

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

MICHELLE ISSACS,

Appellant/Plaintiff

vs.

Circuit Court of Berkeley County

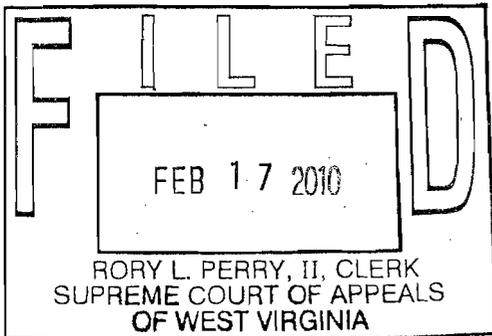
Civil Action No. 05-C-817

Docket Number: ~~090960~~ 35284

DANIEL BONNER,

Appellee/Defendant.

APPELLANT'S REPLY BRIEF



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I. POINTS AND AUTHORITIES

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II. ARGUMENT

Appellee Daniel Bonner's response brief makes clear that his whole case – from his defense to Appellant's claim that he violated the Wage and Hour Act to his counter-claim that Appellant Michelle Isaacs committed fraud – rests entirely on a single, fragile foundation: the conclusion by the trial court that the written vacation policy does not mean what it says. The trial court concluded that departing employees should not be paid for unpaid vacation time, even though the written policy clearly states that "employees who leave our practice will be paid for unused vacation *time* accrued for their calendar year." Fortunately for the Appellant, the trial court's finding was based upon the interpretation of a written employment agreement which is a question of law subject to *de novo* review.

A. **The Circuit Court Erred By Construing a Written Employment Policy that was Clear and Unambiguous**

All of Appellee's arguments rely upon the words of the written vacation policy that the lower court found was in effect at Appellee's dental practice. Although the Appellee could never produce the alleged written policy that was purportedly in effect at the time of Mrs. Isaac's employment, assuming for the purposes of this appeal that the trial court's finding was correct, the relevant paragraph of the vacation policy reads as follows:

We encourage you to take your vacation in one-week blocks (Vacation time may not be taken in blocks of less than one day.) Unused vacation days may not be carried over to subsequent years. *Employees 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.* However if an

employee leaves the practice and has taken vacation time that has not been earned, the employee will be responsible for reimbursing the practice. The money owed will be deducted from the employee's last pay check. For example, let's suppose you are in your fourth year of employment with us and therefore have two weeks of vacation for the year. You work six months of that year. Thus, you have one week of vacation time accrued. If you haven't taken them, you will receive payment for those days if you leave the practice.

See Joint Exh. 1D, at 3 (emphasis added).

The language in the Appellee's purported vacation policy is clear: employees who leave the practice are entitled to be paid for any unused vacation *time* that they have accrued. It is undisputed that the Appellee's employees accrued vacation time in less than full day increments. Indeed, the Appellee conceded to the West Virginia Division of Labor that "at the very most," the Appellant was "entitled to 4.20 hours." See Joint Exh. 1(F). He admitted it again at trial.¹ While the practice could have permitted employees to only accrue vacation in whole day increments, it did not. The practice's employees accrued vacation time by increments of less than whole days and the plain language of the vacation policy indicates that employees will receive payment for accrued vacation *time* at the time of separation.

The term "vacation time" has a clear and logical meaning and the lower court was

¹ At trial, Appellee himself acknowledged that Isaacs had accrued 4.2 hours of unpaid vacation. Contrary to Bonner's statement in his response brief, at no time during his questioning did Appellee ever dispute that Mrs. Isaacs had accrued 4.2 hours of vacation; he simply disputed whether he owed her money for that time. Appellee's statement in his Response Brief that Isaacs misrepresented the testimony was thus an unwarranted attempt to discredit the brief-writer, not an effort to clear up any issues before this Court.

wrong to change the meaning of the word “time” to mean “days.” Quite clearly, if the word “time” was unambiguous, the court should not have interpreted the vacation policy at all.

As the lower court acknowledged, unless the paid leave policy is ambiguous, it must be applied as written. Judgment Order, para. 6, p. 18 of 31. A valid and unambiguous written instrument “is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” *Estate of Tawney v. Columbia Natural Resources, LLC*, 219 W.Va. 266, 272, 633 S.E. 2d 22, 28 (2006). Thus, the fact that the trial court substituted the word “days” for “time” reveals that it implicitly found the policy to be ambiguous- despite its assertion to the contrary. Judgment Order, para. 6, p. 18 of 31. Based thereon, the trial court should have applied the rules of construction that apply to ambiguous employment policies. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 65, n. 23, 459 S.E. 2d 329, 342, n. 23 (1995). As is set forth in exhaustive detail in Appellant’s original filing, and in the amicus brief filed by the West Virginia Division of Labor, the trial court did not. The trial court’s misapplication of controlling law was reversible error.

B. The Circuit Court Erred By Construing a Written Employment Policy in Favor of the Employer

As noted above, because the lower court construed the term “time” to mean “days,” it implicitly found the subject policy to be ambiguous. An “ambiguity” is defined as “language susceptible of two different meanings or language of such doubtful meaning

that reasonable minds might be uncertain or disagree as to its meaning.” *Estate of Tawney v. Columbia Natural Resources, LLC*, 219 W.Va. 266, 272, 633 S.E. 2d 22, 28 (2006). As this Honorable Court would agree, the word “time” comes in many different measurements such as months, years, seconds, and fractions of days (i.e. 4.20 hours). As admitted by the Appellee, Mrs. Isaacs accrued at least 4.20 hours of vacation “time” by the time she left the Appellee’s practice. See Joint Exh. 1(F).

There can be little doubt that trial court’s interpretation of “time” to mean “days” favored the employer and disfavored the employee. Such interpretation meant that the Appellant would not be paid for “time” accrued. Such interpretation of the policy was contrary to the controlling law of West Virginia which requires courts to construe written employment policies in the employee’s favor. *Lipscomb v. Tucker County Com’n*, 206 W.Va. 627, 631, 527 S.E.2d 171, 175 (1999). The trial court cannot avoid applying applicable law by simply asserting that the policy was unambiguous. Its interpretation and construction of the term “time” belies its true finding that the vacation policy was ambiguous.

In addition, with respect to the trial court’s interpretation of the Appellee’s payment of one week of vacation after the Appellant’s first maternity leave as a “bonus,” also favors the employer and not the employee. The trial court made this finding despite the fact that the Appellee failed to record such a “bonus” on the Appellant’s pay stub, as required by W.Va. Code St. R. § 42-5-14.2.

Based upon all of the forgoing, the trial court's consistent failure to interpret the vacation policy in accordance with *Lipscomb, supra* and in the Appellant's favor was reversible error.

C. The Circuit Court Erred By Finding, *Sua Sponte*, that the Appellant Committed the Tort of Injurious Falsehood Against the Employer

The lower court's incorrect construction of the employment policy in the employer's favor was also its predicate for its finding that the Appellant committed the tort of injurious falsehood. As noted by the Division of Labor in its amicus brief, the Appellee never filed a claim for injurious falsehood but instead, fraud. Nevertheless, the trial court did not examine the Appellee's fraud claim under a fraud analysis but instead, under the lesser known standard applicable for injurious falsehood. However, insofar that the Appellee pled fraud, the Court should have applied a fraud analysis, always keeping in mind the high level of proof required. Under West Virginia law, "[a]llegations of fraud, when denied by proper pleading, must be established by clear and convincing proof." Syl. Pt. 5, *Calhoun County Bank v. Ellison*, 133 W.Va. 9, 54 S.E.2d 182 (1949); *See also Tri-State Asphalt v. McDonough Co.*, 182 W.Va. 757, 762, 391 S.E.2d 907, 912 (1990).

The trial court failed to find, by clear and convincing evidence, the required elements of fraud. Fraud requires "(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 and that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was

damaged because he relied on it.” See Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981) (citing *Horton v. Tyree*, 104 W.Va. 238, 242, 139 W.E. 737 (1927)).

The acts that were supposedly fraudulent by Mrs. Isaacs were based upon her submissions to the Department of Labor; specifically, her statement on the Request for Assistance form that there was no written employment policy, her statement that she was due 64 hours of vacation pay, and her alleged failure to provide paystubs showing zero hours to the Department of Labor investigator.²

Significantly, the trial court never addressed the element of fraud that requires proof of justifiable reliance on the part of the Appellee. On the contrary, the Appellee consistently asserted that he never believed (or relied upon) the Appellant’s assertion that there was not a written vacation policy in place. He also disclaimed any reliance on the Appellant’s assertion that she was entitled to 64 hours of vacation pay. He also claimed that his office’s pay stubs, which he was required to maintain pursuant to W.Va. Code sec. 21-5-9(4) and W.Va. Code St. R. § 42-5-14.1, were consistently inaccurate and not relied upon.

If the Appellee always believed there was a written vacation policy, always believed that the Appellant was not entitled to 64 hours of vacation pay, and always knew that the paystubs he provided to his employees were wrong, then how could the Appellee

² As described in detail in Appellant’s Brief, Mrs. Isaacs provided paystubs showing zero hours to the Department of Labor investigator, who acknowledged the receipt of these paystubs during her trial testimony. The lower court simply missed this. The Appellee does not contest that the Department of Labor investigator received these paystubs.

have justifiably relied upon these to his detriment? He could not, and therefore he could not have been the victim of fraudulent conduct by Mrs. Isaacs, even taking the asserted facts as true.

At a minimum, it is a terrible irony that an employee was found liable for fraud because she asserted that there was no written employment policy when, in fact, the employer himself never could produce a copy of that written employment policy, either in paper or electronic format. W.Va. Code St. R. § 42-5-4 prescribes the records that must be maintained by an employer and requires they be maintained for a period of not less than five years. W.Va. Code St. R. § 42-5-4.2(h) requires the employer to maintain the “[m]ethod of calculating the percent of fringe benefits owed to any employee at any given time.” Fringe benefits are defined in W.Va. Code § 21-5-1(l) as “any benefit provided an employee ... and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, [and] personal leave....” Thus, the Appellee as Mrs. Isaacs’ employer was required to maintain the vacation policy for five years so that her fringe benefits could be calculated, but he failed to do so. Yet it is Mrs. Isaacs who is being made to suffer through the fraud finding that was based on her assertion that there was no such written policy.

Similarly, the lower court implicitly found fraud because it found that the paystub that the Appellee provided to Mrs. Isaacs was wrong and Mrs. Isaacs knew it was wrong. It is almost inconceivable that an employer could violate W.Va. Code St. R. § 42-5-14.1,

which requires employers to provide an itemized statement of wages, and then use his own violation of the law as an offensive weapon against an employee.

The filing of a claim – whether it be with the Division of Labor or in Magistrate Court – for money that is reasonably believed to be owed simply cannot be the basis of a finding of fraud. After recovering on her claim with the Division of Labor, Mrs. Isaacs was advised that she was entitled to liquidated damages pursuant W.Va. Code § 21-5-4, and attorney fees under W.Va. Code § 21-5-12 and thus, filed a claim in Magistrate Court. Such an after-the-fact transformation of Mrs. Isaacs' actions, and a rose-tinted view of the Appellee's actions, has troubling implications. If the trial court's finding of fraud is permitted to stand, it would have a chilling effect on future employees who might wish to exercise their rights against employers who fail to pay wages owed or maintain adequate records as required by W.Va. Code § 21-5-9.

III. CONCLUSION

The Appellant was not paid for vacation time that she earned while employed by the Appellee. The Appellee refused to pay this fringe benefit despite the fact that the written employment policy explicitly stated that all unused vacation "time" would be paid to the employee upon departure. The trial court erred by construing the written employment agreement even though it was not ambiguous and then erred again, when it construed the agreement in favor the employer rather than the employee. Further, the trial court erred by ignoring the unwritten employment policy of the Appellee to provide paid vacation after

maternity leave and instead, held that such vacation pay was to be provided at the employer's discretion. The trial court erred again in determining that Isaacs was liable for fraud where her alleged wrongdoings were (1) marking that a written employment policy did not exist – and the employer could not produce this written employment policy; (2) putting on a Request for Assistance that she was due the same amount of vacation pay that her employer put was due on her paystub; and (3) failing to provide copies of her paystubs showing a change in vacation accounting methods when the Division of Labor acknowledges receiving the earlier version of the paystub. The trial court erred in imposing punitive damages and in imposing excessive punitive damages.

Based upon all of the arguments asserted herein, as well as in the Appellant's Petition for Appeal, the Appellant respectfully requests that this Honorable Court reverse the trial court's findings and to remand the case for further consideration.

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Appellee/Defendant.

CERTIFICATE OF SERVICE

I, Andrew C. Skinner, counsel for the Appellant, do hereby certify that I have mailed a true copy of the foregoing Appellant's Reply Brief upon the following persons, by mailing the same by U.S. Mail, postage prepaid, this 17th day of February, 2010:

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