

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 11-1396**

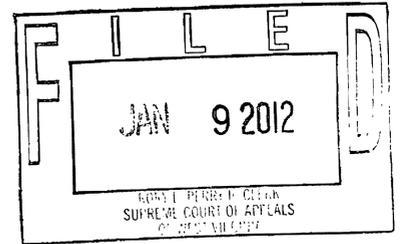
**TELE-RESPONSE CENTER, INC.,**

***Defendant Below / Petitioner***

**v.**

**KACE DOUGLAS and RANDI DAMPHA,**

***Plaintiff Below / Respondent***



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Hon. Martin J. Gaughan, Judge  
Circuit Court of Brooke County  
Civil Action No. 10-C-33

**PETITIONER'S BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	3
ASSIGNMENTS OF ERROR .....	4
STATEMENT OF THE CASE.....	4
SUMMARY OF ARGUMENT .....	11
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	13
ARGUMENT .....	14
I. The respondents were laid off under Section 21-5-4(d) of the West Virginia Code. ....	14
II. The respondents were not entitled to an award of attorney fees and expenses under West Virginia Code Section 21-5-12.....	16
III. The respondents were not the employees of the petitioner as required for liability to be imposed under the Act.....	19
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	22

## TABLE OF AUTHORITIES

### Cases

<u>Ash v. Ravens Metal Products</u> , 190 W. Va. 90, 437 S.E.2d 254 (1993) .....	17,18
<u>Chrystal R.M. v. Charlie A.L.</u> , 194 W.Va. 138, 459 S.E.2d 415 (1995).....	15
<u>Farley v. Zapata Coal Corp.</u> , 167 W. Va. 630, 281 S.E.2d 238 (1981) .....	17
<u>Lehman v. United Bank, Inc.</u> , No. 101486, (Nov. 10, 2011).....	11, 15
<u>Painter v. Peavy</u> , 192 W.Va. 189, 451 S.E.2d 755 (1994).....	15
<u>Woodall v. International Broth. Of Elec. Workers, Local 596</u> , 192 W.Va. 673, 453 S.E.2d 656 (1994) .....	20

### Statutes

W. Va. Code Sec. 21-5-1 .....	4, 19
W. Va. Code Sec. 21-5-4 .....	5, 10, 11, 14, 15, 19, 21
W. Va. Code Sec. 21-5-12 .....	12, 13, 16, 22

### Other Authorities

W. Va. Code of State Reg. Sec. 42-5-2.10 .....	11, 15
W. Va. R. Civ. Pr. 23 .....	4, 5
W. Va. R. Civ. Pr. 56 .....	19, 20

### **ASSIGNMENTS OF ERROR**

- (1) The circuit court erred when it granted respondent's motion for summary judgment and found in its May 27, 2010 Order that the petitioner discharged rather than laid off the class members.
- (2) The circuit court erred when it awarded attorney fees and litigation expenses to the respondents in its September 7, 2011 Order.
- (3) The circuit court erred when it granted respondent's motion for summary judgment and found in its May 27, 2010 Order the petitioner employed the defendants.

### **STATEMENT OF THE CASE**

This case arises out of allegations that petitioner Tele-Response Center, Inc. ("Tele-Response") failed to pay the respondents in a timely manner under the West Virginia Wage Payment and Collection Act, Section 21-5-1 of the West Virginia Code, et seq. (the "Act"), when four West Virginia telemarketing call centers located in Wellsburg, Parkersburg, Dunbar, and Bluefield ceased business operations on January 20, 2010. (*Appendix at pp. 19-23*). Over the objections of the petitioner, respondents had this case certified as a class action under Rule 23 of the West Virginia Rules of Civil Procedure for approximately 187 persons working at these four call centers at the time business operations ceased. (*Appendix at pp. 76-90*).

Respondents filed their Amended Consolidated Class Action Complaint on February 18, 2011. (*Appendix at p. 24*). The trial court on February 25, 2011 entered the ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION. (*Appendix at p. 90*).

Petitioner filed its Answer to the Amended Consolidated Class Action Complaint on March 4, 2011. (*Appendix at p. 29*).

The Amended Consolidated Class Action Complaint made the following pertinent allegations:

(1) Petitioner employed the class members at its four West Virginia call centers in Wellsburg, Parkersburg, Dunbar and Bluefield from January 2, 2010 until January 20, 2010, at which time the class members were discharged or laid off by the petitioner.

(2) Petitioner did not timely pay the class members after the separation from employment, as required by Section 21-5-4(b), (c) or (d) of the West Virginia Wage Payment and Collection Act.

(3) Respondents were entitled to damages, including unpaid wages, liquidated damages, attorney fees and costs, under the Act.

(4) Class certification was appropriate under Rule 23 of the West Virginia Rules of Civil Procedure.

(*Appendix at pp. 19-24*).

Petitioner's Answer asserted that it did not employ the respondents, that it did not fail to make timely wage payments, and that the proposed class did not meet the requirements of Rule 23 for certification. (*Appendix at pp. 25-29*).

Respondents filed a motion for partial summary judgment on May 3, 2011. This motion sought summary judgment on several issues:

(1) That petitioner failed to timely pay its West Virginia employees at the Wellsburg, Bluefield and Dunbar offices for the pay period January 2, 2010 to January 15, 2010; and,

(2) That petitioner failed to timely pay its West Virginia employees at the Parkersburg, Wellsburg, Bluefield and Dunbar offices for the pay period January 16, 2010 to January 20, 2010.

*(Appendix at p. 104).*

Petitioner filed its Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment on May 16, 2011. *(Appendix at p. 135).* In this opposition brief petitioner presented its evidence that Tele-Response did not employ the respondents through the affidavit of Joseph Grossman, Senior Vice President of Operations, and supporting documentation. *(Appendix at pp. 136-48).* This affidavit detailed the employment history of the respondents. Tele-Response Center, Inc. was owned by International Consolidated Companies, Inc. ("ICCI") from February 2009 through May 2010. Late in 2009 ICCI formed and incorporated DCG Financial, Inc. ("DCG"), and ICCI owned all the shares of DCG. ICCI and DCG entered into an agreement with Millennium Teleservices, LLC ("Millennium"), dated January 1, 2010 for the purpose of operating and taking over certain telemarketing call centers including the West Virginia call centers of Parkersburg, Bluefield, Wellsburg and Dunbar, which are the subject matters of this litigation. This agreement specified that DCG would assume the employment of certain Millennium employees and leases for the call centers in Parkersburg, Bluefield, Wellsburg and Dunbar as of January 2, 2010. *(Appendix at pp. 136-48).*

DCG/ICCI was not ready to process the payroll of employees as of January 1, 2010 when the facilities in Parkersburg, Bluefield, Wellsburg and Dunbar started operating under DCG

management. Because of this circumstance DCG/ICCI decided to place its employees working at the Parkersburg, Bluefield, Wellsburg and Dunbar centers on the payroll books of Tele-Response Center, Inc. with the intention of moving these DCG/ICCI employees over to the DCG payroll shortly thereafter. Tele-Response did not have any leases for the call centers in Parkersburg, Bluefield, Wellsburg and Dunbar or any agreements with Millennium who owned and managed those facilities through late December 2009. Tele-Response had no relationship with these employees of DCG/ICCI as it was Tele-Response's parent company, ICCI, which made the decision to place employees of DCG on the payroll books of Tele-Response Center, Inc. (*Appendix at pp. 136-48*).

DCG/ICCI did not have any agreements with the clients being provided telemarketing services previously by Millennium at the Parkersburg, Bluefield, Wellsburg and Dunbar locations and were misled by Millennium that the agreements with the clients to pay Millennium had been assigned to DCG. DCG/ICCI had assumed the billing from these clients would be sufficient and in time to reimburse Tele-Response Center, Inc. for the temporary payroll expense. However, DCG/ICCI never received any money from Millennium or the clients which were supposed to be assigned to DCG/ICCI at the Parkersburg, Bluefield, Wellsburg and Dunbar locations. As a result, DCG/ICCI did not have the funds to pay its employees at the West Virginia locations for work performed from January 1, 2010 through January 20, 2010. Tele-Response's only relationship and involvement with the respondents was from January 1, 2010 through January 20, 2010 when the respondents were placed on the payroll of Tele-Response by ICCI. (*Appendix at pp. 136-48*).

In May 2010 ICCI sold Tele-Response to TRC Acquisition Corp., and Tele-Response has no current relationship to ICCI. After this sale, TRC Acquisition Corp. discovered the corporate manipulations of ICCI to place what were DCG employees on the corporate payroll of Tele-Response. Tele-Response ultimately was the entity which paid all these West Virginia workers their wages from January 1-20, 2010 despite the fact that ICCI/DCG was the entity employing and controlling the employment of the respondents. (*Appendix at pp. 136-48*).

At issue in this case are wage payments to the class members for the pay periods from January 1-15, 2010 and from January 16-20, 2010. (*Appendix at pp. 107-109*). January 20, 2010 was the date that DCG ceased operation of the call centers in West Virginia. (*Appendix at pp. 107-109*). No dispute exists among the parties that all the class members eventually were paid their proper wages; however, owing to Tele-Response's financial condition at the time, some of these final paychecks were received over thirty days late by many of the class members thus implicating the statutory penalties found in the West Virginia Wage Payment and Collection Act. (*Appendix at pp. 17 & 107-08*). The evidence presented to the lower court was undisputed that Tele-Response's pay days were the 5<sup>th</sup> and 20<sup>th</sup> of each month. (*Appendix at p. 107*). Tele-Response mailed out the January 1-15, 2010 paychecks on January 21, 2010 from Parkersburg to the Parkersburg class members and on January 22, 2010 from Philadelphia, Pa. to the Wellsburg, Dunbar and Bluefield class members. (*Appendix at p. 108*). Tele-Response mailed out the January 16-20, 2010 paychecks for all class members on February 23, 2010. (*Appendix at p. 108*).

The trial court entered an Order on May 27, 2011 granting in part the respondents' motion for partial summary judgment. (*Appendix at p. 14*). In this Order the trial court made the following pertinent Findings of Fact:

(1) Tele-Response operated telemarketing call centers in Wellsburg, Parkersburg, Dunbar and Bluefield from January 2-20, 2010, and Tele-Response employed the class members during this time period.

(2) Tele-Response's pay days were the 5<sup>th</sup> and 20<sup>th</sup> of each month;

(3) Tele-Response employed the class members from January 2-20, 2010.

(4) On January 20, 2010 Tele-Response notified the class members in a company-wide communication that their employment would end as of January 20, 2010 at 4:00 pm as a result of unforeseen business circumstances.

(5) Tele-Response offered no evidence when the employments of the class members were terminated that petitioner would be recalling the class members at any time under any circumstances.

(6) Petitioner claimed that the separation from employment was a lay-off, and respondent claimed that the class members had been discharged.

(7) Two paychecks are at issue in this litigation, "Paycheck #1" for the January 20, 2010 payday<sup>1</sup> and "Paycheck #2" for the February 5, 2010 payday.<sup>2</sup>

(10) Paycheck #1 was mailed on January 21, 2010 from Parkersburg, WV for the Parkersburg employees and on January 22, 2010 from Philadelphia, PA for the Wellsburg, Dunbar and Bluefield employees. Paycheck #2 was mailed on February 23, 2010.

*(Appendix at pp. 6-9).*

The trial court then made the following pertinent "Conclusions of Law" in its May 27, 2010 Order:

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<sup>1</sup> Paycheck #1 was for the January 2-15, 2010 pay period.

<sup>2</sup> Paycheck #2 was for the January 16-20, 2010 pay period.

- (2) The class members were the employees of the petitioner.
- (5) The affidavit of Joseph Grossman did not raise even a scintilla of evidence that the class members were not employees of the petitioner.
- (6) The West Virginia Wage Payment and Collection Act uses the terms “discharge” and “layoff” to characterize two separate and distinct employment separations.
- (7) The terms “discharge” and “layoff” are clear and unambiguous. A “discharge” involves a permanent termination of employment whereas a “layoff” involves a temporary suspension of employment with anticipation of recall.
- (9) Petitioner discharged the class members on January 20, 2010 at 4:00 pm.
- (10) West Virginia Code Section 21-5-4(b) provides that a discharged employee must receive their wages in full within seventy-two hours.
- (11) If a class member did not receive paycheck #1 by 4:00 pm on January 23, 2010, the petitioner would be liable to that class member under West Virginia Code Section 21-5-4(e) because paycheck #1 was not received within 72 hours under West Virginia Code Section 21-5-4(b).
- (12) Petitioner was liable to the Wellsburg, Dunbar and Bluefield class members under Section 21-5-4(e) for paycheck #1 because it was not received in seventy-hours.
- (13) Petitioner was not liable to class members in Parkersburg for paycheck #1 because it was received within seventy-two hours.<sup>3</sup>

*(Appendix at pp. 9-12).*

Following the entry of partial summary judgment in favor of the respondents for all the class members with respect to paycheck #2 and the Wellsburg, Dunbar and Bluefield class

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<sup>3</sup> Petitioner does not dispute that paycheck #2 was received untimely by the class members under any analysis of the Wage Payment and Collection Act.

members with respect to paycheck #1, the respondents filed a Motion for Entry of Judgment on June 27, 2011. (*Appendix at p. 242*). After the parties briefed the issues and the trial court conducted a hearing, the trial court issued a September 7, 2011 Order entering judgment in favor of the respondents. (*Appendix at pp. 15-18*). Based on the findings in the May 27, 2011 Order, the parties agreed that the liquidated damages were \$213,310.38 with prejudgment interest in the amount of \$22,932.79. The trial court further awarded all litigation expenses claimed by the respondents in the amount of \$6,992.27. The trial court awarded attorney fees in the amount of \$92,740.00 “based upon the hourly rates determined by the Court to be reasonable founded upon the totality of circumstances in this case. . . .” (*Appendix at pp. 15-18*).

### SUMMARY OF ARGUMENT

(1) The class members were laid off and not discharged.

This Court on November 10, 2011 issued an opinion Lehman v. United Bank, Inc., No. 101486, (Nov. 10, 2011), which was in direct contradiction with the trial court’s May 27, 2011 Order which ruled that the class members had been discharged rather than laid off. The employees at issue in Lehman were notified that their employments were being eliminated as a result of a merger. The employees were given no indication that they would be brought back at any time in the future. This Court relied on West Virginia Code of State Regulations Section 42-5-2.10 which defines a “lay-off” as “any voluntary cessation of an employee for a reason not relating to the quality of the employee’s performance or other employee-related reason,” and rejected the argument of the appellants in Lehman that a lay off could not be permanent in nature. Lehman stands for the proposition that Section 21-5-4(d) “applies to any situation involving the lay-off of an employee, whether the lay-off is temporary or permanent.”

The importance of this distinction in the present case is that with a layoff paycheck #1 would need to have been received by the class members by the next regular pay day of February 5, 2010 rather than within seventy-two hours of discharge as the trial court ruled. As a result, liquidated damages were incorrectly awarded to the class members in Dunbar, Wellsburg and Bluefield for Paycheck #1, which was mailed out from Philadelphia on January 22, 2010 and would have reached all class members by the next pay day of February 5, 2010. The case needs to be remanded back to the trial court for a re-calculation of liquidated damages, costs and attorney fees in light of the fact that no damages should have been awarded with respect to paycheck #1.

(2) No attorney fees or costs should have been awarded to respondents.

West Virginia Code Section 21-5-12 leaves it in the discretion of the trial court whether to award attorney fees and costs to a successful plaintiff. In Wage Payment and Collection Act cases this Court has held that attorney fees and expenses should be awarded to prevailing plaintiffs as a matter of course in the absence of special circumstances which would render such an award unjust. If there ever was a set of facts rendering such an award unjust, this case is it. It is factually undisputed that Tele-Response paid all the class members the wages owed to them. Paycheck #2 was paid late but only due to the petitioner's financial circumstances and the corporate manipulations of DCG/ICCI, Tele-Response paid all wages as soon as it was financially able to make the payments. Tele-Response did not make a deliberate effort to avoid any wage obligations to the class members.

Tele-Response presented more than sufficient evidence of special circumstances such that the trial court abused its discretion in awarding fees and costs to the class members.

(3) Petitioner did not employ the respondents.

The clear language of the West Virginia Wage Payment and Collection Act only imposes liability on a company which does not timely pay its “employees.” Under West Virginia law, an employer-employee relationship did not exist between the petitioner and respondents because Tele-Response had no control over the class members. The affidavit of Joseph Grossman created a genuine issue of material fact as to whether Tele-Response was the employer of the class members such that partial summary judgment should not have been awarded to the respondents.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner deems oral argument to be necessary on one of the issues in this case. Petitioner has presented three issues for consideration in this appeal:

- (1) whether petitioner employed the class members;
- (2) whether petitioner discharged or laid off the class members; and
- (3) whether special circumstances existed in this matter such that the trial court’s award of attorney fees and expenses was unjust.

Oral argument is not necessary on issues (1) and (2). Under Rule 18(a) the dispositive issues inherent in (1) and (2) have already been decided by this Court and the facts and legal arguments can be adequately presented in the briefs and record on appeal.

However, petitioner asserts that issue (3) is one of fundamental public importance such that oral argument is appropriate under Rule 20(a)(2). Section 21-5-12 of the Wage Payment and Collection Act clearly contemplates that a set of facts will exist where the award of attorney fees and litigation expenses is not warranted for a claim brought under the Act. Some degree of

consideration must be afforded a financially insolvent company which makes every effort to pay its workers after ceasing business operations and in fact pays everyone, albeit late, under the Act. The Act's mandatory penalty of treble wages can be a harsh result under these circumstances and can foster a negative business environment in this State. While the petitioner recognizes the overwhelming importance of West Virginia workers being properly compensated for work performed, the lateness of the wage payments under the circumstances did not warrant an award of fees and expenses to an entire class of claimants, especially when the demand for such fees and expenses were generated by enterprising counsel and not the claimants themselves. These types of awards of expenses and fees are of fundamental importance to the business community in West Virginia.

## ARGUMENT

### I. The respondents were laid off under Section 21-5-4(d) of the West Virginia Code.

Section 21-5-4(d) of the West Virginia Code provides that when an employee is laid off "for any reason whatsoever," the company making the layoff must pay the wages owed to the employee by the next regular payday. The trial court in this case ruled in its May 27, 2011 Order granting partial summary judgment that the respondents were discharged, and thus required to have their paycheck for the January 1-15 pay period (Paycheck #1) delivered within seventy-two hours of the discharge as provided by West Virginia Code Section 21-5-4(b). (*Appendix at pp. 11-13*). A lay off under 21-5-4(d) would have required Paycheck #1 to be delivered by February 5, 2010.

The standard of review for a trial court's granting of summary judgment is *de novo*. Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). A *de novo* standard of review also applies "[w]here the issue on an appeal from the circuit court is clearly a question of law or

involving an interpretation of a statute.” Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

This Court recently addressed this precise issue of discharge versus lay off in Lehman v. United Bank, Inc., No. 101486, (Nov. 10, 2011). The employees at issue in Lehman were notified that their employments were being eliminated as a result of a merger. The employees were given no indication that they would be brought back at any time in the future. The trial court in Lehman ruled that these employees were laid off rather than discharged. The West Virginia Supreme Court upheld the trial court’s ruling that a lay off had occurred. This Court relied on West Virginia Code of State Regulations Section 42-5-2.10 which defines a “lay-off” as “any voluntary cessation of an employee for a reason not relating to the quality of the employee’s performance or other employee-related reason.” This Court rejected the argument of the appellants that a lay off could not be permanent in nature and ruled that Section 21-5-4(d) “applies to any situation involving the lay-off of an employee, whether the lay-off is temporary or permanent.”

There is no distinction between the separations from employment in the present case and the ones in Lehman. The determination in the trial court’s May 27, 2011 Order that the class members were discharged because their separation from employment was permanent is now in direct contradiction with the holding of Lehman. (*Appendix at p. 9*). As a result, liquidated damages were incorrectly awarded to the class members in Dunbar, Wellsburg and Bluefield for Paycheck #1, which was mailed out from Philadelphia on January 22, 2010 and would have reached all class members by the next pay day of February 5, 2010.

As a result of Lehman, this case needs to be remanded back to the lower court for the entry of an order with respect to Paycheck #1 which reflects that the class members were laid off

rather than discharged. Likewise, the trial court's award of attorney fees and expenses was based on work performed on behalf of the class members to recover damages for Paycheck #1 when no such damages were warranted. (*Appendix at pp. 17-18*). To the extent this Court permits any award of fees and expenses to stand, this issue also needs to be remanded back to the trial court for a new analysis of fees and expenses in light of the reduced liquidated damages award.

II. The respondents were not entitled to an award of attorney fees and expenses under West Virginia Code Section 21-5-12.

The trial court's September 7, 2011 Order awarded respondents \$92,740.00 in attorney fees and \$6,992.97 in litigation expenses. (*Appendix at p. 18*). The September 7, 2011 Order was in response to the respondents' Motion for Entry of Judgment which respondents filed after the trial court granted summary judgment in favor of the respondents. The Motion for Entry of Judgment requested the lower court to award an amount of liquidated damages under the Wage Payment and Collection Act and to award respondents fees and costs under Section 21-5-12. While the trial court's September 7, 2011 Order did make an award of fees and expenses to the respondents, the order does not provide an analysis or reason for the decision to award fees and expenses. (*Appendix at pp. 15-18*). For the same reasons stated above, the standard of review by this Court of the lower court's award of fees and expenses is *de novo*.

Section 21-5-12(b) of the Act leaves it in the discretion of the trial court whether to award attorney fees and costs to a successful plaintiff, "The Court in any action brought under this article *may*, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant." (emphasis added). This Court over thirty years ago in its decision in Farley v. Zapata Coal Corp., 167 W. Va. 630, 281 S.E.2d 238 (1981), made a strong statement as to when costs of the action should be awarded for claims under the Act:

The statute provides that the court “may” assess costs of the action, including reasonable attorney fees against the defendant. We feel that costs, including attorney fees, should be awarded to prevailing plaintiffs as a matter of course in the absence of special circumstances which would render such an award unjust. Both the Wage Payment and Collection Act and our mechanics' lien statutes are designed to protect the laborer and act as an aid in the collection of compensation wrongfully withheld. Working people should not have to resort to lawsuits to collect wages they have earned. When, however, resort to such action is necessary, the Legislature has said that they are entitled to be made whole by the payment of wages, liquidated damages, and costs, including attorney fees. If the laborer were required to pay attorney fees out of an award intended to compensate him for services performed, the policy of these statutes would be frustrated. The issue, therefore, is not whether working people who assert their legal rights under W.Va. Code Chapter 21, article 5 are entitled to attorney fees, but what a reasonable attorney fee would be under the facts and circumstances of the particular case. Consequently, we hold that 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 would render such an award unjust. Because no such circumstances appear on the record before us, on remand the court below should award costs, including reasonable attorney fees, to the appellants.

167 W. Va. at 639, 281 S.E.2d at 244. This Court in Ash v. Ravens Metal Products, Inc., 190 W. Va. 90, 437 S.E.2d 254 (1993), commented on what circumstances might make an award of attorney fees unjust and suggested that a circumstance where an employer does not refuse to compensate its employees for wages earned might be appropriate for not awarding costs of the action under the Act.

The above quoted section from Farley lays out for factors which should be determinative for when no award of costs of the action is warranted. These factors can be listed as follows:

- (1) “special circumstances” must exist “which would render such an award unjust;”
- (2) a worker is not seeking “the collection of compensation wrongfully withheld;”
- (3) workers did not have “to resort to lawsuits to collect wages they have earned;”  
and
- (4) a worker would not have “to pay attorney fees out of an award intended to compensate him for services performed.”

Inherent in all these factors is the assumption in an award of costs of the action the claimant was seeking earnings which the employer had failed to pay, and the filing of a civil claim was necessary to recover these unpaid earnings. It is significant and determinative in this case to note that the lower court's September 7, 2011 judgment order did not award any unpaid earnings. (*Appendix at p. 15-18*). The only damages awarded to the respondents were liquidated damages, attorney fees and costs. (*Appendix at pp. 15-18*). All earnings were paid to the respondents without the need for a civil action although Paycheck #2 was paid late under the Act.

It would be fundamentally unfair in the present case to award costs of the action to the respondents at the expense of petitioner Tele-Response. Special circumstance exists in this case that the respondents found themselves without employment on January 20, 2010 as a result of their employer having to cease its West Virginia business operations due to financial difficulties. (*Appendix at pp. 107-08*). The respondents had unpaid earnings at the time of their lay-off, but these earnings were mailed out to the respondents on February 23, 2010 before any civil claims were instituted by the respondents. Petitioner undertook to make sure all unpaid earnings were paid as soon as it was financially able to do so. (*Appendix at p. 139*). Unlike the situation in Ash v. Ravens Metal Products, *supra*, petitioner made no deliberate effort to avoid any payment of earnings to the respondents.

It was counsel for respondents who conceived the idea of a class action suit to recover liquidated damages, attorney fees and costs from a financially troubled company. (*Appendix at pp. 30-50*). Had respondents never filed suit, their only losses were the three week delay in receiving unpaid earnings for the January 16-20, 2010 pay period. This loss should not be minimized, but without counsel for the respondents there was no great demand to seek any kind of redress from petitioner for this unavoidable late payment of earnings for five days of work by

the respondents. It cannot be said in any way that the policies of the West Virginia Wage Payment and Collection Act would be in any way frustrated by respondents having to pay their attorney fees and costs out of the award of liquidated damages.

III. The respondents were not the employees of the petitioner as required for liability to be imposed under the Act.

Section 21-5-4 speaks in terms of when “any person, firm or corporation” must pay an “employee” after a discharge,<sup>4</sup> resignation<sup>5</sup> or lay-off.<sup>6</sup> The clear language and intent of the Act is to make a company responsible for the unpaid earnings due to its employee. Section 21-5-1(b) defines an “employee” as including “any person suffered or permitted to work by a person, firm or corporation.”

The lower court in this case granted respondents’ request for summary judgment on the issue of whether petitioner employed the respondents, ruling that such an employment relationship did exist. (*Appendix at pp. 9-10*). Paragraph 2 of the Conclusions of Law in the lower court’s May 27, 2011 order determined that the respondents “were employees of the [petitioner] because the employment records are overwhelming evidence proving and establishing that [petitioner] employed them.” (*Appendix at p. 9*). Paragraph 5 of the Conclusions of Law found that the affidavit of Joseph Grossman, the Senior Vice President Operations for the petitioner, describing the employment history of the respondents was “self-serving” and did “not raise even a scintilla of evidence that the Class members were not employees” of the petitioner. (*Appendix at p. 10*).

As cited above, the standard of review for this determination on summary judgment by the lower court is *de novo*. Rule 56 of the West Virginia Rules of Civil Procedure provides

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<sup>4</sup> Section 21-5-4(b)

<sup>5</sup> Section 21-5-4(c)

<sup>6</sup> Section 21-5-4(d)

summary judgment shall be rendered if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits” show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The affidavit of Joseph Grossman and the applicable law on the employee/employer relationship created a genuine issue of material fact necessitating the denial of summary judgment on this issue. (*Appendix at pp. 136-40*).

There are four general factors which bear upon whether an employer/employee relationship exists; “(1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative.” Woodall v. International Broth. Of Elec. Workers, Local 596, 192 W.Va. 673, 677, 453 S.E.2d 656, 660 (1994). The affidavit of Joe Grossman demonstrated that: (1) DCG/ICCI assumed the employees of Millennium and engaged their services; (2) respondents’ paychecks were run through the payroll books of the petitioner; (3) none of the respondents reported to anyone employed by petitioner; and (4) petitioner had no relationship with the respondents and did not control their employment in any way whatsoever. Petitioner produced sufficient evidence to the lower court pursuant to Rule 56 of the West Virginia Rules of Civil Procedure to present a genuine issue of material fact as to what entity actually employed the respondents. As a result, summary judgment should have been denied by the lower court on this issue.

### **CONCLUSION**

The lower court erred in this case when it granted the respondents’ motion for partial summary judgment. Because the respondents’ separation from employment was a lay-off and not a discharge, petitioner has no liability under the Act for liquidated damages or costs of action associated with Paycheck #1. Petitioner presented sufficient evidence to withstand the granting

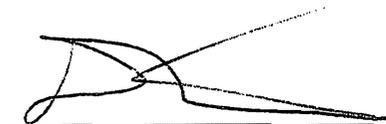
of summary judgment on the issue of whether the respondents were employees of the petitioner. Finally, special circumstances existed in this case rendering an award to respondents of cost of the action matter unjust. As a result, petitioner respectfully requests that this Court grant it the following relief:

(1) Reverse the granting of partial summary judgment in favor of the respondents on the issue of whether the respondents were employees of the petitioner and remand the case to the lower court for further proceedings consistent with this ruling;

(2) Reverse the granting of partial summary judgment against the petitioners with respect to liability under the Act for Paycheck #1 and remand the case back to the lower court for further proceedings consistent with this ruling and order that liability under the Act, if any, for the petitioner can only be predicated upon a violation of Section 21-5-4(d); and

(3) Reverse the lower court's decision to award costs of action under Section 21-5-12 of the Act and remand the case back to the lower court for entry of an order consistent with this ruling.

Respectfully Submitted



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**CERTIFICATE OF SERVICE**

Service of the foregoing **PETITIONER'S BRIEF** was had upon the following by forwarding a true copy thereof by United States Mail, postage prepaid, this **6<sup>th</sup> day of January, 2012**, as follows:

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