

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 1281

KEVIN ALUMBAUGH

VERSUS

GLOBAL DATA SYSTEMS, INC.

*JKW*  
*RHP*

Judgment Rendered: December 23, 2008

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Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Trial Court Number 539,340

Honorable Kay Bates, Judge

\*\*\*\*\*

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Baton Rouge, LA

Attorney for  
Plaintiff – Appellee  
Kevin Alumbaugh

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Defendant – Appellant  
Global Data Systems, Inc.

\*\*\*\*\*

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

*QMC McClendon, J. concurs.*

WELCH, J.

Global Data Systems, Inc. ("Global") appeals a summary judgment granted in favor of its former employee, Kevin Alumbaugh, which awarded him unpaid wages for his unused vacation time when he resigned from employment with Global, penalty wages, and attorney fees. Mr. Alumbaugh has answered the appeal seeking an award of additional attorney fees for this appeal. For reasons that follow, we amend the judgment of the trial court, and as amended, the judgment is affirmed.

### **I. FACTUAL AND PROCEDURAL HISTORY**

The primary issue presented by this appeal concerns the written employee vacation policy of Global, which is set forth in its employee handbook. The following material facts are not in dispute. On May 11, 2003, Mr. Alumbaugh was hired by Global as a project manager. Mr. Alumbaugh was classified as a full-time, salaried, exempt employee earning an annual salary of \$54,500.00. Mr. Alumbaugh acknowledged receiving a copy of the employee handbook on February 12, 2004. With regard to employee vacations, the employee handbook policy provided as follows:

#### **VACATION**

Only full-time [Global] employees are eligible for paid vacation time off. Full-time employees employed on the first day of the fiscal year will be eligible for 10 days/80 hours of vacation time off if employee's anniversary date occurring in the current fiscal year is six (5) [*sic*] years or less. If employee's anniversary date occurring in the fiscal year is seven (6) [*sic*] years or greater, the employee will be eligible to use 15 days/120 hours of vacation time off.

Employees hired after the first day of the current fiscal year will accrue 3.33 hours per pay period (semi-monthly pay period). If employee is hired after October 1<sup>st</sup>, there will be no vacation time accrued for that fiscal year.

An employee is not eligible for vacation time until after their 90-day probationary period.

Upon termination of employment all unused vacation time will be

forfeited and not paid.

Vacation days cannot be carried over to the next year and financial compensation will not be provided in lieu of unused vacation. Once you have used up your vacation hours you must take any additional time off without pay.

Vacation hours are noted on employee check stubs.

....

#### **VACATION TENURE**

All vacation time will be based on actual continuous full time worked at [Global].

....

Eligible employees will be paid for earned but not unused [*sic*] vacation upon termination.

Mr. Alumbaugh resigned from his employment with Global on September 11, 2004. On September 22, 2004, and on October 6, 2005, Mr. Alumbaugh requested payment in writing from Global for his accrued but unused vacation time, which totaled approximately 33.95 hours. Global refused, contending that since Mr. Alumbaugh resigned from employment, he forfeited his unused vacation time in accordance with the above employee vacation policy.

On December 30, 2005, Mr. Alumbaugh instituted these proceedings, seeking the unpaid wages, penalty wages, and attorney fees. Global answered and specifically denied that it had improperly withheld any sums due to Mr. Alumbaugh or that Mr. Alumbaugh was due any unused accrued vacation pay. Global specifically asserted that the employee vacation policy in effect provided that paid vacation was a "mere gratuity" for which there would be no payment upon separation. Additionally, Global asserted that if it was liable to Mr. Alumbaugh for his accrued vacation pay or wages, then its nonpayment of those funds was in good faith, thereby precluding Mr. Alumbaugh's recovery of penalty wages.

Thereafter, Mr. Alumbaugh filed a motion for summary judgment, asserting that he was entitled to summary judgment granting him his unpaid vacation wages, penalty wages, reasonable attorney fees, costs of these proceedings, and legal interest. Pursuant to a judgment signed on April 21, 2008, the trial court granted summary judgment in favor of Mr. Alumbaugh and awarded him unpaid wages in the amount of \$883.55 for 33.950 hours of unused vacation time remaining at the time of his resignation, at the rate of \$26.025 per hour; penalty wages pursuant to La. R.S. 23:632 in the amount of \$18,865.80 for 90 days of wages at the rate of \$209.62 per day; attorney fees pursuant to La. R.S. 23:632 in the amount of \$4,937.34, representing 25% of the total wages recovered; all costs of the proceedings; and judicial interest on all sums due from the date of judicial demand until paid in full. From this judgment, Global has appealed; Mr. Alumbaugh has answered the appeal.

## **II. ASSIGNMENTS OF ERROR**

On appeal, Global asserts that:

1. The [trial] court erred in holding that [Mr.] Alumbaugh was entitled to be paid as “wages” for his unused vacation time upon his separation from the employment of [Global], in light of the gratuitous nature of Global’s grant of vacation leave and the written policy of Global providing that employees are not paid for unused vacation time upon separation from employment.

2. The [trial] court erred in holding that [Global] was liable for penalty wages under La. R.S. 23:632, as [Global] declined to pay [Mr.] Alumbaugh for his unused vacation time in good faith.

3. If the [trial] court’s award of penalty wages is reversed, the amount of attorney’s fees awarded to [Mr.] Alumbaugh should be reduced.

In Mr. Alumbaugh’s answer to appeal, he seeks to be awarded additional attorney fees for work necessitated by this appeal.

## **III. SUMMARY JUDGMENT LAW**

A motion for summary judgment is a procedural device used to avoid a full-

scale trial when there is no genuine issue of material fact, and the summary judgment procedure is favored and designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2); **Power Marketing Direct, Inc. v. Foster**, 2005-2023, p. 8 (La. 9/6/06), 938 So.2d 662, 668. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. *Id.*; La. C.C.P. art. 966(B).

Summary judgments are reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Power Marketing Direct, Inc.**, 2005-2023 at p. 9, 938 So.2d at 669.

On a motion for summary judgment, if the issue before the court is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. La. C.C.P. art. 966(C)(2); **Buck's Run Enterprises, Inc. v. Mapp Constrution, Inc.**, 99-3054, p. 4 (La. App. 1<sup>st</sup> Cir. 2/16/01), 808 So.2d 428, 431. Once the mover has made a *prima facie* showing that the motion for summary judgment should be granted, the burden shifts to the non-moving party to present evidence demonstrating that material factual issues remain. **Jones v. Estate of Santiago**, 2003-1424, p. 5 (La. 4/14/04), 870 So.2d 1002, 1006. The failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. **Hutchinson v. Knights of Columbus, Council No. 5747**, 2003-1533, p. 7 (La. 2/20/04), 866 So.2d 228, 233.

#### IV. APPLICABLE LAW AND DISCUSSION

##### A. Unpaid Wages

Since the material facts with regard to Mr. Alumbaugh's entitlement to unpaid wages are not in dispute, we look solely to the legal question presented by this portion of his motion summary judgment, *i.e.*, whether Mr. Alumbaugh was entitled, as a matter of law, to be paid for his unused vacation time upon his resignation from employment with Global.

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

A. [1](b) Upon the resignation 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 for the pay cycle during which the employee was working at the time of separation or no later than fifteen days following the date of resignation, 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.

Thus, upon Mr. Alumbaugh's resignation, Global was required under La. R.S. 23:631(A)(1)(b) to pay to Mr. Alumbaugh "the amount then due under the

terms of employment.” Pursuant to La. R.S. 23:631(D), vacation pay was “an amount then due” to Mr. Alumbaugh if, according to Global’s stated vacation policy, Mr. Alumbaugh was eligible for and had accrued the right to take vacation time with pay during the current fiscal year and if Mr. Alumbaugh had not taken or been compensated for the vacation time as of the date of his resignation. Furthermore, 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 or paid upon discharge or resignation. **Picard v. Vermillion Parish School Board**, 98-1933, p. 12 (La. App. 3<sup>rd</sup> Cir. 6/23/99), 742 So.2d 589, 595-96, writ denied, 99-2197 (La. 11/19/99), 749 So.2d 675; **Chapman v. Ebeling**, 41,710, p. 4 (La. App. 2<sup>nd</sup> Cir. 12/13/06), 945 So.2d 222, 226.

There is no dispute that under Global’s employee vacation policy, Mr. Alumbaugh was eligible for and had accrued the right to 10 days/80 hours of vacation time with pay. Mr. Alumbaugh was a full-time employee, was employed on the first day of the fiscal year, had an employment anniversary date in the fiscal year of less than five years, and had completed the ninety-day probationary period. There is also no dispute that Mr. Alumbaugh had 33.950 hours of vacation time that he had accrued but had neither taken nor been compensated for as of the date he resigned. Accordingly, upon Mr. Alumbaugh’s resignation, Global was required to compensate Mr. Alumbaugh for 33.950 hours of unused vacation time as an “amount then due under the terms of employment.”

However, Global asserts that Mr. Alumbaugh was not entitled to be compensated for those unused vacation hours when he resigned, because Global’s employee vacation policy established that paid vacation time was gratuitous and was not to be considered an amount due under La. R.S. 23:631. Specifically,

Global contends that the provisions in the employee vacation policy providing that “[u]pon termination of employment, all unused vacation time will be forfeited and not paid” and that “financial compensation will not be provided in lieu of unused vacation” qualify as a “clear written policy that vacation time” granted by Global was a “mere gratuity and not to be considered an amount due or a wage.” See Picard, 98-1933 at p. 12, 742 So.2d at 595-96; Chapman, 41,710 at p. 4, 945 So.2d at 226. We disagree.

At the outset, we note that by its own terms, the provision providing that “[u]pon termination of employment, all unused vacation time will be forfeited and not paid” applies only upon *termination* of employment. Mr. Alumbaugh was not terminated—he resigned. Thus, this provision does not clearly establish that upon *resignation* of employment, the employee’s vacation time is a mere gratuity and not to be considered a wage.

We likewise find no merit to Global’s assertion that “financial compensation will not be provided in lieu of unused vacation” qualifies as a clear written policy that paid vacation time at Global was a “mere gratuity” or not to be considered an amount due or a wage. Global’s employee vacation policy specifically provided that full-time employees who were employed on the first date of the fiscal year were eligible for 10 days/80 hours of vacation time off if the employee’s anniversary date in that fiscal year was five years or less. The policy also provided that an employee was not eligible for vacation time until after a ninety-day probationary period. Once these conditions were met, the employee had the right to the enjoyment of paid vacation time. “[W]hen an employer promises a benefit to employees, and employees accept by their actions in meeting the conditions, the result is not a mere gratuity or illusory promise but a vested right in the employee to the promised benefit.” **Knecht v. Board of Trustees for State Colleges and Universities and Northwestern State Univ.**, 591 So.2d 690, 695 (La. 1991).



In **Kately v. Global Data Systems, Inc.**, 2005-1227, p. 5 (La. App. 3<sup>rd</sup> Cir. 4/5/06), 926 So.2d 145, 149, the third circuit court of appeal considered the exact written employee vacation policy at issue in this case, and the court specifically concluded that the policy did *not* clearly establish that the paid vacation time granted by Global to its employees was nothing more than a mere gratuity or not to be considered a wage. In **Kately**, the plaintiff, a full-time employee, was terminated by Global approximately one year after she was hired. Upon her separation from employment, she alleged that she was due \$907.69 in wages for her accrued but unused vacation time. When Global refused to pay the amount claimed, Ms. Kately filed suit for the wages due, plus penalty wages and attorney fees. The trial court rendered judgment in favor of Ms. Kately for the unused vacation pay or wages and attorney fees, but denied Ms. Kately's claim for penalty wages. Global appealed; however, Ms. Kately did not appeal the denial of penalty wages.

On appeal, the court held that Global's "policy did not clearly state that the vacation time given to its employees was a 'mere gratuity.'" **Kately**, 2005-1227 at p. 4, 926 So.2d at 148. The court specifically found that the statements in Global's employee vacation policy providing that "upon termination of employment all unused vacation time will be forfeited and not paid" and that "financial compensation will not be provided in lieu of unused vacation"—the same provisions relied upon by Global in this case—did not qualify as a clear written policy establishing that vacation time granted by Global to Ms. Kately was a "mere gratuity" and not to be considered an amount due or a wage. **Kately**, 2005-1227 at pp. 4-5, 926 So.2d at 148-49.

After considering the **Kately** case and Global's employee vacation policy in light of the undisputed facts in this case, we agree with the third circuit that there is no clear written policy establishing that paid vacation time at Global is a "mere

gratuity.” A gratuity is something “acquired without bargain or inducement,” “given freely without recompense,” or a “gift.” Black’s Law Dictionary, 631 (5<sup>th</sup> Edition, 1979). Global’s employee vacation policy does not expressly state that paid vacation time was a gift, a donation, or unearned. Rather, Global’s employee vacation policy speaks in terms of eligibility for and accrual of vacation time and specifically provides that “all vacation time will be based on actual continuous full time work” at Global. Absent a clear and written policy to the contrary, we cannot conclude that the paid vacation time granted was a mere gratuity rather than a wage.

Accordingly, Mr. Alumbaugh’s unused vacation time was an amount then due under the terms of employment or a wage for which Mr. Alumbaugh should have been paid under La. R.S. 23:631 upon his resignation from employment with Global. Since Global failed to do so, the trial court correctly granted summary judgment awarding Mr. Alumbaugh unpaid wages in the amount of \$883.55, representing 33.950 hours of vacation time remaining upon his resignation from Global, at the rate of \$26.025 per hour.<sup>1</sup>

### *B. Penalty Wages*

Having determined that Mr. Alumbaugh was entitled to compensation for his accrued but unused vacation time and that Global failed to pay the amount due in accordance with La. R.S. 23:631, we must determine whether Global is liable for penalty wages by virtue of its violation of La. R.S. 23:631.

Louisiana Revised Statutes 23:632 provides, in pertinent part:

Any employer who fails or refuses to comply with the provisions of [La.] R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages.

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<sup>1</sup> On appeal, Global only challenged the fact that unpaid wages were awarded; it did not challenge the actual amount of unpaid wages awarded.

To recover penalty wages under La. R.S. 23:632, a claimant must show that: (1) wages were due and owing; (2) demand for payment was made where the employee was customarily paid; and (3) the employer did not pay upon demand. **Becht v. Morgan Bldg. & Spas, Inc.**, 2002-2047, p. 4 (La. 4/23/03), 843 So.2d 1109, 1112, cert. denied, 540 U.S. 878, 124 S.Ct. 289, 157 L.Ed.2d 142 (2003). Although equitable defenses are not expressly provided for in La. R.S. 23:632, our supreme court has interpreted the statute as a “coercive means” to compel an employer to pay an employee within the time limits set forth in La. R.S. 23:631. **Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc.**, 97-1784, p. 7 (La. 3/4/98), 707 So.2d 1233, 1236. Accordingly, the supreme court has held that the penalty provisions set forth in La. R.S. 23:631 “must be strictly construed and may yield to equitable defenses.” *Id.* If there is “‘a good-faith non-arbitrary defense to liability for unpaid wages, i.e., a reasonable basis for resisting liability,’ the court may refrain from imposing penalty wages upon the employer.” *Id.* (quoting **Carriere v. Pee Wee’s Equipment Co.**, 364 So.2d 555, 557 (La. 1978)).

Based on our *de novo* review of the record, we find that Mr. Alumbaugh made a *prima facie* showing that, pursuant to La. R.S. 23:632, he was entitled to penalty wages. The evidence presented on his motion for summary judgment established, and we have determined, that his accrued but unused vacation pay was an “amount then due under the terms of employment” under La. R.S. 23:631 or a “wage,” which was due and owing to him from Global. By letters dated September 22, 2004, and October 5, 2005, Mr. Alumbaugh made written demand to Lynn Judice, Payroll Administrator/Human Resources for Global at Global’s place of business, and Global refused to pay upon demand. Accordingly, the burden shifted to Global to present evidence in opposition to the motion for

summary judgment sufficient to establish that it would be able to carry its evidentiary burden of proving at trial that it had a good-faith, non-arbitrary defense to liability for unpaid wages or some other reasonable basis to excuse it from the imposition of penalty wages.

The only basis set forth in the record for Global's refusal to pay Mr. Alumbaugh for his unused vacation time are two letters from Ms. Judice that were sent in response to Mr. Alumbaugh's September 22, 2004 and October 5, 2005 written demands for payment. According to Ms. Judice's letters, Global was refusing to pay Mr. Alumbaugh for his unused vacation time based on the provisions of its employee vacation policy providing that "[u]pon termination of employment, all unused vacation time will be forfeited and not paid" and that "financial compensation will not be provided in lieu of unused vacation."

However, as we previously determined, the provision in the employee vacation policy providing for the forfeiture of unused vacation time is not applicable to this case because Mr. Alumbaugh was not terminated. Furthermore, any provision in an employment contract or policy which provides for the forfeiture of wages, including vacation pay, by an employee violates La. R.S. 23:634, and is therefore, unlawful. Reliance on an unlawful company policy does not constitute a good faith, non-arbitrary defense to liability for unpaid wages. **Beard**, 97-1784 at p. 9, 707 So.2d at 1237.

Accordingly, we conclude that Global did not present sufficient evidence in opposition to the motion for summary judgment to establish that it had a good faith, non-arbitrary defense to liability for unpaid wages. Thus, penalty wages were warranted and the trial court correctly granted summary judgment awarding Mr. Alumbaugh penalty wages in accordance with La. R.S. 23:632 in the amount

of \$18,865.80, representing 90 days wages at the daily rate of \$209.62.<sup>2</sup>

### *C. Attorney Fees*

In addition to providing for penalties, La. R.S. 23:632 further provides that “[r]easonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed.” Under La. R.S. 23:632, the award of reasonable attorney fees is mandatory when an employee brings a “well-founded” suit for unpaid wages, irrespective of any equitable defenses that may be raised by the employer. **Loup v. Louisiana State School for the Deaf**, 98-0329, p. 5 (La. App. 1<sup>st</sup> Cir. 2/19/99), 729 So.2d 689, 693. Suits in which the recovery of wages is granted are considered “well-founded.” *Id.*

In this case, Mr. Alumbaugh presented a well-founded suit for unpaid wages in accordance with La. R.S. 23:631 and received a judgment in his favor from the trial court. He is, therefore, entitled to attorney fees. The trial court awarded attorney fees to Mr. Alumbaugh in the amount of \$4,937.34, which was 25% of the total wages recovered by him. Global’s only complaint on appeal with regard to that award is that it should be reduced if the award of penalty wages was reversed. However, as we have determined that penalty wages were properly imposed, we find no merit to Global’s complaint in this regard. In light of the policy behind La. R.S. 23:632, which is to encourage workers to assert their rights to those unpaid wages and to motivate attorneys to prosecute those suits to insure that the working people of this state will not be deprived of their earnings, see Beard, 97-1784 at p. 10, 707 So.2d at 1238, we find the trial court’s award of attorney fees in the amount of \$4,937.34 to be both reasonable and warranted.

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<sup>2</sup> On appeal, Global only challenged the fact that penalty wages were awarded; it did not challenge the actual amount of penalty wages awarded.

However, Mr. Alumbaugh filed an answer to Global's appeal seeking additional attorney fees for this appeal. Additional attorney fees are usually awarded on appeal when a party appeals, obtains no relief, and the appeal has necessitated additional work on the opposing party's counsel, provided that the opposing party has appropriately requested the increase. **Loup**, 98-0329 at p. 8, 729 So.2d at 694. For the work necessitated by this appeal, including reviewing the record, reviewing the appellate brief filed by Global, and preparing a response brief, we find that an additional \$1,000.00 in attorney fees is warranted. See Loup, 98-0329 at p. 9, 729 So.2d at 694; **Harrison v. CD Consulting, Inc.**, 2005-1087, p. 10 (La. App. 1<sup>st</sup> Cir. 5/5/06), 934 So.2d 166, 172. Accordingly, the judgment of the trial court is hereby amended to provide for an additional attorney fee award in the amount of \$1,000.00.

#### **V. CONCLUSION**

For the above and foregoing reasons, the April 21, 2008 judgment of the trial court is amended to provide for additional attorney fees in the amount of \$1,000.00 for the defense of this appeal. In all other respects, the judgment is affirmed. All costs of this appeal are assessed to the defendant/appellant, Global Data Systems, Inc.

**AMENDED AND, AS AMENDED, AFFIRMED.**