

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BRIEF FILED
WITH MOTION

MARY CATHERINE LEHMAN
and PATRICIA POWELL

*Appellants /
Plaintiffs Below*

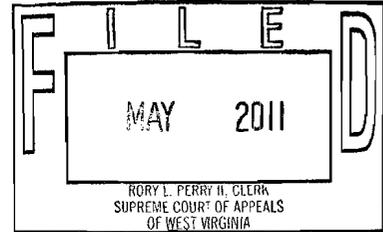
v.

UNITED BANK, INC.

*Appellee/
Defendant Below*

CASE NO. 101486

Appeal from the Circuit Court
of Berkeley County, West
Virginia



BRIEF OF AMICUS CURIAE
WEST VIRGINIA CHAMBER OF COMMERCE
IN SUPPORT OF UNITED BANK, INC. AND
AFFIRMANCE OF THE CIRCUIT COURT OF BERKELEY COUNTY

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I. Introduction

The West Virginia Chamber of Commerce (“the Chamber”) files this amicus curiae brief in support of the Appellee, United Bank, Inc., in its defense of claims filed under the West Virginia Wage Payment and Collection Act, W.Va. Code 21-5-1, et seq. (“the WPCA”).¹

The Chamber, with a 5,000 member reach, is the recognized voice of business in West Virginia. In that role, it strives to (1) study matters of general interest to its members, (2) promote its members’ interests, as well as the interests of the general public, in the proper administration of the laws relating to its members, and (3) otherwise promote the general business and economic welfare of West Virginia. An important part of the Chamber’s activities is representing the interests of its members in matters of importance before the courts, the West Virginia Legislature, and state agencies.

In representing West Virginia businesses, the Chamber has a particularly strong interest in ensuring that the West Virginia Wage Payment and Collection Act is applied in the manner intended by the Legislature. The WPCA applies to every employer in the State of West Virginia, large and small, and covers nearly all of the Chamber’s members.

Although neither state nor federal law requires employers to make

¹ Counsel for United Bank, Inc., Brian M. Peterson, Esq., jointly authored this brief with the Chamber. No monetary contribution was made by Mr. Peterson or United Bank, Inc. specifically to fund the preparation or submission of this brief. United Bank, Inc. is a member of the West Virginia Chamber of Commerce.

severance payments to departing employees, nearly all of the Chamber's members voluntarily make such payments, either through established severance policies or on an ad-hoc basis. Expansion of the WPCA to deem all severance payments "wages" that must be paid within seventy-two hours of discharge would not only constitute an unwarranted expansion of the WPCA, it would potentially reduce the number of severance payments made to employees.

The Wage Payment and Collection Act contains an onerous and unforgiving liquidated damages provision that triples the employee's final paycheck for even the most minor delay in payment, regardless of the intent of the employer or the reason for the delay (*e.g.*, accidental oversight, absence of payroll staff, plant closures due to natural disasters, *etc.*). By declaring all severance payments to be "wages," the Court would effectively override any severance policy calling for payment of severance over a period of weeks or months following discharge. Such a result harms employers by exposing them to liquidated damages simply for following their own policies, and ultimately harms employees by reducing the amounts of severance paid by employers who cannot afford large lump sum payments. The West Virginia Legislature has wisely chosen to avoid extending the WPCA's coverage to severance payments to allow employers the option of paying severance over a period of weeks or months. That balance should not be upset by the courts.

II. Severance pay is not “wages” under the Wage Payment and Collection Act.

A. The plain language of the WPCA does not support severance pay as “wages.”

The Circuit Court correctly interpreted the WPCA by holding that W.Va. Code § 21-5-4 does not apply to severance payments. Section 21-5-4 requires “wages” to be paid to employees within certain timeframes, depending on the reason for separation from employment. *See, e.g.* W.Va. Code § 21-5-4(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.”) The term “wages” is defined as follows:

The term “wages” means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, the term “wages” shall also include 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 added). The term “fringe benefits,” which appears in the definition of wages, is separately defined as follows:

The term “fringe benefits” means 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). Severance pay is not mentioned in either the definition of “wages” or “fringe benefits.” As the Circuit Court noted in its orders,

severance pay, by its very nature, cannot be "earned" by an employee until after termination; therefore, severance pay is not "compensation for labor or services rendered" by the employee. It is over and above the employee's earnings for his or her labor and services. And, because the employment relationship must be ended in order for it to become due and payable, it is not a "then accrued fringe benefit," either.

As this Court has held on numerous prior occasions, "[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (citing *Bullman v. D & R Lumber Company*, 195 W.Va. 129, 464 S.E.2d 771 (1995); *Donley v. Bracken*, 192 W.Va. 383, 452 S.E.2d 699 (1994)). See also, *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (1994) ("Courts are not free to read into the language what is not there, but rather should apply the statute as written."). Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syllabus Point 1, *Consumer Advocate Division v. Public Service Commission*, 182 W.Va. 152, 386 S.E.2d 650 (1989). Because the plain language of the WPCA does not place severance pay within the definition of "wages," either expressly or by reasonable interpretation, the Court must affirm the holding of the Circuit Court that the severance payments were not covered by

W.Va. Code § 21-5-4.

B. Prior decisions of this Court and others support that severance pay is not “wages.”

Furthermore, the Circuit Court’s construction of the WPCA is directly supported by this Court’s prior opinions. This Court has held on at least two prior occasions that severance pay is not a fringe benefit under the WPCA. In *Howell v. City of Princeton*, 559 S.E.2d 424 (W. Va. 2001), a group of police officers and firefighters sued their employer seeking payment for personal leave, sick leave, and severance benefits. Their cases were dismissed at the pleading stage based on the alleged existence of an unwritten policy that such benefits would not be paid upon termination. Reiterating the rules regarding payout of fringe benefits under existing precedent, the court wrote that “[u]nder *Meadows [v. Wal-Mart Stores, Inc.]*, 207 W.Va. 203, 530 S.E.2d 676 (1999)] and *Ingram [v. City of Princeton]*, 208 W.Va. 352, 540 S.E.2d 569 (2000)], this unwritten policy would be sufficient to defeat the claim asserted by the Officers, *if the record clearly illustrated that the Officers were aware of the policy.*” *Howell*, 559 S.E.2d 424, 427 (emphasis in original) (footnote omitted). Then, in footnote 3 which followed that sentence, this Court explained that “[o]ne exception would be the claim by Hawks regarding severance payment, which, as stated in the complaint, **would constitute a specific promise by the City to him, not a fringe benefit.**” *Howell*, 559 S.E.2d 424, 427 n.3 (emphasis added).

In *Meadows v. Wal-Mart*, Justice Davis, in her concurring opinion, explained

that unvested benefits such as severance pay cannot be considered a "then accrued fringe benefit" because they do not vest until *after* termination:

Put into proper context, the majority opinion held that fringe benefits under the West Virginia Wage Payment and Collection Act (hereinafter "ACT"), W. Va.Code § 21-5-1, et seq., **are those benefits which have vested during an employee's period of employment.** As an analogy, the majority opinion referenced the Employment Retirement Income Security Act (hereinafter "ERISA"), 29 U.S.C. § 1001, et seq. Under ERISA, pension benefits are protected only to the extent that they have accumulated and vested in an employee. (footnote omitted) That is, Congress sought not to impose financial liability upon employers for pension benefits that had not vested.²

² Accordingly, the court in *Sejman v. Warner-Lambert Co., Inc.*, 889 F.2d 1346, 1348-49 (4th Cir.1989), held that "[b]ecause, under ERISA, severance benefits are contingent and unaccrued, an employer may unilaterally amend or eliminate the provisions of a severance plan [.]" The *Sejman* decision was followed in *Tobin v. Ravenswood Aluminum Corp.*, 838 F.Supp. 262, 269 (S.D.W.Va.1993), where Judge Haden ruled that "an employer may unilaterally terminate or amend an ERISA severance plan, **because severance benefits are contingent and unaccrued.**"

I do not believe that the state legislature intended for the Act to impose upon employers the financial burden of the payment of nonvested fringe benefits. Indeed, I believe the legislature, if it had so intended, would have affirmatively stated that fringe benefits do not have to be vested to be payable. No such affirmative language appears in the Act.

Meadows v. Wal-Mart Stores, Inc., 530 S.E.2d 676, 699-700 (W. Va. 1999) (Davis, J. concurring) (emphasis added). Justice Davis's elaboration on the majority's opinion that "the WPCA protects as 'wages' only those fringe benefits which have both accumulated and vested," *Meadows*, 530 S.E.2d 676, 690 (W. Va. 1999), clearly supports the conclusion that severance payments are not "wages" under the WPCA because they can never vest during the term of employment. *See also Southern v. Emery Worldwide*, 788 F. Supp. 894, 897 (S.D. W. Va. 1992)

("[s]everance benefits are unaccrued, unvested benefits provided to employees upon their separation from employment").

Similarly, when this Court ruled in *Conrad v. Charles Town Races, Inc.*, 521 S.E.2d 537 (W. Va. 1998) that WARN Act damages are not "wages" under the WPCA, *see* Syllabus, *Conrad*, it relied, in part, on the reasoning of *United Paperworkers Local 340 v. Specialty Paperboard*, 999 F.2d 51 (2nd Cir. 1993) which likened WARN Act damages to severance pay:

Although damages are measured as two months pay and benefits, the WARN claim is not a claim for backpay [sic] because it does not compensate for past services As the district court noted in this case, "WARN Act damages compensate an employee for the injuries caused by his or her improper termination, **much akin to** either an action for wrongful discharge or **severance pay**['.]'" *United Paperworkers*, 999 F.2d at 55 (citation omitted).

Conrad v. Charles Town Races, Inc., 521 S.E.2d at 541 (emphasis added).

This Court has never found severance pay to be within the definition of "wages" or "fringe benefits" under the WPCA, and doing so would nullify many severance pay policies. As severance, employers often agree to continue an employee's salary for one or more weeks following termination. If the employer were required to pay the entire severance in a lump sum within 72 hours of discharge, the employer might refuse to offer any severance at all. The Court should not, through the WPCA, invalidate severance plans calling for continued payment of salary on regularly scheduled pay dates following termination. Severance pay is not compensation for hours worked, and should not be treated as ordinary "wages" or fringe benefits accruing during

employment.

Consistent with the above precedents and the plain language of the WPCA, severance pay cannot fall within the definition of wages because it does not accumulate and vest during the term of employment. Accordingly, this Court should affirmatively hold that severance pay does not constitute wages as defined by the West Virginia Wage Payment and Collection Act, W.Va.Code §§ 21-5-1 to 21-5-18, so that the time limitations governing the payment of wages in W.Va.Code § 21-5-4(b), (c) and (d) (2006) do not apply to such payments.

III. Elimination of an employee's position as a result of a merger is a layoff, not a discharge

Although Judge Groh's orders can be affirmed solely on the ground that severance pay is not "wages," this Court could alternatively affirm based on the holding that the plaintiffs were separated by "lay-off" rather than "discharge." Although both layoffs and discharges are terminations of the employment relationship initiated by the employer, the Legislature has chosen to distinguish between the two in setting its deadlines for payment of final wages. Under the WPCA, employees who are "discharge[d]" must be paid "wages in full within 72 hours," W.Va. Code § 21-5-4(b), while employees who are "for any reason whatsoever ... laid off," must be paid "not later than the next regular payday ... wages earned at the time of suspension or layoff." W.Va. Code § 21-5-4(d). Although the statute does not define "discharge" or "layoff," the West Virginia Code of State Rules defines them as follows :

2.8. "Discharge" means any involuntary termination or the

cessation of performance of work by employee due to employer action.

* * *

2.10. "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. An employee who is laid off shall be paid all wages not later than the next regular payday through regular pay channels, or by mail if requested.

W.Va. C.S.R. § 42-5-2.8, -2.10 (effective March 29, 1990). These definitions comport with dictionary definitions of the same terms. For example, Black's Law Dictionary defines discharge (in the employment context) as "[t]o dismiss from employment; to terminate the employment of a person," *Black's Law Dictionary* 463 (6th Ed. 1990), and layoff as "[a] termination of employment at the will of employer. Such may be temporary (e.g. caused by seasonal or adverse economic conditions) or permanent." *Id.* at 888. While the Plaintiffs in this case have argued that a layoff is temporary while a discharge is permanent, neither the Code of State Rules definition nor the dictionary definition make such a distinction. Both can be permanent. Instead, to distinguish between the two, the definitions require the court to look to the *reason* for the termination. If the reason for termination does "not relat[e] to the quality of the employee's performance or other employee-related reason" such as abolishment of a position, lack of funds, shortage of work, reorganization, or other reason beyond the control of the employee, the termination is a layoff and not a discharge.

The Chamber encourages the Court to clarify that elimination of an employee's position due to merger or other reorganization is a layoff as that

term is used in W.Va. Code § 21-5-4(d). The parties agree that in the present case, the merger of Premier Bank and United Bank resulted in the elimination of the Plaintiffs' positions. The Plaintiffs were informed months in advance that, as a result of restructuring, their positions were being eliminated. There appears to be no dispute that the Plaintiffs' employment ceased involuntarily, and for "reason[s] not relating to the quality of [their] performance or other employee-related reason." *Id.* Nor do the parties dispute that the Plaintiffs performed their job duties satisfactorily to the end.² Accordingly, the Plaintiffs were "laid off" employees entitled to all of their final pay (including severance) on their next regular pay day of August 10, 2007—not within 72 hours of their last day of employment.

IV. Conclusion

Based on the foregoing, the West Virginia Chamber of Commerce urges the Court to affirm the Circuit Court of Berkeley County's judgments concluding that severance pay is not "wages" or "fringe benefits" under the West Virginia Wage Payment and Collection Act, and that the Plaintiffs were laid off and not discharged when their positions were eliminated due to merger.

Respectfully Submitted,

² According to the record, in order to claim entitlement to the severance pay at all, these Plaintiffs were required to maintain satisfactory job performance through the last day of employment. (See June 20, 2007 Letters, attached as Exs. C and D to Petition for Appeal)



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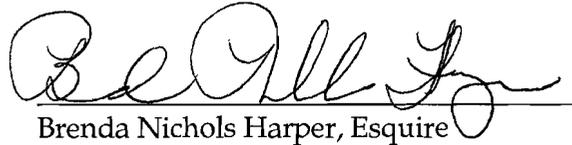
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CERTIFICATE OF SERVICE

I certify that on Tuesday, May 31, 2011, I served a copy of this Brief of Amicus Curiae West Virginia Chamber of Commerce upon the below-named counsel of record by United States Mail first-class postage prepaid.

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