

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CAROL KING,
on behalf of herself and all others
similarly situated,

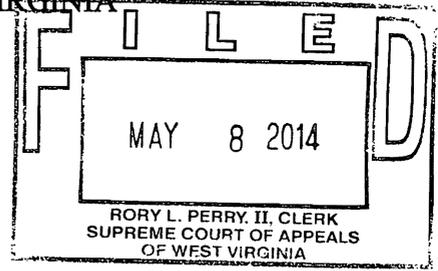
Petitioner,

v.

No. 13-1255

WEST VIRGINIA'S CHOICE, INC.,
a West Virginia corporation,

Respondent.



PETITIONER'S REPLY BRIEF

Cameron S. McKinney
THE GRUBB LAW GROUP
1114 Kanawha Boulevard, East
Charleston, WV 25301
(State Bar No. 7198)
304-345-3356 (telephone)
CMcKinney@grubblawgroup.com

May 8, 2014

TABLE OF CONTENTS

I.	Preliminary Statement	1
II.	Reply Argument	1
	A. Employees Working Where More Than Twenty Percent of Their Coworkers are Exempted from FLSA Benefits (Like Petitioner) Are the Only Beneficiaries of the MWMHS	1
	B. The FLSA’s Coverage of an “Employer” is Irrelevant	6
III.	Conclusion	9

TABLE OF AUTHORITIES

Cases

A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 65 S.Ct. 807, 89 L.Ed. 1095 (1945).....2

Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207, 79 S.Ct. 260,
3 L.Ed.2d 243 (1959).....2

Mitchell v. Kentucky Finance Co., Inc., 359 U.S. 290, 79 S.Ct. 756, 3 L.Ed.2d 815 (1959).....2

Powell v. United States Cartridge Co., 339 U.S. 497, 70 S.Ct. 755, 94 L.Ed. 1017 (1950)2

Pacific Merchant Shipping Ass’n v. Aubry, 918 F.2d 1409 (9th Cir. 1990).....2

Smith v. United Parcel Service, Inc., 890 F. Supp. 523, 528-529 (S.D.W. Va.1995)2

Adkins v. City of Huntington, 191 W. Va. 317, 445 S.E.2d 500 (1994).....3, 4, 5

Kucera v. City of Wheeling, 153 W. Va. 531, 170 S.E.2d 219 (1969)3

State ex rel. Crosier v. Callaghan, 160 W. Va. 353, 236 S.E.2d 321 (1977).....3

Rohrbaugh v. Crabtree, 164 W. Va. 791, 266 S.E.2d 914 (1980)3

Amoroso v. Marion County Commission, 172 W. Va. 342, 305 S.E.2d 299 (1983)4

Haney v. County Commission of Preston County, 212 W. Va. 824,
575 S.E.2d 434 (2002)4, 5, 6

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83
L.Ed.2d 252 (1985)4

Elliott v. Schoolcraft, 213 W. Va. 69, 576 S.E.2d 796 (2002).....6

Zorich v. Long Beach Fire Dept. & Ambulance Service, 118 F.3d 682 (9th Cir. 1997)6

DeArment v. Curtins, Inc., 790 F.Supp. 868 (D. Minn. 1992).....7

Brown v. Ford Storage and Moving Co., Inc., 43 Kan.App.2d 304, 224 P.3d 593 (2010)7

Jones v. OS Restaurant Services, Inc., 245 P.3d 6224 (Okla. Civ. App. 2010)8

Parker v. Schilli Transportation, 686 N.E.2d 846 (Ind. Ct. App. 1997)8

Rules and Statutes

29 U.S.C. § 218(a)2
29 U.S.C. § 213(a)5, 8
W. Va. Code § 21-5C-1(e).....3, 4, 5, 6, 7, 8

I. PRELIMINARY STATEMENT

Petitioner's case presents a rare circumstance in which the West Virginia Minimum Wage and Maximum Hours Standards ("MWMHS") actually apply to render a benefit to a West Virginia worker. It is encouraging that our Legislature recently acted to expand coverage and increase the minimum wage for a large portion of the state's workforce, but we must assume that the Legislature intended for the "old" version of the MWMHS to render benefits to at least some workers. Respondent, on the other hand, argues for an interpretation whereby the "old" MWMHS has no applicability. This Honorable Court should not adopt such a preposterous interpretation; to do so would be a tragic failure of our state's legal system and its long tradition of giving effect to statutes that were designed to render benefits to West Virginians.

II. REPLY ARGUMENT

A. **Employees Working Where More Than Twenty Percent of Their Coworkers Are Exempted from FLSA Benefits (Like Petitioner) Are the Only Beneficiaries of the MWMHS.**

When the West Virginia Legislature enacted and amended the MWMHS, it was well established that the federal Fair Labor Standards Act ("FLSA") already provided minimum wage and "overtime" benefits to almost every American employee. The United States Supreme Court described the FLSA's broad coverage and narrow exceptions eloquently:

The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' [Message of the President to Congress, May 24, 1934.] Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and

unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493, 65 S. Ct. 807, 89 L.Ed. 1095 (1945); *see also, Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211, 79 S. Ct. 260, 3 L.Ed.2d 243 (1959) (The FLSA has been construed liberally to apply to the furthest reaches consistent with congressional direction.) While the FLSA's beneficial coverage is broad, its exemptions from coverage are narrowly construed. *Mitchell v. Kentucky Finance Co., Inc.*, 359 U.S. 290, 295, 79 S. Ct. 756, 3 L.Ed. 2d 815 (1959) *citing A. H. Phillips, Inc., and Powell v. United States Cartridge Co.*, 339 U.S. 497, 70 S. Ct. 755, 94 L.Ed. 1017. As a result of the FLSA's broad coverage of almost any potential employment scenario and its succinct list of narrowly-construed exemptions, there are very few "employees" in the United States who are not entitled to minimum wage and overtime under the FLSA.

As noted in Petitioner's initial brief, our state legislature had the power to adopt minimum wage and/or maximum hours standards *more beneficial* than the FLSA standards. The FLSA "savings clause," 29 U.S.C. § 218(a), preserves states' rights to adopt wages and hours standards more generous than federal standards. *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F. 2d 1409 (9th Cir. 1990), *cert. denied*, 504 U.S. 979, 112 S. Ct. 2956, 119 L.Ed.2d 578 (1992); *see also* Appellant's Brief at 8. States are also free to extend state-law minimum wage or overtime benefits to employees who are not entitled to those benefits under the FLSA. *Smith v. United Parcel Service, Inc.*, 890 F. Supp. 523, 528-529 (S.D.W. Va. 1995) (internal citations omitted); *see also* Appellant's Brief at 8-9.

In this context, the MWMHS could have only three potential effects with regard to minimum wage and overtime: (1) establishment of a higher minimum wage; (2) establishment of a lower hourly maximum per workweek (overtime trigger); and/or (3) establishment of benefits for workers who do not benefit from the FLSA. West Virginia's Legislature (until 2014) chose only to confer benefits to workers who did not benefit from the FLSA, only if they compose more than 20% of their employer's workforce.¹ The lower Court's interpretation would annihilate this sole effect and purpose of the "old" MWMHS.

Obviously, the MWMHS's definition of "employer," which includes "any individual, partnership, association, public or private corporation, or any person or group of persons," is not limited to government employees. *W. Va. Code* § 21-5C-1(e). Nonetheless, all of this Court's decisions on the MWMHS involve employees of public governmental employers such as municipalities, counties, and state agencies. These cases support Petitioner's position, especially in light of the turning point recognized in *Adkins v. City of Huntington*, 191 W. Va. 317, 445 S.E.2d 500 (1994) with regard to the potential application of the MWMHS to those public employees. Prior to *Adkins*, the case law consistently established that public employees were entitled to minimum wage and overtime benefits of the MWMHS, as long as they were not specifically exempted from MWMHS benefits pursuant to *W. Va. Code* § 21-5C-1(f). *Kucera v. City of Wheeling*, 153 W. Va. 531, 170 S.E.2d 219 (1969), *State ex rel. Crosier v. Callaghan*, 160 W. Va. 353, 236 S.E.2d 321 (1977), *Rohrbaugh v. Crabtree*, 164 W. Va. 791, 266

¹ Until the 2014 amendments, the West Virginia minimum wage per the MWMHS is the same as the minimum wage provided by the FLSA. *W. Va. Code* § 21-5C-2(4). The MWMHS generally triggers overtime compensation after forty hours in a workweek, just as the FLSA does. *W. Va. Code* § 21-5C-3.

S.E.2d 914 (1980), *Amoroso v. Marion County Commission*, 172 W. Va. 342, 305 S.E.2d 299 (1983). However, as noted by this Court in *Adkins*, the federal FLSA did not apply to any of the public-worker plaintiffs in the above-referenced cases at the time of the decisions. 191 W. Va. at 319, 445 S.E.2d at 502. This Court had its first opportunity to examine the § 21-5C-1(e) exemption in *Adkins*, and noted that because the FLSA did not apply to municipalities (or public agencies) until 1986, “the issue of interplay between the FLSA and state wage and hour laws is clearly one of first impression.” *Id.*² In other words, *Adkins* was the first case to come up after public workers became *entitled to* FLSA minimum wage and overtime benefits. In fact, the firefighter plaintiffs in *Adkins* prevailed in their claims for overtime pay under the FLSA, but sought more beneficial overtime under the MWMHS. 191 W. Va. at 317, 445 S.E.2d at 500. The Court clarified that state agencies and political subdivisions could be entitled to the § 21-5C-1(e) exemption “provided that eighty percent of their employees are subject to federal wage and hour laws.” 191 W. Va. at 320, 445 S.E.2d at 503. Even though the Court found against the employees’ state claims in *Adkins*, its language still equated “subject to” with an entitlement to benefits: “Given that the parties have stipulated that eighty percent of the City’s employees are *subject to* federal wage and hour laws, we conclude that a city, as a political subdivision of the state, is entitled to the statutory exemption for qualifying employers in *West Virginia Code* § 21-5C-1(e) and therefore, is *not subject to* the overtime pay requirements imposed by *West Virginia Code* § 21-5C-3(a).” *Id.* (emphasis added).

² See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 252 (1985). Petitioner believes the *Garcia* opinion is what this Court was referencing in footnote 5 of *Adkins*.

Likewise, the remand of *Haney v. County Commission of Preston County*, 212 W. Va. 824, 575 S.E.2d 434 (2002) would have been unnecessary under Respondent's and the Circuit Court's analysis of *W. Va. Code* § 21-5C-1(e). The sheriff's deputy and his employer were "subject" to the FLSA, as were at least 80% of the sheriff's employees, but that conclusion was not dispositive as is was in *Adkins*, because it was unclear whether the plaintiff and other county employees who were subject to the FLSA's minimum wage and maximum hours provisions composed at least 80% of the County Commission's workforce. 212 W. Va. at 829, 575 S.E.2d at 439. This potential for MWMHS coverage could not exist without consideration of whether more than 20% of the *employees* are exempt from FLSA minimum wage and overtime provisions pursuant to 29 U.S.C. § 213(a). For instance, the Preston County Commission might have employed executives, professionals, and/or administrators exempt from FLSA minimum wage and maximum hours provisions pursuant to 29 U.S.C. § 213(a)(1). As such, this Court remanded *Haney* with instructions that "the circuit court is to receive evidence and make a finding of fact concerning whether 80% of the County Commission's employees *are covered* under federal wage and hour laws." 212 W. Va. at 830, 575 S.E.2d at 440 (emphasis added). As such, one rather quirky result of the *W. Va. Code* § 21-5C-1(e) definition of "employer" is that some West Virginia workers who are covered by the FLSA might receive more favorable benefits under the MWMHS, only if they are part of a workforce where more than 20% of their coworkers are exempt from FLSA benefits.³ However, because the current MWMHS minimum wage and maximum workweek

³ For instance, in *Adkins*, the Court noted that because firefighters' overtime pay began after a 53-hour week under the FLSA and after a 40-hour week under state law, the practical effect of its decision was whether the firefighter receives three hours or sixteen hours of overtime pay for a 56-hour week. 191 W. Va. at 318, 445 S.E.2d at 501.

thresholds are mostly the same, the more likely beneficiaries of the MWMHS are employees who are excluded from any FLSA benefit who compose a significant portion (more than 20%) of their employer's workforce, like Petitioner.

As the Court said in *Haney*, “[o]nce this Court determines a statute’s clear meaning, we will adhere to that determination under the doctrine of *stare decisis*.” 212 W. Va. at 828, 575 S.E.2d at 438. Petitioner only asks the Court to adhere to its prior determination with regard to the meaning of *W. Va. Code* § 21-5C-1(e).

B. The FLSA’s Coverage of an “Employer” is Irrelevant.

This Court’s precedents in *Adkins* and *Haney* illustrate that FLSA coverage of an “employer” is assumed and not helpful in examining whether 80% of *employees* are subject to the FLSA’s minimum wage, maximum hours, and overtime standards under *W. Va. Code* § 21-5C-1(e).⁴ It is likely that several West Virginia employers do not meet the FLSA thresholds for “enterprise” coverage, but the question of whether its employees are subject to the FLSA is not answered by determination of the employer’s FLSA status.⁵ Indeed, an employee may be covered under the FLSA based on his or her individual activities even if the business employing that individual is not covered. *Zorich v. Long*

⁴ Also, the statute’s language contemplates only federal laws “relating to minimum wage, maximum hours, and overtime compensation,” so the FLSA’s anti-discrimination, record-keeping and child-labor provisions are obviously irrelevant to the MWMHS definition of “employer.” See Respondent’s Brief at 13.

⁵ Petitioner has argued (and still believes) that Respondent is not an “employer” subject to FLSA coverage as an alternative position, in the event this Court reverses its prior interpretations of *W. Va. Code* § 21-5C-1(e), which focus only on FLSA coverage of “employees.” Respondent has not identified any interstate commerce activities sufficient to trigger FLSA coverage. See Petitioner’s Brief at 13. Importantly, the Circuit Court did not permit Petitioner to conduct discovery on the issue of Respondent’s alleged interstate commerce. (A.R. 272.) As such, if the Court somehow determines that the employer’s FLSA status is determinative of whether 80% of its employees are subject to FLSA, Petitioner then asserts that the Circuit Court’s grant of summary judgment was premature. See *Elliott v. Schoolcraft*, 213 W. Va. 69, 576 S.E.2d 796 (2002).

Beach Fire Department & Ambulance Service, 118 F.3d 682, 686 (9th Cir. 1997),
DeArment v. Curtins, Inc., 790 F.Supp. 868, 870 (D. Minn. 1992).

Regardless of the employer's FLSA status, analysis of whether 80% of its employees are subject to the minimum wage and maximum hours provisions of federal law requires a review of 29 U.S.C. § 213 to determine what percentage of the workforce is listed there as exempt from FLSA minimum wage and overtime benefits.

Actually, a proper reading of the cases cited by the Circuit Court and Respondent which analyze other states' very different wage and hour laws should have resulted in a different conclusion concerning West Virginia's law. Where *W. Va. Code* § 21-5C-1(e) hinges on federal-law coverage of the "employee," the West Virginia Legislature could have taken an approach similar to other states whose definitions of "employer" focus on FLSA treatment of the "employer."

The Circuit Court and Respondent rely upon *Brown v. Ford Storage and Moving Company, Inc.*, 43 Kan. App.2d 304, 224 P.3d 593 (Kan. App. 2010), where the Kansas wage and hour law excluded any "employer who is subject to the provisions of the [FLSA]" 43 Kan. App.2d at 307, 224 P.3d at 596. The difference between *W. Va. Code* § 21-5C-1(e)'s exclusion and the blanket exclusion of *employers* subject to the FLSA under Kansas law is of great consequence, but entirely overlooked by the Circuit Court. If the West Virginia Legislature wanted to extend MWMHS benefits only to workers whose *employer* is subject to the FLSA ("enterprise coverage"), it could have adopted a statute worded like Kansas's statute. While the Kanawha County Circuit Court failed to see any difference between West Virginia's employee-focused definition and Kansas's employer-focused definition, the Court of Appeals of Kansas recognized how the

wording of different states' statutes dictate different results. 43 Kan. App. 2d at 314, 224 P.3d at 599 (Kansas's exclusion of FLSA-regulated *employers* is not the same as Montana's exclusion of FLSA-covered *employees*.)

Similarly, the cases cited by the Circuit Court and Respondent analyzing Oklahoma and Indiana wage and hour laws support a different conclusion. Because Oklahoma's minimum wage law excluded "employers subject to the [FLSA], as amended, and who are paying minimum wage under the provisions of said act," a restaurant that was engaged in interstate commerce and was paying minimum wage in compliance with the FLSA was excluded from the Oklahoma law. *Jones v. OS Restaurant Services, Inc.*, 245 P.3d 624, 626 (Okl. Civ. App. 2010). In Indiana, the state wage law provided that an "employer" subject to the state law "shall not include any *employer* who is *subject to* the minimum wage provisions of the federal [FLSA]." *Parker v. Schilli Transportation*, 686 N.E.2d 846, 850 (Ind. Ct. App. 1997).

Again, Oklahoma's and Indiana's exclusions, based on the *employer's* FLSA status, are vastly and critically different from West Virginia's exclusion, but the Circuit Court failed to distinguish between them.

Since *W. Va. Code* § 21-5C-1(e) pays no regard to the federal coverage of any *employer*, the only possible avenue for MWMHS coverage lies in workplaces where more than 20% of the *employees* are excluded from FLSA coverage. Petitioner has established that she and 100% of Respondent's employees only provide "companionship services," and the FLSA's minimum wage, maximum hours, and overtime provisions "shall not apply" to them pursuant to 29 U.S.C. § 213(a).⁶ Consequently, 0% of

⁶ Again, workers providing "companionship services" are not engaged in "home healthcare" and are treated differently from other non-exempt employees providing other

Respondent's employees are "subject to" any federal minimum wage, maximum hours, or overtime law, and Respondent is thus an "employer" pursuant to the MWMHS.

III. CONCLUSION

Wherefore, Petitioner respectfully requests that the Supreme Court of Appeals reverse the decision of the Circuit Court.

Respectfully submitted,

CAROL KING
Petitioner
By Counsel



Cameron S. McKinney (State Bar No. 7198)
David L. Grubb (State Bar No. 1498)
THE GRUBB LAW GROUP
1114 Kanawha Boulevard, East
Charleston, WV 25301
304-345-3356 (telephone)
304-345-3355 (facsimile)

"domestic services." As such, any administrative interpretive "bulletins" or web page comments relating to "home health care workers" are: (1) not relevant to "companionship services;" and (2) not entitled to deference. *See* Petitioner's Brief at 10.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CAROL KING,
on behalf of herself and all others
similarly situated,

Petitioner,

v.

No. 13-1255

WEST VIRGINIA'S CHOICE, INC.,
a West Virginia corporation,

Respondent.

CERTIFICATE OF SERVICE

I, Cameron S. McKinney, counsel for Petitioner, do hereby certify that I have this 8th day of May, 2014, served a true and accurate copy of the foregoing *Petitioner's Reply Brief* upon counsel of record, via U.S. Mail, as follows:

Christopher S. Arnold, Esquire
Hendrickson & Long, PLLC
Post Office Box 11070
Charleston WV 25339


Cameron S. McKinney (State Bar No. 7198)
David L. Grubb (State Bar No. 1498)
THE GRUBB LAW GROUP
1114 Kanawha Boulevard, East
Charleston, WV 25301
304/345-3356 (telephone)
304/345-3355 (facsimile)