

101486

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

MARY CATHERINE LEHMAN

Plaintiff,

v

Civil Action No. 09-C-616

UNITED BANK, INC.,

Defendant.

BERKELEY COUNTY
CIRCUIT CLERK
2010 JUL -7 AM 11:24
VIRGINIA M. SINE, CLERK

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On a previous day came the parties, by counsel, pursuant to W.Va. R. Civ. P., Rule 56 and filed cross motions for summary judgment. This is a suit for liquidated damages under the West Virginia Wage Payment and Collection Act, W.Va. Code 21-5-1, et seq. The Plaintiff, Mary Catherine Lehman, was paid her severance pay one week after her termination in accordance with the employer's severance payment policy, rather than within 72 hours of termination. She now seeks three times the severance payment as liquidated damages. Defendant raises two defenses: (1) that the Plaintiff was laid off and therefore not entitled to be paid her severance until the next regular pay day; and (2) that the severance pay in this case is not "wages" as defined by the West Virginia Wage Payment and Collection Act (WPCA).

The Court finds that the Defendant is entitled to summary judgment in its favor. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The facts of this case are not in dispute. Mary Catherine Lehman was Vice President of Operations for Premier Bank before it merged with United Bank, Inc, in July 2007. By letters dated March 1, 2007, United Bank, Inc. informed Ms. Lehman that her position would be eliminated at the time of the merger. Because of her position, United Bank kept Ms. Lehman

employed after the merger to help with the transition. It paid her a \$10,000 bonus in addition to her normal salary for staying on. Her last day of work was Friday, August 3, 2007.

Upon her termination, the Defendant owed Ms. Lehman salary (not including fringe benefits) for the first three days of August which totaled \$530.88. It also owed her compensation for unused vacation leave which totaled \$1,482.04, and her bonus of \$10,000.00.

Pursuant to a written severance plan contained in the merger agreement between United Bank and Premier Bank, United Bank offered a severance benefit to employees laid off during the merger. The plan provided:

(b) United agrees that each Premier employee who is involuntarily terminated by United (other than for cause) within six (6) months of the Effective Date, shall receive a severance payment equal to two (2) weeks of base pay (at the rate in effect on the termination date) for each year of service at Premier (with credit for partial years of service), with a maximum payment equal to twenty-six (26) weeks of base pay.

In her March 1, 2007 termination letter, Ms. Lehman was informed that her estimated severance would be \$5,297.00, and that “[t]he retention bonus and severance will be paid to you, less required withholdings, in a final payment, no later than the first pay period after your job ends.” She was told that “in order to receive this retention bonus and the severance pay, you must maintain satisfactory job performance throughout the conversion/merger process and remain employed by Premier Community Bankshares or United Bank until the stated job end date.” In actuality, upon losing her position, Ms. Lehman was entitled, based on her years of service, to a slightly higher severance payment of \$5,763.33, and that higher amount was paid to her.

On August 10, 2007, Ms. Lehman’s next regular payday after termination, United Bank paid Ms. Lehman the total gross sum of \$17,776.25, minus withholdings, which included

all salary, bonuses and severance payments. Ms. Lehman retained attorney Lauren Clingan, who claimed Ms. Lehman's final paycheck was untimely paid because it was not given to her within 72 hours of her discharge. Ms. Clingan demanded liquidated damages of three times the total August 10, 2007 paycheck, including the severance portion.

In response, United Bank paid Ms. Lehman 3 times the sum of her vacation pay, bonus, and final earned salary for a total of \$36,038.76 in liquidated damages. It refused, however, to pay liquidated damages on her severance payment because the severance payment was not "earned" until *after* termination occurred, putting it outside the scope of the West Virginia Wage Payment and Collection Act's 72-hour rule. More than a year later, Ms. Lehman hired a new attorney to file suit to recover the liquidated damages on the severance pay. This suit followed.

CONCLUSIONS OF LAW

Summary judgment in United Bank's favor is appropriate under Rule 56 of the West Virginia Rules of Civil Procedure because the material facts are not in dispute, and United is entitled to judgment in its favor as a matter of law. *See* W.Va. R. Civ. P., Rule 56.

The WPCA prescribes various timetables for the payments of an employee's final paycheck. Employees who are "discharge[d]" must be paid "wages in full within 72 hours." W.Va. Code § 21-5-4(b). Employees who "quit[] or resign[]" must be paid their "wages no later than the next regular payday" unless they provide at least one pay period's notice of intention to quit, in which case they must be paid "at the time of quitting." W.Va. Code § 21-5-4(c). Finally, employees who are "suspended as a result of a labor dispute" or 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). The term “layoff” is defined as follows in the Code of State Rules:

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. §42-5-2.10 (effective date March 29, 1990).¹ An employer that fails to adhere to the timetables established in W.Va. Code § 21-5-4(b), (c) and (d) “shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages,” W.Va. Code § 21-5-4(e).

The Plaintiff was laid off, and properly paid on her next regular pay date.

No violation of the WPCA occurred in this case because the undisputed record establishes that the Plaintiff was “laid off” on August 3, 2007, and timely paid all wages and other amounts due and owing to her on her next regular pay date of August 10, 2007. As defined in the Code of State Rules, a “lay-off” is “any involuntary cessation of an employee for a reason not relating to the quality of the employee’s performance or other employee-related reason.” W.Va. Code State R., § 42-5-2.10. As the undisputed record in this case shows, the Plaintiff was given notice on March 1, 2007 that her employer, Premier Community Bankshares, was merging with United Bank, and as a result of restructuring, her position was being eliminated. Indeed, in order to claim entitlement to the severance pay at issue in this case, she has to prove that she

¹ Although in common parlance, the term “layoff” may infer a temporary cessation of employment, the Code of State Rules definition of that term does not require the “cessation” of employment to be temporary. The common dictionary definition of cessation is a stoppage that is either temporary *or* final. See Random House Dictionary of the English Language at 340 (2d Ed. Unabridged 1987) (defining cessation as “a temporary or complete stopping; discontinuance: *a cessation of hostilities.*); Merriam-Webster’s Collegiate Dictionary at 188 (10th Ed. 1998) (defining cessation as “a temporary or final ceasing (as of action): STOP”); American Heritage Dictionary of the English Language (4th Ed. 2009) (defining cessation as “a bringing or coming to an end; a ceasing: *a cessation of hostilities.*).

maintained satisfactory job performance through her last day of employment. The Defendant does not dispute that she was performing her job duties in a satisfactory manner at the time her position was eliminated. Thus, there is no dispute that her cessation of employment was involuntary on her part, and “for a reason not relating to the quality of [her] performance or other employee-related reason.” W.Va. Code State R. § 42-5-2.10. Accordingly, her wages were due by the next regular pay day, not within 72 hours.

The undisputed record also establishes timely payment. The Plaintiff admits in her responses to written discovery that August 10, 2007 was her “next regular pay day” and that she received her final paycheck, including her severance, on that date. Accordingly, United Bank complied with the West Virginia Wage Payment and Collection Act, and is not liable for liquidated damages.

Severance pay is not “wages” that must be paid within 72 hours of discharge.

Even if the Plaintiff was “discharged” for cause and entitled to payment within 72 hours under § 21-5-4(b), the Court concludes that this case should nevertheless be dismissed because the severance pay at issue does not fall within the definition of “wages” provided under the Act. The WPCA requires an employer to pay its discharged employee’s wages in full within 72 hours, *see* W.Va. Code §§ 21-5-1(c), 21-5-4(b), and an employer that fails to adhere to this requirement “shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages,” W.Va. Code § 21-5-4(e).

However, the Court finds that severance pay does not fall within the definition of “wages” provided under the Act. The WPCA defines wages 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). Severance pay, by its very nature, cannot be "earned" by an employee until *after* she is terminated. Therefore, severance pay is not "compensation for labor or services rendered" by the employee. The employment relationship must be ended in order for it to become payable. Therefore, under 21-5-1(c), it is not a "then accrued fringe benefit" ("then" being the moment of termination). Therefore, severance pay does not meet the definition of wages under West Virginia law, and need not be paid within 72 hours of termination.²

Although the West Virginia Supreme Court of Appeals has not had occasion to rule on this point³, there is a wealth of support from the laws of states other than West Virginia that have soundly rejected the notion that severance is a form of "wages" that is governed by final wage payment laws. Courts in **Delaware**, *Dep't. of Labor ex rel. Commons v. Green Giant Co.*, 394 A.2d 753, 755 (Del. Sup. Ct. 1978), **Connecticut**, *McGowan v. Administrator, Unemployment Compensation Act*, 220 A.2d 284, 286 (Conn. 1966) and *Drybrough v. Acxiom Corp.*, 172 F. Supp. 2d 366, 371 (D. Conn. 2001), **Massachusetts** *Prozinski v. Northeast Real Estate Servs., LLC*, 797 N.E.2d 415, 419-420 (Mass. Ct. App. 2003), **Indiana**, *Design*

² If, for some reason, an employee who is owed severance pay is not paid the severance pay after termination, she is not without a remedy. She could file a breach of contract claim for violation of the severance pay policy.

³ In November 2008, the West Virginia Supreme Court of Appeals refused an appeal of an order entered by the Circuit Court of Greenbrier County, West Virginia, dismissing a claim alleging that severance pay is a form of "wages" as defined in the WPCA. The Court has reviewed this order and finds its reasoning persuasive.

Industries, Inc. v. Cassano, 776 N.E. 2d 398, 404 (Ind. Ct. App. 2002), **Maine** *Bellino v. Schlumberger Tech., Inc.*, 753 F. Supp. 391, 393 (D. Me. 1990), **Iowa**, *Hinshaw v. Ligon Industries, L.L.C.*, 551 F. Supp. 2d 798 (N.D. Iowa 2008), **New Hampshire**, *ACAS Acquisitions (Precitech) Inc. v. Hobert*, 923 A.2d 1076 (N.H. 2007) and **Nebraska**, *Heimbouch v. Victorio Ins. Serv., Inc.*, 369 N.W.2d 620 (Neb. 1985) and *Babb v. United Food and Commercial Workers Dist. Union, Local 271*, 448 N.W.2d 168, 172 (Neb. 1989) (all cases attached) have all held that severance is not a form of wages under those states' similar wage payment acts.

In *Hinshaw v. Ligon Industries, L.L.C.*, 551 F. Supp. 2d 798 (N.D. Iowa 2008), the court held that “it would make little sense to say that [a severance] is ‘wages due’ ... when the [severance] cannot even be accurately estimated until the employee is terminated.” *Hinshaw*, 551 F. Supp. 2d at 818. This point is illustrated well in this case, since the severance payment could not be accurately determined until the Plaintiff’s termination date.

And in *Bellino v. Schlumberger Technologies, Inc.*, 753 F. Supp. 391, 393 (D. Me. 1990), the court explained that “[t]he term ‘unpaid wages,’ as ordinarily understood, refers to earnings for completed services. The phrase does not encompass severance pay benefits, which become due only upon and by reason of an employee's termination. The Court, therefore, concludes that Plaintiffs' complaint fails to state a claim ... and thus must be dismissed.” As mentioned above, the West Virginia WPCA contains nearly identical language in its definition of “wages.”

The Fourth Circuit recently issued a detailed unpublished opinion holding that the West Virginia Wage Payment and Collection Act’s 72-hour rule is inapplicable to commissions earned after an employee is discharged. In *Gregory v. Forest River, Inc.*, No. 09-1256 (4th Cir.

March 10, 2010) (attached), the plaintiff employee was a commissioned RV salesperson who was terminated from his job with Forest River. Forest River's commission payment policy provided that monthly commissions would be "paid on shipped units at the end of every month." The policy also provided that if a sales person left employment, commissions would continue to be earned (based on units shipped in the subsequent months), but at a commission rate reduced by 50%.

After Gregory was terminated, Forest River continued to pay his commissions after the end of each month according to its policy (including the 50% post-termination reduction).⁴ Gregory sued, claiming that Forest River's commission policy on its face violated the Act by reducing commissions by 50 percent. He also sought liquidated damages under the Act for the untimely payment of commissions.

The lower court sided with Gregory and concluded that notwithstanding its commission payment policies, Forest River violated the Act by failing to pay Gregory the full amount of his commissions in a timely manner. The court noted that although the post-discharge commissions were arguably due within 72 hours of Gregory's discharge, they were due in any event within 72 hours of the end of each month (based on Forest River's calculation method).

On appeal, the Fourth Circuit reversed in part finding that Forest River did *not* violate the Act as to any commissions on items shipped *after* Gregory was terminated. The Fourth Circuit recognized that although the Act regulates the *timing* of payment of wages, "it does not regulate the amount of wages, and it does not establish how or when wages are earned.

⁴ The Fourth Circuit upheld the 50 percent reduction over the Plaintiff's challenge, holding that the WPCA does not govern the *amount* of wages due, only the timing of the payments. The commission plan, therefore, was controlling as to the amount of the commissions.

Rather, these are matters that arise from the employment agreement.” In this case, the “employment agreement” was Forest River’s commission payment plan.

As to commissions earned after the date of discharge, the court ruled that the Act simply did not apply:

[W]e hold that [Forest River] did not violate the WPCA with respect to any commissions based on units that shipped after July 13, 2007 [Gregory’s termination date]. [Forest River] could not have paid those commissions within 72 hours of Gregory’s termination because they were not earned at that time under the terms of the parties’ employment agreement. Moreover, contrary to the district court’s holding, nothing in the WPCA supports the conclusion that those payments had to be made within 72 hours of the beginning of each month. Rather, the WPCA is silent regarding this circumstance.

(Slip Op. at 14) The logic of this holding extends to the present case insofar as severance payments, like the post-discharge commissions, are not earned until *after* termination and therefore are not covered by the WPCA’s 72-hour rule. The fact that the plaintiff employee performed work to “earn” this compensation is irrelevant. The WPCA will not be interpreted to move ahead the accrual date of the compensation where an unambiguous policy establishes a later date.

Indeed, if the WPCA applied to severance pay, it would nullify and render meaningless many severance pay plans. Oftentimes, employers’ severance plans require payment of continued salary over a period of weeks, months or even years on what would have been the employee’s regular pay dates. In fact, the federal OWBPA requires that employees signing severance agreements have a seven day right of rescission. Nearly every negotiated severance agreement, therefore, requires that the severance check be paid on the eighth day following execution of the release. If the WPCA required payment within 72 hours, then the

employer would be forced to pay the severance *before* the right of rescission expired. Such plans would be essentially invalidated under the WPCA if the entire lump sum was due within 72 hours of discharge. The Legislature surely did not intend for such a result. The only logical reading of the WPCA is that it applies to "compensation for labor or services rendered by an employee" that are earned and accrue *during the term of employment* and not afterward. See *Gregory v. Forest River, Inc., supra*.

The cases cited by the Plaintiff to the contrary are not persuasive. Nearly all of them were addressed and distinguished in Judge Pomponio's order, which the Court finds persuasive.

ACCORDINGLY, it is hereby adjudged that the Defendant's Motion for Summary Judgment is GRANTED, and the Plaintiff's Motion for Summary Judgment is DENIED. This case is DISMISSED WITH PREJUDICE and retired from the active docket, each party to bear her/its own costs.

The objections and exceptions of the Plaintiff to this order are noted.

* The clerk shall mail attested copies of this Order to Brian M. Peterson, P.O. Drawer 1419, Martinsburg, WV 25402-1419; and Tammy M. McWilliams, 307 Rock Cliff Drive, Martinsburg, WV 25401.

ENTERED: _____

July 7, 2010

Gina M. Groh

Hon. Gina M. Groh, Circuit Judge

**A TRUE COPY
ATTEST**

Virginia M. Fine
Clerk of Court

By: _____

Matthew Melius
Deputy Clerk

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA.

PATRICIA ANN POWELL

Plaintiff,

v

Civil Action No. 09-C-613

UNITED BANK, INC.,

Defendant.

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**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

On a previous day came the parties, by counsel, pursuant to W.Va. R. Civ. P., Rule 56 and filed cross motions for summary judgment. This is a suit for liquidated damages under the West Virginia Wage Payment and Collection Act, W.Va. Code 21-5-1, et seq. The Plaintiff, Patricia Ann Powell, was paid her severance pay one week after her termination in accordance with the employer's severance payment policy, rather than within 72 hours of termination. She now seeks three times the severance payment as liquidated damages. Defendant raises two defenses: (1) that the Plaintiff was laid off and therefore not entitled to be paid her severance until the next regular pay day; and (2) that the severance pay in this case is not "wages" as defined by the West Virginia Wage Payment and Collection Act (WPCA).

The Court finds that the Defendant is entitled to summary judgment in its favor. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The facts of this case are not in dispute. Patricia Ann Powell was Chief Financial Officer for Premier Bank before it merged with United Bank, Inc, in July 2007. By letters dated March 1, 2007 and June 20, 2007, United Bank, Inc. informed Ms. Powell that her position would be eliminated at the time of the merger. Because of her position, United Bank kept Ms.

Powell employed after the merger to help with the transition. Her last day of work was Friday, August 3, 2007.

Upon her termination, the Defendant owed Ms. Powell salary (not including fringe benefits) for the first three days of August which totaled \$1,360.56. It also owed her compensation for unused vacation leave which totaled \$3,798.23.

Pursuant to a written severance plan contained in the merger agreement between United Bank and Premier Bank, United Bank offered a severance benefit to employees laid off during the merger. The plan provided:

(b) United agrees that each Premier employee who is involuntarily terminated by United (other than for cause) within six (6) months of the Effective Date, shall receive a severance payment equal to two (2) weeks of base pay (at the rate in effect on the termination date) for each year of service at Premier (with credit for partial years of service), with a maximum payment equal to twenty-six (26) weeks of base pay.

In a letter dated June 20, 2007, Ms. Powell was informed that her estimated severance would be \$17,964.53, and that "severance payments will be made the next scheduled pay date after your job end date." She was told that "in order to receive this retention bonus and the severance pay, you must maintain satisfactory job performance throughout the conversion/merger process and remain employed by Premier Community Bankshares or United Bank until the stated job end date."

On August 10, 2007, Ms. Powell's next regular payday after termination, United Bank paid Ms. Powell the total gross sum of \$23,123.32, minus withholdings. Ms. Powell retained attorney Lauren Clingan, who claimed Ms. Powell's final paycheck was untimely paid because it was not given to her within 72 hours of her discharge. Ms. Clingan demanded

liquidated damages of three times the total August 10, 2007 paycheck, including the severance portion.

In response, United Bank paid Ms. Powell 3 times the sum of her vacation pay and final earned salary for a total of \$15,476.37 in liquidated damages. It refused, however, to pay liquidated damages on her severance payment because the severance payment was not “earned” until *after* termination occurred, putting it outside the scope of the West Virginia Wage Payment and Collection Act’s 72-hour rule. More than a year later, Ms. Powell hired a new attorney to file suit to recover the liquidated damages on the severance pay. This suit followed.

CONCLUSIONS OF LAW

Summary judgment in United Bank’s favor is appropriate under Rule 56 of the West Virginia Rules of Civil Procedure because the material facts are not in dispute, and United is entitled to judgment in its favor as a matter of law. *See* W.Va. R. Civ. P., Rule 56.

The WPCA prescribes various timetables for the payments of an employee’s final paycheck. Employees who are “discharge[d]” must be paid “wages in full within 72 hours.” W.Va. Code § 21-5-4(b). Employees who “quit[] or resign[]” must be paid their “wages no later than the next regular payday” unless they provide at least one pay period’s notice of intention to quit, in which case they must be paid “at the time of quitting.” W.Va. Code § 21-5-4(c). Finally, employees who are “suspended as a result of a labor dispute” or 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). The term “layoff” is defined as follows in the Code of State Rules:

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. §42-5-2.10 (effective date March 29, 1990).¹ An employer that fails to adhere to the timetables established in W.Va. Code § 21-5-4(b), (c) and (d) "shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages," W.Va. Code § 21-5-4(e).

The Plaintiff was laid off, and properly paid on her next regular pay date.

No violation of the WPCA occurred in this case because the undisputed record establishes that the Plaintiff was "laid off" on August 3, 2007, and timely paid all wages and other amounts due and owing to her on her next regular pay date of August 10, 2007. As defined in the Code of State Rules, a "lay-off" is "any involuntary cessation of an employee for a reason not relating to the quality of the employee's performance or other employee-related reason." W.Va. Code State R., § 42-5-2.10. As the undisputed record in this case shows, the Plaintiff was given notice on March 1, 2007 that her employer, Premier Community Bankshares, was merging with United Bank, and as a result of restructuring, her position was being eliminated. Indeed, in order to claim entitlement to the severance pay at issue in this case, she has to prove that she maintained satisfactory job performance through her last day of employment. The Defendant does not dispute that she was performing her job duties in a satisfactory manner at the time her

¹ Although in common parlance, the term "layoff" may infer a temporary cessation of employment, the Code of State Rules definition of that term does not require the "cessation" of employment to be temporary. The common dictionary definition of cessation is a stoppage that is either temporary *or* final. See Random House Dictionary of the English Language at 340 (2d Ed. Unabridged 1987) (defining cessation as "a temporary or complete stopping; discontinuance: *a cessation of hostilities.*"); Merriam-Webster's Collegiate Dictionary at 188 (10th Ed. 1998) (defining cessation as "a temporary or final ceasing (as of action): STOP"); American Heritage Dictionary of the English Language (4th Ed. 2009) (defining cessation as "a bringing or coming to an end; a ceasing: *a cessation of hostilities.*").

position was eliminated. Thus, there is no dispute that her cessation of employment was involuntary on her part, and “for a reason not relating to the quality of [her] performance or other employee-related reason.” W.Va. Code State R. § 42-5-2.10. Accordingly, her wages were due by the next regular pay day, not within 72 hours.

The undisputed record also establishes timely payment. The Plaintiff admits in her responses to written discovery that August 10, 2007 was her “next regular pay day” and that she received her final paycheck, including her severance, on that date. Accordingly, United Bank complied with the West Virginia Wage Payment and Collection Act, and is not liable for liquidated damages.

Severance pay is not “wages” that must be paid within 72 hours of discharge.

Even if the Plaintiff was “discharged” for cause and entitled to payment within 72 hours under § 21-5-4(b), the Court concludes that this case should nevertheless be dismissed because the severance pay at issue does not fall within the definition of “wages” provided under the Act. The WPCA requires an employer to pay its discharged employee’s wages in full within 72 hours, *see* W.Va. Code §§ 21-5-1(c), 21-5-4(b), and an employer that fails to adhere to this requirement “shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages,” W.Va. Code § 21-5-4(e).

However, the Court finds that severance pay does not fall within the definition of “wages” provided under the Act. The WPCA defines wages 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*

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W.Va. Code § 21-5-1(c). Severance pay, by its very nature, cannot be “earned” by an employee until *after* she is terminated. Therefore, severance pay is not “compensation for labor or services rendered” by the employee. The employment relationship must be ended in order for it to become payable. Therefore, under 21-5-1(c), it is not a “then accrued fringe benefit” (“then” being the moment of termination). Therefore, severance pay does not meet the definition of wages under West Virginia law, and need not be paid within 72 hours of termination.²

Although the West Virginia Supreme Court of Appeals has not had occasion to rule on this point³, there is a wealth of support from the laws of states other than West Virginia that have soundly rejected the notion that severance is a form of “wages” that is governed by final wage payment laws. Courts in **Delaware**, *Dep't. of Labor ex rel. Commons v. Green Giant Co.*, 394 A.2d 753, 755 (Del. Sup. Ct. 1978), **Connecticut**, *McGowan v. Administrator, Unemployment Compensation Act*, 220 A.2d 284, 286 (Conn. 1966) and *Drybrough v. Axiom Corp.*, 172 F. Supp. 2d 366, 371 (D. Conn. 2001), **Massachusetts** *Prozinski v. Northeast Real Estate Servs., LLC*, 797 N.E.2d 415, 419-420 (Mass. Ct. App. 2003), **Indiana**, *Design Industries, Inc. v. Cassano*, 776 N.E. 2d 398, 404 (Ind. Ct. App. 2002), **Maine** *Bellino v. Schlumberger Tech., Inc.*, 753 F. Supp. 391, 393 (D. Me. 1990), **Iowa**, *Hinshaw v. Ligon Industries, L.L.C.*, 551 F. Supp. 2d 798 (N.D. Iowa 2008), **New Hampshire**, *ACAS Acquisitions*

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³ In November 2008, the West Virginia Supreme Court of Appeals refused an appeal of an order entered by the Circuit Court of Greenbrier County, West Virginia, dismissing a claim alleging that severance pay is a form of “wages” as defined in the WPCA. The Court has reviewed this order and finds its reasoning persuasive.

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And in *Bellino v. Schlumberger Technologies, Inc.*, 753 F. Supp. 391, 393 (D. Me. 1990), the court explained that “[t]he term ‘unpaid wages,’ as ordinarily understood, refers to earnings for completed services. The phrase does not encompass severance pay benefits, which become due only upon and by reason of an employee's termination. The Court, therefore, concludes that Plaintiffs' complaint fails to state a claim ... and thus must be dismissed.” As mentioned above, the West Virginia WPCA contains nearly identical language in its definition of “wages.”

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month.” The policy also provided that if a sales person left employment, commissions would continue to be earned (based on units shipped in the subsequent months), but at a commission rate reduced by 50%.

After Gregory was terminated, Forest River continued to pay his commissions after the end of each month according to its policy (including the 50% post-termination reduction).⁴ Gregory sued, claiming that Forest River’s commission policy on its face violated the Act by reducing commissions by 50 percent. He also sought liquidated damages under the Act for the untimely payment of commissions.

The lower court sided with Gregory and concluded that notwithstanding its commission payment policies, Forest River violated the Act by failing to pay Gregory the full amount of his commissions in a timely manner. The court noted that although the post-discharge commissions were arguably due within 72 hours of Gregory’s discharge, they were due in any event within 72 hours of the end of each month (based on Forest River’s calculation method).

On appeal, the Fourth Circuit reversed in part finding that Forest River did *not* violate the Act as to any commissions on items shipped *after* Gregory was terminated. The Fourth Circuit recognized that although the Act regulates the *timing* of payment of wages, “it does not regulate the amount of wages, and it does not establish how or when wages are earned. Rather, these are matters that arise from the employment agreement.” In this case, the “employment agreement” was Forest River’s commission payment plan.

⁴ The Fourth Circuit upheld the 50 percent reduction over the Plaintiff’s challenge, holding that the WPCA does not govern the *amount* of wages due, only the timing of the payments. The commission plan, therefore, was controlling as to the amount of the commissions.

As to commissions earned after the date of discharge, the court ruled that the Act simply did not apply:

[W]e hold that [Forest River] did not violate the WPCA with respect to any commissions based on units that shipped after July 13, 2007 [Gregory's termination date]. [Forest River] could not have paid those commissions within 72 hours of Gregory's termination because they were not earned at that time under the terms of the parties' employment agreement. Moreover, contrary to the district court's holding, nothing in the WPCA supports the conclusion that those payments had to be made within 72 hours of the beginning of each month. Rather, the WPCA is silent regarding this circumstance.

(Slip Op. at 14) The logic of this holding extends to the present case insofar as severance payments, like the post-discharge commissions, are not earned until *after* termination and therefore are not covered by the WPCA's 72-hour rule. The fact that the plaintiff employee performed work to "earn" this compensation is irrelevant. The WPCA will not be interpreted to move ahead the accrual date of the compensation where an unambiguous policy establishes a later date.

Indeed, if the WPCA applied to severance pay, it would nullify and render meaningless many severance pay plans. Oftentimes, employers' severance plans require payment of continued salary over a period of weeks, months or even years on what would have been the employee's regular pay dates. In fact, the federal OWBPA requires that employees signing severance agreements have a seven day right of rescission. Nearly every negotiated severance agreement, therefore, requires that the severance check be paid on the eighth day following execution of the release. If the WPCA required payment within 72 hours, then the employer would be forced to pay the severance *before* the right of rescission expired. Such plans would be essentially invalidated under the WPCA if the entire lump sum was due within 72

hours of discharge. The Legislature surely did not intend for such a result. The only logical reading of the WPCA is that it applies to "compensation for labor or services rendered by an employee" that are earned and accrue *during the term of employment* and not afterward. See *Gregory v. Forest River, Inc., supra*.

The cases cited by the Plaintiff to the contrary are not persuasive. Nearly all of them were addressed and distinguished in Judge Pomponio's order, which the Court finds persuasive.

ACCORDINGLY, it is hereby adjudged that the Defendant's Motion for Summary Judgment is GRANTED, and the Plaintiff's Motion for Summary Judgment is DENIED. This case is DISMISSED WITH PREJUDICE and retired from the active docket, each party to bear her/its own costs.

The objections and exceptions of the Plaintiff to this order are noted.

* The clerk shall mail attested copies of this Order to Brian M. Peterson, P.O. Drawer 1419, Martinsburg, WV 25402-1419; and Tammy M. McWilliams, 307 Rock Cliff Drive, Martinsburg, WV 25401.

ENTERED: _____

July 7, 2010



Hon. Gina M. Groh, Circuit Judge

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

By: 
Deputy Clerk