

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 091140

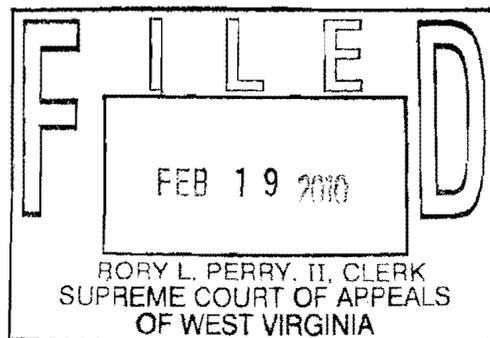
**JAMES E. BEICHLER,**

Appellant,

v.

**WEST VIRGINIA UNIVERSITY  
AT PARKERSBURG,**

Appellee.



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*From the Circuit Court of Kanawha County, West Virginia*

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**AMICUS CURIAE BRIEF FROM THE  
WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION  
IN SUPPORT OF APPELLANT JAMES E. BEICHLER**

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**I. Introduction and statement of interest of *amicus curiae***

*To the Honorable Justices of the*

*West Virginia Supreme Court of Appeals:*

The West Virginia Employment Lawyers Association (WVELA) is an affiliate of the National Employment Lawyers Association (“NELA”). Since its formation in 1985, NELA has served as the only national bar association exclusively comprised of lawyers who represent employees in cases involving employment discrimination, illegal workplace harassment, wrongful termination, denial of employee pay and benefits and other employment related matters. Many of these causes of action provide for the payment of attorney fees to successful employee plaintiffs, through fee-shifting provisions.

NELA and its 68 state and local affiliates have more than 3,000 members. WVELA is an active affiliate of NELA. As such, like its parent association, WVELA is comprised of lawyers throughout the state of West Virginia who devote their time and efforts to representing employees in workplace litigation.

WVELA members often litigate Wage Payment and Collection Act claims. This Act is a powerful tool for all employees, including State employees, designed to ensure employers meet the financial obligations owed to their employees. Without the civil remedy provided by this Act, including liquidated damages and attorneys' fees, many employees terminated from a job may never be paid by their former employers. In recent years, this Court has not had many opportunities to address the application of this Act. The facts in this case touch upon several issues of great interest to employees in this State and WVELA respectfully seeks this opportunity to provide the Court with its view on the issues raised.

This case, involving a claim asserted by Appellant James E. Beichler, who employed by West Virginia University at Parkersburg (WVUP), once again requires this Court to decide how to apply the sovereign immunity provided by Article VI, Section 35 of the West Virginia Constitution, in an employment situation. The Circuit Court of Kanawha County found Mr. Beichler's claim barred by sovereign immunity because the applicable insurance policy excludes the payment of wages and benefits from its coverages and based upon an assertion that Mr. Beichler failed to exhaust administrative remedies.

It should not be surprising that wages and benefits are excluded from insurance coverage because each State agency necessarily would have in its budget money allocated for such wages and benefits. Thus, since the money already has been budgeted for this purpose, having insurance coverage for these same wages and benefits would be duplicative and unnecessary.

WVELA respectfully submits the trial court's decision to deny Mr. Beichler the opportunity to pursue his wage payment claim should be reversed. Simply because Mr. Beichler was a State employee should not mean that he is precluded from pursuing his rights under the Wage Payment and Collection Act, to be paid all wages and benefits previously earned, but not paid.

## **II. Brief statement of the case**

As amicus, WVELA will not provide the Court with any detailed recitation of the facts because the parties involved presumably will provide that information in their briefs. Essentially, Mr. Beichler was a tenure track faculty member at WVUP, whose last date of employment was May 17, 2008. Once he was discharged, WVUP paid Mr. Beichler the wages and benefits owed under his regular contract, but allegedly failed to pay him compensation pursuant to what is referred to as "Faculty Overload Contracts."

Mr. Beichler filed a complaint against WVUP, asserting he was entitled to be paid these additional wages, under the Wage Payment and Collection Act. In addition to these wages, Mr. Beichler was seeking to recover liquidated damages under the Act as well as attorneys' fees and costs. This complaint was dismissed, pursuant to Rule 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, by the Circuit Court of Kanawha County, based upon WVUP's assertion that this claim was barred by sovereign immunity and Mr. Beichler failed to exhaust his administrative remedies.

## **III.**

### **Argument**

When an agency or branch of the State acts as an employer, is it permitted to hide behind the cloak of sovereign immunity when it fails to pay a discharged employee all of the wages and benefits owed? This case will answer this question and will decide whether employees of the State are

entitled to the same right as every other employee in this State—the right to be paid all wages and benefits owed to them once the employment is terminated.

Before jumping into the sovereign immunity issue, the Wage Payment and Collection Act should be examined to see whether State employees somehow are excluded from filing claims under this Act. In interpreting and applying the West Virginia Wage Payment and Collection Act, this Court applies the following standard, noted in *Shaffer v. Ft. Henry Surgical Associates, Inc.*, 215 W.Va. 453, 458, 599 S.E.2d 876, 881 (2004):

[I]t is well settled 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.” 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).

The obligation of **all** employers to pay all wages due to a discharged employee is established by W.Va.Code §21-5-4(c), which provides:

Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee’s wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one period’s notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting.

“Wages” are defined in W.Va.Code § 21-5-1(c), as including “then accrued fringe benefits capable of calculation and payable directly to an employee.” “Fringe benefits” are defined in W.Va.Code § 21-5-1(l), as including “**any benefit provided an employee or group of employees by an employer**, or which is required by law[.]” (Emphasis added). There is no dispute in this case

that if Mr. Beichler were employed by a private company and he could prove that was entitled to be paid additional compensation, pursuant to the “Faculty Overload Contracts,” then clearly he would be entitled to the benefits under this Act.

The protections afforded by this Act are very specific and all encompassing. In W.Va.Code §21-5-1(m), “employer” is defined as “any person, firm or corporation employing any employee.” Thus, there is nothing about this definition excluding the State, as an employer, from coverage under the Act. As noted by Mr. Beichler’s counsel in his petition for appeal, this Court in *Ingram v. City of Princeton*, 208 W.Va. 352, 540 S.E.2d 569 (2000), held this Act does apply to governmental employees. In fact, this Court noted to rule otherwise would create unconstitutional equal protection concerns. 208 W.Va. at 356, 540 S.E.2d at 573.

Having established that the State, as an employer, is subject to the obligations under the Wage Payment and Collection Act, the critical issue is whether this conclusion is impacted by sovereign immunity, mandated by Article VI, Section 35 of the West Virginia Constitution. As freely acknowledged by this Court, our existing sovereign immunity jurisprudence often is difficult to understand and reconcile. In *Gribben v. Kirk*, 195 W.Va. 488, 497 n.18, 466 S.E.2d 147, 156 n.18 (1995), the comprehensive decision addressing an award of unpaid wages to state employees authored by Justice Franklin Cleckley, the Court acknowledged that “our analysis regarding sovereign immunity has lead us to both awkward and irreconcilable results.”

Nevertheless, in many cases, as discussed in some detail in *Gribben*, this Court has approved the award of back pay to State employees and sovereign immunity is not an issue because “the sovereign immunity doctrine is not implicated in the context of employee relations where the State, acting through its agents, as an employer, has unlawfully withheld all or a part of an employee's salary.” *AFSCME v. CSC of West Virginia*, 176 W.Va. 73, 79, 341 S.E.2d 693, 699 (1985).

In addition to these cases, the Court in *Gribben*, 195 W.Va. at 496, 466 S.E.2d at 156, provided the following explanation as to why sovereign immunity is not implicated when the State acts as an employer and an employee claims wages are owed:

[T]he Legislature has directed an agency to engage personnel, to employ them on particular terms, and to pay them according to certain criteria. Despite those directions, the agency, acting through the official named as a respondent in the mandamus petition, failed to properly execute its assignment. **This failure resulted in an obvious legal debt, and the wronged employee's effort to collect on it does not implicate Section 35 because the Legislature, in effect, already had budgeted for the personnel services and for payment for the services in accordance with its directions.** (Emphasis added).

The holdings by this Court in *AFSCME* and *Gribben* clearly support the right of Mr. Beichler to pursue, through a wage payment claim, the unpaid wages he asserts are owed to him. As in any wage payment claim, Mr. Beichler, as the employee, should be permitted an opportunity to prove the merits of his case while the State, as the employer, has the right to defend this claim by asserting Mr. Beichler is not entitled to these wages.

To suggest that all State employees are prohibited from asserting any rights under this Act invites the very equal protection arguments the Court specifically avoided when it held, in *Ingram*, that the Wage Payment and Collection Act applies to governmental employees. Taken to the extreme, under the trial court's holding, State employees would be working at the mercy of the State, which could pick and choose which employees to pay for the work performed and which employees to refuse payment. Those employees in the latter group would be left without any remedy to recover the wages and benefits owed, despite the undisputed fact that the budgets of all State agencies necessarily includes money allocated to pay for salaries and benefits.

If the trial court's decision is affirmed, would State employees, who are owed wages and benefits by the State, be forced to pursue their claims as a moral obligation before the West Virginia Court of Claims? An employee first could prevail in a civil service action, which results in a back pay award, but then may have to file a claim before the West Virginia Court of Claims to actually get paid. This process would be very cumbersome and unfair to all State employees.

There seems to be some suggestion in the order that Mr. Beichler should have filed a mandamus action, rather than a civil complaint under the Wage Payment and Collection Act. With this Court's adoption of Rule 71B of the West Virginia Rules of Civil Procedure, the distinction between a regular civil complaint and a petition for extraordinary relief for mandamus or prohibition has been eliminated because extraordinary relief now must be sought through the filing of a regular civil complaint. Thus, the actual label placed on the complaint should be irrelevant.

The world is not going to end if State employers, whose budgets include the payment of wages and benefits to their employees, are required by a court, through a wage payment claim, to pay their employees any wages or benefits actually owed as well as the liquidated damages, attorneys' fees, and costs associated with such claim. Paying employees their wages and benefits is an obligation assumed by the State as an employer and the State should not be permitted to duck its responsibilities by claiming sovereign immunity.

WVELA respectfully submits the expansive application of sovereign immunity found by the trial court is inconsistent with this Court's case law and potentially would require this Court to reverse all of the cases cited in *AFSCME* and *Gribben* for the proposition that sovereign immunity simply is not implicated in the context of employee relations where the State, acting through its agents, as an employer, has unlawfully withheld all or a part of an employee's salary.

Counsel for WVELA has researched this issue in other jurisdictions, but has found this process to be of little benefit because the sovereign immunity provisions in other states are worded differently and in many states, the Legislature is authorized to identify, in statutes, which claims against the State may proceed and which may not. The history of West Virginia's sovereign immunity provision, beginning with the seminal decision in *Pittsburgh Elevator Co. v. The West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983), has been to recognize various circumstances and exceptions where claims against the State may proceed, regardless of any alleged immunity. The approach by this Court in *AFSCME* and *Gribben* requires the trial court to be reversed for dismissing this case based upon sovereign immunity.

The exhaustion of administrative remedies rationale, also adopted by the trial court, does not warrant much discussion. Clearly, Mr. Beichler was entitled to file his claim under the West Virginia Wage Payment and Collection Act. The trial court held Mr. Beichler's failure first to exhaust whatever administrative remedies were available to him as a State employee precludes his wage payment claim.

There is nothing in the Wage Payment and Collection Act requiring an employee first to exhaust whatever administrative remedies may be available. Furthermore, this Court has refused to require a plaintiff to exhaust his administrative remedies in a variety of different cases. *Ronnie Lee S. v. Mingo County Board of Education*, 201 W.Va. 667, 500 S.E.2d 292 (1997); *Collins v. Elkay Mining Co.*, 179 W.Va. 549, 371 S.E.2d 46 (1988); *Wiggins v. Eastern Associated Coal Corp.*, 178 W.Va. 63, 357 S.E.2d 745 (1987). As this Court explained in *Wiggins*, 178 W.Va. at 66-67, 357 S.E.2d at 748-49, "The general requirement of the exhaustion of administrative remedies is not a jurisdictional doctrine, but is a matter of comity, within the discretion of the trial court....This Court

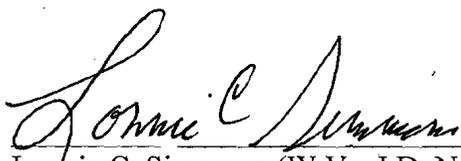
will not require the exhaustion of administrative remedies where such remedies are duplicative or the effort to obtain them futile.” Consequently, there is no legitimate reason why Mr. Beichler should have been forced first to go through the State employee’s grievance process first before filing his wage payment claim.

#### IV. Conclusion

For the foregoing reasons, WVELA respectfully asks this Court to reverse the final order of the Circuit Court of Kanawha County, to find that Mr. Beichler may continue pursuing his claim under the Wage Payment and Collection Act against the State, the State is not protected by sovereign immunity under these facts, and Mr. Beichler was not required to exhaust his administrative remedies before filing his claim. No matter how this Court resolves these issues, WVELA appreciates the opportunity to share its concerns with the Court regarding the issues raised in this case.

**WEST VIRGINIA EMPLOYMENT  
LAWYERS ASSOCIATION, Amicus  
Curiae,**

–By Counsel–



Lonnie C. Simmons (W. Va. I.D. No. 3406)

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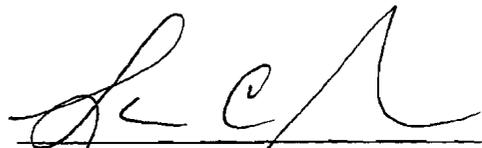
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**Certificate of Service**

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF FROM THE WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT JAMES E. BEICHLER** as well as the **AMICUS CURIAE BRIEF FROM THE WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT JAMES E. BEICHLER** was served on counsel of record on the 18<sup>th</sup> day of February, 2010, through the United States Postal Service, postage prepaid, to the following:

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