

Nos. 31110 & 31111–

Joyce Gress v. Advantage Food Products, Inc., a West Virginia limited liability company; Perdue Farms, Inc., a Maryland corporation

FILED

December 18, 2003

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

McGraw, Justice, dissenting:

I must depart from the majority decision because I feel that the company's vacation policy was ambiguous, and, therefore, should have been construed in favor of the employees. The policy in question stated that: "After one year of service, you are eligible for one week's paid vacation." While the company, and the Court, have taken the view that this may state, *sub silencio*, "and in successive years you accrue no vacation at all until you reach another anniversary date," the policy simply doesn't say that. The company could have written the policy that way, but it did not.

The employees argue that the policy should be construed to mean that, employees receive no vacation until they have worked for a full year, after which they get one week of vacation each year, which accrues gradually as the employee works. This is a logical, fair construction of the policy. As this Court has explained: "Where an employer prescribes in writing the terms of employment, any ambiguity in those terms shall be construed in favor of the employee. In other words, the employers, who give life to their policies, must also live up to their policies." *Lipscomb v. Tucker County Comm'n*, 206 W. Va. 627, 631, 527 S.E.2d 171, 175 (1999).

Not only did the lower court correctly follow this Court's holding in *Lipscomb*, but it also made a ruling consistent with common sense and fairness. While the employer has some argument for denying vacation to employees until they have lasted a full year, there is