IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 23-ICA-324

WHEELING JESUIT UNIVERSITY, INC.,
***Defendant Below, Petitioner*,**

v.

KATHRYN A. VOORHEES, JASON FULLER, JESSICA WROBLESKI, PETER EHNI, ANDREW STARON, AMY CRINITI PHILLIPS, NANCY BRESSLER, JOHN W. WHITEHEAD III,
Plaintiffs Below, Respondents.

APPEAL FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA
CIVIL ACTION NO. CC-35-2019-C-218
JUDGE RONALD E. WILSON

PETITIONER'S BRIEF OF WHEELING JESUIT UNIVERSITY, INC.

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I. ASSIGNMENTS OF ERROR

As explained below, the Circuit Court of Ohio County erred when it granted Respondents' motion for summary judgment on Respondents' breach of contract claim and West Virginia Wage Payment and Collection Act ("WPCA") claim. The Circuit Court further erred when it failed to include Respondents' interim earnings when calculating their breach of contract and WPCA damages. Finally, the Circuit Court erred when it failed to reduce Respondent Dr. Kathryn Voorhees' damages because she did not engage in reasonable diligence to find subsequent employment. The specific assignments of error are as follows:

Assignment of Error 1: The Circuit Court erred by entering summary judgment against Petitioner, formerly known as Wheeling Jesuit University, Inc., and now named Wheeling University ("WU") for the breach of contract claim. This claim is based on the allegation that Respondents were entitled to a "terminal appointment," *i.e.*, an extra year of employment, even though WU had declared that it was in a state of financial exigency, which allowed WU to end Respondents' employment with the University at the conclusion of their appointment period.

Assignment of Error 2: The Circuit Court erred by entering summary judgment against WU for the WPCA claim. Because the terminal appointment did not satisfy the definition of wages or accrued fringe benefits under the WPCA, WU did not violate the WPCA by not providing Respondents a terminal appointment.

Assignment of Error 3: Even if the Circuit Court properly found summary judgment against WU, the Circuit Court erred by failing to reduce Respondents' breach of contract damages and WPCA damages by their interim earnings. The failure to reduce Respondents' damages by their interim earnings violates West Virginia Code Section 55-7E-3(a).

Assignment of Error 4: Even if the Circuit Court properly entered summary

judgment against WU, the Circuit Court erred by failing to reduce Respondent Dr. Voorhees' damages because she did not engage in reasonable diligence to find subsequent employment. The failure to reduce Dr. Voorhees' damages because she did engage in the required reasonable diligence violates West Virginia Code Section 55-7E-3(a).

In this appeal, WU requests that the Court reverse the Circuit Court's decision to grant Respondents summary judgment on the breach of contract claim and the WPCA claim and instruct the Circuit Court to grant summary judgment to WU on these claims. If the Court determines that summary judgment was appropriately entered against WU, WU requests that the Court reverse the Circuit Court's decision regarding Respondents' damages and find that Respondents' breach of contract and WPCA damages must be reduced by their interim earnings, and also find that Dr. Voorhees' damages must be reduced due to her failure to engage in reasonable diligence to find subsequent employment.

II. STATEMENT OF THE CASE

A. Respondents.

Respondents are all former faculty members of WU. (JA 00008).[1] In February/March 2018, Respondents were issued Notices of Reappointment for the 2018-2019 academic year. (JA 00219 to JA 00226). Pursuant to these notices, four of the Respondents (Dr. Jason Fuller, Dr. Andrew Staron, Dr. Amy Phillips and Dr. Nancy Bressler) (the "Tenure-Track Respondents") were reappointed to **tenure-track positions in their probationary period**. (JA 00219 to JA 00222; JA 00251) (emphasis added). The other four Respondents (Dr. Kathryn A. Voorhees, Dr. Jessica Wrobleski, Dr. Peter Ehni and Mr. John W. Whitehead, III) (the "Tenured Respondents") were appointed to **tenured positions**. (JA 00223 to JA 00226; JA 00251 to JA

[1] The documents in the Appendix have been Bates numbered with the prefix "JA."

00252) (emphasis added).

On March 28, 2019, due to significant financial issues at WU, all eight Respondents were notified that their employment was not being renewed at the end of the 2018-2019 academic year because WU's Board of Trustees had determined that WU was in a state of "financial exigency." (JA 00227 to JA 00234; JA 00253). Due to the declaration of "financial exigency," WU determined that it needed to make significant changes to its academic programs for the 2019-2020 academic year. (JA 00227 to JA 00234).

Thus, as WU informed Respondents, the academic majors that Respondents taught in were either being eliminated or reduced, which resulted in Respondents' positions being eliminated at the end of the 2018-2019 academic year. (*Id.*). For instance, the English major, the Chemistry major and the Theology major were being eliminated, and the Physics major was being reduced. (*Id.*). After providing the notices of non-reappointment, Respondents remained employed with WU until the end of the 2018-2019 academic year, and WU continued to pay Respondents their salaries and benefits for the rest of the 2018-2019 academic year. (*Id.*; JA 00253). Their employment ended on August 31, 2019, which was at the end of the 2018-2019 academic year. (*Id.*).

B. Provisions Of The Wheeling Jesuit University Handbook.

Respondents' terms and conditions of employment were defined through the "Wheeling Jesuit University Faculty Handbook (2/23/18)" ("Faculty Handbook"). (JA 00252). Unlike employee handbooks, which are typically drafted by employers, WU faculty often have a role in drafting faculty handbooks. Here, the Faculty Handbook has provisions which allow the faculty to be involved in revising and amending the Faculty Handbook. (JA 00126). For instance, Section 2.6, entitled "Updates to Faculty Handbook," states:

> **Proposed amendments** to this Faculty Handbook may originate **with the Faculty Council**, the Rank and Appointments, the Faculty Welfare, and Curriculum Committees, the CAO or the President. Proposed revisions of the Handbook from other committees should be brought to one of the above committees for consideration. **All proposed revisions will be considered by the Faculty Council**, appropriate committees and the Administration **before going to Faculty as a resolution and vote**. (See 4.1.1.7 for the Resolutions process.)

(*Id.*) (emphasis added).

Section 4.1.1.7 sets forth the process for amending or revising the Faculty Handbook. (JA 00136 to JA 00138). This process involves Faculty members drafting resolutions to amend the Faculty Handbook, the Faculty members voting on the resolutions, and Faculty members having the opportunity to vote to reconsider a resolution that is initially rejected by the WU President. (*Id.*). Additionally, Section 4.1.1.7 states:

> **Faculty Council works with the CAO to keep the Faculty Handbook current**. **Faculty Council tracks all resolutions passed at Faculty Meetings**, presents them to the Chief Academic Officer in proper format, and when they have become effective (completing the appropriate processes), **recommends the appropriate spot for the resolution in the Handbook**, renumbering if necessary. **Faculty Council Chair** and the CAO also makes certain that necessary updates are made in other sections **to keep the Handbook internally consistent and reflective of current practices**. **The CAO and Faculty Council Chair are responsible for the annual updating** and publication of the Handbook in connection with the issuance of the Notice of reappointment or Nonreappointment letters.

(JA 00138) (emphasis added). Thus, the Faculty Handbook is not a typical employee handbook.[2]

As explained below, this case is based on allegations that, pursuant to the Faculty Handbook, Respondents were entitled to receive a "terminal appointment," *i.e.*, an extra year of

[2] In fact, WU had an entirely separate "Employee Handbook," which contained other policies that were applicable to faculty members, as well as all employees. (JA 00126). This separate Employee Handbook is not relevant to the proceedings in this case.

employment, for the 2019-2020 academic year. (JA 00010). Respondents assert that they were entitled to an extra year of employment despite the fact that WU had declared that it was in a state of financial exigency, and despite the fact that WU was making significant changes to its academic majors, which included the elimination and reduction of majors that Respondents taught. (JA 00227 to JA 00234).

The provisions of the Faculty Handbook at issue are Sections 7.4 and 7.5. Section 7.4 applies when the appointment for a tenure-track faculty member, who is still in probation, is not renewed at the expiration of the appointment period. (JA 00161; JA 00252). The specific language of Section 7.4 states:

> **7.4 Non-Renewal of a Multi-Year Appointment, a Non-Tenure-Track Appointment, or a Tenure-Track Appointment in Probation at End of Term**
>
> **Tenure-track faculty appointments in probation** and non-tenure track faculty appointments may not be renewed at expiration of the appointment period **based upon financial exigency (legal term)**; change in University's mission or needs; program termination, reduction, or redirection; a faculty member's inability to perform or lack of performance of the essential functions or fundamental job duties of his position; mental or physical disability; failure to comply with University policies; conviction of a felony; or moral turpitude, as determined by the Administration. (*emphasis added)*.

(*Id.*) (emphasis added). As noted above, four of the Respondents were tenure-track faculty members who were still in their probationary period. (JA 00251). They remained employed for the entire 2018-2019 academic year, and at the expiration of that appointment period, their employment ended as WU did not re-appoint them for the 2019-2020 academic year. (JA 00253). Section 7.4 does not mention a terminal appointment and does not mention any requirement of providing the Tenure-Track Respondents with a terminal appointment under any scenario. (JA 00161; JA 00252).

In this case, Respondents have relied upon language in Section 7.5 of the Faculty Handbook to support their claim for a terminal appointment. (JA 00009). Section 7.5 states:

> **7.5 Termination of Tenured Appointment or of a Non-Tenured-Track Appointment During the Term**
>
> **A tenure appointment or non-tenure track appointment during term may be terminated because of financial exigency** (legal term); change in University mission or needs; program termination, reduction, or redirection; a faculty member's inability to perform or lack of performance of the essential functions or fundamental job duties of his position; mental or physical disability; failure to comply with University policies; conviction of a felony; or oral turpitude. Revocation of an appointment during the term because of professional incompetence (for cause) is termed dismissal. In the case of the termination of a faculty member for any of these circumstances, the President, CAO and appropriate Chair must meet to review, discuss, and recommend termination to the Board of Trustees which will make the final decision. A faculty member who has been terminated has the right to appeal through the Due Process Procedures in Section 13.
>
> Tenured or tenure-track faculty members whose appointments are terminated (not for cause), are given a terminal appointment for the next academic year. At the discretion of the President, a faculty member may or may not be asked to teach during the terminal appointment. If the faculty member is offered the opportunity to teach, and chooses not to do so, the employment relationship is severed.

(JA 00161 to JA 00162; JA 00252 to JA 00253) (emphasis added).

Respondents are relying upon the second paragraph of Section 7.5, which mentions the "terminal appointment," and which sets forth what needs to occur for the employee to obtain the "terminal appointment," *i.e.*, an entire additional year of employment. (*Id.*). The specific language relied upon by Respondents provides: "Tenured or tenure-track faculty members whose appointments are terminated (**not for cause**), are given a terminal appointment for the next academic year." (*Id.*) (emphasis added). Therefore, to obtain a terminal appointment, Respondents' termination must be "not for cause." (*Id.*).

Respondents, however, are not entitled to a terminal appointment because their employment ended due to a for cause reason, which was WU's Board of Trustees declaration that the University was in a state of "financial exigency." (JA 00227 to JA 00234). The first paragraph of Section 7.5 provides a list of various reasons that can be considered a for cause termination of a tenure appointment, and at the top of that list is "financial exigency." (JA 00161; JA 00252). In Section 7.6 of the Faculty Handbook, a financial exigency is defined

> as the **critical, pressing, or urgent need** on the part of the University **to reorder its monetary expenditures** in such a way as **to remedy and relieve the state of urgency within the University created by its inability to meet its annual monetary expenditures** with sufficient revenue to prevent a sustained loss of funds and/or abandonment of its stated institutional mission.

(JA 00162) (emphasis added).

Therefore, when WU advised Respondents that their employment was not being renewed at the end of their current appointment period due to financial exigency, WU's Board of Trustees had determined that there was "critical, pressing, or urgent need" "to reorder [the University's] monetary expenditures" "to prevent a sustained loss of funds and/or abandonment of its stated institutional mission." As a result, WU had a for cause reason to support its decision not to renew Respondents' appointment, and Respondents were not entitled to receive a terminal appointment for another year of employment.

C. The Circuit Court's Order Granting Summary Judgment.

Both WU and Respondents filed competing motions for summary judgment and supporting memoranda regarding Respondents' breach of contract claim and WPCA claim. (JA 00064 to JA 00072; JA 00207 to JA 00218). On January 20, 2023, the Circuit Court entered an Order granting Respondents' second motion for summary judgment, which, in effect, denied WU's

motion for summary judgment.[3] (JA 00257 to JA 00260). In granting summary judgment to Respondents, the Circuit Court found WU liable for Respondents' breach of contract claim and WPCA claim. (*Id.*). As explained below in the argument section, the Circuit Court, however, erred in several ways. First, with regard to the breach of contract claim, the Circuit Court's Order did not address the distinction between the four Tenure-Track Respondents and the four Tenured Respondents. (*Id.*). Even though Section 7.4 of the Faculty Handbook applied to the Tenure-Track Respondents, the Circuit Court's Order did not analyze Section 7.4. (*Id.*). Instead, the Circuit Court focused on the language in Section 7.5 and applied that language (which applies to tenured faculty) to the Tenure-Track Respondents. (*Id.*).

The Circuit Court also erred by failing to find that the Board of Trustees' declaration of "financial exigency" was a for cause termination under Section 7.5 of the Faculty Handbook. (*Id.*). Even though Section 7.5 listed various causes that could support termination, including the declaration of "financial exigency," the Circuit Court improperly ignored that language and used an entirely different section of the Faculty Handbook to determine what constituted a for cause termination. (*Id.*). For instance, although it is not specifically mentioned in Section 7.5, the Circuit Court improperly relied upon language in Section 13.3 of the Faculty Handbook to determine what constituted a for cause termination. (*Id.*). From the perspective of analyzing Respondents' arguments, at best they might establish that there was a question of fact regarding whether WU breached the Faculty Handbook by not providing Respondents a terminal appointment for the

[3] Respondents had to file a "second" motion because Respondents' first motion did not meet the Circuit Court Judge's requirements regarding the length of motions and supporting memorandum. (JA 00063). According to the Circuit Court Judge, "[a]ll motions [were] limited to three pages in length, and no memorandum of law in support of those motions may exceed five pages in length." (*Id.*). Both parties were subject to this same requirement. This arbitrary page limitation requirement, however, made it difficult to set forth detailed briefs on the issues in the case.

2019-2020 academic year. Yet the Court entered summary judgment in their favor. As explained below, the terms of the Faculty Handbook are not clear and unambiguous on this issue.

With regard to the WPCA claim, the Circuit Court erred in finding that the terminal appointment was a then accrued fringe benefit. The Circuit Court improperly characterized the terminal appointment as a "severance payment." (*Id.*). The terminal appointment is not a "severance payment" because the terminal appointment is not a lump sum payment due and payable at the end of employment. Rather, the terminal appointment is an appointment which may be made for the employee to work for another year. It contemplates *future* pay to an employee in consideration for *future* services which may be rendered in the future (in this instance, teaching and other faculty duties) during the terminal appointment year. Therefore, the terminal appointment was not a vested and accrued fringe benefit.

In the summary judgment Order, the Circuit Court also instructed the parties "to try to agree on the amount owed to the [Respondents] and submit that figure to the court." (JA 00260). If the parties could not reach an agreement, the Circuit Court instructed Respondents to submit an itemized statement on how their claimed money owed was calculated, and WU was instructed to respond to Respondents' calculations. (*Id.*).

D. <u>Calculating Respondents' Damages And The Circuit Court's Order.</u>

After the parties could not reach an agreement on Respondents' damages, Respondents filed their "Itemized Statement of Terminal Contract Damages" on February 27, 2023. (JA 00268 to JA 00271). In their statement, Respondents sought to receive their full salary amount for their terminal appointments for the 2019-2020 academic year. (JA 00268 to JA 00269). Respondents did not reduce these amounts by the interim wages they earned in employment they obtained during the 2019-2020 academic year. (*Id.*). Without any consideration of their interim

earnings, which would have reduced the amounts owed, Respondents similarly sought liquidated damages under the WPCA in amounts equal to two times the full salary amount of their unpaid terminal appointments. *(*JA 00269).

On March 14, 2023, WU filed its response to Respondents' itemized statement. (JA 00273 to JA 00280). In the response, WU argued that contrary to the requirements of West Virginia Code Section 55-7E-3(a), Respondents' itemized statement failed to include Respondents' interim earnings when calculating their damages. (JA 00274 to JA 00276). As WU pointed out, West Virginia Code Section 55-7E-3(a), which applies to any employment law cause of action regardless of whether it arose from a statutory right or the common law, unmitigated or flat back pay awards were not an available remedy. (*Id.*). Rather, any award had to be reduced by the amount of either the employee's "interim earnings or the amount earnable with reasonable diligence by the" employee. (*Id.*). Since Respondents' breach of contract claims and their WPCA claims were based on the employer-employee relationship with WU, WU asserted that West Virginia Code Section 55-7E-3(a) applied, and any damages owed had to be reduced by Respondents' interim earnings. (*Id.*).

WU further argued that the liquidated damages that Respondents sought under the WPCA should also be calculated based on the amount of wages owed **after** including any interim earnings. Otherwise, Respondents would receive a windfall, as they would be compensated for far more than what was needed to make them whole. (*Id.*). Additionally, the liquidated damages would be more punitive than compensatory. (*Id.*). Indeed, as reflected in WU's response, four of the Respondents were able to fully mitigate their damages by finding subsequent employment in a job earning more than their WU salary. (JA 00276 to JA 00278).

In its response, and based on Respondents' deposition testimony, WU provided the

Circuit Court with information regarding how seven of the Respondents had either fully mitigated or partially mitigated their damages. (JA 00276 to JA 00278). With regard to the eighth Respondent (Dr. Voorhees), based on her deposition testimony, WU argued that since she did not make any efforts to find subsequent employment after leaving WU, her damages should be reduced by an amount she would have earned had she excised reasonable diligence in searching for another job. (JA 00278).

Despite these issues and arguments raised by WU, the Circuit Court entered an Order on June 26, 2023 granting Respondents' itemized statement of damages. (JA 00326). In a single page Order, with limited analysis, the Circuit Court determined that the terminal appointments were wages already earned by Respondents and that the mitigation issue had no relevance. (*Id.*). As a result, the Circuit Court ordered "that the damages calculations [Respondents] previously submitted are adopted without reduction for mitigation." (*Id.*).

E. <u>Final Judgement Order.</u>

After WU filed its Notice of Appeal, the Circuit Court entered a Final Judgment Order.[4] (JA 00328 to JA 00333). WU filed its Notice of Appeal prior to the entry of a Final Judgment Order because in entering the January 20, 2023 Order, which granted summary judgment to Respondents on liability, and in entering the June 26, 2023 Order regarding Respondents damages, the Circuit Court had decided all of the remaining issues in the case. At the time WU filed its Notice of Appeal, given that all issues had been addressed, WU did not know if the Circuit Court would subsequently enter another Order titled, "Final Judgment Order."

After the filing of the Final Judgment Order, WU filed another Notice of Appeal on

[4] While the Final Judgment Order was dated July 25, 2023 by the Circuit Court, it was not filed by the Circuit Clerk until August 15, 2023. (JA 00328 to JA 00333).

August 24, 2023. That appeal is Case No. 23-ICA-383. The issues in this appeal and in Case No. 23-ICA-383 are the same. In essence, the Final Judgment Order summarizes the Circuit Court's rulings in the Order granting Respondents summary judgment and in the Order adopting Respondents' damages calculations. (*Id.*; JA 00257 to JA 00260; JA 00326). The Final Judgment Order further set forth the salary amount for each Respondent that would be used to calculate the damages owed for their terminal appointment, as well as their WPCA damages. (JA 00331).

III. SUMMARY OF ARGUMENT

The Circuit Court erred when it granted summary judgment to Respondents for the breach of contract and WPCA claims because WU did not award Respondents a terminal appointment for the 2019-2020 academic year. With regard to the breach of contract claim, the Circuit Court erred because it applied the wrong section of the Faculty Handbook to the four Tenure-Track Respondents. Because the four Tenure-Track Respondents' employment ended after they completed the 2018-2019 academic year, Section 7.4 of the Faculty Handbook applied to their situation. There is nothing in Section 7.4 of the Faculty Handbook which requires that WU award the four Tenure-Track Respondents a terminal appointment.

Even if Section 7.5 of the Faculty Handbook was the applicable section for all of the Respondents, the Circuit Court erred in granting Respondents a terminal appointment under Section 7.5. A terminal appointment can only be awarded if Respondents' employment ended due to a "not for cause" reason. The first paragraph of Section 7.5 provided various for cause reasons that could be used to justify WU's decision not to reappoint a faculty member. The very first for cause reason listed in Section 7.5 was a declaration of financial exigency. Therefore, when WU's Board of Trustees determined that the University was in a state of financial exigency in March 2019, WU had the right not to reappoint Respondents and was not required to award Respondents

a terminal appointment, *i.e.*, an extra year of employment, for the 2019-2020 academic year. Thus, the Circuit Court should not have entered summary judgment in Respondents' favor, and instead, should have entered summary judgment in WU's favor on the breach of contract claim.

In the alternative, and if summary judgment is not appropriate for WU, the terms of the Faculty Handbook are ambiguous and subject to different interpretations, thereby creating a question of fact that defeats summary judgment for Respondents. For instance, there is ambiguity concerning the "not for cause" phrase located in Section 7.5 because it is subject to different interpretations. There is also an ambiguity over whether the "for cause" reasons set forth in Section 13.3 of the Faculty Handbook apply to Section 7.5 or whether Section 7.5 sets forth in its own "for cause" reasons which can be used to determine whether a terminal appointment is required. Due to the ambiguities in the Faculty Handbook, summary judgment is not appropriate.

With regard to the WPCA claim, the Circuit Court erred by finding that WU violated the WPCA by failing to provide the terminal appointment. Terminal appointments are not "wages" or "then accrued fringe benefits" under the WPCA. The terminal appointment merely allows for payment for services that may occur in the future. Wages, however, are payments for past services that are rendered. Moreover, the terminal appointments were not an accrued fringe benefit that vested during Respondents' period of employment. Respondents' employment ended at the end of the 2018-2019 academic year, *before* they had performed any work for WU for the 2019-2020 academic year, and *before* their alleged "fringe benefit" had vested and accrued.

Furthermore, the language in Section 7.5 shows that a terminal appointment is not a paid benefit that a faculty member automatically receives. Pursuant to Section 7.5, if the University's President offers a faculty member the opportunity to teach during the terminal appointment year, and if the faculty member turns down that opportunity, the employment

relationship is severed, which means that the faculty member does not receive the terminal appointment or any compensation for working during the terminal year. Thus, there are additional requirements that must be met to obtain the terminal appointment and to be paid during the terminal appointment year, such as continuing to teach during the terminal appointment year if required by the President.

The terminal appointment also is not "severance pay" because the terminal appointment is not a lump sum payment made at the end of employment. Rather, the terminal appointment is an appointment for the employee to work for another year. It contemplates *future* pay to an employee in consideration for *future* services not yet rendered (in this instance, teaching and other faculty duties) during the terminal appointment year. If the employee refuses to teach during the terminal appointment year, the employment relationship is ended and the employee does not get paid. For these reasons, the Circuit Court erred when it determined that WU violated the WPCA by not providing Respondents a terminal appointment. Instead, the Circuit Court should have granted summary judgment to WU on this issue.

Even if the Circuit Court's summary judgment decision was appropriate, the Circuit Court erred when it awarded breach of contract damages and WPCA liquidated damages that were not reduced based on Respondents' interim earnings during the 2019-2020 academic year. That decision violated West Virginia Code Section 55-7E-3(a), which requires that damages for back pay, *i.e.,* lost wages, be reduced by Respondents' interim earnings.

With regard to Dr. Voorhees, the Circuit Court erred in not reducing her damages because West Virginia Code Section 55-7E-3(a) also requires the employee to exercise reasonable diligence in finding subsequent employment. Dr. Voorhees, however, did not exercise reasonable diligence as she did not look for any positions in higher education and only applied to three

openings.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the provisions of Rule 18 of the West Virginia Rules of Appellate Procedure, oral argument under Rule 20 is appropriate in this case because it involves an issue of first impression. For instance, this appeal involves several undecided issues regarding the reduction of damages required by West Virginia Code Section 55-7E-3(a). First, it involves whether faculty members' damages for lost compensation should be reduced by the compensation they received during a terminal appointment period. The other issue concerns whether the requirements of West Virginia Code Section 55-7E-3(a) apply in determining how to calculate liquidated damages under the WPCA. Oral argument can assist the Court in its understanding of the factual and legal issues giving rise to the claims in this case. For the same reasons discussed above, a memorandum decision is not appropriate in this case.

V. ARGUMENT

A. Standard of Review.

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo* review, this Court applies the same standard for granting summary judgment that a circuit court must apply. *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 383, 624 S.E.2d 815, 820 (2005). Therefore,

> "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Syl. Pt. 2, *Painter*, 192 W. Va. at 190, 451 S.E.2d at 756. Moreover, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter,

but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, *id.*

Furthermore, "[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *id.* "[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986)).

Additionally, "[t]he interpretation of [a] . . . contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal." Syl. Pt. 2, *Riffe v. Home Finders Assocs., Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999). The West Virginia Supreme Court of Appeals has further stated:

> In construing the terms of a contract, we are guided by the common-sense canons of contract interpretation. One such canon teaches that contracts containing unambiguous language must be construed according to their plain and natural meaning. *Payne v. Weston*, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1985). **Contract language usually is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken**. In note 23 of *Williams*, 194 W.Va. at 65, 459 S.E.2d at 342, we said: "A contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction."

Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996) (emphasis added). Moreover,

> [o]nly if the court makes the determination that the contract cannot be given a certain and definite legal meaning, and is therefore ambiguous, can a question of fact be submitted to the jury as to the meaning of the contract. It is only when the document has been found to be ambiguous that the determination of intent through extrinsic evidence becomes a question of fact.

Payne, 195 W. Va. at 507, 466 S.E.2d at 166.

B. Assignment of Error No. 1: The Circuit Court Erred by Entering Summary Judgment Against WU For The Breach Of Contract Claim.

1. The Circuit Court Applied the Wrong Section of the Faculty Handbook to the Tenure-Track Respondents.

In determining that the four Tenure-Track Respondents were entitled to a terminal appointment, the Circuit Court analyzed and applied the wrong section of the Faculty Handbook by applying Section 7.5 instead of Section 7.4. As WU argued in its summary judgment briefing, Section 7.4 is clearly the applicable section in determining whether the four Tenure-Track Respondents were entitled to a terminal appointment. (JA 00214 to JA 00215).

As indicated in both the title of the section and the language used in the section, Section 7.4 applies when the appointment of a tenure-track faculty member, who is still in probation, is not renewed at the expiration of the appointment period, *i.e.*, at the end of the term of employment. (JA 00161; JA 00252). Indeed, the first sentence of Section 7.4 states: "**Tenure-track faculty appointments in probation** and non-tenure track faculty appointments **may not be renewed at expiration of the appointment period based upon financial exigency (legal term)**[.]" (*Id.*) (emphasis added).

That is exactly what happened to the four Tenure-Track Respondents. As indicated in the 2018 Notices of Reappointment, the Tenure-Track Respondents were reappointed to **tenure-track positions** in their **probationary period** for the 2018-2019 academic year. (JA 00219 to JA 00222; JA 00251) (emphasis added). Therefore, when WU notified them in March 2019 that they

were not being reappointed at the expiration of the 2018-2019 academic year, each Tenure-Track Respondent was in a tenure-track position in their probationary period. (*Id.*). Moreover, each Tenure-Track Respondent was employed for, and was paid for, the entire 2018-2019 academic year, and their employment ended **after** they completed the 2018-2019 academic year. (JA 00253). Furthermore, the Tenure-Track Respondents' employment ended because WU decided not to renew their appointment at the expiration of the appointment period due to a determination that WU was in a state of financial exigency. (*Id.*; JA 00228; JA 00231 to JA 00233). Thus, in analyzing the rights of the Tenure-Track Respondents and the rights of WU, the applicable section was Section 7.4.

Pursuant to the clear language in Section 7.4, WU had the right not to renew the Tenure-Track Respondents' employment at the expiration of their appointment period due to a financial exigency, which is what occurred in this case. (JA 00161; JA 00252 to JA 00253). Moreover, there is nothing in Section 7.4 which requires WU to provide a terminal appointment to the faculty member when it decides not to renew a Tenure-Track faculty member who is in probation. (JA 00161; JA 00252). Indeed, Section 7.4 does not even mention a terminal appointment. (*Id.*).

In granting summary judgment to the Tenure-Track Respondents, the Circuit Court ignored the clear language of Section 7.4. Instead, the Circuit Court incorrectly applied Section 7.5 to the Tenure-Track Respondents. Section 7.5, however, does not apply to the Tenure-Track Respondents in this situation. Section 7.5 only applies to them if they were terminated **during the term** of their employment. Additionally, it is clear that the Circuit Court did not consider Section 7.4 when analyzing the issue. Indeed, in its Order granting summary judgment, the Circuit Court incorrectly stated that WU "relies solely on the language contained in section 7.5 of the

handbook[.]" (JA 00258). This statement, however, was directly contrary to the arguments that WU advanced in its memorandum in support of its own summary judgment motion. (JA 00214 to JA 00215).

Therefore, the Circuit Court erred when it ignored the clear language of Section 7.4 and found that WU breached a contract when it did not provide the Tenure-Track Respondents a terminal appointment for the 2019-2020 academic year. Contrary to the Circuit Court's summary judgment ruling, WU did not breach any contract by failing to provide the Tenure-Track Respondents with a terminal appointment. They simply were not entitled to receive one.[5]

2. The Circuit Court Erred in Finding that Respondents' Terminations Were not a For Cause Termination.

Even if Section 7.5 is determined to be the applicable section for all of the Respondents, Respondents still are not entitled to receive a terminal appointment because under Section 7.5, a terminal appointment is only required for "faculty members whose appointments are terminated (**not for cause**)[.]" (*Id.*) (emphasis added). As WU argued in its summary judgment briefing, Section 7.5 provides a list of various reasons, or causes, that can be considered a for cause termination of an appointment, and at the top of that list is "financial exigency." (JA 00161; JA 00192 to JA 00193; JA 00215; JA 00252). For instance, Section 7.5 begins: "A tenure appointment or non-tenure track appointment during term may be terminated **because of financial exigency (legal term)**[.]" (JA 00161; JA 00252) (emphasis added). Section 7.5 goes on to provide a list of other reasons, or causes, that WU can use to support a termination. (*Id.*). These other causes

[5] While the Tenure-Track Respondents may argue that Section 7.5 gives them the right to receive a "terminal appointment," Section 7.5 only applies to them if they were terminated **during the term** of their appointment. (JA 00161 to JA 00162; JA 00252 to JA 00253) (emphasis added). It should be undisputed that the Tenure-Track Respondents were not terminated during the term of their employment. (JA 00228; JA 00231 to JA 00233; JA 00253).

include

> change in University mission or needs; program termination, reduction, or redirection; a faculty member's inability to perform or lack of performance of the essential functions or fundamental job duties of his position; mental or physical disability; failure to comply with University policies; conviction of a felony; or moral turpitude.

(*Id.*). Section 7.5 also lists professional incompetence as another cause to justify termination. (*Id.*).

Moreover, Section 6.4.4 of the Faculty Handbook provides the following regarding tenured faculty members:

> Tenure means the right to continuous appointments as a ranked member of a particular department or program within a particular department **until the faculty member** dies, retires, resigns or **is dismissed for adequate cause** or lack of institutional need **as indicated in section 7.5, 7.6**, 7.7, or 7.8 of this Handbook.

(JA 00157) (emphasis added). Thus, when addressing a cause that can be used to end a faculty member's tenured employment, Section 6.4.4 specifically refers to Section 7.5 (which lists financial exigency) and 7.6 (which defines financial exigency).

Therefore, all of the reasons listed in the first paragraph of Section 7.5, including financial exigency, are a for cause reason that justifies immediate termination of a faculty member and does not trigger rewarding the faculty member with an extra year of employment. Indeed, the very nature of a financial exigency is to allow an institution of higher education to take immediate action to address significant financial issues. In fact, the Faculty Handbook defines financial exigency

> as the **critical, pressing, or urgent need** on the part of the University **to reorder its monetary expenditures** in such a way as **to remedy and relieve the state of urgency within the University created by its inability to meet its annual monetary expenditures** with sufficient revenue to prevent a sustained loss of funds and/or abandonment of its stated institutional mission.

(JA 00162) (emphasis added). Therefore, when WU declared that the University was in a state a

financial exigency, which has not been disputed or challenged by Respondents, WU was declaring that there was a critical or urgent need to reorder its monetary expenditures to prevent a sustained loss of funds or the abandonment of its institutional mission. In other words, WU needed to take immediate action to correct its financial situation so that it could remain open and continue to provide educational services to its students.

Clearly, reordering its monetary expenditures would include eliminating the tremendous expense of paying salaries to its faculty members. Therefore, given the urgent need to fix its financial situation, it defies logic to conclude that WU could declare financial exigency due to its dire financial situation, which required immediate action, but still be required to pay faculty members for an extra year, especially when the majors that these faculty members taught in were either being outright eliminated or reduced. Thus, a declaration of financial exigency should clearly be considered a for cause termination reason under Section 7.5 which does not create any obligation to provide a terminal appointment.

Indeed, the other causes, listed along with financial exigency in Section 7.5, are the type of conduct or situation that would logically and understandably also preclude creating an obligation to provide a terminal appointment. Certainly, if there was a change in the University's mission or a program was terminated, WU should not be required to pay impacted faculty members for an extra year of employment. Moreover, if a faculty member could not perform his or her job duties or if there was a mental or physical disability which prevented the faculty member from working, WU should not be required to continue to pay that faculty member for an extra year of employment. Furthermore, if a faculty member failed to comply with WU's policies, was convicted of a felony or engaged in conduct of moral turpitude, WU should not be required to pay that faculty member for an additional year of employment. Thus, all of these various causes listed

in Section 7.5, including the declaration of financial exigency, logically and understandably are situations which create the basis for a for cause termination and which do not create any obligation on the part of WU to pay a terminal appointment. In ruling otherwise, the Circuit Court made a decision that defies logic.

In fact, the Circuit Court's ruling defeats the entire purpose of being able to declare financial exigency, which allows an institution of higher education, like WU, to take immediate steps to address its finances. From a public policy standpoint, the Circuit Court's decision could place financial burdens on already distressed colleges and universities by limiting their options in trying to remain open for their students. Obviously, paying faculty members whose majors have been eliminated for another year of employment when a school is in a state of financial exigency is not sustainable.

Thus, when WU's Board of Trustees declared that the University was in a state of financial exigency, that declaration created a for cause reason that supports terminating Respondents' employment and did not impose on WU the obligation to provide Respondents an extra year of employment through a terminal appointment. It follows that the Circuit Court erred in finding that WU breach a contract by failing to provide a terminal appointment.

In granting summary judgment to Respondents, the Circuit Court also improperly relied upon language in Section 13.3 of the Faculty Handbook to find that the term "financial exigency" is not included in the Faculty Handbook's alleged definition of the term "for cause." While Section 13.3 sets forth various examples of the term "for cause," Section 13.3 is not the applicable section in this case. Rather, this case involves WU's right to end a faculty member's employment based on WU's declaration of financial exigency, which is addressed in Sections 7.4 and 7.5. While Section 7.5 makes a general reference to the right to appeal set forth in Section 13,

neither Section 7.4 nor Section 7.5 refer specifically to Section 13.3 or to the "for cause" language set forth in Section 13.3. Instead, Sections 7.4 and 7.5 provide their own various causes which can be used to end a faculty member's employment, and financial exigency is identified as one of those causes. Thus, Section 13.3 does not apply, and the Circuit Court erred in relying upon Section 13.3.

For the foregoing reasons, the Circuit Court erred in granting summary judgment to Respondents on their breach of contract claim. Because WU had a for cause reason to support its decision not to reappoint Respondents to their positions, the Circuit Court should have granted summary judgment to WU on Respondents' breach of contract claim.

3. At the Very Least, The Circuit Court Erred in Finding that the Faculty Handbook was Unambiguous and that There was no Question of Fact regarding Whether Respondents were Entitled to a Terminal Appointment.

In the alternative, and if summary judgment is not appropriate for WU, the terms of the Faculty Handbook are ambiguous and subject to different interpretations, thereby creating a question of fact that defeats summary judgment for Respondents. As the Supreme Court of Appeals has recognized, "[c]ontract language usually is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." *Fraternal Order of Police, Lodge No. 69*, 196 W. Va. at 101, 468 S.E.2d at 716. As WU argued in its summary judgment briefing, the relevant provisions of the Faculty Handbook are ambiguous. (JA 00193 to JA 00195).

First, in the second paragraph of Section 7.5, it states that "[t]enured or tenure-track faculty members whose appointments are terminated (not for cause), are given a terminal appointment[.]" (JA 00162; JA 00252). The "not for cause" language is ambiguous because it is

subject to several different meanings. For instance, it could mean that, as WU has argued, the term "for cause" includes all of the reasons that are listed in the first paragraph of Section 7.5 that justify terminating an appointment during its term. This would include financial exigency. Conversely, it could mean that, as argued by Respondents, the term "for cause" means how that term is used in Section 13.3 of the Faculty Handbook. Because this phrase is subject to differences of opinion as to its meaning, there is, at the very least, a question of fact regarding what this phrase means, and the Circuit Court should have submitted the issue to a jury.

There is an additional ambiguity regarding whether Section 13.3 can be used to determine what the term "for cause" means in Section 7.5. Section 7.5 does not specifically refer to Section 13.3 or give any indication that the phrase "not for cause" is defined in Section 13.3. (JA 00161 to JA 00162; JA 00252 to JA 00253). Indeed, Section 7.5 only contains a general reference to a faculty member's appeal rights set forth in Section 13. (*Id.*).

By contrast, and as noted above, Section 6.4.4 of the Faculty Handbook provides that

> [t]enure means the right to continuous appointments as a ranked member of a particular department or program within a particular department **until the faculty member** dies, retires, resigns or **is dismissed for adequate cause** or lack of institutional need **as indicated in section 7.5, 7.6**, 7.7, or 7.8 of this Handbook.

(JA 00157) (emphasis added). Thus, while Section 7.5 makes no specific reference to Section 13.3, Section 6.4.4 specifically refers to Section 7.5 and 7.6 (which defines financial exigency) when addressing causes that can end a faculty member's tenured employment. Although Respondents want to point to Section 13.3 to limit the types of causes that constitute a for cause termination, the language in Section 6.4.4 creates a question of fact on this issue which should be submitted to a jury.

Finally, while the Supreme Court of Appeals has held that "[w]here an employer

prescribes in writing the terms of employment, any ambiguity in those terms shall be construed in favor of the employee[,]" the Faculty Handbook in this case is not a typical employee handbook that was drafted solely by the University. Syl. Pt. 2, *Lipscomb v. Tucker Cnty. Commn.*, 206 W. Va. 627, 527 S.E.2d 171 (1999). As noted above, faculty handbooks are not exclusively drafted by administrators. Rather, handbooks are a joint effort between administrators and faculty. Indeed, the WU Faculty Handbook has provisions which allow the faculty to be involved in revising and amending the Faculty Handbook. (JA 00126; JA 00136 to JA 00138). This includes having the right to draft resolutions to amend the Faculty Handbook, the right to vote on those resolutions and the right to vote to reconsider a resolution that is initially rejected by the WU President. (JA 00136 to JA 00138). Thus, while there are ambiguities in the Faculty Handbook, those ambiguities should not be construed solely against WU.

For the foregoing reasons, the Circuit Court erred in granting summary judgment to Respondents as, at the very least, there are multiple questions of fact that arise in determining what a for cause termination is under Section 7.5.

C. Assignment of Error 2: The Circuit Court Erred By Entering Summary Judgment Against WU For The WPCA Claim.

1. Terminal Appointments are not "Wages" or "Fringe Benefits" under the WPCA.

As WU argued in its summary judgment briefing, there are several reasons why terminal appointments are not "wages" or "fringe benefits." (JA 00195 to JA 00196; JA 00215 to JA 00217). For instance, under the WPCA, "[t]he 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." W. Va. Code § 21-5-1(c) (emphasis added) In using the phrase "for labor or services rendered," the WPCA is referring to compensating employees for past labor or services rendered; not for future labor or services to be rendered. The terminal

appointment was not a payment for past "labor or services rendered." Instead, it would have been a future payment for "labor or services rendered" during the 2019-2020 academic year, which never occurred when WU decided not to reappoint Respondents. Because Respondents never rendered labor or services to WU in 2019-2020, they did not earn any "wages" due to them under the WPCA.

While "accrued fringe benefits" are also included in the WPCA's definition of "wages," the WPCA requires that an employee's fringe benefits must have already accrued for an employee to have a claim to them and future unaccrued or unvested benefits are not included. W. Va. Code § 21-5-1(c) ("[t]he term 'wages' shall also include **then accrued** fringe benefits capable of calculation and payable directly to an employee." *Id.* (emphasis added)). Moreover, in *Meadows v. Wal-Mart Stores, Inc.*, the Supreme Court of Appeals held that the terms of employment are determinative of whether an employee's fringe benefits have accrued upon their termination. Syl. Pt. 5, 207 W. Va. 203, 530 S.E.2d 676 (1999). The *Meadows* Court also held that "the proper definition of the word 'accrued' in W. Va. Code § 21-5-1(c) is 'vested.'" *Id.* at 215; *see also Miller v. St. Joseph Recovery Center, LLC*, 246 W. Va. 543, 553, 874 S.E.2d 345, 355 (2022). In her concurring opinion in *Meadows*, Justice Davis notes that "the majority opinion held that fringe benefits under the [WPCA] are those benefits which have **vested during an employee's period of employment**." *Meadows,* 207 W. Va. at 226, 530 S.E.2d at 699. (emphasis added).

Here, there is no accrued fringe benefit that vested during Respondents' period of employment. Respondents' employment ended at the end of the 2018-2019 academic year, *before* they had performed any work for WU for the 2019-2020 academic year, and *before* their alleged "fringe benefit" had vested and accrued. Thus, Respondents' terminal appointments did not vest during their period of employment and is not an "accrued fringe benefit" under the WPCA.

Moreover, the language used in Section 7.5 confirms that the terminal appointment is not an accrued fringe benefit. Section 7.5 states that, "[a]t the discretion of the President, a faculty member may or may not be asked to teach during the terminal appointment. If the faculty member is offered the opportunity to teach, and chooses not to do so, the employment relationship is severed." (JA 00162; JA 00253). Pursuant to this language, if the President offers a faculty member the opportunity to teach during the terminal appointment year, and if the faculty member turns down that opportunity, the employment relationship is severed, which means that the faculty member does not receive the terminal appointment or any compensation for working during the terminal year. As a result, the terminal appointment does not operate as a fringe benefit that a faculty member automatically receives. Rather, there are additional requirements that must be met to obtain the terminal appointment and to be paid during the terminal appointment year, such as continuing to teach during the terminal appointment year if required by the President.

2. The Terminal Appointments are not "Severance Pay."

In granting summary judgment to Respondents, the Circuit Court held that the terminal appointments were wages in the form of a severance payment. (JA 00259 to JA 00260). The Circuit Court, however, erred in finding that the terminal appointments were a severance payment. As WU argued in its briefing regarding its motion to dismiss the WPCA claim, the common usage of the term "severance pay" is compensation given at the time of separation in order to mitigate the impacts of separation, most often based on employees' length of service to the company and after the employment relationship has been permanently terminated. **(**JA 00038 to JA 00039**)**. *Southern v. Emery Worldwide*, 788 F. Supp. 894, 897 (S.D.W. Va. 1992) ("Severance benefits are unaccrued, unvested benefits provided to employees **upon their separation from employment**"); *Ziemer v. GovDelivery, Inc.*, A13-0644, 2013 WL 6725782, at *2 (Minn. App.

Dec. 23, 2013) (quoting *Carlson v. Augsburg Coll.,* 604 N.W.2d 392, 394–95 (Minn.App. 2000) (quoting *The American Heritage Dictionary* 1652 (3d ed. 1992) ("'Severance pay' . . . means "'[a] sum of money usually based on length of employment for which **an employee is eligible upon termination**'"); *Mowry v. State ex rel. Wyoming Ret. Bd.*, 866 P.2d 729, 731 (Wyo. 1993) ("'The historical meaning of severance pay — or 'dismissal compensation' . . . is payment 'made by an employer to an employee for **permanently terminating the employment relationship** primarily for reasons beyond the control of the employee.' Howard A. Specter and Matthew W. Finkin, 1 *Individual Employment Law and Litigation* § 5.26 at 327 (1989)") (emphasis added).

Here, the terminal appointment is something entirely different. The terminal appointment is not a lump sum payment made at the end of employment. Rather, the terminal appointment is an appointment for the employee to work for another year. It contemplates *future* pay to an employee in consideration for *future* services not yet rendered (in this instance, teaching and other faculty duties) during the terminal appointment year. As noted above, and unlike a situation involving actual severance pay where an employee's employment is permanently terminated, Respondents' employment is not necessarily permanently terminated as they may continue to teach during the terminal appointment academic year. *See Section 7.5* ("At the discretion of the President, a faculty member may or may not be asked to teach during the terminal appointment.") (JA 00162; JA 00252 to JA 00253).

Moreover, the terminal appointment is simply an appointment to continue working for another year at the University. There is nothing in Section 7.5 which requires WU to provide the employee with an upfront, lump sum payment for the entire terminal appointment year. For instance, Section 7.5. does not state that the employee receives a terminal "payment" for the entire academic year. Rather, the employee just receives an "appointment" which means that the

employee remains employed with the University for that terminal appointment year, and, at the discretion of the University's president, may be asked to teach a class or classes during the terminal appointment. (*Id.*). As indicated throughout Chapter 6.0 of the Faculty Handbook, an "appointment" is what an employee receives to begin and continue his or her employment with the University. (JA 00154 to JA 00159). Therefore, if an employee receives a terminal appointment for another year of employment, the employee would be paid as a regular employee throughout the terminal appointment year.

If the employee voluntarily decides to leave WU during the terminal appointment year, WU would not be obligated to continue to pay the employee for the rest of the year. Section 7.5 specifically recognizes this possibility as it clearly provides that "[i]f the faculty member is offered the opportunity to teach, and chooses not to do so, **the employment relationship is severed**." (JA 00162; JA 00253) (emphasis added). Similarly, if the employee engages in conduct that allows WU to terminate an appointment during its term, like in Section 7.5, WU would not be obligated to continue to pay the employee for the rest of the terminal appointment period. Under either scenario, there is no language which indicates that WU would continue to pay the employee for the rest of the terminal appointment year. For these reasons, the terminal appointment is inconsistent with the common usage of the term "severance pay," and the Circuit Court's decision to classify the terminal appointments as "severance pay" is incorrect.

While the Supreme Court of Appeals found in *Miller v. St. Joseph Recovery Center, LLC*, 246 W. Va. 543, 874 S.E.2d 345 (2022) that a severance payment was a then accrued fringe benefit under the WPCA, the situation in *Miller* is distinguishable. In *Miller*, the employee had an employment agreement which specifically referred to a "Servance Package" that was paid when the employee's employment ended. *Id.*, 246 W. Va. at 546, 874 S.E.2d at 348. For instance,

Section 4.4 of the agreement provided: "In the event that the Employee resigns for Good Reason, he shall be entitled to the Severance Package set forth in Section 4.6 below." *Id.* Section 4.6, which also permitted the employee to receive a Severance Package if terminated without cause, set forth how the Severance Package was calculated and paid. *Id.* In *Miller*, the Supreme Court of Appeals concluded that the Severance Package was due to the employee because she had already performed all services required of her as an employee. *See id.*, 246 W. Va. at 553, 874 S.E.2d at 355 (noting that the Severance Package "represented a form of deferred compensation for work performed during the employment").

By contrast, the Respondents herein would only be paid pursuant to their terminal appointments if they performed the services required to fulfill the appointments. The mere fact that they argue they are entitled to terminal appointments does not create a present obligation by WU to pay them wages. As explained above, the terminal appointment is not a payment that it made to the employee at the conclusion of the employee's employment. Rather, the terminal appointment is an appointment for another year of employment that the employee is required to work, if asked, in order to receive any payments. Thus, the situation in *Miller* is distinguishable and does not support finding that the terminal appointment is a severance payment.

3. Even if a Terminal Appointment could be Considered a Severance Payment, it is not a Fringe Benefit under the WPCA Because it is not a Then Accrued, Vested Benefit.

Under the WPCA, only those fringe benefits that are "then accrued" are considered to be wages, and, thus, payable to employees at termination. (JA 00044 to JA 00047). W. Va. Code § 21-5-1(c) ("the term 'wages' shall also include **then accrued** fringe benefits capable of calculation and payable directly to an employee") (emphasis added). In determining what the word "accrue" means, the Supreme Court of Appeals has held that "the proper definition of the word

'accrued' in W. Va. Code § 21–5–1(c) is 'vested.'" *Meadows*, 207 W. Va. at 215, 530 S.E.2d at 688.

Moreover, in determining when a fringe benefit accrues or vests under the WPCA, the Supreme Court of Appeals has further held that

> [t]he concept of vesting is concerned with expressly enumerated conditions or requirements all of which must be fulfilled or satisfied before a benefit becomes a presently enforceable right. Because the WPCA contains no such conditions or requirements, the payment of fringe benefits can only be governed by the terms of employment found in employment policies promulgated by employers and agreed to by employees. Accordingly, **the terms of the applicable employment policy, and not the WPCA, determine whether fringe benefits are included in the term "wages"** under W. Va. Code § 21–5–1(c).

Meadows, 207 W. Va. at 215-16, 530 S.E.2d at 688-89 (emphasis added).

Therefore, for the terminal appointment to be an accrued fringe benefit that is included in the definition of wages, the terminal appointment must be a vested and enforceable right that Respondents are entitled to receive pursuant to WU's employment policies. As explained above in Section V.B.2, which WU incorporates by reference, the terminal appointment is not a vested, accrued fringe benefit under Section 7.5 of the Faculty Handbook because WU declared financial exigency, which was a for cause reason not to reappoint Respondents to their positions. In order for this alleged fringe benefit to vest under Section 7.5, Respondents' employment had to be terminated "not for cause." Because WU had a for cause reason to end Respondents' employment, the terminal appointment never became a vested, then accrued fringe benefit. Thus, Respondents do not have a viable WPCA claim based on WU not appointing them to a terminal appointment for the 2019-2020 academic year. For the foregoing reasons, the Circuit Court erred in granting summary judgment to Respondents on their WPCA claim. Instead, the Circuit Court should have granted summary judgment to WU on that claim.

D. Assignment of Error 3: Even If The Circuit Court Properly Found Summary Judgment Against WU, The Circuit Court Erred By Failing To Reduce Respondents' Breach Of Contract Damages And WPCA Damages By Their Interim Earnings.

Contrary to the requirements of West Virginia Code Section 55-7E-3(a), the Circuit Court awarded damages to Respondents in amounts that were not reduced by any interim earnings that Respondents actually received during the 2019-2020 academic year. As a result, the Circuit Court awarded lost wages to Respondents which equaled their entire salary for the 2019-2020 academic year plus liquidated damages under the WPCA which equaled two times their entire salary for the 2019-2020 academic year. (JA 00331 to JA 00332). Thus, even though four of the Respondents were able to fully mitigate their lost wages and three of the Respondents were able to partially mitigate their lost wages with interim earnings by finding subsequent employment for the 2019-2020 academic year, the Circuit Court has awarded unmitigated damages to Respondents, which totaled together equals $1,233,000. (JA 00276 to 00278; JA 00326; JA 00331 to JA 00332).

As argued in WU's briefing regarding Respondents' damages, the Circuit Court's failure to include interim earnings when calculating Respondents' damages is contrary to the requirements of West Virginia Code Section 55-7E-3(a). (JA 00274 to JA 00276). That Code provision states:

> In **any employment law cause of action** against a current or former employer, **regardless of whether the cause of action arises from a statutory right created by the Legislature or a cause of action arising under the common law of West Virginia**, the plaintiff has an affirmative duty to mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights. The malice exception to the duty to mitigate damages is abolished. **Unmitigated or flat back pay and front pay awards are not an available remedy**. **Any award of back pay or front pay** by a commission, court or jury **shall be reduced by the amount of interim earnings** or the amount earnable with reasonable

> diligence by the plaintiff. It is the defendant's burden to prove the lack of reasonable diligence.

Id. (emphasis added).

Here, Respondents are all former employees of WU. Respondents' breach of contract claim and their WPCA claim are based on their employee-employer relationship with WU. Moreover, their breach of contract claim arises under the common law of West Virginia, and their WPCA claim arises from a statutory right created by the West Virginia Legislature. Furthermore, under both their breach of contract claim and their WPCA claim, Respondents are seeking damages for back pay, *i.e.*, lost wages, that was owed to them. Therefore, under clear West Virginia law, Respondents are not entitled to unmitigated damages for their breach of contract and WPCA claims. Rather, any damages must be reduced by Respondents' interim earnings.

Furthermore, the liquidated damages section of the WPCA provides that "[i]f a . . . corporation fails to pay an employee wages as required under this section, the . . . corporation, in addition to the amount which was unpaid when due, is liable to the employee for two times **that unpaid amount as liquidated damages**." W. Va. Code § 21-5-4(e) (emphasis added). In calculating their liquidated damages, the Circuit Court awarded Respondents liquidated damages in amounts that did not include their interim earnings. This calculation, however, is contrary to the purpose of West Virginia Code Section 55-7E-3. West Virginia Code Section 55-7E-2(b) provides that "[t]he purpose of this article[, which includes W. Va. Code § 55-7E-3,] is to provide a framework for adequate and reasonable compensation to those persons who have been subjected to an unlawful employment action, **but to ensure that compensation does not far exceed the goal of making a wronged employee whole**." W. Va. Code § 55-7E-2(b) (emphasis added).

Because West Virginia Code Section 55-7E-3(a) imposes an affirmative duty on Respondents to mitigate their past lost wages and requires the Circuit Court to reduce any award

of back pay, *i.e.*, lost wages, by Respondents' interim earnings, the "**unpaid amount**" that must be used for liquidated damages is the amount that is owed **after** calculating Respondents' interim earnings. Otherwise, the purpose of West Virginia Code Section 55-7E-3(a) is not met because the compensation that each Respondent receives will "far exceed the goal of making a wronged employee whole." In other words, if Respondents receive liquidated damages that do not take into account their interim earnings, they will receive a windfall by being compensated for more than it is needed to make them whole. While the very nature of liquidated damages under the WPCA may provide some windfall because it is providing the employee with two times what the employee is owed, this windfall should not be unnecessarily increased by failing to calculate each Respondent's interim earnings. Otherwise, the liquidated damages become punitive instead of compensatory.

Indeed, if Respondents' interim earnings are not included in calculating their damages, they will receive a significant windfall.

- **Dr. Jason Fuller**: Without mitigation, Dr. Fuller would receive **$142,500** ($47,500 [WU annual salary] + ($47,500 X 2 [liquidated damages]). (JA 00331 to JA 00332). Dr. Fuller, however, fully mitigated his damages by finding subsequent employment for the 2019-2020 academic year at a salary more than his WU salary. (JA 00276; JA 00283 to JA 00284).

- **Dr. Andrew Staron**: Without mitigation, Dr. Staron would receive **$129,000** ($43,000 [WU annual salary] + ($43,000 X 2 [liquidated damages]). (JA 00331 to JA 00332). Dr. Staron, however, fully mitigated his damages by finding subsequent employment for the 2019-2020 academic year at a salary more than his WU salary. (JA 00276; JA 00290 to JA 00291).

- **Dr. Jessica Wrobleski**: Without mitigation, Dr. Wrobleski would receive **$135,000** ($45,000 [WU annual salary] + ($45,000 X 2 [liquidated damages]). (JA 00331 to JA

00332). Dr. Wrobleski, however, fully mitigated her damages by finding subsequent employment for the 2019-2020 academic year at a salary more than her WU salary. (JA 00276; JA 00294 to JA 00295). In fact, Dr. Wrobleski made $75,000 a year during the 2019-2020 academic year, which was $30,000 more than what she would have made at WU. (*Id.*).

- **Dr. Nancy Bressler**: Without mitigation, Dr. Bressler would receive **$127,500** ($42,500 [WU annual salary] + ($42,500 X 2 [liquidated damages]). (JA 00331 to JA 00332). Dr. Bressler, however, fully mitigated her damages by finding subsequent employment for the 2019-2020 academic year at a salary that was "about the same" as what she received from WU. (JA 00276 to JA 00277; JA 00299 to JA 00300).

- **Dr. Amy Phillips**: Without mitigation, Dr. Phillips would receive **$130,500** ($43,500 [WU annual salary] + ($43,500 X 2 [liquidated damages]). (JA 00331 to JA 00332). Dr. Phillips, however, partially mitigated her damages by finding subsequent employment for the 2019-2020 academic year at a salary of $37,000. (JA 00277; JA 00304). Thus, for her breach of contract claim, and if her interim earnings are included, her damages would be limited to **$6,500** ($43,500 - $37,000). (*Id.*). Since $6,500 is the unpaid amount, her liquidated damages under the WPCA would be two times that unpaid amount, *i.e.*, **$13,000**. (*Id.*). With mitigation, Dr. Phillips' total damages would be **$19,500** ($6,500 + $13,000). (*Id.*).

- **Dr. Peter Ehni**: Without mitigation, Dr. Ehni would receive **$180,000** ($60,000 [WU annual salary] + ($60,000 X 2 [liquidated damages]). (JA 00331 to JA 00332). Dr. Ehni, however, partially mitigated his damages by finding subsequent employment for the 2019-2020 academic year at a salary of $50,000. (JA 00277; JA 00309). Thus, for his breach of contract claim, and if his interim earnings are included, his damages would be limited to **$10,000** ($60,000 - $50,000). (*Id.*). Since $10,000 is the unpaid amount, his liquidated damages under the WPCA

would be two times that unpaid amount, *i.e.*, **$20,000**. (*Id.*). With mitigation, Dr. Ehni's total damages would be **$30,000** ($10,000 + $20,000). (*Id.*).

- **John Whitehead**: Without mitigation, Mr. Whitehead would receive **$193,500** ($64,500 [WU annual salary] + ($64,500 X 2 [liquidated damages]). (JA 00331 to JA 00332). Mr. Whitehead, however, partially mitigated his damages by finding subsequent employment for the 2019-2020 academic year and receiving interim earnings of approximately $58,032. (JA 00277 to JA 00278; JA 00313 to JA 00314).[6] Thus, for his breach of contract claim, and if his interim earnings are included, his damages would be limited to **$6,468** ($64,500 - $58,032). (JA 00277 to JA 00278). Since $6,468 is the unpaid amount, his liquidated damages under the WPCA would be two times that unpaid amount, *i.e.*, **$12,936**. (*Id.*). With mitigation, Mr. Whitehead's total damages would be **$19,404** ($6,468 + $12,936).[7] (*Id.*).

Thus, without including their interim earnings when calculating their damages, each Respondent would receive over six figures in damages even though their actual damages had been fully or substantially mitigated. This result is contrary to the stated purpose of West Code Section 55-7E-1 *et seq.* as compensation Respondents received would "far exceed the goal of making a wronged employee whole." W. Va. Code § 55-7E-2(b).

In holding that Respondents' damages would not be reduced due to mitigation, the Circuit Court also improperly relied upon the decision in *Miller v. St. Joseph Recovery Center, LLC*, 246 W. Va. 543, 874 S.E.2d 345 (2022). In its Order regarding Respondents' damages, the Circuit Court stated: "Having applied the reasoning of [the] Miller court leads this court to its

[6] Mr. Whitehead worked full-time at $27.90 per hour. (JA 00277 to JA 00278; JA 00313 to JA 00314). $27.90 times 40 hours times 52 weeks equals $58,032.

[7] Because Respondent Dr. Kathryn Voorhees did not find subsequent employment, her situation is different and is discussed below in Section V.E.

conclusion that Miller is the authority for this court's decision in this case. **That decision is that mitigation has no relevance to wages already earned by the plaintiffs** while they were employed at WU." (JA 00326) (emphasis added). The Supreme Court of Appeals' decision in *Miller*, however, did not address mitigation in any way and did not address the requirements of West Virginia Code Section 55-7E-3(a). *See Miller*, 246 W. Va. 543, 874 S.E.2d 345. Thus, the Circuit Court erred in finding that the *Miller* decision was the authority on the mitigation issue.

Moreover, contrary to the Circuit Court's decision, and as explained above, the terminal appointment is not "wages already earned by the" Respondents. Rather, the terminal appointment is an appointment for another year of employment that the employee can be required to work, if asked, in order to earn and receive any payments. For the foregoing reasons, the Circuit Court erred when it failed to include Respondents' interim earnings when calculating their damages.

E. Even If The Circuit Court Properly Entered Summary Judgment Against WU, The Circuit Court Erred By Failing To Reduce Dr. Kathryn Voorhees' Damages Because She Did Not Engage In Reasonable Diligence To Find Subsequent Employment.

As argued in WU's briefing regarding Respondents' damages, Respondent Dr. Voorhees is either not entitled to any damages, or, at the very least, her damages should be reduced because after her employment with WU ended, she made inadequate efforts to seek subsequent employment. (JA 00278). At the time Dr. Voorhees received her notice of non-reappointment, she was sixty-five years old. (JA 00317 to JA 00318). Prior to receiving her notice of non-reappointment, Dr. Voorhees admitted that she intended to work until age seventy-five. (JA 00319). However, after receiving her notice of non-reappointment, Dr. Voorhees did not seek any employment in the area of higher education. (JA 00318). Instead, she limited her job search to applying for just three positions: (1) a position at a wellness center; (2) a position at a shop that

sold artisans' work; and (3) a position at a flower shop. (*Id.*). When she did not receive a call back for these applications, she stopped looking for work and retired at age sixty-six. (*Id.*).

West Virginia Code Section 55-7E-3(a) provides that "**[a]ny award of back pay** or front pay by a commission, court or jury **shall be reduced by** the amount of interim earnings or **the amount earnable with reasonable diligence by the plaintiff**." *Id. (emphasis added)*. The Supreme Court of Appeals has recognized that West Virginia Code Section 55-7E-3(a) imposes "**an affirmative duty**" on the plaintiff to mitigate any claim for past wages and "requiring an award, if any, of back pay . . . to be reduced by . . . the amount that may be earned with reasonable diligence by the plaintiff." *Martinez v. Asplundh Tree Expert Co*., 239 W. Va. 612, 618, 803 S.E.2d 582, 588 (2017) (emphasis added). Moreover, "[t]he purpose of this article is to provide a framework for adequate and reasonable compensation to those persons who have been subjected to an unlawful employment action, but to ensure that compensation does not far exceed the goal of making a wronged employee whole." W. Va. Code § 55-7E-2(b).

Dr. Voorhees did not engage in reasonable diligence to find subsequent employment. Indeed, she did not even look for a position in higher education, and while she had planned on working until age seventy-five, she ended her job search after only applying for three positions. (JA 00318 to JA 00319). Such an effort is not engaging in reasonable diligence to find subsequent employment.

Moreover, such an effort does not meet the stated purpose of West Virginia Code Section 55-7E-1 *et seq*., which is "to ensure that compensation does not far exceed the goal of making a wronged employee whole." W. Va. Code § 55-7E-2(b). Based on the Circuit Court's decision, Dr. Voorhees stands to gain **$195,000** ($65,000 [annual salary] + ($65,000 X 2 [liquidated damages]). (JA 00331 to JA 00332). This far exceeds the goal of making a wronged employee

whole, especially since she made very little effort in attempting to find subsequent employment.

Had Dr. Voorhees engaged in reasonable diligence to find another job, she likely would have found a position at a wage rate that either fully or partially mitigated her damages. Four of the Respondents were able to find subsequent positions that fully mitigated their damages, and three of the Respondents were able to find subsequent employment that partially mitigated their damages. (JA 00276 to JA 00278). Because she failed to exercise reasonable diligence, and because all of the other Respondents were able to find employment that either fully or partially mitigated their damages, the Circuit Court erred in failing to reduce Dr. Voorhees' damages completely, or at the very least, by an amount Dr. Voorhees would have earned had she engaged in reasonable diligence to find another position.[8]

VI. CONCLUSION

For the foregoing reasons, the Circuit Court's decision to grant summary judgment to Respondents should be reversed, and WU should be awarded summary judgment on Respondents' breach of contract and WPCA claims. Or, in the alternative, the Court should find that summary judgment is inappropriate because there is a question of fact and Respondents' claims should be submitted to the jury.

If the Court determines that summary judgment was appropriately entered against WU, the Court should reverse the Circuit Court's decision to award Respondents unmitigated breach of contract damages and unmitigated WPCA liquidated damages. As a result, and with regard to Respondents' damages, the Court should direct the Circuit Court to reduce Respondents'

[8] In determining the amount that Dr. Voorhees could have earned, Dr. Ehni and Mr. Whitehead's situation provides guidance as they had a similar yearly salary as Dr. Voorhees. (JA 00331). Had she exercised reasonable diligence in looking for subsequent employment, she should have been able to find some type of employment within the same range of salary as Dr. Ehni or Mr. Whitehead.

breach of contract and WPCA damages by their interim earnings for the 2019-2020 academic year. With regard to Dr. Voorhees' damages, the Court should direct the Circuit Court to reduce her breach of contract and WPCA damages by an amount Dr. Voorhees would have earned had she engaged in reasonable diligence to find another position.

Respectfully submitted this 26th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2023, a copy of the foregoing "***Petitioner's Brief of Wheeling Jesuit University, Inc.***" was filed electronically via File & ServeXpress. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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