

NO. A11-1481

**State of Minnesota
In Court of Appeals**

Jane Kay Dukowitz,

Appellant,

vs.

Hannon Security Services, Inc.,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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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

- I. Minnesota construes the public policy exception to the at-will employment doctrine narrowly. A claim for retaliatory discharge is not recognized in Minnesota unless the discharge was in violation of a clear statement of public policy legislatively expressed. In this case, the Legislature did not include in the unemployment statutes a clear statement of public policy that makes it unlawful to discharge an employee who files for unemployment benefits. The District Court did not err in concluding that Minnesota does not recognize Appellant's claim as an exception to the at-will employment doctrine.

- II. Minnesota Statutes §§ 268.03 and 268.192 do not provide Appellant with an implied private right of action because she is not a beneficiary of the statute, the Legislature indicated an intent to deny a cause of action, and implying a private cause of action is inconsistent with the purpose of the statutes. The District Court did not err in concluding that there is no private right of action for retaliatory discharge that can be inferred from the unemployment statutes.

STATEMENT OF THE CASE

Respondent provides security services to clients. Appellant was performing poorly in her job as a security officer at one of Respondent's client's locations. Respondent agreed to transfer her to a location that was less busy but had a risk of being only a temporary position. Appellant understood this and knew that if this post closed she would not be able to return to her previous position. The post ultimately closed and Appellant was deactivated. Subsequently, Appellant worked minimal hours due to her own scheduling issues, and, therefore, was laid off. In the meantime Appellant had filed for unemployment benefits, which Respondent initially objected to. Ultimately, however, Respondent acquiesced in her claim for benefits as Appellant was no longer working for Respondent.

Respondent did not retaliate against appellant. Nevertheless, Minnesota does not recognize a cause of action for retaliation following an employee's filing for unemployment benefits because the language of the unemployment statutes do not create this type of claim.

On June 29, 2011, the District Court held that Minnesota does not recognize a cause of action for alleged termination in response to filing for unemployment. The District Court opined that the vast statutory scheme comprising the unemployment statutes does not suggest that a common law claim for retaliation should be recognized. Moreover, the statutes cannot imply a cause of action.

STATEMENT OF FACTS

Hannon Security Services, Inc. provides security officers to its clients. (RA72 at ¶3.) It does so in the Minneapolis/St. Paul area as well as the St. Cloud area. (*Id.*)

Appellant began working for Hannon as a security officer in November 2005. Her initial assignment was at the Gold'n Plump plant in Cold Spring, MN, working a shift from 3:00 p.m. to 11:00 p.m., Monday through Friday. (*Id.* at ¶5.) In 2007, she requested to be put on a day shift. Hannon had an account at the Fingerhut warehouse, and during Fingerhut's busy season (the fourth quarter during the holiday season) there was additional activity there, and, thus, a need to open a security post in a building known as Building 26. On October 26, 2007, Appellant was assigned to that post to work the day shift Monday through Friday. (*Id.*)

Fingerhut kept that post open through the winter, but by March 2008, Fingerhut closed that post. Appellant was transferred to Building 24 on the Fingerhut campus. (RA73 at ¶6.) Unfortunately, this area was busier and had more activity (meaning more people going through the security checkpoints and more work for the security officers). (*Id.*) Appellant had difficulty keeping the proper logs and paperwork, making her rounds, handling the electronic and paper based record keeping system, generally complained about the record keeping system, and was cited for a number of job performance issues. (RA40-47.) Appellant conceded that she had made a number of errors on the job. (RA112-13 (saved log to template and missed strips on the detext round); 113-114 (truck

gate); 114 (Notice of Disciplinary Action); 114-15 (logging daily equipment); 115 (lost radio); 115-16 (logging information on computer); 116 (report saving, the base radio, securing the outside doors)).¹

By this time, Appellant believed that she was going to be fired. (RA118 (“I was getting the feeling they were trying to get rid of me.”)). On July 18, 2008, Appellant informed her supervisor that she wanted to take the day shift at Building 26 if it opened up again. She was warned that by giving up her current position for what was, in effect, a temporary job, she could risk losing her employment in the event the post closed after the holiday season because Hannon needed to fill her position at Building 24. (RA53.) Despite the risk, Appellant took the position. (*Id.*) In fact, in her deposition, Appellant admitted to understanding that she was taking a risk on whether the position would remain available. (RA117-18.)

On August 25, 2008, Appellant again began the day shift at Building 26. However, Fingerhut decided to close that post on December 23, 2008. Because of the difficulties Appellant had with her position at Building 24, Fingerhut did not want to place her at that location again. Appellant herself conceded that the post at Building 26 was an easier position than the post at Building 24. (RA110.)

¹ Respondent directs the Court to RA6-11 and RA77-87 for a more comprehensive factual recitation.

There were no other open positions for Appellant to move into since Hannon did not consider Appellant an ideal candidate for the job at Building 24. (RA122 at ¶¶3, 4.) Hannon representatives communicated this to Appellant, but Appellant asked that she remain in Hannon's employ and offered to pick up occasional shifts if needed. (RA50-51.) Unfortunately, very few opportunities arose. (RA54.) Appellant was not able to work at Fingerhut, Hannon's largest client in the St. Cloud area, because the client did not want her working there, and there were no other open positions available that Appellant was eligible for. (RA73 at ¶9; RA122 at ¶¶3-4.) In addition, Appellant limited her availability (RA53 ("She [Appellant] also states she needs off of nights."); RA56 (overnights); RA55 ("After 6/19/08 I [Appellant] will no longer be able to work on Saturdays at Fingerhut."); RA111-12 (day shift); RA119 (Saturdays)). Appellant only worked one shift between December 23, 2008, and March 2009. Therefore, she was laid off on March 13, 2009. (RA120-21.)

Appellant filed for unemployment benefits on December 21, 2008. (RA57.) At the time, Hannon appealed her claim on the ground that her departure should be treated as a voluntary resignation because Appellant took the job at Building 26 knowing that it had the risk of being temporary. (RA58.) However, Hannon realized that Appellant was, in fact, laid off, and that she deserved unemployment benefits because she was not and would not be working for Hannon. Therefore, Hannon did not participate any further in the unemployment process. (RA74 at ¶12.)

On May 28, 2010, Appellant initiated a lawsuit against Hannon for wrongful termination in contravention of public policy. (RA1-4.) She claimed that Hannon terminated her because she filed for unemployment benefits. This act, she asserted, was in contravention to “a clear mandate of public policy” expressed in Minn. Stat. § 268.03. (*Id.*)

On May 6, 2011, Respondent filed its motion for summary judgment on the grounds that Minnesota does not recognize Appellant’s cause of action; that even if it did, Hannon did not terminate Appellant for filing for unemployment benefits; and that even if Hannon did terminate Appellant for that reason, it had a legitimate business reason for the termination. (RA5-71.)

On June 29, 2011, the Honorable Mary Mahler, Judge of District Court, granted Respondent’s motion for summary judgment/judgment on the pleadings. (RA127-42.) The District Court held that Minnesota does not recognize a cause of action for alleged termination in response to filing for unemployment. (*Id.*) The District Court opined that the vast statutory scheme underlying the unemployment statutes does not suggest that a common law claim for retaliation should be recognized. Moreover, the District Court held that the statutes cannot imply a cause of action. (*Id.*)

STANDARD OF REVIEW

In its supporting memorandum, the District Court used the standard of review for a summary judgment motion. As part of Respondent's motion, it submitted extrinsic evidence; however, summary judgment was granted on the pleadings. "Generally, the court may not consider extrinsic evidence on a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e)." *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). But where a court fails to exclude extrinsic materials, it effectively converts a motion to dismiss to one for summary judgment. Minn. R. Civ. P. 12.02; *see also Black v. Snyder*, 471 N.W.2d 715, 718 (Minn. Ct. App. 1991) (stating that where respondent submitted documentary evidence in connection with motion to dismiss, court's failure to exclude materials converted motion into one for summary judgment), review denied (Minn. Aug. 29, 1991).

Summary Judgment decisions are reviewed by this court *de novo*. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). When there are no genuine issues of material fact, the Court of Appeals reviews the District Court's decision *de novo* to determine whether it erred in applying the law. *Art Goebel Inc. v. N. Suburban Agencies*, 567 N.W.2d 511, 515 (Minn. 1997).

ARGUMENT

I. SUMMARY OF ARGUMENT

Minnesota narrowly construes the public policy exception to the at-will employment doctrine. Minnesota requires that a clear mandate exist to apply the public policy exception. Moreover, Minnesota requires that the act of an employer actually violate the public policy stated by the Legislature. Appellant brings this appeal on the ground that she has a viable common law cause of action for retaliatory discharge based on the statement of public policy contained in Minn Stat. § 268.03.

The Minnesota Unemployment Insurance Law, Minn. Stat. §§ 268.001-268.23, governs the administration of unemployment benefits to Minnesota workers unemployed through no fault of their own. The chapter has a provision that explicitly declares the public purpose of the program. The stated purpose is as follows:

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. Clearly, this stated public purpose is not the type of clear mandate required for the application of the public policy exception. The Minnesota Unemployment Insurance Law does not contain a public policy against terminating those seeking unemployment benefits. Therefore, even if Hannon did terminate Appellant for

filing for unemployment benefits, which it denies, such an act does not contravene any public policy.

In *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 457 (Minn. 2006), the Minnesota Supreme Court stated that participation in an activity sanctioned by the Legislature does not create a protected status for an employee that would insulate him or her from termination as a result of that activity. Accordingly, just because Appellant participated in a lawful activity—filing for unemployment benefits—does not implicitly create for her a common law cause of action if her employer terminated her for her participation in that activity.

II. MINNESOTA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR RETALIATORY DISCHARGE WHEN AN EMPLOYEE IS TERMINATED FOR FILING FOR UNEMPLOYMENT BENEFITS.

Minnesota courts have been adamant that there is only one application of the public policy exception to the at-will employment doctrine. That application exists when an employee is discharged in contravention to a clear legislative mandate of public policy. This narrow construction causes Appellant’s cause of action for wrongful discharge to fail as a matter of law. As such, The District Court Order should be affirmed.

A. Minnesota Construes the Public Policy Exception to the At-Will Employment Doctrine Narrowly.

Minnesota has upheld the at-will employment doctrine for decades, most recently in 2006. *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 457 (Minn. 2006). The public policy exception to the employment at-will doctrine is narrowly construed and

has only been used to protect employees when they either report their employers' violation of the law or refuse to violate the law on behalf of their employers. Minnesota requires a clear, substantial and fundamental statement of public policy (such as those who refuse violate the law) in order to utilize the public policy exception. In the present case, the Minnesota Unemployment Insurance Law does not state a policy that is meant to protect current employees' rights. It exists only to provide financial assistance for unemployed persons. Accordingly, the public policy exception should not be extended to this case for a claim in which Appellant alleges that she was terminated because she filed for unemployment benefits.

1. Minnesota's At-Will Employment Doctrine.

In Minnesota, an employer can terminate an employee for any reason or for no reason at all. *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 627 (Minn. 1983):

Where the hiring is for an indefinite term, as in this case, the employment is said to be "at-will." This means that the employer can summarily dismiss the employee for any reason or no reason, and that the employee, on the other hand, is under no obligation to remain on the job.

Id. (quoting *Cederstrand v. Lutheran Brotherhood*, 117 N.W.2d 213, 221 (Minn. 1962); see also *Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc.*, 637 N.W.2d 270, 273 (Minn. 2002).

Appellant asserts that she was wrongfully terminated because she filed a claim for unemployment benefits. (RA3.) She claims that this was in contravention of the public policy expressed in Minn. Stats. §§ 268.03 and 268.192. Thus, she claims she is entitled

to a public policy exception to the employment at-will doctrine. However, Appellant misapplies the law in Minnesota by suggesting that these statutes create a common law cause of action for retaliatory discharge. Minnesota only extends the exception to cases when a clear mandate of public policy, expressed through a statute, prohibits an employer from retaliating against its employees.

Minn. Stats. §§ 268.03 and 268.192 do not state such a policy. They simply state the public purpose behind providing access to unemployment benefits to individuals unemployed through no fault of their own. There is no public policy, either legislatively or judicially based, nor should there be, that prohibits an employer from retaliating against an employee for filing for unemployment benefits.

2. Narrow Construction of the Exception to At-Will Employment.

Appellant is not entitled to relief as a matter of law because Minnesota does not extend the public policy exception to the at-will employment doctrine in situations involving the filing of a claim for unemployment benefits. In fact, Minnesota courts have only been willing to extend the public policy exception in one type of situation – to situations involving an employee’s refusal to engage in unlawful conduct or reporting unlawful conduct. *See Phipps v. Clark Oil & Refining Corporation*, 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff’d*, 408 N.W.2d 569 (Minn. 1987).

a. The *Phipps* Decisions.

The Minnesota Supreme Court held in *Phipps* 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 or rule or regulation adopted pursuant to law.” 408 N.W.2d at 571.

Phipps was the first case in which the Minnesota Supreme Court applied the public policy exception to the at-will employment doctrine. *Phipps* involved a lawsuit brought by an employee against his employer after the employee was terminated for refusing to violate the Federal Clean Air Act.² *Id.* The Court of Appeals in *Phipps* held that the plaintiff stated a valid cause of action for wrongful termination under the public policy exception to the at-will employment doctrine because “[a]n employer’s authority over its employee does not include the right to demand that the employee commit a criminal act. An employer therefore is liable if an employee is discharged for reasons that contravene a clear mandate of public policy.” 396 N.W.2d at 592. As evidenced by the language used, the Court of Appeals is limiting the definition of an act that contravenes a clear mandate of public policy to situations in which an employer is demanding that the employee commit a criminal act.

Following the Court of Appeals’ decision in *Phipps*, the Minnesota legislature enacted the whistleblower statute, which prohibits an employer from terminating an

² 42 U.S.C. §§ 7401-7642 (1990).

employee who makes a good faith report of a violation or suspected violation of any federal or state law or who refuse to violate a law. Minn. Stat. § 181.932 (2000).

In light of the whistleblower statute, the Minnesota Supreme Court still had to determine whether it would recognize a common law cause of action for wrongful discharge. The Court was only willing to apply the public policy exception under one limited circumstances:

[A]n 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 or rule or regulation adopted pursuant to law.

Phipps, 408 N.W.2d at 571.

Together, the whistleblower statute and the public policy exception “only protect employees who expose violations of law designed to promote the public’s morals, health, safety and welfare.” *Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A.*, 586 N.W.2d 811, 814 (Minn. Ct. App. 1998); *see also Vonch v. Carlson Companies, Inc.*, 439 N.W.2d 406, 408 (Minn. Ct. App. 1989).

Since *Phipps*, Minnesota courts have been cautious not to apply the public policy exception too broadly fearing that doing so would swallow the general at-will employment doctrine.

b. The *Nelson* Decision.

Even after nearly twenty years following the *Phipps* decision Minnesota still only narrowly construes the public policy exception to the at-will doctrine in such a way that it

is implicated only in circumstances in which an employee is retaliated against by the employer for refusing to engage in unlawful conduct. *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d at 457 n.5 (citing *Anderson-Johanningmeier*, 637 N.W.2d at 277-78; *Haskin v. Northeast Airways, Inc.*, 123 N.W.2d 81, 86 (Minn. 1963)).

In *Nelson*, the Minnesota Supreme Court revisited the public policy exception to the at-will doctrine and further reiterated its reluctance to extend the exception to other instances of retaliatory discharges that are not explicit violations of law. 715 N.W.2d 452 (Minn. 2006). *Nelson* involved a former employee of a nonprofit organization that brought a wrongful termination action when he was discharged in retaliation for voting as a member of the nonprofit organization. *Id.* The Court stated that “[t]hough there are several statutory exceptions to the at-will rule, we only have recognized a common-law cause of action for wrongful discharge in violation of public policy once, in *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569.” The Court refused to extend the public policy exception in this case. The Court cited the narrow application of the public policy exception and the limited holding in *Phipps*:

[A]n 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 or rule or regulation adopted pursuant to law.

715 N.W.2d at 455 (quoting *Phipps*, 408 N.W.2d at 571).

The Court reviewed its own holdings and those holdings of courts in other jurisdictions and noted that there must be a clear, substantial and fundamental public policy to allow an exception to the at will doctrine:

Even 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.** *See, e.g., 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.**” (quotations omitted)), abrogated on other grounds by *Green v. Ralee Eng’g Co.*, 960 P.2d 1046 (Cal. 1998); *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1043 (Utah 1989) (holding that **the court would recognize only those public policies that “are so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public good”**).

Nelson, 715 N.W.2d at 456. (Emphasis supplied.)

In *Nelson*, the alleged public policy in question – protecting non-profit members’ voting rights – was not a clear public policy that supported a cause of action for employees discharged in retaliation for exercising their rights as nonprofit members. *Id.* at 456. In reaching this conclusion, the Court adopted a limited understanding of the types of “clear” public policy worthy of the exception. The Court based its application on a decision from the California Supreme Court: *Gantt v. Sentry Ins.*, 824 P.2d 680, 684 (Cal. 1992). In *Gantt*, the Court held that a public policy is only “clear” for purposes of the exception to the at-will employment doctrine in four instances: the employee 1) refused to violate a statute; 2) performed a statutory obligation; 3) exercised a constitutional or statutory right or privilege; or 4) reported a statutory violation of the

public's benefit. *Id.* The *Gantt* Court also observed that in order to provide an exception to the at-will employment doctrine, "the policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer; in addition, the policy must be "fundamental," "substantial" and "well established" at the time of the discharge." *Id.* (citing *Foley v. Interactive Data Corp.*, 765 P.2d 373, 379-80 (Cal. 1988)).

Ultimately, the *Nelson* Court concluded that the public policy proffered by the employee did not rise to the level necessary to trigger the application of the exception. "[S]ince 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." 715 N.W.2d at 457.

Similarly, the Minnesota Legislature promulgated Minn. Stat. § 268.184, which explicitly defines employer misconduct. The provision does not prohibit employer retaliation for filing for the unemployment benefits. As the Minnesota Supreme Court found in *Nelson*, it is clear that the Legislature implicitly reserved this action for Hannon's discretion.

c. The *Freidrichs* Decision.

Appellant attempts to support her position by pointing to *Freidrichs v. Western National Mutual Insurance Company*, 410 N.W.2d 62 (Minn. Ct. App. 1987) for the

proposition that her claim is viable despite its absence in the statutory framework of the unemployment statutes. However, *Freidrichs* is distinguishable. *Freidrichs* was a whistleblower case in which the employee reported wrongdoing by the employer.³

In *Freidrichs*, the employee, an inspector of pressure vessels, claimed he was discharged in retaliation for reporting violations of standards that the employer was required to follow with respect to these vessels. 410 N.W.2d 62, 64 (1987). The law at the time stated that it was a felony for an inspector to falsely certify any “steam boiler or its attachments or the hull and equipments of any steam vessel.” *Id.* at 65. The employer argued that the Court could not apply the public policy exception to the case because the law did not explicitly reference pressure vessels. However, the law was amended in 1982 to include “pressure vessels.” *Id.*

The Court disagreed with the employer, and ruled that the underlying emphasis on the statute, even prior to the amendment, was public safety and protection of citizens, which was a “clearly mandated public policy.” *Id.* at 65 (*citing Phipps*, 408 N.W.2d at 571.) Furthermore, the Court concluded that the statutes involved were “not to be read in isolation but rather as part of the legislature’s intent to further clarify inspection, construction and operation standards and to allow imposition of stiffer penalties for

³ The 1980 statute that existed at the time of the employee’s claim did not explicitly reference the type of violation the employee reported. However, the purpose and effect was the same, and the Court’s ultimate result is consistent with the *Phipps* and *Nelson* decisions.

violation of these standards.” *Id.* at 65. Thus, the employee in *Freidrichs* was terminated for reporting a situation that endangered the health and safety of others—a classic whistleblower case. *See Phipps*, 408 N.W.2d 569 (refusing to violate Clean Air Act; Minn. Stat. § 181.932; *Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A.*, 586 N.W.2d 811 (Minn.Ct. App. 1998) (report should affect the morals, health, safety, and welfare of the public).

The statutes Appellant relies on are of a completely different breed than those involved in *Freidrichs*. First, the unemployment statutes include a provision regarding employer misconduct. Minn. Stat. § 268.184. The statute calls for certain administrative penalties to be applied to employers who collude with employees seeking the benefits, make misrepresentations, or fail or refuse to honor a subpoena. *Id.* It also discusses criminal penalties an employer can face for misconduct. *Id.* It does not prohibit employer retaliation. Moreover, as evidenced above, the public purpose statement included in Minn. Stat. § 268.03 fails to make any intimation that it is for the protection of employed individuals—such as Appellant at the time she filed for the benefits. Finally, Minn. Stat. § 268.192 provides no support for Appellant’s assertion in this case. The statute states as follows:

No employer may directly or indirectly make or require or accept any deduction from wages to pay the employer's taxes, 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.

Minn. Stat. § 268.192. This provision merely protects the rights of those individuals who receive the benefits. It does provide protection from employer retaliation.

Unlike the employee in *Freidrichs*, Appellant did not refuse to violate or report a violation of a law which was a clearly mandated public policy. Instead, she is trying to assert outright that the exception should apply to her case because the retaliatory discharge was in violation of the public policy included in the unemployment statutes. This clearly is not the case.

d. The *Kozloski* Decision.

Appellant faces a similar problem with her use of the unpublished decision, *Kozloski v. Am Tissue Servs. Foundation*, 2006 WL 4037589 (D. Minn. 2006). She uses this case to further her assertion that there need not be an explicit statement of public policy in the application of the exception, and that it is only necessary that the termination occur for a reason that clearly violates public policy. *Id.* at 6-7. This case, however, lacks analogous support for Appellant's cause of action because it is a whistleblower case that involves FDA regulations.⁴ There, the plaintiffs claimed they were terminated as a direct result of and in retaliation for their reporting to the employer and the FDA their concerns about public safety, violations of federal regulations and federal law, and related concerns regarding quality control issues. *Id.* at 3. The only reason the plaintiffs could

⁴ Whistleblower claims are cognizable where there is a violation of law involved. *Buytendorp v. Extendicare Health Services, Inc.*, 498 F.3d 826 (8th Cir. 2007).

not sustain their whistleblower claim was because they lacked the factual allegations necessary to allege that the plaintiff was an employee within the meaning of the statute. As a result, they were able to assert their claim through the public policy exception. *Id.* at 4-5. The Court concluded that “the FDA regulations concerning the safe transfer of tissues from cadavers for use in live patients emphasize the public safety and protection of citizens and thus encompass *clear* public policy regarding public’s safety.” *Id.* at 7. The circumstances involved in the *Kozloski* case are far removed from those involved in Appellant’s case.

Unlike the plaintiffs in *Kozloski*, Appellant does not have a claim that the employer violated the unemployment statutes or did something inconsistent with them. Instead, her claim is based on her own individual right to unemployment benefits. It implicates no public safety or protection concerns for greater society.

Minn. Stat. § 268.03 only goes so far in proclaiming the public purpose behind the unemployment statutes. It states that 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.’” (Emphasis supplied.) This public policy only relates to the creation of the fund that will provide unemployment insurance to those unemployed individuals who are eligible. It does not seek to protect the rights of employed

individuals and seeks only to state what the purpose of the unemployment insurance program is: to provide the temporary partial wage replacement.

Like the employee in *Nelson*, Appellant cannot point to an explicit public policy that creates a cause of action for employees who are discharged in retaliation for exercising their right to unemployment benefits. Therefore, the District Court properly dismissed her Complaint.

3. The Unemployment Statutes Do Not Have the Type of Public Policy Declaration Necessary for the Application of the Exception to the At-Will Employment Doctrine.

The Minnesota Unemployment Insurance Law, Minn. Stat. §§ 268.001-268.23, governs the administration of unemployment benefits to Minnesota workers unemployed through no fault of their own. The chapter has a provision that explicitly declares the public purpose of the program. The stated purpose is as follows:

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 (2007). In creating this statute, the Minnesota legislature has created a vast body of law that covers all aspects relating to unemployment benefits. With that has come an explicit declaration of the public purpose which is limited to an unemployed person’s ability to obtain unemployment benefits. The purpose clearly is meant to provide unemployed individuals with benefits if they are not able to work through no

fault of their own. **It does not protect the rights of an employed individual.** Further, the statute **does not** prohibit an employer from terminating an employee for filing for these benefits. In fact, it begins with the presumption that the employee is actually unemployed. Minn. Stat. § 268.035, Subd. 26; *Ackerson v. Western Union Telegraph Co.*, 48 N.W.2d 338 (Minn. 1951).

There is no clear public policy protecting individuals from discharge in the event they seek unemployment benefits under the Minnesota Unemployment Insurance Program. In the present case, while Appellant points to the public policy provision as support for her assertion that she has a viable cause of action, this statement does not evidence a clear, fundamental and substantial statement of public policy to make a claim for retaliatory discharge for seeking unemployment benefits.

Therefore, Appellant's cause of action is not a proper claim upon which relief can be granted and the District Court Order should be affirmed.

B. If the Minnesota Legislature Intended to Create a Retaliatory Discharge Claim Through the Unemployment Statutes It Would Have Explicitly Done So, and It Did Not.

Respondent's position and the holding of the District Court is further supported by the Minnesota Legislature's deliberate promulgation of several provisions that explicitly create causes of action for retaliatory discharge in specific situations. However, nowhere in the comprehensive unemployment statutes is there any sort of provision that supports Appellant's attempted cause of action. As such, we can only assume that the Legislature

intended to not create a claim for an employee who is discharged for seeking unemployment benefits. In fact, the Legislature has spoken to “employer misconduct” within the unemployment context and did not include any public policy for the protection of an employee discharged for seeking unemployment benefits. *See* Minn. Stat. § 268.184. The Minnesota Legislature has taken care to explicitly delineate the circumstances in which retaliatory discharge claims are actionable, and has clearly not done so within the context of the unemployment statutes. As such, Minnesota should not be among the states that recognizes this type of common law cause of action.

1. The Minnesota Legislature’s Explicit Creation of Certain Causes of Action for Retaliatory Discharges.

The Minnesota Legislature has explicitly prohibited an employer from taking adverse employment action against an employee in these instances: Minn. Stat. § 611A.036 (2009) (taking reasonable time off from work to testify as a victim or witness in a criminal proceedings); Minn. Stat. § 518B.01, Subd. 23 (2006) (taking reasonable time off from work to seek relief under the Domestic Abuse Act); Minn. Stat. § 181.964 (2011) (asserting rights or remedies in connection with personnel record review and access statutes); Minn. Stat. § 543.20, Subd. 3 (2010) (service of process at place of employment or postsecondary education institution for support enforcement cases and paternity suits); Minn. Stat. § 182.669 (2006) (exercising any right authorized under Occupational Safety and Health Act); Minn. Stat. § 181.75 (2010) (refusing to take a lie-detector test); Minn. Stat. § 593.50 (2010) (serving on jury duty).

The Workers' Compensation Act, Minn. Stat. § 176.82 (2006), creates a cause of action for civil damages if an employer obstructs an employee who seeks benefits under the workers' compensation statutes. Similarly, the Minnesota Human Rights Act declares it an unfair discriminatory practice for an individual, like an employer, to intentionally engage in any reprisal against a person who 1) opposed a practice prohibited by the MHRA, "or has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the MHRA]" or 2) "[a]ssociated with a person or group of persons who are disabled or who are of different race, color, creed, religion, sexual orientation or national origin." Minn. Stat. § 363A.15 (2004). The statute goes on to describe types of reprisals as "any form of intimidation, retaliation, or harassment." *Id.*

It is evident from the examples cited above that the Minnesota Legislature is cognizant of the possibility of retaliation or reprisal in the employee-employer relationship. As a result, in certain instances it has taken deliberate action in explicitly prohibiting such conduct. It did not do so within the context of the unemployment statutes.

2. The Legislature's Decision Not to Include a Provision in the Unemployment Statutes is Dispositive.

The Minnesota Legislature's decision not to include a provision in the vast statutory scheme that is the Minnesota Unemployment Insurance Law that prohibits retaliation cannot be dismissed as accidental. In fact, the Legislature did discuss its views

on “employer misconduct” in Minn. Stat. § 268.184 (2007), which defines “employer misconduct” and sets out penalties for the same. It is important to note that nowhere in that provision or any other provision is there evidence that the Legislature wanted to protect an employee from termination for utilizing the benefits of the program. Moreover, it provides the employee with both administrative and criminal remedies for employer misconduct. *See* Minn. Stat. § 268.184, Subds. 1, 2. There is no type of civil remedy for any employer misconduct, and no reference to retaliation.

As stated above, the Supreme Court of Minnesota in *Nelson* recently revisited the public policy exception to the at-will doctrine and further reiterated its reluctance to extend the exception to instances of retaliatory discharges that are not explicit violations of law. *Nelson*, 715 N.W.2d 452 (Minn. 2006).

A fundamental axiom of statutory interpretation and construction with respect to legislative intent is that “when a statute speaks with clarity in limiting its application to specifically enumerated subjects, its application shall not be extended to other subjects by process of construction. *Martinco v. Hastings*, 122 N.W.2d 631, 637 (Minn. 1963) (*citing* *Griswold v. County of Ramsey*, 65 N.W.2d 647 (Minn. 1954); *City of St. Louis Park v. King*, 75 N.W.2d 487 (Minn. 1956); 17 Dunnell, Dig. (3 ed.) § 8980; 50 Am.Jur., Statutes, §§ 229, 244. Furthermore, “[o]nce the Minnesota legislature has drawn the line between employment disputes that genuinely implicate public policy and are actionable

and those that are not, it is not for courts to redraw that line.” *Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1493 (8th Cir. 1992).

Minnesota has narrowly construed the public policy exception to the at-will doctrine in such a way that it is implicated only in circumstances in which an employee is retaliated against by the employer for refusing to engage in unlawful conduct. The Minnesota Legislature has codified a number of statutes that prohibit employers from engaging in acts of retaliation. The Legislature did not create this type of provision in the statutes governing unemployment benefits. As such, there is no clear public policy that creates a cause of action for Appellant for wrongful discharge under the public policy exception to the at-will doctrine. Therefore, Appellant’s Complaint was properly dismissed with prejudice, and this Court should affirm the District Court’s Order.

C. Foreign Jurisdictions That Have Refused to Extend the Exception to the Filing of Unemployment Benefits Are Instructive on the Issue.

While the Minnesota case law authority is clear on the narrow application of the exception, court decisions from other jurisdictions that have ruled on this issue provide further support for Respondent’s position and the District Court’s holding. Most persuasive in this pursuit are the decisions that have come down in the jurisdictions of Missouri and Indiana.

1. Missouri Case Law.

In a diversity action in the Eastern District of Missouri, three employees alleged that they were discharged after their employer learned that they had filed for state

unemployment benefits when they were on layoff status. *Kosulandich v. Survival Technology, Inc.*, 795 F.Supp. 294 (E.D. Mo. 1992). The District Court held that the employees failed to state a claim on the ground that Missouri recognized only narrow exception to the at-will doctrine: refusing to violate a law or for “whistleblowing.” *Id.* (citing *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473 (8th Cir. 1990) (applying Missouri law)).

In support of its ruling, the District Court noted that unlike the Missouri Workers’ Compensation Act,⁵ the unemployment compensation statute did not contain an “anti-retaliation provision protecting individuals who filed for benefits.”⁶ The employer appealed to the Eight Circuit Court of Appeals. 997 F.2d 431 (8th Cir. 1993). Affirming the District Court, the Eighth Circuit Court of Appeals held that while Missouri has a statute that explicitly states a public policy favoring the **availability** of unemployment benefits and a statute that **prohibits an employer from accepting a waiver of the right to receive the benefits**, the statutes “simply do not rise to the level of proscription which would justify regarding them as an exception to at-will employment under applicable

⁵ Mo. Rev. Stat. § 287.780 (2005). (“No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.”)

⁶ See Mo. Rev. Stat. §§ 288.010-.390 (2005).

precedent . . . No law expressly forbids retaliation against employees who exercise their right to seek unemployment benefits.” *Id.* at 433.

Again, like Missouri, Minnesota has a wide array of statutory provisions that expressly prohibit certain types of retaliatory conduct by an employer. The Minnesota Unemployment Insurance Law does not contain this type of provision, and in fact, it includes a provision prohibiting certain types of employer misconduct; however, this provision does not prohibit employer retaliation. Minnesota and Missouri have similar statutory language when it comes to the unemployment statutes, and like the Court in *Kosulandich* and the District Court in this case, this Court should find that a reading of the statutes fails to rise to the level to justify the application of the exception to the at-will employment doctrine.

2. Indiana Case Law.

A similar situation arose in *Lawson v. Haven Hubbard Homes, Inc.*, 551 N.E.2d 855 (Ind. App. 1990). The Indiana Court of Appeals granted an employer’s motion for summary judgment when a former employee claimed that while she was still employed, but on medical leave, the employer terminated her in retaliation for her having filed for unemployment benefits. *Id.* at 856. The employee injured herself at work and attempted to return to work but was unable to return when her chiropractor placed her on a weight restriction. The employer refused to allow her to return to work but kept her on as an employee with medical leave status. *Id.* at 857. The employee in *Lawson* argued that the

statutory prohibition against retaliation of an employee who files for workers' compensation is analogous to the filing for unemployment benefits. The Indiana Court of Appeals was not convinced and refused to extend the public policy exception on the ground that the underlying concern for workers' compensation retaliation is not the same as the concern for the filing of unemployment benefits. *Id.* at 860.

We fail to see how the 'fear of being discharged' in the present case would have a 'deleterious effect on the exercise of a statutory right.' Presumably, an employee will not file an unemployment compensation claim unless the employee is unemployed, or unless the employer is refusing to allow the employee to return to work—as is the case here. In either case, the employee will receive unemployment benefits—assuming the employee has not been discharged for just cause or voluntarily left his employment without good cause.

Id. The Indiana Court of Appeals refused to recognize the public policy exception in this case, and its reasoning is instructive.

Minnesota has not practiced leniency with respect to the recognition of the exception in cases alleging wrongful discharges, and, in its long history, has employed the exception in only one limited circumstance. Therefore, this Court should follow suit and construe the exception narrowly and refuse to recognize a cause of action for wrongful discharge in cases in which an employee is terminated for filing for unemployment benefits.

D. Foreign Jurisdiction That Have Allowed the Exception to Apply to Retaliation for Filing for Unemployment Benefits Are Distinguishable From Minnesota Law.

The public policy exception to the at-will doctrine has been used by courts in some jurisdictions that have confronted cases of a retaliatory discharge of an employee who filed for unemployment benefits. Those cases, however, are distinguishable given Minnesota's narrow construction of the public policy exception and the Minnesota Legislature's practice of codifying prohibitions against retaliation in the workplace.

1. Iowa.

Iowa has recognized the filing of unemployment benefits as a valid public policy exception to the at-will employment doctrine. *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994). In *Lara*, the employer made an oral promise to double an employee's salary and provide insurance benefits and paid vacations. Additionally, he promised to continue her employment until his retirement. *Id.* at 780. The employee alleged that the employer did not follow through with the agreement and reduced her hours so significantly that it entitled her to partial unemployment benefits. *Id.* After she applied for the benefits, the alleged retaliatory behavior continued. The employer told Iowa Job Service she had quit, he reduced the employee's scheduled hours even more, changed the locks on the office, scheduled her at odd times when she was unable to enter the office, and refused to speak to her. *Id.* at 782.

The Iowa Supreme Court considered the employer's discharge of the employee for filing for unemployment benefits a violation of the public policy behind Iowa's unemployment benefits laws, and, therefore, held that the employer frustrated a recognized and defined public policy of the state. *Id.* (citing *Springer v. Weeks & Leo Co.*, 429 N.W.2d 560 (Iowa 1988); Iowa Code § 96.15 (2010)). The Court stated that it recognized a cause of action for tortious discharge where an employer's retaliatory discharge "would conflict with certain legislatively declared goals." *Id.*

Iowa courts have used the public policy exception as a means to the types of ends accomplished by statutes in Minnesota. The use of the exception has not been narrowly applied, and instead has been used in a number of instances in which the court determined that the retaliatory discharge violated "legislatively declared goals." *See, e.g., Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 285-89 (Iowa 2000) (public policy in favor of providing truthful testimony); *Teachout v. Forest City Community School Dist.*, 584 N.W.2d 296, 300-01 (Iowa 1998) (public policy in favor of reporting suspected child abuse); *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998) (public policy in favor of permitting employees to make demand for wages); *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560-61 (Iowa 1988) (public policy in favor of permitting employees to seek workers' compensation for work-related injuries). The standard of applying the exception to any situation in which a legislatively declared goal is at stake runs in glaring divergence with Minnesota courts' application of the exception.

However, it is important to note that Iowa only permits the broad use of this exception when a violation actually occurs. For example, in *Lara*, the employer's initial conduct caused the employee to seek the aid of unemployment benefits. It was the initial conduct coupled with the retaliation that the Court found problematic. In this case, it was clearly Appellant who not only took the risk of taking a temporary position, but also limited her availability in picking up other hours. Appellant filed for unemployment benefits in December 2008. She was not terminated until March 2009. Even in Iowa, the exception to the at-will employment doctrine is not applicable if there was no violation of public policy to begin with. *Mahony v. Universal Pediatric Services, Inc.*, 643 F.3d 1103, 1107-08 (8th Cir. 2011) (citing *Jasper v. H. Nizam*, 764 N.W.2d 751, 765 (Iowa 2009)). Here, Appellant cannot show there was retaliation on the part of Hannon.

2. Pennsylvania.

Like Iowa, Pennsylvania has used the public policy exception to create a cause of action for an individual employee who is discharged in retaliation for filing for unemployment benefits. *Highhouse v. Avery Transportation*, 660 A.2d 1374 (Pa. Super. 1995).

In *Highhouse*, the employer, a bus company, required the employee, a driver, to agree that he would not file for unemployment compensation during the time when work was unavailable. *Id.* at 1376. After the employee refused to make such an agreement, the employer made it impossible for him to continue working once the employee began

receiving unemployment benefits. For example, the employer assigned choice trips to drivers with less experience, required the employee to pay cash up front and submit expense reports for reimbursement instead of giving him a company credit card, withheld the Christmas bonus, and was openly disapproving of employee's decision to file a claim for unemployment benefits. *Id.* Prior to *Highhouse*, Pennsylvania courts consistently held that an employer violates public policy by terminating an employee for exercising his or her legal rights. *Id.* (citing *Kroen v. Bedway Security Agency, Inc.*, 633 A.2d 628, 633 (Pa. Super. 1993) (termination of at-will employee for refusal to take polygraph test violated public policy)); *Macken v. Lord Corp.*, 585 A.2d 1106 (Pa. Super. 1991) (at-will employee had a valid cause of action when discharged in retaliation for filing a worker's compensation claim⁷). These types of claims are preserved in Minnesota through explicit statutory provisions that prohibit employers from retaliating against employees who engage in these acts. However, despite Appellant's insistence, no such cause of action has been preserved in the unemployment statutes.

⁷ Pennsylvania's legislature has not created a statutory prohibition against retaliatory discharges for employees in situations such as an employee's filing of a workers' compensation claim. Without this type of provision it is necessary for Pennsylvania courts to be more willing to extend the public policy exception to ensure protection of an employee's rights, like that of workers' compensation benefits. Recall, Minnesota has a statute that explicitly prohibits any retaliation against an employee that files a workers' compensation claim. The Minnesota legislature did not insert a similar statute in the Unemployment Insurance Law.

The *Highhouse* Court held that the right of an employee to receive unemployment compensation was a right granted by the laws of the Commonwealth. 660 A.2d at 1377. The Court also looked to Pennsylvania's statute that prohibited any employment agreement that would have the effect of waiving, releasing, or commuting an employee's right to unemployment compensation. *Id.* at 1378 (*quoting* 43 Penn. Stat. § 861 (2009)). Based on the implied right and statutory authority, the Court held that if the employee was discharged "because he had made a claim for unemployment compensation during a period when he was not working and earning income, the discharge will constitute a violation of public policy and will support a tort claim for wrongful discharge." *Id.*

This case is distinguishable because the idea of "public policy" is much broader in Pennsylvania than in Minnesota. For example, the Superior Court of Pennsylvania has held that there is no cause of action for wrongful discharge if there is a statutory remedy and no violation of public policy. *Macken v. Lord Corporation*, 585 A.2d 1106, 1109 (Pa. 1991). In Pennsylvania, an actionable violation of public policy occurs in cases of wrongful discharge when a "well-recognized facet of public policy is at stake," a policy which "strikes at the heart of [a] citizen's social right, duties, and responsibilities." *Highhouse*, 660 A.2d at 1377 (citations omitted). Like Iowa, Pennsylvania employs a much more lenient and inclusive application of the public policy exception.

Minnesota has only recognized the public policy exception to the at-will employment doctrine in the case of a retaliatory discharge that occurs when an employee

refuses to violate a clear legislative mandate of public policy. Despite Appellant's assertions to the contrary, the case law concretely shows that Minnesota courts have never broadened the scope of the exception beyond this one application. Unlike Pennsylvania and Iowa courts, Minnesota courts have not been lenient with the exception given the fact that the Legislature has taken initiative to codify those circumstances in which employer retaliation is prohibited.

3. Ohio.

Ohio has also confronted this issue. *Smith v. Troy Moose Lodge No. 1044*, 645 N.E.2d 1352 (Ohio Com. Pleas 1994). In *Smith*, the Ohio Court of Appeals reversed the trial court's grant of summary judgment against the employer who had discharged its employee when she applied for unemployment benefits. *Id.* at 1353. The employee had been temporarily unemployed, and, in anticipation of being laid off again at a later date, applied for the benefits. *Id.* The Court held that the purpose of Ohio unemployment compensation was to benefit employees temporarily deprived of employment. However, it is significant to note that Ohio lacks a clear declaration of the policy behind its unemployment compensation law.

The Court remanded the case and instructed the trial court to determine whether the right to receive unemployment compensation because of temporary unemployment was a clear public policy of Ohio. *Id.* To make these determinations, Ohio courts have relied on the four criteria set forth in *Painter v. Graley*:

1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).
4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

369 N.E.2d 51, 57 (Ohio 1994). Ohio courts have fashioned their own test to determine whether a retaliatory discharge is a violation of Ohio's public policy, and, therefore, a cognizable cause of action under the common law. This method is different than Minnesota's. Minnesota courts have taken the opposite approach by only allowing the recognition of the exception in instances in which an employee is discharged after his or her employer violates the law or requires the employee to do so.

Minnesota's reluctance to apply the public policy exception to the at-will doctrine to situations outside of the one circumstance illustrates the stark, fundamental difference between Minnesota and these other jurisdictions when it comes to this exception. Iowa, Pennsylvania and Ohio courts have created for themselves a very different approach in dealing with wrongful discharge cases than what Minnesota has historically employed. Minnesota's abundance of statutory provisions that explicitly prohibit certain retaliatory discharges makes a Minnesota court's involvement in claims for retaliatory discharge under the common law much more rare, and it further limits the court's ability to fashion

a remedy out of whole cloth. Therefore, this Court should not take its cues from other jurisdictions that have a much broader understanding and application of this exception.

Instead, this Court should follow the precedent set in *Phipps* and recently applied in *Nelson* by construing the exception narrowly and refusing to recognize it in this case. Appellant claims she was terminated for filing for unemployment benefits. Minnesota does not have a public policy that prohibits an employer from discharging an employee for filing for unemployment benefits. The Minnesota Legislature had an opportunity to prohibit this type of retaliatory conduct but has chosen not to do so. Instead, the public purpose of the Unemployment Insurance Law is to “provide[] workers who are unemployed through no fault of their own a temporary partial wage replacement to assist the unemployed worker to become reemployed.” Minn. Stat. § 268.03.

Even if Hannon terminated Appellant as a result of Appellant’s filing for unemployment benefits,⁸ such action is not prohibited, and, therefore, Appellant cannot sustain her cause of action because the public policy exception does not apply. As a result, Appellant’s status as an at-will employee gave Hannon the right to terminate Appellant for any reason or no reason at all, and Appellant’s Complaint fails as a matter of law.

⁸ Which Hannon vehemently denies.

III. MINNESOTA'S UNEMPLOYMENT COMPENSATION STATUTES DO NOT PROVIDE AN IMPLIED PRIVATE RIGHT OF ACTION.

Appellant's assertion that her action is viable because the unemployment statutes create an implied private right of action fails for three reasons: 1) she was not in the class of persons for whose benefit the statutes were enacted as she was still employed with Hannon when she filed for the benefits; 2) the Legislature clearly knew how to create a cause of action for retaliatory discharge and deliberately did not do so within the unemployment statutes, thereby removing any possibility that it indicated an intent to create or deny a remedy; 3) implying a remedy in this case would be inconsistent with the underlying purpose of the unemployment statutes considering the existence of the provision regarding employer misconduct and the provision that makes inadmissible any evidence and resulting decisions related to unemployment benefit hearings.

In determining whether to imply a private cause of action, this Court must consider the following criteria:

(1) whether the plaintiff belongs to the class for whose benefit the statute was enacted; (2) whether the legislature indicated an intent to create or deny a remedy; and (3) whether implying a remedy would be consistent with the underlying purpose of the statute.

Flour Exch. Bldg. Corp. v. State, 524 N.W.2d 486, 499 (Minn. Ct. App. 1994). However, the judiciary is reluctant to imply a private right of action. *Hoppe by Dykema v. Kandiyohi County*, 543 N.W.2d 635, 638 (Minn. 1996); *Haage v. Steies*, 555 N.W.2d 7, 8

(Minn. Ct. App. 1996) (“Principles of judicial restraint weigh against recognizing statutory rights of action that are not clearly expressed or implied by the legislation.”)

None of the above-listed factors support Appellant’s claim that the unemployment statutes imply a private cause of action.

Before delving into the *Flour Exchange* factors, Appellant cites as authority for this overreaching argument *Fiumetto v. Garrett Entr.*, 749 N.E.2d 992, 997-98 (Ill. Ct. Ap. 2001), in which the Illinois Court of Appeals concluded that the Illinois unemployment statutes create a private right of action. Despite Appellant’s bald statement to the contrary, the Illinois statutes are completely incongruous with Minnesota’s statutory framework with regard to unemployment benefits. Illinois’ public policy declaration is at great odds with the language used by the Minnesota’s Legislature. Minnesota’s declaration of public policy states only that “[t]he 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.**”

Minn. Stat. § 268.03. (Emphasis supplied.) The Unemployment Act of Illinois includes the following extensive statement of its underlying purpose:

It is the considered judgment of the General Assembly that in order to lessen the menace to the health, safety and morals of the people of Illinois, and to encourage stabilization of employment, compulsory unemployment insurance upon a statewide scale providing for the setting aside of reserves during periods of employment to be used to pay benefits during periods of unemployment, is necessary.

820 ILCS 405/100. This language explicitly states that the public policy is to encourage the stabilization of employment. Minnesota has no such language. In Minnesota, the purpose is only to create the fund that provides the wage replacement. The focus in the Minnesota statute is on unemployed workers. In Illinois, the focus seems to be employed workers. Given the divergent purposes of the two statutes this case should not be persuasive as this Court considers Appellant's request to imply a private a cause of action.

A. Appellant is Not A Beneficiary of the Statute.

Upon a closer examination of the *Flour Exchange* factors, Appellant's cause of action fails as a matter of law. First, Appellant cannot be a member of the class for whose benefit the statute was enacted.

The declared public policy as expressed in Minn. Stat. § 268.03 does not protect employees from retaliatory discharges as a result of their filing for unemployment benefits. It merely creates the program that will fund the temporary partial wage replacement that will tide an unemployed individual over until he or she is reemployed. At most, the intended beneficiaries are those individuals who are unemployed through no fault of their own. Logistically speaking, Appellant could not have been an intended beneficiary of this statute **until** she was discharged from Hannon's employ, which in this case did not occur until March of 2009—over two months after she filed for the benefits.

It is illogical that Appellant would file for unemployment benefits—conceding that she was unemployed through no fault of her own—and then later claim that she was

wrongfully discharged for her employer's decision to terminate her after having been off of the payrolls for nearly three months.

Therefore, Appellant cannot prove that she was an intended beneficiary of the unemployment statutes, which were obviously enacted for those individuals who were already unemployed, while arguing that she was wrongfully terminated as a result of her application for unemployment benefits.

B. The Legislature Indicated an Intent to Deny a Cause of Action.

Appellant also cannot establish that the Minnesota Legislature intended to create a remedy. As has been discussed above, it is clear that the Minnesota Legislature did not intend to create this type of remedy because no such intent can be found in Minnesota's unemployment statutes. First, the Legislature is familiar with promulgating anti-retaliation statutes that prohibit certain types of discharge. There is no such statute in Minnesota that prohibits retaliation in this case. Second, the Legislature spoke on the issue of employer misconduct and did not include any provision indicating an intent to prohibit retaliatory discharges under these circumstances. Thus, the Minnesota Legislature did not intend to create a cause of action.

"[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979). In light of the hesitation courts have exercised in implying a private cause of action, such an act in this case is not warranted. "Given that the statutory language

weighs against implying a private cause of action, the silence of the legislative history on the subject ‘reinforces our decision not to find such a right of action implicit within the section.’” *Flour Exchange*, 524 N.W.2d at 499-500 (citation omitted). Here, the Legislature was silent. As such, this prong fails.

C. Implying a Private Cause of Action is Inconsistent with the Purpose of the Statute.

Finally, if this Court implies a cause of action in this case, it would be in contradiction to the well-established separation that exists between the administration of unemployment benefits and civil proceedings that involve the employer-employee relationship. Minn. Stat. § 268.105, Subd. 5(a) prohibits the admission of findings of fact, decisions or orders issued by an unemployment law judge in any separate or subsequent action. Subdivision 5(c) prohibits the admission of testimony obtained at an evidentiary hearing by an unemployment law judge in any other proceeding. It would be incongruous to assume that the Legislature intended to imply a private cause of action in the unemployment statutes when it prohibits this type of evidence in civil proceedings.

The Legislature has already created a lengthy and involved statutory framework that governs the administration of unemployment benefits. As part of that framework there is a specific statute that governs the remedies for employer misconduct. Such remedies are limited to administrative remedies and criminal penalties. Moreover, the framework includes a provision that forbids the admission of testimony, findings of fact, decisions or orders of the unemployment law judge in a civil proceeding. This obviously

evinces an intention on the part of the Legislature to keep the administration of unemployment benefits separate from civil litigation.

Therefore, Appellant is obviously wrong in claiming that implying a remedy would be consistent with the underlying purpose of Minn. Stats. §§ 268.03 and 268.192. In an effort to persuade this Court on this point, Appellant makes only the slightest effort by simply stating the following: “Again, 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.” (Appellant’s Brief at 41.) As clearly evidenced above, such a finding would undermine, not further, the legislative framework.

It is unquestionable how inconsistent it would be to imply a remedy under the statutes given the underlying purpose of the unemployment statutes. Minnesota’s Legislature is well-versed on how to create a private right of action, no private right of action was made here. In addition, the unemployment statute governing employer misconduct leaves no room for an implied remedy.

Furthermore, the separation that exists between the proceedings governing unemployment benefits administration and that of civil litigation proceedings is highly persuasive on this point. The vast body of law that makes up Minnesota’s Unemployment Insurance Law removes any possibility that an implied cause of action exists. As such, Appellant’s claim was properly dismissed by the District Court, and the Order should be affirmed.

Appellant also includes the assertion that if the implied cause of action argument fails, which it clearly does, she can succeed under the more lenient standard set forth in the Restatement (Second) of Torts § 874A. However, Appellant fails to cite any Minnesota authority adopting this alternative remedy. Even so, under the Restatement, Appellant's cause of action still fails because under the analysis set forth above, she cannot establish that the legislative provisions protect a class of persons "by proscribing or requiring certain conduct," and the private right of action is not "in furtherance of the purpose of the legislation," nor is it "needed to assure the effectiveness of the provision" Therefore, her claim was properly dismissed.

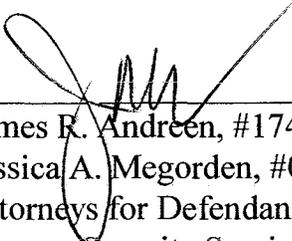
CONCLUSION

For the reasons set forth above, the District Court's Order of June 29, 2011 should be affirmed.

Dated: _____

10/19/11

ERSTAD & RIEMER, P.A.



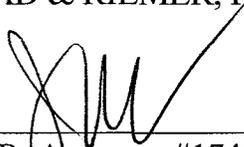
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 10,641 words. This brief was prepared using Word Perfect 9.

ERSTAD & RIEMER, P.A.

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