IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 23-ICA-383

Wheeling Jesuit University, Inc.,
Defendant Below, Petitioner

v.

Kathryn A. Voorhees, Jason Fuller, Jessica Wrobleski,
Peter Ehni, Andrew Staron, Amy Criniti Phillips,
Nancy Bressler, and 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

RESPONDENTS' REPLY BRIEF

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I. Assignment of Error

Petitioner asserts that 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. Petitioner asserts that Circuit Court further erred when it failed to include Respondents' interim earnings when calculating their breach of contract and WPCA damages. Finally, Petitioner asserts 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. As discussed herein, none of these assignments of error have merit.

II. Statement of the Case

The parties entered into the following stipulation of facts upon which the Circuit Court relied in entering judgment for the Respondents. The stipulation states as follows:

> Pursuant to the Court's Order dated October 20, 2021, Plaintiffs, by counsel, and Defendants, by counsel, have conferred to determine what facts the parties can stipulate to in this case. After conferring, the parties jointly stipulate to the following facts:
>
> 1. Plaintiffs are all former faculty members of Defendant Wheeling Jesuit University, Inc. ("WJU").[1]
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> 2. During the 2018-2019 academic year, Plaintiff Jason Fuller was in a tenure-track position and in his full probationary period for tenure.
>
> 3. During the 2018-2019 academic year, Plaintiff Andrew Staron was in a tenure-track position and in his full probationary period for tenure.

[1] In its initial brief Appellant adopts the abbreviation "WU" apparently referring to a DBA it adopted after the employment of Respondents and after the litigation herein. As reflected in the record herein, WJU Vice President of Human Resources David Hacker – testifying as WJU's 30(b)(7) designee - acknowledged that Wheeling Jesuit University, Inc. was the legal entity employing Respondents and that it had not changed since Respondents' employment there. Although it is now doing business as Wheeling University, the same legal entity has been in ownership and control of WJU at all times relevant to the claims at issue in this matter. Hacker TR 12. Herein Respondents will follow the denomination of the Appellant adopted by stipulation of the parties and the Circuit Court and refer to Appellant as WJU.

4. During the 2018-2019 academic year, Plaintiff Amy Phillips was in a tenure-track position and in her full probationary period for tenure.

5. During the 2018-2019 academic year, Plaintiff Nancy Bressler was in a tenure-track position and in her full probationary period for tenure.

6. During the 2018-2019 academic year, Plaintiff Peter Ehni was in a tenured position.

7. During the 2018-2019 academic year, Plaintiff Kathryn Voorhees was in a tenured position.

8. During the 2018-2019 academic year, Plaintiff John Whitehead was in a tenured position.

9. During the 2018-2019 academic year, Plaintiff Jessica Wrobleski was in a tenured position.

10. Plaintiffs' terms and conditions of employment were defined through a document titled "Wheeling Jesuit University Handbook (2/23/18)" ("WJU Handbook").

11. Section 7.4 of WJU's Handbook 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 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.

12. Section 7.5 of WJU's Handbook states:

7.5 Termination of a Tenured Appointment or of a Non-Tenure-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 moral 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.

13. Section 13.3 of WJU's Handbook states:

13.3 Dismissal and Suspension
Individual faculty members who have tenure or whose term of appointment has not expired may be dismissed for cause. "For cause," includes poor teaching performance, negligence in the performance of duty, repeated failure to meet the express written policies of the institution, moral turpitude, professional, financial or ethical dishonesty, conviction of a felony, or loss of licensure/certification.

14. On March 28, 2019, WJU gave Plaintiffs notices of non-reappointment, which notified Plaintiffs that their employment with WJU would be terminated on August 31, 2019, which was the end of the 2018-2019 academic year. Plaintiffs remained employed with WJU until the end of the 2018-2019 academic year.

15. Plaintiffs were paid their salaries and benefits through the end of the 2018-2019 academic year, which ended in August, 2019.

16. Plaintiffs were advised that their appointments were not being renewed because WJU's Board of Trustees had determined that WJU was in a state of financial exigency.

17. Plaintiffs were not given a terminal appointment for the 2019-2020 academic year. (emphasis added)

III. Summary of Argument

Herein the Circuit Court faced the unusual situation of deciding cross motions for summary judgment on a record composed entirely of stipulated facts. Indeed, the fact that that the Petitioner moved for summary judgment against the Respondents below demonstrates just how settled the facts were. It was a legal question which was correctly decided by the Circuit Court. Accordingly,

the Court's decisions as to the parties' respective legal liability were clear and should not be disturbed.

The contract that Plaintiffs below sought to enforce against WJU stated that they shall be paid severance in the event that they were terminated for any reason other than "for cause" set forth in the contract. The facts, as stipulated to below, do not establish that Plaintiffs below were terminated "for cause." Because there is no dispute of material fact as to the liability of WJU to the Respondents for a terminal contract of employment the Circuit Court's ruling in favor of the Respondents was correct and should be affirmed.

Furthermore, the issue of whether the severance pay that Respondents are owed constitutes wages has already been addressed by West Virginia's Supreme Court in Miller v. St. Joseph Recovery Ctr., 874 S.E.2d 345 (W. Va. 2022), and need not be revisited herein at much length. Severance pay such as the type at issue in this case has already been adjudged to be wages under that case.

IV. Statement Regarding Oral Argument and Decision

Oral argument is not necessary in this case because it involves no issues of first impression. Both issues regarding the reduction of damages WJU suggests is required by W. Va. Code §55-7E-3(a) were recently resolved by this Court in Miller v. St. Joseph Recovery Ctr., 874 S.E.2d 345 (W. Va. 2022), adversely to WJU's position. Oral argument would be unlikely to assist the Court in its understanding of the issues giving rise to the Circuit Court's orders as the material facts upon which the orders were based were all stipulated. A memorandum decision affirming the Circuit Court's detailed judgment order in favor of the Respondents based upon the stipulations of the parties is the appropriate resolution of this appeal.

V. Standard of Review

Appellant correctly states the 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. "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."
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> 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))."

VI. Argument

A. The Circuit Court Quoted and Applied Section 7.4 of the Faculty Handbook Which WJU Incorrectly Claims the Circuit Court Ignored

As its first assignment of error, Petitioner states that the Circuit Court improperly entered summary judgment against WJU for the breach of contract claim. WJU premises its initial argument in its first assignment of error upon its contention that "[i]n 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." WJU

asserts that Section 7.5 does not apply to the Tenure-Track Respondents because they were not terminated during the term of their employment.

WJU's contention is inaccurate upon three grounds. First, the Circuit Court did not ignore Section 7.4 – it quotes it in full in its judgment order from which this appeal proceeds. Instead, what WJU asked the Circuit Court to do – and by extension what it asks this Court to do upon appeal - was to ignore the plain language of Section 7.5 which explicitly provides that both tenure **and tenure-track** faculty "whose appointments are terminated (not for cause), are given a terminal appointment **for the next academic year**."

Second, 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. By the illogical parsing suggested by WJU, if, due to financial exigency, it had terminated the tenure-track Respondents one day **before** the conclusion of their 2018-2019 academic year of employment WJU would owe them an entire year of terminal contract wages, but, because it terminated them at the end of their 2018-2019 academic year of employment it owes them nothing. WJU's tortured reading of the applicable provisions of the handbook is unsupportable and was properly rejected by the Circuit Court.

Third, Section 7.4 by its terms addresses "nonrenewal" of tenure-track faculty and permits such nonrenewal, inter alia, for financial exigency, exactly as does Section 7.5, which, in this regard, mirrors the language as 7.4. What Section 7.5 adds, however, is that upon a "not for cause" termination of employment – such as for financial exigency - tenure and tenure-track faculty shall be "given a terminal appointment for the next academic year." WJU stipulated that due to financial exigency all Respondents were "terminated on August 31, 2019, which was the end of the 2018-2019 academic year." 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.

Finally the argument WJU now urges upon this Court was directly disavowed by its sole 30(b)(7) designee. When asked in its 30(b)(7) deposition, WJU gave the following testimony regarding this provision of the Faculty Handbook and WJU's defense to Respondents' claims:

> Q. "Designation No. 4 asks the basis upon which defendant denies the allegations of paragraph 9 of the Complaint.
> Paragraph 9 states, "By virtue of the termination of the tenured and tenure track without cause, plaintiffs, and each of them, are entitled pursuant to the handbook to a terminal appointment for the academic year 2019-2020."
> A. The 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."
> Q. Okay. Does the defendant have any other basis to deny the allegation of paragraph 9 other than that which you just stated?
> A. Just what I have stated.
> **Q. So the sole basis for the defendant's position is that under 7.5 of the faculty handbook, a faculty appointment may be terminated due to financial exigency.**
> **A. Correct**."
>
> JA 77.

The Circuit Court was plainly entitled to rely upon WJU's unequivocal admission that "financial exigency" was the only defense relied upon to deny Respondents terminal contracts.

B. The Circuit Court Properly Found that Respondents' Terminations Were Not "For Cause"

WJU strains credulity by arguing that this Court should ignore the definition of "for cause" WJU itself adopted in Section 13.3 of WJU's Handbook to relieve it of its obligation to provide terminal contracts to Respondents, arguing that "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." First, "should" has nothing to do with the contractual obligation WJU undertook as Respondents' employer. Second, what WJU **should** do is to fulfill the promise it

made to its long serving, loyal faculty Respondents and provide them the terminal contracts it promised them to help ease their transitions to other employment after WJU terminated them in 2019.

WJU next flails about with arguments about situations not at issue, speculating about what obligation WJU might have had "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" or "if a faculty member failed to comply with WU's policies, was convicted of a felony or engaged in conduct of moral turpitude" But WJU stipulated that these are not the facts *sub judice*. The facts to which the parties stipulated are the facts relied upon by the court below, not WJU's irrelevant hypotheticals. Contrary to WJU's suggestion that "the Circuit Court made a decision that defies logic" that is what it invited the Circuit Court to do. It now urges that same illogical position upon this Court. Like the Circuit Court, this Court should decline WJU's invitation to permit it to renege upon its contractual obligation to Respondents.

In its final desperate argument in support of this assignment of error WJU argues that the Circuit Court was not entitled to rely upon WJU's own definition of "for cause" to determine whether "financial exigency" should be considered "for cause" under the Handbook. Astoundingly – and without explanation - WJU argues "Section 13.3 is not the applicable section in this case." Mixing apples and oranges, WJU notes that "this case involves W[J]U's right to end a faculty member's employment based on W[J]U's declaration of financial exigency, which is addressed in Sections 7.4 and 7.5." Petitioner's Brief, page 22. Respondents have never challenged WJU's right to terminate their employment based upon financial exigency. The sole issue before the Circuit Court and this Court is WJU's contractual obligation – upon termination of Respondents - to provide them with terminal contracts. WJU offers no rationale as to why the definition of "for

cause" in Section 13.3 should not apply when the term is used in Sections 7.4 and 7.5 of the same Handbook. This Court should reject this argument.

C. *The Circuit Court Correctly Found that the Faculty Handbook was Unambiguous and that There was no Question of Fact regarding Whether Respondents were Entitled to a Terminal Appointment*

In this portion of its argument WJU argues it was improperly deprived of a jury trial. In so doing WJU asks this Court to ignore the procedural history framing the Circuit Court's orders from which this appeal proceeds. The parties **agreed** that there were no disputed material facts. WJU and Respondents filed cross motions for summary judgment each urging judgment in their favor. JA 64-249. The parties then adopted a comprehensive stipulation of facts upon which the Circuit Court relied in ruling for Respondents. JA 250-255.

Seeking to escape the factual stipulations it previously agreed to WJU now argues that this Court should not follow Lipscomb v. Tucker Cnty. Commn., 206 W. Va. 627, 527 S.E.2d 171 (1999), which 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[,]" WJU argues that the "Handbook in this case is not a typical employee handbook that was drafted solely by" WJU. WJU suggests that the Handbook was "a joint effort between administrators and faculty." In fact, the handbook at issue was not a joint effort – it was imposed by WJU. But that issue is not legally significant because WJU was under no legal obligation to adopt any suggestions about the contents of the Handbook from any source. WJU alone chose to adopt as legally binding the terms and conditions of Respondents' employment which it now asks this Court to permit it to abrogate.

D. Wages WJU Owed Respondents for Terminal Contracts are "Wages" under the WPCA

WJU argues that – even accepting as accurate the Circuit Court's determination that it owed Respondents terminal contracts – the wages it should have paid them under the promised contracts should not count as wages. Ignoring Miller v. St, Joseph Recovery Center, LLC, 246 W.Va, 243 (2022), WJU cites to Justice Davis' concurring opinion in Meadows, wherein she noted 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). WJU argues that the promised terminal contracts did not "vest" during Respondents' employment at WJU but cites no language from the Handbook to bolster this unsupported assertion.[2]

WJU further suggests that "Section 7.5 confirms that the terminal appointment is not an accrued fringe benefit" because it allows WJU's President to require "a faculty member . . . to teach during the terminal appointment".[3] WJU correctly notes that "[p]ursuant to this language, if the [WJU] 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

[2] WJU's argument regarding the terminal contracts it promised Respondents is remarkably similar to the argument advanced by SJRC, the employer in Miller:

> SJRC claims that the severance package described in the *Employment Agreement* is not compensation for labor or services, could not be earned until after the end of the employment relationship, and was designed to be contractual damages owed to employees for suffering an unexpected loss, and thus, the severance package cannot be wages under the WPCA

The Circuit Court noted that the Miller Court rejected SJRC's characterization of the severance payments at issue therein in rejecting a similar argument advanced by WJU regarding the terminal contracts at issue herein.

[3]The parties stipulated that no request to teach during the terminal appointment year was made as to any Respondents.

appointment or any compensation for working during the terminal year." Petitioner's brief p. 27. Contrary to WJU's argument this provision makes it even more clear that the terminal contract were intended to be for wages which – at WJU's election – it could either pay to Respondents and require them to work or could simply pay to them as a terminal contract without requiring their teaching services in return. Nothing in the language cited suggests the conclusion urged by WJU that "there are additional requirements that must be met [for Respondents] to obtain the terminal appointment" because none were required by WJU's President.

E. Wages Due to Respondents Pursuant to the Terminal Contracts WJU Promised Them Constitute Severance Pay as Contemplated by Miller v. St, Joseph Recovery Center

WJU argues that the terminal contracts it promised are "entirely different" from the severance payments at issue in Miller because, unlike the Miller severance the "terminal appointment is not a lump sum payment made at the end of employment." Nether were the severance payments in Miller: Just as in Miller, the terminal contract wages were to be paid to Respondents as regular WJU payroll. This is exemplified by the fact that – upon request – each Respondent **could** have been required to continue to teach for the academic year covered by the terminal contract. As WJU admits "the terminal appointment is an appointment for the employee to work for another year." However, contrary to WJU's argument that "[i]t contemplates *future* pay to an employee in consideration for *future* services not yet rendered," it plainly contemplates **either** continued teaching **or** that the eligible faculty be paid the salary he or she would have received had they been requested to teach during the terminal appointment year.

Contrary to WJU's argument, this **is** "a situation involving actual severance pay where an employee's employment is permanently terminated." It **might** not have been had WJU requested that Respondents continue to teach during the terminal appointment academic year – but WJU

made no such request. Terminal appointments may be an appointment to continue working for another year at WJU, but they are payable whether or not WJU chooses to exercise that option. In the event it does not – as it did not in this case - Section 7.5 requires WJU to provide the terminated employee with a terminal contract, payable as wages, just as though they had remained employed teaching at WJU for the next academic year. WJU's discussion of "lump sum" payments is a red herring as the Circuit Court did not order any such payments.

Contrary to WJU's suggestion, there is no material difference between the severance payment analyzed in Miller and the terminal appointments at issue herein. WJU's distinction regarding the potential requirement to continue teaching and thereby perform "the services required to fulfill the appointments" was an election entirely within WJU's control. The fact that it chose not to require Respondents to continue to teach for the academic year covered by the terminal contract does not diminish WJU's obligation to pay the wages it promised to pay for that period.

Certainly, WJU is correct that "[t]he mere fact that [Respondents] argue they are entitled to terminal appointments does not create a present obligation by W[J]U to pay them wages." Petitioner's brief p. 30. As the Circuit Court correctly held what created WJU's obligation is was the Handbook it adopted defining the terms and conditions of Respondents employment. Terminal appointments promised thereunder are wages payable to eligible employees at the conclusion of the employee's employment, just as the severance payment was in Miller.

Terminal appointments are "fringe benefits" under the WPCA as they are accrued, vested and payable directly to eligible employees such as Respondents. WJU notes that "for the terminal appointment to be an accrued fringe benefit that is included in the definition of wages [under the WPCA], the terminal appointment must be a vested and enforceable right that Respondents are

entitled to receive pursuant to WU's employment policies." The terminal contracts at issue meet each of the WPCA criteria identified by WJU itself to be considered "fringe benefits" and therefore "wages" payable to Respondents pursuant to the WPCA.

F. The Circuit Court Properly Applied Miller v. St, Joseph Recovery Center, LLC and Found No Duty of Mitigation for Accrued but Unpaid Wages

Petitioners' third assignment of error reads, "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." However, WJU admitted that the Respondent's Itemized Statement of Damages accurately reflected "the salary amount [Plaintiffs] received during the 2018-2019 academic year to determine what salary they would have received for their terminal contract, which would have occurred during the 2019-2020 academic year" which is what Respondents were contractually entitled to. Now though, WJU argues that "[c]ontrary to West Virginia law, Plaintiffs' calculations, however, do not include any interim earnings Plaintiffs received during the 2019-2020 academic year. Pursuant to W. Va. Code § 55-7E-3(a)".

Based upon Miller v. St. Joseph Recovery Center, LLC the Circuit Court held that "mitigation has no relevance to wages already earned by the [Respondents] while they were employed by [WJU]." (JA 00326) Contrary to WJU's argument, Miller **did** address mitigation and, by implication, refused to apply W. Va. Code 55-7E-3(a) because mitigation has no application to wages already earned. The terminal contracts at issue herein are analogous to the severance package at issue in Miller v. St. Joseph Recovery Ctr., 874 S.E.2d 345, 355-56 (W. Va. 2022) recently decided by the West Virginia Supreme Court. Therein the Court held that even though Plaintiff Miller was employed elsewhere immediately upon her departure from her former

employer St. Joseph Recovery Center[4] she was nevertheless entitled to the entirety of her severance without any reduction for mitigation:

> In accordance with this Court's discussion above, when Ms. Miller resigned from SJRC for good reason, she became entitled to the severance package pursuant to the provisions of the Employment Agreement. SJRC claims that the severance package described in the Employment Agreement is not compensation for labor or services, could not be earned until after the end of the employment relationship, and was designed to be contractual damages owed to employees for suffering an unexpected loss, and thus, the severance package cannot be wages under the WPCA. In reply, Ms. Miller contends that the severance package is an unused fringe benefit that is owed to her under the WPCA unless the Employment Agreement contains "express and specific" language to the contrary. We agree with Ms. Miller. Under the Employment Agreement, at the time of Ms. Miller's separation from employment, the severance package was accrued, capable of calculation, and payable directly to her. The severance package was an inducement to procure an employee's services and represented a form of deferred compensation for work performed during the employment. Therefore, Ms. Miller's severance package is a fringe benefit that constitutes unpaid wages under the WPCA, and SJRC was required to pay those wages in accordance with the timeline provided by the Act. In failing to pay Ms. Miller in accordance with West Virginia Code § 21-5-4(c), SJRC violated the WPCA. Accordingly, Ms. Miller is entitled not only to the severance package, but also to the damages, costs and reasonable attorney's fees permitted under the WPCA. See W. Va. Code §§ 21-5-4(e) and 21-5-12(b) (1975).
>
> Miller v. St. Joseph Recovery Ctr., 874 S.E.2d 345, 355-56 (W. Va. 2022) (footnote omitted).

Miller contended that the severance package she was promised was a fringe benefit owed to her under the WPCA and the Supreme Court agreed. The Supreme Court held that Miller's unpaid severance was accrued, capable of calculation, and payable directly to her and that it was an inducement to procure her services. As such the Supreme Court held that Miller's severance

[4] The Miller Court noted:
Around June 18, 2019, Ms. Miller tendered a resignation letter to SJRC's CEO, Donna Meadows, and its Director of Nursing, Tabitha Smith. In the letter, Ms. Miller stated that she had "received an offer to work as a Nurse Practitioner at a halfway house in Marietta, Ohio. After careful consideration [she] realized that this opportunity [was] too exciting to decline."**2** Ms. Miller further indicated that her last day of work would be August 15, 2019. Although she gave nearly two months of notice, the parties later agreed that Ms. Miller's employment would extend only two weeks beyond the date on which she tendered her resignation letter, to July 3, 2019.
Miller v. St. Joseph Recovery Ctr., 246 W. Va. 543, 547, 874 S.E.2d 345, 349 (2022)

was a form of deferred compensation for work performed during her employment. That is exactly the situation Respondents are in vis-a-vis the terminal contract WJU promised them.

The Supreme Court held that Miller's severance package was a fringe benefit that constituted unpaid wages under the WPCA, and that her former employer was required to pay those wages in accordance with W. Va. Code § 21-5-4(c) of the WPCA. The Supreme Court further held that Miller was entitled to the additional remedies provided by WPCA provisions W. Va. Code § 21-5-4(e) and 21-5-12(b). Miller v. St. Joseph Recovery Ctr., 874 S.E.2d 345, 355-56 (W. Va. 2022). The Circuit Court properly recognized that this contract should be interpreted by the same principles expressed in Miller. WJU's efforts to distinguish Miller from the case *sub judice* on the mitigation issue are unavailing.

WJU further argues that the Circuit Court erred in rejecting its argument that the Court should impose a mitigation obligation upon Respondent Voorhees pursuant to W.Va. Code § 55-7E-3. This code section provides, inter alia, 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. It is the defendant's burden to prove the lack of reasonable diligence." Wages Respondents earned while employed by WJU are not "back pay or front pay" – they are unpaid wages: failing to pay unpaid wages when and as due is a violation of the WPCA. Therefore, whether Respondent Voorhees did or did not engage in reasonable diligence in finding subsequent employment is irrelevant to WJU's obligation to pay her the wages she accrued upon her termination.[5]

[5] Even if WJU's contention regarding Respondent Voorhees' mitigation were relevant to this appeal - which it decidedly is not – it would not be for this Court to issue judgment in favor of WJU on such an issue as WJU has requested, especially in light of the fact that it is an issue as to which WJU bears the burden of proof.

The Miller facts are closely analogous to the situation faced by the Respondents herein. Respondents' promised terminal contracts were a form of deferred compensation for work performed by Respondents during their employment with WJU, just as Miller's severance package was a form of deferred compensation for work performed during her employment. Thus, mitigation has no relevance to wages already earned by the Respondents while employed at WJU. The damages calculations Respondents previously submitted should be adopted without reduction for mitigation, as Miller requires.

VII. CONCLUSION

For the reasons set forth herein, the Circuit Court's careful and detailed judgment should be affirmed. There are no genuine disputes of material fact, and Petitioner has merely asked this Court to save it from the mistakes it made by stipulating to facts which made the case unwinnable for WJU. As such, this matter should be remanded to the Circuit Court for further proceedings based upon affirmation of the Circuit Court's judgments in the litigation thus far.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 2023, a copy of the Respondents' Brief 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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