

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 101476

KIM WOLFE, in his capacity as Cabell County Sheriff; CABELL COUNTY SHERIFF'S OFFICE; CABELL COUNTY COMMISSION;
and the CABELL COUNTY CIVIL SERVICE COMMISSION,
Defendants Below, Petitioners

v.

NATHANIEL ADKINS; JERRI ALRED; 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; STEVE RAPPOLD; JERRY RYDER; JEREMY SKIDMORE; KAREN SPENCE; GREGG STILTNER; JAMES VAUGHT; ELGIN WARD; and KEVIN WHITE, Plaintiffs Below, Respondents

Hon. F. Jane Hustead, Judge
Circuit Court of Cabell County
Civil Action No. 04-C-1123

REPLY BRIEF

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I. STATEMENT OF THE CASE

This is a reply brief in an appeal from a judgment finding that although Cabell County had a written policy which stated, “When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department” (emphasis supplied), the petitioners were obligated to pay employees whose jobs were eliminated not only the value of that sick leave, but an additional 30 days liquidated damages and attorney fees, for a total judgment of \$406,932.26, because the employees never read the county’s policy.

1. The Petitioners Assert Questions of Law, Not Issues of Fact.

In their brief, respondents repeatedly emphasize the fact that the judgment in this case was entered after a jury trial, but petitioners’ assignments of error are matters of law, not matters of fact. Specifically, where the written policy clearly precluded respondents from receiving anything for their accumulated sick leave, judgment should have been entered for petitioners; where respondents had counsel, but nevertheless executed releases at the time of termination of their employment, judgment should have been entered for petitioners; where respondents conceded that accumulation of more than thirty days of sick leave was prohibited, judgment should have been entered for petitioners for anything in excess of thirty days; and, finally, where the right to payment for accumulated sick leave had never been asserted by respondents or any other county employee, let alone established, until the filing of this suit, judgment should have been entered for petitioners on respondents’ request for statutory penalties and attorney fees.

2. The Evidence is Undisputed that Respondents Were Advised They Were Subject to County Policy Which Cancels Accumulated Sick Leave Upon Termination of Employment.

Respondents emphasize that there was no evidence that anyone ever handed them a copy of the county's policy which clearly states, ""When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department," but conveniently ignore the evidence that they had been informed that "Correction officers may accumulate yearly sick leave in accordance with policies to be established by the county commission." (Emphasis supplied).

3. Because the County Policy was on File with the Commission, Respondents Are Charged with Constructive Notice of that Policy.

There is good reason for the maxim that "ignorance of the law is no excuse."¹ Here, respondents admit that they were told that the sick leave was controlled by county policy and their only excuse is "ignorance," which is simply insufficient. Because the county's policy was on file in the county's offices, respondents are charged with constructive knowledge of that policy irrespective of any actual knowledge.²

4. The Evidence is Undisputed that No Cabell County Has Ever Been Paid for Accumulated Sick Leave Upon Termination of Employment.

Respondents do not dispute that they have no evidence that any Cabell County employee, in the history of Cabell County, has ever received the accumulated sick leave

¹ *Hartley Hill Hunt Club v. County Com'n of Ritchie County*, 220 W. Va. 382, 647 S.E.2d 818 (2007)(all persons are presumed to know the law, and ignorance thereof is no excuse).

² See *In re Williams*, 213 W. Va. 780, 784, 584 S.E.2d 922, 926 (2003)("Constructive notice is '[s]uch notice as is implied or imputed by law, usually on the basis that the information is a part of a public record or file')(Emphasis supplied and citation omitted).

benefits they are claiming. Response to Petition for Appeal at 7 (“[P]laintiffs did not identify anyone by name at trial who definitely received such benefits”). Obviously, speculation about “scenarios” in which respondents “believe” employees might have been paid is insufficient to create any genuine issue of material fact.³

5. The Trial Court Instructed the Jury to Disregard Affidavits Executed by Respondents Waiving Any Additional Compensation.

Whether respondents felt pressured to execute affidavits waiving the right to any additional compensation, argued at trial and in their brief, Response to Petition for Appeal at 12, misses the point. The salient facts are that (1) respondents had already contacted counsel before executing the affidavits; (2) some of respondents objected to various aspects of their compensation, but none objected to the failure to compensate them for accumulated sick leave;⁴ and (3) all of the respondents nevertheless executed the statutory affidavits. Tr. at 138, 161, 188, 318, 326.

³ Indeed, respondents concede that a parade of former correctional officers testified that they were aware of the county’s policy that all accumulated sick leave was cancelled upon termination of employment. Response to Petition for Appeal at 8. The fact that none of these former correctional officers “could identify a single conversation with these Plaintiffs,” *id.*, is irrelevant. Again, respondents are charged with the constructive knowledge of the county’s sick leave policy as (1) they were advised, in writing, that the county’s policy governed their sick leave and (2) the county’s policy was on file in the county’s offices.

⁴ Respondents attach to their response an exchange of correspondence in December 2003 regarding the issue of accumulated sick leave, Response to Petition for Appeal at Exhibit C, but this correspondence was never offered at trial; no testimony was ever adduced regarding such correspondence; and more importantly, how could the respondents complain about executing affidavits disclaiming any entitlement to additional compensation when their attorney was writing the Civil Service Commission asking for a hearing? Petitioners are unaware of any case in which any court has held that an employee has not made a knowing and intelligent waiver of a claim where the employee had already consulted with counsel regarding the claim and that counsel had written asserting the claim prior to execution of the waiver.

Respondents argue that the trial judge did not exclude the affidavits, but the trial judge directed the jury to disregard the affidavits, thereby entering judgment as a matter of law on the issue of waiver:

The applicable law also provides that no provision of the WPCA may in any way be contravened or set aside by private agreement and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim, and any release required as a condition of such payment shall be null and void.

Tr. at 345. As discussed in petitioners' brief and further discussed herein, this is simply wrong as a matter of law.

II. SUMMARY OF ARGUMENT

Under West Virginia law, the Wage Payment and Collection Act cannot create an entitlement to fringe benefits; but rather, any entitlement must arise from the employment itself. Indeed, there must be an "express agreement" between employer and employee that the employee is entitled to payment of a fringe benefit upon separation of employment. Where there is evidence that an employee never anticipated payment of a fringe benefit upon separation of employment, the fact the employee claims to not have been aware of a written policy which expressly stated, "When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department," (emphasis supplied), does not afford the employee a cause of action. Thus, the trial court erred in failing to award petitioners judgment as a matter of law.

Prior to respondents' departure from employment, they were told by the Regional Jail Authority that it would not accept the transfer of their accumulated sick

leave, which resulted in them retaining counsel for purposes of advising them of their rights. Nevertheless, they thereafter executed affidavits at the time of their separation of employment, which were required by law, certifying that they were receiving all payments to which they were entitled. Under these circumstances, the trial court erred in ruling that these statutory affidavits were invalid under the Wage Payment and Collection Act.

Respondents acknowledged that they were told, in writing, that none of them could accumulate sick leave in excess of 30 days unless they were retiring. Nevertheless, the trial court awarded them payment for sick leave for as many as almost 200 days, which petitioners contend was erroneous as a matter of law.

Finally, where respondents' entitlement to these payments had never been adjudicated by any court at any time and where no employee, in the history of Cabell County, had ever claimed or received such payments, the trial court erred by awarding statutory penalties and attorney fees.

III. ARGUMENT

- A. **THE TRIAL COURT ERRED BY FAILING TO GRANT JUDGMENT TO PETITIONERS WHEN RESPONDENTS CONCEDED THAT THEY HAD BEEN TOLD THEY WERE SUBJECT TO COUNTY POLICY AND SUCH COUNTY POLICY PROVIDED THAT ACCUMULATED SICK LEAVE EXPIRED UPON SEPARATION FROM EMPLOYMENT.**

Under the undisputed evidence in this case, in light of the applicable law, it is clear petitioners were entitled to judgment as a matter of law, and the case should never have proceeded to trial.

1. It is Undisputed That Cabell County Never Budgeted for Payment of Accumulated Sick Leave.

With respect to fiscal matters, W. Va. Code § 7-1-3m provides:

The county courts shall, not later than March twenty-eight of each year, take up and consider the probable amount necessary to be expended for such personnel in the following fiscal year; shall determine and fix an aggregate sum to be expended during the following fiscal year for the compensation of such personnel, which shall be reasonable and proper, taking into account the amount of labor and services necessary to be performed by those who are to receive the compensation; and shall make and enter an order stating any action taken in this regard.

Of course, it is undisputed that Cabell County's budget contained no amount for the payment of accumulated sick leave for departing employees, including respondents.

2. It is Undisputed That None of Respondents Claimed Entitlement to Payment for Accumulated Sick Leave at the Time of Termination of Their Employment.

With respect to the payment of personnel, W. Va. Code § 7-1-3m provides:

The county courts shall file with their clerks a statement in writing showing such action and setting forth the name of each person employed pursuant to the provisions of this section, the time for which employed and the monthly compensation. . . . Until the statements required by this section shall have been filed, no allowance or payments shall be made by the county courts for personnel.

Again, it is undisputed that none of respondents claimed, prior to issuance of their severance check, the right to payment for any accumulated sick leave. Indeed, respondents admit that no one ever told them they were entitled to such payment.

3. Respondents Rely Upon No Written or Unwritten Policy and the Only Written Policy Clearly Precludes Payment for Accumulated Sick Leave.

On May 17, 2001, Cabell County adopted a leave policy applicable to these respondents. Nowhere in that policy does it state that any employee will be paid for

accumulated sick leave upon separation of employment. Indeed, none of respondents ever pointed to any written policy providing for payment of accumulated sick leave upon termination of employment.

On February 15, 2002, Cabell County issued a memorandum to jail personnel, including respondents, stating that, “Sick leave is guided by WV State Code 7-14B-19C, which states Corrections Officers may accumulate sick leave in accordance with policy established by the County Commission.” (Emphasis supplied). Respondents do not dispute receiving this memorandum.

With respect to the accumulation of sick leave, W. Va. Code § 7-14B-19(c) provides, “Correctional officers may accumulate yearly sick leave in accordance with policy to be established by the county commission.” (Emphasis supplied). Respondents do not dispute being advised of this.

Finally, the county’s policy, applicable to all county employees, including respondents, plainly states, “When the services of an employee have been terminated, all sick leave credited shall be cancelled as of the last working day with the department.” (Emphasis supplied). Again, respondents do not dispute that this was the county’s written policy referenced in the memorandum they received regarding the accumulation of sick leave. Rather, their only contention is that they never read the policy. Plainly, failing to read an employer’s plain and unambiguous fringe benefit policy does not then

entitle an employee to claim the right to receive benefits they admit they were never promised.⁵

4. The Terms of Employment, Not the Wage Payment and Collection Act, Determine an Employee's Entitlement to the Payment of Fringe Benefits.

This Court has held, "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)." Syl. pt. 5, in part, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999)(emphasis supplied). Where there is no term of employment, however, as in the instant case, providing for the payment of accumulated sick leave upon an employee's separation of employment, the employee is simply not entitled to such payment. Rather, only where

⁵ Respondents make the argument that they were somehow confused because retirees were allowed to use accumulated sick leave to purchase service credit and/or extend health care benefits, Response to Petition for Appeal at 20. Respondents reference no case, however, in which any court has held that because an employer allows employees to use accumulated sick leave upon retirement to purchase service credit and/or extend health care benefits, other employees are entitled to be paid for accumulated sick leave upon separation from employment for reasons other than retirement. Indeed, "Where a city employee gave notice he was 'retiring' from his position after 16 years of service at the age of 44 but was denied payment of his unused accumulated sick leave, the employee was not entitled to payment for his accrued unused sick leave because payment for unused sick leave applied specifically to employees at the time of retirement, and given the definition of retirement in the applicable statute, the employee did not retire but rather resigned." 15A Am. Jur. 2d *Civil Service* § 47 (2011)(footnote omitted). Likewise, respondents reference no authority for the proposition that employers have to hand their employees a document stating "all sick leave credited shall be cancelled as of the last working day with the department," which is what the county's policy provided here, or otherwise their employees can claim entitlement to any fringe benefits their creative minds may envision.

the employer has a written or unwritten policy providing such fringe benefits is the employer obligated to pay the employee upon separation from employment.

In *Gress v. Petersburg Foods, LLC*, 215 W. Va. 32, 592 S.E.2d 811 (2003), an employee claimed that she was entitled to payment for accumulated vacation time and for a bonus, upon termination of her employment, even though her employer's written policies did not entitle her to either payment. Rejecting the argument that the failure of an employer's policies to specifically address certain fringe benefits entitles employees to payment of those benefits, this Court held:

Before a fringe benefit is payable to an employee, the fringe benefit must have accrued to the employee. As defined in *Meadows*, the employer's policies define when a fringe benefit accrues to an employee. The terms of the appellant's policy dictated that to qualify for the yield bonus an employee must have been employed by the appellant on the date that the appellant distributed the yield bonus payments. Ms. Gress was not employed by the appellant on the date that the appellant distributed the yield bonuses; therefore, the yield bonus fringe benefit had not yet accrued to Ms. Gress. Because the yield bonus had not yet accrued to Ms. Gress, we need not decide whether the yield bonus was a fringe benefit "capable of calculation" and payable directly to an employee under the WPCA. Thus, we find that the circuit court erred in granting summary judgment in favor of the appellee on the issue of yield bonus pay.

The appellants also appealed the circuit court's order granting summary judgment in favor of the appellee on the issue of unpaid vacation pay. In ruling for the appellee, the circuit court found that the appellant's vacation policy was ambiguous about whether and how an employee's vacation time would accrue between the first and fifth year of employment. The circuit court further found that the appellant's vacation policy did not speak to what would happen to any unused vacation time at the conclusion of employment with the appellant. Relying on Syllabus Point 6 of *Meadows v. Wal-Mart*, the circuit court construed the silence and ambiguity of the appellant's policy against the appellant and ruled that Ms. Gress was entitled to 2.5 days of vacation based on the six months that she had worked before being fired.

The appellants argue that the circuit court erred in granting summary judgment to Ms. Gress because the appellants had a consistently applied unwritten vacation policy. In *Ingram v. City of Princeton*, 208 W.Va. 352, 540 S.E.2d 569 (2000) (per curiam), this Court held that a consistently applied unwritten employment policy regarding the payment of fringe benefits could support an employer's defense against a WPCA suit when the unwritten policy was known by employees.

In the instant case, there is no dispute that the appellant's employees, including Ms. Gress, were aware that the appellant had a practice of only allowing workers to take vacations in five-day increments after each full year of employment with the appellant. Further, Ms. Gress offered no evidence to contradict the appellant's assertion that the appellants had a consistent policy of not paying employees for partial weeks of unused vacation at the time of discharge. When employers have a consistently applied unwritten policy, employers have the protection offered by Ingram against a claim under the Wage Payment and Collection Act.

Applying *Ingram* to facts of the case at hand, we find that the circuit court erred in granting summary judgment in favor of Ms. Gress on the vacation pay claim.

Id. at 36-37, 592 S.E.2d at 815-16. (Emphasis supplied).

5. As in *Gress*, Because There is No Written or Unwritten Policy Providing for the Payment of Accumulated Sick Leave Upon Termination of Employment, Petitioners are Entitled to Judgment as a Matter of Law.

Of course, this case is like *Gress*, but even more favorable for petitioners. First, petitioners are not relying upon an “unwritten policy,” but a consistently applied “written policy” which states, “When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department.”

Second, respondents’ argument that because they allegedly were not aware of the county’s written policy even though they admit receiving a memorandum incorporating by reference that policy, they are somehow nevertheless entitled to payment under the Wage Payment and Collection Act, was expressly rejected. Finally, respondents do not

dispute that defendants had a consistent “use it or lose it” sick leave policy and, in fact, they conceded that no employee in the history of Cabell County has ever been paid for accumulated sick leave upon the separation of employment.

The term “wages” under the Wage Payment and Collection Act is defined as including “then accrued fringe benefits capable of calculation and payable directly to an employee: Provided, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article.” W. Va. Code § 21-5-1(c) (emphasis supplied).

In other words, as this Court held in *Gress*, the right to payment for fringe benefits as wages under the Wage Payment and Collection Act is dictated by the “agreement between an employer and his employees” unless otherwise prohibited by law. In this case, respondents have never argued that not paying employees for accumulated sick leave upon separation from employment is contrary to any law.

The term “fringe benefits” under the Wage Payment and Collection Act is defined as “any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage.” W. Va. Code § 21-5-1(l) (emphasis supplied). Here, respondents do not dispute that they were never told by anyone at any time that they would receive payment for accumulated sick leave upon separation from employment.

Respondents' argument, accepted by the trial court, was that because the statutory definition of "fringe benefits" includes "sick leave," the burden is on the employer, contrary to *Gress*, to establish that payment for "sick leave" was not only affirmatively excluded by the employer, as it was in this case, but that each and every employee was expressly told that payment was affirmatively excluded.

In other words, respondents flipped the statute and *Gress* on their heads:

While the terms of employment may provide that unused fringe benefits will not be paid to employees upon termination from employment, the terms of employment must be express and understood so that employees understand the amount, if any, of the fringe benefits owed to them upon separation from employment. Put another way, there must be an "express" understanding between employers and employees regarding the payment or nonpayment of unused fringe benefits.

Plaintiffs' Proposed Instruction No. 1 (emphasis supplied).

6. Respondents Have Identified No Policy Ambiguity and They Are Charged With Constructive Notice of the Policy, "All Sick Leave Credited Shall Be Canceled as of the Last Working Day With the Department."

It is undisputed that the county's policy which provides, "When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department" (emphasis supplied), was a matter of public record. Because it was a matter of public record, whether respondents chose to look at it after being told it governed their sick leave is irrelevant as they are charged with constructive knowledge of the public record.⁶

⁶ See *Williams*, supra at 784, 584 S.E.2d at 926 ("Constructive notice is '[s]uch notice as is implied or imputed by law, usually on the basis that the information is a part of a public record or file . . .'")(Emphasis supplied and citation omitted).

Employers are not required to prove that they provided actual notice of employment policies because, in some case, that would not be possible. Rather, employers are only required to prove that they advised their employees that employment policies were available for review.

In *Aronson v. New York City Employees Retirement System*, 757 F. Supp. 226 (S.D. N.Y. 1991), for example, a former municipal employee sued alleging that she had been deprived of certain benefits upon termination of her employment. Rejecting her argument that because she had no actual notice of her benefit rights, she was entitled to relief, the court held that constructive notice was sufficient:

She was originally enrolled in a pension plan and therefore had access to all of the membership materials explaining the plans. Apparently, upon request, all plan members are given a booklet describing the plan in which they are enrolled. Kreisberg Affid., Exh. A. This booklet contains the restrictions on changing retirement plans at issue in this case. Because there is no affirmative duty for NYCERS administrative staff to inform members about the specifics of pension provisions beyond providing the booklet, the availability of this information to members charges Aronson with the information contained within the booklets. . . .

Further, Aronson concedes to being a member of Plan A prior to her discharge from employment. Deconinck Affid., Exh. 2, p. 12. She is thus charged with constructive knowledge of that which was contained within the Plan description booklets.

Id. at 229. (Emphasis supplied).

Other courts have similarly held that constructive notice of employee benefits is sufficient in a dispute over employee policies and benefits.

For example, in *Martin v. Citibank, Inc.*, 567 F. Supp. 2d 36, 44 (D.D.C. 2008), the court held:

The Court can think of no conceivable reason why in plaintiff's eight (8) years of employment prior to the alleged harassment, she never took advantage of the opportunity to review the Handbook and Arbitration Policy, available to all employees on the Company's intranet. The Court agrees with defendant that plaintiff "had years to review the Company's Employee Handbooks and Employment Arbitration Policy, and to withdraw her agreement to comply with the Policy if she disagreed with its provisions."

In *Strotman v. E.I. DuPont de Nemours & Co.*, 935 F.2d 271 at *1 (6th Cir. 1991), the Sixth Circuit affirmed an award of summary judgment to an employer, ruling that even though the employee claimed not to have seen it, the employee "received at least constructive notice of this policy provision" which precluded health insurance benefits for covered dependents over the age of 25.

In *Jordan v. Tyson Foods, Inc.*, 257 Fed. Appx. 972 at * 6 (6th Cir. 2007), the Sixth Circuit rejected an employee's argument that he should not suffer because the employer did not bring to his specific attention the need to pay premiums after his separation from employment, stating that, "Plaintiff had at least constructive notice of his duty to pay his health care premiums while on leave. An employee's duty to pay premiums was noted in the IBP Plan Summary Plan Description"

In *Aguilera v. Landmark Hotel-Metairie*, 1992 WL 396842 at *3 (E.D. La. 1992), the court held that an employee's claim not to have received an employee handbook was unavailing because "plaintiff cannot plead ignorance to the policies of her own health care program, since it was her responsibility to make sure she was following its requirements."

In *Mears v. Department of Agriculture*, 155 F.3d 569 at *2 (Fed. Cir. 1998), the court held, "as an agency employee, she was on constructive notice from the Employee

Handbook section 0.735-23(d) not only that the agency had proper authority to reassign her involuntarily but that her failure to accept such a directed reassignment could justify her removal.”

In *Vana v. Mallinckrodt Medical, Inc.*, 70 F.3d 116 at *2 (6th Cir. 1995), the court agreed that an employer “satisfied its legal duties by posting EEOC-approved notices in prominent places in its headquarters, as well as listing its EEOC policies in its employee handbook, so that Vana had constructive notice of EEOC policy.”

In *Dennison v. City of Phoenix*, 2007 WL 656440 at *8 (D. Or.), the court held, “Plaintiff also complains that he was not given notice that he was in a probationary period. However, as set forth above, Plaintiff was at the very least on constructive notice that he was in a probationary period of employment as provided by the personnel handbook.”⁷

Likewise, in this case, respondents cannot plead ignorance of the county’s policy when they were told it applied and it was a matter of public record. Consequently, the trial court erred by failing to award judgment to petitioners.

B. THE TRIAL COURT ERRED BY RULING THAT THE STATUTORY AFFIDAVITS EXECUTED BY RESPONDENTS WERE VOID UNDER THE WAGE PAYMENT AND COLLECTION ACT.

Respondents concede that at the time of their separation from employment, W. Va. Code § 7-7-10 provided, “If the services to the county of a . . . employee terminate before the end of a fiscal year, the . . . employee shall, at the time his services end, sign

⁷ See also *Wentzell v. DaimlerChrysler Corp.*, 2007 WL 4248519 at *2 (Del. Super.) (“Constructive knowledge can be found where there is a written policy such as an employer’s handbook.”)

and submit the above affidavit to the clerk of the county court.” The affidavit stated: “I hereby certify that I have rendered the services herein stated, that I have received the full compensation to which I was entitled for those services rendered” Response to Petition for Appeal at 22.

Moreover, respondents do not discuss and, thus, apparently do not dispute that in Syllabus Point 1 of *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984), this Court held, “The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.”

Here, W. Va. Code § 7-7-10, specifically governing the procedure when county employees separate from employment and requiring that they certify that they are receiving all payments to which they are entitled should have been given precedence over W. Va. Code § 21-5-10, which is a general statute applying to all public and private employers and employees. Instead, as noted, the trial court erroneously instructed the jury:

The applicable law also provides that no provision of the WPCA may in any way be contravened or set aside by private agreement and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim, and any release required as a condition of such payment shall be null and void.

Tr. at 345.

Because respondents set forth no meaningful response to this assignment of error, petitioners submit that this Court should reverse the trial court’s erroneous invalidation of affidavits required by W. Va. Code § 7-7-10.

C. THE TRIAL COURT ERRED BY RULING RESPONDENTS WERE ENTITLED TO PAYMENT FOR ACCUMULATED SICK LEAVE, EVEN IF IT WAS IN EXCESS OF 30 DAYS, WHICH RESPONDENTS ADMITTED WAS THE CARRYOVER CAP.

Respondents' discussion of the argument of their counsel to the trial court notwithstanding, Response to Petition for Appeal at 24-28, the evidence in the case was undisputed that respondents were informed, in writing, that "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 carry over of sick leave time." Joint Trial Exhibit 2. Yet, the trial court awarded respondents payment of accumulated sick leave in excess of 30 days, for some as many as nearly 200 days, even though they did not "retire," but separated from employment when their positions were eliminated due to the opening of the Western Regional Jail.

Although, in the judgment order, the trial court acknowledged that this was the county's policy, it nevertheless awarded payment for days in excess of 30 because "defendants admitted that the proffered number of 'accrued' sick leave days was correct in their Responses to Requests for Admission." Judgment Order at 5. The trial court's interpretation of petitioners' admission, however, is incorrect.

The request for admission referenced asked, "Please admit that each of the following Plaintiffs has accrued the following amounts of sick leave as of the date of their termination of employment" and petitioners correctly admitted the days set forth in the request as they were accurate. Petitioners never admitted, however, that those days were to be used to calculate respondents' entitlement to payment for sick leave. Indeed, petitioners denied respondents' entitlement to any payment.

The issues of liability and damages in this case were bifurcated and the only issues presented to the jury were “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?,” which was answered by the jury in the affirmative and, “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?,” which was answered by the jury in the negative, precipitating a trial court ruling, under respondents’ theory of the case, that if the respondents did not know what happened, they were entitled to payment. Judgment Order at 2-3.

When the case moved to the damages phase, to be determined by the trial court, it ruled, “By implication, the jury verdict established that the Plaintiffs did not know that benefits would be limited to thirty (30) days under any circumstances,” Judgment Order at 6, but this is clearly contrary to not only the documentary evidence, but the respondents’ own testimony that they understood that they could carryover nor more than 30 days except upon retirement, when they could convert those days into extended health care benefits.

Consequently, the trial court erred by failing to limit respondents’ damages, if any, to no more than 30 days per respondent.

D. THE TRIAL COURT ERRED BY AWARDING STATUTORY DAMAGES AND ATTORNEY FEES TO THE RESPONDENTS.

In *Syllabus Point 3 of Farley v. Zapata Coal Corp.*, 167 W. Va. 630, 281 S.E.2d 238 (1981), this Court held, “An 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.” (Emphasis supplied). Here, petitioners submit that an award of statutory damages and attorney fees, under the circumstances, are unjust.

In addition to its defenses on the merits of respondents’ claims, it was undisputed that they consulted with counsel well before the separation of their employment. At no time after such consultation and prior to their separation did either counsel or respondents raise any issue with petitioners regarding their post-separation claim of entitlement. Again, payment to any county employee of accumulated sick leave on separation from employment was unprecedented. Even respondents conceded they were never told that they would be paid for their accumulated sick leave nor were they aware of any other employee who had been paid. Finally, it is undisputed that the county’s written policy, which respondents had been informed applied to them, but they merely contended they had not read, states that, “When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department.”

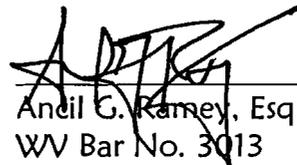
Respectfully, these are the type of “special circumstances,” referenced in *Zapata*, which would render “unjust” the award of statutory damages and attorney fees. Therefore, petitioners request that the Court set aside the award of statutory damages and attorney fees.

IV. CONCLUSION

Essentially, respondents' argument is "because retirees receive a gold watch, we're entitled to a gold watch, even though we were never promised one; no employee, other than retirees, ever received a gold watch; and there was a written policy that only retirees receive a gold watch." Merely because retirees are provided with a fringe benefit, however, does not permit non-retirees to claim, "Where is my gold watch?" Thus, petitioners request that this Court reverse the judgment of the Circuit Court of Cabell County and remand with directions to either enter judgment for petitioners or, in the alternative, enter judgment without awarding respondents damages in excess of 30 days accumulated sick leave, liquidated statutory damages, and/or attorney fees.

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

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., hereby certify that on May 9, 2011, I served the foregoing "Reply Brief" by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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