

COPY

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

JAMES E. BEICHLER,

Appellant/Appellant,

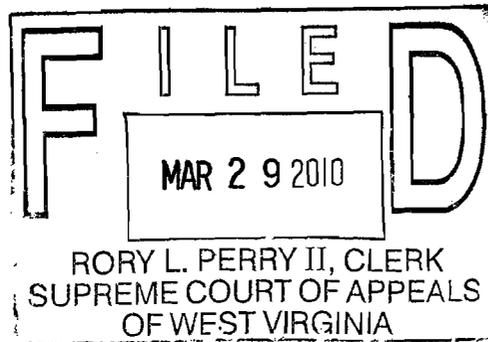
v.

Appeal No. 35435

**WEST VIRGINIA UNIVERSITY
AT PARKERSBURG,**

Appellee/Defendant.

**REPLY OF APPELLANT TO WEST VIRGINIA UNIVERSITY AT
PARKERSBURG'S BRIEF IN RESPONSE TO APPEAL**



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On behalf of Appellant

I. RESPONSE TO THE DEFENDANT'S STATEMENT OF FACTS

Plaintiff first notes that the Defendant's statement of facts contains not a single citation to any portion of the record before this Court. Further, the statement of facts is contradicted by the verified complaint filed in this matter which is a matter of record. As set forth in the complaint, and exhibits thereto, the Plaintiff's notes that:

"As of Plaintiff's separation from employment by Defendant, Plaintiff's rate of pay as established in overload contracts, true and exact copies of which are attached hereto as Exhibits A through E, was \$432.00 per overload hour taught by Plaintiff.

Defendant has failed and refused to pay Plaintiff for all hours authorized by Defendant and worked by Plaintiff. As set forth herein below, Plaintiff has been authorized to work and has worked hours for which Plaintiff has not been compensated."

Additionally, Plaintiff alleged that he did not receive his final pay after termination within seventy-two hours of his termination on May 16, 2008. Plaintiff's final pay received from Defendant was issued on June 31, 2008.¹

In addition, Plaintiff set forth in the verified complaint specific hours per semester for which he was to have been paid but for which he received no reimbursement beginning 2004 and continuing through 2008. Complaint paragraphs nine through fourteen. Defendant alleges :

"Further, in addition to his regular contracts of employment, Appellant had from time to time entered into several "Faculty Overload Contracts", which provided him additional agreed upon compensation when he taught in an overload capacity.

¹ As set forth in paragraph eight of the Complaint: "In addition to the failure to pay Plaintiff for hours in which Plaintiff performed work, Defendant also failed to pay Plaintiff in a timely manner for his final overload paycheck. Plaintiff's formal separation from employment was May 16, 2008. Plaintiff did not receive a payment of his final overload pay of 7 ½ hours (\$3,240.00) until June 31, 2008. Failure to pay all wages due within two weeks of Plaintiff's separation from employment is a violation of the West Virginia Wage Payment and Collection Act, West Virginia Code § 21-5a-4."

Faculty Overload Contracts are discretionary contracts whereby the institution and the faculty member agree upon the additional compensation to be paid above an individual's regular salary for additional classes (instructional hours) to be taught by the faculty member." Brief in Response to Appeal, p.2.

This statement by Defendant is accurate and the exhibits attached to the complaint (exhibits A through D) are copies of said Overload Contracts for the years 2005, 2006 and 2007. However, Defendant alleges that the contracts entered into between the Plaintiff and the Defendant "which cover the time periods in dispute" are the contracts for spring 2007 and spring 2008. *Id.* This is incorrect. As set forth in the complaint and exhibits thereto, the time period in dispute includes the period from fall 2004 through Plaintiff's termination in June 2008.

Additionally, Defendant places reliance upon the fact that one of the Overload Contracts at issue (for the spring 2008 semester) was "not executed by Appellant until May 19, 2008, **two days after** his employment ended with WVUP and therefore after any work under the same would have been completed." *Id.* (emphasis in original). This document, referred to by the Defendant, is contained nowhere within any record before this Court. Furthermore, Plaintiff notes that the original Overload Contract which was agreed to during his final semester of employment with the Defendant was, according to the Defendant, lost by the Defendant.

Defendant asserts that "there is no dispute that all amounts due under his regular contract and any additional (Faculty Overload Contracts) were paid in full." This is not accurate. As set forth in the Complaint and detailed in paragraphs six and nine through fourteen, Plaintiff was not compensated for all amounts due under Faculty Overload Contracts.

Thus, the factual allegations of the Defendant, unsupported by any reference to an exhibit or to the record, are in direct conflict with the allegations of the Complaint and the exhibits

thereto. Defendant posits no basis upon which the Circuit Court could properly discount Plaintiff's allegations at the pleading stage of the proceeding.

As to the Defendant's contention that the absence of a written Overload Contract "would mean the only compensation due to Appellant during those semesters would be under his regular Faculty Appointment Contract", This belies the fact that the Defendant advertised the "overload" classes to be taught by the Plaintiff, filled the "overload" classes to be taught by the Plaintiff with students and then simply fail to produce the Overload Contracts applicable to these time periods. Defendant may not suffer and permit the Plaintiff to work without pay: Failure to pay is a violation of the West Virginia Wage Payment and Collection Act.

II AUTHORITIES RELIED UPON

STATE STATUTES

W.Va. Code §21-5a-4	2
W.Va. Const. art. VI, § 35.....	5
W.Va. Code, 29-6-15 [1977].....	5
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STATE CASES

<i>University of West Virginia Bd. of Trustees ex rel. West Virginia University v. Graf</i> , 205 W.Va. 118, 122- 123, 516 S.E.2d 741, 745-746 (1998)	4
<i>Russell v. Bush & Burchett, Inc.</i> , 210 W. Va. 699, 704, 559 S.E.2d 36, 41 (2001)	4
<i>Gribben v. Kirk</i> , 195 W. Va. 488, 466 S.E.2d 147 (1995).	4
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<i>Spencer v. CSC</i> , 173 W.Va. 153, 313 S.E.2d 430 (1984).....	5
<i>Drennen v. Department of Health</i> , 163 W.Va. 185, 255 S.E.2d 548 (1979).....	5
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<i>Harris v. CSC</i> , 154 W.Va. 705, 178 S.E.2d 842 (1971).....	5
<i>State ex rel. Godby v. Hager</i> , 154 W.Va. 606, 177 S.E.2d 556 (1970).....	5
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State ex rel. Clark v. Dadisman, 154 W.Va. 340, 175 S.E.2d 422 (1970).....6

Gribben, 195 W.Va. at 495-496, 466 S.E.2d at 154 - 155.....6

Ingram v. The City of Princeton, 208 W. Va. 352, 356, 540 S.E.2d 569, 573 (2000).....8

Mullins v. Venable, 171 W. Va. 92, 297 S.E.2d 866 (1982).....8

McDaniel v. West Virginia Division of Labor, 214 W.Va. 719, 726-7, 591 S.E. 2d 277,
284-5 (2003).....8

Kincell v. Superintendent of Marion County Schools, 201 W.Va. 640, 499 SE 2nd 862 (1997)....9

STATE RULES

W. Va. R. Civ. P. 71b.....6

III. ARGUMENT

A. W. Va. Constitution Article VI, Section 35 Immunity Does Not Bar Plaintiff's WWPCA Claim

Contrary to the absolutist approach of complete constitutional immunity advanced by Defendant, the cases collected at University of West Virginia Bd. of Trustees ex rel. West Virginia University v. Graf, 205 W.Va. 118, 122- 123, 516 S.E.2d 741, 745-746 (1998) (per curiam) "indicate that establishing the applicability and parameters of West Virginia Constitution, Article VI, Section 35 in a given case involves the consideration of a range of factors, including: other constitutional provisions; principles of stare decisis; expressions and conduct by the legislative and executive branches; principles of equity; and the inherent duties and powers of the judicial branch." Russell v. Bush & Burchett, Inc., 210 W. Va. 699, 704, 559 S.E.2d 36, 41 (2001). This nuanced approach was in evidence in Gribben v. Kirk, 195 W. Va. 488, 466 S.E.2d 147 (1995). In that case, the Court discussed two general exceptions to constitutional immunity. The first is the Supremacy Clause Exception. As explained by the Court:

[W]e recognize two very limited contexts in which awards have been upheld. One category is represented by Kerns, supra, where we granted a writ of mandamus against the respondents, the West Virginia University President and the Board of Regents, to compel payment of damages for employment discrimination on the basis of sex. The respondents argued the damages were barred by constitutional immunity, but we determined the State's immunity was superseded by the Supremacy Clause of the United States Constitution and federal legislation that protects against employment discrimination. In Syllabus Point 1 of Kerns, we explained:

"In addition to the overriding effect of the supremacy clause of the Constitution of the United States (art. VI, cl. 2) upon contrary state law, federal legislation which is expressly authorized by section 5 of the fourteenth amendment to the Constitution of the United States and which implements such amendment will by

its own force override contrary state constitutional or statutory law, such as governmental immunity (W.Va. Const. art. VI, § 35), which state law provides less protection or relief than provided by the fourteenth amendment and its implementing legislation, such as the Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1982)."

Thus, damages may be had against the State despite constitutional immunity if there is federal legislation that applies to the State by virtue of Section 5 of the Fourteenth Amendment. Gribben, 195 W.Va. at 494, 466 S.E.2d at 153.

"Legislatively Anticipated Liability" is the second exception to constitutional immunity. As explained by the Court:

One argument made by the respondents in AFSCME II was that the action was barred by constitutional immunity. We disagreed and stated:
"[T]he enactment of W.Va.Code, 29-6-15 [1977] [the relevant civil service provision] and decisions of this Court in which back pay was awarded to public employees wrongfully suspended, demoted, or dismissed, Spencer v. CSC, 173 W.Va. 153, 313 S.E.2d 430 (1984); Drennen v. Department of Health, 163 W.Va. 185, 255 S.E.2d 548 (1979); Bell v. Dadisman, 155 W.Va. 298, 184 S.E.2d 141 (1971); Harris v. CSC, 154 W.Va. 705, 178 S.E.2d 842 (1971); State ex rel. Godby v. Hager, 154 W.Va. 606, 177 S.E.2d 556 (1970); State ex rel. Karnes v. Dadisman, 153 W.Va. 771, 172 S.E.2d 561 (1970); State ex rel. Clark v. Dadisman, 154 W.Va. 340, 175 S.E.2d 422 (1970), flow from an implicit recognition that 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.... The sovereign immunity doctrine is not a bar to recovery of back pay in the cases now before us." 176 W.Va. at 79, 341 S.E.2d at 699. (One citation omitted).
See also Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990). Although AFSCME II was a per curiam opinion and thus lacked precedential weight, the authorities cited to support the issuance of the writ of mandamus were aptly described, and all but one--155, 496 Spencer v. CSC, 173 W.Va. 153, 313 S.E.2d 430 (1984)--were signed opinions of the Court. Indeed, while ruling on appeals by State employees, we said in Bell v. Dadisman, 155 W.Va. 298, 300, 184 S.E.2d 141, 143 (1971), that "one wrongfully discharged from a public office is entitled to be paid for the entire time during which he was wrongfully excluded therefrom." In addition, we stated in Syllabus Point 1, in part, of State ex rel. Clark v. Dadisman, 154 W.Va. 340, 175 S.E.2d 422 (1970), that a wrongfully dismissed civil servant "is entitled to be reinstated to his former position ... without loss of pay during the period from the date of his dismissal until the date he is reinstated."

Gribben, 195 W.Va. at 495-496, 466 S.E.2d at 154 - 155 (footnote omitted).

Of course this is precisely a case “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.” Thus, immunity should not apply.

Defendant distinguishes Gribben first upon the ground that Gribben proceeded in the form of a writ of mandamus, as opposed to a civil action. This is a distinction without a difference, as the result is the same (an award of unpaid wages) and the proof necessary to achieve that relief is the same: namely that the Plaintiff is owed wages which the Defendant has not paid. The idea that the form of the action controls the available relief is untenable in light of W. Va. R. Civ. P. 71b.²

²Rule 71B. (“Extraordinary writs”) provides. In pertinent part:

(a) Applicability of rules.

The West Virginia Rules of Civil Procedure govern the procedure for the application for, and issuance of, extraordinary writs.

(b) Joinder of claims in different writs.

A plaintiff may join a demand for relief which encompass different types of writs and other types of relief.

(c) Complaint.

(1) Caption.

The complaint shall contain a caption as provided in Rule 10(a) except that the plaintiff shall name as defendants the agencies, entities, or individuals of the State of West Virginia to which the relief shall be directed.

(2) Contents.

The complaint shall contain a short and plain statement of the authority for the writ demanded. A form indicating the simplified nature of the extraordinary writ practice as provided for by this provision is contained in the Appendix as Form 32.

In turn, Form 32 states in toto:

1. Plaintiff is an employee of the State of West Virginia, [indicate specific agency or entity] and has prevailed in a grievance (a) by default; (b) as a result of a hearing held before a [grievance evaluator] [hearing examiner].
2. Despite a demand to do so, plaintiff has not been accorded the relief demanded in the grievance petition attached hereto as Exhibit A.

The question of whether the Plaintiff's proof of unpaid wages is persuasive is not at issue in the context of a motion to dismiss - Plaintiff's detailed and specific allegations of non-payment of wages must be accepted as true at this stage of the proceedings. Thus, based upon the record, Defendant is unlawfully withholding Plaintiff's wages in violation of its non-discretionary legal obligation to pay him all wages due as required by the WWPCA..

B. The Grievance Procedure Applicable to Plaintiff's Employment Does Not Bar His WWPCA Claim in Circuit Court

W. Va. Code § 21-5-12 (a) ("Employees' remedies") provides:

Any person whose wages have not been paid in accord with this article, or the commissioner or his designated representative, upon the request of such person, **may bring any legal action necessary to collect a claim under this article.** With the consent of the employee, the commissioner shall have the power to settle and adjust any claim to the same extent as might the employee. (Emphasis added).

In Ingram v. The City of Princeton, 208 W. Va. 352, 356, 540 S.E.2d 569, 573 (2000), the Court considered - and rejected - the employer City of Princeton's argument that the WWPCA did not apply to governmental employers:

To accept the City's limitation on the meaning of employer under the wage payment and collection provisions of the [Wage Payment and Collection] Act would lead to such a prohibited result and such would invoke constitutional equal protection concerns. In the final analysis, "the West Virginia Wage Payment and Collection Act is remedial legislation designed to protect [all] 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). (footnote omitted)
Accordingly, we do not hesitate to find that the Legislature did not intend to bind

Wherefore, a Writ of Mandamus is hereby demanded to accord the relief plaintiff is entitled to as a prevailing grievant, including costs, interest as provided by law, and reasonable attorney's fees expended in support of this action.

A True Copy

Attest:

Clerk, Supreme Court of Appeals

private employers to certain wage payment and collection guidelines designed to protect workers, yet exclude State and political subdivision workers from such protections. Rather, we conclude that the Legislature intended its statutory wage payment and collection guidelines to apply to both governmental and nongovernmental employers alike.

The case cited by Defendant to the Circuit Court for the proposition that processing a grievance regarding non-payment of wages is a condition precedent to filing a WVWPCA complaint does not stand for that proposition. McDaniel v. West Virginia Division of Labor, 214 W.Va. 719, 726-7, 591 S.E. 2d 277, 284-5 (2003), described the scope of the legal issue before it as follows:

Although this Court previously has examined tangential issues regarding the authority of administrative agencies to award damages in the context of administratively exhaustion of administrative remedies and in cases in which the Legislature has expressly delegated such power to or implicitly conferred such authority on the agency in question, we have yet to address the narrow issue presently before us as to whether, generally speaking, an administrative agency, namely the Division of Labor, may award damages during an administrative proceeding.(footnotes omitted)

The McDaniel Court concluded that the Division of Labor was not authorized to award damages under the WVWPCA administratively, and could bring a lawsuit to enforce its determination of an employer's failure to pay only after processing the claim administratively. However, the McDaniel Court's discussion of WVWPCA claims includes, at footnote 25, this observation:

"This decision is consistent with our prior cases wherein we intimated that an award for damages under the Wage Payment and Collection Act would have to be made by a judicial tribunal rather than by an administrative agency." Thus, while accurate, Defendant's point about administrative exhaustion has no application to a WVWPCA claim brought by an employee directly to Circuit Court, as opposed to one brought administratively by the Division of Labor.

Before this Court the Defendant urges another case as controlling - Kincell v. Superintendent of Marion County Schools, 201 W.Va. 640, 499 SE 2nd 862 (1997). Therein school employees sought compensation they claim was due by operation of certain provisions of school law although they conceded did not actually work the day for which they sought compensation.³ The Kincell Court noted that “[t]he parties have not cited any statutory basis to support their request for extraordinary relief.” Kincell raised no WVWPCA claim because the plaintiff employees therein were paid for all work performed. Perforce, Kincell resolved no WVWPCA claim. By contrast, Plaintiff herein raises solely statutory claims under the WVWPCA. Kincell has no application to this matter.

C. BRIMM Policy Covers WVWPCA Claims

If the State Board of Risk and Insurance Management (BRIM) policy provides coverage for the claim raised by the plaintiff, Defendant concedes that Article VI, Section 35 immunity does not bar Plaintiff’s claim. The policy provides, at page 4, that the policy provides coverage for “**incidental contracts**” defined to include “[a]ny written contract or agreement relating to the conduct of the ‘**Named Insured’s**’ business.” At page 14, in describing coverage which the policy provides, the policy notes that “[t]he company will pay on behalf of the ‘**insureds,**’ individually or collectively, . . . all sums which said ‘**insureds**’ shall become legally obligated to

³The facts giving rise to Kincell were as follows:

While Appellants [Marion County school employees] did not physically report to work for a day beyond their 200-day employment term, they contend that they were forced to complete the work associated with records/closing day on their own time and are accordingly entitled to compensation for having lost the records/closing day originally scheduled for June 9, 1995.

pay for a 'loss' arising from any 'Wrongful Act' of the 'insured' or of any other person for whose actions the 'insured' is legally responsible . . ." However, the exclusions provision beginning on page 14 and continuing on page 15 of the policy also provides that "[t]his insurance does not apply to . . . any claim(s) made against the 'insured' for damages attributable to wages, salaries and benefits" and "[t]o any claim(s) based upon or attributable to any allegations or claims that the 'insured' breached the terms of any type or any form of contract, either expressed or implied, written or oral." Finally, at page 16, the policy defines "Wrongful Act" to include "[a]ny actual or alleged act, breach of duty, neglect, error, misstatement, misleading statement or omission by the 'insured(s)' in the performance of their duties for the 'Named Insured', individually or collectively, . . ."

Policy language must be construed in favor of coverage, not against it. This policy arguably defines contractual obligations as both covered and excluded from coverage. The fact that the insurer (AIG) says it does not cover a claim is relevant but not final where, as here, the language is equivocal. Defendant repeats its position asserted before the Circuit Court, namely that "AIG determined that WVUP's insurance policy excludes claims attributable to wages, salaries, benefits, attorneys fees costs and for such other relief as the court deems just and proper." Brief in Response to Appeal, p. 8. But AIG's position is not determinative of the issue. Where it is unclear from the policy language whether the Plaintiff's claims are covered by the policy or not, a motion to dismiss is inappropriate. The parties should be permitted to further develop the facts in order to present the court with a full picture of the basis for the coverage exclusion defense.

III. CONCLUSION

Based upon all of the foregoing, the claim raised in this action pursuant to the West

Virginia Wage Payment and Collection Act is not barred by the doctrine of sovereign immunity because they arise in the context of employee relations where the State acting through its agents as an employer withheld part of the Plaintiff's salary. There is no requirement that the Plaintiff file a complaint with the West Virginia Division of Labor, the West Virginia Public Employees Grievance Board, or any other administrative agency or body, as a condition precedent to filing a complaint alleging a violation of the West Virginia Wage Payment and Collection Act. Based upon all of the above, Defendant's motion to dismiss should have been denied by the Circuit Court. The Circuit Court's dismissal of Plaintiff's case should be reversed.

JAMES E. BEICHLER,
Plaintiff by Counsel,

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Walt Auvil', is written over a horizontal line. The signature is stylized and enclosed within two large, hand-drawn ovals.

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CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiff hereby certified that on the 26th day of March, 2010, he served the foregoing and hereto annexed *Reply of Appellant to West Virginia University of Parkersburg's Brief in Response to Appeal*, by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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The original and nine copies were mailed to:

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