

No. 22-0185 – *Jayson Nicewarner, et al. v. The City of Morgantown*

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EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Wooton, Justice, concurring, in part, and dissenting, in part:

I concur with the majority that the firefighters’ claims in this case fall within the ambit of the West Virginia Wage Payment and Collection Act, West Virginia Code sections 21-5-1 to -18 (2019 & Supp. 2023); that accordingly, the claims are governed by the five-year statute of limitations found in West Virginia Code section 55-2-6 (2016); and that the circuit court erred in applying the equitable doctrine of laches to the claims, which are entirely legal in nature. However, I vehemently disagree that the language of West Virginia Code section 8-15-10a (2023) (“the holiday pay statute”) should be meanly parsed in a way that denies the firefighters the benefit of twenty-four hours of compensatory time for all holidays worked – a benefit I believe the Legislature intended to bestow.

It is a venerable principle of statutory construction that “statutes which are remedial in their very nature should be *liberally construed* to effectuate their purpose.”¹

¹I am confused by the majority’s somewhat casual reference to the statute as “clear and unambiguous,” which it most certainly is not. Shortly after the holiday pay statute went into effect, officials from three counties sought guidance from the West Virginia Attorney General as to a variety of issues, including whether the statute “contemplate[s] only an 8-hour workday so that a fireman who normally works a 24-hour shift . . . shall be allowed time off or eight hours of time and a half (equivalent of 12 hours) of pay when his regularly scheduled day off occurs on a holiday?”. Years later this Court grappled with a related issue, and in the years that followed three circuit courts have arrived at differing conclusions as to how to align a shift schedule spanning parts of two calendar days with a holiday that, by definition, falls entirely on one calendar day. Further, we are informed that

Syl. Pt. 6, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953) (emphasis added); *see also State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 309, 852 S.E.2d 799, 809 (2020) (“Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.”) (quoting *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995)). In this case, it is beyond serious question that the holiday pay statute is remedial in purpose; as this Court has explained, “holiday pay statutes are designed to provide *enhanced benefits* to those employees who are required to work on a holiday when most employees are off.” *Pullano v. City of Bluefield*, 176 W. Va. 198, 204-05, 342 S.E.2d 164, 171 (1986) (emphasis added and citations omitted).

The starting point in any case involving statutory construction is a critical examination of the actual language of the statute. West Virginia Code section 8-15-10a provides, in relevant part, that

if any member of a paid fire department is required to *work during a legal holiday* as is specified in subsection (a), section one, article two, chapter two of this code, or if a legal holiday falls on the member’s regular scheduled day off, he or she shall be allowed equal time off at such time as may be approved by the chief executive officer of the department under whom he

in the decades that followed enactment of the holiday pay statute, numerous counties and municipalities settled this issue with their firefighters in widely disparate ways; indeed, Morgantown now awards twenty-four hours of compensatory time for every holiday. (As the majority notes, Morgantown informs us that this action was not taken in settlement of the firefighters’ claims in this suit.)

or she serves or, in the alternative, shall be paid at a rate not less than one and one-half times his or her regular rate of pay[.]

(Emphasis added). The first key word here is “work,” which requires little discussion because the City of Morgantown computes the number of hours comprising a firefighter’s “work week” as including the entirety of each of his or her twenty-four-hour shifts. This is consistent with this Court’s longstanding, and liberal, construction of both federal and state wage and hour laws. *See generally McCarty v. Harless*, 181 W. Va. 719, 384 S.E.2d 164 (1989), where the question was whether deputies’ on-call lunch periods could be counted as “work” for the purpose of computing their overtime hours; this Court held that they could so long as the deputies were “required to stay on site or at a particular location during their meal period[s].” *Id.* at 727, 384 S.E.2d at 172; *see also Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995) (members of the West Virginia State Police entitled to back overtime pay for all on-call hours).

The second key word is “during,” which has two separate but related meanings: “throughout the duration of” or “at a particular point in.”² This is where the statute is ambiguous, as “working during a legal holiday” could reasonably mean working during the entirety of the holiday, i.e., throughout its duration, or working during some part of it, i.e., at a particular point. My research discloses that no one, past or present, has ever advocated for the former interpretation, which would totally eliminate holiday pay for any

²“During,” Merriam-Webster.com
<https://www.merriam-webster.com/dictionary/during> (last visited Nov.6, 2023).

firefighter whose twenty-four-hour shift begins at any time other than midnight. Accordingly, I will proceed on the assumption that the statute is intended to benefit any firefighter working during some part of a holiday or whose regular day off coincides with some part of a holiday.

This brings up a choice between two possible interpretations, both of them entirely reasonable. The first interpretation is that because some part of a firefighter's shift falls during some holiday hours, he or she is working "during a legal holiday" and is entitled to twenty-four hours of compensatory time (or thirty-six hours of premium pay). This is the position advocated by the petitioners. The alternative interpretation is that a firefighter is entitled to compensatory time (or premium pay) only for those hours of his shift which actually fall within the temporal boundaries of the holiday. Taking Christmas as an example, a firefighter whose shift begins at 8:00 a.m. on December 24 would be entitled to eight hours of compensatory time, as only the last eight hours of the shift fall on the holiday, while a firefighter whose shift begins at 8:00 a.m. on December 25 would be entitled to sixteen hours of compensatory time, as only the first sixteen hours of the shift fall on the holiday. This was the circuit court's interpretation, which is adopted wholesale by the majority.

Because the above interpretation is not the one which most liberally construes the statute to effectuate its purpose, *see Vest*, 138 W. Va. at 661, 76 S.E.2d at 887, Sy. Pt. 6, in part, I cannot agree with this cramped interpretation of the statutory

language. Further, I am not persuaded by the forty-six-year-old opinion of the Attorney General that is the only authority cited by the majority – which then, amusingly enough, goes on at length to make clear that such opinions are not binding on this Court. In my view, the Legislature intended to give a maximum benefit to the State’s firefighters, those individuals who run straight into danger every day, thus allowing the rest of us to run away from it. The majority chooses to water down that benefit, finding this to be a comfortable “middle ground” between the firefighters’ position and that of the City, which claims to have “fairly compensated the firefighters by crediting them with twelve hours of leave time for every legal holiday[.]”³ I take comfort in the fact that the majority has failed to memorialize its holding in a syllabus point that actually resolves the issue presented, a telling omission on its part.

For the reasons set forth in this separate opinion, I concur, in part, and respectfully dissent, in part. I would award the petitioner firefighters what they are justly owed: twenty-four hours of compensatory time off for every holiday worked during the five years preceding the institution of their lawsuit, and every holiday worked thereafter until February, 2020, when the City adopted a resolution changing its policy.

³ This argument had no support whatsoever in the language of the statute.