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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. ~~090960~~ 35284

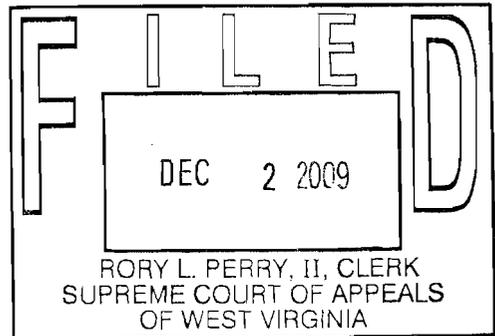
MICHELLE ISAACS,

Appellant,

v.

DANIEL P. BONNER,

Appellee.



***AMICUS CURIAE* BRIEF OF
THE WEST VIRGINIA DIVISION OF LABOR**

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AMICUS CURIAE BRIEF OF
THE WEST VIRGINIA DIVISION OF LABOR

The West Virginia Division of Labor (the “Division”), by its counsel Elizabeth G. Farber, Assistant Attorney General, hereby respectfully submits its brief as *amicus curiae* in the above matter pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. For the reasons set forth herein, the Division urges this Court to grant the relief requested by the Appellant.

I. STATEMENT OF INTEREST

The Division of Labor is the state agency authorized by the Wage Payment and Collection Act (the “WPCA”) to investigate employee claims for unpaid wages. W. Va. Code §§ 21-1-3 and 21-5-11. Upon receipt of the Appellant’s Request for Assistance (i.e., wage claim), the Division initiated an investigation. The Appellee, in response to a letter from the Division advising him that wages were owed, initially made his own calculation about what he owed and sent a check for that

amount to the Division to be paid to the Appellant. Although he disputed the amount the Division determined was owed, he subsequently paid that amount on the advice of his accountant.¹

How the Court decides this appeal could have a substantial - and potentially chilling - impact on employees of this state who may need to file a claim for unpaid wages with the Division. Most troubling to the Division is the circuit court's findings and conclusions interpreting the WPCA

¹ The Appellee himself acknowledged that he owed the Appellant some amount for earned but unused vacation upon her separation from employment. *See* Judgment Order Finding of Fact 72.

Although the Appellee acted on the advice of his accountant that it would be less expensive to pay the wage claim than to fight it, the Appellee was informed in the Division's January 12, 2005 letter that he could request a meeting, which would have been an opportunity for him to present any additional information in support of his position that no wages were owed and that the Division's calculations were wrong. The Appellee responded by letter dated January 21, 2005 objecting to the Division's calculations, making his own calculation that the amount of wages owed was \$96.60, including a check for that amount, and submitting some additional records in support of his position. The Appellee did not request a meeting.

An employer typically has access to records and information that an employee does not have. For this reason, the Division always seeks records, employment policies, etc. from the employer as a part of its investigation into a wage claim, and always offers an employer the option of an informal status conference or meeting to personally present any relevant information bearing on the investigation.

Because an employer has specific record-keeping responsibilities under the WPCA, if an employer does not provide any records or other information, or provides incomplete records or information, the Division relies on information provided by the employee.

In the case at bar, although the Appellee provided some records and information to the Division on or about October 5, 2004, he did not submit records and information sufficient to call into question the information submitted by the Appellant. After receipt of the Appellee's January 21, 2005 letter objecting to the Division's determination of wages owed, the Division issued a subpoena duces tecum on February 10, 2005 seeking additional records. Although no additional records were provided by the Appellee, he sent a check for \$920.00 dated February 23, 2005.

and caselaw at every instance against the Appellant, in favor of the Appellee, ultimately concluding that the Appellant committed fraud - or the tort of injurious falsehood - in the wage claim she filed with the Division and awarding both compensatory and punitive damages and attorney's fees and costs to the Appellee.

The *amicus* Division of Labor has had the opportunity to review only limited portions of the trial record and is therefore submitting this brief based on the Circuit Court's Judgment Order and Addendum to Judgment Order Awarding Attorney Fees and Costs, the Petition for Appeal and Response filed by the parties, Joint Exhibit 2, and the Division's own file.

II. ARGUMENT

This case hinges on analyzing the Appellee's employment practices and policies regarding paid vacation and the Appellee's record-keeping responsibilities under the WPCA according to statutory requirements and this Court's well-settled caselaw. This Court has consistently recognized that "[t]he West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld." Syl. Pt. 3, Shaffer v. Fort Henry Surgical Associates, Inc., 215 W.Va. 453, 458, 599 S.E.2d 876, 881 (2004); Syllabus, Mullins v. Venable, 171 W.Va. 92, 297 S.E.2d 866 (1982); Syl. Pt. 3, Jones v. Tri-County Growers, Inc., 179 W.Va. 218, 366 S.E.2d 726 (1988); Syl. Pt. 3, Lipscomb v. Tucker County Com'n, 206 W.Va. 627, 527 S.E.2d 171 (1999). "Therefore, '[s]tatutes, such as the [Wage Payment and Collection Act], that are designed for remedial purposes are generally construed liberally to benefit the intended recipients. Conrad v. Charles Town Races, Inc., 206 W.Va. 45, 51, 521 S.E.2d 537, 543 (1998) (citations omitted)'" Fort Henry Surgical Associates, Inc., 215 W.Va. at 458, 599 S.E.2d at 881.

**A. The Circuit Court Erred in its Findings of Fact
and Conclusions of Law Concerning
the Appellee's Employment Practices and Policies**

**1. The Circuit Court Erred in its Findings of Fact
and Conclusions of Law Concerning the
Appellee's Exceptions to the Written Paid Vacation Policy**

It is undisputed that the Appellant took an unpaid maternity leave of absence from September 1, 2001 through January 31, 2002. Judgment Order Finding of Fact 15. The circuit court found that the Appellee's leave policy provided that paid leave would be calculated on a pro rata basis for an employee not working a full year. Judgment Order Finding of Fact 6. The circuit court further found that the Appellee exercised discretion when he paid the Appellant for a full week of leave even though she had been on an unpaid leave of absence and, under the terms of the vacation policy, had not earned a full week of paid leave. Judgment Order Findings of Fact 16-19. The circuit court also found that the Appellee's willingness to make an exception to the policy does not change the policy and that the "[e]mployees **appear** to be aware that they can approach the [Appellant] with . . . special circumstances" for exceptions to the paid leave policy. Judgment Order Finding of Fact 20. (Emphasis added.).

The essential issue in both written and unwritten employment policies and practices is that employees must be aware of and understand the terms of the policies and practices. Finding that employees **appear** to be aware that the Appellee was exercising discretion when he paid the Appellant for vacation as an exception to the paid leave policy does not establish that the employees actually were aware. In fact, employee Gretchen Wolfe testified that she believed she was going to receive paid vacation even though she would be on unpaid maternity leave. In other words, Ms. Wolfe did not express an understanding that the exception was discretionary. Petition for Appeal

at 26, 28.

If an employer chooses to exercise discretion in making exceptions to written fringe benefit policies, those exceptions must be express and specific “to spare workers from trying to hit an ever-moving target.” Ingram v. City of Princeton, 208 W.Va. 352, 359, 540 S.E.2d 569, 576 (2000) (citing Robertson v. Opequon Motors, Inc., 205 W.Va. 560, 566, 519 S.E.2d 843, 849 (1999)). “[T]he terms of employment must be express and specific so that employees understand the amount, if any, of the fringe benefits owed to them upon separation from employment.” Syl. Pt. 6, Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (1999). The paid vacation policy, Joint Exhibit 2, is simply silent with regard to exceptions.

Although the circuit court initially found that the Appellee’s exercise of discretion in making exceptions to the written policy did not change the policy, Judgment Order Finding of Fact 20, the circuit court then concluded that the Appellee “ha[d] an unwritten policy with regard to earning paid leave while on an unpaid leave of absence,” “had a consistent policy of using his discretion in deciding whether to allow an employee to accrue paid leave while on maternity leave,” and “did not have a policy of awarding paid leave without reduction for extended periods of absence from the dental practice.” Judgment Order Conclusion of Law 7 at p. 20, 23. The circuit court next characterized the paid leave as a “bonus”² to an employee after returning from maternity leave, and concluded that an employer “has discretion to award bonuses to employees.” Judgment Order Conclusion of Law 7 at p. 24.

These findings and conclusions are at best confusing, perhaps reflecting both the written

² If the payment to the Appellant of paid leave time was in fact a bonus, the Appellee should have recorded it as a “bonus” on the Appellant’s pay stub. See W. Va. Code St R. § 42-5-14.2, *infra*.

policy's silence on exceptions and the Appellee's exercise of discretion in making exceptions. "Where an employer prescribes in writing the terms of employment, any ambiguity in those terms shall be construed in favor of the employee. Syl. Pt. 2, Lipscomb, 206 W.Va. at 628, 527 S.E.2d at 172. Adding to the confusion, the circuit court then concluded that the Appellee's policy of discretion was consistently applied and was known by the [Appellant] "[d]espite the [Appellee's] testimony that he does not tell employees whether they will receive the discretionary bonus until after they seek vacation pay and despite [Appellee's] testimony that he did not tell [Appellant] that he may treat her differently after her second maternity leave." Judgment Order Conclusion of Law 7 at p. 24.

As the circuit court noted, for an employer to rely upon an unwritten policy, the employer must consistently apply the unwritten policy and the unwritten policy must be known by the employees. Judgment Order Conclusion of Law 7 at p. 20. Although the circuit court found that the employees appeared to be aware of the unwritten policy, Judgment Order Finding of Fact 20, such finding was contradicted by the Appellee himself who testified that he does not tell employees whether they will receive the discretionary bonus until after they seek vacation pay, and the court's finding that the Appellant was the first employee that the Appellee allowed to take paid leave after an unpaid leave of absence and that the Appellant was the only employee to have requested paid leave. Judgment Order Finding of Fact 21.

It is difficult to understand how a first time circumstance can be characterized as a consistently applied unwritten policy that is known by employees.

2. The Circuit Court Erred in its Findings of Fact and Conclusions of Law Concerning the Appellee's Written Paid Vacation Policy on Unused Leave at Separation from Employment

It is undisputed that the Appellant went to work for the Appellee beginning November 1, 2000 and resigned effective July 14, 2004. The Appellant's fourth year of employment began on November 1, 2003. Judgment Order Finding of Fact 14. It is also undisputed that the Appellant took another unpaid maternity leave of absence from November 1, 2003 through January 31, 2004. Judgment Order Finding of Fact 23. Under the terms of the vacation policy, the Appellant was eligible to receive two weeks of paid vacation, subject to an accounting for vacation time taken and a pro-rated determination based on the separation date. Judgment Order Findings of Fact 5(a), 6, and 7.

The circuit court found that the Appellee's leave policy required that paid leave be taken in full-day increments and that upon separation, an employee was entitled to be paid for earned but unused **days** of paid leave, calculated on a pro rata basis. Judgment Order Finding of Fact 5 (d), 7. (Emphasis added.). The circuit court concluded that "[t]he policy **fully explains** that only unused, accrued **days** of paid leave will be compensated for an employee who leaves the practice and explain by clear example how the leave time accrued will be calculated pro rata if the employee leaves. . . ." Conclusion of Law 6 at p. 19. (Emphasis added). What the policy actually states is that "[e]mployees who leave our practice will be paid for unused vacation **time** accrued for their calendar year, which is calculated from each individual's date of hire." (Emphasis added.). The final paragraph of the vacation policy uses the word "time" several times, referring to both vacation time and days. Joint Exhibit 2.

While the circuit court concluded that the policy unambiguously stated that a departing

employee can only be paid for unused time in full day increments, the court ignored the policy language that a departing employee will be paid for unused vacation time accrued. Whatever the Appellee meant to state in the policy, he has used both vacation time and vacation days interchangeably, creating an ambiguity. In addition, in his January 21, 2005 letter to the Division, the Appellee pro-rated the amount of vacation time owed to the Appellant using a partial day, or hours, stating that she was “entitled, at the very most, to 4.20 hours” of paid vacation.

The circuit court found that the Appellee did not include any amount for unused, accrued leave in the Appellant’s final paycheck because the Appellee determined that she had used all the leave she had accrued. Judgment Order Finding of Fact 60. Contrary to this finding, the Appellee clearly recognized that he owed the Appellant some amount for earned but unused vacation, stating in a letter to the Division that “at the very most,” the Appellant was “entitled to 4.20 hours.” Judgment Order Finding of Fact 72. The Appellee’s testimony that leave did not accrue in partial days and that he made a partial day calculation in an attempt to settle the Appellant’s wage claim, Judgment Order Finding of Fact 72, does not alter his acknowledgment that the Appellant was owed for earned but unused time.

“Terms of employment concerning the payment of unused fringe benefits to employees must be express and specific so that employees understand the amount of unused fringe benefit pay, if any, owed to them upon separation from employment. Accordingly, this Court will construe any ambiguity in the terms of employment in favor of employees.” Syl. Pt. 6, Meadows v. Wal-Mart, 207 W.Va. at 206, 530 S.E.2d 679.

If the terms of the policy are unclear, a court cannot rewrite the policy to reflect what the court believes the employer intended and an employer cannot apply the terms of a policy according

to what he or she intended. It is the terms of the policy itself that define what the employer owes and what the employee is entitled to. If the terms are not clearly explained so that employees understand what they are entitled to, a court must find that the policy is ambiguous and construe the ambiguity in favor of employees. *Id.*

**B. The Circuit Court Erred
in its Findings of Fact and Conclusions of Law
Regarding the Appellee's Record-Keeping
and Notification Responsibilities Under the WPCA**

Under the WPCA, an employer is required to “[m]ake available to his employees in writing or through a posted notice maintained in a place accessible to his employees, employment practices and policies with regard to vacation pay, sick leave, and comparable matters.” W. Va. Code § 21-5-9 (3). An employer is also required to maintain written payroll and employment records, to include the “[h]ours worked each workday and total hours worked each workweek; [and the][m]ethod of calculating the percent of fringe benefits owed to an employee at any given time,” W. Va. Code St R. § 42-5-4.2 (g-h).

An employer must “at the time of hire notify their employees in terms of hour, day, month or year, including the term of employment, in writing of the rate of pay, overtime rate, fringe benefits amount and method of computing fringe benefits and of the day, hour and place of payment. Any changes in such rate, time, term or place shall be furnished to employees in writing or by posted notice in a place or places where all employees would observe it on a daily basis at least one (1) full pay period prior to the effective date of such change.” W. Va. Code St R. § 42-5-14.1

An employer must also “[f]urnish each employee with an itemized statement of deductions made from his wages for each pay period such deductions are made.” W. Va. Code § 21-5-9 (4). The itemized statement must also include bonus and incentive pay. W. Va. Code St R. § 42-5-14.2.

The circuit court found that when the Appellant began working for the Appellee, the employees reported their hours of work and paid leave days for each pay period on “post-it notes or other scraps of paper” and that the employees were paid according to the time reported by them. Judgment Order Findings of Fact 49, 50. While there is no claim that the employees were not paid according to the time they reported, the record-keeping system using “post-it notes or other scraps of paper” can only be described as haphazard at best.

When the Appellee switched to a payroll computer program in late 2002, he did not use the feature for recording available and used leave on employee pay stubs, but continued to keep leave records manually. Judgment Order Findings of Fact 40-41. The computer program generated pay stubs that showed leave time as “zero.” Judgment Order Finding of Fact 42. Beginning with the April 23, 2004 payroll, the employees’ pay stubs began showing amounts of available leave. Judgment Order Finding of Fact 43. The circuit court thereafter found that the amount of leave indicated on the pay stubs was not accurate, that the employees knew the amounts were not accurate, and concluded that the Appellant knew that the Appellee did not use the pay stubs to provide an accounting of leave. Judgment Order Findings of Fact 43-44; Conclusions of Law 11.

Clearly, it was the Appellee’s responsibility to keep accurate payroll records, including the amount of vacation time earned and used by employees. W. Va. Code § 21-5-9 (4); W. Va. Code St R. § 42-5-14.1. If the Appellee knew that the amount of leave time on the employees’ pay stubs was not accurate, the Appellee had a responsibility to correct it. Blaming the inaccuracy on a computer program or the Appellee’s lack of computer skills, or relying on discussions at staff meetings, Judgment Order Findings of Fact 43, 44, does not relieve the Appellee from providing his employees with accurate payroll information on their pay stubs. Given that the Appellee’s error was

on employees' pay stubs, the correction needed to be on the pay stubs themselves or on a posted notice where all employees could observe it on a daily basis.

The circuit court erred in not holding the Appellee accountable for his responsibilities under the WPCA, finding and concluding instead that the Appellant knew the information was wrong.

**C. The Circuit Court Erred
In Its Conclusion that the Appellant
Committed Fraud**

The circuit court concluded that the Appellant used a “pay stub record she knew to be erroneous and used it to extract money from the [Appellee] that she knew” was not owed to her when she filed a wage claim with the Division of Labor. Judgment Order Conclusion of Law 12.

The Appellee counterclaimed against the Appellant when she filed for liquidated damages in magistrate court, alleging that she had filed a “fraudulent claim” with the Division of Labor. Judgment Order Defendant’s Counterclaim 9.

Rather than examine the Appellee’s counterclaim under a fraud analysis, the circuit court *sua sponte* characterized the Appellant’s actions as a common law tort of injurious falsehood. Judgment Order Conclusion of Law 10 at p. 25. The elements of fraud have been well-established by this Court, whereas the tort of injurious falsehood has received little attention. The circuit court used a rather cursory injurious falsehood analysis as grounds for imposing compensatory and punitive damages. The analysis is misplaced in that the two West Virginia cases that mention injurious falsehood concern tortious interference with business or contractual relations (Torbett v. Wheeling Dollar Sav. & Trust Co., 173 W.Va. 210, 216, 314 S.E.2d 166, 172 (1983)) and a quitclaim deed (TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 476, 419 S.E.2d 870, 879 (1992)).

A fraud analysis is clearly on point. “The essential elements in an action for fraud are: ‘(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.’ Horton v. Tyree, 104 W.Va. 238, 242, 139 S.E. 737 (1927).” Syl. Pt. 1, Lengyel v. Lint, 167 W.Va. 272, 280 S.E.2d 66 (1981).

It is undisputed that the Appellant filed a wage claim with the Division of Labor. However, this Court has held that more than a false statement is needed to establish fraud. To find fraud, the Appellee in the case at bar would have had to rely on the Appellant’s allegedly false statement and be damaged by relying on it. Legg v. Johnson, Simmerman & Broughton, L.C., 213 W.Va. 53, 60, 576 S.E.2d 532, 539 (2002).

The wage claim filed by the Appellant included both her own statements and the pay stub record that was the Appellee’s own statement. Instead of relying on the Appellant’s statements and his own pay stub, the Appellee consistently disputed both as inaccurate. In terms of the elements necessary to establish fraud, because the Appellee did not rely on either statement, he was not damaged by them. Not only did the Appellee not rely on the Appellant’s statements or his own pay stub record, the Appellee initially determined that he owed the Appellant “at the very most” 4.20 hours of earned but unused vacation. The Appellee initially submitted a check for \$96.60 and another check for \$920.00 to the Division to pay the Appellant’s wage claim. As the circuit court found, the Appellee made this payment by relying on the advice of his accountant, who said it would be less expensive than fighting the Appellant’s wage claim. Judgment Order Finding of Fact 75.

The essential elements necessary for a finding of fraud cannot be met.

When the Appellant subsequently filed a claim for liquidated damages in the Magistrate Court of Berkeley County, she did not know why the Appellee paid her wage claim - she knew only that he paid her. Since this Court has determined that liquidated damages are mandatory when an employer fails to pay wages as required by W. Va. Code § 21-5-4, the Division advises an employee that he or she can seek recovery of liquidated damages if he or she chooses to do so. "W. Va. Code 21-5-4(e) prescribes a mandatory requirement that liquidated damages are to be paid whenever an employer fails to pay an employee wages as required under W. Va. Code 21-5-4." Syl. Pt. 2, Ash v. Ravens Metal Products, Inc., 190 W. Va. 90, 437 S.E.2d 254 (1993).

The Appellee clearly recognized that he owed the Appellant some amount for earned but unused vacation upon her separation from employment, "stating that at the very most" the Appellant was "entitled to 4.20 hours." Judgment Order Finding of Fact 72. Contrary to the circuit court's conclusion that the Appellant was using erroneous information to extract money from the Appellee that she knew he did not owe, the Appellee acknowledged that he did in fact owe her money for earned but unused vacation.

Without fraud, there is no basis for an award of punitive damages or an award of attorney's fees and costs to the Appellee.

III. CONCLUSION

The *amicus curiae* Division of Labor thanks the West Virginia Supreme Court of Appeals for its attention to the foregoing arguments and requests that the Court give these submissions due consideration.

Respectfully submitted,
Amicus Curiae West Virginia Division of Labor
By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in cursive script that reads "Elizabeth G. Farber". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I, Elizabeth G. Farber, Assistant Attorney General, counsel for the West Virginia Division of Labor, certify that I have on this 2nd day of December, 2009, served a true copy of the foregoing ***AMICUS CURIAE BRIEF OF THE WEST VIRGINIA DIVISION OF LABOR*** upon the following by depositing the same in the United States Mail, first class postage prepaid, addressed as follows:

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