

NUMBER A05-1887

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STATE OF MINNESOTA  
IN SUPREME COURT

## CASE TITLE:

BIO-MEDICAL APPLICATIONS OF MINNESOTA, INC.  
d/b/a FRESINIUS MEDICAL CARE, INC.,

Petitioner,

vs.

SUSAN LEE,

Respondent.

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**RESPONDENT'S BRIEF**

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## LEGAL ISSUES

**I. Whether the Court of Appeals correctly held that the Employer wrongfully refused to pay Ms. Lee for her earned but unused Paid Time Off in violation of Minnesota Statute Sections 181.13 and 181.171?**

The Court of Appeals reversed and remanded the District Court holding that the Employer's refusal to pay Employee earned but unused vacation time was a violation of Minnesota Statutes Section 181.13(a).

*Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994);  
*Kohout v. Shakopee Foundry Co.*, 281 Minn. 401, 162 N.W.2d 237 (1968);  
*Kvidera v. Rotation Engineering and Manufacturing Co.*, 705 N.W.2d 416 (Minn.App. 2005)

**II. Whether the Court of Appeals correctly held that the language of an Employee handbook cannot unilaterally deprive an employee of her right to earned wages or vacation time in violation of Minnesota Statute Sections 181.13(a)?**

The Court of Appeals reversed and remanded the District Court holding that the Employer had wrongfully refused to pay Ms. Lee her earned but unused PTO in violation of Minnesota Statute Section 181.13.

*Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994);  
*Kohout v. Shakopee Foundry Co.*, 281 Minn. 401, 162 N.W.2d 237 (1968);  
*Kvidera v. Rotation Engineering and Manufacturing Co.*, 705 N.W.2d 416 (Minn.App. 2005);  
*Teamsters Local Union 688 v. John J. Meier Co.*, 718 F.2d 286, 289 (8<sup>th</sup> Cir. 1983);

**III. Whether there is a genuine issue of material fact or law which must be determined by the trier of fact which precludes summary judgment in favor of the Employer in an action for award of wages in the form of earned but unused Paid Time Off following termination of an employee by her employer?**

The Court of Appeals did not address the issue of whether there was a genuine issue of material fact because the Court of Appeals held that as a matter of law the Employer must pay Ms. Lee her earned but unused vacation under Minn. Stat. Sec. 181.13(a).

*Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853 (Minn. 1986)  
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## STATEMENT OF THE CASE

The Respondent Susan Lee commenced an action in the St. Louis County Conciliation Court, Duluth, Minnesota, the Honorable Gerald Maher presiding, seeking payment of her earned but unused Paid Time Off (hereinafter “PTO”) plus penalties, costs and attorney’s fees. The Conciliation Court found in favor of Ms. Lee in the amount of \$5,052.80.

The Employer appealed the Conciliation Court Judgment to the St. Louis County District Court, Duluth, Minnesota, the Honorable Heather Sweetland presiding. Ms. Lee was represented before the District Court by Don L. Bye, Attorney at Law through the Volunteer Attorney Program a not-for-profit legal services program that arranges *pro bono* representation for income eligible persons. The Employer was represented in District Court by Sandro Garafalo and Marko J. Mrkonich, LITTLER MENDELSON, P.C.

As part of the District Court action, the Employer filed a Motion For Summary Judgment, and a Memorandum in Support of Summary Judgment. The Employer claimed that the language of its employee handbook excused the Employer’s obligation under Minnesota Statute Section 181.13 to pay the Ms. Lee for earned but unused PTO after the Employer had terminated the Employee.

Ms. Lee filed a Motion for Denial of the Employer’s Motion For Summary Judgment and a cross motion for Summary Judgment in favor of Ms. Lee and a Memorandum in Support of the Respondent’s position. Susan Lee reasserted her claim for earned but unused PTO under Minnesota Statutes and Minnesota Case Law.

Following oral arguments by counsel, the Honorable Heather Sweetland, St. Louis County District Court, granted Summary Judgment in favor of the Employer Fresenius Medical

Care, Inc. denying all the claims of Ms. Lee. The District Court held that the Employer's unilateral handbook language was sufficient to deprive Ms. Lee of her right to earned but unused Paid Time Off contrary to Minnesota Law. Ms. Susan Lee commenced an appeal. On August 8, 2006, the Court of Appeals of the State of Minnesota reversed the ruling of the District Court and remanded the matter. The Court of Appeals held that the Employer violated Minn. Stat. Sec. 181.13(a) when it discharged Ms. Lee and refused to pay her *earned* but unused vacation time. The Court of Appeals held, in accordance with *Brown v. Tonka Corp.*, 519 N.W.2d 474, 475 (Minn. App. 1994), that having received the benefit of the employee's services, an Employer is obligated to pay a terminated employee *earned* but unused vacation time. The Court of Appeals further stated that:

“. . . under Minn. Stat. Sec 181.13(a), compensation for accrued vacation time actually earned and unpaid at the time an employee is discharged must be paid in the same manner as other wages and commissions.”

(Emphasis added) The Court of Appeals stated that although an employer's liability for vacation pay is contractual:

“. . . having received the benefit of the discharged employees' work product, the employer was obligated to pay the employees for the accrued vacation time . . .”

Fresenius subsequently petitioned the Supreme Court of the State of Minnesota for review.

### **STATEMENT OF THE FACTS**

The Respondent Susan Lee started working for Miller Dwan dialysis center in Duluth, Minnesota in 1991. Ms. Lee performed at the same job at Miller Dwan dialysis center without disciplinary action from 1991 to June 2002. Appendix pp. 92-93. Miller Dwan sold the dialysis

center portion of its operation to Fresenius Medical Care, Inc. in or about August 2000. Appendix p. 46. At that time, Ms. Lee became an employee of Fresenius Medical Care, Inc. (hereinafter “Employer”). On or about August 31, 2000, the Employer had Ms. Lee sign an acknowledgment stating that Ms. Lee had received a copy of the Employer’s “Fresenius Employee Handbook.” Under the terms of the Fresenius Employee Handbook, vacation time, known as Paid Time Off (hereinafter “PTO”) is *earned* for each completed pay period. Specifically the Fresenius Employee Handbook states that a three-quarter (3/4) time employee earns 8.08 hours of Paid Time Off for each two week pay period worked.<sup>1</sup> Appendix pp. 92, 96. Thus, once an employee has worked a pay period, the PTO time has been earned and is the property of the employee just as wages have been earned for the same period.

The Fresenius Employee Handbook also states in relevant part that:

“[a]n employee who gives proper notice, as described above, is eligible to be paid for earned but unused Paid Time Off (PTO), unless otherwise required by state law. If you do not give acceptable notice, you may not be paid for earned but unused PTO, and you may not be considered eligible for re-employment. In addition, if your employment is terminated for misconduct, you will not be eligible for pay in lieu of notice or payment of earned but unused PTO, **unless required by state law.**”

(Emphasis added.)

In 2002, Ms. Lee worked in the Employer’s Superior, Wisconsin facility. Prior to June 2002, Ms. Lee’s employee evaluations rated her as highly skilled, motivated and doing an excellent job. Appendix pp 92, 93. Prior to June 2002, Ms Lee had consistently received the highest ratings and compliments for her work. Appendix pp. 92, 93. Ms. Lee earned \$16.56 per

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<sup>1</sup>At the time of her termination, it is undisputed that Ms. Lee was a three-quarter (3/4) time employee.

hour. Appendix pp. 92, 99.

In 2002, Ms. Lee became involved in trying to organize a union for her work group at Fresenius' dialysis center in Superior, Wisconsin where Ms. Lee was currently assigned. Appendix p. 93. In June 2002, the Employer began to harass Ms. Lee charging her with half a dozen disciplinary actions in June and July of 2002. Appendix p. 93. On or about August 13, 2002, the Employer fired Ms. Lee ostensibly for bringing a bag of mushrooms as a gift for a dialysis patient. Appendix p. 93. The dialysis patient had given Ms. Lee a container of fresh strawberries the week before. Appendix p. 81. The Employer provided no written Fresenius policy or state or federal regulation prohibiting Ms. Lee from offering mushrooms to a patient. However, when Ms. Lee's supervisor objected to the gift of Chanterelle mushroom, Ms. Lee did not give the mushrooms to the patient. Appendix pp. 81, 93.

At the time of her termination on or about August 13, 2002, Ms. Lee had earned, but not used, 181.86 hours of PTO. Appendix p. 99. On or about August 12, 2004, Ms. Lee demanded in writing that the Employer pay her for her earned but unused 181.86 hours of PTO worth \$3,011.60. Appendix pp. 92-95, 98, 100. The Employer refused.

The conciliation claim, civil district court action, reversal on appeal and petition for review followed.

### **STANDARD OF REVIEW**

On appeal from summary judgment, the review court must determine whether there is any genuine issue of material fact and whether the district court erred as a matter of law in granting summary judgment in favor of the employer. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108 (Minn. 1992). In reviewing a summary judgment motion all factual disputes must be determined

in favor of the non-moving party. *Wagner v. Schwegmann's South Town Liquor, Inc.*, 485 N.W.2d 730 (Minn.App. 1992).

The construction and interpretation of a contract are questions of law which the court of appeals reviews *de novo*. *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853 (Minn. 1986); *Michealson v. Minnesota Mining and Manufacturing, Co.*, 474 N.W.2d 174 (Minn.App. 1991), *aff'd*, 479 N.W.2d 58 (Minn. 1992). "Except where the language of a contract is ambiguous or its construction depends on extrinsic evidence, the construction and effect of a contract are questions of law for the court." *Affiliated Banc Group, Ltd. V. Zehringer*, 527 N.W.2d 679, 681-82 (Minn. 1990). If a contract is ambiguous, its interpretation is a question of fact. *Trondson v. Janikula*, 458 N.W.2d 679, 681-82 (Minn. 1990).

### ARGUMENT

**I. The Court of Appeals correctly held that the Employer wrongfully refused to pay Ms. Lee for her earned but unused Paid Time Off in violation of Minnesota Statute Sections 181.13 and 181.171.**

An employee is entitled to accrued but unused vacation pay because he has a "vested right" in the accrued but unused vacation pay and does not forfeit that right. *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994), *citing*, *Hagen v. Bismarck Tire Center*, 234 No.W.2d 224 (N.D. 1975). Accrued, vested vacation benefits are due and payable at termination. *Berglund v. Granger*, Appellate File No. C8-97-2362 (Minn.App. June 23, 1998).

**"It is beyond dispute that an agreement to pay vacation pay to employees made to them before they perform their services, and based upon length of service and time worked, is not a gratuity but is a form of compensation for services, and when the services are rendered, the right to secure the promised compensation is vested as much as the rights to receive wages or other form of compensation."**

(Emphasis added.) *Tynan v. KSTP, Inc.* 247 Minn. 168, 177, 77 N.W.2d 200, 206 (1956); *Berglund v. Granger*, Appellate File No. C8-97-2362, 1998 WL 328382, (Minn.App. June 23, 1998).

In *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994), the Court of Appeals of Minnesota affirmed a District Court award of payment of the employees' earned but unused vacation time following termination. By working the required time to earn the vacation time period, the employees had a vested right in being paid for earned but unused vacation time in the same way as an employee has a vested right to payment for hours worked. *Id* at 477 and 478.

In *Berglund v. Granger*, Appellate File No. C8-97-2362, 1998 WL 328382 p. 3 (Minn.App. June 23, 1998) the Court of Appeals of the State of Minnesota reaffirmed that as a matter of law, vacation benefits are part of the consideration for the employment. Where materials provided by the employer at summary judgment do not define the terms "earned", "accrued" or "vested" the court must look to common law to define the terms. *Brown* at p. 477; *Berglund* at p. 3. And, absent an additional condition precedent, the right to vacation benefits attaches as soon as an employee has performed the work for which the vacation pay is consideration. *Berglund* at p. 4. In the present case, Ms. Lee had completed the condition precedent to the accrual and vesting of her vacation (PTO) time. The Employer's compensation formula states that an employee *earns* 8.08 hours of PTO for every two week pay period worked. Appendix pp. 92, 96. Paid Time Off is earned by the employee by working the previous two week pay period. The employee is vested in the earned PTO by completion of the two week pay period. At the time of her termination, Ms. Lee had worked enough pay periods have earned and be vested in 181.86 hours of PTO. That the vacation (PTO) time was earned and fully vested is

evidenced by the fact that Ms. Lee had used 12 hours of vacation (PTO) time during the pay period ending January 12, 2002 and 14.25 hours of vacation (PTO) time during the pay period ending March 9, 2002. If the vacation had not accrued and vested, Ms. Lee would not have been able to take vacation on those dates. Since Ms. Lee's vacation (PTO) had accrued and vested, the employer cannot unilaterally and after the fact, divest Ms. Lee of her earned, vested benefits through the unilateral penalty provision of the Employee Handbook which denies an employee payment of earned, vested PTO if the employer unilaterally determines that a termination was for misconduct. Ms. Lee's right to be paid for her earned and vested PTO is legally the same as her entitlement to be paid for wages earned. *Tynan v. KSTP, Inc.*, 247 Minn. 168, 77 N.W.2d 200 (1956) The Employer cannot deprive Ms. Lee of wages already earned and vested in violation of Minn. Stat. Sec. 181.13. The Court of Appeals for the State of Minnesota correctly reversed and remanded the ruling of the District Court in this matter. The ruling of the Court of Appeals must be affirmed.

The ruling of the Court of Appeals of the State of Minnesota must be affirmed because the Court of Appeals correctly held that Minnesota Statute Sec. 181.13(a) requires an employer to pay an employee earned vested unpaid wages including vacation time. Earned but unused vacation pay (PTO) is classified as wages for the application of Minn. Stat. Sec. 181.13. *Brown v. Tonka Corporation*, 519 N.W.2d 474 (Minn.App. 1994); *Kohout v. Shakopee Foundry Co.* 281 Minn. 401, 162 N.W.2d 237 (1968). Ms. Lee had accrued but not used PTO (vacation time) of 181.86 hours which is reimbursable at her normal hourly pay rate of \$16.56. For every two week pay period worked, Ms. Lee earned 8.08 hours of Paid Time Off. By completing the requisite period of employment Ms. Lee became entitled to payment for the earned but unused

PTO either through time off with pay or a cash buy out of the earned PTO. The Employer wrongfully refused to pay Ms. Lee for her earned, vested PTO following her termination. The Court of Appeals correctly held that the Employer violated Minn. Stat. Sec. 181.13 when the Employer failed to pay Ms. Lee for her earned, vested PTO. The decision of the Court of Appeals must be affirmed.

The Court of Appeals for the State of Minnesota's decision that Ms. Lee is entitled to her earned, vested PTO is well supported by Minnesota case law. In *Kvidera v. Rotation Engineering and Manufacturing Co.*, 705 N.W.2d 416 (Minn.App. 2005), the Court of Appeals of the State of Minnesota affirmed a trial court finding that the employer had wrongfully refused to pay the employee his earned and accrued bonus following termination in violation of Minn. Stat. Sec. 181.13(a). The Court of Appeals, citing the language in *Brown v. Tonka Corporation*, 519 N.W.2d 474 (Minn.App. 1994), held that when an employee contracts for a benefit (such as a bonus or vacation time) in exchange for his labor, and the right to that benefit vests prior to termination, the employer is obligated to pay the unpaid benefit within 24 hours of the employee's demand or be subject to penalties under Minn. Stat. Sec. 181.13(a). *Id* at 423. The Court of Appeals held that a benefit such as a bonus or vacation pay is accrued when the employee has completed the work required by the employer's guidelines for earning the benefit. *Id*. Having received the benefit of the employee's work product, the employer is obligated to pay the employee for their accrued, accumulated benefit such as a bonus or vacation time. *Id* at 422. In the present action, once Ms. Lee completed the two (2) week work periods required to earn or accrue her 181.86 hours of vacation time, it was vested and payable. The employer cannot subsequently divest Ms. Lee of the benefit by claiming have terminated her for misconduct. Ms.

Lee had completed the condition precedent (working the requisite number of previous two (2) week pay periods to accumulate 181.86 hours of PTO) to earn the vacation time prior to termination. In accordance with *Kvidera*, the Court of Appeals correctly held that the Employer owed Ms. Lee her earned, vested PTO time. Therefore, the decision of the Court of Appeals for the State of Minnesota in this matter must be affirmed.

The decision of the Court of Appeals in this matter must be affirmed because the ruling was in accord with existing case law. In *Simons v. Midwest Telephone Sales and Service, Inc.*, 433 F. Supp. 1007, 38 Employee Benefits Cas. 2712 (U.S. Dist. Ct. June 1, 2006), the United States District Court for the District of Minnesota held that an employee had an earned and vested right to payment for vacation time once the employee had completed the specified work period required to accrue the benefit. In *Simons*, the parties were in disagreement over whether the employee had earned and vested vacation time when the employee had only worked part of the second calendar quarter prior to termination. The United States District Court for the District of Minnesota looked to the terms of the employment handbook to determine what work period an employee had to complete to accrue vacation time. *Id* at 1011. The United States District Court found that pursuant to the terms and examples in the employment handbook, vacation days were not earned until the employee had worked the entire prior calendar quarter. *Id* at 1011. To earn vacation days for a particular quarter of the calendar year, the employee must work through or after the last day of the calendar quarter in any given year. *Id* at 1009. In the *Simons* case, the employee had worked the entire first quarter of the calendar year and accrued 2 ½ days vacation pursuant to the employee handbook. *Id* at 1008-1010. The employee was terminated before the end of the second calendar quarter. Thus the United States District Court

held that the employee had not met the condition precedent required to earn and vest vacation days in the second calendar quarter. *Id* at 1010. In *Simons* the Court did find that the employee had earned and vested two and one-half (2 ½) days for the first calendar quarter of the year but had already used all earned, vested vacation time prior to termination. Therefore, because the employee in *Simons* had not worked through the last day of the second calendar quarter prior to her termination, the employee did not meet the condition precedent (working through the last day of the second quarter) necessary to accrue vacation days in the second quarter. *Simons* at 1011. Therefore, the U.S. District Court held that the employee had no additional earned, vested but unused vacation days under the employment handbook. *Id* at 1011. In the present case, unlike the employee in *Simons*, Ms. Lee had worked all the necessary two (2) week pay periods necessary to earn and vest her 181.86 hours of PTO. Therefore, as the Court of Appeals for the State of Minnesota held, Ms. Lee was entitled to payment for her earned, vested 181.86 hours of PTO time. The decision of the Court of Appeals for the State of Minnesota must be affirmed.

The decision of the Court of Appeals for the State of Minnesota in this matter is in accord with the holding in *Chambers v. Metropolitan Property and Casualty Insurance Company*, 351 F.3d 848 (8<sup>th</sup> Cir. 2003). In *Chambers*, the United States Court of Appeals for the Eighth Circuit, held that a terminated employee was not entitled to receive an incentive bonus when the employee had not completed the specified full calendar year work period required under the employee handbook to earn and vest the incentive bonus. *Id* at 845. The United States Court of Appeals for the Eighth Circuit held that the language of the employee handbook did not allow for proration of the incentive bonus where the terminated employee had worked less than the calendar year required by the handbook for earning and vesting the bonus. *Id*. In the present

case, the employer required a three-quarter (3/4) time employee to work the prior two (2) week pay period to earn each 8.08 hours of PTO. The employee was immediately eligible to use PTO time once earned. Under Minnesota law as stated in *Brown and Kvidera*, completing the work period necessary to earn the benefits means the benefit is vested. Thus, unlike the employee in *Chambers*, Ms. Lee had earned and vested 181.86 hours of PTO time before her termination. An employer cannot unilaterally divest an employee of an earned, vested benefit. See *Brown and Kvidera*. Therefore, the decision of the Court of Appeals for the State of Minnesota in this matter is correct and must be affirmed.

The Court of Appeals for the State of Minnesota correctly held that Ms. Lee is entitled to payment of her earned, vested PTO time. In *Rudolph v. U.S. Bank National Association*, 2006 WL 1579862 (D.Minn. June 2, 2006) the District Court for the State of Minnesota held that the employee was not entitled to payment of a disputed incentive bonus following termination because under the employee handbook language an employee did not earn an incentive bonus unless the employee was in good standing at the time of distribution of the bonus. The employee in *Rudolph* was terminated before the distribution of the incentive bonus. The incentive bonus would be earned and vested by each employee upon disbursement of the bonus. Since the employee was no longer employed at the time of distribution, the employee had not completed the work period necessary to earn the bonus. *Id.* Thus, the employee in *Rudolph* had not earned the bonus under the handbook language. *Id.* at p. 6.

Unlike the employee in *Rudolph*, Ms. Lee had completed the necessary work periods to earn and vest her 181.86 hours of PTO time. In the current matter, the employer's materials state that PTO time is earned upon completion of each two (2) week pay period. Having completed

the necessary pay periods required to earn the PTO time, the benefit vested. *Brown and Kvidera*. Ms. Lee had completed the necessary pay periods to earn the 181.86 hours of PTO time. Therefore, unlike the employee in *Rudolph*, Ms. Lee's PTO was earned and vested. The Employer is obligated to pay Ms. Lee for her earned, vested PTO time. The ruling of Court of Appeals for the State of Minnesota is in accordance with the case law of Minnesota and the ruling in *Rudolph*. The decision of the Court of Appeals for the State of Minnesota must be affirmed.

**II. The Court of Appeals correctly held that the language of an Employee handbook cannot unilaterally deprive an employee of her right to earned wages or vacation time in violation of Minnesota Statute Sections 181.13 and 181.171.**

Ms. Lee is entitled to payment for her earned but unused Paid Time Off under Minn. Stat. Sec. 181.13 and Minnesota Case Law. Vacation benefits, or paid time off, are compensation for work already performed. *Teamsters Local Union 688 v. John J. Meier Co.*, 718 F.2d 286 (8<sup>th</sup> Cir. 1983). Paid vacation time is additional wages. The consideration for the paid vacation time is the employee's work performed to accrue the paid time off. *Teamsters Local Union 688 v. John J. Meier Co.*, 718 F.2d 286, 289 (8<sup>th</sup> Cir. 1983); *In re Wil-Low Cafeterias*, 111 F.2d 429 (2d Cir. 1940); *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994), citing, *Hagen v. Bismarck Tire Center*, 234 N.W.2d 224 (N.D. 1975); *Tynan v. KSTP, Inc.*, 247 Minn. 168, 77 N.W.2d 200 (1956). Absent specific contract language defining paid time off in another manner, paid time off is consideration for past services rendered. *Id* at 289. Earned but unused paid time off is due and payable upon termination in the same manner as wages. *Id* at 289. Minnesota Statute Section 181.13 requires an employer to pay a terminated employee all wages earned for all past services rendered within 24 hours of demand. Since paid time off is earned for past services

rendered it is also due and payable under Minn Stat. Sec. 181.13. The Employer cannot deprive Ms. Lee of her earned paid time off in violation of Minn. Stat. Sec. 181.13 any more than the Employer could deprive her of wages earned for services already rendered. The Employer acknowledged that their ability to deprive an employee of earned paid time off was limited by Minnesota Law. The Employer's Employee Handbook specifically states:

“An employee who gives proper notice, as described above, is eligible to be paid for earned but unused Paid Time Off (PTO), unless otherwise required by state law. If you do not give acceptable notice, you may not be paid for earned but unused PTO, and you may not be considered eligible for re-employment. In addition, if your employment is terminated for misconduct, you will not be eligible for pay in lieu of notice or payment of earned but unused PTO, **unless required by state law.**”

(Emphasis added.) Minnesota Statute Section 181.13 requires earned wages to be paid within 24 hours of demand following termination. Under Minnesota Statute Section 181.13 paid time off earned for services rendered are wages. *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn.App. 1994). Minnesota Law prohibits an employer from unilaterally depriving an employee of earned wages through unilateral contract language. The Employer acknowledged that it cannot deprive an employee of earned wages or paid time off in violation of Minnesota Law by including the language of “ **unless required by state law**” (emphasis added) in the employee handbook. Therefore, the decision of the Court of Appeals must be affirmed.

In seeking to deny Ms. Lee her earned, vested PTO time, the Employer argues that the ruling of the Court of Appeals of the State of Minnesota must be reversed based upon dicta contained in *Simons v. Midwest Telephone Sales and Service, Inc.*, 433 F. Supp. 1007, 38 Employee Benefits Cas. 2712 (U.S. Dist. Ct. June 1, 2006). In dicta, the U.S. District Court in

*Simons* mentions that the employee would not be entitled to payment for any earned but unused vacation days because the employment handbook also states that “[p]ayment is based on present and continued employment. (You must be employed at least one (1) week after your Vacation).” *Simons* at p. 1011. However, this portion of the U.S. District Court decision is not controlling because the U.S. District Court did not rely on this provision for determining that the employee in *Simons* was not entitled to payment for vacation days that had not accrued or vested in the second calendar quarter. In reaching its decision in *Simons*, the U.S. District Court held that the employee had no earned but unused vacation days because she had not worked through the last day of the second calendar quarter. The provision of the employee handbook in *Simons* that purported to divest an employee of earned, vested benefits formed no part of the U.S. District Court’s decision. Furthermore, the United States District Court did not address in any way the issue of whether the employer could claim that the “continued employment” provision of the employment handbook could alter the vesting date for earned vacation after completion of the work period. The dicta of the U.S. District Court is not binding upon nor the basis for attacking the decision of the Court of Appeals of the State of Minnesota in the present action. Rather, the decision of the United States District Court is in accord with the ruling of the Court of Appeals in this matter. An employee is entitled to payment for benefits earned after the employee has completed the work period necessary to accrue the benefit.

Additionally, the dicta of the United States District Court of the District of Minnesota in *Simons* is contrary to Minnesota case law. In *Brown v. Tonka Corporation*, 519 N.W.2d 474 (Minn.App. 1994) and *Kvidera v. Rotation Engineering and Manufacturing Co.*, 705 N.W.2d 416 (Minn.App. 2005) the Court of Appeals for the State of Minnesota have specifically held that

benefits are vested after the employee has completed the work period required to earn the benefit. Thus in the present case, Ms. Lee's vacation time was not only earned but vested after she completed the requisite two week pay periods necessary to accrue the 181.86 hours of PTO time. The Employer violated Minn. Stat. Sec. 181.13(a) when it wrongfully refused to pay Ms. Lee her earned and vested PTO time after termination. The Courts of Minnesota have never recognized an exception that allows an employer to refuse to pay a terminated employee benefits that have already been earned and vested. In the present action, the Employer is proposing that it be allowed to enforce a condition subsequent to payment of earned and vested benefits. The Employer is asking the courts to endorse a plan that would allow employers to refuse payment of benefits whenever the employer chooses to rule an employee termination as "for misconduct." Not only does this argument violate the explicit holdings in cases such as *Brown* and *Kvidera*, but it would deprive employees of rights to earned, vested benefits based solely upon a unilateral decision by an employer to denominate a termination as "for misconduct." Generally, the employee would have no meaningful recourse to an employer's decision to denominate a termination as "for misconduct" short of legal action. In most instances the dollar value of any individual employee's claim would be too small to feasibly allow the employee to seek redress in the courts. The current action is the perfect case in point, Ms. Lee's original claim for unpaid PTO time was for only \$3,011. Ms. Lee sought redress for the employer's wrongful refusal to pay her earned, vested benefits in small claims court. When the small claims court found in Ms. Lee's favor based upon Minn. Stat. Sec. 181.13(a) and existing case law, the Employer, a major national corporation, removed the matter to district court and armed itself with a firm of lawyers to defend against Ms. Lee's claim for \$3,011.60 in PTO benefits. As a low-income, divorced,

mother of three children, Ms. Lee was not in a financial position to pursue a district court action against a multi-million dollar national corporation.<sup>2</sup> She could not afford to hire an attorney to represent her. Fortunately for Ms. Lee, the Volunteer Attorney Program, Duluth, Minnesota (a not-for-profit organization committee to helping low income people receive justice) was able to match Ms. Lee with a private attorney willing to represent Ms. Lee free of charge. Absent a lawyer in the community willing to volunteer his time, Fresenius, a multi-million dollar, national corporation would have robbed Ms. Lee of her earned, vested vacation time. The \$3011.60 in PTO time originally sought by Ms. Lee is a *de minimus* amount to a mega-corporation like Fresenius and its parent company; however, the amount is of huge importance to employees like Ms. Lee who have worked in reliance on the benefits they believed they had earned and vested. In most instances, similarly situated employees will be unable to find qualified attorneys willing to assist them in pursuing such a small claim for unpaid earned, vested benefits. Legal Services Corporations, such as Legal Aid of Northwest Minnesota, are precluded by Congressional mandate from pursuing any action such as the present matter which involves recoupment of money damages. Thus to adopt the dicta in *Simons*, would be to permit an employer to impose a condition subsequent to payment of an employee's earned, vested benefits in violation of Minn. Stat. Sec. 181.13(a). Such an interpretation of Minnesota law, would deprive Minnesota employees of the right to payment for wages and benefits they have earned with their labor. Therefore, the dicta in *Simon* must be disregarded. The ruling of the Court of Appeals for the State of Minnesota must be affirmed.

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<sup>2</sup>Ms. Lee has proceeded *In Forma Pauperis* in the District Court, Court of Appeals and Supreme Court.

Minnesota Statute Sections 181.13 and 181.171 specifically impose penalties and costs on employers who fail to pay employees wages and paid time off earned for past services rendered. In *Brown v. Tonka Corp.*, the Minnesota Court of Appeals held that the employees were entitled to payment for vacation time that had been earned through completion of the requisite past work period. 519 N.W.2d at 478. In this case, Ms. Lee completed sufficient past pay periods to have earned and vested 181.86 hours of Paid Time Off. Having worked the requisite pay periods to earn and vest the Paid Time Off, the Employer cannot unilaterally deprive Ms. Lee of wages or Paid Time Off already earned. Unilateral language in an Employee Handbook cannot abrogate Minnesota Law and deprive Ms. Lee of earned wages. The decision of the Court of Appeals must be affirmed.

**III. There is a genuine issue of material fact or law which must be determined by the trier of fact which precludes summary judgment in favor of the Employer in an action for award of wages in the form of earned but unused Paid Time Off following termination of an employee by her employer.**

If the Court of Appeals is reversed, this matter must be remanded for trial because there is a genuine issue of material fact. Where it appears that there is a dispute over the existence of an issue of fact which affects or determines what law will apply, the matter must go to trial. *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965). The District Court and the Employer erroneously claim that Ms. Lee does not dispute that she was terminated for misconduct. Ms. Lee in her Affidavit in support of Summary Judgment and in oral arguments for Summary Judgment stated that she was discharged for her union activity and that prior to her union activity she had an exemplary employment history. Appendix p. 93. The only evidence supplied at Summary Judgment to show that Ms. Lee was performing below an acceptable level

were incidents that the Employer alleges occurred on June 6, 2002, July 22, 2002, August 3, 2002 and August 8, 2002, after Ms. Lee began actively attempting to unionize her work group. Appendix pp. 69-84. The Employer provided no incidents of misconduct occurring before Ms. Lee began attempting to unionize her work group. The Employer does not dispute the fact that Ms. Lee performed at the same job without disciplinary action from 1991 to June 2002. Appendix p. 93. The Employer does not effectively deny the fact that Ms. Lee was targeted for termination because of her unionizing activities. In Ms. Lee's Memorandum in opposition to the Employer's Motion for Summary Judgment, Ms. Lee argues

"It is very strange that there were so many things to criticize about Plaintiff's employment during the months of June, July and August, 2002, right after supervisor Kerry and higher-level supervisor Roth took over at Fresenius. Plaintiff had an excellent work record with Miller Dwan and with this Defendant. Plaintiff was working at the very same facility, performing the very same work for which she was trained and qualified and had performed for 11 years. Why would she all of the sudden drop to such level to cause a half a dozen acts of discipline in two months culminating in termination? Why would Plaintiff be terminated because she exhibited the kindness of giving a patient a bag of fresh mushrooms, which most of us would consider a delicacy? Since there was no rule against doing so, since it was common practice and since she was only reciprocating to the same patient who had brought her home-grown strawberries the week before, it does not seem to be the kind of event that would trigger termination of a long-time employee. As indicated in her affidavit, Ms. Lee is of the strong belief and opinion that it had more to do with her being actively involved in attempting to organize a union for her and her co-workers at or about that same time."

Appendix p. 88. This creates a fundamental issue of fact as to whether Ms. Lee was terminated for misconduct as a result of her attempts to organize a union in her work group or any other activity. The factual positions of the parties as to whether Ms. Lee was terminated for misconduct are diametrically opposed. There is a genuine issue of material fact which can only be determined by the trier of fact following a full trial on the merits. Therefore, if the decision of

the Court of Appeals is reversed, this matter must be remanded for trial on the merits.

If the decision of the Court of Appeals for the State of Minnesota is reversed the matter must still be remanded for trial because there is a genuine issue of material fact which must be determined at trial. Ms. Lee alleges that she was terminated for her union activities and not for cause. Ms Lee's position was strenuously argued by her attorney at oral arguments on Summary Judgment. This creates a genuine issue of material fact. At oral arguments, counsel for Ms. Lee disputed the Employer's allegations that Ms. Lee was terminated for "misconduct" or "cause" when counsel argued:

"I guess there was involvement, an attempt to form a union and dispute as to whether that was the grounds of termination, ...there was involvement and representation there and I think there were NLRB [National Labor Relations Board] proceedings. I don't know, I wasn't involved in any of that.

But at least the dispute was there."

Transcript pp. 11-12 . Counsel for Ms. Lee further argued at oral arguments on Summary Judgment:

"As soon as they say misconduct, Your Honor, then we're into a whole barrel of facts -- of facts for determination. We're not going to sit and agree that somebody can get fired because they'd tried to give somebody a sack of Chanterelle mushrooms. We're not going to sit and talk about whether somebody should have reported something to his supervisor or not.

\* \* \*

But that's what they are inviting as soon as they say misconduct. You cannot just decree misconduct. In fact, I believe he said in his opening argument, in the eyes of us it's misconduct. Well, it's the eyes of the Court, if that's what you're going to get to, and we'd be back in a full factual hearing. I don't think we were there."

Transcript pp. 16 . The Employer provided only self created documents purporting to show alleged misconduct by Ms. Lee after she began her union activity. The Employer never provided

affidavits from persons who actually saw the alleged misconduct. The Employer never denied that Ms. Lee was involved in attempting to unionize her work group. Nor did the Employee provide any information showing that Ms. Lee had any disciplinary problems before she began working to unionize her group. In reviewing a summary judgment motion all factual disputes must be determined in favor of the non-moving party. *Wagner v. Schwegmann's South Town Liquor, Inc.*, 485 N.W.2d 730 (Minn.App. 1992). It is a genuine issue of material fact whether Ms. Lee was terminated for her union activity or for any other type of actual misconduct as claimed by the Employer. Therefore, if the decision of the Court of Appeals is reversed, this matter must be reversed and the matter remanded for trial on the merits.

The Employer bases its entire case on handbook language that excuses payment of earned but unused PTO if an employee is terminated for misconduct. The misconduct contended at the time of Ms. Lee's termination supposedly all occurred within a two month time period including three (3) instances of alleged misconduct on August 8, 2002. Appendix pp. 69-84. The Employer claims that the ultimate act of alleged misconduct which resulted in Ms. Lee's termination was Ms. Lee bringing a sack of Chanterelle mushrooms to work with the intention of giving them to a dialysis patient. *Id.* The supervisor allegedly informed Ms. Lee that it was a violation of employer policy to give Chanterelle mushrooms to a dialysis patient. Although Ms. Lee disagreed with her supervisor's allegation that the gift of Chanterelles violated employer rules or state and federal regulations, Ms. Lee followed her supervisor's instructions and did not give the mushrooms to the patient. At no point has the Employer produced copies of any employer policies, state regulations or federal regulations supporting the Employer's allegation that a gift of Chanterelle mushrooms was a violation of policy or a danger to the patient. If there

was no violation of policy or regulation and Ms. Lee followed her supervisor's instruction not to give the mushrooms to the patient, the alleged incident cannot support a claim of misconduct on the part of Ms. Lee. This creates an issue of fact and law which must be determined at trial.

Therefore, if the decision of the Court of Appeals is reversed, this action must be remanded for trial.

If the decision of the Court of Appeals is reversed, this matter must still be remanded for trial on the issues. The Employer did not prove that Ms. Lee committed misconduct. There was no showing of rule or policy violation. After the termination, the Employer complained of several minor incidents that occurred over the prior two months, some of which were complained of at the time and some of which were not, and some resolved. At the termination conference Ms. Lee asked when she would get a chance to explain her view of what had transpired but she was not given an opportunity to do so. In order to prevail on its contended theory, the Employer must be required to prove as a matter of law that there was in fact "misconduct" or "cause" for Ms. Lee's termination. Knowing that the 2002 edition of the Employee Handbook had not been shown to Ms. Lee, the Employer has continually alternated its argument between claiming termination "for cause" language of the August 2002 employee handbook and "misconduct" as referenced in the 2000 employee handbook. Either way, the facts of Ms. Lee's employment performance are necessarily at issue as soon as either "cause" or "misconduct" is contended. The Employer cannot just decree "misconduct" or "cause" and make it so. In Employer's Affidavit in Support of its Motion for Summary Judgment, the Employer alleges that Ms. Lee was terminated "due to unsatisfactory performances which was 'for cause'" pursuant to the Employer's policies. Appendix 46. The Employer never submitted the Employee Handbook portion defining

“misconduct” or “cause”. A dictionary definition of “misconduct” is:

“to manage badly or dishonestly; unlawful, bad or dishonest behavior; willfully improper behavior.”

(Webster New Word Dictionary, 2<sup>nd</sup> Ed.) There is no evidence in the record to show that Ms. Lee’s action in bringing a gift to a patient was willfully improper behavior or dishonesty in this case. The existence of misconduct or cause is an issue of material fact that must be determined through production of evidence at trial. Therefore, if the decision of the Court of Appeals is reversed, this matter must still be remanded for trial on the merits.

### **CONCLUSION**

The decision of the Court of Appeals of the State of Minnesota must be affirmed. Minnesota Statutes Section 181.13 and applicable case law requires the Employer to pay Ms. Lee for her earned, vested Paid Time Off. At termination the Employer was required to pay all earned but unpaid wages including Paid Time Off. The Employer failed to do so even after demand for payment had been made pursuant to Minn. Stat. Sec. 181.13. The Employer failed to pay Ms. Lee as required by law. Having failed to pay Ms. Lee within 24 hours of her demand, the Employer is now also liable for penalties and all attorney’s fees and costs associated with this action under Minn. Stat. Sec. 181.171. For this reason the decision of the Court of Appeals must be affirmed.

If the decision of the Court of Appeals is reversed, the matter must be remanded for trial on the issue of misconduct. Ms. Lee has denied at every stage that she was discharged for cause or misconduct. The issue of whether Ms. Lee was discharged for misconduct is a fact issue

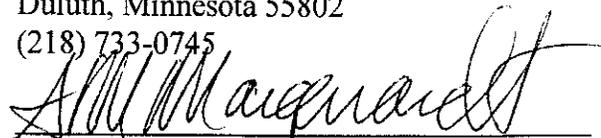
which can only be determined after a full trial on the issue. Accordingly, if the decision of the Court of Appeals is overturned, the matter must be remanded for trial on the factual issues.

Dated: 12-14-06



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