ct. App. 2001), reviewed Illinois’ unemployment statutes, which as stated above are strikingly similar to Minnesota’s, and concluded that a private right of action should exist. *Id.* The Court analyzed a similar version of the three factors set forth in *Flour Exch. Bldg. Corp.*, with an additional factor, namely whether allowing a private right of action is “necessary to provide an adequate remedy for violations of the statutes.” *Id.* at 998. In spite of the fact that employers under Illinois’ unemployment compensation statute are subject to a misdemeanor if they attempt to interfere with an employee’s application for benefits, the Court stated that this is not an adequate deterrence. *Id.* at 953. The Court noted that inadequate criminal penalties are often insufficient to motivate compliance. *Id.* at 1001. “[A]n employer who is able to successfully coerce an employee to refrain from seeking unemployment insurance can also likely coerce the employee to refrain from reporting the coercion.” *Id.* at 1000. Similarly, the Court noted that employers have a motivation to coerce employees from seeking benefits “because the amount they are required to contribute toward unemployment insurance is dependent upon the amount of benefits received by their employees.” *Id.* at 953. Accordingly, the Court found that a private right of action was necessary in order to carry forth the policy

behind Illinois' unemployment statutes. With that in mind, Dukowitz will analyze the three factors set forth in *Flour Exch. Bldg. Corp.*

1. Dukowitz belongs to the class for whose benefit the statute was enacted

As to the first factor, courts seek to determine the intended or direct beneficiary of the statute. *See Flour Exch. Bldg. Corp.*, 524 N.W.2d at 499 (determining the intended beneficiary of the statute). *Counties of Blue Earth v. Minnesota Dept. of Labor and Indus.*, 489 N.W.2d 265, 268 (Minn. Ct. App. 1992), provides an example.

There, the Counties claimed that MINN. STAT. § 177.41 created a private right of action, allowing them to challenge the Department of Labor's determination as to what the Counties must pay laborers for public-works projects. That statute provided:

It is in the *public* interest that public buildings and other public works be constructed and maintained by the best means and highest quality of labor reasonably available and that persons working on public works be compensated according to the real value of the services they perform. It is therefore the policy of this state that wages of *laborers, workers, and mechanics on projects financed in whole or part by state funds* should be comparable to wages paid for similar work in the community as a whole.

Minn.Stat. § 177.41 (1990) (emphasis added). The Court disagreed with the Counties and held that this statute was intended to benefit the *public* and *employees providing labor for public projects*. *Counties of Blue Earth*, 489 N.W.2d at 268. Accordingly, the Counties were not intended beneficiaries of the statute.

Noteworthy, the Court found that labors of public projects were the intended beneficiaries of MINN. STAT. § 177.41. Indeed, the statute specifically named them therein. The framework of MINN. STAT. §§ 268.03 and 268.192 is on the same footing. Those statutes specifically identify laid-off workers as in need of protection. Dukowitz, an eligible employee applying for those benefits, falls within that class. Accordingly, she is an intended beneficiary of the statutes.

2. Legislative history and intent

In ascertaining legislative intent, the following presumptions prevail: (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable; (2) the legislature intends the entire statute to be effective and certain; and, (3) the legislature intends to favor the public interest as against any private interest. MINN. STAT. § 645.17. Courts are also to consider the “mischief to be remedied” by the statute. *Id.* at § 645.16(3). The plain language of § 268.192 shows that the legislature intended to prevent employer’s from taking adverse action against employees that file for benefits. A private right of action here would further that intention.

As alluded to by the *Fiumetto* Court, Illinois’ unemployment compensation statute, like § 268.192, may be of little consequence without a private-right of action. “[A]n employer who is able to successfully coerce an employee to refrain from seeking unemployment insurance can also likely coerce the employee to refrain from reporting

the coercion.” *Fiumetto*, 749 N.E.2d at 1000. Also, employers have a motivation to coerce employees from seeking benefits “because the amount they are required to contribute toward unemployment insurance is dependent upon the amount of benefits received by their employees.” *Id.* at 953. At a bare minimum, allowing a private right of action adds an additional layer of protection and furthers the public purpose set forth in § 268.03.

3. Implying a remedy would be consistent with the underlying purpose of MINN. STAT. §§ 268.03 and 268.192

The consequences of providing a private right of action under the circumstances would further the legislative framework of § 268.192 and by consequence § 268.03. Again, the situation is in line with the Court of Appeals’ statement in *Phipps*: “Permitting a cause of action for wrongful discharge in a case such as this is not contrary to the policies expressed in the Act, since, in sanctioning the wrongful discharge, we will be advancing an already-declared legislative public policy. *Phipps*, 396 N.W.2d at 593–94.

4. Restatement (Second) of Torts § 874A

In the event the Court does not find a private right of action under the three factors set forth in *Flour Exch. Bldg. Corp.*, 524 N.W.2d at 499, Restatement (Second) of Torts § 874A provides an alternative remedy. It states, in its entirety, as follows:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action; using a suitable existing tort action or a new cause of action analogous to an existing tort action.

Three parts of that test are relevant. The legislative provision must protect a class of persons; the civil remedy must further the legislative purpose; and the civil remedy must be necessary to assure the effectiveness of the provision. *Credit Managers Ass'n of Southern California v. Kennesaw Life and Acc. Ins. Co.*, 809 F.2d 617, 624 (9th Cir. 1987). While the Restatement is similar to the three factors previously discussed, it does not require a finding of legislative intent.

As to the first factor, as mentioned Dukowitz falls within the class of employees protected by the statute. Also as previously discussed, without a private right of action one is left with little ability to enforce the prohibition set forth in § 268.192. And, providing a remedy would further the purpose of the legislation as set forth in § 268.03. The appropriate tort, in this instance, as discussed above, would be wrongful termination.

D. SUMMATION

In sum, Dukowitz has alleged facts sufficient to allow her to move forward with her claim under either the public-policy exception to the at-will employment rule or under an implied private right of action. Those facts allege that Hannon threatened to

terminate her if she filed for unemployment benefits. When Dukowitz did apply for benefits, Hannon severely restricted her hours despite the fact other positions were open within the company. It then appealed her eligibility for benefits, failed to appear at the appeal hearing, and later acknowledged that it had no legal basis to appeal in the first place. After Dukowitz's award for unemployment benefits were upheld, Hannon terminated her.

Conclusion

Dukowitz respectfully requests that this Court: (1) reverse the Trial Court's decision and (a) find that Minnesota's public-policy exception extends to those situations where the employee's termination "contravenes a clear mandate of public policy" as established by the Minnesota Constitution, statutes, regulations, or common law; and (b) that Minnesota's unemployment compensation statutes (MINN. STAT. §§ 268.03 and 268.192) are clear sources of public policy upon which to premise such a claim; and, (c) that Minnesota's unemployment compensation statutes provide an implied private right of action; and, (2) remand the case back to the Trial Court with the instruction to evaluate the record evidence in light of the Court's ruling.

Respectfully submitted.

Dated: September 18, 2011.

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Certificate of Compliance

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