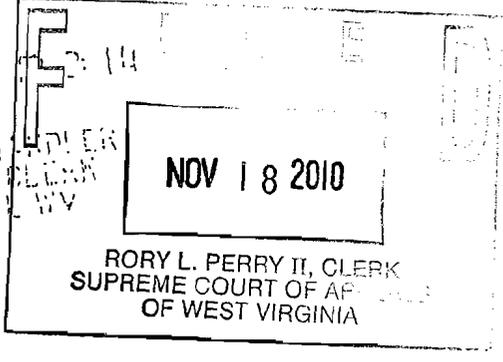


101476

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

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



Plaintiffs,

v.

Civil Action No. 04-C-1123  
Judge F. Jane Husted

KIM WOLFE, in his capacity as CABELL  
COUNTY SHERIFF, the CABELL COUNTY  
SHERIFF'S OFFICE, the CABELL COUNTY  
COMMISSION, and the CABELL COUNTY  
CIVIL SERVICE COMMISSION,

Defendants.

JUDGMENT ORDER

This case came on for trial on March 8, 2010 before the Honorable F. Jane Husted. The case was limited in nature to minimal factual questions to the jury based on the agreement by and between counsel for both parties and this Court's concurrence that the calculation of damages upon the rendering of such a verdict was purely mathematical and flowed from an application of the law to the facts as established by the jury. After voir dire by the Court and counsel, and three strikes each being utilized by the parties plus an additional strike each by the parties for the alternates, a jury of seven, including an alternate, was seated and placed in the box. The parties, by counsel, proceeded with opening statements, followed by the presentation of evidence on behalf of the Plaintiffs in their case in chief. The Plaintiffs called the following witnesses: Johnny R. Bowman, James Johnson, Gary Lambert (individually and as representative of the superior ranking officers at

the time of the closing of the jail), and Kenneth Glover (individually and as representative of the non-ranking officers at the time of the closing of the jail). The remaining Plaintiffs testified through "Stipulations of Expected Testimony," which were agreed to by and between the parties, and through their Affidavits, which were stipulated and agreed to by and between the parties. At the close of this testimony, Plaintiffs rested their case. Defendants moved the Court for judgment as a matter of law at that time on the grounds that Plaintiffs had failed to establish a prima facie claim, which motion was denied.

The Defense then presented its case and called the following witnesses: Chris Tatum, David Pennington, Jim Schiedler, George Kisor, Larry Gay, Barry Lewis, Leah Lewis, and Karen Cole. Defendants also offered testimony of Steve Vincent and Terry McFann through "Stipulations of Expected Testimony," which were agreed to by and between the parties. At the close of this testimony, the defense rested. The Plaintiffs did not present any rebuttal evidence and again rested.

The Defendant again moved the Court for judgment as a matter of law. The Court again denied such motion and found sufficient evidence to allow the case to go to the jury.

After the jury received the instructions of the Court as to the applicable law, which instructions were agreed to and jointly prepared and submitted by the parties, the parties, through their counsel, then presented closing arguments. The jury then retired to deliberate. The jury later reported its verdict on the Verdict Form provided by the Court, which form was again agreed to and jointly prepared and submitted by the parties with minor revisions by the Court. The Verdict Form provided, in relevant part, as follows:

1. *Did the Defendant employers have a policy, either written or unwritten, applicable to the Plaintiff employees regarding what happened to sick leave benefits upon the termination of their employment?*

Yes   X                        No

If your answer to this question is "No", you will return a verdict for the plaintiff and answer no further questions. Date and sign this form and return to the courtroom. The Judge will award any damages the plaintiffs are entitled to pursuant to West Virginia Code 21-5-4(e). However, if your answer to this question is "Yes", proceed to question 2.

2. Did the Plaintiff employees know of any such policy, either written or unwritten, regarding what happened to sick leave benefits upon the termination of their employment?

Yes \_\_\_\_\_ No  X

If your answer to question 2 is "Yes", you will return a verdict for the defendant and answer no further questions. Date and sign this form and return to the courtroom.

If your answer to question 2 is "No", you will return a verdict for the plaintiff and answer no further questions. Date and sign this form and return to the courtroom. The Judge will award any damages the plaintiffs are entitled to pursuant to West Virginia Code 21-5-4(e).

Date: 3/9/10

/s/ William Thomas Lane Jr.  
Foreperson

This verdict having been returned in open court, the parties did not request that the jury be polled. The Court accepted the jury verdict as being proper in form and dismissed the jury with the Court's thanks. The Court instructed the parties to set a hearing on the issue of damages and attorney fees.

Consequently, Plaintiffs filed their "Motion for the Establishment of Damages and Entry of Judgment Order." Defendants filed their Response brief and an Amended Response brief to Plaintiffs' Motion. Additionally, Defendants filed a "Motion for New Trial." The Court, reviewed the submissions of the parties, and heard the arguments of counsel at a hearing on April 2, 2010.

With regards to Defendants' "Motion for New Trial," Defendants' motion raises only one ground – "[t]he jury's verdict was in contradiction to the weight of the evidence presented in the case." *Defendants' Motion for New Trial* ¶1, p. 1. Defendants raise no other alleged errors, mistakes, rulings, admissions, or omissions. Additionally, the parties stipulated as to the submission of certain joint exhibits to-wit: Joint Exhibit No. 1, Jail Division General Order 11-2001 and Joint Exhibit No. 2, Memo Log File #2002-005 and the jury instructions were submitted jointly by the parties.

The prevailing law requires that Defendants argue more than a verdict contrary to the evidence. As set forth by the West Virginia Supreme Court in *Chambers v. Smith*, 157 W.Va. 77, 82, 198 S.E.2d 806, 810 (1973):

Rule 7(b), R.C.P. provides that the grounds for a motion seeking an order of a court shall be stated with particularity. This Court has recently held, and we adhere thereto, that grounds for a motion for a new trial must be stated with particularity and if this is not done the motion should not be considered. 'Merely stating that 'The verdict is contrary to the evidence' has been held not to be sufficient to meet the requirements of stating the grounds with particularity.'

The Defendants relied on the defense that there was an unwritten policy which was known to all employees that when you were terminated you lost all benefits. *Ingram v. The City Of Princeton*, 540 S.E.2d 569 (2000) held that whether the employee knew of the unwritten policy was a jury question.

Accordingly, Defendants' motion is fatally insufficient and further, this Court finds that the evidence was sufficient to support the jury verdict and DENIES the Motion.

At the conclusion of said hearing, the Court granted additional time for the parties to file any further response they desired with reference to the issue of attorney fees and the establishment of damages.

The Court having received additional pleadings from both parties did contact the parties and set a status hearing for May 13, 2010 on the issue of whether the defendants desired to have a full

hearing on the issue of attorney fees. The Defendants informed the Court that they did not feel that a further hearing was necessary and requested that the Court issue a ruling based on the pleadings and argument of counsel on the issue of attorney fees. The Plaintiff requested additional time to submit a further brief memorandum on the issue of damages, which the Court did grant.

It is undisputed that other than Joint Exhibits No 1 and 2, there was no other policy provided to the Plaintiffs which informed them of what happened to sick leave benefits upon termination. The Defendants relied on the defense that there was an unwritten policy which was known to all employees that when you were terminated you lost all benefits.

With respect to damages, at the April 2, 2010 hearing, the Defendants contended for the first time in the history of this case, in their Amended Response, that the sick leave benefits should be limited to a period of Thirty (30) days referencing Joint Exhibit No. 2, which consists of four pages. The fourth page with the hand written heading at the top, Policy of County of Cabell Commission, relates to Sick Leave and provides among other things the following language: "... The carryover of the sick leave time for bona fide personal illness absences is limited to 30 days; provided, however, for retirement purposes there is unlimited carryover of sick leave time." There is no language contained in said exhibit which expressed what happened to sick leave in the event the employee quit or was terminated.

The defendants admitted that the proffered number of "accrued" sick leave days was correct in their Responses to Requests for Admissions. Eighteen out of Twenty-two Plaintiffs had accrued sick leave days which exceeded Thirty (30) days. The defendants never at any time indicated to the Court or opposing counsel that said sick leave was to be limited to Thirty (30) days. The defendants never moved to withdraw or modify said admissions. The defendants did not make any argument with reference to said issue to the jury. Pursuant to W.Va. R.Civ.P. 36(b), "[a]ny matter admitted under this rule is conclusively established."

The jury had this exhibit and ruled that the employees did not know Defendant's sick leave policy upon termination. By implication, the jury verdict established that the Plaintiffs did not know that benefits would be limited to thirty (30) days under any circumstances.

In *Meadows v Wal-Mart Stores, Inc.*, 530 S.E.2d 676 (1999), the Court held in Syl. Pt. 5, "Pursuant to W.Va. Code § 21-5-1(c) (1987), whether fringe benefits have then accrued, are capable of calculation and payable directly to an employee so as to be included in the term "wages" are determined by the terms of employment and not by the provisions of W.Va. Code § 21-5-1(c). Further, the terms of employment may condition the vesting of a fringe benefit right on eligibility requirements in addition to the performance of services, and these terms may provide that unused fringe benefits will not be paid to employees upon separation from employment."

The Court further held in Syl. Pt. 6, "Terms of employment concerning the payment of unused fringe benefits to employees must be express and specific so that employees understand the amount of unused fringe benefit pay, if any, owed to them upon separation from employment. Accordingly, this Court will construe any ambiguity in the terms of employment in favor of employees." See also *Ingram v. The City Of Princeton*, 540 S.E.2d 569 (2000); *Howell v. The City of Princeton*, 559 S.E.2d 424 (2001); *Gress v. Petersburg Foods LLC*, 592 S.E.2d 811 (2003).

This principle was recently reaffirmed in *Isaacs v. Bonner*, No. 35284 (May 6, 2010), wherein the Court found the language compelling.

That language, of course, is a restatement of principles expressed in the legislative and regulatory mandates concerning the Wage Payment and Collection Act. As W.Va. Code, 21-5-9(3) (1975), provides: 'Every person, firm and corporation shall: . . . (3) Make available to his employees in writing or through a posted notice maintained in a place accessible to his employees, employment practices and policies with regard to vacation pay, sick leave, and comparable matters.' Furthermore, § 42-5-4.2 of the Code of State Regulations concerning the Wage Payment and Collection Act states that '[t]he written record or records with respect to each and every employee shall contain . . . (g) Hours worked each workday and total hours worked each workweek; [and the] (h) Method of calculating the percent of fringe benefits owed to an employee at any given time.' In addition, § 42-5-14.1 and 14.2 provide, in part, that '[a]ll employers shall at the time of hire

notify their employees . . . [of the] method of computing fringe benefits[,] . . . [and the] employer shall furnish to each employee an itemized statement of wages[.]'

The Court does therefore find, as a matter of law, that the Defendants' sick leave policy was ambiguous in that there was no mention of what happened to accrued sick leave benefits upon termination and any ambiguity must be construed in favor of the employees. The Court does further find, in accordance with the jury verdict, which found the plaintiffs did not know of the Defendants' policy, that damages cannot be limited to Thirty (30) days of accrued sick leave benefits.

Wherefore, based on the findings of the jury, as set forth above, and having reviewed all pleadings and arguments of counsel, the Court finds and concludes as follows:

1. Each of Plaintiffs' respective accumulated sick leave days and rates of pay are established by admission in Defendants' Responses to Plaintiffs' Requests for Admissions. Since these figures have been admitted to by Defendants, the Court accepts them and recognizes them as accurate.
2. Likewise, Defendants' Responses to Plaintiffs' Requests for Admissions also establish that a full days' wages was based on an 8-hour workday.
3. By stipulation at trial and by further agreement between counsel at the April 2, 2010 hearing, Plaintiffs' last regular payday occurred no later than December 15, 2003.
4. Plaintiffs' employment with Defendants terminated pursuant to and in connection with the opening of the new Western Regional Jail and, as such, Plaintiffs were laid off from their positions with Defendants in December 2003. Accordingly, all wages, including accumulated fringe benefits, were due and payable to Plaintiffs not later than the next regular payday, pursuant to W.Va. Code § 21-5-4(d).<sup>1</sup>

---

<sup>1</sup> To the extent that there is any dispute as to the nature of Plaintiffs' termination of employment, W.Va. Code § 21-5-4(b) and (c) both address any other possibilities and provide that all wages, including accumulated fringe benefits, were due and payable to Plaintiffs either within 72 hours but in no event later than the next regular payday.

5. According to W.Va. Code § 21-5-4(e), as it was codified on both the date that the Plaintiffs' right to bring their claim had accrued and on the date on which the Complaint was filed,<sup>2</sup> because the Defendants failed to pay Plaintiffs' wages as required by the next regular payday, December 15, 2003, the Defendants are liable to each Plaintiff for liquidated damages in the amount of an additional 30 days' wages, for penalty.
6. Accordingly, Plaintiffs' accumulated wages total the following amounts: \$3,922.84 for Plaintiff Nathaniel Adkins, consisting of \$1,592.44 for 20.5 sick days and \$2,330.40 for 30 days of liquidated damages at the rate of \$9.71 per hour and \$77.68 per day; \$14,722.76 for Plaintiff Jerri Allred, consisting of \$11,768.36 for 119.5 sick days and \$2,954.40 for 30 days of liquidated damages at the rate of \$12.31 per hour and \$98.48 per day; \$17,617.60 for Plaintiff Tim Blevins, consisting of \$14,872.00 for 162.5 sick days and \$2,745.60 for 30 days of liquidated damages at the rate of \$11.44 per hour and \$91.52 per day; \$23,691.80 for Plaintiff Johnny R. Bowman, consisting of \$20,497.40 for 192.5 sick days and \$3,194.40 for 30 days of liquidated damages at the rate of \$13.31 per hour and \$106.48 per day; \$4,603.34 for Plaintiff John Bowman, II, consisting of \$2,402.54 for 32.75 sick days and \$2,200.80 for 30 days of liquidated damages at the rate of \$9.17 per hour and \$73.36 per day; \$6,293.76 for Plaintiff Dianne Brubaker, consisting of \$3,759.36 for 44.5 sick days and \$2,534.40 for 30 days of liquidated damages at the rate of \$10.56 per hour and \$84.48 per day; \$7,451.76 for Plaintiff Darrell Chapman, consisting of \$5,008.56 for

---

Accordingly, for purposes of calculating damages here, the Court will find that the next regular payday, being later in time, is the appropriate date for calculation.

<sup>2</sup> W.Va. Code § 21-5-4(e) was amended effective 90 days after March 10, 2006 to provide for liquidated damages in the amount of an additional 3 times the unpaid sick leave pay for each Plaintiff employee. However, because this claim accrued December 15, 2003, Plaintiffs claims are governed by the law in existence at the time of accrual.

61.5 sick days and \$2,443.20 for 30 days of liquidated damages at the rate of \$10.18 per hour and \$81.44 per day; \$8,775.60 for Plaintiff John Coburn, consisting of \$6,219.60 for 73.0 sick days and \$2,556.00 for 30 days of liquidated damages at the rate of \$10.65 per hour and \$85.20 per day; \$4,777.32 for Plaintiff Kenneth Glover, consisting of \$2,446.92 for 31.5 sick days and \$2,330.40 for 30 days of liquidated damages at the rate of \$9.71 per hour and \$77.68 per day; \$4,466.60 for Plaintiff Wayne Jarrell, consisting of \$2,136.20 for 27.5 sick days and \$2,330.40 for 30 days of liquidated damages at the rate of \$9.71 per hour and \$77.68 per day; \$4,855.00 for Plaintiff Ruth Jones, consisting of \$2,524.60 for 32.5 sick days and \$2,330.40 for 30 days of liquidated damages at the rate of \$9.71 per hour and \$77.68 per day; \$10,799.36 for Plaintiff Gary Lambert, consisting of \$8,053.76 for 88.0 sick days and \$2,745.60 for 30 days of liquidated damages at the rate of \$11.44 per hour and \$91.52 per day; \$10,350.80 for Plaintiff Ronnie Miller, consisting of \$7,638.80 for 84.5 sick days and \$2,712.00 for 30 days of liquidated damages at the rate of \$11.30 per hour and \$90.40 per day; \$7,017.84 for Plaintiff Bonnie Myers, consisting of \$4,555.44 for 55.5 sick days and \$2,462.40 for 30 days of liquidated damages at the rate of \$10.26 per hour and \$82.08 per day; \$6,393.60 for Plaintiff Steven Rappold, consisting of \$3,996.00 for 50.0 sick days and \$2,397.60 for 30 days of liquidated damages at the rate of \$9.99 per hour and \$79.92 per day; \$11,895.24 for Plaintiff Jerry Ryder, consisting of \$9,425.64 for 114.5 sick days and \$2,469.60 for 30 days of liquidated damages at the rate of \$10.29 per hour and \$82.32 per day; \$2,151.60 for Plaintiff Jeremy Skidmore, consisting of \$195.60 for 3.0 sick days and \$1,956.00 for 30 days of liquidated damages at the rate of \$8.15 per hour and \$65.20 per day; \$4,088.16 for Plaintiff Karen Spence, consisting of \$1,683.36 for 21.0 sick days and

\$2,404.80 for 30 days of liquidated damages at the rate of \$10.02 per hour and \$80.16 per day; \$8,405.76 for Plaintiff Gregg Stiltner, consisting of \$5,871.36 for 69.5 sick days and \$2,534.40 for 30 days of liquidated damages at the rate of \$10.56 per hour and \$84.48 per day; \$11,717.16 for Plaintiff James Vaught, consisting of \$9,141.96 for 106.5 sick days and \$2,575.20 for 30 days of liquidated damages at the rate of \$10.73 per hour and \$85.84 per day; \$8,021.84 for Plaintiff Elgin Ward, consisting of \$5,578.64 for 68.5 sick days and \$2,443.20 for 30 days of liquidated damages at the rate of \$10.18 per hour and \$81.44 per day; and \$5,010.36 for Plaintiff Kevin White, consisting of \$2,679.96 for 34.5 sick days and \$2,330.40 for 30 days of liquidated damages at the rate of \$9.71 per hour and \$77.68 per day.

7. Furthermore, W.Va. Code § 56-6-31 provides that “if the judgment or decree, or any part thereof, is for special damages [defined to include “lost wages and income”], or for liquidated damages, the amount of such special or liquidated damages shall bear interest from the date the right to bring the same shall have accrued, as determined by the court.”
8. Here, the Court finds, and the parties agree, that “the date the right to bring the same shall have accrued” was the date of Plaintiffs’ last regular payday on December 15, 2003. Thus, Plaintiffs are entitled to prejudgment interest on both their special damages and liquidated damages since December 15, 2003.
9. Because December 15, 2003 was the date on which Plaintiffs’ right to bring their claim accrued, Plaintiffs are entitled to prejudgment interest at the rate of ten percent per annum, which “shall remain constant from that date until the date of the judgment or decree” even if the Supreme Court’s determined interest rate changes in subsequent years prior to judgment. W.Va. Code § 56-6-31.

10. Accordingly, Plaintiffs are entitled to the following additional amounts as prejudgment interest at the rate of ten percent per annum for 2,276 days, calculated simply, from December 15, 2003 through March 9, 2010 (the date of the jury verdict) totaling the following amounts: \$2,446.13 for Plaintiff Nathaniel Adkins; \$9,180.55 for Plaintiff Jerri Allred; \$10,985.66 for Plaintiff Tim Blevins; \$14,773.30 for Plaintiff Johnny R. Bowman; \$2,870.47 for Plaintiff John Bowman, II; \$3,924.55 for Plaintiff Dianne Brubaker; \$4,646.63 for Plaintiff Darrell Chapman; \$5,472.13 for Plaintiff John Coburn; \$2,978.95 for Plaintiff Kenneth Glover; \$2,785.20 for Plaintiff Wayne Jarrell; \$3,027.39 for Plaintiff Ruth Jones; \$6,734.07 for Plaintiff Gary Lambert; \$6,454.36 for Plaintiff Ronnie Miller (deceased); \$4,376.06 for Plaintiff Bonnie Myers; \$3,986.60 for Plaintiff Steven Rappold; \$7,417.42 for Plaintiff Jerry Ryder; \$1,341.66 for Plaintiff Jeremy Skidmore; \$2,549.22 for Plaintiff Karen Spence; \$5,241.51 for Plaintiff Gregg Stiltner; \$7,306.37 for Plaintiff James Vaught; \$5,002.11 for Plaintiff Elgin Ward; and \$3,124.27 for Plaintiff Kevin White.

11. Consequently, when totaling accrued sick leave, liquidated damages, and prejudgment interest, the Plaintiffs are entitled to the following cumulative amounts: \$6,368.97 for Plaintiff Nathaniel Adkins; \$23,903.31 for Plaintiff Jerri Allred; \$28,603.26 for Plaintiff Tim Blevins; \$38,465.10 for Plaintiff Johnny R. Bowman; \$7,473.81 for Plaintiff John Bowman, II; \$10,218.31 for Plaintiff Dianne Brubaker; \$12,098.39 for Plaintiff Darrell Chapman; \$14,247.73 for Plaintiff John Coburn; \$7,756.27 for Plaintiff Kenneth Glover; \$7,251.80 for Plaintiff Wayne Jarrell; \$7,882.39 for Plaintiff Ruth Jones; \$17,533.43 for Plaintiff Gary Lambert; \$16,805.16 for Plaintiff Ronnie Miller (deceased); \$11,393.90 for Plaintiff Bonnie

Myers; \$10,380.40 for Plaintiff Steven Rappold; \$19,312.66 for Plaintiff Jerry Ryder; \$3,493.26 for Plaintiff Jeremy Skidmore; \$6,637.38 for Plaintiff Karen Spence; \$13,647.27 for Plaintiff Gregg Stiltner; \$19,023.53 for Plaintiff James Vaught; \$13,023.95 for Plaintiff Elgin Ward; and \$8,134.63 for Plaintiff Kevin White; altogether totaling \$303,654.90.

12. Pursuant to W.Va. Code § 56-6-29, "in all cases where a judgment or decree is rendered or made for the payment of money, it shall be for the aggregate of principal and interest due at the date of the verdict." Thus, the judgment shall include both the principal due and prejudgment interest.

Plaintiffs have also contended they are entitled to their costs and fees incurred in bringing this action, and reasonable attorney's fees, pursuant to W.Va. Code § 21-5-12. *See also Shafer v. Kings Tire Service, Inc.*, 597 S.E.2d 302, 215 W.Va. 169 (2004); *Hollen v. Hathaway Electric, Inc.*, 584 S.E.2d 213 W.Va. 667 (2003).

With respect to the issue of reasonable attorney fees, Defendants maintain that the attorney fee requested by Plaintiffs' counsel is unreasonable and unjustified. The Defendants have made no comment in any way with respect to the costs that Plaintiffs have claimed.

The Wage Payment and Collection Act, W.Va. Code § 21-5-1 et seq., permits the recovery of attorney's fees. The Act provides in pertinent part:

(a). Any person whose wages have not been paid in accord with this article ... may bring any legal action necessary to collect a claim under this article.

(b). The court in any action brought under this article may, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant.... W.Va. Code § 21-5-12 (1975).

Clearly the Legislature intended that prevailing workers could recover fees under the Act. As this Court has observed in *Hollen v. Hathaway Electric Inc.*, 584 S.E.2d 523 (2003), "the purpose of the fee shifting under the Act is that the opportunity to recovery 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:

We feel that costs, including attorney fees, should be awarded to prevailing plaintiffs as a matter of course in the absence of special circumstances which would render such an award unjust. Both the Wage Payment and Collection Act and our mechanics' lien statutes are designed to protect the laborer and act as an aid in the collection of compensation wrongfully withheld. Working people should not have to resort to lawsuits to collect wages they have earned. When, however, resort to such action is necessary, the Legislature has said that they are entitled to be made whole by the payment of wages, liquidated damages, and costs, including attorney fees. If the laborer were required to pay attorney fees out of an award intended to compensate him for services performed, the policy of these statutes would be frustrated.

*Farley v. Zapata Coal Corp.*, 167 W.Va. 630, 639, 281 S.E.2d 238, 244 (1981); accord, *Taylor v. Mutual Min., Inc.*, 209 W.Va. 32, 543 S.E.2d 313 (2000) (*per curiam*). The Court went on to hold: "An employee who succeeds in enforcing a claim under W.Va. Code Chapter 21, article 5 should ordinarily recover costs, including reasonable attorney's fees unless special circumstances render such an award unjust." *Farley* at syl. pt. 3.

Plaintiffs' fee agreement with counsel indicated that his attorney shall receive "40% of any recovery if full preparation for trial is made and/or the case is tried." Fee Agreement and Contract.

In *Hollen*, the Court stated:

Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Syl. pt. 4, *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

In *Shafer v. Kings Tire Service, Inc.*, 597 S.E.2d 302 (2004), the Court held "When the relief sought in a human rights action is primarily equitable, 'reasonable attorneys' fees' should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate--the lodestar calculation--and (2) allowing, if appropriate, a contingency enhancement. The general factors outlined in Syllabus Point 4 *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986) should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and, (2) the allowance and amount of a contingency enhancement." Syllabus point 3, *Bishop Coal Co. v. Salyers*, 181 W.Va. 71, 380 S.E.2d 238 (1989).

And as stated in *Heldreth v. Rahimian*, 637 S.E.2d 359 (2006), "The underlying basis for an award of fees pursuant to the fee shifting statute at issue was articulated in *Bishop Coal Company v. Salyers*, 181 W.Va. 71, 380 S.E.2d 238 (1989):

The goal of the West Virginia human rights law is to protect the most basic, cherished rights and liberties of the citizens of West Virginia. Effective enforcement of the human rights law depends upon the action of private citizens who, from our observations of these matters, usually lack the resources to retain the legal counsel necessary to vindicate their rights. Full enforcement of the civil rights act requires adequate fee awards.

181 W.Va. at 80, 380 S.E.2d at 247. Thus, inherent 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 a 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."

Therefore, the Court does hereby find as follows:

1. The contingency fee agreement between the parties is not the deciding factor in awarding an attorney fee in a fee-shifting case such as the one before the Court.
2. Plaintiff's counsel has indicated that he expended 388.1 hours that he can actually document, although he believes this total should actually be higher by as much as 25-35%.

3. The novelty and difficulty of the questions presented in this case were not remarkable.
4. The skill required to perform the legal services properly was moderate.
5. Counsel did not cite for the court any preclusion of other employment due to the acceptance of this case. Therefore, the Court does not consider this factor in making its decision.
6. The customary contingency fee in taking a case to trial ranges from 33 and 1/3 percent to 40 percent.
7. The fee was contingent.
8. There were no cited time limitations imposed by the client or circumstances of the case. Therefore, the Court does not consider this factor in making its decision.
9. The amount involved varied between the individual Plaintiffs with a low of (before liquidated damages as provided by statute) \$195.60 to a high of \$20,497.40.
10. The experience, reputation and ability of counsel is considered good to excellent by this court. Mr. Bailey has ten years of experience practicing law.
11. The desirability of the case is considered low by this court.
12. Counsel did not indicate the nature and length of his professional relationship with the Plaintiffs. Therefore, the Court does not consider this factor in making its decision.
13. As the award in this case is based purely on a mathematical calculation of hours of sick leave accrued, the Court did not compare awards in other cases.
14. The Plaintiff represented twenty two plaintiffs which obviously required more time than one plaintiff only.

The Court further notes that in *Bishop*, the Court recognized in footnote 10 that the great weight of authority is that the lodestar calculation is the general rule in awarding attorneys' fees with occasional contingency enhancement.

Counsel presented to the Court an affidavit from Mike Ranson, Esq., an attorney who practices in Charleston, WV, which indicated in his opinion an hourly rate of \$250.00 would not be excessive and that an attorney in his firm was recently awarded an hourly rate of \$350.00 in a similar fee-shifting case.

Defendants' counsel argues that an award of \$250.00 per hour would be excessive.

This Court has addressed this issue before in an employment discrimination case tried in McDowell County, where the losing side argued that the attorney's fees awarded to the winning side were in excess of the prevailing rate for the area. In *Bishop*, which was decided in 1989, the Court awarded a fee of \$110.00 per hour.

As this Court explained in *Hollen*:

Appellant employer argues that her charges exceed the hourly rate that would have been charged by competent lawyers in McDowell or Mercer Counties. But in this regard we note that the appellant employer is represented by a distinguished Charleston law firm, and we doubt that [employee's counsel's] hourly rates significantly exceed the hourly rates paid by the appellant. *Bishop Coal Co. v. Salyers*, 181 W.Va. 71, 82, 380 S.E.2d 238, 249 (1989). The instant matter was filed in Upshur County. Ms. Hollen's counsel is based in Morgantown and appellee's counsel in Clarksburg, both communities with significantly larger populations and a greater number and variety of attorneys than one might find in Upshur County.

One advantage for a client seeking counsel in a relatively larger community is the availability of a larger pool of legal talent, and a correspondingly greater variety of specializations. One disadvantage, however, is that the attorney from the larger community usually charges a higher hourly rate. While a rate enormously greater than the "local rate" would not stand, courts considering the reasonableness of attorney's fees should consider how common it is today for lawyers to travel from Charleston, or Clarksburg, or Huntington, or other cities to represent clients in other, smaller counties. As the Court noted in *Salyers*:

[W]e agree with the appellant that a losing defendant cannot be saddled with attorneys' fees that are unreasonably large simply because the plaintiff chooses a lawyer from New York City or another urban area where overhead costs and

prevailing hourly rates make the lawyer's customary and usual charges far above what equally competent West Virginia lawyers would charge. That, however, is not the situation in this case: [employee's counsel's] hourly rate was comparable--and perhaps even below--what a young partner in a major firm headquartered in Charleston would charge for a case conducted in southern West Virginia.

Id., 181 W.Va. at 82, 380 S.E.2d at 249 (1989).

Counsel for the defendants did not pose any questions to Plaintiff's counsel concerning his hours expended other than to say he "was amazed" and made no comment with reference to the court costs asserted. This case has been on going since 2004. This Judge inherited the case in November, 2008 and started active advancement toward trial status at that time. Therefore, the Court cannot attest to how much time was spent in court hearings before it became involved, but since November, 2008, the Court does not dispute the amount of time that Plaintiff's counsel indicates he has spent in court on said case. Therefore, based on the information provided, the Court has no basis to question Mr. Bailey's hours expended as reflected in the invoice that has previously been filed with the Court.

Plaintiff's counsel argued that 1.) this case has been pending for more than five and one-half years and Plaintiffs' counsel has been involved for more than six and one-half years; 2.) activities have involved numerous letters and attempted negotiations, filing of the Complaint, numerous discovery requests and responses, numerous depositions, multiple motions and hearings,<sup>3</sup> unsuccessful mediation on 2 occasions,<sup>4</sup> and the two day trial of this matter; 3.) the legal questions involved unique aspects that made this case more difficult than the average case; 4.) perhaps most importantly, case management and coordination for a case involving twenty-two Plaintiffs was extremely challenging to say the least; 5.) additionally, while on the high end of the scale, the 40%

---

<sup>3</sup> In fact, the Court heard argument on at least 3 motions for summary judgment, numerous motions in limine, and various other motions.

<sup>4</sup> The Commissioners failed to appear for the first mutually agreed upon mediation date, which led to sanctions in this matter.

contingent fee charged is standard in this area for a case that has been tried. When further considering that the average attorney fee per Plaintiff is just over \$5,500.00, the reasonableness of the fee becomes apparent given the amount of time and effort expended on the case.

Plaintiff's counsel further argued that when also considering that the purpose for awarding attorney fees to Plaintiffs in matters such as this is to make them whole, and further considering that the Defendants were aware of the contingent nature of the fee arrangement here between Plaintiffs and their counsel from the earliest days of this case, this Court finds that it would unfairly prejudice the Plaintiffs to award them less than the contingent fee contracted for with their attorney due to Defendants willingness to "roll the dice" and place this case in front of a jury.

The Court finds that the issue is not whether working people who assert their legal rights under W.Va. Code 21-5-1 are entitled to attorney fees, but what a reasonable attorney fee would be under the facts and circumstances of the particular case. *Farley v Zapata Coal Corp.*, 281 S.E.2d 238 (1981).

Furthermore, as stated in footnote 7 in *Rice v. Ford*, 403 S.E.2d 774 (1991), in *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 726 (1978), an Odometer Act case the Court noted that allowing the recovery of attorney's fees "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.' " See also *Fleet Investment Co., Inc v. Rogers* 620 F.2d at 793. The Court finds that same reasoning persuasive in a wage and hour claim such as the one before this Court.

The Court notes that a 33 and 1/3% attorney fee would amount to \$101,117.08; a 40% attorney fee would be \$121,461.96; and a fee based upon 388.1 hours at the rate of \$250.00 would be \$97,025.00. The Court had instructed counsel not to include in his hourly fee calculations the

time spent in preparing the same, but based on *Hollen*, the Court recognizes that it was wrong and counsel is entitled to be compensated for said work. Therefore, upon counsel's submission that he expended an additional 4.8 hours in preparing his fee invoice, the Court does add to the hours previously furnished by counsel the sum of 4.8 hours for a total of 392.9 hours which would result in a fee of \$98,225.00.

Consequently, under the facts and circumstances of this particular case, the Court has applied a balancing test using the factors enumerated herein to determine the amount of attorney fees to be awarded on the basis of the time reasonably expended on this litigation and has taken into consideration the purpose of awarding attorneys' fees in action such as this. Thus having balanced all of the appropriate factors, the Court does hereby award attorney fees totaling \$98,225.00 which shall be assessed against the Defendants in addition to \$5,052.36 in costs.<sup>5</sup>

Accordingly, pursuant to the jury's verdict, and the findings and law as set forth above, this Court hereby ORDERS, ADJUDGES, DECREES, and AWARDS Plaintiffs judgment, as set forth above, in an amount totaling \$303,654.90 for cumulative unpaid accrued sick leave, liquidated damages, and prejudgment interest from December 15, 2003 through March 9, 2010. Furthermore, this Court also AWARDS Plaintiffs attorney fees and costs totaling \$103,277.36 against Defendants in this matter as set forth above. Consequently, this amounts to a total award of \$406,932.26 through March 9, 2010.

It is further ORDERED that this judgment shall accrue interest from the date of the jury's verdict, March 9, 2010, forward, until paid in full, at the prevailing statutory rate of 7% per annum based on the interest rate established by the West Virginia Supreme Court for this year, which rate

---

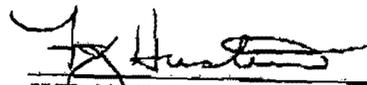
<sup>5</sup> Of these \$5,052.36 in costs, \$2,750 are filing fees, an additional \$700 are deposition fees, ~\$500 are mediation costs, and the remaining are other incidental costs and fees.

shall remain constant even if the Supreme Court's determined interest rate changes in subsequent years. W.Va. Code § 56-6-31.

This Court further ORDERS, ADJUDGES and DECREES that Defendants' Motion for New Trial is fatally insufficient and DENIES said Motion.

The Clerk of the Court is directed to mail certified copies of this Order to Mike Bailey and William Watson.

Entered this \_\_\_\_ day of June, 2010.

  
\_\_\_\_\_  
JUDGE F. JANE HUSTEAD

ENTERED Circuit Court Civil Order Book

No. 229 Page 202 of 210

JUN 4 2010