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 REPLY BRIEF OF WHEELING JESUIT UNIVERSITY, INC.

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Petitioner, formerly known as Wheeling Jesuit University, Inc., and now named Wheeling University ("WU"), submits the following reply to Respondents' response:[1]

I. STATEMENT OF THE CASE

In their Statement of the Case, Respondents cite to facts that both parties stipulated to and submitted to the Circuit Court. Contrary to any assertion by Respondents, these are not the only facts that could be considered in deciding the case. Rather, these are just the facts that could be stipulated to by the parties. Moreover, when the parties stipulated to what various sections in the Faculty Handbook said, the parties were not stipulating to how those various sections should be interpreted or applied by the Circuit Court. Rather, the parties were just agreeing on what language appears in the Faculty Handbook.

Finally, in Respondents' response, Respondents' quote of Section 7.5 of the Faculty Handbook is not correct. The quoted language in Respondents' response shows that Section 7.5 is one single paragraph. *Respondents' Brief, pp. 2-3*. However, in the Faculty Handbook, in the Stipulation and in the Circuit Court's Final Judgment Order, there are two separate paragraphs in Section 7.5. (JA 00161 to JA 00162; JA 00252 to JA 00253; JA 00329).

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this case because there is an issue of first impression. As noted in WU's initial brief, this case involves undecided issues regarding the reduction of damages required by West Virginia Code Section 55-7E-3(a). For instance, it involves whether faculty members' damages for lost compensation should be reduced by the compensation

[1] There are currently two pending appeals before the Intermediate Court of Appeals, which concern the same parties and same issues. Those two appeals are Case No. 23-ICA-324 and Case No. 23-ICA-383. While Respondents' brief has Case No. 23-ICA-383 in the caption on the cover page, Respondents' brief was filed in Case No. 23-ICA-324.

they received during a terminal appointment period, and whether the mitigation requirements of West Virginia Code Section 55-7E-3(a) apply in determining how to calculate liquidated damages under the West Virginia Wage Payment and Collection Act ("WPCA").

Respondents claim that the Supreme Court of Appeals' decision in *Miller v. St. Joseph Recovery Center, LLC*, 246 W. Va. 543, 874 S.E.2d 345 (2022), resolved these issues. *Respondents' Brief, p. 4*. That assertion, however, is not accurate for several reasons. First, the Supreme Court of Appeals' decision in *Miller* 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. Indeed, the word "mitigation" and West Virginia Code Section 55-7E-3(a) are not mentioned anywhere in the *Miller* decision. *Id.*

In their brief, Respondents argue that it can be inferred, by implication, that the Supreme Court of Appeals addressed mitigation because the plaintiff in *Miller* found a job immediately after leaving her employment and she was still awarded her entire severance pay without any reduction for mitigation. *Respondents' Brief, pp. 13-14*. However, an alleged inference which is created by the Court's silence on an issue does not mean that the Supreme Court of Appeals has decided the issue or provided any guidance on the issue.

Moreover, as explained in greater detail in its initial brief and below, the severance payment that was awarded in *Miller* is different from the terminal appointment that Respondents are seeking in this case. The severance payment is a set and guaranteed payment that is made after employment has ended. By contrast, the terminal appointment is an appointment to remain employed for an additional year. The terminal appointment is not a guaranteed payment of the employee's entire salary for the following academic year as that employment could end during that year for various reasons. Thus, because the severance payment and the terminal appointment are

different, the *Miller* decision is not dispositive on the issue of mitigation and the application of West Virginia Code Section 55-7E-3(a).

For similar reasons, the *Miller* decision did not resolve the issue concerning whether the mitigation requirements of West Virginia Code Section 55-7E-3(a) apply in determining how to calculate liquidated damages under the WPCA. Thus, contrary to any assertion by Respondents, the issues raised in this appeal have not been previously resolved by the Supreme Court of Appeals. As a result, a memorandum decision is not appropriate in this case, and the Court should schedule an oral argument.

III. ARGUMENT

A. The Circuit Court Applied The Wrong Section Of The Faculty Handbook To The Tenure-Track Respondents.

As part of its first assignment of error, WU argued that the Circuit Court applied the wrong section of the Faculty Handbook to the four Tenure-Track Respondents when it applied Section 7.5 to them instead of Section 7.4. In challenging WU's argument, Respondents first assert that the Circuit Court did not ignore Section 7.4 because the Circuit Court quoted Section 7.4 in the Judgment Order. In making this assertion, however, Respondents misunderstand WU's argument. While the text of Section 7.4 is quoted in the Judgment Order, WU's argument is that the Circuit Court ignored Section 7.4 by failing to apply the provisions of Section 7.4 to the four Tenure-Track Respondents. In fact, it is clear that the Circuit Court ignored Section 7.4 when analyzing the issue. 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).

Section 7.4 is clearly the section that the Circuit Court should have applied to the Tenure-Track Respondents. Section 7.4 is titled "**Non-Renewal of** a Multi-Year Appointment, a Non-Tenure-Track Appointment, or **a Tenure-Track Appointment in Probation at End of Term**." (JA 00329) (emphasis added). Further, 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). This is **exactly** what happened to the four Tenure-Track Respondents. They were all on probation, and they were advised on March 28, 2019, that **at the end of their current term**, WU was not renewing their appointments. (JA 00328; JA 00330). They continued to be employed by WU and paid by WU until the end of their current term, which did not expire until August, 2019. (JA 00330).

Thus, as clearly indicated in both the title and in the first sentence of Section 7.4, the Faculty Handbook gave WU the right not to renew the appointment of a tenure-track faculty member, who was in probation, at the end of the appointment period based upon financial exigency. Because this is what happened to the four Tenure-Track Respondents, and because Section 7.4 does not mention or require that WU provide the tenure-track faculty members a terminal appointment under this scenario, the Circuit Court erred in granting a terminal appointment to the four Tenure-Track Respondents.

Respondents next assert that "there is no language in either Section 7.4 or 7.5 which suggests that Section 7.5 applies to tenure-track faculty only if they were terminated during the term of their employment." *Respondents' Brief, p. 6*. This is not accurate as the title of Section 7.5 indicates that it concerns a termination of an appointment that occurs "[d]uring the term." (JA 00329). Additionally, the first sentence of Section 7.5 discusses appointments being terminated

"during term[.]" (*Id.*). While the title and the first sentence of Section 7.5 do not specifically mention tenure-track faculty members, the reasonable interpretation is that the entirety of Section 7.5 only applies when an appointment is terminated during the term. Thus, when the termination of tenure-track faculty members is mentioned in the second paragraph of Section 7.5, that paragraph is discussing what happens when a tenure-track faculty member's appointment is terminated during the term of the appointment. Otherwise, it makes no sense for that second paragraph to appear in Section 7.5, which clearly only relates to terminations that occur during the term of an appointment.

Respondents further argue that the "Circuit Court properly found that Section 7.4 does not explicitly nor implicitly limit the right to a terminal contract expressly provided for tenure and tenure-track WJU faculty by Section 7.5." *Respondents' Brief, pp. 6-7*. This argument should be rejected. As noted above, because the Circuit Court flat out ignored the language of Section 7.4 and did not analyze WU's rights under Section 7.4, the Circuit Court could not have possibly made any findings related to any alleged interplay between Section 7.4 and Section 7.5. Rather, and even though the Tenure-Track Respondents were not terminated during the term of their appointment, the Circuit Court improperly analyzed the parties' respective rights under just Section 7.5.

Finally, Respondents refer to the testimony of a Rule 30(b)(7) witness to assert that WU cannot rely upon the language in Section 7.4 in defending against the claims in this case. Respondents have asserted a breach of contract claim based on allegations that WU breached the terms of the Faculty Handbook. Therefore, the terms of the entire Faculty Handbook are relevant in determining whether WU engaged in any conduct that breached the Faculty Handbook. The language in Section 7.4 further supports WU's argument that it was authorized, under the Faculty

Handbook, not to provide the Tenure-Track Respondents a terminal appointment due to the declaration of a financial exigency. As explained above, because the Tenure-Track Respondents' appointments were not renewed at the expiration of their appointment period, the provisions of Section 7.4 are directly on point to their specific situation. A Rule 30(b)(7) witness' confusion during a deposition over the distinction between "tenure-track" (falling under Section 7.4) and "tenured" (falling under Section 7.5) does not change the fact that the Faculty Handbook applies and says what it says. By its plain language, tenure-track faculty fall under Section 7.4. Thus, WU should be able to rely upon the language in Section 7.4 when defending against Respondents' claim that WU breached the terms of the Faculty Handbook.

Additionally, when asked for WU's position regarding its denial of paragraph 9 of the Complaint, the witness testified that "[t]he university's position is that under 7.5 of the faculty handbook '**A tenure appointment** or **non-tenure track appointment** during term may be terminated because of financial exigency.'" (JA 00077) (emphasis added). The Tenure-Track Respondents, however, do not fall under either the "tenure appointment" or "non-tenure track appointment" categories identified in the testimony. Also, they were not terminated during the term of their appointment. Thus, WU should not be precluded from asserting its argument, which was asserted to the Circuit Court in its briefing, that Section 7.4 is the applicable section when analyzing the Tenure-Track Respondents' claims. (JA 00214 to JA 00215).

B. The Circuit Court Erred In Finding That Respondents' Terminations Were Not A For Cause Termination.

Even though Section 7.5 of the Faculty Handbook makes no specific reference to Section 13.3 or to the for cause language set forth in Section 13.3, Respondents argue that Section 13.3 provides the for cause definition that the Circuit Court must rely upon when determining whether Respondents' employment ended due to a for cause reason under Section 7.5. Section

13.3, however, is not the applicable section because Section 7.5 sets forth its own specific for cause reasons, such as financial exigency, that give WU the right not to give Respondents a terminal appointment.

Indeed, the very first cause listed in Section 7.5 which supports terminating a tenure appointment is financial exigency. (JA 00329). Section 7.5 proceeds to list other causes which support terminating a tenure appointment during its term. (*Id.*) These other causes 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.*). Respondents' argument is not logical or reasonable as it would require the Court to ignore the causes that are listed in the first paragraph of Section 7.5 that support terminating a tenure appointment and use an entirely different section of the Faculty Handbook, which is not specifically referred to in Section 7.5, to determine what causes allow WU not to be required to give the employee a terminal appointment.

While Respondents claim that WU "flails about with arguments about situations not at issue," those causes listed in the first paragraph of Section 7.5, like financial exigency, are causes, which logically and reasonably would not create an obligation for WU to provide a terminal appointment for the following academic year. *See WU's Brief, pp. 20-22*. The Court can rely upon those causes listed in the first paragraph of Section 7.5 in interpreting what the second paragraph of Section 7.5 means. Indeed, the fact that Section 7.5 lists in its first paragraph financial exigency and the other causes that can be used to support terminating a tenure appointment during its term shows that the for cause language in the second paragraph of Section 7.5 is addressing the causes listed above in the first paragraph. Had the for cause language in Section 7.5 meant to only include

the for cause reasons listed in Section 13.3, Section 7.5 would have clearly identified Section 13.3 in the second paragraph of Section 7.5. Because the second paragraph of Section 7.5 is silent, the more logical and reasonable conclusion is that the for cause language in the second paragraph of Section 7.5 is referring to the causes listed above in the first paragraph of Section 7.5.

The Faculty Handbook provides further guidance that Section 13.3 is not the sole and only provision that addresses causes for termination. As noted in its initial brief, 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). The fact that Section 6.4.4 specifically states that a tenured faculty member can be dismissed for cause and specifically cites to Section 7.5 and Section 7.6 is a clear indication that Section 13.3 is not the only provision that addresses a for cause termination of a tenured faculty member. Indeed, in citing to Sections 7.5 and 7.6, Section 6.4.4 **expressly** identifies financial exigency as a cause that can be used to terminate a tenured faculty member's appointment. Thus, the Circuit Court erred when it relied solely on the language of Section 13.3 to determine that financial exigency could not be considered a for cause termination under Section 7.5.

At the very least, because there are different provisions in the Faculty Handbook regarding what is considered to be a cause that will support terminating a faculty member's appointment, there is a basis from which the Court could, and should conclude that, Section 7.5,

rather than Section 13.3, determines what is a for cause termination, and therefore the Circuit Court erred in granting summary judgment to Respondents on this issue.

Finally, if the Court determines that Section 13.3 sets forth the sole definition of for cause termination under Section 7.5, that same definition should not be used for the Tenure-Track Respondents because Section 13.3 does not apply to the Tenure-Track Respondents' situation in this case. The first sentence of Section 13.3 states: "Individual faculty members who have tenure **or whose term of appointment has not expired** may be dismissed for cause." (JA 00330) (emphasis added). Thus, for non-tenured faculty, Section 13.3 would only apply to them if they were dismissed prior to the expiration of their appointment. As noted above and in WU's initial brief, the Tenure-Track Respondents were not dismissed during their appointment period. Rather, after their appointments expired, their appointments simply were not renewed for the following year. Therefore, it would be unfair to WU to selectively use language from Section 13.3 to find that the Tenure-Track Respondents were entitled to another year of wages when the rest of Section 13.3 clearly does not apply to their situation in this case.

C. The Circuit Court Erred In Finding That The Faculty Handbook Was Unambiguous And In Finding That There Was No Question Of Fact Regarding Whether Respondents Were Entitled To A Terminal Appointment.

The parties submitted a Joint Stipulation, which contained just those facts upon which the parties could agree. (JA 00250 to JA 00255). In the Joint Stipulation, it states that the parties, through their counsel, "have conferred to determine what facts the parties can stipulate to in this case." (JA 00251). There was no stipulation as to how the Faculty Handbook should be interpreted, and there was no stipulation as to ambiguity, or a lack thereof, regarding the Faculty Handbook. Thus, WU has not waived the right to argue, in the alternative, that if this Court determines that summary judgment is not appropriate for WU, this Court should find that 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 WU's argument as to why the Faculty Handbook is ambiguous, *see* WU's argument in Section V.B.3 of its initial brief. *WU's Brief, pp. 23-25*.

Moreover, WU is not "[s]eeking to escape the factual stipulations it previously agreed to" by arguing that the Court should not follow *Lipscomb v. Tucker Cnty. Commn.*, 206 W. Va. 627, 527 S.E.2d 171 (1999). First, there are no factual stipulations "to escape." Respondents' claims require the interpretation of various sections of the Faculty Handbook. As stated above, WU never stipulated as to how those various sections should be interpreted and never stipulated that there was no ambiguity in those sections. Rather, in stipulating about the various sections in the Faculty Handbook, WU only stipulated to quoting the exact language used in the Faculty Handbook. Quoting the language in the Faculty Handbook is not an agreement as to what the language means or how the language should be interpreted.

Furthermore, the principle of *Lipscomb* should not be followed because, unlike an employee handbook or an employment policy, which are typically drafted solely by the employer, the Faculty Handbook is different because WU faculty have the right to play a role in drafting and revising the Faculty Handbook. As explained in more detail in its initial brief, faculty handbooks at WU are not exclusively drafted by administrators. *See WU's Brief, pp. 3-4.* 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).

Additionally, as set forth in the Faculty Handbook, "Faculty Council works with the CAO [Chief Academic Officer] to keep the Faculty Handbook current." (JA 00138). This includes tracking all resolutions passed at Faculty meetings and recommending the appropriate place to put a passed resolution in the Faculty Handbook. (*Id.*). The "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." *Id.* Thus, the Faculty Handbook is not drafted or maintained solely by WU. As a result, any ambiguities in the Faculty Handbook should not be construed solely against WU.

D. A Terminal Appointment Is Not "Wages" Under The WPCA.

Respondents argue that WU cites to no language from the Faculty Handbook to support its argument that the terminal appointments did not "vest" during Respondents' employment. In arguing that the terminal appointments did not "vest" during Respondents' employment, WU cited to the following language in Section 7.5, which 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. This language shows that the terminal appointment does not operate as a vested 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.

Moreover, as the Supreme Court of Appeals recognized in *Meadows v. Wal-Mart Stores, Inc*., 207 W. Va. 203, 530 S.E.2d 676 (1999),

> "**[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)."

Gress v. Petersburg Foods, LLC, 215 W. Va. 32, 36, 592 S.E.2d 811, 815 (2003) (quoting *Meadows*, 207 W. Va. at 215–16, 530 S.E.2d at 688–89) (emphasis added). Therefore, WU's decision not to ask any of the Respondents to teach the following academic school year does not impact how the above language from Section 7.5 should be analyzed. The fact that WU's President has the option to ask a faculty member to teach during the following year, and the fact that a faculty member's failure to agree to teach impacts whether the faculty member remains employed by WU shows that the terminal appointment is not a guaranteed, vested benefit or wage that a faculty member automatically gets. Rather, the language in Section 7.5 creates conditions or requirements that must be fulfilled or satisfied to be paid the terminal appointment.

In addition to the above language in Section 7.5, WU cites to the language in the first sentence of the second paragraph in Section 7.5 to support its position that the terminal appointment was not a vested benefit for Respondents. Based on that language, the right to a terminal appointment only "vests" if Respondents are terminated not for cause. As WU has thoroughly explained above and in its initial brief, Respondents' employment was terminated due to the declaration of financial exigency, which is a for cause reason under Sections 7.4 and 7.5 of

the Faculty Handbook. Because Respondents' employment ended due to the declaration of financial exigency, Respondents did not have a vested right to the terminal appointment under the terms of the Faculty Handbook.

E. The Terminal Appointments Are Not "Severance Pay" Because They Are Appointments To Remain Employed As Opposed To A Promise Of Guaranteed Payment.

Contrary to Respondents' argument, the terminal appointments in this case are different from the severance pay at issue in *Miller v. St. Joseph Recovery Center, LLC*, 246 W. Va. 543, 874 S.E.2d 345 (2022). The fact that WU has the discretion to ask the employees to continue to teach, and the fact that "the employment relationship is severed" if the employee chooses not to teach is precisely why the terminal appointment is different from a true severance payment. (JA 00162; JA 00253). With a severance payment, the employee receives the full severance payment regardless of what happens in the future because, unlike the terminal appointment in this case, there is no continued employment, and the employee is only entitled to the severance payment because the employment relationship has ended. *See Miller*, 246 W. Va. at 553, 874 S.E.2d at 355 (noting that the employee in *Miller* "became entitled to the severance package pursuant to the provisions of the Employment Agreement" when the employee resigned for a good reason).

Moreover, the terminal appointment is an "appointment" for another year of employment with the University. It is not a guarantee of a payment for a full year of employment, and it is not a guarantee that the employee will remain employed by WU for the entire academic year. As noted above, if the employee is asked to teach during the appointment year and refuses to do so, the employment relationship is severed. In that event, there is nothing in the Faculty Handbook which would require WU to continue to pay the employee for the rest of the terminal appointment year after the employment relationship is severed.

Similarly, 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). There is no provision in Section 7.5 which states that the employee is guaranteed to remain employed during the entire terminal appointment year. Thus, regardless of whether the employee is teaching or not, if the employee engages in any conduct during that year that would allow WU to terminate the appointment during the term of the appointment, WU would have the right to end the employment relationship under the Faculty Handbook, and the employee would not be entitled to continue to be paid during the terminal appointment period.

For instance, if during the terminal appointment year, an employee is convicted of a felony or engages in conduct of moral turpitude, WU would have the right under the Faculty Handbook to end the employment relationship at that time. (JA 00329 to JA 00330). There is no language in Section 7.5 which would require WU to continue to pay the employee for the entire terminal appointment year under those scenarios. For these reasons, the terminal appointment is quite different from a severance payment that is made at the end of an employee's employment. The severance payment is a guaranteed payment. The terminal appointment is an appointment for another year of employment during which the employee must continue to teach, if asked, and must continue to abide by all of the other terms and conditions of employment with WU.

F. The Circuit Court Erred By Failing To Reduce Respondents' Breach Of Contract Damages And WPCA Damages By Their Interim Earnings.

Respondents argue that the Circuit Court did not err in failing to reduce their damages because the Supreme Court of Appeals' decision in *Miller* "address[ed] mitigation, and by implication, refused to apply W. Va. Code [§] 55-7E-3(a) because mitigation has no application to wages already earned." *Respondents' Brief, p. 13*. Respondents' assertion is not accurate for

several reasons. First, the *Miller* decision 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. Indeed, the word "mitigation" and West Virginia Code Section 55-7E-3(a) are not mentioned anywhere in the *Miller* decision. *Id.*

In an attempt to get around this issue, Respondents argue that it can be inferred, by implication, that the Supreme Court of Appeals addressed mitigation and West Virginia Code Section 55-7E-3(a) because the plaintiff in *Miller* found a job immediately after leaving her employment and she was still awarded her entire severance pay without any reduction for mitigation. *Respondents' Brief, pp. 13-14*. However, an alleged inference which is created by the Court's silence on an issue does not mean that the Supreme Court of Appeals has decided the issue or provided any guidance on the issue. It is possible that the employer in *Miller* did not raise these issues on appeal. Because the Supreme Court of Appeals' decision in *Miller* is completely silent on the mitigation issue, the Supreme Court of Appeals did not provide any clear ruling or guidance on how to address the mitigation issue or how to apply West Virginia Code Section 55-7E-3(a) under the facts of this case.

Moreover, as explained above, the severance payment that was awarded in *Miller* is different from the terminal appointment that Respondents are seeking in this case. The severance payment is a set and guaranteed payment that is made after employment has ended. By contrast, the terminal appointment is an appointment to remain employed for an additional year. The terminal appointment is not a guaranteed payment of the employee's entire salary for the following academic year as that employment could end during that year for various reasons. Thus, contrary to the severance payment in *Miller*, the terminal appointment is not compensation for wages already earned because the employee must remain employed during the terminal appointment year

to continue to earn the payment. Thus, because the severance payment and the terminal appointment are different, the *Miller* decision is not dispositive on the issue of mitigation and the application of West Virginia Code Section 55-7E-3(a).

Furthermore, due to the nature of a terminal appointment, the rationale for reducing Respondents' damages by their interim earnings is consistent with the fundamental rule and principle of compensating plaintiffs for their actual damages.

> "[I]t is a fundamental principle of the law of contracts that **a plaintiff is only entitled to such damages as would put him in the same position as if the contract had been performed**. *Bryant v. Peckinpaugh*, 241 Va. 172, 400 S.E.2d 201 (1991); *Associated Stations, Inc. v. Cedars Realty and Development Corp.*, 454 F.2d 184 (4th Cir. 1972). In other words, **a plaintiff is not entitled to damages beyond his actual loss attributable to defendant's breach**. *Horn v. Bowen*, 136 W. Va. 465, 67 S.E.2d 737 (1951)."

Miller v. WesBanco Bank, Inc., 245 W. Va. 363, 392-93, 859 S.E.2d 306, 335-36 (2021) (quoting *Milner Hotels, Inc. v. Norfolk & W. Ry. Co.*, 822 F. Supp. 341, 344 (S.D.W. Va. 1993), *aff'd*, 19 F.3d 1429 (4th Cir. 1994) (table decision) (emphasis added)). Additionally, as the Supreme Court of Appeals has stated:

> "**[T]he aim of compensatory damages is to restore a plaintiff to the financial position he/she would presently enjoy but for the defendant's injurious conduct**. In this manner, '[c]ompensatory damages indemnify the plaintiff for injury to property, loss of time, necessary expenses, and other actual losses. They are proportionate or equal in measure or extent to plaintiff's injuries, or such as measure the actual loss, and are given as amends therefor.' '**[T]he general rule in awarding damages** is to give compensation for pecuniary loss; **that is, to put the plaintiff in the same position, so far as money can do it, as he would have been [in] if ... the tort [had] not [been] committed**.'"

Brooks v. City of Huntington, 234 W. Va. 607, 615, 768 S.E.2d 97, 105 (2014) (quoting *Kessel v. Leavitt*, 204 W. Va. 95, 187, 511 S.E.2d 720, 812 (1998) (citations omitted) (emphasis added)). In fact, West Virginia Code Section 55-7E-2(b) codifies this general rule and principle. That

provision 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).

If Respondents' damages are not reduced by the interim wages that Respondents earned during what would have been their terminal appointment year, Respondents would receive a windfall. In that event, Respondents would not be placed in the same position had there been no breach of the Faculty Handbook. Rather, Respondents would be placed in a significantly much better financial position as they would receive a payment for their entire salary for the entire terminal appointment year on top of the wages they earned at other employers during that same year.

This windfall is even more significant if Respondents are awarded unmitigated damages, and those unmitigated amounts, instead of the amounts reduced by interim earnings, are used to calculate the liquidated damages they would receive under the WPCA.[2] As explained in its initial brief, four of the Respondents fully mitigated their damages, and three of the Respondents substantially mitigated their damages by finding subsequent employment. *WU's Brief, pp. 34-36*. Thus, failing to reduce Respondents' damages by their interim earnings is not consistent with the general rule and principle for compensating the Respondents for their actual damages.

Respondents also argue that West Virginia Code Section 55-7E-3 does not apply because that code provision addresses "back pay or front pay," and the unpaid wages that

[2] Under the WPCA, the liquidated damages amount would be two times the unpaid amount of lost wages. W. Va. Code § 21-5-4(e).

Respondents are seeking are not back pay or front pay. Respondents' argument is incorrect. First, by reading West Virginia Code Section 55-7E-3(a) in its entirety, the terms "back pay" and "front pay" are being used to address "lost wages." West Virginia Code Section 55-7E-3(a) 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). Thus, when discussing a plaintiff's duty to mitigate, West Virginia Code Section 55-7E-3(a) explicitly states that "the plaintiff has an affirmative **duty to mitigate past and future lost wages**[.]" *Id.* (emphasis added). Therefore, when West Virginia Code Section 55-7E-3(a) subsequently discusses reducing awards of "back pay or front pay," West Virginia Code Section 55-7E-3(a) is addressing awards for "past and future lost wages."

Here, Respondents are seeking compensation for lost wages that they would have received had they continued their employment with WU with their terminal appointments. While Respondents assert that the terminal appointment is a severance payment that they already earned, their claim, in reality, is that they were discharged a year earlier than they should have been and that they should be compensated for the wages, *i.e.*, back pay, they lost during that year.

Moreover, pursuant to the clear language used by the West Virginia Legislature, West Virginia Code Section 55-7E-3(a) applies "[i]n **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[.]" *Id.* (emphasis added). Here, Respondents, as employees, have asserted employment law causes of action against their former employer, WU. Their breach of an employment contract claim arises under the common law, and their WPCA claim arises from a statutory right created by the West Virginia Legislature. Therefore, while Respondents assert that their claim for wages under the WPCA should be excluded from the requirements of West Virginia Code Section 55-7E-3(a), that argument is inconsistent with the clear language of West Virginia Code Section 55-7E-3(a), which applies to an employment law cause of action that arises from a statutory right created by the West Virginia Legislature.

For these reasons, the requirements of West Virginia Code Section 55-7E-3(a) apply to the lost wages that Respondents are seeking in this case for the breach of contract claim and for their WPCA claim. Thus, the interim earnings that Respondents earned, or, in the case of Respondent Dr. Kathryn Voorhees, could have earned, must be used to reduce Respondents' damages for past lost wages, *i.e.*, back pay. Additionally, when determining the liquidated damages that Respondents are owed under the WPCA, the amount used to calculate those damages must be the mitigated amount that factors in Respondents' interim earnings, or in the case of Dr. Voorhees, the earnings she could have earned. When the Circuit Court failed to factor in Respondents' interim earnings, the Circuit Court erred because it failed to follow the requirements of West Virginia Code Section 55-7E-3(a).

IV. CONCLUSION

For the foregoing reasons, and for the reasons set forth in WU's initial brief, 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 damages. As a result, and with regard to Respondents' damages, the Court should direct the Circuit Court to reduce Respondents' 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 18th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2023, a copy of the foregoing "***Petitioner's Reply 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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