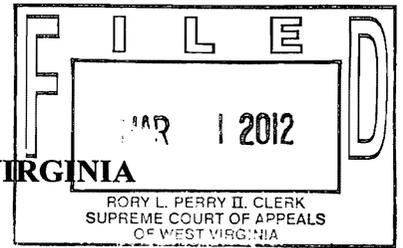


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1396



TELE-RESPONSE CENTER, INC.,

Defendant Below / Petitioner

v.

KACE DOUGLAS and RANDI DAMPHA,

Plaintiff Below / Respondent

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

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

I. There is no meaningful distinction between the present case and this Court's recent decision in *Lehman v. United Bank, Inc.*

Syllabus Point 4 of *Lehman v. United Bank, Inc.*, 719 S.E2d 370 (W.Va. 2011), provides that the “term ‘laid off’ as used in West Virginia Code § 21–5–4(d) (2006) applies to any situation involving the lay-off of an employee, whether the lay-off is temporary or permanent in duration.” This Court examined the “plain meaning” of West Virginia Code § 21–5–4(d) and “relevant regulations” to reach the conclusion that a “termination” from employment is a “lay-off” and not a “discharge” if “the reason for the termination does not relate ‘to the quality of the employee's performance or other employee-related reason.’” *Lehman*, 719 S.E.2d at 374.

Respondent makes the point that petitioner's own employment records reflect that it “Terminated” the class members (1124-1128), and for this reason alone this Court should find that petitioner discharged the respondents. However, this logic flies in the face of the Court's own holding in *Lehman* that a “termination” from employment can be characterized as a layoff or discharge depending on the circumstances. *Id.* at 374. The petitioner's own internal designation of the separation of employment as a “termination” is meaningless to this analysis.

The next distinction which respondent attempts to make between the present case and *Lehman* is that the employer in *Lehman* continued its operations following the terminations, and the petitioner did not. Technically this is not accurate. The employer in *Lehman* was Premier Community Bankshares, Inc., which merged with United Bank, Inc., and United Bank, Inc. was the surviving company. *Id.* at 371. Also, petitioner just discontinued its West Virginia call centers but did not cease to exist as a company or discontinue all its operations, so in theory the petitioner is just as capable of asking the class members to return to work as the employer in *Lehman*. Respondent's attempt to make this distinction has no legal significance in the analysis

of whether the class members were laid off or discharged, and the holdings in Lehman clearly dictated a determination by the trial court that the class members were laid-off.

Finally, respondents ask that this Court revisit Lehman, a decision which is less than four months old at the time of the filing of this brief because this Court determined that a lay-off could be temporary or permanent in nature. West Virginia is in no way alone in characterizing a lay-off as being either temporary or permanent. Black's Law Dictionary defines a "layoff" as "a termination of employment at the will of the employer" and may be "temporary or permanent." See Nichols v. Jack Cooper Transport Co., Inc., 318 S.W.3d 354, 365 (Tenn. 2010) (recognizing the broad definition of "lay off" in Black's Law Dictionary); Zupp v. Mun. Civ. Serv. Comm.; 933 N.E.2d 281, 286 (Ohio App. 10 Dist.,2010) (adopting Black's Law Dictionary definition of "lay off" as being temporary or permanent). This Court in Lehman thoroughly examined what a "lay-off" under 21-5-4 means and whether the determination should be dependent on the permanent or temporary nature of the cessation of employment or the underlying reasons for the termination. This Court determined that the most important factor for a lay-off or discharge was the reason for the termination. There is no reason to re-examine Lehman just because respondents do not like its application to the present case.

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 REPLY BRIEF** was had upon the following by forwarding a true copy thereof by United States Mail, postage prepaid, this **28th day of February, 2012**, as follows:

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