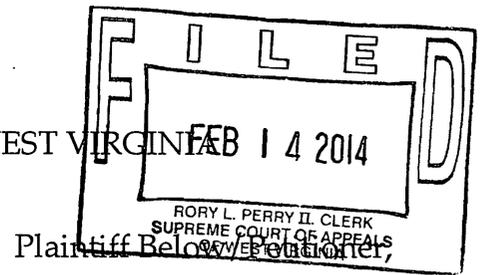


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHRISTOPHER D. ADKINS,

Plaintiff Below/Petitioner,

v.

DOCKET NO. 13-0932

Appeal from the August 30, 2013, Order
of the Circuit Court of Kanawha County
(Civil Action No. 11-C-307)

AMERICAN MINE RESEARCH, INC.,

Defendant Below/Respondent.

RESPONDENT'S BRIEF

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Now comes defendant below/respondent American Mine Research, Inc. (hereinafter “respondent”), by and through its counsel, Lawrence E. Morhous and Jerad K. Horne, pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure and responds to the brief of plaintiff below/petitioner Christopher Adkins (hereinafter “petitioner”) by stating that this Honorable Court should deny petitioner’s appeal and affirm the August 30, 2013, Order of the Circuit Court of Kanawha County, West Virginia, granting respondent summary judgment. [J.A. at 345-352].

I. ASSIGNMENTS OF ERROR BY PLAINTIFF BELOW/PETITIONER

- A. The Circuit Court erred in determining that commissions were earned upon shipment of the product.
- B. The Circuit Court erred in finding that the commission rate structure was modified and could be applied retroactively.
- C. The Circuit Court erred in finding that there was no violation of the WPCA.

II. STATEMENT OF THE CASE

Petitioner was employed as an at-will employee by respondent from October 1, 2000, to August 15, 2010. [J.A. 2 at ¶ 6]. Petitioner was the Eastern Territory Sales Representative covering West Virginia, Kentucky, Maryland, Ohio, Pennsylvania, Virginia, and Tennessee. [J.A. 2 at ¶ 7].

Petitioner's beginning salary was \$24,000 plus commissions and a car allowance. [J.A. 3 at ¶ 9]. The initial monthly commission structure was approximately (a) 1% for \$40,000 to \$80,000 of gross sales; and (b) 2% over \$80,000 of gross sales. [J.A. 3 at ¶ 10; J.A. at 104:21-105:19 (petitioner testifying that his first commission structure was (a) 1% for \$40,000 to \$80,000; (b) 1.5% for \$80,000 to \$100,000; and (c) 2% over \$100,000)].

By 2004-2005, Petitioner had received raises in base salary, and the new commission structure was (a) 1% for \$40,000 to \$80,000 of gross sales; (b) 2% for \$80,000 to \$100,000 of gross sales; and (c) 3% over \$100,000 of gross sales. [J.A. 3 at ¶¶ 12-14].

Petitioner's commission was calculated "[o]n what was shipped that month." [J.A. at 105:23-106:1]. The commissions were paid at the end of each month for equipment that was shipped during the preceding month. [J.A. at 118:18-24]. In addition, there were no commissions paid for canceled orders because the items did not actually ship. [J.A. at 148:24-149:2]. In other words, petitioner did not "earn" his commission until the time of shipment.

As noted above, respondent had the right to – and from time to time did – adjust petitioner's commission structure.

Q: Were there ever any changes made? You said what your starting salary and commission and vehicle allowance were. Was that ever changed throughout your term with American Mine Research?

A: Yes.

Q: How many times?

A. Probably seven. But that's - - it may have been eight.

[J.A. at 107:16-24]. Typically, respondent's management discussed changes in petitioner's pay arrangement (a/k/a a commission structure review) in or around

October of each year since October 1 marked the beginning of its fiscal year. [J.A. at 109:19-110:2; J.A. at 156:8-21]. Petitioner was well aware that any change in his commission structure related back to October 1 as the first day of a new fiscal year.

Q: If [the commission rates] were changed, they were made effective October 1st of that particular year, regardless of when it was changed - -

A: Okay.

Q: - - is that correct?

A: That's correct; yes.

[J.A. at 158:16-21].¹

After passage of the 2006 Miner Act, respondent started making a system for tracking and communicating in underground mines. [J.A. 4 at ¶¶ 16-18]. This new system was very popular, and petitioner was responsible for around \$15 million in purchase orders for this equipment. [*Id.* at ¶ 20]. However, multiple other individuals with respondent were also involved in securing the sales. [J.A. at 65:4-11]. Petitioner has conceded that all salaries and commissions were properly calculated and paid on every item shipped before October 1, 2009. [J.A. at 107:11-15; J.A. at 156:4-7]. This is consistent with respondent's policy that commissions are calculated based on what was actually shipped in the previous month. [J.A. at 105:23-106:1; J.A. at 118:18-24].

In November of 2009, respondent adjusted petitioner's pay structure as follows: new base salary increased from \$46,000 to \$50,000 and there was a new monthly commission structure of (a) 0% for \$0 to \$300,000 of gross sales; (b) 3% over \$300,000 of gross sales; and (c) an annual commission cap of \$85,000. [J.A. at 167:9-13]. This new commission plan was implemented in November 2009 but related back to

¹ It should also be noted that petitioner's new employer reviews his pay arrangement annually around October which is standard in the industry. [J.A. at 205:3-10].

October 1 as the first day of the then beginning fiscal year. [J.A. at 214:19-23]. Petitioner was not singled out with respect to caps on his earnings as others had similar caps placed on their commissions or bonuses at that same time, and those caps have remained in place. [J.A. at 67:11-15; 71:5-72:4; 74:23-76:9; 77:3-21]. In addition, petitioner has conceded that he received his commissions for all items shipped after October 1, 2009. [J.A. at 218:21-219:5]. After petitioner reached the commission cap of \$85,000 – in addition to his base pay – respondent even agreed to an additional “half a percent [commission] on new sales - - any new sales that happened from that point on.” [J.A. at 215:5-13]. Those “new sales” were orders placed by customers after their initial tracking and communicating equipment order had been fulfilled, i.e., delivered.

However, petitioner’s contention is that his commissions for the tracking and communicating equipment should be calculated under the pre-2009 pay structure, even for items that actually shipped after October 1, 2009, or, for that matter, may have never been shipped. [J.A. 4 at ¶ 20; J.A. at 170:11-19; J.A. at 199:16-24]. In other words, petitioner argues that his commissions for the tracking and communicating equipment were somehow “earned” prior to the date of shipment. On this point, petitioner testified as follows:

Q: I thought you only got paid commissions when equipment was shipped?

A: In an ordinary setup with CO, yes.

Q: What made the tracking system different than the CO system?

A: Because everything that I sold had to go on hold until it was approved (by MSHA), which I had no control over. (Note: language in parenthesis added solely for clarification)

[J.A. at 169:17-24]. However, as noted above, petitioner understood that all of his commissions were based on the goods that actually shipped and that he received no

commissions for canceled orders. Thus, the communications and tracking equipment were no different than any other purchase order that had not actually shipped; customers could simply change their mind or encounter any number of problems with an order prior to shipping.

III. SUMMARY OF THE ARGUMENT

Respondent respectfully submits that the Circuit Court of Kanawha County correctly granted respondent summary judgment because petitioner cannot establish that respondent violated the WPCA as alleged in his complaint. Petitioner's claim must therefore fail because respondent paid all commissions due under the pay structure in place at the time of shipment. As discussed in more detail below, petitioner could not "earn" any commission prior to the time a product he sold was shipped, and respondent had the right to alter the terms of petitioner's at-will employment including, but not limited to, the amount of commissions to be paid. In short, there is no genuine issue of material fact and respondent is entitled to and the Circuit Court properly granted respondent summary judgment as a matter of law.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure, respondent states that oral argument is unnecessary because "the facts and legal

arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.”

In the event that this Court determines that oral argument is necessary and would be beneficial, respondent states that argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate because petitioner maintains that the Circuit Court erred in applying settled law to the facts of this civil action.

Finally, respondent states that a memorandum decision is appropriate to dispense with this appeal pursuant to Rule 21 of the West Virginia Rules of Appellate Procedure.

V. STANDARD OF REVIEW

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). “Summary judgment is appropriate . . . where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” *Syl. Pt. 2, Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W. Va. 1995). “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Syl. Pt. 2, Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994) (citations omitted). “A circuit court's entry of summary judgment is reviewed *de novo*.” *Id.* at *Syl. Pt. 1*.

VI. ARGUMENT

This Court should dismiss petitioner's appeal and affirm the Kanawha County Circuit Court's Order granting respondent summary judgment because there are no genuine issues of material fact, and respondent is entitled to a judgment as a matter of law. The Circuit Court properly determined that the commission payments were earned at the time of product shipment as opposed to at the time of consummation of sales as contended by petitioner. The Circuit Court also correctly found that respondent effectively modified the terms of its commission payment structure and appropriately applied that structure to petitioner. Therefore, the Court found that respondent did not violate the WPCA because it paid petitioner all commissions to which he was entitled pursuant to the governing commission payment structure. Ultimately, the Circuit Court properly granted respondent summary judgment as a matter of law.

Both of the counts in petitioner's complaint are based on the alleged failure to pay the correct amount of commissions. [J.A. 5-6 at ¶¶ 26-32; *see also*, Compl. at ¶¶ 24-25 (page inadvertently omitted from J.A.)]. Specifically, petitioner claims that respondent violated the WPCA by failing to pay all of the wages owed to petitioner at the next regular pay day after his resignation. [J.A. 6 at ¶ 32].

The WPCA provides that "(w)henever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee." W. Va. Code § 21-5-4(c). The term "wages" is defined as "compensation for labor or services rendered by an employee, whether the amount is determined on a

time, task, piece, commission or other basis of calculation.” W. Va. Code § 21-5-1(c). Thus, petitioner is correct that the payment of commissions can fall within the WPCA.

A. The Circuit Court properly determined that commissions were earned upon shipment of the product.

The key issue is the exact amount of commissions owed by respondent to petitioner. The WPCA “does not regulate the amount of wages, and it does not establish how or when wages are earned” since “these are matters that arise from the employment agreement.” *Gregory v. Forest River, Inc.*, 369 F. App’x 464, 469 (4th Cir. 2010). *See also, Meadows v. Wal-Mart Stores, Inc.*, 530 S.E.2d 676, 689 (W. Va. 1999). In *Gregory*, the Fourth Circuit upheld an employment agreement that “established that commissions would be paid on shipped units” as “[its] provisions do not contravene any provision of the WPCA” because “they merely establish the amount of commissions and when they are earned.” *Id.* *See also, Saunders v. Tri-State Block Corp.*, 535 S.E.2d 215, 219 (W. Va. 2000) (holding in a WPCA case that the amount of the employee’s damages for unpaid commissions was to be determined by the documents establishing the employment relationship; the employer could base the commission on whether an account was for a new client or existing client);

As in *Gregory*, respondent calculated petitioner’s commissions based on shipped units. Respondent also had the absolute right to amend petitioner’s commission structure each year of his employment for the next fiscal year of employment. These policies do not violate the WPCA and simply establish the amount of commissions and when they are earned. *See Gregory*, 369 F. App’x at 469.

In the case of *Geary v. Telular Corp.*, 793 N.E.2d 128, 132 (Ill. Ct. App. 2003), the plaintiff/employee did not dispute the defendant/employer's right to make prospective changes to the compensation plan; in addition, the plaintiff conceded that pursuant to all the compensation plans, the commissions were payable when the product shipped. However, the plaintiff argued that his commission was somehow "earned" when the buyer agreed to purchase, rather than at the time of shipment, in an attempt to fall within the prior and more lucrative commission structure. *Id.* The Illinois Court of Appeals noted that "(w)hen an employment agreement is terminable at will, it may be modified by the employer as a condition of its continuance," and that "[t]his right to modify unilaterally at-will employment terms applies to modifying compensation terms." *Id.* at 131. The *Geary* Court held as follows:

There is no issue of fact that commissions were earned when product shipped. The question then is whether or not any product shipped to [the customer] prior to the . . . change in plaintiff's commission plan Because no product had shipped prior to the . . . change in plaintiff's compensation plan, no commission on the [particular] account had been earned under the old plan when the plan changed [W]hen the new plan was introduced, everyone, including plaintiff, was paid for any commissions that had been earned up until that point and were then put on the new plan going forward.

Id. at 133. Thus, summary judgment was appropriate for the defendant/employer. *Id.*

In this action, there is no issue of fact that commissions were earned by petitioner when a product shipped. [J.A. at 105:23-106:1]. As in *Geary*, respondent had the right to modify the commission structure going forward. When the new plan was introduced as of October 1, 2009, petitioner was paid for any commissions that had been earned up until that point and was then put on the new plan going forward for any products that had not yet shipped as was consistent with its payment structure. As in

Geary, petitioner is simply trying to argue that his commission was somehow “earned” prior to the date of shipment in order to receive a higher commission. Such an argument fails as a matter of law, and summary judgment is appropriate for respondent. *See Geary*, 793 N.E.2d at 133.

Petitioner cites the West Virginia Uniform Commercial Code, specifically § 46-2-204 and § 46-2-301, as authority for his claim that he became entitled to commissions at the time each contract for the sale of the product was consummated. Although the Uniform Commercial Code may establish what constitutes a sales contract, it cannot serve as the basis for establishing when petitioner became entitled to commissions; his entitlement being based upon the employment relationship and a commission payment structure that entitled him to commissions only on products that actually shipped.

Petitioner’s argument that the reasoning of the Court in *Geary* should not apply to this action because he did not have a written agreement with respondent and that “the parties had no agreement that Mr. Adkins’ commission would be paid based upon the commission rate in effect at the time of shipment” is fallacious.

As set forth in *Davis v. All American Siding & Windows, Inc.*, 897 N.E.2d 936, 940 (Ind. App. 2009), “**absent some other arrangement or policy**, when an employer makes an agreement to provide compensation for services, the employee’s right to compensation vests when the employee renders the services.” (citation omitted) (emphasis added). That case is clearly distinguishable from this civil action because the exception to the general rule was not satisfied as the employment contract did not provide for a different compensation scheme than one based upon when orders were

received, which is contrary to the established compensation scheme in this civil action based upon shipment of products. *See id.*

The case of *Vector Engineering and Manufacturing Corp. v. Pequet*, 431 N.E.2d 503, 505 (Ind. App. 1982), provides that “[a]s a general rule, a person employed on a commission basis to solicit sales orders is entitled to his commission when the order is accepted by his employer.” However, “[t]his general rule may be altered by written agreement by the parties or by the conduct of the parties which clearly demonstrates a different compensation scheme.” *Id.* (emphasis added). The undisputed facts in this action clearly demonstrate respondent’s compensation package and petitioner’s agreement therewith constitute an exception to that “general rule” such that petitioner was not entitled to any commission compensation until shipment of ordered products.

The *Vector* case is also clearly distinguishable from this case. In *Vector*, a former employee sued to recover commissions on orders secured but not shipped prior to his termination from employment. *See id.* at 504-505. The Court in *Vector* found that the employee was entitled to commissions for orders secured during his employment even though shipment did not occur until after termination. *See id.* at 503. However, unlike this case, the Court found no agreement or conduct between the parties that established that commissions would not be paid for orders shipped after termination. *See id.* at 505. Plaintiff also relies on the cases of *J Squared, Inc. v. Herndon*, 822 N.E.2d 633 (Ind. App. 2005), *Sample v. Kinser Ins. Agency, Inc.*, 700 N.E.2d 802 (Ind. App. 1998), and *Oken v. Nat’l. Chain Co.*, 424 A.2d 234 (R.I. 1981), all of which dealt with former employees and their claims to commissions for shipments after termination. All of those cases are distinguishable from this case in that there was no evidence of an

agreement or conduct establishing that employees would not receive commissions on sales paid for/shipped after termination of employment.

B. The Circuit Court properly determined that the commission rate structure was modified and applied to petitioner.

The fact that there is no written agreement between the parties regarding that compensation arrangement is inconsequential. It certainly does not establish that the arrangement somehow was not in effect or that petitioner earned commission at any time other than the time of shipment. *See Davis*, 897 N.E.2d at 941 (“**We recognize, however, that a contract of employment, out of which the relationship of employer and employee arises, may be either express or implied, verbal or written.**”) (emphasis added).

Petitioner’s relies on *Malone v. American Business Information, Inc.*, 647 N.W.2d 569 (Neb. 2002), another case dealing with former employees suing to recover commissions, to establish that respondent did not have authority to alter petitioner’s compensation scheme to deny him commissions on secured orders that had not shipped at the time the commission scheme was changed. In so arguing, petitioner has elected to clearly ignore his admission in this suit that he and respondent did have an agreement covering when any commission owed to him would be paid, i.e., at the time a product was actually shipped to the customer. [J.A. at 105:23-06:1]. Moreover, pursuant to that same compensation agreement and as acknowledged and acceded to by petitioner, no commissions were due him for canceled orders because the product involved was not shipped. [J.A. at 148:24-149:2].

Petitioner never voiced any objection to the nine other occasions when respondent changed his payment terms under that same agreement - even when some of those terms resulted in a lowering of base earnings. [J.A. at 107:16-24]. Petitioner was always paid the amounts due and owing him for products shipped during the effective periods of those various changes. [J.A. at 107:11-15; J.A. at 156:4-7]. Also, those changes were always placed into effect at the same approximate time of year as the change petitioner is now contesting. [J.A. at 158:16-21].

More importantly, that compensation agreement between petitioner and respondent, while not in writing, had been in existence for the entire time petitioner worked for respondent; petitioner's employment beginning on October 1, 2000, and continuing until August 15, 2010. By continuing to work after the changes in his compensation plan throughout the course of his employment, petitioner should be deemed to have accepted his compensation plan as amended throughout the course of his employment. *See Geary*, 341 Ill. App. 3d at 698 (citing *Schoppert v. CCTC International, Inc.*, 972 F.Supp. 444 (N.D. Ill. 1997) ("**When an at-will employee continues to work after a change in commission plan, he is deemed to have accepted the change.**") (emphasis added). The Court in *Geary* found that the petitioner in that case "accepted the . . . modifications to the compensation plan when he accepted payment of the commissions under the [changed plan] and continued employment." *Id.* at 700.

C. **The Circuit Court properly determined that there was no violation of the WPCA.**

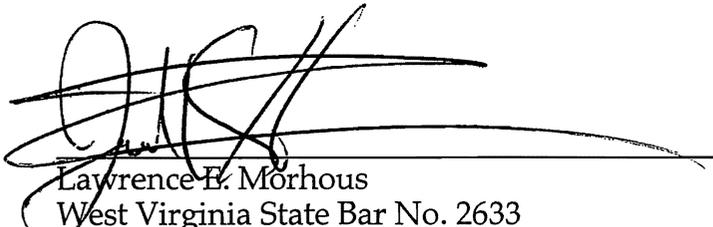
The undisputed facts in this civil action establish that respondent modified its structure for the payment of commissions while maintaining its long-

standing policy/practice of basing commission payments on products that actually shipped as opposed basing such payments on secured contracts for the sale of products as petitioner contends. Respondent then paid petitioner for all products that shipped pursuant to the revised compensation plan. Thus, the Circuit Court properly determined that respondent did not violate the WPCA.

VII. CONCLUSION

For all the reasons stated herein, respondent respectfully prays that this Court dismiss petitioner's appeal and affirm the Order of the Circuit Court of Kanawha County granting respondent summary judgment as a matter of law.

AMERICAN MINE RESEARCH, INC.,
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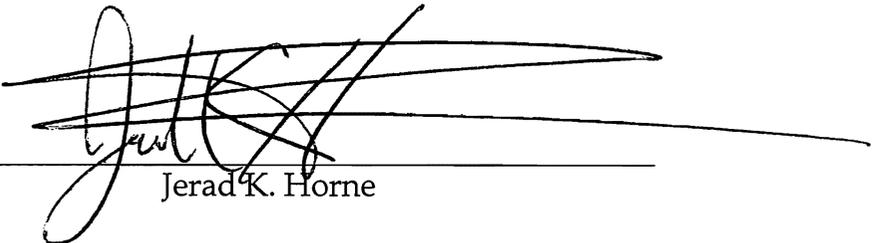
CERTIFICATE OF SERVICE

I, JERAD K. HORNE, attorney for defendant below/ respondent, hereby certify that on the 14th day of February, 2014, I served the preceding RESPONDENT'S BRIEF on plaintiff below/ petitioner's attorneys, J. Michael Ranson, Cynthia N. Ranson, and G. Patrick Jacobs, by facsimile and by depositing true copies thereof into the United States mail, postage prepaid, in envelopes addressed to them as follows:

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