



No. A09-949

State of Minnesota
In Supreme Court

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,
Appellant,

vs.

RONALD J. STAGG,
Respondent,

and

VINTAGE PLACE,
Respondent.

APPELLANT-DEPARTMENT'S BRIEF

LEE B. NELSON (#77999)
AMY R. LAWLER (#0388362)
MINNESOTA DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT
1ST NATIONAL BANK BUILDING
332 MINNESOTA STREET, SUITE E200
ST. PAUL, MINNESOTA 55101
(651) 259-7117
Attorneys for Appellant-Department

VINTAGE PLACE
984 ALBEMARLE STREET
ST. PAUL, MINNESOTA 55117-5146
(651) 488-6878
Respondent- Employer -Pro se

PAUL A. BANKER
CHRISTOPHER A. GRGURICH
LINDQUIST & VENNUM PLLP
80 SOUTH EIGHTH STREET, SUITE 4200
MINNEAPOLIS, MINNESOTA 55402
(612) 371-3211
Attorney for Respondent

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Legal Issues

Issue 1:

Individuals who are discharged for committing employment misconduct are ineligible for unemployment benefits. Since 1999, the statutory definition of “misconduct” has been exclusive, and there is no equitable or common-law entitlement to benefits. Minnesota courts have long maintained that an employee’s misconduct is determined without regard to whether the employee was wrongfully terminated, and the governing statute does not give Unemployment Law Judges authority to consider whether an applicant was terminated for cause. But in *Stagg v. Vintage Place*, A09-949, filed June 1, 2010, the Court of Appeals revived and strengthened a contradictory line of cases holding that an employer’s inconsistent application of progressive discipline steps laid out in its employment handbook is a breach of contract that can remove the employee’s actions from the realm of misconduct.¹ Did the Court of Appeals err in so doing?

Issue 2:

Unemployment Law Judges have limited authority. In misconduct proceedings, they conduct non-adversarial, evidence-gathering hearings, in which no party has a burden of proof. They decide whether, under a preponderance of the evidence standard, an applicant committed a serious violation of the standards of behavior the employer had the right to

¹ Appendix to Department’s Brief, A1-A8.

reasonably expect of him, or displayed a substantial lack of concern for his employment. Did the Court of Appeals expand the scope of the ULJs' authority and obligation when it held that ULJs must also gather evidence and make a finding as to whether an employer breached an employment contract when it terminated an employee?

The Unemployment Law Judge ("ULJ") found that Ronald Stagg, who was frequently absent from his job at Vintage Place, a group home for troubled youth, was terminated for misconduct. The Court of Appeals reversed, finding that Stagg was wrongfully terminated, because Vintage Place breached an employment contract allowing for five warnings before termination, instead of the four that Stagg received. The Court of Appeals did not acknowledge that its decision cannot be reconciled with precedent holding that ULJs and courts are not concerned with whether an employee should have been terminated, nor did it acknowledge that its decision would alter and expand a ULJ's role in misconduct proceedings.

Statement of the Case

The question before this Court is whether the Court of Appeals erred in finding that Ronald Stagg did not commit employment misconduct, and was entitled to unemployment benefits. Stagg established a benefit account with the Minnesota Department of Employment and Economic Development (the "Department"). A Department adjudicator determined that Stagg was discharged

by Vintage Place for reasons of employment misconduct, and held him ineligible for unemployment benefits.

Stagg appealed that determination, and Unemployment Law Judge (“ULJ”) Scott Mismash held a de novo hearing, in which both parties participated and neither party was represented by counsel. The ULJ affirmed, finding that Stagg was discharged for employment misconduct, and was therefore ineligible for benefits.² Stagg filed a request for reconsideration with the ULJ, who affirmed.³

Stagg obtained a writ of certiorari under Minn. Stat. § 268.105, subd. 7(a) (2008) and Minn. R. Civ. App. P. 115, and the Court of Appeals received briefs and heard oral arguments on the matter. On June 1, 2010, it issued a decision reversing the Unemployment Law Judge, finding that Stagg could not have committed employment misconduct, since he was entitled to an additional warning before being terminated for chronic absenteeism and tardiness.

Department’s Relationship to the Case

The Department is charged with the responsibility of administering and supervising the unemployment insurance program.⁴ The Department was not a party to Stagg’s hearing before the ULJ, and became a party only when the Court of Appeals granted Stagg’s writ of certiorari.⁵ The Department’s contributions to

² Appendix to Department’s Brief, A13-17.

³ Appendix A9-A12.

⁴ Minn. Stat. § 116J.401, subd. 1(18).

⁵ Minn. Stat. § 268.105, subd. 7(e).

the proceedings as a party in this matter have thus consisted only of its responsive briefing and its oral argument before the Court of Appeals.

Statement of Facts

Ronald Stagg worked as a full-time overnight counselor at Vintage Place, a group home for troubled youths, from November 23, 2007, through January 29, 2009, with a final pay rate of \$12.00 an hour.⁶ Stagg struggled with absenteeism and tardiness, and during the last two months on the job received several warnings:

1) On or about November 27, 2008, Vintage Place president Troy Johnson met with Stagg, and gave him a verbal warning about his ongoing attendance problems, including about being two hours late for his shift without calling in.⁷ Johnson informed Stagg that when he was late it affected the staff that he was supposed to be relieving, and that his frequent tardiness put his job in danger.⁸

2) Also in November, supervisor Mikle Cline also gave Stagg a performance review, reminded him that he had been given several verbal warnings about attendance, and told him that it was important that he arrive at work on time.⁹

⁶ Transcript references will be indicated "T." T. 15-16.

⁷ T. 17, 18, 43-44.

⁸ T. 19-20.

⁹ T. 36.

3) On December 3, Johnson gave Stagg a written warning. Stagg called in sick on December 1, 2008, only 15 minutes before his shift was to start, and this write-up warned him about both his November 27 and December 1 absences.¹⁰

4) Stagg was suspended from work on December 8 and 9, 2008, after he was 45 minutes late to work on December 3, and did not call to tell his supervisor that he would be late until 25 minutes after his shift had already started.¹¹

On January 28, 2008, Stagg did not report to his midnight shift, and instead called Johnson at approximately 1:30 a.m. and told him that he had overslept.¹² Johnson ultimately told him not to come in that night, and discharged him for poor attendance the next day.¹³

Standard of Review

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the ULJ's decision, remand to the ULJ for further proceeding, reverse, or modify the decision if the petitioner's substantial rights were prejudiced because the decision of the ULJ violated the constitution, was in excess of the statutory authority or jurisdiction of the Department, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence,

¹⁰ T. 43, 45.

¹¹ T. 45.

¹² T. 24, 30-31.

¹³ T. 41, 52.

or was arbitrary or capricious.¹⁴ The Minnesota Supreme Court may review decisions of the Court of Appeals.¹⁵

The Court of Appeals held in *Skarhus v. Davannis* that the issue of whether an employee committed employment misconduct is a mixed question of fact and law.¹⁶ Whether the employee committed a particular act is a fact question.¹⁷ Whether the employee's acts constitute employment misconduct is a question of law.¹⁸ The Court of Appeals also held in *Skarhus* that it views the ULJ's factual findings "in the light most favorable to the decision,"¹⁹ and will not disturb the ULJ's factual findings when the evidence substantially sustains them.²⁰ The Supreme Court in *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency* defined substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion."²¹ In *Ywswf v. Teleplan Wireless Services, Inc.*, the Court of Appeals reiterated the standard that the Court reviews de novo the legal question of whether the employee's acts constitute employment misconduct.²²

¹⁴ Minn. Stat. § 268.105, subd. 7(d)(1)-(6) (2008).

¹⁵ Minn. Stat. § 480A.10, subd. 1 (2009).

¹⁶ 721 N.W.2d 340, 344 (Minn. App. 2006).

¹⁷ *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997)).

¹⁸ *Id.*

¹⁹ 721 N.W.2d 340, 344 (Minn. App. 2006) (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)).

²⁰ *Id.* (citing Minn. Stat. § 268.105, subd. 7(d)).

²¹ 644 N.W.2d 457, 466 (Minn. 2002).

²² 726 N.W.2d 525 (Minn. App. 2007).

Argument

1. The unemployment insurance program is a creature of statute, and unemployment proceedings are not adversarial.

Before directly addressing Stagg's ineligibility for benefits, the Department must first address the unique system that is the unemployment insurance program. It is unlike any other system encountered in Minnesota law.

a. No party has the burden of proof in unemployment insurance proceedings, and there is no presumption of entitlement to benefits.

There is a common misconception, even among learned counsel, that unemployment insurance proceedings are adversarial in nature. Many assume that hearings before a ULJ are like any other contested proceeding before a neutral judge, and that unemployment benefits are paid by the employer. But that is not how the UI system functions. Unemployment benefits are paid from state funds, not employer funds.²³ The public interest prevails over any private interest,²⁴ and the public has a strong interest in the proper payment of benefits. Thus, neither the Department nor its ULJs are interested in picking a winner from two parties; they are interested in uncovering relevant evidence from all available sources, and making fully informed decisions.

The unemployment insurance statute assigns very limited burdens to

²³ Minn. Stat. § 268.069, subd. 2 (2009). *See also Jackson v. Honeywell*, 47 N.W.2d 449, 451 (Minn. 1951).

²⁴ Minn. Stat. § 645.17(5) (2009).

applicants in the preliminary stages of the proceedings, and no burden to either party after that. When an applicant applies for benefits, he must give the reason he is unemployed; if it is other than lack of work it raises an issue of ineligibility, and the Department must issue a written determination on the issue.²⁵ The applicant, who has indicated he was discharged, is then further required to give all the facts he knows about the discharge.²⁶ Based upon that information and information from any other source – whether anything is obtained from the employer or not – the Department is required to issue the written determination.²⁷ Thus, an applicant can be held ineligible for benefits because of misconduct based upon his statement alone, the employer providing nothing.

After this initial determination stage, though, neither an applicant nor an employer has a burden of proof, nor is an applicant presumed eligible or ineligible for benefits. As Minn. Stat. § 268.069, subd. 2, explains:

The commissioner has the responsibility for the proper payment of unemployment benefits regardless of the level of interest or participation by an applicant or an employer in any determination or appeal. An applicant's entitlement to unemployment benefits must be determined based upon that information available and any agreement between an applicant and an employer is not binding on the commissioner in determining an applicant's entitlement. There is no presumption of entitlement or nonentitlement to unemployment benefits.

Because of the ULJs' unique role as referees in fact-finding inquiries, ULJs

²⁵ Minn. Stat. § 268.101, subd. 1(a) (2009).

²⁶ Minn. Stat. § 268.101, subd. 1(d) (2009).

²⁷ Minn. Stat. § 268.101, subd. 2(a) and (c) (2008).

will often conduct hearings even when only one party – the appealing party - appears.²⁸ They will also conduct hearings on an applicant’s eligibility when an employer appears and argues that it has no objection to the payment of benefits. In light of the statute’s clear lack of presumption, eligibility for benefits is decided using a preponderance of the evidence standard.²⁹ There is no burden of proof assigned to any party. There is no common law entitlement to benefits, and thus no common law burdens of proof can be assigned in unemployment insurance proceedings.³⁰ Just as an employer’s objection does not summarily doom an applicant’s application for benefits, an employer’s silence cannot guarantee payment. As the Supreme Court indicated in *Lolling v. Midwest Patrol*, the expenditure of state funds to an applicant should not be triggered by an employer’s inaction.³¹

While there is no presumption and no burden of proof, the Department and ULJs also have limited power. ULJs hold hearings with the parties that generally last no more than an hour; they hold five hearings a day, and 25 hearings a week. They must often decide an applicant’s eligibility with a limited record, and within a statutory scheme that requires little disclosure from either party. There is no collateral estoppel for ULJ decisions.³² ULJs cannot award benefits under theories

²⁸ Minn. Stat. § 268.105 (2009).

²⁹ Minn. Stat. § 268.101, subd. 2(e); Minn. Stat. § 268.031, subd. 1 (2009).

³⁰ Minn. Stat. § 268.069, subd. 3 (2009).

³¹ 545 N.W.2d 372, 376 (Minn. 1996).

³² Minn. Stat. § 268.105, subd. 5a (2009).

of common law or equity, and do not create precedential decisions.³³ The only entitlements to benefits are those laid out in statute, and the proceedings to determine entitlement are described in detail in the statute.

A ULJ does not have “burdens,” in the sense that his actions or failures to act cannot render an applicant eligible or ineligible for benefits. A ULJ is neutral, and the Department is not a party to an unemployment insurance proceeding until a party petitions for a writ of certiorari from the Court of Appeals, or somehow otherwise brings a case before a judicial body.³⁴ A ULJ also has limited powers. He has authority to issue – but not enforce - a subpoena himself; all subpoenas must be enforced through the Ramsey County District Court.³⁵ A party must disclose the witnesses and documents it will present at the hearing, but otherwise there is no discovery process.³⁶ Moreover, unlike in civil or criminal proceedings, and even unlike other administrative proceedings, unemployment insurance proceedings are evidence-gathering inquiries, not adversarial proceedings. Unemployment insurance proceedings are not governed by the Administrative Procedure Act, but instead by the procedure laid out in Minn. Stat. § 268.105. The ULJ’s obligation under Minn. Stat. § 268.105, subd. 2(b), is to gather evidence, as “[t]he evidentiary hearing is conducted by an unemployment law judge as an

³³ *Id.*; Minn. Stat. § 268.069, subd. 3 (2009); *see also Pichler v. Alter Co.*, 240 NW 2d 328, 329 (Minn. 1976).

³⁴ Minn. Stat. § 268.105, subd. 7(e) (2009).

³⁵ Minn. Stat. § 268.105, subd. 4 (2009).

³⁶ Minn. R. 3310.2914.

evidence gathering inquiry...The unemployment law judge must ensure that all relevant facts are clearly and fully developed...”

Moreover, under Minn. R. 3310.2921, “[t]he judge should assist unrepresented parties in the presentation of evidence....The judge must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing...” The Court of Appeals has made clear that ULJs must fulfill the obligations laid out for them in the statute and in Minn. R. 3310.2921, and a ULJ’s obligation to assist an unrepresented party applies to both unrepresented applicants and unrepresented employers.³⁷

b. The statutory definition of employment misconduct has evolved under this unique statutory scheme.

In light of the non-adversarial nature of unemployment insurance proceedings, and the limited role that employers play in determining whether a former employee is eligible for benefits, the definition of employment misconduct has evolved a great deal over time, and particularly during the past 37 years. In 1973 the Minnesota Supreme Court adopted Wisconsin’s common law definition of misconduct, which generally included “conduct evincing such willful or wanton disregard of an employer's interests....”³⁸ In the years following 1983, when the Minnesota Court of Appeals was formed, the Court of Appeals issued scores of

³⁷ *Ywswf*, 726 N.W.2d at 529-30; *Thompson v. County of Hennepin*, 660 N.W.2d 157 (Minn. App. 2003); *Ntamere v. DecisionOne Corp.*, 673 N.W.2d 179 (Minn. App. 2003).

³⁸ *Tilseth v. Midwest Lumber Co.*, 204 N.W.2d 644, 646 (Minn. 1973).

published decisions relating to unemployment insurance, including some of the cases at issue in this proceeding.

By 1997, the Court of Appeals and Supreme Court had considered countless misconduct cases, and the definition of misconduct had grown increasingly muddled and difficult to decipher. The legislature then codified the definition of misconduct in 1997, leading to a precise and enforceable definition.³⁹ In 1999, the legislature made this definition of misconduct exclusive.⁴⁰ Statutory terms are, of course, given their plain ordinary meaning unless specifically defined otherwise.⁴¹ A court may not set aside the plain meaning of the statute in order to insert its own concept of what it believes the law ought to be.⁴²

The legislature has continued to frequently amend the statute, at times in response to court decisions that have stretched the statute beyond its exclusive provisions. Indeed, after the Supreme Court read an intent requirement into the word “disregard” under a different section of the prior version of the misconduct statute in *Houston v. Int’l Data Transfer Corp.*,⁴³ the legislature promptly amended the statute to make clear that there was no *mens rea* element to

³⁹ Laws 1997, ch. 66, sec. 49.

⁴⁰ Laws 1999, ch. 107, sec. 44.

⁴¹ Minn. Stat. § 645.08 (2009).

⁴² Minn. Stat. § 645.16 (2009).

⁴³ 645 N.W.2d 144 (Minn. 2002).

misconduct in an unemployment insurance proceeding.⁴⁴ The statute in effect at the time of Stagg's determination, and thus governing this case, reads:

Subd. 6. Employment misconduct defined.

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

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

* * *

(e) The definition of employment misconduct provided by this subdivision is exclusive and no other definition applies.⁴⁵

c. The misconduct statute inquires into an employment standard's reasonableness, but not into whether an applicant's termination was fair.

The statute directs the Department, the ULJ, and Minnesota courts to look at three things when considering whether an applicant was discharged for

⁴⁴ Laws 2003, 1st Spec. Sess., ch. 3, art. 2, sec. 13. The Court of Appeals has recognized that *Houston* no longer applies, saying in *Hebrink v. Crows Nest Programs, Inc.*, 2006 WL 1984751 (Minn. App. 2006) ("A36-A39) that "in 2003, the *Houston* court's interpretation of employment misconduct was superseded when the legislature changed the statutory definition of employment misconduct."

⁴⁵ Minn. Stat. § 268.095 (2008). The statute has since been amended by Laws 2009, ch. 15, sec. 9, and Laws 2010, ch. 347, sec. 17. These amendments have changed the formatting of the statute and have added additional conduct to the list of behavior that is not misconduct. These amendments have not changed the definition of misconduct at issue in Stagg's case.

misconduct: 1) whether the employer's standards of behavior were reasonable; 2) whether the employee's conduct displayed clearly a serious violation of those standards; or 3) whether the applicant showed a lack of concern for his employment. One statutory element has remained constant throughout this time, though; an employer is not the arbiter of an applicant's eligibility for benefits. While an employer is entitled to set its own standards, practices, and policies, the ULJ and the Courts will ultimately determine whether those standards were reasonable, or whether the applicant's violation was serious.

Some standards of behavior would certainly be unreasonable in any context. An employer would be entitled to implement a zero-tolerance policy toward sneezing, for example, but it would certainly not be reasonable to prohibit employees from engaging in such an involuntary deed. In other situations, the reasonableness of an employer's policy might depend on the nature of the employer's business. An employer might have a policy prohibiting employees from consuming alcohol less than 10 hours before the start of a shift; such a policy might be unreasonable in a typical office environment, but might be entirely reasonable when applied to airline pilots. The reasonableness of a standard might also depend on whether an employee was informed of the standard, or whether it was a common-sense standard that the employee should have been expected to understand. In short, these statutory inquiries are highly fact-specific.

Similarly fact-specific are inquiries into whether an applicant's violation of an employer's reasonable standard was serious, or whether the applicant showed a

lack of concern for his employment. This might depend on the nature of the applicant's work, the number of times the applicant committed the violation, or whether the applicant was even aware that he was violating the employer's standard. For example, in considering whether an applicant committed a serious violation when he took an unauthorized break, we might inquire into the nature of the applicant's work. Was he an open-heart surgeon who endangered a patient while he took a break mid-surgery, or was he a bank teller who simply returned from lunch a few minutes late? Did the applicant know the break schedule that the employer expected him to follow, and had he ever taken an unauthorized break before? While these are all fact-specific inquiries, dependent on the employer and the employee, these inquiries all take place within the specific confines laid out by statute.

Besides these inquiries, though, the statute cares very little about the employer. First, the statute does not allow the ULJ or Minnesota courts to consider whether the employer wants the employee to receive benefits or not. While some employers have informed their employees that they are ineligible for benefits, and have even had them sign agreements to that effect, and other employers have promised their employees benefits, under Minn. Stat. § 268.069, subd. 2, "any agreement between an applicant and an employer is not binding on the commissioner in determining an applicant's entitlement." In *McNeilly v. Dep't of Employment and Econ. Development*, for example, the Court of Appeals found an applicant ineligible for benefits because he was not seeking work, despite the

fact that his seasonal employer wanted him to receive benefits, and did not want him to seek work in the off-season.⁴⁶ In *Scheeler v. Sartell Water Controls, Inc.*, the Court of Appeals refused to enforce an employer's promise that employees taking voluntary layoffs would receive unemployment benefits, noting that such contracts are void because they "abrogate[] the ULJ's legal right to decide eligibility for unemployment benefits."⁴⁷ An employer cannot promise an employee benefits, or foreclose the possibility of their receipt; that power lies with the Department, the ULJ, and the Courts. An employer cannot thwart this statutory scheme by promising or threatening to withhold benefits.

Second, the statute does not allow the ULJ or Minnesota courts to consider whether the employer engaged in some kind of wrongdoing toward the employee. The statute does not care about whether the employer made a mistake in terminating the employee, or whether the employee should have been given another chance to keep his job.⁴⁸ It does not matter if the employer failed to give the employee the most recent copy of the disciplinary policy, or failed to uniformly discipline multiple employee culprits.⁴⁹ The statute does not allow the consideration of whether an employee was terminated for cause. What matters is whether the employer's standard was reasonable, whether the applicant's violation

⁴⁶ 778 N.W.2d 707 (Minn. App. 2010).

⁴⁷ 730 N.W.2d 285 (Minn. App. 2007).

⁴⁸ *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002); *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981).

⁴⁹ *Sivertson v. Sims Security*, 390 N.W.2d 868 (Minn. App. 1986).

was serious, or whether the applicant showed a substantial lack of concern for his employment.

2. The Court of Appeals' decision in *Stagg* improperly found that an employer's breach of an employment contract will prevent a finding of employment misconduct.

Before the definition of misconduct was codified and made exclusive, the Court of Appeals and Supreme Court developed contradictory precedent under the common law definition. One enduring precedent, which this Court first laid out in *Auger v. Gillette Co.*, holds that the question of whether an applicant's employer should have terminated him has no relevance to the proper question before the Court: whether he is ineligible for benefits because of misconduct.⁵⁰

The Court of Appeals has faced this issue repeatedly since *Auger* was decided. Every year the Department handles thousands of appeals from *pro se* applicants who have been discharged from employment. In the majority of these cases, the applicant argues that he shouldn't have been discharged, that the discharge was unfair, or that he shouldn't have been discharged when a co-worker was not. Some of those applicants also bring this argument to the Court of Appeals, and the Court of Appeals has consistently rejected it, holding that it is not the role of the ULJ to determine whether an employee should or should not have been terminated.

The Court of Appeals has consistently affirmed *Auger*, holding that “[w]e

⁵⁰ 303 N.W.2d 255, 257 (Minn. 1981).

are not concerned with whether or not the employee should have been discharged but only with the employee's eligibility for benefits after termination of employment.”⁵¹ As the Court of Appeals explained in *Schmitz v.*

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The question to be answered by this court, however, is not whether relator should have been terminated under the policy, but whether he qualifies for unemployment benefits. As stated in Minn. Stat. § 268.095, subd. 6(e) (Supp. 2007), “[t]he definition of employment misconduct provided by this subdivision shall be exclusive and no other definition shall apply.” Relator's absences qualify as misconduct under the definition found in the statute. These absences do not cease being employment misconduct simply because relator may have accumulated fewer than the minimum number of points needed for termination under his employer's attendance policy.⁵²

While this issue has not appeared so frequently before the Supreme Court, nonetheless this Court has also held that “the issue is not whether the employer can choose to terminate the employment relationship...”⁵³

⁵¹ *Brown v. National American University*, 686 N.W.2d 329, 332 (Minn. App. 2004).

⁵² 2009 WL 1684448, at *4 (Minn. App. Jun 16, 2009) (internal citations omitted) (A28-A31). See also *Bennett v. United Parcel Service Inc.*, 2010 WL 1541302, at *1 (Minn. App. Apr 20, 2010) (A18-A19) (“Bennett argues that he had been unfairly discharged...But the question under review is not whether Bennett should have been discharged or even whether he should have been reemployed. Rather, the sole question before us is whether, having been discharged, Bennett is ineligible for unemployment benefits because he was discharged for misconduct within the meaning of the unemployment-compensation statute.”); *Chase v. Fedex Kinko's Office and Print Services Inc.*, 2009 WL 1515452, at *3 (Minn. App. Jun 02, 2009) (A32-A35) (“Relator's argument that FedEx Kinko's should have investigated the appeal of relator's first written warning, and that if the investigation had occurred, relator might not have been terminated, fails because it does not address the relevant issue before the ULJ--whether relator should receive unemployment benefits, not whether he should have been terminated.”).

⁵³ *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002).

But the Court of Appeals also held, over 26 years ago in *Hoemberg v. Watco Publishers, Inc.*, that employees were not discharged for misconduct where their employer failed to follow the progressive discipline steps laid out in their employment contract.⁵⁴ It would, of course, be impossible for a ULJ both to consider whether an employee was wrongfully terminated (under *Hoemberg*) and ignore it (under *Auger*). For decades, Minnesota courts have sidestepped this obvious contradiction by relying on cases decided shortly after *Hoemberg*, which created exceptions to *Hoemberg* that severely limited its scope.

Two years after *Hoemberg*, the Court of Appeals decided *Sivertson v. Sims Security*.⁵⁵ There, the employee had not received an updated employment manual laying out the revised progressive discipline policy, and while he knew that his offense - leaving his guard desk unattended - violated his employer's policy, he may not have known that it could have led to his immediate termination.⁵⁶ The employer also may not have uniformly enforced its policy among guards.⁵⁷ Nonetheless, the Court of Appeals found that Sivertson had committed misconduct, because "Sivertson was aware he should not leave his assignment until he was replaced," he had been twice warned about his conduct, and because he knew that the policy "provide[d] for reprimand, suspension and/or dismissal."⁵⁸

⁵⁴ 343 N.W.2d 676 (Minn. App. 1984).

⁵⁵ 390 N.W.2d 868 (Minn. App. 1986).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 871.

More importantly, a year later the Court of Appeals decided *Thurner v. Philip Clinic, Ltd.*, and distinguished *Hoemberg* from cases in which the employee handbook “states the disciplinary steps set forth therein ‘may be taken...’”⁵⁹ The Court held that “[w]e do not construe this language as the type of ‘condition of employment’ contemplated by *Hoemberg*.”⁶⁰ Since the employment manuals at issue in unemployment insurance cases have generally either contained a no-contract disclaimer or used permissive language, *Thurner* created an exception to *Hoemberg* that largely swallowed the rule.

It would, of course, have been more logically sound for the Court to outright reverse the decision it had made only a few years before in *Hoemberg*. It could then have acknowledged its contradiction with *Auger*, and confirmed that an employee can commit a serious violation of a reasonable standard, or show a substantial lack of concern for employment, without it rising to the level of a terminable offense under the disciplinary policy. It could also have reaffirmed that it is never the proper role of the ULJ to inquire into whether an employee was terminated for cause, or was somehow wrongfully terminated. Instead, though, the Court of Appeals has taken great pains to avoid overruling precedent. Despite the fact that *Hoemberg* and its progeny were decided under a non-exclusive common-law definition of misconduct, the Court of Appeals has, for many years, simply distinguished *Hoemberg* from the cases it hears.

⁵⁹ 413 N.W.2d 537, 541 (Minn. App. 1987).

⁶⁰ *Id.*

When the statutory definition of misconduct became exclusive in 1999, the statutory language further confirmed the holding, first laid out in *Auger*, that a ULJ cannot properly consider whether or not an employee should have been terminated. While bolstering *Auger*, the exclusive statutory definition of misconduct would also seem to directly preclude ULJs or Minnesota courts from applying *Hoemberg*, and further preclude ULJs from considering breach of contract or wrongful termination questions. The statutory definition of misconduct leaves no room for a *Hoemberg*-type inquiry into whether there was an employment contract, or a breach of that contract. The law of misconduct, as laid out by statute, is simply not interested in such questions. The statute does not empower ULJs to consider whether an applicant should have been discharged. In the face of *Auger* and its progeny, as well as the exclusive statutory definition of misconduct, and the well-established rules governing the limited role of ULJs, *Hoemberg* should have been reversed outright some time ago. But, for whatever reason, it has not been done.

This may be due in part to a general reluctance of courts to reach issues that they do not need to reach. Four years ago, for example, this Court considered another unemployment insurance decision, in which the parties thoroughly briefed a related question concerning an employer's breach of a promise or contract in the misconduct context. Yet in *Jenkins v. American Exp. Financial Corp.*, this Court's decision doesn't contain the word "contract," and instead narrowly

focused on whether the employer's expectations were reasonable.⁶¹ Only a dissenting opinion raised a concern that the majority's opinion was unnecessarily touching on the realm of common law.⁶²

Like this Court, the Court of Appeals has avoided resolving this contractual issue, and has instead distinguished *Hoemberg* rather than reversed it outright. Since at least 1999, until its decision in *Stagg*, the Court of Appeals has not relied on *Hoemberg* to find that an applicant did not commit misconduct, and has not invoked *Hoemberg* in awarding benefits. Instead, it has seized on the fact that an employer's progressive discipline policies almost universally contain permissive language like the "may" wording in *Thurner*, and found that that the employer did not breach any contract with its employees. The Court of Appeals considered this argument twice in early 2010, and both times it invoked *Thurner* in affirming the ULJ's finding of misconduct.⁶³ This has certainly been a roundabout way of deciding these cases, ignoring *Auger* and the exclusivity provision of the statutory definition of misconduct, but each time the Court of Appeals did reach the correct result.

Yet when the Court of Appeals heard the issue for a third time this year, it changed its analysis. The disciplinary policy in *Stagg*, like in the other cases

⁶¹ *Jenkins v. American Exp. Financial Corp.*, 721 N.W.2d 286 (Minn. 2006).

⁶² *Id.* at 293 n.1.

⁶³ See *Foix v. Clusiau Sales & Rental*, 2010 WL 346401, at *3 (Minn. App. Feb. 2, 2010) (A20-A23); *Krueger v. White Earth Reservation*, 2010 WL 274518, at *3 (Minn. App. Jan. 26, 2010) (A24-A27).

recently considered by the Court of Appeals, contained permissive language. Yet the Court did not invoke *Thurner*. For the first time since the legislature adopted an exclusive statutory definition of misconduct, and despite the longstanding *Auger* precedent that courts should not examine the propriety of an applicant's discharge, the Court of Appeals reversed the ULJ and awarded Stagg benefits. The Court of Appeals held that it would no longer consider disciplinary policies conditioned with the word "may" to be optional, and instead found that that they formed a binding contract. It held that the Department's interpretation "would permit Vintage to discipline employees for absenteeism in any form and in any manner whatsoever, thus rendering the progressive-discipline steps meaningless."⁶⁴ This is, of course, the position dictated by *Auger*.

The Court of Appeals in *Stagg* did not confine its analysis to the statutory definition of misconduct. It did not consider whether Vintage Place's standards of behavior - that its employees arrive at work on time, and work their scheduled shifts - was reasonable. It did not consider whether Stagg's repeated absences, in the face of multiple warnings, were a serious violation of Vintage Place's standards of behavior. It did not consider whether Stagg showed a substantial lack of concern for his employment. Instead, it concluded that "because Vintage skipped the fourth step of a ten-day suspension, relator's absenteeism does not amount to employment misconduct precluding eligibility for benefits."⁶⁵ In so

⁶⁴ Stagg decision, p. 8, (Appendix, A1-A8).

⁶⁵ Stagg decision, p. 8, (Appendix, A1-A8).

holding, the Court of Appeals did not cite the exclusive statutory definition of misconduct, and indeed none of the statutory exceptions to misconduct list “premature termination under the progressive discipline policy.” The Court of Appeals did not cite or acknowledge *Auger*, *Schmidgall*, or *Sivertson*; instead, it cited *Hoemberg*.

This holding has no basis in the exclusive statutory definition of misconduct. An employer cannot contract out of the unemployment insurance system’s definition of misconduct. To do so would contradict the long line of cases, starting with *Auger* and continuing through *Schmidgall*, *Sivertson*, and *Scheeler*. As it now stands post-*Stagg*, we will essentially have two misconduct standards: one for employers with employment manuals, and one without. Instead of inquiring into whether a standard was reasonable, a violation serious, or a lack of concern substantial, we must now consider whether the employer entered into some sort of promise or contract with its employees, whereby it agreed to overlook a certain number of infractions before terminating him. We will be required to first consider whether an offense was terminable before determining whether the offense constituted misconduct.

Before *Stagg*, a ULJ considering an applicant terminated for theft would consider only whether the employer’s anti-theft standards of behavior were reasonable, whether the employee’s theft was serious, or whether the theft showed a substantial lack of concern for employment. Post-*Stagg*, the ULJ would have to inquire into whether the employer had a progressive discipline policy or some

other binding employment contract. If the employer, say, had a policy that employees would not be terminated unless they committed three behavioral offenses, and the employee had only stolen from a coworker's purse twice, the ULJ would have to find that the employee was not terminated for misconduct. In order to do this, the ULJ would have to disregard the clear language of the statute, and look to the "wrongdoing" committed by the employer, an inquiry previously prohibited by *Auger* and its progeny.

More broadly, the *Stagg* decision does not apply only to progressive discipline policies, but other areas of employment contract law. For example, it is not uncommon for certain union contracts to prohibit supervisors from searching a union member's lunchbox unless a union representative is present. Let us then imagine a situation in which a supervisor nonetheless searches an employee's lunchbox in the parking lot without the presence of a union representative, finds a stash of tools stolen from the jobsite, and discharges the employee. Under the statute and the long line of *Auger* cases, the Department would not consider whether the employer breached the union contract, but would instead consider whether the employee's theft constituted misconduct. The employee, if he sought other relief, would have to file a union grievance or pursue a breach of contract claim elsewhere. But post-*Stagg*, the ULJ would have to consider whether the employer's search breached the union contract, and if it did, would have to find that the employee did not commit misconduct. This is not an inquiry that *Auger* or the unemployment insurance statute permit.

The *Stagg* decision also cannot be reconciled with *Scheeler*, or with Minn. Stat. § 268.069, subd. 2. If the Court of Appeals has now rejected the statutory admonition under Minn. Stat. § 268.069, subd. 2, that “any agreement between an applicant and an employer is not binding on the commissioner in determining an applicant's entitlement,” then it appears that employers can simply contract with their employees to either expand or contract their entitlement to benefits. Thus, two identical employers with identical policies, employees, and employee infractions, would receive entirely different review, depending upon whether those policies were conveyed in an employee manual. What would the Department do if faced with an employer whose policy read: “employees with fewer than five unexcused absences may be terminated, but they have not committed misconduct and will be eligible for unemployment benefits. Employees with more than five unexcused absences may be terminated, but have committed misconduct and will be ineligible for benefits.” Post-*Stagg*, the Department is uncertain as to whether it should honor such a contract, since *Stagg* would seem to allow employers to negotiate the legislature out of the benefits process, and simply decide for themselves whether certain wrongdoing constitutes misconduct.

3. The Court of Appeals' decision in *Stagg* is incompatible with the nature of unemployment insurance proceedings, as it will require ULJs to decide breach of contract claims.

In addition to the legal error of the Court of Appeal's decision, the *Stagg* decision would fundamentally and impermissibly change the role and purpose of

unemployment insurance proceedings. As discussed earlier, they are conducted as evidence-gathering inquiries, with neither side bearing the burden of proof. Before *Stagg*, an employment manual was useful in determining what an employer's standard of behavior was, and whether it was reasonable. It was also useful in considering the seriousness of the applicant's conduct; a sternly-worded policy, or multiple previous warnings under a policy, might be helpful in considering the nature of the applicant's conduct. But ULJs did not consider whether an applicant was terminated for cause, whether he was wrongfully terminated, or whether an employer breached an employment contract. Under *Auger*, *Schmidgall*, and *Sivertson*, and under the clear language of the statute, ULJs could not inquire or rule on an applicant's claim of wrongful termination.

Post-*Stagg*, there is also the troubling (and likely) proposition that the parties will use the unemployment benefits process to litigate alleged wrongful termination or breach of employment contract. This is exactly the type of litigation that *Auger*, and a narrowly-worded statute, sought to prevent. While there is no collateral estoppel attached to ULJ findings or decisions,⁶⁶ the unemployment insurance statute obviously contains no such limitations on Court of Appeals findings and decisions. The Court of Appeals - based on the limited scope of ULJ review in a discrete area of administrative law - has concluded that Vintage Place created a binding unilateral contract with *Stagg*. As a matter of law,

⁶⁶ Minn. Stat. § 268.105, subd. 5a (2009).

the Court of Appeals has concluded that Vintage Place breached its employment contract with Stagg.

This raises the obvious point that if the Court of Appeals was correct, Stagg should be back at work, with back pay, and this case should be moot. But it also raises the troubling prospect that applicants would use the unemployment insurance process for discovery purposes, to take testimony on an alleged breach of contract, and most importantly, to procure binding rulings from the Court of Appeals that an employer has breached an employment contract. Employers, fearing that the UI hearing will be used to conduct discovery for a future breach of contract action, might not participate in the hearing before the ULJ, subverting a system that seeks to encourage full participation. ULJs would have to don the robes of district court judges in deciding whether a contract existed and whether it was breached. Without the longstanding strictures laid out in *Auger* and confirmed by statute, ULJs would have to consider and rule on contractual matters that they are ill-equipped to consider. ULJs would no longer be confined to considering whether an applicant was terminated for misconduct, but would instead have to consider whether the applicant should have been terminated at all.

The Court of Appeals in *Stagg* cited no statutory language that would allow, much less require, ULJs to undertake an inquiry into wrongful termination or breach of contract. Indeed, there is none. The unemployment insurance statute has, at every step, designed proceedings that are fast and accessible, but that in no way comport with the structure and procedure that would be found in a district

court considering breach of contract actions. By statute, the rules governing unemployment insurance hearings “need not conform to common law or statutory rules of evidence and other technical rules of procedure.”⁶⁷ Given the limited scope of a ULJ’s authority prior to *Stagg*, no such rules of evidence or procedure were necessary.

Unemployment law judges conduct over 30,000 hearings every year. In addition to the five hearings that each ULJ conducts every day, they also rule on requests for reconsideration under Minn. Stat. § 268.105, subd. 2. This system has worked for over 75 years, and continues to work even in this era of limited and shrinking resources, and staggering unemployment rates. But this system could not function if ULJs had to conduct hearings as though they were civil wrongful termination or breach of contract claims.

The ULJs cannot take on the additional burden of hearing and deciding such claims. Minn. Stat. § 268.101 *et seq.* does not allow such a review, and there are no procedural or evidentiary rules in place that would allow ULJs to take on such an expanded role. A terminated employee seeking to litigate a breach of contract should find his remedy at contract law, under a system with rules and procedure equipped to consider such claims. The Department should not be used as a proxy for a district court in a breach of contract or wrongful termination inquiry.

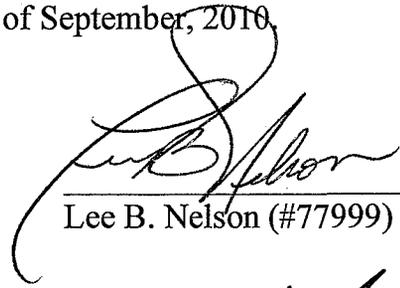
⁶⁷ Minn. Stat. § 268.105, subd. 1(b) (2009).

Finally, the Department must note that only two or three pages of the Vintage Place employment manual are in the record before this Court. The Court of Appeals decided that the Vintage Place employment manual constituted a contract, and that Vintage Place breached the contract, without ever reading the rest of the employment manual. As a practical matter, it was impossible for the Court to decide whether the employment manual was a contract without a record that contained either the entire manual or testimony on what the missing pages contained. A court cannot decide a contract case without reading the contract at issue. At minimum, this Court cannot affirm the Court of Appeals decision as it stands, but would need to remand this case to allow the ULJ to conduct an additional evidentiary hearing and create a full record on the question of what the missing pages of the employment manual contained.

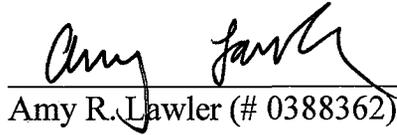
Conclusion

The decision of the Court of Appeals finding that Stagg is eligible for unemployment benefits should be reversed.

Dated this 9th day of September, 2010.



Lee B. Nelson (#77999)



Amy R. Lawler (# 0388362)

Department of Employment and
Economic Development
1st National Bank Building
332 Minnesota Street, Suite E200
Saint Paul, Minnesota 55101-1351
(651) 259-7117
Attorneys for Respondent Department