



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TELE-RESPONSE CENTER, INC.,
dba 121 Direct Response

Defendant below/Petitioner,

vs.

Appeal No. 11-1398

KACE DOUGLAS and
RANDI DAMPHA, individually
and on behalf of all others similarly situated

Circuit Court of Brooke County
The Honorable Martin J. Gaughan
Civil Action No. 10-C-33

Plaintiffs below/Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

This class action is based upon Tele-Response's violation of the West Virginia Wage Payment and Collection Act (the "Act") regarding the timely payment of final wages in full under W.Va. Code §21-5-4. In particular, subsections (b)-(e) of section 21-5-4 provide that

(b) Whenever a person, firm or corporation discharges an employee, such person, firm or corporation shall pay the employee's wages in full within seventy-two hours.

(c) 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 pay 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.

(d) When work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.

(e) 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 for three times that unpaid amount as liquidated damages. Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages, as he or she would have been entitled to had he or she rendered service therefor in the manner as last employed; except that, for the purpose of such liquidated damages, such failure shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he or she is adjudicated bankrupt upon such petition.

W.Va. Code §21-5-4(b)-(e).

The circuit court entered a class certification order on February 25, 2011, **76-99**, entered a summary judgment order on May 27, 2011, **4-14**, and entered a judgment order on September 7, 2011, **15-18**.

Respondents object to Tele-Response paraphrasing the complaint, motion for summary judgment, and the circuit court's summary judgment order. Petitioner's brief at 5-6 and 9-10.

Respondents refer the Court to the actual papers for their exact contents. **19-24, 102-124, and 4-14**.

Tele-Response operated telemarketing related businesses in Wellsburg, Bluefield, Dunbar, and Parkersburg from on or about January 2, 2010 through January 20, 2010 at 4:00 p.m. **582-1091**. Tele-Response's **Pay Day Policy** provides that "[t]he actual Paydays are scheduled for the 5th and the 20th of each month." **713 and 927**.

Tele-Response employed the subject workers ("the Class") from on or about January 2, 2010 through January 20, 2010 at 4:00 p.m. **582-1091**. The Class consists of approximately 189 Class members – 62 Wellsburg employees, 72 Parkersburg employees, 14 Dunbar employees, and 41 Bluefield employees. On January 20, 2010, Tele-Response notified the Class in a company-wide communication that

[u]nfortunately, effective 4:00 PM today, January 20, 2010, the company must inform you that as a result of unforeseen business circumstances beyond our control, it will be ceasing the operations located at the following offices:

205 North Street, Bluefield, WV 24701

1308 Ohio Avenue, Dunbar, WV 25064

903 Division Street, Parkersburg, WV 26101

704 Charles Street, Wellsburg, WV 26070....

677. It is undisputed that Tele-Response separated the employment of the Class on January 20, 2010 effective at 4:00 p.m. **677**. Tele-Response closed and shuttered the subject telemarketing facilities in Wellsburg, Bluefield, Dunbar, and Parkersburg. As of January 20, 2010, at 4:00 p.m., the jobs of the Class ceased to exist. Tele-Response offered no evidence that it has recalled the Class and no evidence that it notified them that they would be recalled by a date certain or under any set of circumstances. Tele-Response offered no evidence that it resumed operations at the subject locations.

With respect to when and how the Tele-Response paid wages to the Class following that announcement, Tele-Response answered Interrogatory No. 12 as follows:

All checks were mailed to the employees in the four West Virginia offices via first class mail for the pay periods January 1-15, 2010 and January 16-31, 2010. Checks for the January 1-15 pay period were mailed on January 21 and 22, 2010 [“**paycheck #1**”] to all employees in the four West Virginia Offices, and checks for the January 16-31, 2010 pay period were mailed to all employees on February 23, 2010 [“**paycheck #2**”].

The Respondents’ successful claim was based on a common core of facts, namely that Tele-Response did not timely pay the Class members’ wages in full under the Act after the employment separation occurring on January 20, 2010 effective at 4:00 p.m. The circuit court entered a summary judgment order against Tele-Response providing, in part, that

2. The Class members were employees of [Tele-Response] because the employment records are overwhelming evidence proving and establishing that [Tele-Response] employed them.

9. [Tele-Response] discharged the Class members on January 20, 2010, at 4:00 p.m. because [Tele-Response] permanently terminated the employment relationship (and permanently extinguished the subject jobs) when it ceased business operations on January 20, 2010.

12. [Tele-Response] is liable to Class members who worked in Wellsburg, Bluefield, and Dunbar under W.Va. Code §21-5-4(e) regarding paycheck #1 because those Class members did not receive paycheck #1 within 72 hours under W.Va. Code §21-5-4(b).

16. [Tele-Response] is liable to the Class members under W.Va. Code §21-5-4(e) regarding paycheck #2 because [Tele-Response] did not timely pay those wages under either W.Va. Code §21-5-4(b), §21-5-4(c), or §21-5-4(d).

4-14. After the circuit court entered its summary judgment order, the Respondents moved for judgment under W.Va.R.Civ.P. 58 and sought to recover liquidated damages under §21-5-4(e) and fees, costs, and expenses under §21-5-12(b). **242-254.** In support of their motion, the Respondents submitted a certified public accountant’s liquidated damage calculations, **286-287**

and 389-578, attorney fee, cost, and expense records, *289-319*, supporting attorney affidavits, *339-347*, and court opinions in other “fee-shifting” cases, *324-337 and 355-387*. The supporting attorney affidavits provide, among other things, that Class counsel’s amount of time and costs are “reasonable and commensurate” with this type of litigation and was “reasonable and necessarily expended,” that Class counsel “competently and reasonably” litigated the matter, and that Class counsel performed “exceptional legal work” in this matter. *339-347*. The circuit court entered a judgment order against Tele-Response providing, in part, that

- (1) Plaintiffs are awarded liquidated damages in the amount of \$213,310.38 plus prejudgment interest in the amount of \$22,932.79;
- (2) Plaintiffs are awarded costs incurred in the litigation of this case in the amount of \$6992.27;
- (3) Plaintiffs are awarded attorney fees in the amount of \$92,740.00, which is based upon the hourly rates determined by the Court to be reasonable founded upon the totality of circumstances in this case as discussed above.

15-18.

SUMMARY OF ARGUMENT

I. The Respondents respectfully request the Court to affirm the circuit court and find that Tele-Response discharged the Class because it permanently terminated the employment relationship and it did not temporarily suspend it. The Respondents contend that the Court’s recent decision in *Lehman v. United Bank, Inc.*, – W.Va. –, 719 S.E.2d 370 (November 10, 2011) can be distinguished from the present matter because the employer in *Lehman* continued to operate after the employment separation, but Tele-Response stopped operating the subject facilities after the employment separation.

If necessary to affirm the circuit court, the Court should re-visit *Lehman* and the rationale underlying it because the terms “discharge” and “laid off” had clear and well known meanings in

the law when the modern day version of §21-5-4 was enacted in 1975, and these meanings conflict with the regulations cited in *Lehman*. For example, it appears to be the majority view across the country—if not the unanimous view (subject to *Lehman*, of course)—that a “discharge” involves a permanent termination of employment whereas a “layoff” involves a temporary suspension of employment with an anticipation of recall.

II. The Respondents respectfully request the Court to affirm the circuit court and find that Tele-Response is liable for their fees, costs, and expenses, and to also award them the fees, costs, and expenses associated with this appeal, because no special circumstances exist making an award unjust. The circuit court did not abuse its discretion when awarding fees, costs, and expenses because it followed the seminal *Aetna* and *Bishop Coal* decisions and provided an analysis and reason for the award. The Respondents successfully “obtained a judgment” and “enforced a claim” against Tele-Response for violating the Act and should recover their fees, costs, and expenses. The question is not whether or not the filing of a civil claim was necessary to recover unpaid wages. Rather, the question is whether or not the filing of a civil claim was necessary to recover unpaid wages and liquidated damages because Tele-Response’s liability for unpaid wages and liquidated damages are inextricably linked and the same under section 21-5-4(e).

Tele-Response is also liable for the Respondents’ fees, costs, and expenses even if the Court finds that Tele-Response laid off the Class and that Paycheck #1 was timely because the Respondents successfully pursued a single claim based on a common core of facts, i.e. that Tele-Response did not timely pay the Class members’ wages in full under the Act after the

employment separation occurring on January 20, 2010 effective at 4:00 p.m. A finding of “discharge” or “laid off” impacts the amount of liquidated damages only, and not the success of the claim that Tele-Response failed to timely pay wages in full to the Class under the Act.

Finally, Tele-Response is liable for the Respondents’ fees, costs, and expenses related to this appeal because the Court has awarded fees related to an appeal in similar cases. *Hollen v. Hathaway Elec., Inc.*, 213 W. Va. 667, 584 S.E.2d 523, 530 (2003).

III. The Respondents respectfully request the Court to affirm the circuit court and find that Tele-Response employed the Class because there is no “genuine issue” that Tele-Response employed the Class. In entering summary judgment against Tele-Response, the circuit court cited and referenced certain employment records of Respondent Douglas and redacted portions of Tele-Response’s discovery answers. Without question, these employment records unequivocally prove and establish that Tele-Response employed the Class (i.e. Tele-Response offered employment to the Class, hired the Class, paid the Class, represented to the government that it employed the Class, insured the Class, controlled the Class, discharged the Class, etc.). Moreover, Tele-Response admitted employing the Class in discovery and briefing. Finally, Tele-Response is liable to the Class under the Act even if it is not “the employer” because it clearly “suffered or permitted” the Class to work at the Wellsburg, Parkersburg, Dunbar, and Bluefield facilities.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents believe that oral argument is not necessary.

ARGUMENT

I. Notwithstanding the Court's recent decision in *Lehman*, the Respondents respectfully request the Court to affirm the circuit court and find that Tele-Response discharged the Class because it permanently terminated the employment relationship and it did not temporarily suspend it.

The Court has held that “[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syl. Pt. 1 of *Appalachian Power Co. v. State Tax Dep’t of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

The circuit court concluded as a matter of law that “[Tele-Response] discharged the Class members on January 20, 2010, at 4:00 p.m. because [Tele-Response] permanently terminated the employment relationship (and permanently extinguished the subject jobs) when it ceased business operations on January 20, 2010.” *II*.

The Respondents claim that Tele-Response discharged the Class while Tele-Response claims that it laid off the Class. Tele-Response claims that it laid off the Class even though its own employment records reflect that it “Terminated” the Class. *1124-1128*. For that reason alone, the Court should find that Tele-Response discharged the Class on January 20, 2010.

a. The Court's recent decision in *Lehman* can be distinguished from the present matter because the employer in *Lehman* continued operating after the employment separation, but Tele-Response ceased operating after the employment separation.

In *Lehman*, the Court held that “the term ‘laid off’ as used in West Virginia Code §21-5-4(d) (2006) applies to any situation involving a lay-off of an employee, whether the lay-off is temporary or permanent in duration.” Syl. Pt. 4 of *Lehman v. United Bank, Inc.*, – W.Va. –, 719 S.E.2d 370 (November 10, 2011). The Syllabus in *Lehman* does not contain the following language from the opinion: *If the reason for the termination does not relate “to the quality of the employee’s performance or other employee-related reason,” the termination is a lay-off and not*

a discharge. *Lehman* at 374 (Emphasis added). See *Citizens' National Bank v. Burdette*, 61 W.Va. 636, 57 S.E. 53, 54 (1907)(Providing that “[n]ow, our Constitution requires the court to make the syllabus, and it is that which is the real decision over the opinion.”); Syl. Pt. 2 of *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001) (“This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution.”); and *W. Va. Const. art. VIII, §4* (“[I]t shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred, which shall be prefixed to the published report of the case.”).

In theory, the employer in *Lehman* can ask the former employees to return to work at some point in the future (even if their lay-offs were “permanent”) because they lost their jobs as a result of a merger, and not because of a shut down. The employer in *Lehman* continued to operate. In contrast, Tele-Response closed and shuttered the subject telemarketing facilities in Wellsburg, Bluefield, Dunbar, and Parkersburg. Tele-Response ceased operating at these locations.

As a result, the Respondents respectfully request the Court to affirm the circuit court and conclude that Tele-Response discharged the Class under these circumstances.

b. If necessary to affirm the circuit court, the Respondents respectfully request the Court to re-visit *Lehman* because the terms “discharge” and “laid off” have clear and well known meanings in the law and they conflict with the regulations cited in *Lehman*.

At first glance, Respondents concede that the Court’s recent opinion in *Lehman* strongly suggests that Tele-Response laid off the Class because the January 20 shut down did not relate “to the quality of the employee’s performance or other employee related reason” under

W.Va.C.S.R. §42-5-2.10. *Lehman* at 374. However, Respondents respectfully request the Court to re-visit the *Lehman* decision and the rationale underlying it because the terms “discharge” and “laid off” had clear and well known meanings in the law when the modern day version of §21-5-4 was enacted in 1975, and these meanings conflict with the regulations cited in *Lehman*. The parties in *Lehman* apparently did not argue this theory and the opinion in *Lehman* does not address it.

The Act uses the terms “discharge” and “laid off” to characterize two separate and distinct employment separations. W.Va. Code §21-5-4(b) and (d). The Court has held that “[g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.” Syl. Pt. 4 of *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959). Similarly, the Court has held that “[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syl. Pt. 1 of *Miners in General Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941). Moreover, the Court has held that

[a] statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Syl. Pt. 4 of *Kessel v. Monongalia County General Hosp. Co.*, 220 W.Va. 602, 648 S.E.2d 366 (2007). Most important, the Court has held that

[w]hen the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. By borrowing terms of art in which are

accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Syl. Pt. 5 of *Kessel v. Monongalia County General Hosp. Co.*, 220 W.Va. 602, 648 S.E.2d 366 (2007). See also *Lorillard v. Pons*, 434 U.S. 575, 583, 98 S.Ct. 866, 871, 55 L.Ed.2d 40, 47 (1978) (“‘[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.’ *Standard Oil v. United States*, 221 U.S. 1, 59, 31 S.Ct. 502, 515, 55 L.Ed. 619, 646 (1911)”).

The terms “discharge” and “laid off” in §21-5-4 are terms of art. They are clear and unambiguous and have well known meanings in the law and they conflict with the regulations cited in *Lehman*. This was especially true when the modern day version of §21-5-4 was enacted in 1975 and incorporated five (5) categories of employment separation: (1) discharge, (2) quit, (3) resign, (4) suspension as a result of a labor dispute, and (5) laid off. ***Exhibit 1*** (marked by counsel). For example, it appears to be the majority view across the country—if not the unanimous view (subject to *Lehman*, of course)—that a “discharge” involves a permanent termination of employment whereas a “layoff” involves a temporary suspension of employment with an anticipation of recall. See e.g. *Taylor v. United States*, 495 U.S. 575, 592, 110 S.Ct. 2143, 2155, 109 L.Ed.2d 607 (1990)(Recognizing the familiar “maxim that a statutory term is generally presumed to have its common-law meaning.”).

In *CBS Inc. v. International Photographers of the Motion Picture Industries, Local 644*, 603 F.2d 1061 (2d Cir.1979), the court explained the distinction between layoff and discharge when it stated that

[t]he ordinary meanings of the terms discharge and layoff have long been recognized by the courts. A discharge normally means the “termination of the employment relationship or loss of a position.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 286, 66 S.Ct. 1105, 1112, 90 L.Ed. 1230 (1946). A layoff, on the other hand, is ordinarily a “period of temporary dismissal;” inherent in the term is the anticipation of recall. *Id.* at 287 n. 11 & 286-87, 66 S.Ct. at 1112 n. 11, & 1111-12.

603 F.2d at 1063. In fact, the Supreme Court of Rhode Island had to characterize an almost identical employment separation where the employer “shut down its operations.” *Formisano v. Blue Cross of Rhode Island*, 478 A.2d 167, 168 (R.I. 1984). Before characterizing the employment separation, the court noted that

[o]ther jurisdictions have held that the term “lay off” generally means “temporary cessation of employment with an expectation of eventual return.” *Conner v. Phoenix Steel Corp.*, 249 A.2d 866, 869 (Del.1969). In determining the eligibility of an employee under a company pension plan, the Louisiana Court of Appeals found that this term “has been generally interpreted by the courts to mean a suspension of employment and not a termination of employment.” *White v. Crane Co.*, 147 So.2d 32, 36 (La.Ct.App.1962). “Layoff” ordinarily means “a ‘period of temporary dismissal’ ” with anticipation of recall. *CBS Inc. v. International Photographers of the Motion Picture Industries, Local 644, I.A.T.S.E.*, 603 F.2d 1061, 1063 (2d Cir.1979). Within provisions of the Michigan Employment Security Act governing back-to-work benefits, “[a] ‘layoff’ is a temporary dismissal by the employer which anticipates reemployment and therefore is distinguished from unemployment by reason of discharge, resignation or other permanent termination.” (Emphasis added.) *General Motors Corp. v. Erves*, 399 Mich. 241, 253, 249 N.W.2d 41, 46 (1976).

Formisano at 169. As a result, the court concluded that “the term ‘layoff’ as used in §27-19.1-1 does not include employees permanently terminated from employment by reason of an employer’s going out of business.” *Formisano* at 169.

Accordingly, Tele-Response discharged the Class on January 20, 2010, at 4:00 p.m. because Tele-Response permanently terminated the employment relationship (and permanently extinguished the subject jobs) when it ceased business operations on January 20, 2010.

A finding that a “discharge” involves a permanent termination of employment whereas a “layoff” involves a temporary suspension of employment with an anticipation of recall is in line with the underlying statute and the facts of this case. The Court has held that “[i]t is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is used.” *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 338, 472 S.E.2d 411, 423 (1996) (citations omitted). Here, the terms “discharge” and “laid off” are found in the West Virginia Wage Payment and Collection Act. The Court has repeatedly held 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.” Syl. Pt. 3 of *Shaffer v. Fort Henry Surgical Associates, Inc.*, 215 W.Va. 453, 599 S.E.2d 876 (2004). Therefore, the Court has stated that “statutes, 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).

Notwithstanding the fact that “discharge” and “laid off” are clear and unambiguous and have ordinary and familiar meaning (and thus, not subject to regulatory review), the Division of Labor promulgated regulations defining “discharge” and “lay-off” contrary to the well known meanings cited above. See e.g. *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 472 S.E.2d 411, 422 (1996)(Providing that “[w]hen this Court finds the terms of a statute unambiguous, judicial review is complete. In such a case, the statutory language must be regarded as conclusive.”) and Syl. Pt 3. of *Appalachian Power Co. v.*

State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995)(Providing that “[j]udicial review of an agency’s legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency’s position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. No deference is due the agency’s interpretation at this stage.”).

However, the definitions create ambiguity (where no ambiguity otherwise existed) because **both definitions** cover the January 20 shut down. For example, WVCSR 42-5-2.8 provides as follows: “Discharge” means any involuntary termination or the cessation of performance of work by employee due to employer action. WVCSR 42-5-2.10 provides as follows: “Lay-off” means any involuntary cessation of an employee for a reason not relating to the quality of the employee's performance or other employee-related reason.

In sum, the Respondents respectfully request the Court to affirm the circuit court and find that Tele-Response discharged the Class because it permanently terminated the employment relationship and it did not temporarily suspend it.

II. The Respondents respectfully request the Court to affirm the circuit court and find that Tele-Response is liable for their fees, costs, and expenses, and to also award them the fees, costs, and expenses associated with this appeal, because no special circumstances exist making an award unjust.

Tele-Response incorrectly states that “the standard of review by this Court of the lower court’s award of fees and expenses is *de novo*.” Petitioner’s Brief at 16. Rather, the Court has held that “[t]he trial [court]...is vested with a wide discretion in determining the amount of...court costs and counsel fees, [sic] and the trial [court’s]...determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.” Syl. Pt. 1 of *Hollen v. Hathaway Elec., Inc.*, 213 W. Va. 667, 584 S.E.2d 523 (2003)(citations omitted).

Tele-Response also incorrectly states that “[t]he [circuit court’s] order does not provide an analysis or reason for the decision to award fees and expenses.” Petitioner’s Brief at 16. Even a cursory review of the circuit court’s judgment order reveals that the circuit court cited and followed the seminal *Aetna* and *Bishop Coal* decisions and provided an analysis and reason for the award. *15-18*. As a result, the Respondents respectfully request the Court to affirm the award of fees, costs, and expenses because the circuit court did not abuse its discretion. *242-254 and 286-578*.

a. Tele-Response is liable for the Respondents’ fees, costs, and expenses because the Respondents successfully “obtained a judgment” and “enforced a claim” against Tele-Response for violating the Act.

Pursuant to section 21-5-12(b) of the Act, a court “may, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess the costs of the action, including reasonable attorney fees against the defendant.” (Emphasis added). The statute reflects a policy decision by the Legislature that “[w]orking people should not have to resort to lawsuits to collect wages they

have earned.” *Farley v. Zapata Coal Corp.*, 167 W. Va. 630, 639, 281 S.E.2d 238, 244 (1981).

Therefore, “[a]n 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.” *Id.* at Syl. Pt. 3 (emphasis added).

In the present case, the Respondents successfully “obtained a judgment” and “enforced a claim” against Tele-Response for violating the Act and should recover their fees, costs, and expenses. No special circumstances exist making the circuit court’s award unjust. Tele-Response argues that it paid wages in full before the filing of the subject lawsuit and that such payment is a special circumstance making the circuit court’s award unjust. However, this argument misses the mark for a number of reasons.

First, Tele-Response incorrectly states that “[a]ll earnings were paid to the respondents without the need for a civil action although Paycheck #2 was paid late under the Act.” Petitioner’s Brief at 18. In fact, Tele-Response did not pay unpaid wages to Class representative Kace Douglas until August 16, 2010 - almost seven months after the January 20 shutdown. 51. Class counsel did not know, and could not know, if Tele-Response paid wages in full to the approximately 189 Class members until Tele-Response produced wage and employment records. However, Tele-Response fought the production of wage and employment records until after the circuit court certified the class. 263-266.

Second, Tele-Response was liable to the Class for liquidated damages under section 21-5-4(e) from the moment it failed to timely pay wages in full to the Class, i.e. its liability for liquidated damages was instantaneous. In other words, Tele-Response’s liability for unpaid wages and liquidated damages are inextricably linked and the same under section 21-5-4(e). So

the question is not whether or not “the filing of a civil claim was necessary to recover these unpaid earnings.” Petitioner’s Brief at 18. Rather, the question is whether or not the filing of a civil claim was necessary to recover unpaid wages and liquidated damages. The record is void of any attempt by Tele-Response to satisfy its liability under section 21-5-4(e), including the filing of an offer of judgment under Rule 68. To this day, Tele-Response has neither paid nor offered to pay any liquidated damages (or any other amount) to the Class.

The amount of damages awarded to an employee under section 21-5-4(e) is usually small and, at times, nominal. As a result, the employee’s fees, costs, and expenses will almost always exceed the amount of the damages recoverable under section 21-5-4(e). However, an award of fees, costs, and expenses is still proper under section 21-5-4(e). See e.g. *Hollen v. Hathaway Elec., Inc.*, 213 W. Va. 667, 584 S.E.2d 523 (2003) (Holding that counsel was entitled to attorney’s fees of \$13,520.00 [104 hours at \$130.00/hr.] in an action involving wages of \$500.00 and liquidated damages of \$1,500.00) and *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466, 480 (1986)(Stating that an attorney’s fee award of \$245,456.25 was permissible in a case where the plaintiffs were only awarded \$33,350.00 in compensatory damages, and holding that “[w]e reject the proposition that (statutory attorney fee-shifting) awards should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.”).

In *Hollen*, the Court stated that “the purpose of the fee shifting under the Act is that the opportunity to recover attorney’s fees makes it much more likely that the provisions of the Act will be enforced, and that those it seeks to aid will be able to benefit from its protections.” *Hollen* at 671. See also Syl. Pt. 2 of *Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 259

(2006)(Holding that “[i]nherent in any statutory fee award made pursuant to West Virginia Code §5-11-13(c)...is a recognition that the economic incentive provided by such fee-shifting mechanism is necessary to attract competent counsel for the purpose of enforcing civil rights laws that serve to protect the interests of this state’s citizenry.”) and *Rice v. Mike Ferrell Ford, Inc.*, 184 W.Va. 757, 403 S.E.2d 774, 779 (1991)(Recognizing that the purpose of statutory fee-shifting provisions such as under the Odometer Act “‘are a response to legislative recognition that, as a practical matter, ‘in many situations, the amount of damage under the Act will be so small that few attorneys will pursue his client’s case with diligence unless the amount of the fee be proportionate to the actual work required, rather than the amount involved.’” (citation omitted).

Tele-Response’s argument is nothing more than a futile attempt to escape liability for the fees, costs, and expenses it caused the Class to incur in this matter. Tele-Response fought the production of wage and employment records, class certification, the characterization of the employment separation occurring on January 20, and even the fact that it employed the Class. **263-266.** Simply put, Tele-Response fought Respondents “tooth and nail” on almost every single issue in this litigation and has no one to blame but itself for being liable for fees, costs, and expenses. See e.g. fn. 11 of *City of Riverside* (Providing that “[t]hus, [the defendants] could have avoided liability for the bulk of the attorney’s fees for which they now find themselves liable by making a reasonable settlement offer in a timely manner... ‘The [defendants] cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.’ *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 414, 641 F.2d 880, 904 (1980) (en banc)”).

b. Tele-Response is liable for the Respondents' fees, costs, and expenses even if the Court finds that Tele-Response laid off the Class and that Paycheck #1 was timely because the Respondents successfully pursued a single claim based on a common core of facts.

The West Virginia Supreme Court of Appeals and the United States Supreme Court have recognized fee awards when a plaintiff is successful on some, but not all claims. See Heldreth at 364 (Providing that “[w]hat is critical in parsing out fees for unsuccessful claims, as Bishop Coal makes clear, is determining whether a separate and distinct factual development was required to support those alternate theories of recovery upon which recovery was not obtained. If this is the case, then those fees arising in connection with the unsuccessful claims are to be culled out.”).

The Court has recognized that

[o]ften plaintiffs will have one basic problem which, in a complaint, they express in numerous alternative ways, each corresponding to a slightly different legal theory. When this occurs, as it did in the case before us, the fact that the commission or court selects one of the theories upon which to award relief does not necessarily mean that the plaintiff has not substantially prevailed. However, when a complainant sets forth distinct causes of action so that the facts supporting one are entirely different from the facts supporting another, and then fails to prevail on one or more such distinct causes of action, the appellant is correct that attorneys' fees for the unsuccessful causes of action should not be awarded.

Bishop Coal Co. v. Salyers, 181 W. Va. 71, 83, 380 S.E.2d 239, 250 (1989). See also Heldreth at 365 (Providing that “the plaintiff’s claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead, the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.”) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933 (1983)).

In the present case, the Respondents successfully pursued a single claim based on a common core of facts. Respondents alleged that Tele-Response did not timely pay the Class members' wages in full under the Act after the employment separation occurring on January 20, 2010 effective at 4:00 p.m. **19-24**. Respondents pursued no other claims such as, e.g., wrongful discharge, discrimination, retaliation, tort of outrage, etc. A finding of "discharge" or "laid off" impacts the amount of liquidated damages only, and not the success of the claim that Tele-Response failed to timely pay wages in full to the Class under the Act. Again, the "discharge" versus "laid off" question impacts the amount of liquidated damages only and it is strictly a legal issue and no facts are disputed.

c. Tele-Response is liable for the Respondents' fees, costs, and expenses related to this appeal because the Court has awarded fees related to an appeal in similar cases.

For example, in *Hollen*, the Court stated that "this Court has held on several occasions that the right to recover reasonable attorney's fees in cases such as this extends beyond the initial trial below to encompass work performed in the pursuit of a necessary appeal." *Hollen*, 584 S.E.2d at 530 (citing Syl. Pt. 2 of *Orndorff v. West Virginia Dep't of Health*, 165 W.Va. 1, 267 S.E.2d 430 (1980)).

III. The Respondents respectfully request the Court to affirm the circuit court and find that Tele-Response employed the Class because the employment records and Tele-Response's admissions unequivocally prove and establish that Tele-Response employed the Class.

The Court has held that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). W.Va.R.Civ.P. 56(e) provides that "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." The Court has

stated that “summary judgment is proper where the record demonstrates ‘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.’” *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815, 839 (2010)(citing W.Va. R.Civ.P. 56(c)). The Court has recognized that a “genuine issue” exists ““if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party.” *Ramey v. Contractor Enterprises, Inc.*, 225 W.Va. 424, 693 S.E.2d 789, 793 (2010) (citing *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997)).

a. There is no “genuine issue” that Tele-Response employed the Class because the record taken as a whole unequivocally proves and establishes that Tele-Response employed the Class.

Notwithstanding Tele-Response’s affidavit of Joe Grossman, Respondents agree with the circuit court when it found that

2. The Class members were employees of the Defendant because **the employment records are overwhelming evidence proving and establishing that Defendant employed them.**

3. For example, attached as *EXHIBIT 4 [679-711]* are certain employment records of Plaintiff Douglas and attached as *EXHIBITS 6-12 [715-1091]* are redacted portions of Defendant’s discovery answers. **These documents are overwhelming evidence proving and establishing that the Class members were employees of the Defendant.**

4. *EXHIBIT 4 [679-711]* and *EXHIBITS 6-12 [715-1091]* include signed company policies identifying the Defendant as the employer, payroll records identifying the Defendant as the employer, offers of employment identifying the Defendant as the employer, applications for employment identifying the Defendant as the employer, and official government reporting documents identifying the Defendant as the employer or the insured for purposes of workers’ compensation coverage (i.e. Form W-4 Employee’s Withholding Allowance Certificate, Form I-9, Employment Eligibility Verification, Form W-2 Wage and Tax Statement, Form WVUC-A-154-A West Virginia Unemployment Compensation WAGE REPORT, and POLICY INFORMATION PAGE ENDORSEMENT).

5. The Court finds the affidavit of Joseph Grossman attached to MEMORANDUM OF LAW OF DEFENDANT IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT to be self-serving and a description of corporate networking. **The Court finds that the affidavit does not raise even a scintilla of evidence that the Class members were not employees of the Defendant.**

4-14 (Emphasis added).

The Act defines "employee" as "any person suffered or permitted to work by a person, firm or corporation." W.Va. Code §21-5-1(b). The documents referenced by the circuit court are certain employment records of Respondent Douglas, **679-711**, and redacted portions of Tele-Response's discovery answers, **715-1091**. Without question, these documents unequivocally prove and establish that Tele-Response employed the Class (i.e. Tele-Response offered employment to the Class, **916-923 and 959-972**, hired the Class, **681 and 706-708**, paid the Class, **200 and 582-676, 719-899, 910-914, 934-953, and 977-1010**, represented that it employed the Class, **682-686, 709-711, 719-899, and 1025-1077**, insured the Class, **1091**, controlled the Class, **689-703 and 679-711**, discharged the Class, **677**, etc.).

Likewise, the word "Associate" (a term used by Tele-Response to refer to its employees) is used in both Tele-Response's January 20, 2010, discharge letter and Tele-Response's internal e-mail to refer to the Class. **1094-1100** (marked by counsel). Even though Tele-Response seems to contend that International Consolidated Companies, Inc. ("ICCI") and/or DCG Financial, Inc. ("DCG") employed the Class, Tele-Response was the only entity authorized to do business in West Virginia. **1152-1154**. ICCI and DCG have never been authorized and/or qualified to do business in West Virginia. **1152-1154**. Finally, the Act provides that "[e]very person, firm or corporation doing business in this state, except railroad companies as provided in section one of this article, **shall settle with its employees at least once in every two weeks, unless otherwise**

provided by special agreement, and pay them the wages due, less authorized deductions and authorized wage assignments, for their work or services.” W.Va. Code §21-5-3(a) (Emphasis added). This statute requires the payment of wages every two weeks rather than twice a month unless the employer obtains a special agreement. The subject workers were scheduled to be paid on 5th and 20th of each month (i.e. twice a month) so the employing entity must have had a special agreement to pay twice a month. *1156-1160* (marked by counsel). In fact, only Tele-Response had such a special agreement. *1162*.

In sum, the documents cited above unequivocally and overwhelmingly prove and establish that Tele-Response employed the Class

b. There is no “genuine issue” that Tele-Response employed the Class because Tele-Response has admitted employing the Class.

For example, as early as September 27, 2010, the Tele-Response admitted the following in response to five (5) separate Requests for Admission

REQUEST NO. 1. Admit that Defendant discharged Plaintiff Kace Douglas on January 20, 2010 effective at 4:00 p.m. on January 20, 2010.

ANSWER: Denied. Defendant ceased operations in West Virginia on January 20, 2010 and, therefore **ceased to have employees** after January 20, 2010.

REQUEST NO. 3. Admit that Defendant discharged Plaintiff Randi Dampha on January 20, 2010 effective at 4:00 p.m. on January 20, 2010.

ANSWER: Denied. Defendant Tele-Response Center, Inc. ceased **its operations** in West Virginia on January 20, 2010 and, therefore **ceased to have any employees** after January 20, 2010.

REQUEST NO. 5. Admit that Defendant discharged on January 20, 2010 effective at 4:00 p.m. on January 20, 2010 its employees at the following offices (a) 704 Charles Street, Wellsburg, West Virginia, (b) 205 North Street, Bluefield, West Virginia, (c) 1308 Ohio Avenue, Dunbar, West Virginia, and (d) 903 Division Street, Parkersburg, West Virginia..

ANSWER: Denied. Defendant Tele-Response Center, Inc. ceased **its operations** on January 20, 2010 at **its West Virginia locations at Wellsburg, Bluefield, Dunbar and Parkersburg**, and, therefore, **it ceased to have any employees after that date.**

REQUEST NO. 6. Admit that Defendant did not pay wages [as defined in West Virginia Code §21-5-1(c)] in full to its employees at the following offices (a) 704 Charles Street, Wellsburg, West Virginia, (b) 205 North Street, Bluefield, West Virginia, (c) 1308 Ohio Avenue, Dunbar, West Virginia, and (d) 903 Division Street, Parkersburg, West Virginia within seventy-two hours of 4:00 p.m. on January 20, 2010.

ANSWER: Denied. Request No. 6 is too broad to provide a more specific answer at this point in time. **The defendant had multiple employees at its Wellsburg, Bluefield, Dunbar, and Parkersburg offices;** many of **these employees** were paid in a timely fashion. If the plaintiff desires to resubmit their request with the names of **specific employees**, the defendant can provide a more specific answer.

REQUEST NO. 7. Admit that Defendant did not pay any wages [as defined in West Virginia Code §21-5-1(c)] to its employees at the following offices (a) 704 Charles Street, Wellsburg, West Virginia, (b) 205 North Street, Bluefield, West Virginia, (c) 1308 Ohio Avenue, Dunbar, West Virginia, and (d) 903 Division Street, Parkersburg, West Virginia within seventy-two hours of 4:00 p.m. on January 20, 2010.

ANSWER: Denied. Request No. 7 is too broad to provide a more specific answer at this point in time. **The defendant had multiple employees at its Wellsburg, Bluefield, Dunbar, and Parkersburg offices;** many of **these employees** were paid in a timely fashion. If the plaintiff desires to resubmit their request with the names of **specific employees**, the defendant can provide a more specific answer.

1102-1105 (Emphasis added).

Moreover, in its MEMORANDUM OF DEFENDANT IN OPPOSITION TO CLASS CERTIFICATION, Tele-Response stated the following on page 3:

As evidenced by the January 20, 2010 letters attached to plaintiffs' Motion to Certify Class, the defendant laid off all of **its employees** in multiple branches, including four in West Virginia, on January 20, 2010. Pursuant to West Virginia Code Section 21-5-4(d), defendant had until January 31, 2010 to pay **these employees** for work performed from January 16, 2010 to January 20, 2010....common sense dictates that with its January 20, 2010 letter the defendant laid off **its entire work**.

1113 (Emphasis added).

Consequently, Tele-Response's admissions and representations to the Court clearly establish that Tele-Response employed the Class notwithstanding Tele-Response's contention to the contrary.

c. Even if the Court finds that Tele-Response is not “the employer” of the Class or that Tele-Response is not estopped from denying, and/or has not waived the right to deny, that it employed the Class, Tele-Response is subject to the Act vis-a-vis the Class because it is a “joint employer” and/or the Act also imposes liability on non-employers.

Subsections (b)-(e) of W.Va. Code §21-5-4 do not use the phrase “employer.” Instead, those subsections refer to a “person, firm or corporation” on the one hand and to an “employee” on the other hand. The Act defines “employee” as “any person suffered or permitted to work by a person, firm or corporation.” W.Va. Code §21-5-1(b). In other words, liability attaches under the Act merely if a person is “suffered or permitted to work by a person, firm or corporation” without regard to whether or not the “person, firm or corporation” is actually “the employer.”

Based upon the discussion set forth above, Tele-Response clearly “suffered or permitted” the Class to work at the Wellsburg, Parkersburg, Dunbar, and Bluefield facilities. As a result, Tele-Response is subject to the Act vis-a-vis the Class because it is a “person, firm or corporation” under the Act and/or a “joint employer” and/or liable under the Act as a non-employer. See e.g. Syl. Pt. 1 of *Rowe v. Grapevine Corporation*, 193 W.Va. 274, 456 S.E.2d 1 (1995)(Holding that “[t]he West Virginia Wage Payment and Collection Act, *W.Va. Code 21-5-1* [1987], *et seq.* is applicable to any firm that suffers or permits a person to work; therefore, when foreign agricultural workers are recruited by a corporation whose only activity is the hiring, transporting, feeding, housing and payment of workers who perform all their services for individual growers, the individual growers are joint employers of the workers for the purposes of the West Virginia Wage Payment and Collection Act.”)

CONCLUSION

The Respondents respectfully request the Court to (a) affirm the circuit court's summary judgment order entered on May 27, 2011, *4-14*, (b) affirm the circuit court's judgment order entered on September 7, 2011, *15-18*, and (c) award them the fees, costs, and expenses related to this appeal, *Hollen*, 584 S.E.2d at 530 (citing Syl. Pt. 2 of *Orndorff v. West Virginia Dep't of Health*, 165 W.Va. 1, 267 S.E.2d 430 (1980)).

KACE DOUGLAS and
RANDI DAMPHA, individually
and on behalf of all others similarly situated



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(c) 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 pay 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.

(d) When work of any employee is suspended as a result of a labor dispute, or when an employer for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.

(e) 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 due, be liable to the employee for liquidated damages in the amount of wages at his regular rate for each day the employer is in default, until he is paid in full, without rendering any service therefor. Provided, however, that he shall cease to draw such wages thirty days after such default. Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages, as he would have been entitled to had he rendered service therefor in the manner as last employed; except that, for the purpose of such liquidated damages, such failures shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition. (1891, c. 76, § 1; Code 1923, c. 15H, § 80; 1925, c. 37; 1975, c. 147.)

Time of payment of wages may be fixed by agreement. — Under section § 21-5-7, prior to its 1975 amendment, an employer and his employee may by agreement fix the time when wages or salary of the latter shall become due and payable; and a contract of employment, which postpones the payment of wages earned

until the employee, when discharged, vacates a house occupied as an incident of his employment and which works no hardship upon the employee, will not be declared invalid as against public policy. *Konode v. Houston Collieries Co.*, 110 W. Va. 227, 157 S.E. 407 (1931), decided under § 21-5-7 prior to its 1975 amendment.

§ 21-5-5. Coercion of employees to purchase merchandise in payment of wages; sale of merchandise for more than prevailing cash value.

If any corporation, company, firm or person shall coerce or compel, or attempt to coerce or compel, an employee in its, their or his employment to purchase goods or supplies in payment of wages due him, or to become due him, or otherwise, from any corporation, company, firm or person, such first named corporation, company, firm or person shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punishable as provided in the next preceding section (§ 21-5-4). And if any such corporation, company, firm or person shall, directly or indirectly, sell to any such employee in payment of wages due or to become due him, or otherwise, goods or supplies at prices higher than the reasonable or current market value thereof at cash, such corporation, company, firm or person shall be liable to such employee, in a civil action, in double the

value thereof at cash, such corporation, company, firm or person shall be liable to such employee, in a civil action, in double the amount of the charges made and paid for such goods or supplies, in excess of the reasonable or correct value thereof in cash. (1891, c. 76, § 2; Code 1923, c. 15H, § 81.)

Editor's note.—Acts 1887, c. 63, was held unconstitutional in *State v. Fire Creek Coal, etc., Co.*, 33 W. Va. 188, 10 S. E. 288, 25 Am. St. Rep. 891, 6 L. R. A. 359, 14 L. R. A. 326n, 582n, 28 L. R. A. 273 (1889), as being class legislation.

However, as the section then stood it prohibited anyone engaged in mining or manufacturing from selling supplies to their employees at a greater percentage of profit than they acquired from selling to others not employed by them.

§ 21-5-6. Refusal to pay wages or redeem orders.

If any person, firm or corporation shall refuse for the period of twenty days to settle with and pay any of its employees at the intervals of time as provided in section three [§ 21-5-3] of this article, or shall neglect or refuse to redeem any cash orders provided for in this article, within the time specified, if presented, and suit be brought for the amount overdue and unpaid, judgment for the amount of such claim proven to be due and unpaid, with legal interest thereon until paid, shall be rendered in favor of the plaintiff in such action; and, if the laborer continues to hold the cash order herein provided for, given for payment of labor, in case of the insolvency of the person, firm or corporation giving same, such laborer shall not lose his lien and preference under existing laws. (1887, c. 63, § 5; Code 1923, c. 15H, § 79.)

§ 21-5-7. Collection of wages on discharge; lien; limitation of section.

Whenever any employer of labor shall discharge his or its employees without first paying them the amount of any wages or salary then due them in cash, lawful money of the United States, or its equivalent, or by check or draft, within seventy-two hours after demand, or shall fail or refuse to pay them in like money, or its equivalent, or by check or draft, the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment, whether employed by the hour, day, week or month, each of his or its employees so discharged may charge and collect wages in the sum agreed upon in the contract of employment for each day his employer is in default, until he is paid in full, without rendering any service therefor: Provided, however, that he shall cease to draw such wages or salary thirty days after such default. Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages, as he would have been entitled to had he rendered service therefor in manner as last employed. This section shall not apply in case of bankruptcy, assignment or other legal disability of the employer to pay for any

wages so due and owing, or in case of shutdown or other cessation of operations. (1919, c. 30, § 67c; Code 1923, c. 15H, § 67b.)

Time of payment of wages may be fixed by agreement. — Under this section an employer and his employee may by agreement fix the time when wages or salary of the latter shall become due and payable; and a contract of employment, which postpones the payment of wages earned until the employee, when discharged, vacates a house occupied as an incident of his employment and which works no hardship upon the employee, will not be declared invalid as against public policy. *Konoda v. Houston Collieries Co.*, 110 W. Va. 227, 157 S. E. 407 (1931).

§ 21-5-8. Checkweighman where wages depend on production.

Where the amount of wages paid to any of the persons employed in any manufacturing, mining, or other enterprise employing labor, depends upon the amount produced by weight or measure, the persons so employed may, at their own cost, station or appoint at each place appointed for the weighing or measuring of the products of their labor a checkweighman or measurer, who shall in all cases be appointed by a majority ballot of the workmen employed at the works where he is appointed to act as such checkweighman or measurer. (1901, c. 20, § 1; Code 1923, c. 15H, § 55.)

Quoted in *Mouell v. Local No. 7635*, 81 F. Supp. 151 (1948).

ARTICLE 5A.

WAGES FOR CONSTRUCTION OF PUBLIC IMPROVEMENTS.

<p>Sec. 21-5A-1. Definitions. 21-5A-2. Policy declared. 21-5A-3. Fair minimum rate of wages; determination; filing; schedule of wages part of specifications. 21-5A-4. Composition of minimum wage rate board; appointment, term, etc., of members; chairman; duties; secretary and other employees. 21-5A-5. Prevailing wages established at regular intervals; how determined; filing; objections</p>	<p>Sec. to determination; hearing; final determination; appeals to board; judicial review. 21-5A-6. Contracts to contain provisions relative to minimum wages to be paid. 21-5A-7. Wage rates to be kept posted. 21-5A-8. Wage records to be kept by contractor, subcontractor, etc.; contents; open to inspection. 21-5A-9. Penalties for violation of article. 21-5A-10. Existing contracts. 21-5A-11. Provisions of article severable.</p>
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Editor's note. — Acts 1961, c. 72, repealed the former article, consisting of five sections and inserted the present article, consisting of eleven sections. Where provisions of the present article are similar to former provisions, the historical citations for the former sec-

tions have been added to the present provisions.

Minimum wage law for public improvements is not applicable to emergency or temporary repairs. 50 Ops. Att'y Gen. 753 (1964).

§ 21-5A-1. Definitions.

(1) The term "public authority," as used in this article, shall mean any officer, board or commission or other agency of the State of West

Virginia, or any institution supporting West Virginia expenditures of public funds.

(2) The term "construction, repairing, or repair of construction" shall mean...

(3) The term "to be performed, efficient number of men to perform such work or more counties in this State is to be performed and mechanics construction. With State road commissions in the public improvement workmen and on public improvement

(4) The term "to include all built ditches, sewage treatment works upon which Virginia or any

(5) The term "that industry construction of ditches, sewage treatment works or work defined in sub-

(6) The term "substituted in this

(7) The term "construed to be authority on emergency

§ 21-5A-2.

It is hereby a wage of no

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2012, I served the foregoing **RESPONDENTS' BRIEF** upon the following party via Regular U.S. Mail:

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