No. 25325 - Kay K. Meadows v. Wal-Mart Stores, Inc.; and
No. 25326 - Beverly Judy and Karen Austin, Individually and as Class Representatives v. Sheetz Corporation; and
No. 25327 - Christine Remsberg, et al. v. Kmart Corporation; and
No. 25328 - Elizabeth Besaw Hutzler and Contessa Besaw Vanorsdale v. Easton Molding Corporation, a West Virginia corporation; and
No. 25329 - H. Vance Stewart v. Waco Equipment Co., dba Waco Scaffolding & Equipment

Starcher, C. J., dissenting:

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I dissent to the majority opinion's subversion of the employment laws of this State, and its reversion to 19th century fictional concepts of employee contracts. In the days of the Industrial Age, courts invented the fantasy that every employer and every employee sits down across a table, and after a few days of negotiations and bargaining, they hammer out a contract of employment. The West Virginia Legislature had the sense to recognize in 1917 that railroad workers were getting the short end of the fictional "bargain," and enacted the Wage Payment and Collection Act, to require railroad employers to timely pay their employees the wages that they had earned after work has been performed. The Legislature has since expanded the Act to apply to every employment contract created in the State of West Virginia.

The Act, specifically *W.Va. Code*, 21-5-1(c), defines "wages" as "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."[1] Under this statute, the employer and employee can "agree" on a way to

[1]*W.Va. Code*, 21-5-1(c) defines "wages" in the following way:

> (c) 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. . . . [T]he term

(continued...)

calculate wages (*i.e.*, $5.25 in cash per hour worked). Once the employee performs and provides services or labor, then the employer must respond and compensate the employee pursuant to the "contract."

W.Va. Code, 21-5-1(c) specifically says that the term "wages" "shall also include then accrued fringe benefits capable of calculation and payable directly to an employee[.]" A "fringe benefit" includes such things as vacation, holidays, sick leave, or production bonuses. *W.Va. Code*, 21-5-1(l).[2] Hence, under the statute, an employer and an employee can also "agree" on a way to calculate fringe benefits that are payable just like wages (*i.e.*, 1.5 days of sick leave for each month worked). Again, once the employee performs and provides services or labor, then the employer must respond and compensate the employee with the fringe benefit pursuant to the means of calculation set forth in the "contract."

The statute says that wages include fringe benefits "capable of calculation" and "payable directly to an employee." "Calculate" means to "ascertain or determine beforehand, esp. by arithmetic," while "payable" means "due . . . owed, owing, outstanding, unpaid, receivable." *Oxford Desk Dictionary and Thesaurus, American Edition* (1997).

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[1](...continued)

> "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.

[2]*W.Va. Code*, 21-1-5(l) defines "fringe benefits" in the following manner:

> (l) The term "fringe benefits" means any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage.

Hence, the term "wages" in *W.Va. Code*, 21-5-1(c) includes vacation and sick leave that can be arithmetically determined before services are rendered by the employee, and which are due, owing, and as yet unpaid to an employee who has provided services. These fringe benefits became part of the plaintiff-employees' overall compensation earned during their periods of employment.

There is nothing in the Wage Payment and Collection Act that requires an employer to offer fringe benefits. Nothing in the Act compels an employer to give his employees time off for vacation, or for holidays, or for sick leave. Employers offer fringe benefits because it appeals to employees, and makes the job more enticing.

However, once an employer makes the choice to offer a fringe benefit, then *W.Va. Code*, 21-5-1(c) takes over and ensures that if the employee performs the specified work in expectation of receiving the fringe benefit, then the employer may not make the earned benefit illusory. Specifically, the employer cannot condition the receipt of the fringe benefit on the occurrence of some uncertain future event.

The majority opinion holds that an employer *can* make fringe benefits illusory and contingent upon uncertain occurrences, stating at Syllabus Point 5 that "whether fringe benefits have then accrued, are capable of calculation and payable directly to an employee so as to be included in the term 'wages' are determined by the terms of [the] employment [contract] and not by the provisions of W.Va. Code § 21-5-1(c)." This holding ignores our long-standing precedent that every contract implicitly incorporates existing legal principles. We held, in Syllabus Point 2 of *Huntington Water Corp. v. City of Huntington*, 115 W.Va. 531, 177 S.E. 290 (1935), that:

> All general legal principles affecting contracts enter by implication into and form a part of every contract, as fully as if specifically expressed therein.

In accord, *McGinnis v. Cayton*, 173 W.Va. 102, 105, 312 S.E.2d 765, 768 (1984) ("[A]ll of the general legal principles affecting contracts at the time a particular agreement is entered into form a part of that contract as fully as if they were specifically expressed within it[.]")

In other words, the definition of wages established in *W.Va. Code*, 21-5-1(c) controls the employment contract; the majority is wrong in holding otherwise.

The California Supreme Court once considered and rejected many of the same arguments posited by the employers (and adopted by the majority opinion) in the instant case. In *Suastez v. Plastic Dress-Up Co.*, 183 Cal.Rptr. 846, 647 P.2d 122 (1982), the employer had a policy of awarding employees with paid vacation time on the anniversary of the employee's employment. The employer refused to pay vacation benefits to anyone whose employment terminated before that anniversary date.

The employee in *Suastez* had his employment terminated 3 months before his anniversary date, and he requested a *pro rata* share of his vacation pay. The employer argued (like the employers in the instant case) that employment on the anniversary date was a condition precedent to the "vesting" of vacation rights, and refused to pay the employee any portion of his vacation pay.

The California court rejected the employer's position and held that the employee was entitled to a *pro rata* share of his fringe benefits. The court stated that a fringe benefit like vacation pay "is not a gratuity or a gift, but is, in effect, additional wages for services performed." 183 Cal.Rptr. at 849, 647 P.2d at 125. In other words, fringe benefits are "simply a form of deferred compensation . . . which inherently are not payable until a time subsequent to the work which earned the benefits. . . ." *Id.*, *citing Posner v. Grunwald-Marks, Inc.*, 14 Cal.Rptr. 297, 363 P.2d 313 (1961). The court concluded that an employee whose employment is terminated mid-year has earned a portion of his fringe benefits as soon

as he has performed substantial services for his employer, and that the employer's contract improperly attempted to impose a "condition subsequent which attempts to effect a forfeiture of vacation pay already vested." 183 Cal.Rptr. at 850, 647 P.2d at 126.

In support of its ruling, the California Supreme Court stated that:

> [O]nce it is acknowledged that vacation pay is not an inducement for future services, but is compensation for past services, the justification for demanding that employees remain for the entire year disappears. If some share of vacation pay is earned daily, it would be both inconsistent and inequitable to hold that employment on an arbitrary date is a condition precedent to the vesting of the right to such pay.

The same reasoning applies in the instant case: sick leave is not an inducement for future services, it is compensation for past services. Every day that the plaintiffs went to work, they earned a portion of their sick pay. The plaintiffs did not use their sick leave, but accrued it for future use; upon the termination of their employment, they should have been compensated for any leave not used.

The rule espoused by the majority opinion concerning sick leave can be summarized as "use it or lose it." Workers who use their sick leave get a day off at home to nurse an "illness," no matter how serious. Workers who tirelessly work, day after day, regardless of any pains or plagues in order to accrue additional sick days -- according to the majority opinion, when they say goodbye to the job, they can say goodbye to the pay they would have received, had they stayed home and watched TV from their beds.

In the long run, employers end up being the losers of the "use it or lose it" rule applied by the majority. Under the rule, every employee in the state is encouraged to use their sick days routinely, and employers pay the cost. Instead of competent, trained workers coming to work with minor aches and

pains,[3] the employer will be forced to pay overtime to another employee or pay an inexperienced temporary employee to do the job. Rather than compensate the worker by paying them the value of the sick time accrued at the time their employment is terminated years later, the employer pays the worker sick time today plus pays another worker overtime, and/or suffers substantial losses from lowered quality and productivity.

The majority opinion states that the employment "contract" controls the how, when and whether an employee will be compensated in the form of a fringe benefit. I disagree, and firmly believe that if an employer chooses to offer a fringe benefit, then West Virginia law takes over and mandates that such fringe benefits are wages. The law demands that the employee be paid wages for the work performed. *W.Va. Code*, 21-5-1(c) clearly makes sick pay a form of wages. When the plaintiffs in the instant cases terminated their employment, the employers should have paid the plaintiffs their *pro rata* share of the sick pay they had accumulated and not used.

I therefore dissent.

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[3]I recognize that there are hidden costs in a sick employee coming to the workplace and breathing germs all over everyone else. It is probably cheaper for an employer to force an employee with a communicable disease to stay home, thereby keeping other employees healthy. But what of the employee who has minor surgery, or has discomfort from, say, a slip and fall? Should such an employee take some aspirin and come to work? The majority rule says the employee should stay home and take it easy -- use the sick day or lose it.