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ADELL CHANDLER, CIRCUIT CLERK

By CO Deputy

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 10----

NATHANIEL ADKINS; JERRI ALRED; TIM BLEVINS; JOHNNY R. BOWMAN; JOHN BOWMAN, II; DIANNE BRUBAKER; DARRELL CHAPMAN; JOHN COBURN; KENNETH GLOVER; WAYNE JARRELL; RUTH JONES; GARY LAMBERT; RONNIE MILLER; BONNIE MYERS; STEVE RAPPOLD; JERRY RYDER; JEREMY SKIDMORE; KAREN SPENCE; GREGG STILTNER; JAMES VAUGHT; ELGIN WARD; and KEVIN WHITE, Plaintiffs Below, Respondents

v.

KIM WOLFE, in his capacity as Cabell County Sheriff; CABELL COUNTY SHERIFF'S OFFICE; CABELL COUNTY COMMISSION; and the CABELL COUNTY CIVIL SERVICE COMMISSION, Defendants Below, Petitioners

Hon. F. Jane Husted, Judge
Circuit Court of Cabell County
Civil Action No. 04-C-1123

FILE
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

PETITION FOR APPEAL

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I. ASSIGNMENT OF ERRORS

1. Where the Cabell County Commission promulgated a written policy pursuant to statute providing that, "When the services of an employee have been terminated, all sick leave credited as of the last working day with the department" and plaintiffs admitted that they had been advised they were subject to the policy, but simply had not read it, the trial court erred by failing to award defendants judgment as a matter of law.

2. Where plaintiffs conceded that (a) they had consulted with counsel prior to termination of their employment about the potential for claiming the right to payment for accumulated sick leave and (b) they nevertheless executed statutory affidavits certifying that they were receiving all payments to which they were entitled, the trial court erred by ruling that such affidavits were invalid under the Wage Payment and Collection Act.

3. Where plaintiffs conceded that, except for retirees, no employee could accumulate and carry over more than thirty days of sick leave, the trial court erred by awarding plaintiffs damages in excess of that amount.

4. Where the right to payment for accumulated sick leave to plaintiffs had never been asserted by plaintiffs or any other county employee, let alone established, until the filing of this suit, the trial court erred by imposing statutory penalties and attorney fees upon the defendants under the Wage Payment and Collection Act.

II. STATEMENT OF THE CASE

This is an appeal by the Cabell County Sheriff, Cabell County Commission, and Cabell County Civil Service Commission, from a judgment entered on June 24, 2010, finding that although Cabell County had a written policy which expressly stated, “When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department,” they was nevertheless obligated to pay those employees whose jobs were eliminated upon the opening of the Western Regional Jail not only the value of that sick leave, ranging between 3.0 days and 192.5 days per employee, but an additional 30 days liquidated damages under the Wage Payment and Collection Act and attorney fees, for a total judgment of \$406,932.26 through March 9, 2010, because the Regional Jail Authority refused to accept the transfer of accumulated sick leave when they left the employment of the county and became employees of the Authority and because plaintiffs had never read the county’s written policy. This judgment, however, was erroneous and should be set aside.

This suit was precipitated by the opening of the Western Regional Jail at which time most if not all of the plaintiffs left the employment of the Cabell County Sheriff and became employed at the Western Regional Jail. Tr. at 45.

It was undisputed that none of the plaintiffs received anything in writing informing them that they would receive any monetary compensation for accumulated sick leave upon termination of their employment by the Cabell County Sheriff. Tr. at 45, 133. Indeed, it was stipulated that “no written contract

containing any provision or language regarding what happens upon that employee's termination of employment was ever distributed to the plaintiff employees."¹ Thus, their suit for benefits was not predicated upon any written contract.²

Indeed, the applicable written policy involving sick leave, which plaintiffs admitted receiving, stated only that its purpose was for short term absences from work due to personal illness or injury which is not the result of any work-related activities, but was not to be used for purposes of engaging in various forms of leisure, social, or personal time, or to extend holidays, vacations, or weekends. Tr. at 75. In other words, "sick leave" was exactly that – compensated leave when employees were sick.

The sick leave policy³ provided that employees accumulated 18 days of sick leave per year and could carry over no more than 30 day from one calendar year to another,⁴ but upon retirement, could carry over an unlimited amount of sick leave, which was used by retirees pursuant to an informal policy to extend health

¹ Tr. at 55.

² Conversely, the written policy expressly provided that employees were to be paid their accumulated vacation pay upon termination of their employment. Tr. at 104-05.

³ See *Exhibit A*. In addition to sick leave, these employees also received other fringe benefits, including vacation time, health insurance, life insurance, dental insurance, supplemental insurance, and retirement, Tr. at 212-13, costing the county between \$8,000 and \$15,000 per employee, Tr. at 213.

⁴ Even though plaintiffs did not dispute that no more than 30 days of sick leave could be carried over except upon retirement, the trial court nevertheless awarded them damages well in excess of 30 days, some as many as almost 200 sick days.

insurance benefits. Tr. at 75, 78, 142. Specifically, retirees could purchase one month of health insurance for every three days of accumulated sick leave. Tr. at 78.

Indeed, plaintiffs' first witness at trial testified as follows: "Q. And as far as your understanding of what happened to sick leave benefits on termination of employment, what was your understanding? A. I accumulated the and upon my retirement I was going to use them to buy health insurance." Tr. at 85.⁵

The evidence was undisputed at trial that no county employee, whether employed by the Sheriff, Prosecuting Attorney, Circuit Clerk, County Clerk, or Assessor, had ever received payment for accumulated sick leave upon termination of their employment. Tr. at 52.

Indeed, the County Clerk, whose office handles the county's payroll, testified that no county employee had ever received payment for accumulated sick leave upon termination of their employment. Tr. at 320. The County Clerk also testified that many county employees, including correctional officers,⁶ frequently questioned various aspects of their compensation, but not one employee had ever questioned the non-payment of accumulated sick leave upon termination of employment. Tr. at 324.

⁵ Plaintiffs conceded that their employment was eliminated, not that they retired. Tr. at 109.

⁶ Indeed, many of these plaintiffs, when they signed affidavits upon receive of their final checks, complained about a number of other matters, but not one complained about not being paid for sick leave. See note 14, *infra*.

As the assistant county administrator testified, "Sick leave really doesn't build cash value" Tr. at 216. For that reason, he testified that all employees understood that they were not entitled to reimbursement for any accumulated sick leave upon separation from employment. Tr. at 219-20.

Moreover, the evidence was undisputed that nothing was included in the county's budget to pay any employee for accumulated sick leave upon their separation from employment. Tr. at 268. Even plaintiffs' own evidence was that no other employee or correctional officer was ever paid for accumulated sick leave, Tr. at 80, 109,⁷ and that no correctional officer who had previously left employment had ever requested payment for accumulated sick leave, Tr. at 110.⁸

This was because plaintiffs had been informed, in writing, that "Correction officers may accumulate yearly sick leave in accordance with policies to be established by the county commission," Tr. at 107,⁹ and the Cabell County Commission had never established a policy whereby any county employee, including plaintiffs, would be paid for accumulated sick leave upon termination of their

⁷ Indeed, the jail administrator at the time these positions were eliminated testified that no correctional officer had ever been paid for sick leave upon termination of their employment. Tr. at 140-41, 143.

⁸ Moreover, one of the members of the deputy sheriff's civil service commission testified that no one had ever claimed a right to payment for accumulated sick leave upon separation from employment. Tr. at 269.

⁹ *Exhibit B*. Although plaintiffs admitted receiving this notice, some of them claimed not to understand it. Tr. at 195. But the failure to understand an employment policy does not afford the employee the right to make one up out of whole cloth to benefit the employee.

employment.¹⁰ Rather, the county's written policy expressly states, "When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department."¹¹

Plaintiffs elicited evidence from correctional officers that there was never any discussion with either the Sheriff's office or the County Commission regarding payment for accumulated sick leave, Tr. at 160,¹² and that no mention was made at the time of the elimination of their positions upon the opening of the Western Regional Jail that they would be paid for their accumulated sick leave. Tr. at 82.¹³ Moreover, plaintiffs do not dispute that upon termination of their employment on December 15, 2003, they signed affidavits¹⁴ acknowledging that their severance

¹⁰ Plaintiffs were subject to the County Commission's policies because of its status as co-employer with the Sheriff. Tr. at 208-09.

¹¹ *Exhibit C*.

¹² Although eight former employees testified that it had been discussed among correctional officers that they were not entitled to any payment for accumulated sick leave upon separation from their employment, Tr. at 236 ("They just lost that time."); Tr. at 248 ("It was pretty much common knowledge that either you used them during your time with the agency or you would lose them."); Tr. at 264 ("General common knowledge that you would lose them . . ."); Tr. at 274 ("I lost mine. Because I went on to another job."); Tr. at 284 ("I just remember if you had sick days, that you either used the sick days or you lost the sick days."); Tr. at 299 ("You lost your sick days."); Tr. at 328, plaintiffs indicated that they could not recall such discussions.

¹³ Indeed two former employees testified that one of the plaintiffs intentionally "burned up" his sick days in anticipation of the loss of his job because he knew you either "use it or lose it." Tr. at 292, 301-02.

¹⁴ See *Exhibit D* (selected affidavits). As the County Clerk testified, these affidavits were mandated by state law at the time of the termination of plaintiffs' employment. Tr. at 318. The County Clerk also confirmed that no county employees, including plaintiffs, were entitled to compensation for accumulated sick leave upon their separation from

payments were all of the compensation to which they were entitled, Tr. at 46, 55-56, and plaintiffs' own evidence was that no one refused to sign the affidavits, Tr. at 137.¹⁵

Indeed, the jail administrator testified that no one addressed any issue regarding payment for accumulated sick leave to him, Tr. at 138, even though plaintiffs had already contacted counsel about the possibility of securing payment for accumulated sick leave, Tr. at 161. In fact, one of the plaintiffs testified as follows:

Q. Okay. At what point were you made aware – not [sic] definitively not receive the benefit of those?

A. At the signing of the document to receive our paycheck.

Q. Okay. And at that time had you already retained an attorney to address the issue?

A. Yes, sir.

Q. And with regards to the signing of the affidavit to obtain the final paycheck, that's the compensation affidavits that have been referred to earlier, is that correct?

A. That's correct.

Tr. at 188.

employment. Tr. at 320. The Court will notice that several of the plaintiffs objected to various aspects of their final compensation checks, *Exhibit D*, but not one objected to not being paid for accumulated sick leave.

¹⁵ One former employee testified that when she signed the same affidavit she did not consider that she was waiving the right to receive payment for accumulated sick leave because she knew the policy was "use it or lose it." Tr. at 303.

In other words, even though plaintiffs had retained counsel to dispute the non-payment of accumulated sick leave, they nevertheless executed statutory certifying that they were being paid all to which they were entitled.

The excuse offered by plaintiffs as to why they would sign statutory affidavits certifying that they were being paid all they were owed even though they had contacted counsel about securing an additional payment for accumulated sick leave was that they wanted to receive their severance check and had never been told by anyone that they would receive payment for accumulated sick leave upon separation from employment. Tr. at 163-64. But this excuse is not, as a matter of law, sufficient when, as the County Clerk testified, execution of those affidavits was required by statute. Tr. at 326.

Even though plaintiffs concede that (1) they were never informed, in writing, that they would be paid for accumulated sick leave upon separation from employment; (2) they were never informed, verbally, that they would be paid for accumulated sick leave upon separation from employment; (3) no county employee, including correctional officers, had ever been compensated for accumulated sick leave upon separation from employment; (4) they never asked upon their own separation from employment for the payment of accumulated sick leave; (5) they understood that accumulated sick leave could be used only upon retirement to purchase additional health insurance coverage; (6) they had been provided with a written memorandum advising them that their sick leave policy was established by the county, which stated, "When the services of an employee have been terminated,

all sick leave credited shall be canceled as of the last working day with the department;" and (7) they all signed statutory affidavits, after consulting with counsel, acknowledging that their severance checks were full and complete payment of any monies due them, they nevertheless secured a judgment awarding them over \$400,000 in accumulated sick leave, statutory penalties, prejudgment interest, and attorney fees.

One of the plaintiffs explained their theory of recovery despite the absence of any evidence of entitlement as follows:

Sir, I feel that I was – we were all good employees at the jail. And that no person that I'm aware of that went from the Cabell County Jail to the Western Regional Jail was terminated. We did not do anything to be fired, so to speak. No one did any ill act, any illegal activity to be fired. I was a good employee, I feel. And I went to the regional jail to continue my career. And I – saved those days for that purpose.

Tr. at 173.

Moreover, it appears that the real reason at least some of the plaintiffs filed this suit was that they were upset because their accumulated sick leave did not carry over to their employment at the Western Regional Jail. Tr. at 174, 185. Specifically, one of the plaintiffs testified as follows: "[T]here was several meetings with the Regional Jail Authority and us before the closing, and the question was asked about what about our benefits we have here, and they told us they don't honor the county's." At that point, when asked, "Did you do anything as a result of what you learned at that meeting?," the plaintiff replied, "I consulted – I consulted you." Tr. at 185-86.

In other words, plaintiffs' theory is that when the position of any employee, public or private, is eliminated due to economic conditions through no fault of the employee and the employee's new employer will not accept the transfer of accumulated sick leave, the employee should be able to convert his or her accumulated sick leave into cash even though the employee was never informed that accumulated sick leave had any cash value; even though no previous employee who left employment, voluntarily or involuntarily, ever received payment for accumulated sick leave; and even though all of the affected employees understood that their sick leave could be used for only two purposes – sick leave or to purchase extended health care coverage upon retirement.

Indeed, here is the relevant portion of the closing argument of plaintiffs' counsel:

Now, understandably they're scrambling to avoid paying these benefits even though, as we believe the evidence shows, these plaintiffs did not know. They didn't see it. They didn't hear about it. And they didn't experience it. They did not know.

Tr. at 358. In other words, plaintiffs' contention has never been that they were not paid something that had been told that they would be paid upon separation of their employment.

Rather, their contention is that because they allegedly were never expressly told that they would not receive payment, they are somehow entitled to it because they want it:

Now, you've heard the judge's instructions regarding how the WPCA applies. You've heard her say specifically WVPC does not create a

right to fringe benefits but reserves the question of fringe benefits to the bargaining process between employers and employees. I ask you if the plaintiffs did not know what the policy was, how could they effectively bargain their positions?

Tr. at 358. In other words, unless a West Virginia employer affirmatively bargains each and every possible fringe benefit with its employee, then that employee can claim, upon separation of employment, the right to any fringe benefit not specifically bargained. Obviously, that position is absurd but was plaintiffs' sole legal argument.

There are five fundamental problems with the entry of judgment against defendants in this case. First, plaintiffs did not dispute that they were told that their sick leave was subject to county policy and that county policy provided that their sick leave expired upon termination of their employment, but only that they allegedly did not see a copy of the county policy. Second, where plaintiffs had already consulted with counsel about the potential for claiming payment for accumulated sick leave, but nevertheless signed statutory affidavits certifying that they were being paid all to which they were entitled, the defendants should have been awarded judgment as a matter of law. Third, where plaintiffs conceded that no more than 30 days of sick leave could be carried over except for use to pay for extended health benefits upon retirement, their damages, if any, should have been limited to payment for accumulated sick leave not to exceed 30 days per plaintiff. Finally, where any right to payment for accumulated sick leave to plaintiffs had never been asserted, let alone established, until the filing of this suit, the

defendants should not have been assessed with statutory penalties and attorney fees.

III. SUMMARY OF ARGUMENT

Under West Virginia law, the Wage Payment and Collection Act cannot create an entitlement to fringe benefits; but rather, any entitlement must arise from the employment itself. Indeed, there must be an "express agreement" between employer and employee that the employee is entitled to payment of a fringe benefit upon separation of employment. Where there is evidence that an employee never anticipated payment of a fringe benefit upon separation of employment, the fact the employee claims to not have been aware of a written policy which expressly stated, "When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department," does not afford the employee a cause of action. Thus, the trial court erred in failing to award defendants judgment as a matter of law.

Prior to plaintiffs' departure from employment, they were told by the Regional Jail Authority that it would not accept the transfer of their accumulated sick leave, which resulted in them retaining counsel for purposes of advising them of their rights. Nevertheless, they thereafter executed affidavits at the time of their separation of employment, which were required by law, certifying that they were receiving all payments to which they were entitled. Under these circumstances, the trial court erred in ruling that these statutory affidavits were invalid under the Wage Payment and Collection Act.

Plaintiffs acknowledged that they were told, in writing, that none of them could accumulate sick leave in excess of 30 days unless they were retiring. Nevertheless, the trial court awarded them payment for sick leave for as many as almost 200 days, which defendants contend was erroneous as a matter of law.

Finally, where plaintiffs' entitlement to these payments had never been adjudicated by any court at any time and where no employee, in the history of Cabell County, had ever claimed or received such payments, the trial court erred by awarding plaintiffs' statutory penalties and attorney fees.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Defendants never budgeted for the payment of accumulated sick leave nor had ever paid any employee accumulated sick leave upon separation from employment. Likewise, defendants suspect that many other political subdivisions have not budgeted for payment of accumulated sick leave nor have they ever paid their employees for accumulated sick leave upon separation from employment. Here, the county's policy expressly provided, "When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department," but plaintiff were allowed to go forward with their claims merely because they contended they had not read the policy even though they admitted being provided a memorandum referencing the policy.

Moreover, because the Wage Payment and Collection Act applies to all employers, both public and private, the implications of the ruling that employers bear the burden of proving that their employees were told that some fringe benefit

claimed at the separation of employment would not be awarded, are profound. Defendants submit that the trial court grossly misinterpreted this Court's decisions regarding an employee's burden of proving an express agreement to the payment of fringe benefits upon separation from employment.

Finally, because this case presents matters of first impression under the evidence presented and of fundamental public importance to both public and private employers and employees, defendants request an opportunity to present full argument under R. App. P. 18(a) and R. App. P. 20.

V. ARGUMENT

A. THE TRIAL COURT ERRED BY FAILING TO GRANT JUDGMENT TO DEFENDANTS AS A MATTER OF LAW WHEN PLAINTIFFS CONCEDED THAT THEY HAD BEEN TOLD THEY WERE SUBJECT TO COUNTY POLICY AND COUNTY POLICY PROVIDED THAT ACCUMULATED SICK LEAVE EXPIRED UPON SEPARATION FROM EMPLOYMENT.

Article IX, § 11 of the West Virginia Constitution provides, "The county commissions . . . shall . . . have the superintendence and administration of the internal police and fiscal affairs of their counties . . ." Likewise, W. Va. Code § 7-1-3 provides, "The county commissions . . . shall have . . . the superintendence and administration of the internal police and fiscal affairs of their counties . . ."

With respect to fiscal matters, W. Va. Code § 7-1-3m provides, "The county courts shall, not later than March twenty-eight of each year, take up and consider the probable amount necessary to be expended for such personnel in the following fiscal year; shall determine and fix an aggregate sum to be expended during the

following fiscal year for the compensation of such personnel, which shall be reasonable and proper, taking into account the amount of labor and services necessary to be performed by those who are to receive the compensation; and shall make and enter an order stating any action taken in this regard.” Of course, it is undisputed that Cabell County’s budget contained no amount for the payment of accumulated sick leave for departing employees, including plaintiffs.

With respect to the payment of county personnel, W. Va. Code § 7-1-3m provides, “The county courts shall file with their clerks a statement in writing showing such action and setting forth the name of each person employed pursuant to the provisions of this section, the time for which employed and the monthly compensation. . . . Until the statements required by this section shall have been filed, no allowance or payments shall be made by the county courts for personnel.” Again, it is undisputed that none of plaintiffs claimed, prior to issuance of their severance check, the right to payment for any accumulated sick leave. Indeed, plaintiffs admit that no one ever told them they were entitled to such payment.

On May 17, 2001, Cabell County adopted a leave policy applicable to these plaintiffs. *Exhibit A*. Nowhere in that policy does it state that any employee will be paid for accumulated sick leave upon separation of employment.

On February 15, 2002, Cabell County issued a memorandum to jail personnel, including plaintiffs, stating that, “Sick leave is guided by WV State Code 7-14B-19C, which states Corrections Officers may accumulate sick leave in

accordance with policy established by the County Commission.” *Exhibit B*. Plaintiffs do not dispute receiving this memorandum. *Exhibit E*.

With respect to the accumulation of sick leave, W. Va. Code § 7-14B-19(c) provides, “Correctional officers may accumulate yearly sick leave in accordance with policy to be established by the county commission.” *Exhibit B*. Plaintiffs do not dispute being advised of this. *Exhibit E*.

Finally, the county’s policy, applicable to all county employees, including plaintiffs, plainly states, “When the services of an employee have been terminated all sick leave credited shall be cancelled as of the last working day with the department.” *Exhibit C*. Again, plaintiffs do not dispute that this was the county’s written policy or that it was the policy referenced in the memorandum they received regarding the accumulation of sick leave. Rather, their only contention is that they never read the policy. *Exhibit E*. Plainly, failing to read an employer’s plain and unambiguous fringe benefit policy does not then entitle an employee to claim the right to receive benefits they admit they were never promised.

This Court has held, “Pursuant to W. Va. Code § 21-5-1(c) (1987), whether fringe benefits have then accrued, are capable of calculation and payable directly to an employee so as to be included in the term ‘wages’ are determined by the terms of employment and not by the provisions of W. Va. Code § 21-5-1(c).” Syl. pt. 5, in part, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999) (emphasis supplied).

Where there is no term of employment, however, as in the instant case, providing for the payment of accumulated sick leave upon an employee's separation of employment, the employee is simply not entitled to such payment. Rather, only where the employer has a written or unwritten policy providing such fringe benefits, is the employer obligated to pay the employee upon separation from employment.

In *Gress v. Petersburg Foods, LLC*, 215 W. Va. 32, 592 S.E.2d 811 (2003), for example, an employee claimed that she was entitled to payment for accumulated vacation time and for a bonus, upon termination of her employment, even though her employer's written policies did not entitle her to either payment. Rejecting the argument that the failure of the employer's policies to specifically address certain fringe benefits claimed entitled the employee to payment of her claimed vacation time and a bonus, this Court held:

Before a fringe benefit is payable to an employee, the fringe benefit must have accrued to the employee. As defined in *Meadows*, the employer's policies define when a fringe benefit accrues to an employee. The terms of the appellant's policy dictated that to qualify for the yield bonus an employee must have been employed by the appellant on the date that the appellant distributed the yield bonus payments. Ms. Gress was not employed by the appellant on the date that the appellant distributed the yield bonuses; therefore, the yield bonus fringe benefit had not yet accrued to Ms. Gress. Because the yield bonus had not yet accrued to Ms. Gress, we need not decide whether the yield bonus was a fringe benefit "capable of calculation" and payable directly to an employee under the WPCA. Thus, we find that the circuit court erred in granting summary judgment in favor of the appellee on the issue of yield bonus pay.

The appellants also appealed the circuit court's order granting summary judgment in favor of the appellee on the issue of unpaid

vacation pay. In ruling for the appellee, the circuit court found that the appellant's vacation policy was ambiguous about whether and how an employee's vacation time would accrue between the first and fifth year of employment. The circuit court further found that the appellant's vacation policy did not speak to what would happen to any unused vacation time at the conclusion of employment with the appellant. Relying on Syllabus Point 6 of *Meadows v. Wal-Mart*, the circuit court construed the silence and ambiguity of the appellant's policy against the appellant and ruled that Ms. Gress was entitled to 2.5 days of vacation based on the six months that she had worked before being fired.

The appellants argue that the circuit court erred in granting summary judgment to Ms. Gress because the appellants had a consistently applied unwritten vacation policy. In *Ingram v. City of Princeton*, 208 W.Va. 352, 540 S.E.2d 569 (2000) (per curiam), this Court held that a consistently applied unwritten employment policy regarding the payment of fringe benefits could support an employer's defense against a WPCA suit when the unwritten policy was known by employees.

In the instant case, there is no dispute that the appellant's employees, including Ms. Gress, were aware that the appellant had a practice of only allowing workers to take vacations in five-day increments after each full year of employment with the appellant. Further, Ms. Gress offered no evidence to contradict the appellant's assertion that the appellants had a consistent policy of not paying employees for partial weeks of unused vacation at the time of discharge. When employers have a consistently applied unwritten policy, employers have the protection offered by Ingram against a claim under the Wage Payment and Collection Act.

Applying *Ingram* to facts of the case at hand, we find that the circuit court erred in granting summary judgment in favor of Ms. Gress on the vacation pay claim.

Id. at 36-37, 592 S.E.2d at 815-16 (emphasis supplied).

Of course, this case is like *Gress*, but even more favorable for defendants. First, defendants are not relying upon a consistently applied "unwritten policy," but a consistently applied "written policy" which states, "When the services of an

employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department.” Second, plaintiffs’ argument that because they allegedly were not aware of the county’s written policy even though they admit receiving a memorandum incorporating by reference that policy, they are somehow nevertheless entitled to payment under the Wage Payment and Collection Act, was expressly rejected. Finally, plaintiffs do not dispute that defendants had a consistent “use it or lose it” sick leave policy and, in fact, they conceded that no employee in the history of Cabell County has ever been paid for accumulated sick leave upon the separation of employment.

The term “wages” under the Wage Payment and Collection Act is defined as including “then accrued fringe benefits capable of calculation and payable directly to an employee: Provided, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article.” W. Va. Code § 21-5-1(c) (emphasis supplied).

In other words, as this Court held in *Gress*, the right to payment for fringe benefits as wages under the Wage Payment and Collection Act is dictated by the “agreement between an employer and his employees” unless otherwise prohibited by law. In this case, plaintiffs have never argued that not paying employees for accumulated sick leave upon separation from employment is contrary to any law.

The term “fringe benefits” under the Wage Payment and Collection Act is defined as “any benefit provided an employee or group of employees by an employer,

or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage.” W. Va. Code § 21-5-1(l) (emphasis supplied). Here, plaintiffs do not dispute that they were never told by anyone at any time that they would receive payment for accumulated sick leave upon separation from employment.

Plaintiffs’ argument, accepted by the trial court, was that because the statutory definition of “fringe benefits” includes “sick leave,” the burden is on the employer, contrary to *Gress*, to establish that payment for “sick leave” was not only affirmatively excluded by the employer, as it was in this case, but that each and every employee was expressly told that payment was affirmatively excluded.

In other words, plaintiffs have flipped both the statute and *Gress* entirely on their head:

While the terms of employment may provide that unused fringe benefits will not be paid to employees upon termination from employment, the terms of employment must be express and understood so that employees understand the amount, if any, of the fringe benefits owed to them upon separation from employment. Put another way, there must be an “express” understanding between employers and employees regarding the payment or nonpayment of unused fringe benefits.

Plaintiffs’ Proposed Instruction No. 1 (emphasis supplied).

For their argument, plaintiffs relied upon *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999) and *Howell v. City of Princeton*, 210 W. Va. 735, 599 S.E.2d 424 (2001), both decided before *Gress*, but neither case supports it.

In *Meadows*, five former employees sued claiming the right to recover for non-payment of various fringe benefits. Unlike the instant case, this Court clearly held that it was the employee's burden to prove that payment for fringe benefits was a term of employment:

The WPCA does not create a right to fringe benefits. Rather, it reserves the question of fringe benefits to the bargaining process between employers and employees. . . .

It is clear that an employer is free to set the terms and conditions of employment and compensation, including fringe benefits, and employees are free to accept or reject these conditions. As noted above, the WPCA does not contain eligibility or vesting requirements governing the payment of fringe benefits. Accordingly, when fringe benefits are part of a compensation package, they are governed by the terms of employment. Further, nothing in the WPCA prevents employers from conditioning the vesting of a fringe benefit right on some eligibility requirement in addition to the performance of services or from providing, such as in the instant cases, that unused fringe benefits will not be paid to employees upon separation from employment. We emphasize, however, that the terms of employment must be express and specific concerning the vesting of fringe benefits. Generally, employers draft the policies which are relied upon by employees. Therefore, any ambiguity in the terms of employment will be construed in favor of the employees. Accordingly, we conclude that W. Va. Code § 21-5-1(c) simply means that if under the terms of employment an employee is entitled to the payment of fringe benefits, the payment of these benefits has the same status as unpaid wages.

Id. at 216, 530 S.E.2d at 689 (emphasis supplied).

In other words, only if “under the terms of employment an employee is entitled to the payment of fringe benefits,” does “the payment of these benefits” have “the same status as unpaid wages.” Here, plaintiffs do not dispute that they were never advised that they would be paid for accrued sick leave upon their

separation from employment. Thus, under *Meadows*, they clearly were not entitled to such payment.¹⁶

In *Howell*, five former city employees sued claiming the right to payment for accumulated personal leave, sick leave, and severance benefits. As in this case, the *Howell* plaintiffs claimed entitlement to such payment, not because of any express promise, but under their interpretation of the Wage Payment and Collection Act. Again, this Court reiterated:

A first impression of the above statutory provisions may seem to indicate that in all instances employers are obligated to pay unused fringe benefits to employees upon their termination. This proposition

¹⁶ In *Meadows*, one of the sick leave policies was silent on the issue of sick leave and, because of the particular language of that employer's policy, this Court held that those employees were entitled to payment for accumulated sick leave. That policy provided, however, "Any unused sick days allocated during the current year will be carried forward and accumulated for either future sick days or Short Term Disability, subject to the maximum accumulation of ninety (90) days" and "On normal retirement from Waco, an employee will be paid at the then current rate of salary for cumulative sick days not taken during the course of employment up to a maximum of ninety (90) days." *Id.* at 212, 506 S.E.2d at 685. Waco's defense was not, as in this case, that neither plaintiffs, defendants, nor anyone else had ever been informed, claimed, or been awarded payment for accumulated sick leave at the time of separation from employment, but rather that its handbook somehow actually provided that such benefits would not be awarded. *Id.* at 222, 530 S.E.2d at 695. Accordingly, this Court correctly held, "This Court will not draw the inference from this silence urged on us by the appellant." *Id.* at 223, 530 S.E.2d at 696. Here, of course, this Court has much more than mere silence as there was a wealth of testimony that (1) the county had never budgeted for payment of accumulated sick leave upon separation from employment; (2) no employee in the history of the county had ever requested or been paid for accumulated sick leave upon separation from employment; (3) a number of other employees in the exact same position as plaintiffs did not claim payment for accumulated sick leave because they testified they understood they were not entitled to such payment; (4) plaintiffs testified that they were never told they were entitled to payment for accumulated sick leave and never believed that they were so entitled; (5) plaintiffs admitted receiving a memorandum that county policy controlled and county policy excluded payment; (6) plaintiffs executed affidavits, even after they had consulted with counsel, waiving the right to any further payment, which would have included payment for accumulated sick leave; and (7) plaintiffs' apparent motivation for claiming sick leave was that the Regional Jail Authority declined to allow them to transfer accumulated sick leave.

is not legally correct. Payment of unused fringe benefits was addressed by this Court in *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). Meadows held that the Act did not make payment of fringe benefits mandatory, and that the terms and conditions of fringe benefits were controlled by the agreement between the employer and employee. In Syllabus point 5 of *Meadows* we ruled that "the terms of employment may . . . provide that unused fringe benefits will not be paid to employees upon separation from employment." It was further stated in Syllabus point 6 of *Meadows* that:

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.

Thus, under *Meadows*, there must be an "express" understanding between employers and employees regarding the payment or nonpayment of unused fringe benefits in order for the Officers to prevail in this case. That same analysis was enunciated in *Ingram*. In fact, in *Ingram*, the City argued and proved successfully that it has a longstanding unwritten policy of never paying employees unused fringe benefits, including sick leave. . . .

Id. at 738, 559 S.E.2d at 427 (emphasis supplied).

Here, of course, plaintiffs conceded that there was no express understanding regarding the payment of accumulated sick leave and although they denied knowing they were not entitled to such payment, there was not only overwhelming evidence to the contrary, plaintiffs did not dispute that they were unaware of any other employee being paid for accumulated sick leave upon separation from employment and none of the plaintiffs disputed that none of them ever claimed, prior to separation from employment, the right to such payment.

Indeed, one of the facts relied upon by this Court in *Ingram v. City of Princeton*, 208 W. Va. 352, 357, 540 S.E.2d 569, 574 (2000), to deny the employee's claim of entitlement to payment of accumulated sick leave upon his separation of employment was his admission that he knew that other employees had left without being paid and he never complained about not being paid.

Defendants submit that this Court never intended by its decisions in *Meadows* and *Ingram* to require employers which have adopted a written policy that accumulated sick leave expires upon termination of employment to prove that each and every employee actually received a copy of such policy or otherwise face payment for such leave upon separation of employment.¹⁷ Rather, it is the employee's burden to prove, by a preponderance of evidence, that there was an "express understanding" that such payment would be made.

Here, the clear evidence was that no such payment would be made. Indeed, the county's written policy, which plaintiffs merely contended they had never read, expressly states, "When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department."

Employees who are made aware of the existence of policies, but simply choose not to read them, cannot later claim the benefit of their self-imposed ignorance. Otherwise, an employee who was aware of an employer's sexual harassment or theft

¹⁷ The present case is also not like *Isaacs v. Bonner*, 225 W. Va. 460, 694 S.E.2d 302 (2010), where the employer's policy expressly provided for payment of accrued vacation leave, but was ambiguous as to how such payment would be calculated. Here, plaintiffs concede that the county's sick leave policy was silent on any entitlement to payment for accumulated sick leave and silence on a subject does not create ambiguity.

policy could sue after being sued for sexual harassment or theft claiming that they could not be terminated because they had never read the policy. Here, plaintiffs admitted that they were told that the county commission's sick leave policy applied to them and they cannot avoid its clear language by claiming not to be aware of its terms.¹⁸

Consequently, the trial court erred by failing to award judgment to defendants as a matter of law.

B. THE TRIAL COURT ERRED BY RULING THAT THE STATUTORY AFFIDAVITS EXECUTED BY PLAINTIFFS WERE VOID UNDER THE WAGE PAYMENT AND COLLECTION ACT.

W. Va. Code § 21-5-10 provides, "Except as provided in section thirteen, no provision of this article may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as a condition of such payment shall be null and void." (Emphasis supplied). In other words, an employee cannot be compelled to surrender wages to which the employee is entitled by a "private agreement" and any "release required as a condition of such payment" is void.

¹⁸ See, e.g., *Martin v. Citibank, Inc.*, 567 F. Supp. 2d 36, 44 (D.D.C. 2008) ("The Court can think of no conceivable reason why in plaintiff's eight (8) years of employment prior to the alleged harassment, she never took advantage of the opportunity to review the Handbook and Arbitration Policy, available to all employees on the Company's intranet. The Court agrees with defendant that plaintiff had years to review the Company's Employee Handbooks and Employment Arbitration Policy, and to withdraw her agreement to comply with the Policy if she disagreed with its provisions.").

Here, however, plaintiffs were not required by “private agreement” or “release required as a condition of such payment” to waive their right to payment for accumulated sick leave. Rather, at the time of plaintiffs’ separation from employment, W. Va. Code § 7-7-10 provided, “If the services to the county of a . . . employee terminate before the end of a fiscal year, the . . . employee shall, at the time his services end, sign and submit the above affidavit to the clerk of the county court.” The affidavit stated: “I hereby certify that I have rendered the services herein stated, that I have received the full compensation to which I was entitled for those services rendered”

Thus, for county employees like the plaintiffs, the Legislature specifically required that upon their separation from employment, they were required to execute affidavits certifying that they were receiving the full compensation to which they were entitled for services rendered. Here, of course, not only did plaintiffs sign those statutory affidavits, they did so without any expectation of being paid for accumulated sick leave and after retaining counsel for purposes of advising them on their rights. Under these circumstances, the trial court erred by ruling that the statutory affidavits were invalid.

In Syllabus Point 1 of *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984), “The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” Here, W. Va. Code § 7-7-10, specifically governing the procedure when county employees separate from

employment and requiring that they certify that they are receiving all payments to which they are entitled should have been given precedence over W. Va. Code § 21-5-10, which is a general statute applying to all public and private employers and employees.

Moreover, in Syllabus Point 1 of *Smith v. Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975), this Court stated the well-settled rule that, "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." In discerning such legislative intent, this Court has further observed, "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

There is no ambiguity in the language: "I hereby certify that I have rendered the services herein stated, that I have received the full compensation to which I was entitled for those services rendered" And, obviously, the legislative purpose was to ensure that when all county employees separate from employment, they were required to certify that they were being paid all to which the alleged entitlement so that counties could predictably budget for personnel expenditures and, upon separation from employment, proceed forward without any uncertainty as to whether anything else was owed to the employee.

Here, particularly where plaintiffs had counsel prior to certifying that they were receiving all to which they were entitled; plaintiffs concede that they were

never told that they would be receiving any payment for accumulated sick leave and that the county's written policy indeed provides that no employee will receive any payment for accumulated sick leave; plaintiffs concede that no county employee had ever received payment for accumulated sick leave; plaintiffs' coworkers, in the identical circumstances, testified that it was well-known that they were not entitled to payment for accumulated sick leave; and there was evidence that the only reason plaintiffs pursued sick leave payment was because their request to transfer accumulated leave to the Regional Jail Authority was rejected, the trial court erred by ruling that their statutory affidavits were void under the Wage Payment and Collection Act.

C. THE TRIAL COURT ERRED BY RULING PLAINTIFFS WERE ENTITLED TO PAYMENT FOR ACCUMULATED SICK LEAVE, EVEN IF IT WAS IN EXCESS OF 30 DAYS, WHICH PLAINTIFFS ADMITTED WAS THE CARRYOVER CAP.

The evidence in the case was undisputed that plaintiffs were informed, in writing, that "the carryover of the sick leave time for bona fide personal illness absences is limited to 30 days; provided, however, for retirement purposes there is unlimited carry over of sick leave time." Joint Trial Exhibit 2. Indeed, as discussed earlier, plaintiffs who testified understood that was the county's policy. Yet, the trial court awarded plaintiffs payment of accumulated sick leave in excess of 30 days, for some as many as nearly 200 days, even though they did not "retire," but separated from employment when their positions were eliminated due to the opening of the Western Regional Jail.

Although, in the judgment order, the trial court acknowledged that this was the county's policy, it nevertheless awarded payment for days in excess of 30 because "defendants admitted that the proffered number of 'accrued' sick leave days was correct in their Responses to Requests for Admission." Judgment Order at 5. The trial court's interpretation of defendants' admission, however, is incorrect.

The request for admission referenced asked, "Please admit that each of the following Plaintiffs has accrued the following amounts of sick leave as of the date of their termination of employment" and defendants correctly admitted the days set forth in the request as they were accurate. Defendants never admitted, however, that those days were to be used to calculate plaintiffs' entitlement to payment for sick leave. Indeed, defendants denied plaintiffs' entitlement to any payment.

The issues of liability and damages in this case were bifurcated and the only issues presented to the jury were "Did the Defendant employers have a policy, either written or unwritten, applicable to the Plaintiff employees regarding what happened to sick leave benefits upon the termination of their employment?," which was answered by the jury in the affirmative and, "Did the Plaintiff employees know of any such policy, either written or unwritten, regarding what happened to sick leave benefits upon the termination of their employment?," which was answered by the jury in the negative, precipitating a trial court ruling, under plaintiffs' theory of the case, that if the plaintiffs did not know what happened, they were entitled to payment. Judgment Order at 2-3.

When the case moved to the damages phase, to be determined by the trial court, it ruled, "By implication, the jury verdict established that the Plaintiffs did not know that benefits would be limited to thirty (30) days under any circumstances," Judgment Order at 6, but this is clearly contrary to not only the documentary evidence, but the plaintiffs' own testimony that they understood that they could carryover no more than 30 days except upon retirement, when they could convert those days into extended health care benefits.

Consequently, the trial court erred by failing to limit plaintiffs' damages, if any, to no more than 30 days per plaintiff.

D. THE TRIAL COURT ERRED BY AWARDING STATUTORY DAMAGES AND ATTORNEY FEES TO THE PLAINTIFF.

In addition to awarding plaintiffs their regular rate of pay times the number of accumulated sick leave days even if in excess of 30 days, the trial court also award statutory damages of their regular rate of pay times another 30 days, which more than doubled the award for some plaintiffs. In addition, the trial court awarded plaintiffs' counsel a total of \$98,225 in attorney fees and \$5,052.36 in expenses. Both awards, defendants submit, were erroneous under the circumstances of this case.

It was undisputed that defendants never budgeted for these fringe benefits; no one had ever requested these fringe benefits; no one had ever received these fringe benefits; no one had ever promised these fringe benefits; no one had ever relied upon the existence of these fringe benefits; and plaintiffs all executed

statutory affidavits certifying upon their separation of employment that they were receiving all to which they were entitled.

W. Va. Code § 21-5-4(d) in effect at the time of plaintiffs' separation from employment provided, "If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount which was unpaid when due, be liable to the employee liquidated damages . . . until he is paid in full . . . Provided, however, That he shall cease to draw such wages thirty days after default."

W. Va. Code § 21-5-12(b) provides, "The court in any action brought under this article may . . . assess costs of the action, including reasonable attorney fees against the defendant."

In Syllabus Point 3 of *Farley v. Zapata Coal Corp.*, 167 W. Va. 630, 281 S.E.2d 238 (1981), this Court held, "An employee who succeeds in enforcing a claim under W.Va. Code Chapter 21, article 5 should ordinarily recover costs, including reasonable attorney fees unless special circumstances render such an award unjust." (Emphasis supplied). Here, defendants submit that an award of statutory damages and attorney fees, under the circumstances, are unjust.

In addition to its defenses on the merits of plaintiffs' claims, it was undisputed that they consulted with counsel well before the separation of their employment. At no time after such consultation and prior to their separation did either counsel or plaintiffs raise any issue with defendants regarding their post-separation claim of entitlement. Again, payment to any county employee of

accumulated sick leave on separation from employment was unprecedented. Even plaintiffs conceded they were never told that they would be paid for their accumulated sick leave nor were they aware of any other employee who had been paid. This was not a case where an isolated employee claimed to be confused about the county's policy; rather, these are 22 employees who left at the same time as numerous other employees, due to the opening of the Western Regional Jail, who testified that they never sought payment for their accumulated sick leave because they were well aware that the county's policy was "use it or lose it." Finally, it is undisputed that the county's written policy, which plaintiffs had been informed applied to them, but they merely contended they had not read, states that, "When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department."

Respectfully, these are the type of "special circumstances," referenced in Zapata, which would render "unjust" the award of statutory damages and attorney fees. Therefore, defendants request that the Court grant their appeal and set aside the award of statutory damages and attorney fees.

VI. CONCLUSION

Defendants respectfully request that this Court grant their petition for appeal; reverse the judgment of the Circuit Court of Cabell County; and remand with directions to either enter judgment for defendants or, in the alternative, enter judgment without awarding plaintiffs' damages in excess of 30 days accumulated sick leave; liquidated statutory damages; and/or attorney fees.

KIM WOLFE, in his capacity as
Cabell County Sheriff; CABELL
COUNTY SHERIFF'S OFFICE;
CABELL COUNTY COMMISSION;
and the CABELL COUNTY CIVIL
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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE