No. 25325 - Kay K. Meadows v. Wal-Mart Stores, Inc.; AND Beverly Judy and Karen Austin, Individually and as Class Representatives v. Sheetz Corporation; AND Christine Remsberg, et al. v. Kmart Corporation; AND Elizabeth Besaw Hutzler and Contessa Besaw Vanorsdale v. Easton Molding Corporation, a West Virginia Corporation; AND H. Vance Stewart v. Waco Equipment Co., dba Waco Scaffolding & Equipment

FILED
June 9, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
June 9, 2000
DEBORAH L. McHENRY, CLERK
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Davis, Justice, concurring:

I firmly believe the legally correct decision was expressed in the majority opinion. I write separately only for the purpose of emphasizing the basis of my decision to vote with the majority.

Employees Have Legitimate Options for Obtaining Nonvested Fringe Benefits

The common thread running through these consolidated cases was the meaning that should be placed on the phrase "then accrued." The majority opinion has correctly interpreted the phrase to mean "vested." 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.[1] That is, Congress

[1]ERISA was enacted in part to prevent employees and their beneficiaries from being deprived of anticipated benefits in the event their retirement plan is terminated. 29 U.S.C. §1001(a). In the case of a defined benefit plan, accrued benefits are usually determined by years of service, and the amount of

sought *not* to impose financial liability upon employers for pension benefits that had not vested.[2] Moreover, the definition resorted to by the majority is not foreign to the law in other contexts. *See Estate of Huey v. J.C. Trucking, Inc*., 837 P.2d 1218, 1221 (Colo. 1992) (accrued means to come into existence as an enforceable claim, vest as a right); *Seattle Sch. Dist. No. 1 v. International Union of Operating Eng'rs*, 944 P.2d 1062, 1066 (Wash. Ct. App. 1997) (accrued means to vest as a right); *Board of Regents v. Putnam County*, 506 S.E.2d 923, 925 (Ga.App. 1998) (accrued means due and payable); *South Cent. Bell Tel. Co. v. Tarver*, 704 So.2d 278, (La. Ct. App. 1997) (accrued means to come into existence as an enforceable claim); *Singleton v. Kenya Corp*., 961 P.2d 571, 575 (Colo. Ct. App. 1998) (the term unaccrued benefits means unvested benefits).

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.

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accrued compensation is expressed as a percentage. 29 U.S.C. §1002(35). An employee's right to accrued benefits derived from his or her own contributions to a retirement plan is nonforfeitable at all times. *See Ferguson v. Joiner*, 667 So. 2d 1133, 1136 (La. App. 1995).

[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."

Two options remain available to employees in their quest to obtain nonvested fringe benefits: unionization and legislation. First, unions regularly negotiate with employers for the payment of nonvested fringe benefits. In fact, the payment of fringe benefits and severance packages are legitimate issues that are included in most collective bargaining agreements. Moreover, the heart and soul of unionization centers around the union's strength to negotiate on a level playing field with employers. Nothing illustrates this point better than these consolidated cases. All companies involved in this litigation are non-union companies. Had the employees been represented by unions, the terms and conditions of the fringe benefit package undoubtedly would have been fully set forth in the collective bargaining agreement.

The second method by which employees may obtain nonvested fringe benefits is through legislation. Nothing prevents employees from urging state legislators to amend the Act, so that it expressly requires the payment of nonvested, fringe benefits.

This Court's function is narrowly tailored to interpret or apply the law. The dissenters in this case, again and again, attempt to rewrite the governing statutes to achieve the result for which they are advocating. Legislation is not the function of this Court. As I indicated in my dissenting opinion in *State ex rel. Farley v. Spaulding*, 203 W.Va. 275, ___, 507 S.E.2d 376, 388 (1998), this Court must never "infringe upon the powers granted to the executive and legislative branches of government." This Court correctly observed in *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 167, 279 S.E.2d 622, 630 (1981), that the separation of powers doctrine embedded in our state constitution, which

> prohibits any one department of our state government from exercising the powers of the others[,] is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed. Where one branch of our state government seeks to exercise or to impinge upon the powers conferred upon another branch, we are compelled by this mandate to restrain such action, absent a specific constitutional provision permitting such interference.

(Citations omitted).

For the reasons stated, I concur in the majority opinion.