

No. 29332 -- John Howell, Sr., John Howell, Jr., and Allen Radford v. The City of Princeton, a West Virginia municipal corporation; and Marshall Vaughn Lytton, II, v. The City of Princeton, a West Virginia municipal corporation; and Jeffrey S. Hawks v. The City of Princeton, a West Virginia municipal corporation

**FILED**

**RELEASED**

Starcher, J., concurring, in part, and dissenting, in part.

**December 13, 2001**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**December 14, 2001**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I agree with the majority's decision in the instant case to reverse the circuit court's dismissal order, and to remand the case for further proceedings.

I disagree, however, with the majority opinion's discussion of the law. The majority holds that if there is an "express" understanding between an employee and an employer regarding the payment or nonpayment of unused fringe benefits, that understanding is essentially an enforceable contract between the parties.

In the instant case, the plaintiff police officers allege they are entitled to be paid for unused sick leave when they terminate their employment – but the defendant city alleges it has an unwritten policy that officers are never paid for unused sick leave. The majority opinion concludes that "this unwritten policy would be sufficient to defeat the claim asserted by the Officers, *if* the record clearly illustrated that the Officers were aware of the policy."

This conclusion is directly contrary to the Wage Payment and Collection Act, because the Act plainly says employer policies regarding pay must be written. The Act specifically says that an employer's sick leave policy must be "in writing," so as "to spare workers from trying to hit an ever-moving target." *Robertson v. Opequon Motors, Inc.*, 205 W.Va. 560, 566, 519 S.E.2d 843, 849 (1999) (*per curiam*). *W.Va. Code*, 21-5-9 [1975] states that:

Every person, firm and corporation shall: . . .

(3) Make available to his employees in writing or through a posted notice maintained in a place accessible to his employees, employment practices and policies with regard to vacation pay, sick leave, and comparable matters.

It is undisputed in this case that the City of Princeton's policy regarding sick leave -- that it never paid sick leave to an employee whose job terminated -- was unwritten. That means the policy was in violation of law, and should be unenforceable. Yet the majority suggests that because many police officers knew about the unwritten policy through word of mouth, this breach of the law is excusable.

If we do not hold that the sanction for failing to put an employment policy in writing is that the policy will be unenforceable, then what sanction will an employer face for not complying with the law? The majority opinion does not answer this pressing question, which is plainly raised by the record.

I reiterate my belief, as I stated in my separate opinion in *Ingram v. City of Princeton*, 208 W.Va. 352, \_\_\_, 540 S.E.2d 569, 575 (2000) (Starcher, J., concurring in part and dissenting in part), that when the City of Princeton chose to redefine "wages" in its unwritten policy to exclude sick leave from fringe benefits payable to the employee upon termination of their employment, it refused to pay its police officers a fringe benefit for which they worked and that they earned. This refusal to pay the officers the wages they earned through the use of an unwritten policy plainly violates the Act.

I therefore concur with the majority's opinion reversing the circuit court's dismissal order, but I respectfully dissent to the majority's discussion of the law. I am authorized to state that Justice McGraw joins in this separate opinion.