SUPREME COURT

STATE OF LOUISIANA

NO. _____

NOLTON F. SEMIEN,
Plaintiff – Applicant

versus

THE GEO GROUP, INC.,
Defendant – Respondent

CIVIL PROCEEDING

Application for a Supervisory Writ or a Writ of Certiorari and Review to the Third Circuit Court of Appeal, State of Louisiana, Docket No. CA-10-642; Thirty-Third Judicial District Court, Parish of Allen, State of Louisiana, Docket No. C-2009-554, the Honorable Patricia Cole, Judge Presiding

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APPLICATION FOR A WRIT ON BEHALF OF PLAINTIFF, NOLTON F. SEMIEN

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Writ-Grant Considerations

Louisiana R.S. 23:631 requires employers pay their discharged employees for any unused vacation the employees had acquired. This applies only if the employer's policy states that the employee was eligible for and had acquired the right to paid vacation.[1] The issue before this Court is whether vacation protected under statute becomes unprotected if, as the Third Circuit Court of Appeals claims in the instant case and *Kately v. Global Data Systems*[2], the employer provides employees a clear, written policy establishing that the vacation time granted by the employer to the employee is nothing more than a mere gratuity.

The Third Circuit's decision in this case significantly affects the public's interest in having earned vacation protected from seizure by employers. Employers could forgo paying discharged employees their vested rights in their unused, earned vacation by making simple declarations in their employee handbooks. The decision also conflicts with decisions of this Court in *Wyatt v. Avoyelles Parish School Board*[3] and *Beard v. Summit Inst. of Pulmonary Med. & Rehabilitation*[4] on the same legal issue.

[1] La. R.S. 23:631(D)(1).

[2] 05-1227 (La. App. 3rd Cir. 4/5/06); 926 So. 2d 145, 148.

[3] 01-C-3180, 02-C-0131, 02-C-0259, (La., 12/4/02), 831 So.2d 906, 912-913.

[4] 97-C-1784, (La. 3/4/98), 707 So. 2d 1233, 1236-1237.

Memorandum

Statement of the Case

1. Factual Background

Nolton Semien earned vacation throughout the fifteen years he worked as a prison guard in Allen Parish for GEO Group, Inc. (hereinafter, "GEO") and its predecessors. GEO's vacation policy provided employees vacation only after they had first worked a year at GEO.[5] At that and each subsequent year, employees would receive a year's worth of vacation on their work-anniversary dates and which would have to be used within a year or lost.[6] The more years of employee service to GEO, the more vacation an employee would earn.[7]

GEO's vacation and sick leave policy changed in Mr. Semien's last year at the prison. The new policy discontinued sick leave and instead increased the amount of vacation an employee could earn.[8] It also renamed vacation 'paid time off' or PTO.[9] GEO changed the once-yearly date at which employees received their vacation from the employee's anniversary date to December 29th.[10] GEO no longer described the employee's vacation as 'earned' in its employee handbook and used instead the words 'granted' and 'benefit'.[11] It also claimed that, under the new policy, it would not pay discharged employees their unused vacation:

> "PTO is a benefit that combines elements of the former Vacation and Sick Leave. At the beginning of each fiscal year, eligible full-time employees will be granted PTO, ... which must be used during that year of it will be forfeited[.] ... PTO days are not paid out upon termination."[12]

Since GEO changed the date at which it provided employees their yearly allotment of vacation, the first grant of vacation under the new policy would be provided earlier than the workers' hiring anniversary dates.[13] Prior to the policy change, Mr. Semien received his vacation at his anniversary in March, 2008. A few months later, GEO announced that the new leave policy would be enacted soon and

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[5] *Semien v. GEO*, The appellate record, R. 37.

[6] *Semien v. GEO*, The appellate record, R. 36.

[7] *Semien v. GEO*, The appellate record, R. 37.

[8] *Semien v. GEO*, The appellate record, R. 36.

[9] *Id.*

[10] *Id.*

[11] *Semien v. GEO*. The appellate record, R. 25.

[12] *Id.*

[13] *Semien v. GEO*, The appellate record, R. 37.

that employees would have to use their vacation by December 28, 2008 or it would be lost.[14] Mr. Semien used all of his vacation before that date.[15] On December 29, 2008, Mr. Semien was credited with 208 hours of vacation under the new policy.[16] The vacation that GEO provided Semien in March, 2008 was for work Semien did for GEO from March, 2007 to March, 2008, while the vacation provided to him on December 29, 2008 was for the nine months Semien worked for GEO from March, 2008 to December 29, 2008.[17] GEO made no prorated adjustment to any employees' allotment of vacation made in December, 2008.

Following the December 29, 2008 grant of vacation, Mr. Semien started working and earning vacation again that was supposed to have been awarded twelve months later on December 29, 2009.[18] He did not work at GEO for another year, however, and GEO discharged him on January 27, 2009.[19] Nonetheless, he had worked about five weeks since the allotment made on December 29, 2008 and had earned about two days of leave toward the expected December, 2009 allotment.[20]

When GEO discharged Mr. Semien, he still had 204 hours of vacation that he had not yet used and that was worth, at his wage of $9.94 per hour, $2,028.[21] Semien asked GEO for payment but it refused.

2. Action of the trial court

Mr. Semien filed a wage claim under La. R.S. 23:631 demanding GEO's payment of the unused portion of his vacation. The court rejected his claim on two grounds.[22] First, the court found that GEO's employee handbook established Mr. Semien's vacation as a mere gratuity.[23] The court noted that GEO had described vacation in their new employee handbook with the word 'grant' suggesting it was unearned while it used the word "earn" in its older handbook to describe vacation.[24] Secondly, the court,

[14] *Semien v. GEO*, The appellate record, R. 37.

[15] *Semien v. GEO*, The appellate record, R. 62-63.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Semien v. GEO*, The appellate record, R. 2.

[20] *Semien v. GEO*, The appellate record, R. 37.

[21] *Semien v. GEO*, The appellate record, R. 5.

[22] *Semien v. GEO*, The appellate record, R. 128-130; p. 8-10 of transcript of trial court in appendix.

[23] *Id.*

[24] *Semien v. GEO*, The appellate record, R. 129; p. 9 of transcript of trial court in appendix.

in a clearly wrong assessment, found that Mr. Semien had not yet earned his vacation and that he had been earning his 208 hours of vacation on-the-go while he worked that year.[25]

3. Action of the court of appeal

The appellate court affirmed the lower court's decision finding that Semien's vacation was a gratuity because GEO had unambiguously declared in its employee handbook that employees' vacations were unearned.[26] The court wrote that Semien's vacation (PTO) and sick (LTI) leave were unearned because "PTO and LTI were 'granted' as a benefit by GEO and not 'earned' by the employee."[27] The court found that the policy language in the employer's handbook had clearly established Semien's vacation a grant, a benefit, and unearned.[28]

Assignment of Errors

Error #1. THE LOWER COURTS ERRED IN DETERMINING IF SEMIEN'S VACATION WAS PROTECTED UNDER THE LOUISIANA WAGE CLAIM ACT BY EXAMINING ONLY THE EMPLOYER'S WRITTEN POLICY AND INSTEAD SHOULD HAVE DETERMINED IF IT MET THE CRITERIA UNDER LA. R.S. 23:631(D)(1).

Error #2. THE APPELLATE COURT ERRED IN THE STANDARD OF REVIEW USED.

Error #3. THE LOWER COURTS ERRED IN DENYING PLAINTIFF'S WAGE CLAIM UNDER LA. R.S. 23:631 SEEKING PAYMENT FROM HIS EMPLOYER FOR THE UNUSED PORTION OF HIS VACATION.

Error #4. THE LOWER COURTS ERRED IN FINDING THAT PLAINTIFF SHOULD NOT BE AWARDED PENALTIES, ATTORNEY'S FEES AND COURT COSTS UNDER THE LOUISIANA WAGE CLAIM ACT.

Summary of the Argument

At issue is whether Mr. Semien's vacation is an "amount then due" under the Louisiana Wage Claim Act and, therefore, protected under the Act. We argue that it is protected because his vacation met the definition of an amount then due for vacation under La. R.S. 23:631(D)(1). The appellate court, however, found the leave unprotected under the Wage Claim Act because the employer had a clearly established written policy making vacation a mere gratuity.[29] We argue that the lower courts should have first determined if Semien's leave was protected under La. R.S. 23:631(D)(1) and, only if it was

[25] *Semien v. GEO*, The appellate record, R. 129-130; p. 8-10 of transcript of trial court in appendix.

[26] *Semien v. GEO*, The appellate opinion, p. 2-3. Find in appendix here.

[27] *Id.*

[28] *Id.*

[29] *Id.*

unprotected, examine, as the courts did, whether the employer's policy clearly established his vacation a mere gratuity. The lower courts relied on case law that has been overruled by legislative amendment and this Court's decisions.[30]

Argument

Error #1: The lower courts erred in determining if Semien's vacation was protected under the Louisiana Wage Claim Act by examining only the employer's written policy and instead should have determined if it met the criteria under La. R.S. 23:631(D)(1).

The Louisiana Wage Claim Act describes employer requirements for paying the wages of discharged employees.[31] It also defines when vacation is subject to the statute, that is, when it is "an amount then due".[32] The statute La. R.S. 23:631(D)(1-2) defines vacation protected under the Act as follows:

> (1) For purposes of this Section, vacation pay will be considered an amount then due only if, in accordance with the stated vacation policy of the person employing such laborer or other employee, both of the following apply:
>
> (a) The laborer or other employee is deemed eligible for and has accrued the right to take vacation with pay.
>
> (b) The laborer or other employee has not taken or been compensated for the vacation time as of the date of the discharge or resignation.
>
> (2) The provisions of this Subsection shall not be interpreted to allow the forfeiture of any vacation pay actually earned by an employee pursuant to the employer's policy.

For Mr. Semien, La. R.S. 23:631(D)(1) described his circumstances: GEO's stated vacation policy had deemed him eligible for and he had accrued the right to take vacation with pay, and GEO had not compensated him for his unused vacation after his discharge.[33]

Employers cannot evade the requirements of the Act by entering into contracts with its employees that would forfeit upon the employee's discharge any wages protected under the Act.[34] This Court has extended that protection holding that employer policies, too, are invalid if used in a similar fashion.[35]

The Third Circuit has held, however, that an employer's written policy can prevent vacation from being considered wages under the Wage Claim Act if that policy declares vacation a mere gratuity.[36] In *Picard*, the court said,

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[30] La. R.S. 23:631(D)(1); *Wyatt,* 831 So. 2d at 912-913; *Beard,* 707 So. 2d at 126-1237.

[31] La. R.S. 23:631-634.

[32] La. R.S. 23:631.

[33] *Semien v. GEO*, The appellate record, R. 5.

[34] La. R.S. 23:634.

[35] *Beard,* 707 So. 2d at 1236.

[36] *Picard v. Vermilion Parish School Bd.,* 98-1933 (La. App. 3rd Cir. 6/23/99) 742 So. 2d 589, 591; *Kately,* 926 So. 2d at 148.

> "In *Huddleston v. Dillard Dept. Store, Inc*., 94-53 (La. App. 5th Cir. 5/31/94); 638 So. 2d 383, the court found that where an employer has a clearly established policy that vacation time is not considered wages for the purposes of La. R.S. 23:631(D)(2), an employee is not entitled to reimbursement for unused, accrued vacation time."[37]
>
> and
>
> "We now hold that in the absence of a clear, written policy establishing that vacation time granted by an employer to an employee is nothing more than a mere gratuity and not to be considered an amount due or a wage, accrued but unused vacation time is a vested right for which an employee must be compensated upon discharge or resignation."[38]

The Third Circuit has affirmed this doctrine more recently in 2006 in *Kately*[39] that vacation normally protected under the Wage Claim Act is unprotected if the employer policy establishes that the vacation is a mere gratuity.

The doctrine described above from *Picard* and *Kately* is invalid because it relies on *Huddleston* that is no longer good law. The quotes above, also, imply that *Huddleston* was decided using the amended version of La. R.S. 23:631 when, actually, the case was decided in 1994 and the amendment enacted in 1997. This misquote suggests that the *Huddleston* decision survived the 1997 amendment to the statute when the legislative intent of the amendment was to overturn *Huddleston*-like decisions.[40]

If *Huddleston* was decided today, it would be over-ruled because of the (D)(1) amendment to La. R.S. 23:631 and the decisions from *Beard* and *Wyatt.*[41] In *Huddleston,* the court approved an employer's decision to refuse paying the unused vacation of an employee fired for cause because employer policy did not permit payment to employees fired for cause.[42] The court held that under the employer's written policy "the right to be paid for unused vacation does not vest in the employee until such time that the appropriate conditions prior to separation from employment are met."[43] As a result, the court ruled, the vacation was not protected under La. R.S.23:631.

This Court decided *Beard* four years after *Huddleston* but on facts that preceded the (D)(1) and (D)(2) amendments to the law. *Beard* diminished but did not over-rule *Huddleston*. In *Beard,* this Court held that an employer policy cannot be used to forfeit earned wages under the Act upon an employee's

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[37] 742 So. 2d at 591.

[38] *Id.* at 595-596.

[39] 926 So. 2d at 148.

[40] Gerald J. Huffman, *The New Louisiana Employment Statutes: What Hath the Legislature Wrought*, 58 La. L. Rev. 1033, 1062-3, FN 183 (1998)

[41] 707 So. 2d at 1236; 831 So. 2d at 912-913.

[42] *Huddleston,* 638 So. 2d at 384.

[43] *Id* at 385.

discharge.[44]

The subsection (D) amendment to La. R.S. 23:631 was made law effective August 15, 1997 establishing a definition of vacation protected under the Act.[45] The vacation described in *Huddleston* that the court found unprotected in 1994 is the same type of vacation that would be protected under (D)(1) in 1997: the *Huddleston* employer had a policy that established that the employee was eligible for and had acquired the right to take paid vacation, and at discharge the employee had some unused vacation. Although the employer in *Huddleston* also had policy language that declared the vacation a benefit and not earned, this does not affect whether vacation meets the requirements of La. R.S. 23:631(D)(1); it only requires that the policy recognize that the employee has a right to and was eligible for taking paid vacation.

This Court in *Wyatt*[46] affirmed the criteria in La. R.S. 23:631(D)(1) for determining when vacation was protected:

> "Pursuant to La. R.S. 23:631(D), vacation pay is "an amount then due" if, according to the employer's stated vacation policy, the employee is eligible for and has accrued the right to take vacation time with pay and the employee has not taken or been compensated for the vacation time as of the date of his resignation. Subsection (D) cannot be interpreted to allow the forfeiture of any vacation pay actually earned by an employee pursuant to the employer's policy."

In conclusion, the Third Circuit's findings in *Picard* and *Kately* allowing employers to dictate via employer policy whether vacation is subject to the protection of the Louisiana Wage Claim Act is invalid if the vacation is a wage then due under La. R.S. 23:631(D)(1). This Court in *Wyatt*[47] also held that vacation that meets the criteria in La. R.S. 23:631(D)(1) is protected under the Act. Employer policy cannot be used to evade the requirements of La. R.S. 23:631(D)(1) because La. R.S. 634 and this Court's decision in *Beard*[48] prevent employer's contractual or policy provisions that forfeit discharged employees' earned wages. The Third Circuit in *Kately* relies on old law from *Huddleston*[49] that states that the language in an employee handbook alone can determine if vacation is protected under the

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[44] 707 So. 2d at 1236-1237.

[45] LexisNexis; Lexstat, Louisiana Annotated Statutes, La. R.S. 23:631 (2009), p. 1.

[46] 831 So. 2d at 912-913.

[47] *Id.*

[48] 707 So. 2d at 1236-1237.

[49] 638 So. 2d at 385.

Louisiana Wage Claim Act. This holding in *Huddleston* has been overruled by legislative amendment and this Court in *Beard* and *Wyatt.*[50]

In the instant case, the appellate court cited and relied in its opinion on *Kately* and *Picard* as described above.[51] There is little dispute that Semien's vacation met the criteria listed in La. R.S. 23:631. Although GEO termed its vacation "Paid Time Off", it did not differ from vacation. Like vacation and unlike sick leave, it carried no precondition to its use and could be used for any reason. As to the other criteria, there is no dispute that GEO's policy stated that full-time employees like Semien were eligible for and had the right to paid vacation. Also, there is no dispute that at his discharge, he still had 204 hours of vacation. Therefore, despite GEO's written policy that clearly established Semien's vacation a mere gratuity, his vacation should be protected under the Wage Claim Act because it meets the criteria of a wage then due under La. R.S. 23:631(D)(1).

Error #2. The appellate court erred in the standard of review used.

The lower courts concluded that the language of the employer's policy determined if Nolton Semien's vacation came under the protection of the Louisiana Wage Claim Act and that this was the issue of fact for review. We argue instead that the trial court misapplied the law. The courts should have determined if Semien's vacation met the definition of vacation that is protected under the Act at La. R.S. 23:631(D)(1). As a result, the issue for appellate review was a matter of law and not fact and the standard of review should have differed. The argument that La. R.S. 23:631(D)(1) should have been used instead of that used by the courts is argued above in the section for Error #1.

Error #3. The lower courts erred in denying plaintiff's wage claim under La. R.S. 23:631 seeking payment from his employer for the unused portion of his vacation.

The cause of the courts' error in denying plaintiff's wage claim for vacation was due to the courts' reliance on employer policy rather than the statutory definition for protected vacation in determining when vacation is a wage then due under the Act. Find this argument above in the section for Error #1.

Error #4. When the lower courts erred in finding that Nolton Semien's vacation was not protected by the Louisiana Wage Claim Act, it also erred in finding that Mr. Semien should not be awarded penalties, attorney's fees and court costs.

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[50] 707 So. 2d at 1236-1237; 831 So. 2d at 912-913.

[51] *Semien v GEO*, The appellate opinion, p. 2-3. Find in appendix here.

Since the lower courts did not find that the vacation was protected under the Wage Claim Act, they could not award penalties, attorney's fees, and court costs to Semien under La. R.S. 23:631 and 23:632. Under La. R.S. 23:632, the award of reasonable attorney fees is mandatory if the plaintiff prevails.[52]

An employer can avoid paying penalties if it shows a good-faith, non-arbitrary defense to the denial of wages.[53] Here, defendant GEO has relied on the holding in *Huddleston,* and its Third Circuit progeny of *Picard* and *Kately* for its denial of Semien's demand for wages.[54] As this Court has said regarding this defense of relying on *Huddleston* to avoid penalties:

> "Summit claims that it should not be assessed penalty wages because it relied on jurisprudence which indicated that, in an appropriate case, an employer's policy which resulted in forfeiture of accrued fringe benefits (as opposed to actual wages for hours worked) might well be approved. *See Potvin v. Wright's Sound Gallery, Inc., supra* and *Huddleston v. Dillard Department Store, Inc.*, 94-53 (La. App. 5th Cir. 5/31/94), 638 So. 2d 383. Although there is no evidence in the record that Summit based its decision not to pay vacation benefits on these cases, assuming that it did, this is not a valid equitable defense."[55]

Therefore, under the facts of this case as described above, plaintiff should prevail in this suit and, given no good-faith defense available to GEO, plaintiff should be awarded vacation wages, penalties, court fees, and attorney fees.

Conclusion

The Third Circuit has held that a written employer policy can make vacation that is otherwise protected under the Wage Claim Act unprotected.[56] We conclude that this holding is invalid where the employee's vacation meets the definition of a wage then due under La. R.S. 23:631(D)(1) as found in the instant case. Additionally, such avoidance of the Louisiana Wage Claim Act by employer policy violates this Court's holding in *Beard*[57] where, in accordance with the anti-forfeiture features of La. R.S. 23:634, the forfeiture of earned wages by company policy is invalid.

Accordingly, plaintiff, Nolton Semien, respectfully urges this honorable Court to grant the writ, and, after due proceedings had, reverse the decision of the lower courts and enter an order awarding him

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[52] *Loup v. Louisiana State School for the Deaf,* 98-0329, (La. App. 1st Cir. 2/19/99), 729 So.2d 689, 693.

[53] *Beard*, 707 So. 2d at 1236.

[54] *Huddleston,* 638 So. 2d at 384; *Picard,* 742 So. 2d at 591; *Kately,* 926 So. 2d at 148.

[55] *Beard,* 707 So. 2d at 1237.

[56] *Picard,* 742 So. 2d at 595-596 and cited with approval at *Kately,* 926 So. 2d at 148.

[57] 707 So.2d at 1236-1237.

his vacation time, plus penalties, costs and attorney's fees as provided by statute, casting all costs in this Court and the lower courts to defendant, The GEO Group, Inc.

Respectfully submitted:

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Certificate of Service

I hereby certify that on January 7, 2011, a copy of the above and foregoing Application was sent by United States mail, postage prepaid and properly addressed to Samuel B. Gabb, Plauche, Smith & Nieset, LLC, 1123 Pithon Street, Lake Charles, LA 70601 and to Clerk of Court Mr. Charles K. McNeely at the Third Circuit Court of Appeal, P.O. Box 16577, Lake Charles, LA 70616.

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Paul F. Bell

Appendix