

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. ~~090960~~
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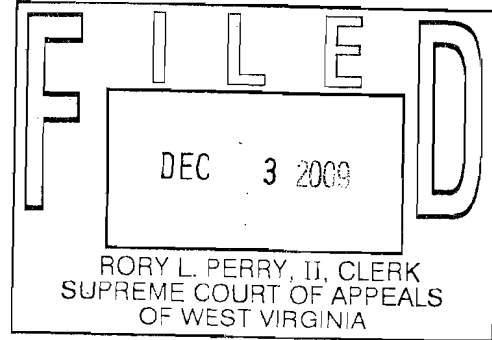
MICHELLE ISAACS,

Appellant,

v.

DANIEL P. BONNER,

Appellee.



From the Circuit Court of Berkeley County, West Virginia

**AMICUS CURIAE BRIEF FROM THE
WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF APPELLANT MICHELLE ISAACS**

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

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

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

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

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

This unusual case, which began as a straightforward Wage Payment action filed *pro se* by Appellant Michelle Isaacs, somehow resulted in a substantial fraud verdict against her. WVELA is concerned the affirmance of the judgment rendered against Appellant potentially would have a chilling effect on those employees who may seek to file a claim under this Act in the future, particularly considering the fact that Appellant filed her claim for liquidated damages upon the advice provided to her by the Wage & Hour Section of the West Virginia Division of Labor.

For these reasons, WVELA respectfully asks this Court first to evaluate Appellant's Wage Payment claim in light of the remedial purposes of the Act, which requires the Act to be construed liberally in favor of the recipient, *i.e.*, the employee. Second, WVELA respectfully asks this Court to set aside the fraud judgment rendered against Appellant because it is not supported either by the facts or the applicable law.

II. Brief statement of the case

Counsel for Appellant Michelle Isaacs and Appellee Daniel P. Bonner will be providing this Court with a much more detailed discussion of the facts developed in the record and there is no purpose served by rehashing these facts in detail in this brief. For purposes of this amicus brief, the WVELA does not intend to get involved in the amazing minutiae and complications developed in this record over what should have been a very simple case. In any Wage Payment claim, the essential question posed is, **“Did the employer fail to pay the discharged employee all of the wages and benefits to which the employee was entitled within time periods prescribed under the Act?”**

In most cases, this question is easily answered by referring to the written policies of the employer as well as reviewing the written records, including pay stub information. Employers are required, under W.Va.Code §21-5-9, to create and maintain notices and written records establishing the wages and benefits of their employees. If the employer complies with this statute, there rarely should be any real question as to what wages and benefits are owed to an employee, after the employee either has been fired or has resigned.

The essential facts are that on July 14, 2004, Appellant resigned, and one week later, Appellant received her final paycheck. (**JUDGMENT ORDER, ¶59**). Appellant’s final paycheck did not include any payment for unused, accrued paid leave because Appellee had calculated Appellant was not entitled to such pay. (**JUDGMENT ORDER, ¶60**). At this point, WVELA notes it is not unusual in Wage Payment cases for the employer and the employee to have some disagreement over whether or not additional wages or benefits should have been included in the final paycheck. This dispute normally is resolved through an examination of the employer’s written policies as well as the pay stub information.

Appellant's most recent pay stub, which is a written document created by her employer, showed that she was entitled to sixty-four hours of accrued paid leave. (**JUDGMENT ORDER**, ¶¶45, 47, and 62). In the record and in the findings made by the trial court, there is a lot of discussion about how everyone in this particular office knew that the pay stub information on the amount of accrued paid leave owed to each employee was inaccurate. (**JUDGMENT ORDER**, ¶¶42-45). Thus, in this case, it was Appellee, as the employer, and not Appellant, as the employee, who created a written document containing false information.

Appellant sought relief for the payment of her accrued paid leave from the Wage & Hour Section of the West Virginia Division of Labor. (**JUDGMENT ORDER**, ¶61). During the negotiations that occurred between Wage & Hour and Appellee, eventually Appellee conceded at the most, Appellant was entitled to 4.2 hours of unpaid leave and Appellee offered a check to cover that amount of leave. (**JUDGMENT ORDER**, ¶¶72). Through further negotiations the Appellee **voluntarily** settled the wage portion of Appellant's claim by sending her a check for \$920, which was consistent with Wage & Hour's calculation that Appellant was owed forty hours. (**JUDGMENT ORDER**, ¶75-76). Wage & Hour then, correctly, advised Appellant that she still had the right to seek recovery for liquidated damages against Appellee, which is what caused the present case to be filed. (**JUDGMENT ORDER**, ¶¶76-66).

Once the Court plows through all of the transcripts and documents, there are three possible conclusions to be reached, based upon the facts. First, as conceded by Appellee, Appellant was entitled to 4.2 hours of accrued unpaid leave. Appellee's position is that accrued unpaid leave can only be paid in full day increments, therefore, because 4.2 hours does not constitute a full nine hour work day, Appellant is not entitled to be paid at all for this leave. From Appellee's perspective, an

employee simply is required to forego the payment of any accrued leave that is less than a day. Second, Appellant was entitled to about twenty hours of accrued unpaid leave. This amount includes an accumulation of unpaid leave during the time Appellant was off work for maternity leave. Appellee disputes this assertion. For purposes of this amicus brief, WVELA takes no specific position because the actual policy of this particular employer seems to be based largely on testimony and anecdotal evidence, rather than an actual written document. Third, Appellant is entitled to forty hours of accrued unpaid leave, based upon the analysis by Wage & Hour.

Regardless of whether Appellant was entitled to be paid for 4.2 hours or twenty hours or forty hours of accrued unpaid leave, to the extent that Appellant was owed **any** amount of accrued unpaid leave, the liquidated damages provision under W.Va.Code §21-5-4, is triggered. At the time Appellant resigned, the Wage Payment and Collection Act authorized liquidated damages of up to thirty days wages. As applied in this case, where Appellant was seeking to recover liquidated damages only, Appellant was entitled to be paid a total of **\$6,210** [$\23 (Appellant's hourly rate) X 9 (hours worked each day) = **\$207**; 30 (total days permitted under the Act) X $\$207$ =**\$6,210**]. Thus, whether Appellant was owed 4.2 hours or twenty hours or forty hours of accrued unpaid leave, in any instance, she still was not compensated for the full amount of liquidated damages to which she was entitled under the Act.

III. Argument

A.

Appellant should prevail on her Wage Payment claim

In interpreting and applying the West Virginia Wage Payment and Collection Act, this Court applies the following standard, noted in *Shaffer v. Ft. Henry Surgical Associates, Inc.*, 215 W.Va. 453, 458, 599 S.E.2d 876, 881 (2004):

[I]t is well settled that “[t]he West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld.” Syllabus, *Mullins v. Venable*, 171 W.Va. 92, 297 S.E.2d 866 (1982).’ Syl. Pt. 3, *Jones v. Tri-County Growers, Inc.*, 179 W.Va. 218, 366 S.E.2d 726 (1988).” Syl. Pt. 3, *Lipscomb v. Tucker County Com’n*, 206 W.Va. 627, 527 S.E.2d 171 (1999). Therefore, “[s]tatutes, such as the [Wage Payment and Collection Act], that are designed for remedial purposes are generally construed liberally to benefit the intended recipients.” *Conrad v. Charles Town Races, Inc.*, 206 W.Va. 45, 51, 521 S.E.2d 537, 543 (1998)(citations omitted).

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

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

“Wages” are defined in W.Va.Code § 21-5-1(c), as including “then accrued fringe benefits capable of calculation and payable directly to an employee.” “Fringe benefits” are defined in W.Va.Code § 21-5-1(l), as including “**any benefit provided an employee or group of employees by an employer**, or which is required by law[.]” (Emphasis added). There is no dispute in this case that if Appellant were due any accrued unpaid leave, such leave would constitute a benefit required to be paid no later than the next regular payday.

At the time Appellant resigned, W.Va.Code §21-5-4, provided liquidated damages of up to thirty days. As calculated above, Appellant was seeking to recover **\$6,210** in connection with her liquidated damages claim. A critical fact not given much weight by the trial court is Appellee’s voluntary settlement with Appellant for \$920, based upon the Wage & Hour’s calculation that Appellant was due forty hours of accrued unpaid leave.

If Appellee believed so strongly that his written notices and policies regarding employees' wages and benefits, required by W.Va.Code §21-4-9, clearly supported his view of the facts, he never should have voluntarily entered into a settlement, which established that he had violated the Wage Payment and Collection Act. Appellee had every right to provide Wage & Hour with whatever documentation he had to dispute the information on the pay stubs and to explain how accrued leave time was calculated in his office. For most employers, it would be a very easy task to show Wage & Hour the specific written policy, explaining how leave was calculated, and the specific pay stub information for the employee. Unfortunately, according to counsel for Appellant, the specific written policy at issue in this case never was produced in this case and Appellee included information regarding Appellant's leave on her pay stubs that Appellee disputes. In light of these inadequate and, according to Appellee, inaccurate records, Appellee decided the better course of action was to settle with Appellant under a theory that she was owed forty hours of unpaid leave.

Since this settlement did not resolve Appellant's liquidated damages claim, she was fully entitled to follow the advice given to her by the Wage & Hour people to file such a claim. It should be emphasized there can be no dispute that once a Wage Payment violation was established, through Appellee's concession that Appellant, at a minimum, was entitled to 4.2 hours of accrued unpaid leave, and through his payment of a settlement, Appellant was entitled to be paid thirty days wages as liquidated damages.

The trial court reached its conclusion that Appellant was not entitled to be paid anything for her accrued unpaid leave by reviewing Appellee's policies in the light most favorable to him, rather than to Appellant. As noted by counsel for Appellant, the written policy at issue in this case never was produced by Appellee in this trial. Somehow, despite the lack of this written documentation, the trial court made numerous specific findings of fact about this never produced written policy, apparently based upon the testimony of various witnesses.

Fundamentally, in any Wage Payment case, the employer is responsible for having his policies regarding wages and benefits to be in writing and made available to the employees. In this case, there was a lot of confusion over exactly what the policies were. This problem was compounded by Appellee including on the pay stubs of the final checks paid to Appellant that she was entitled to sixty-four hours of accrued unpaid leave. Clearly, it was Appellee, the employer, who added to the factual questions in this case by including this information on the pay stubs of his employees, when, according to some of the trial court's findings, Appellee believed that information was not accurate.

The trial court in this case never held Appellee accountable for his sloppy and possibly inaccurate recordkeeping and maintenance of written policies. Furthermore, the trial court did not account for Appellee's concession that Appellant was due, at a minimum, 4.2 hours nor did the trial court consider the legal effect of Appellee's settlement.

WVELA respectfully submits the manner in which the trial court interpreted and applied the facts in this case was inconsistent with the standard established by this Court in *Shaffer* and other Wage Payment cases. Requiring employers to keep accurate written records regarding the wages and benefits of their employees, as statutorily mandated by W.Va.Code §21-5-9, is not a great burden. What explanation does Appellee have for putting information on the pay stubs of his employees regarding their leave, which Appellee contends was inaccurate? Where is the specific written policy at issue in this case, which Appellee never produced? An employer's concession of inaccurate recordkeeping and his inability to produce a copy of the written policy in question should not be rewarded as it was in this case.

Otherwise, the lesson of this case, if affirmed, would be that employers should not bother having written policies available to their employees nor should employers be concerned about the accuracy of the information provided to their employees on their pay stubs. Fundamentally, it is not too much to ask for employers to maintain accurate written records governing the wages and benefits due to their employees.

Under the facts, WVELA respectfully submits Appellant is entitled to be paid the liquidated damages of thirty days wages, based upon the concession by Appellee that he owed Appellant 4.2 hours and his settlement of her claim with the Wage & Hour office. In addition to that amount, counsel for Appellant, under W.Va.Code §21-5-12(b), is entitled to seek recovery for the attorneys' fees and costs incurred in this action. The resolution of that issue would require this case to be remanded to the trial court.

B.

Appellant committed no fraud

The most disturbing aspect of this case is the conversion of Appellant's attempt to recover liquidated damages under the Wage Payment and Collection Act, based upon advice she had received from Wage & Hour, into a fraud judgment against Appellant, where she is ordered to pay Appellee \$1,016.60 in compensatory damages, based upon the voluntary settlement paid by Appellee to settle the Wage & Hour claim; \$5,000 in punitive damages; and \$29,487.52 in attorneys' fees and costs.

In Syllabus Point 1 of Syllabus Point 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981), this Court defined the elements of fraud:

“The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.’ *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927).”

Appellee’s theory of fraud was based upon two main facts. First, Appellant provided the Wage & Hour people a copy of the pay stub, **prepared by Appellee**, showing that Appellant was owed sixty-four hours of paid leave. Appellant did not create this document; Appellee did. If this document was false or inaccurate, Appellee had every right to prove that fact to the Wage & Hour people, but he voluntarily decided not to do so. Instead, he paid Appellant \$920, representing the payment of forty hours of unpaid leave. Fundamentally, Appellee cannot be defrauded based upon an alleged misrepresentation that not only was created by Appellee, but also which Appellee insists was false. Stated differently, Appellee cannot claim to have **relied** upon some fraudulent act by Appellant when the pay stub, even if it is inaccurate, was created by Appellee and Appellee asserts he knew the information on the pay stub was false.

Second, Appellant represented in the documentation provided to Wage & Hour that Appellee had no written leave policy. As counsel for Appellant observes throughout his petition for appeal, the written leave policy at issue was never produced by Appellee in this trial. How can Appellant be found guilty of fraud for asserting she was not aware of any written leave policy when Appellee is unable to provide such a document? Since Appellee’s burden of proof in a fraud action is clear and convincing evidence, WVELA respectfully submits the evidence in this case falls woefully short of supporting this claim.

Even if the Court concludes that Appellant is not entitled to any recovery under her Wage Payment claim, that does not mean she was guilty of some fraud for pursuing this case. Appellant

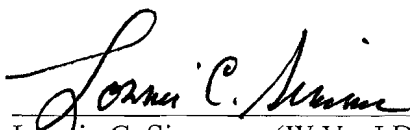
began this case representing herself without a lawyer. She was following the advice she received from the Wage & Hour people and sought liquidated damages because the payment made by Appellee to her did not include liquidated damages. If it were not for the poor records maintained by Appellee, the parties would not be before this Court.

IV. Conclusion

For the foregoing reasons, WVELA respectfully asks this Court to reverse the final orders of the Circuit Court of Berkeley County, to find that Appellant was entitled to recover liquidated damages on her Wage Payment and Collection Act claim, to reverse as a matter of law the fraud judgment entered against Appellant, and to remand this case so that counsel for Appellant can petition for the attorneys' fees and costs incurred in this action. No matter how this Court resolves these issues, WVELA appreciates the opportunity to share its concerns with the Court regarding the issues raised in this case.

WEST VIRGINIA EMPLOYMENT
LAWYERS ASSOCIATION, Amicus
Curiae,

–By Counsel–



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Certificate of Service

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF FROM THE WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT MICHELLE ISAACS** as well as the **AMICUS CURIAE BRIEF FROM THE WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT MICHELLE ISAACS** was served on counsel of record on the 2nd day of December, 2009, through the United States Postal Service, postage prepaid, to the following:

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