

NO. A11-1481

**State of Minnesota
In Court of Appeals**

Jane Kay Dukowitz,

Appellant,

vs.

Hannon Security Services, Inc.,

Respondent.

APPELLANT'S REPLY BRIEF

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REPLY

A. THE APPROPRIATE STANDARD OF REVIEW

The parties disagree over the appropriate standard of review. The trial court dismissed Dukowitz's complaint under Rule 12. (Addendum. 1 & 2). Yet, Hannon cites *Black v. Snyder*, 471 N.W.2d 715, 718 (Minn. Ct. App. 1991), for the proposition that, upon a motion to dismiss, the trial court's failure to exclude extrinsic materials converts a Rule 12 motion into one for summary judgment. That rule applies, however, only where the trial court, in reaching its decision, actually considers and relies upon the extrinsic materials presented. See *Carlson v. Lilyerd*, 449 N.W.2d 185, 187 (Minn. Ct. App. 1989) (stating that "[b]ecause this case involves a motion for judgment on the pleadings where more than just the pleadings were *considered*, we review the trial court's determinations under a summary judgment standard"). Here, the Court did not consider the alleged facts as submitted through the parties' documentation, nor did it use those alleged facts in its analysis. Rather, the trial court issued its order solely on the legal issues presented.

Second, even in *Black*, 471 N.W.2d at 718—the case relied upon by Hannon—the Court did not refer to the extrinsic evidence, but rather limited its review to the legal issues presented and remanded, in part, back to the trial court for further consideration. Indeed, the Court stated, "Whether treated as a rule 12 dismissal or a summary judgment, [] the specific issues for review are questions of law." *Id.* at 721 (omission added).

Likewise, here the trial court limited its decision to the legal issues presented. Thus the specific issues for review are questions of law for this Court to determine.

Accordingly, upon review of the trial court's Rule 12 dismissal, the Court should consider only the facts alleged in the complaint, accept those facts as true, and construe all reasonable inferences in favor of the non-moving party, that being Dukowitz. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (citing standard of review for judgment upon the pleadings).

Even if the summary judgment standard were utilized, as Hannon claims, our appellate courts have consistently stated that factual determinations should receive initial consideration by the trial court. *See State v. Lieberg*, 553 N.W.2d 51, 58 (Minn. Ct. App. 1996) (stating where trial court neglected to address factual issue, court of appeals has no choice but to remand for additional proceedings); *Bogatzski v. Hoffman*, 430 N.W.2d 841 (Minn. Ct. App. 1988) (determining legal issue and remanding case where trial court failed to make factual determinations). Here, the trial court has not determined whether material factual disputes exist. In the end, if the Court finds that Dukowitz has a viable cause of action, she respectfully requests that this Court remand to the trial court so it can review the record evidence in light of this Court's decision. Also for this same reason, Dukowitz respectfully requests that the Court ignore Hannon's factual claims as scattered throughout the legal discussion of its briefs.

B. NEW ISSUES RAISED IN HANNON’S RESPONSE DO NOT UNDERMINE THE VIABILITY OF DUKOWITZ’S CLAIM FOR WRONGFUL TERMINATION IN CONTRAVENTION OF PUBLIC POLICY

In its response, Hannon believes that Dukowitz’s claim fails because the legislature did not sanction its alleged conduct: namely terminating her for filing for unemployment benefits. Yet, MINN. STAT. § 268.192 specifically states, in relevant part, that “[n]o employer may directly or indirectly . . . in any manner obstruct or impede an application or continued request for unemployment benefits.” Hannon’s alleged actions in terminating Dukowitz for filing for unemployment benefits after it threatened to do so is both a direct and indirect attempt to obstruct or impede Dukowitz’s application and continued request for unemployment benefit. Accordingly, our Legislature did sanction Hannon’s alleged conduct.

Even so, Hannon claims that it should be able to get away with its actions because the Legislature fails to provide a remedy (retaliatory discharge) within our unemployment compensation statutes. Yet, this argument undercuts the purpose and existence of the public-policy exception, which is to gap fill and provide appropriate relief where the legislature failed to do so. Indeed, Minnesota’s public-policy exception came into existence in *Phipps v. Clark Oil & Ref.*, 396 N.W.2d 588 (Minn. Ct. App. 1986), because there was no remedy in the Clean Air Act. The absence of any remedy in the Act there did not prevent the Court from fashioning one.

Moreover, there should be no concern over judicial policy making here because Dukowitz's cause of action furthers the Legislative purpose of our unemployment compensation statutes, as set forth in MINN. STAT. §§ 268.03 & 268.192. Indeed, as the Court in *Phipps I* stated, “[p]ermitting 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 v. Clark Oil & Ref.*, 396 N.W.2d 588 (Minn. Ct. App. 1986).

Layering its arguments, Hannon further claims that even if Dukowitz has a viable claim she does not fall within the protections of Minnesota's unemployment statutes—either as a beneficiary or pursuant to her public-policy claim—because she was not “unemployed” during the relevant time period. Contrary to Hannon's position, an individual is afforded the protections and benefits of Minnesota's unemployment compensation statutes—and hence a person is “unemployed” for purposes of unemployment compensation—when the individual works less than 32 hours and her earnings with respect to that week are less than her weekly benefit amount. *See* Minn. Stat. § 268.035, Subd. 26 (defining “unemployed,” for purposes of receiving benefits, as any week in which the employee works less than 32 hours and received less than what the worker would otherwise receive in weekly unemployment benefits). Accordingly, Dukowitz falls within the protections and benefits of the statutes.

In the last instance, Hannon claims that Minnesota’s unemployment compensation statutes are not a clear mandate of public policy and, according to Hannon, they do not implicate public safety or protection concerns for greater society. Clearly, the Legislature identified our unemployment compensation statutes as “public policy.” The Legislature specifically uses the words “public policy” within Minn. Stat. § 268.03 and further states therein that the *public good* is promoted by providing workers with a temporary partial wage replacement. And, as Dukowitz identified in her principle brief, unemployment benefits have a substantial impact on society by reducing the impact of past recessions, pumping money into the economy, reducing poverty, allowing workers to search for jobs within their skill set, and reducing mortgage foreclosures. All this has an impact on society as a whole, especially in our present economic climate. The public policy and purpose behind our unemployment statutes cannot be doubted.

- 1. Other statutes providing a claim for retaliation do no bear on the relevant issue here, which is whether Minn. Stat. §§ 268.03 & 268.192 evidence a “clear mandate of public policy”**

Hannon cites a number of Minnesota statutes where our Legislature has prohibited an employer from discharging or retaliating against an employee. It follows, according to Hannon, that since the Legislature did not provide a comparable prohibition within the unemployment compensation statutes, Dukowitz’s public-policy claim must fail. As stated previously, the Legislature has sanctioned the type of activity alleged here:

retaliating against an employee for filing unemployment benefits. While the Legislature did not use the terms “discharge” or “retaliation,” it chose to use the broader requirement that “[n]o employer may directly or indirectly . . . in any manner obstruct or impede an application or continued request for unemployment benefits.” MINN. STAT. § 268.192 (emphasis added). Retaliation or discharge certainly falls within that sanctioned conduct. This is especially true where our unemployment compensation statutes, which are remedial in nature, are to be liberally construed to further the public policy stated therein. *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.”).

Moreover, most of the statutes cited by Hannon existed either prior to or at the same time the Court rendered its 1986 decision in *Phipps*. *Phipps v. Clark Oil & Ref.*, 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987). Even though the Clean Air Act lacked a specific prohibition on employer retaliation it did not prevent the *Phipps* Court from finding a public-policy exception there. Indeed, seven of the nine statutes cited by Hannon existed sometime on or well before 1986: (1) Minn. Stat. § 543.20, Subd. 3 (service of process at place of employment for support enforcement) existed in 1983 (Laws 1983, c 308, § 31); (2) Minn. Stat. § 181.75 (refusal to take lie detector) existed in 1973 (Laws 1973, c 667, § 1); (3) Minn. Stat. § 593.50

(jury service) existed in 1977 (Laws 1977, c 286, § 20); (4) Minn. Stat. § 182.669 (Occupational Safety and Health Act) existed in 1973 (Laws 1973, c 732, § 20); (5) Minn. Stat. § 611A.036 (time off from work to testify as a crime victim) existed in 1986 (Laws 1986, c 463, § 9); (6) Minn. Stat. § 176.82 (filing worker’s comp claim) existed in 1975 (Laws 1975, c 359, § 21, 23); and (7) Minn. Stat. § 363A.15 (participating in rights secured under the MHRA) has its genesis in laws dating back to 1955 (Laws 1955, c 516, § 5). As evidenced by the *Phipps* decision, the fact that other statutes contain a specific prohibition on retaliation does not preclude a public-policy claim. Perhaps most telling is the fact that our Supreme Court determined in *Nelson*, 715 N.W.2d 452, 453 (Minn. 2006), that the Legislature’s Whistleblower Act—an explicit prohibition on retaliation—does not preclude a common-law claim for wrongful discharge in violation of public policy.

2. The majority of cases from foreign jurisdictions are directly on point

Hannon misconstrues or massages decisions from Iowa, Pennsylvania, and Ohio in an attempt to find some distinguishing feature to the present matter. In doing so, it claims that these states have a more liberal application of the public-policy exception. It also claims that Minnesota’s abundance of retaliatory prohibitions in other statutes is another distinguishing characteristic when compared to these states.

Hannon then fails to discuss two favorable cases from Illinois and Connecticut. And, finally, it fails to recognize that Indiana now falls in line with the majority of other states on this issue. In the end, of the seven jurisdictions to address the present public-policy claim, only one has failed to recognize its viability.

a. *Indiana*

Hannon cites *Lawson v. Haven Hubbard Homes, Inc.*, 551 N.E.2d 855 (Ind. Ct. App. 1990), for the position that Indiana does not recognize a public-policy claim where an employer terminates an employee for applying for unemployment benefits. *Lawson* has since been displaced by *M.C. Welding and Mach. Co. v. Kotwa*, 845 N.E.2d 188 (Ind. 2006). In *M.C. Welding*, the employer announced a “two-week shutdown,” telling workers to return after the shutdown. *Id.* at 196. Kotwa applied for unemployment benefits and when he returned two-weeks later he was told that he was terminated for filing for unemployment benefits. *Id.* The Court concluded that this was sufficient to support a retaliatory discharge claim. *Id.* at 195.

Like Minnesota, Indiana’s Legislature has specifically set forth the public policy behind its unemployment compensation statutes. IND. CODE § 22-4-1-1 states, in relevant part: the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is declared hereby to be a serious menace to the health, morale, and welfare of the people of this state and to the maintenance of public order within this state.

Like Minnesota, Indiana's statutes prohibit an employer from encouraging or inducing an employee to forego his or her rights to benefits. *See* IND. CODE §§ 22-4-33-1 & 22-4-34-3.

Interestingly, Indiana falls within the limited category of those states that recognize a public policy exception to the at-will employment rule. LITTLER & MENDELSON, *THE NATIONAL EMPLOYER*, vol. I, chapt. 7 (2009–10). The policy applies only when an employee is discharged for exercising a statutorily conferred right. *Purdy v. Wright Tree Serv.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005). This, in contrast to the 29 states that apply a broad public-policy exception, namely where the employer's action violates a "clear mandate of public policy." *Id.* Yet, even under this more limiting standard, Indiana recognizes a public-policy claim where the employee is terminated for applying for unemployment benefits. *Kotwa*, 845 N.E.2d at 195.

Moreover, the Indiana Legislature has prohibited employer retaliation in a number of statutes. *See* IND. CODE § 22-9-1-6(h) (participating in actions under Indiana's civil rights act); *Id.* at § 22-8-1.1-38 (filing complaint under Indiana's Occupation Safety Act); *Id.* at § 36-1-8-8(b) (whistleblowing – city employees); *Id.* at § 36-15-10-4(b) (whistleblowing – state employees); *Id.* at § 22-5-3-3 (whistleblowing – private employees). Yet, contrary to Hannon's position, this did not stop Indiana courts from finding a public-policy exception where the employee is terminated for filing for benefits.

b. Iowa

Hannon concedes that Iowa recognizes a public-policy exception where an employee is discharged for filing for unemployment benefits. *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994). Contrary to Hannon’s position, however, Iowa does not take a liberal approach to its public-policy exception. In fact, in *Fitzgerald v. Salsbury Chem.*, 612 N.W.2d 275, 281 (Iowa 2000), the Iowa Supreme Court stated that it takes a narrow approach to its public-policy exception. Iowa’s standard is similar to that found in *Phipps I*: “a cause of action should exist [where] discharge serves to frustrate a well-recognized and defined public policy of this state.” *Springer v. Week & Leo*, 429 N.W.2d 558, 560 (Iowa 1988) (alteration added). In addition, Iowa Courts have added three additional elements that a plaintiff must establish beyond the existence of a clearly defined public policy:

- (1) Policy would be undermined by a discharge from employment;
- (2) The challenged discharge was the result of participating in the protected activity; and,
- (3) There was a lack of other justification for the termination.

Fitzgerald, 613 N.W.2d at 282 n.2. Yet, even under that more exacting test, Iowa determined that its public policy exception would protect workers who were discharged for filing for unemployment benefits. *Lara*, 512 N.W.2d at 782.

As discussed before, Iowa’s unemployment compensation statutes are similar to Minnesota’s. 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)).

Finally, the fact that the Iowa Legislature has identified claims for retaliatory discharge in other statutes, it did not prevent Iowa courts from finding a public-policy exception under the present circumstances. Indeed, the following Iowa Statutes prohibit an employer from discharging an employee: IOWA CODE ANN. § 135C.46 (whistleblower for healthcare workers); *Id.* at § 272C.8 (teacher providing information to licensing board); *Id.* at § 70A.29 (whistleblower for public employees).

c. *Pennsylvania*

As Hannon correctly points out, Pennsylvania recognizes a public-policy exception where an employee is terminated for filing for unemployment benefits. *Highhouse v. Avery Transp.*, 660 A.2d 1374 (Pa. 1995). Hannon, however, incorrectly claims that Pennsylvania takes a more open approach to this claim. In *Smith v. Carlson Carbon*, 917 F.2d 1338 (3d Cir. 1990), the Court stated that Pennsylvania construes the exception narrowly. The standard is similar to that found in *Phipps I*: There must be a "clear mandate of public policy." *Novosel v. Nationwide*, 721 F.2d 894, 894 (3d Cir. 1983). Pennsylvania even adds an additional element: the retaliation must stem from the

employee doing something she is privileged by law to do. *Novosel v. Nationwide*, 721 F.2d 894, 894 (3d Cir. 1983). Even under this additional requirement, which is not found in *Phipps I*, Pennsylvania courts allow a public-policy claim where an employee is terminated for filing for unemployment benefits.

In addition, Pennsylvania's unemployment compensation statutes are similar to Minnesota's. Pennsylvania's statutes state: "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). And, the Pennsylvania Legislature in a number of statutes prohibits employer discharge. For example: 43 PA. CONS. STAT. ANN. § 1201 (discharging fireman for service); *Id.* at § 1421 (whistleblower law for public employees); 75 PA. CONS. STAT. ANN. § 1619 (discharging employee that refuses to operate a commercial vehicle not in compliance). Despite the absence of such a prohibition in Pennsylvania's unemployment compensation statutes, this did not prevent Pennsylvania courts from fashioning a public-policy remedy for employees that are terminated for filing for unemployment benefits.

d. Ohio

Ohio also recognizes a public-policy exception where an employee is terminated for filing for unemployment benefits. *Smith v. Troy Moose Lodge No. 1044*, 645 N.W.2d

1352 (Ohio 1994). Contrary to Hannon's claim, Ohio construes the public policy exception "very narrowly." *Bilbrey v. Certain Teed Corp.*, 1986 WL 7873 (Ohio Ct. App. 1986). Similar to *Phipps I*, there must be a "clear violation of public policy." But more exacting, the employee must establish (1) "clear" public policy found in state or federal constitution or administrative regulation, or in the common law; (2) the termination would "jeopardize" the public policy; (3) termination motivated by conduct related to the public policy; and, (4) no business justification. *Painter v. Graley*, 639 N.E.2d 51, 56-57 n.8 (Ohio 1994). Moreover, a claim for wrongful discharge may not be predicated upon a statute which does not prohibit discharge of employees. *Vidovich v. York Intern Corp.*, 181 F.3d 106 (6th Cir. 1999).

Yet, even under that more exacting and stringent requirement, Ohio Courts determined that the public-policy exception would lie under allegation similar to the present. *Smith*, 645 N.W.2d at 1352. Moreover, Ohio courts were not dissuaded by the fact that the Ohio Legislature specifically prohibited retaliation in other statutes and failed to do so under its unemployment compensation statutes. *See* OHIO REV. CODE § 4123.90 (worker's comp.); *Id.* at § 4112.02(I) (participation in activities protected by Ohio's civil rights act); *Id.* at § 4113.52 (whistleblower statute).

e. Illinois

Illinois allows a public-policy exception where an employee is terminated for

applying for unemployment benefits. *Fiumetto v. Garrett Enterprises, Inc.*, 749 N.E.2d 992 (Ill. Ct. App. 2001). A claim for wrongful discharge in contravention of public policy is also similar to that found in *Phipps I*: the discharge must violate a “clear mandate” of public policy. *Zimmerman v. Buchheit of Sparta*, 645 N.E.2d 877, 880 (Ill. 1994). Policy is found within the state’s constitution, statutes, and judicial decisions. *Palmateer v. International Harvester*, 421 N.E.2d 876, 879 (Ill. 1981).

Like Minnesota, the public policy in Illinois’ unemployment compensation statutes 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)). This was sufficient to base a public-policy claim under Illinois.

Moreover, the Illinois Legislature’s vast statutory scheme prohibiting retaliation in other context was not dispositive. *See* 740 ILCS 170/10 & 5/12-818(garnishment of wages); 720 ILCS 510/13 (refusal to perform abortion); 745 ILCS 70/5 (refusal to participate in medical care); 705 ILCS 305/4.1 (jury duty); 725 ILCS 125/8 (subpoenaed to testify); 820 ILCS 115/14 (reporting wage violation); 775 ILCS 5/6-101 (filing claim under Illinois civil rights); 740 ILCS/20-2 (Whistleblower law).

In sum, Hannon’s attempt to distinguish relevant cases from foreign jurisdictions

is not persuasive. Contrary to Hannon's claim, the public-policy exception from these foreign jurisdictions is similar to that stated in *Phipps I*. In some instances, it is even more exacting. Yet, courts there found a public-policy exception under their respective unemployment compensation statutes. Second, Minnesota's statutory prohibitions on discharging employees is similar to those found in these other jurisdictions. Despite these statutes, these foreign courts applied a public-policy exception. Accordingly, contrary presentation, these cases are more similar to Minnesota than they are different.

3. Even if Minnesota's public-policy exception applied where an employee is discharged for refusing to violate the law, Dukowitz's complaint must survive under our liberal pleading requirements

In the final analysis, even if this Court were to limit the public-policy exception to those situations where an employee refuses to violate the law, Dukowitz's complaint must survive. Minnesota is "extremely liberal in construing the allegations of a pleading." *Krzyzaniak v. Maas*, 233 N.W. 595, 596 (Minn.1930). "Every reasonable intendment will be indulged in favor of the sufficiency of the pleading attacked." *Id.* And, [t]he objection should be overruled if the pleading can be sustained under the most liberal construction. *Id.*

In her Complaint, Dukowitz claimed that she was discharged for filing for unemployment benefits. (RA3, ¶ XI & XII). To support this claim, she alleged that after Hannon reduced her hours, it indicated that it would terminate her if she filed for

unemployment benefits. (RA2, ¶ VII).

Again, Minn. Stat. § 268.192 provides in relevant part that:

No employer may directly or indirectly . . . require or accept any waiver of any right or in any manner obstruct or impede an application or continued request for unemployment benefits. Any employer or officer or agent of any employer who violates any portion of this subdivision is, for each offense, guilty of a misdemeanor.

Here, under Dukowitz's allegations Hannon violated Minn. Stat. § 268.192 and would be subject to a misdemeanor for threatening to terminate her if she filed for unemployment benefits. Dukowitz refused to participate in this illegal activity by actually applying for benefits. Accordingly, if Minnesota's public policy exception is limited to whistleblower claims, Dukowitz's allegations would fit this mold. She refused to participate in an illegal activity and was later terminated for it.

In addition, prior to her termination, Dukowitz reported or at least mentioned this illegal activity to the Minnesota Department of Employment and Economic Development in a submission she made. (App. 237, ¶ 8 & App. 239). Again, these allegations would fall within the whistleblower context because she reported a violation. Even under Hannon's narrow interpretation of *Phipps, Nelson, Freidrichs, and Kozloski*, the allegations would survive a Rule 12 motion.

C. CONCLUSION

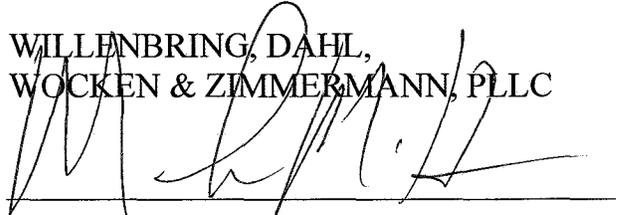
Dukowitz respectfully requests that this Court reverse the trial court's decision

based on the reasons asserted here and in her principle brief. From there, she respectfully requests that the Court 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: October 31, 2011.

WILLENBRING, DAHL,
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A handwritten signature in black ink, appearing to read 'John J. Neal', is written over a horizontal line. The signature is fluid and cursive.

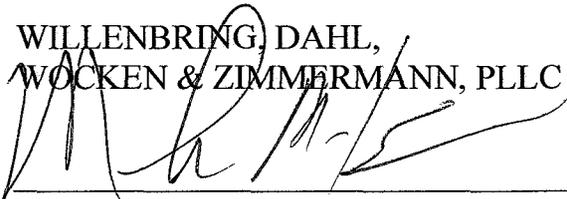
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Certificate of Compliance

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word version 2010, which reports that the brief contains 324 lines and 3,820 words.

Dated: October 31, 2011.

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