

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

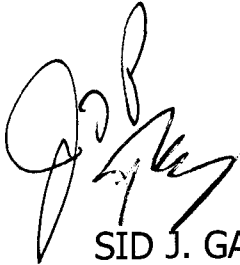
COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 1338

ELY BOUCHER

VERSUS



SID J. GAUTREAU, III, IN HIS CAPACITY AS SHERIFF OF  
EAST BATON ROUGE PARISH

Judgment rendered

**APR 11 2018.**

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Appealed from the  
19<sup>th</sup> Judicial District Court  
in and for the Parish of East Baton Rouge, Louisiana  
Trial Court No. C657238  
Honorable R. Michael Caldwell, Judge

\*\*\*\*\*

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SID J. GAUTREAU, III, IN HIS  
CAPACITY AS SHERIFF OF  
EAST BATON ROUGE PARISH

\*\*\*\*\*

**BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.**

*Crain, J. dissent and assigns reasons*

**PETTIGREW, J.**

In this appeal, plaintiff challenges the trial court's judgment denying his claim for unpaid wages, penalties, and attorney fees, and dismissing, with prejudice, all of his claims against defendant. For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

Plaintiff, Ely Boucher, was an employee of the East Baton Rouge Parish Sheriff's Office ("EBRSO") from 1989 until August 22, 2016. At the time of Ely's termination from EBRSO, Procedural Order No. 03-02, effective April 1, 2003, and revised on November 1, 2015 (the "Leave Policy"), was in effect concerning leave for employees. It is undisputed in the record that Ely received a copy of the revised Leave Policy and was required to read the policy and request clarification should he have any questions regarding the policy.

The Leave Policy provided for accrual of paid-time-off leave ("PTO") according to an employee's years of service; accrued PTO leave could then be used "for vacation, personal business, illness, doctor appointments, family care or any other needs that may require time off from work." Moreover, according to the Leave Policy, PTO leave balances up to 300 hours were paid upon termination of employment. This provision had been included in the Leave Policy since the 2009 revision and in every subsequent revision thereto.

At the time of Ely's termination, he had a PTO leave balance of 914.75 hours, but was paid for 300 hours of PTO leave as per the provisions of the Leave Policy. Arguing that the Leave Policy was in violation of La. R.S. 23:631 of the Louisiana Wage Payment Act, Ely made written demand on Sheriff Sid J. Gautreaux, III for unpaid wages in the amount of \$15,467.11. When his demand for payment went unanswered, Ely filed the instant suit for unpaid wages against defendant, Sid J. Gautreaux, III, in his capacity as Sheriff of East Baton Rouge Parish, seeking unpaid wages, penalties, attorney fees, and costs of the proceedings.

Prior to the trial of this matter, Ely filed a *motion in limine*, seeking to exclude the testimony of Kellie Jolivette, EBRSO Human Resource Director, regarding her

interpretation of the Leave Policy. Ely argued that the Leave Policy was the best evidence of its contents and that pursuant to the laws governing contract interpretation, Ms. Jolivette's testimony should be excluded. In response, defendant asserted that the rules of contractual interpretation were not applicable to this case as employer personnel policies do not create contractual rights between the parties. Defendant further maintained that under the Louisiana Wage Payment Act, Louisiana courts routinely consider employer testimony in resolving disputes concerning leave policies.

Prior to the start of the trial of this matter, the trial court denied Ely's *motion in limine*. Thereafter, the bench trial proceeded, following which the trial court concluded that the Leave Policy was clear and not in violation of La. R.S. 23:631 *et seq.* The trial court found no basis for the payment of any additional wages to Mr. Boucher, above the 300 hours of PTO leave that had been paid to him upon his termination as per the Leave Policy and denied his claim for wages, penalties, and attorney fees. On June 14, 2017, the trial court signed a judgment in accordance with these findings. From this judgment, Ely has appealed, assigning the following errors for our review:

1. The trial court erred in dismissing Ely Boucher's *Motion in Limine* to exclude the testimony of Kellie Jolivette and allowing the testimony of Kellie Jolivette to attempt to change the meaning of the plain written text of the EBRSO'[s] leave policy.
2. The trial court erred in dismissing Ely Boucher's claim for unpaid wages by incorrectly ruling that the PTO earned by Ely Boucher during his employment with EBRSO did not count as vacation and was a gratuity, not an earned wage.

### **STANDARD OF REVIEW**

A court of appeal may not overturn a judgment of a trial court unless there is an error of law or a factual finding that is manifestly erroneous or clearly wrong. **Morris v. Safeway Ins. Co. of Louisiana**, 2003-1361 (La. App. 1 Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 2004-2572 (La. 12/17/04), 888 So.2d 872. The Louisiana Supreme Court has posited a two-part test for the appellate review of facts in order to affirm the factual findings of the trier of fact: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and

(2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). See Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. **Stobart v. State, through Dept. of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993). If the trial court's factual findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings, even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. **Smegal v. Gettys**, 2010-0648 (La. App. 1 Cir. 10/29/10), 48 So.3d 431, 435.

#### **MOTION IN LIMINE**

With respect to the initial error assigned by Ely, the trial court concluded as follows in denying Ely's *motion in limine*:

All right. It's a motion in limine to exclude the testimony of the human resource representative of the Sheriff's Office, Ms. Jolivette. This is not a contract. There is not testimony offered to vary the terms of the contract. It is correct that the court's determination will be based upon the wording of the policy. That does not mean that Ms. Jolivette's testimony is not helpful to the trier of fact in making a determination of the exact factual situation in this case. The objections raised by the plaintiff go to the weight to be given to her testimony, not to its admissibility. Therefore, the motion in limine is denied.

The trial court has great discretion in its consideration of evidentiary matters such as *motions in limine*. See Heller v. Nobel Insurance Group, 2000-0261 (La. 2/2/00), 753 So.2d 841. On review, the appellate court must determine whether the trial court abused its great discretion in ruling on a *motion in limine*. Based on our review of the record and applicable jurisprudence, we find no abuse of discretion in the trial court's ruling denying Ely's *motion in limine* and allowing Ms. Jolivette's testimony.

#### **CLAIM FOR UNPAID WAGES**

The second error assigned by Ely concerns the trial court's determination that the PTO leave earned by Ely during his employment with EBRSO was a gratuity and not an

earned wage, thereby leading to the dismissal of Ely's claim for unpaid wages against defendant. Defendant counters, arguing that any PTO leave accrued by Ely in excess of 300 hours was a benefit given to him by the Sheriff. Thus, as Ely was only eligible for 300 hours of PTO leave upon termination, defendant contends that the trial court was correct in denying Ely's claim for additional wages, penalties, and attorney fees.

Louisiana Revised Statutes 23:631 provides, in pertinent part:

A. (1)(a) Upon the discharge of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular payday or no later than fifteen days following the date of discharge, whichever occurs first.

.....

D. (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 time 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.

Additionally, La. R.S. 23:634(A) provides:

No person, acting either for himself or as agent or otherwise, shall require any of his employees to sign contracts by which the employees shall forfeit their wages if discharged before the contract is completed or if the employees resign their employment before the contract is completed; but in all such cases the employees shall be entitled to the wages actually earned up to the time of their discharge or resignation.

In support of his position that the terms PTO and vacation pay are interchangeable, Ely relies on this court's holding in **Davis v. St. Francisville Country Manor, L.L.C.**, 2013-0190 (La. App. 1 Cir. 11/1/13), 136 So.3d 20. In **Davis**, this court concluded that compensation owed for unused paid time off was "an amount then due" under La. R.S. 23:631(D) and must be timely paid in accordance with La. R.S. 23:631(A), noting that "[a]ny purported difference between 'paid days off' and 'vacation time with pay' is a distinction without substance and is simply a matter of semantics." **Davis**, 136 So.3d at 24. We find the instant case is distinguishable from the **Davis** case. Not only was **Davis** different procedurally, *i.e.*, the issue was before us on review of a summary

judgment rendered by the trial court in favor of the employer, but the leave policy at issue in **Davis** specifically provided that the paid days off were "provided in lieu of vacation or holidays." **Davis**, 136 So.3d at 23.

In ruling on Ely's unpaid wage claim in the instant case, the trial court noted as follows:

So, the central question in this case is whether the PTO provided by the Sheriff's Office is earned and whether or not it is, in fact, wages. ... [A]s I read the policy, and as I interpret the statutes [La. R.S. 23:631 and 23:634] as written, I don't think this PTO amounts to vacation time. I don't think it's alleged forfeiture or the fact that not all of it is paid at the time of the termination of employment violates either of these statutes. I think the policy is clear. It is given to some extent, or in full extent, as a gratuity. It is not something that was earned as part of the employment. It was something that was given by the Sheriff's Office as a perk or a benefit. I think the provisions of allowing the payment of only 300 hours at the time of retirement is a sound and established policy clear from the policy that was made available to all of the employees repeatedly from 2009 forward. So I find no basis for the payment of any additional wages to Mr. Boucher and accordingly, his claims for damages or for wages, penalties and attorney's fees is denied at his cost.

We find no error in the trial court's ruling in this regard. The statutes governing the payment of wages, La. R.S. 23:631 and La. R.S. 23:632, "are designed to compel prompt payment of wages upon an employee's discharge or resignation." **Boudreaux v. Hamilton Medical Group, Inc.**, 94-0879 (La. 10/17/94), 644 So.2d 619, 621. The statutes are penal in nature and must be strictly construed. **Miller v. Heidi's Inc. of Baton Rouge**, 2001-0627 (La. App. 1 Cir. 5/10/02), 818 So.2d 959, 963. The **Boudreaux** court held that the phrase "any amount then due under the terms of employment ... refers to wages which are earned during a pay period" and that "only compensation that is earned during a pay period will be considered wages under the statutes." **Boudreaux**, 644 So.2d at 622.

This court finds that the facts and evidence before us on review support a finding that the EBRSO's Leave Policy is clear with regard to the accrual of PTO leave and specifically provides that "PTO Leave balances up to 300 hours will be paid upon termination of employment." It is undisputed that Ely, who was paid for 300 hours of PTO leave upon his termination from the EBRSO, knew or should have known of the Leave Policy with respect to the payment of PTO leave balances upon termination. And,

unlike our decision in **Davis**, supra, in this case we have Ms. Jolivette's trial testimony, which confirmed the purpose of PTO leave. Ms. Jolivette testified that PTO leave was intended to allow employees to be able to take care of things in their personal lives without the worry of lost wages. She agreed that PTO leave combined the elements of "annual leave" and "sick leave," but added that PTO leave "is used for whatever purpose the employee needs to be off for." Ms. Jolivette stated that the maximum amount of PTO leave paid to any employee at the end of employment with the EBRSO is 300 hours, regardless of whether the employee is discharged, resigns, or retires. She maintained that she considered PTO leave to be a benefit for the EBRSO employees and that it is listed as a benefit on the conditional offer sheet provided to prospective job applicants.

After a thorough review of the record and applicable jurisprudence, we conclude that the record reasonably supports a finding that Ely is not entitled to any wages, penalties, or attorney fees under La. R.S. 23:631-634. The decision of the trial court was not manifestly erroneous. Pursuant to the EBRSO's Leave Policy, Ely's unused PTO leave in excess of 300 hours was not "an amount then due" under the terms of his employment, or a wage for which Ely should have been paid under La. R.S. 23:631 upon the termination of his employment with EBRSO. Accordingly, we find no error in the trial court's judgment dismissing Ely's claims for wages, penalties, and attorney fees.

### **CONCLUSION**

For the above and foregoing reasons, we affirm the June 14, 2017 judgment and assess all costs associated with this appeal against plaintiff, Ely Boucher.

**AFFIRMED.**

**ELY BOUCHER**

**STATE OF LOUISIANA**

**VERSUS**

**COURT OF APPEAL**

**SID J. GAUTREAUX, III, IN HIS  
CAPACITY AS SHERIFF OF  
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**FIRST CIRCUIT**

**NO. 2017 CA 1338**

 **CRAIN, J., agrees in part, dissents in part.**

I agree the trial court did not abuse its discretion denying the motion in *limine*; however, I believe the trial court legally erred finding Boucher's accrued, unused "paid time off" (PTO) was not compensation owed at the termination of his employment. Under the Wage Payment Act, vacation pay is "an amount then due" the employee upon termination of his employment if, in accordance with the employer's policy, the employee is "eligible for and has accrued the right to take vacation time with pay," and "has not taken or been compensated for the vacation time as of the date of the discharge or resignation." *See* La. R.S. 23:631D(1). Whether labeled "vacation," "paid days off," or any other similar label, accrual of the right to be compensated while not at work is the triggering event making Subsection 23:631D applicable. *Davis v. St. Francisville Country Manor, L.L.C.*, 2013-0190 (La. App. 1 Cir. 11/1/13), 136 So. 3d 20, 24.

At the termination of his employment, Boucher had 914.75 hours of unused PTO. The PTO was earned pursuant to defendant's Leave Policy, which provides that for each "Reporting Period," an employee "shall accrue" a stated number of PTO hours, beginning at 8 hours per period and increasing incrementally to 11 hours per period, depending on the employee's years of service. The Leave Policy expressly states, "PTO Leave will accrue only upon completion of a reporting period, and will not be prorated for partial reporting periods. PTO Leave cannot be used until it is accrued." The policy further provides that unused PTO hours carry over from one calendar year to the next, subject to a limit of 1,040 hours.



When an employer promises a benefit to an employee, and the employee accepts by meeting the conditions, the result is not a mere gratuity or illusory promise, but a vested right in the employee to the promised benefit. *Davis*, 136 So. 3d at 24. By working each reporting period, Boucher met the conditions necessary to accrue 914.75 hours of PTO. The defendant's Leave Policy contains no suggestion the PTO is a gratuity given at the *beginning* of a work period, untethered by any work requirement to acquire the benefit. *See e.g. Gremillion v. Greene Tweed & Co. I, L.P.*, 2013-0684, 2013WL6858253 (La. App. 1 Cir. 12/27/13); *Semien v. GEO Group, Inc.*, 10-642 (La. App. 3 Cir. 12/8/10), 52 So. 3d 1019, 1019, *writ denied*, 11-0083 (La. 2/25/11), 58 So. 3d 458. To the contrary, Boucher acquired every hour of PTO only upon "*completion* of a reporting period"; that is, after working the required time. (Emphasis added.)

Louisiana Revised Statute 23:631D(2) and 23:634 prohibit an employer, either through an employment contract or policy, from requiring an employee to forfeit earned compensation at the termination of his employment. By allowing Boucher to accumulate 914.75 hours of PTO, but limiting his compensation to only 300 hours, the Leave Policy impermissibly required Boucher to forfeit over 600 hours of accrued PTO when his employment terminated. The forfeiture violates the Wage Payment Act. *See* La. R.S. 23:631D(2) and 23:634; *Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc.*, 97-1784 (La. 3/4/98), 707 So. 2d 1233, 1235; *Martin v. Iberia Bone, Joint & Foot Clinic*, 15-0526, 2015WL6951278 (La. App. 1 Cir. 11/9/15); *Davis*, 136 So. 3d at 24. I would reverse the trial court's judgment, render judgment in favor of Boucher for his unpaid PTO, and remand to determine his entitlement to penalty wages and attorney fees pursuant to Louisiana Revised Statute 23:632.