compromise
front pay
settlement
wrongful discharge
FRBP 9019
ORE 408
ORS 659A.203
ORS 659A.885

In re William and Kay Pruitt — Case # 09-65328-fra7
November 1, 2011 — FRA (not intended for publication) — 2011 WL ?

Debtor William Pruitt filed a joint Chapter 7 petition with his wife Kay. Pre-petition he had filed in state court a wrongful termination suit against the State of Oregon. The claims included statutory "whistle-blower" claims as well as a common law wrongful discharge claim. Debtor and the State settled the claims post-bankruptcy for $650,000 without the Chapter 7 Trustee's knowledge. Also, at the time, the State had no knowledge of the bankruptcy. When the State found out about the bankruptcy, it rescinded the settlement, as violative of the stay and involving the incorrect party in interest. The Trustee then entered into another settlement for $300,000 and moved for its approval. In an opinion entered in June, 2011, the Court denied that motion without prejudice. See, In re Pruitt, 2011 WL 2292205. The Trustee then renewed his motion on identical terms except the State added a contribution of up to $6,000 for the estate to retain an expert in support of the settlement. Debtor opposed the renewed motion.

The Court granted the motion. Based largely on the expert's testimony, and applying the factors set out in In re A & C Properties, 784 F.2d 1377, 1381 (1986), the Court found and concluded that while the Chapter 7 estate would likely be able to establish the State's liability on several of the claims, there was little likelihood of obtaining a judgment of more than $300,000 (exclusive of attorney's fees and costs). Among other things, the Court found that in any trial, evidence of the prior $650,000 settlement would be excluded under ORE 408. Further, Judge Radcliffe's prior findings of the Debtor's bad faith (in denying an earlier motion to convert from Chapter 7 to Chapter 13), seriously undercut Debtor's credibility and hence any damage award. The Court also found the damages considerations would be complex and expensive to litigate, and that there would be up to a two year delay in bringing the matter to trial in state court. Finally, the Court found the settlement was in the best interests of creditors because it would likely pay them in full and provide a surplus for the Debtor.

In light of the grant of the Trustee's renewed motion (and the surplus the settlement would likely generate), the Court approved the Trustee's abandonment of another pre-petition lawsuit the Debtor had filed against another of his former employers.

E11-19(11)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE WILLIAM ROBERT PRUITT and KAY ANN PRUITT, Debtors.	))))))	Bankruptcy Case No. 09-65328-fra7 MEMORANDUM OPINION[1]

William Robert Pruitt (Debtor) and Kay Ann Pruitt filed a joint Chapter 7 petition on September 30, 2009. The Court previously denied a motion seeking substantive consolidation of their bankruptcy estates. Subsequently separate trustees have been appointed. Two matters are currently before the court, each of which concerns the William Pruitt estate. The first is Debtor's trustee, Rodolfo Camacho's (the Trustee) renewed motion for an order approving a settlement reached with the State of Oregon (the State) concerning a wrongful termination suit Debtor brought pre-petition in the Circuit Court for Marion County, Oregon (the Oregon Action). The second is the Trustee's amended notice of intent to abandon another suit Debtor brought pre-petition against another former employer, the Chenault [Lake Charles, Louisiana] International Airport Authority (the CIAA Action). Both matters were heard on October 11, 2011.

For the procedural and factual background concerning this case, the Court refers the parties to its Memorandum Opinion entered June 8, 2011, In re Pruitt, 2011 WL 2292205 (Bankr. D. Or. 2011), which by

[1]This Memorandum Opinion is not intended for publication.

this reference is incorporated herein. That Opinion addressed the Trustee's original motion to settle the Oregon Action. The motion had originally been heard by the Court's late colleague, the Hon. Albert Radcliffe. Judge Radcliffe passed away before he could issue an opinion disposing of the matter. With the parties' consent the undersigned judge reviewed the transcript and the evidence, and determined that the trustee had not provided evidence sufficient to support findings that the proposed settlement satisfied the criteria set out in Martin v. Kane (In re A & C Properties), *infra*. The motion was denied but without prejudice.[2]

Renewed Motion to Approve Settlement:

The Trustee's current proposed settlement of the Oregon Action is identical to his original. It provides in material part that in exchange for $300,000 and a release of any claims the State may have against Debtor's Chapter 7 estate, the estate agrees to release any claims it may have against the State. This includes agreeing to dismissal of the Oregon Action with prejudice.[3] In addition, the State agreed to pay up to $6,000 to the Trustee to defray the expense to the estate of retaining an expert witness to testify in support of the settlement.

Authority to approve a compromise or settlement is provided by FRBP 9019. Settlements must be fair and equitable. Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988). They must also be reasonable under the circumstances and in the estate's best interests. Martin v. Kane (In re

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[2]At the October 11, 2011, hearing, Debtor objected on preclusion principles to the re-litigation of any matter relating to the settlement. However, because the Trustee's original motion was denied without prejudice, the Court overruled Debtor's objection.

[3]In a pre-hearing memorandum, Debtor argued the settlement also includes language requiring the estate to indemnify the State for any damages the State incurs as the result of claims made by third parties. He then argues that such an indemnity clause should not be approved. The Court has carefully reviewed the Settlement Agreement. It contains no such indemnity clause. In fact, it provides just the opposite. That is, under the Agreement both the estate and State agree to a mutual release of any and all claims against each other including "rights of contribution or indemnity." See, Ex. C to the Trustee's Renewed Motion to Approve Settlement [Docket #184] at §§ C.3 & 4.

A & C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986). In determining the fairness, equity and reasonableness of a settlement the court must consider:

> (1) the probability of success in the litigation;
> (2) the difficulties, if any, to be encountered in the matter of collection;
> (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
> (4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Id. "When assessing a compromise, courts need not rule upon disputed facts and questions of law, but rather only canvass the issues. A mini trial on the merits is not required." (Burton v. Ulrich) In re Schmitt, 215 B.R. 417, 423 (9th Cir. BAP 1997) (citations omitted). The Trustee has the burden of proof. A & C Properties, 784 F.2d at 1381.

In assessing A & C factors one and three, attorney Kim Hoyt testified as an expert on the estate's behalf. Ms Hoyt has practiced employment law for 20 years, largely in Marion and surrounding counties, representing both employers and employees. About 70% of her practice involves employment litigation. She has handled cases substantially similar to the Oregon Action. In preparing to testify, she reviewed among other things, the portion of attorney Judy Snyder's[4] file that was turned over to the Trustee, the Marion County Circuit Court file, various correspondence between the principals involved, and Debtor's FRBP 2004 exam. In preparing, she did not interact with either the Trustee or the State's counsel.

Examining the A & C factors:

(1) Probability of success in the litigation:

[4]Ms Snyder represented Debtor pre-petition and filed the Oregon Action (and the tort claims notice which preceded it). Post-petition, she continued to negotiate on Debtor's behalf which led to the State's $650,000 settlement with Debtor personally, without notice to the trustee. Pruitt, 2011 WL 2292205 at *4. At the time, the State was unaware of Debtor's bankruptcy. Once it became aware, it promptly rescinded the settlement and stopped payment on the settlement check. Id. Doing so was entirely correct, since the Debtor's action was an attempt to control an estate asset, and in violation of the automatic stay. 11 U.S.C. §362(a)(3). Moreover, the estate, not the Debtor, was the real party in interest.

Debtor began work for the Oregon Department of Aviation (ODA) as its state airports manager on July 18, 2008, making him the ODA's second highest ranking officer. His employment was terminated by ODA's then-director Dan Clem (Clem) on October 2, 2008. The Oregon Action[5] includes four claims seeking remedies for the termination. Claims three and four are based on statute.[6] They allege Debtor worked in an environment where Clem and ODA's leasing manager Rita Rogerson (Rogerson) had an intimate relationship. Debtor alleged that at work Rogerson was insubordinate to Clem and continued this behavior despite Debtor's (who was Rogerson's superior) request to stop. This, as alleged by Debtor, created a hostile work environment. Ms Holt testified claims three and four had little merit and would most likely be resolved on summary judgment in the State's favor. Debtor proffered no countervailing evidence. The Court thus finds and concludes that there is little probability of success on the merits of claims three and four.

Claims one and two stem from two series of events. The first involved Debtor's objection to a below-market 25 year lease granted to TLM Holdings LLC (TLM).[7] The leased property was over 31,000 sq. ft. of airpark space at Aurora Airport. TLM was to pay its lease payments with "in kind" paving work. Debtor alleges he advised Clem and Rogerson that the lease violated FAA rules, namely its "Rates and Charges Policy." The second involved Debtor's attempted mediation of lease disputes at a private hangar development at the Mulino Airport. Debtor alleges that despite brokering an amicable settlement, Clem, Rogerson and another employee expressed outrage that Debtor had resolved the issues without legal action thereby interrupting Clem's and Rogerson's plan to condemn the hangar complex based on the defaults.

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[5]The tort claims notice and the Oregon Action complaint were admitted as Exhibits 103 and 104 respectively at the October 27, 2010, hearing on SunTrust's motion to substantively consolidate. At the hearing on the instant motion, at the Trustee's request, the Court took judicial notice of the prior record in these proceedings, including previously admitted exhibits, subject to relevancy objections. Subsequently, there were no relevancy objections to these two exhibits.

[6]See, ORS 659A.030(1)(a), (b) (claim three), and (f) (claim four).

[7]TLM's principal was Ted Millar, whom the tort claims notice alleges was a politically connected personal friend of Clem's.

Claim one is a statutory claim alleging Debtor was terminated because he disclosed information he reasonably believed was a violation of federal law and because he challenged conduct that he reasonably believed was mismanagement or abuse of authority, all in violation of ORS 659A.203.[8] For violations of ORS 659A.203, injunctive and other equitable relief as may be appropriate is available including reinstatement and an award of up to two years of back pay preceding the filing of the complaint. ORS 659A.885(1), (2). Compensatory damages or $250 whichever is greater, ORS 659A.885(5), as well as costs and reasonable attorney's fees at trial and on appeal, ORS 659A.885(1), are also available.

Claim two is a common law claim for wrongful discharge alleging Debtor was wrongfully terminated because he fulfilled an important public duty by disclosing and opposing ODA's leasing practices which he reasonably believed to be in violation of FAA rules and regulations pertaining to revenue diversion and by refusing to participate in any activities that violated such federal laws. It further alleges Debtor was terminated because he fulfilled an important public duty by opposing practices of the ODA director which amounted to abuse of power and/or mismanagement of funds in order to secure political gain. To establish a

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[8]ORS 659A.203(1) in pertinent part makes it an unlawful employment practice for any public employer to:

> (b) Prohibit any employee from disclosing, or take or threaten to take disciplinary action against an employee for the disclosure of any information that the employee reasonably believes is evidence of:
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> > (A) A violation of any federal or state law, rule or regulation by the state, agency or political subdivision; [or]
> > (B) Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the state, agency or political subdivision;
>
> [or]
>
> (d) Discourage, restrain, dissuade, coerce, prevent or otherwise interfere with disclosure or discussions described in this section.

ORS 659A.203(2) provides that: "No public employer shall invoke or impose any disciplinary action against an employee for employee activity described in subsection (1) of this section . . . ."

common law claim for wrongful discharge, a plaintiff must show he was terminated for exercising an employment-related right, or for complying with or fulfilling a public duty. Archer v. Letica Corp., 126 Or. App. 309, 312, 868 P.2d 770, 771 (1994). "[I]n a tort action for wrongful discharge, a plaintiff is entitled to the full range of economic damages, as well as damages for such personal injuries as anguish, physical symptoms of stress, a sense of degradation, and the cost of psychiatric care." Dunwoody v. Handskill Corp., 185 Or. App. 605, 615, 60 P.3d 1135, 1141 (2003) (internal quotation omitted).

In both claims one and two Debtor claims: 1) lost wages and benefits from the date of termination until trial, plus prejudgment interest thereon; 2) reinstatement to a position of comparable pay rank and seniority and fully restored benefits, or "front pay"[9] in lieu of reinstatement, in an amount to be determined at

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[9]The U.S. Supreme Court has described "front pay" as:

> money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. For instance, when an appropriate position for the plaintiff is not immediately available without displacing an incumbent employee, courts have ordered reinstatement upon the opening of such a position and have ordered front pay to be paid until reinstatement occurs. In cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers . . . courts have ordered front pay as a substitute for reinstatement.

Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846, 121 S. Ct. 1946, 1948 (2001)(citations omitted).

The Oregon Supreme Court has described "front pay" as:

> [A] short hand term frequently used in federal courts and administrative agencies to refer to future lost pay and benefits. *Black's Law Dictionary,* 669 (6th ed 1990), defines "front wages" as: "Type of prospective compensation paid to a victim of job discrimination . . . until the victim achieves the position he would have attained but for the illegal and discriminatory act."

Tadsen v. Praegitzer Industries, Inc. 324 Or. 465, 467, n.5, 928 P.2d 980, 981 (1996).

trial; and 3) $500,000 in compensatory damages for pain, suffering and humiliation. In addition, in claim one he sought reasonable attorney's fees and costs.

ODA's federal violations have been well documented. See, Debtor's Hearing Ex. B, pp. 1-6 (letter from Dave Roberts, an FAA Civil Engineer/Projects Manager to Mitch Swerker, Oregon's then State Airports Director, detailing the violations and requiring the State to provide a "plan of action" to ensure future federal funding). Accordingly, Ms Hoyt testified that she started with the assumption claims one and two had merit. She then testified as to a likely damage award. She noted that Debtor's documented wish that the ODA position would be his "last job," was a factor that would increase a jury award. However, she testified to multiple factors that would cause a jury to limit any award.

First, she testified that jury awards are significantly affected by a plaintiff's credibility. Aside from impeachment ramifications, she explained that juries identify more with plaintiffs in actions such as this whose primary motivation is to protect the public's interest, as opposed to their own. She advised that jurors pay particular attention to a judge's prior credibility findings. She therefore concluded that the prospect of any large jury award was seriously damaged by Judge Radcliffe's earlier findings of Debtor's bad faith, which were based largely on false or incomplete statements in Debtor's sworn bankruptcy schedules. Pruitt, 2011 WL 2292205 at *5(finding of bad faith was basis for denying Debtor's motion to convert to Chapter 13).[10] She also noted that the short duration of Debtor's employment, which had not extended beyond his "trial service" period, would likely reduce a jury award. She further testified the probability of success would be diminished because it was unlikely the estate could retain counsel to prosecute the claims. Even assuming the estate agreed to pay a contingent fee, she concluded an employment attorney would most likely not be willing to advance the litigation costs-which as discussed below, would be sizeable-to a client with no other assets. Also, she believed that Judge Radcliffe's previous findings as to Debtor's lack of credibility would dissuade many employment attorneys from taking the case.

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[10]Mr. Pruitt was denied a discharge under §727(a)(2), (3), and (4). A default judgment to that effect was entered on April 19, 2010, in United States Trustee v. Pruitt, Adv. No. 10-06007, United States Bankruptcy Court for the District of Oregon

Of particular import, Ms Hoyt testified – correctly, in the Court's view– that the State's original $650,000 settlement would not be admissible at trial in an Oregon court, see ORE 408 (ORS 40.190), and thus would play no role in any deliberations. Further, contrary to Debtor's assertion, Ms Hoyt advised there was almost no likelihood of changing venue from Marion County despite Mr. Clem's service on the City of Salem's council. Even if venue were changed, Ms Hoyt testified that typical jury verdicts in employment cases in the surrounding counties were in fact lower than those in Marion County.

Debtor argues that the Oregon Action is worth more that the amount now offered because political figures-including Oregon's then Governor were somehow involved. Ms Hoyt however testified that based on her experience, involvement of political figures do not increase a case's value. In summary, she concluded the chance of a Marion County jury awarding more than $300,000 (exclusive of an attorney's fee award) on claims one and two was "virtually zero."

For many of the same reasons, the Trustee, who is also an experienced attorney practicing in the same geographical area, agreed. He also testified that based on belittling and taunting e-mails Debtor sent to Mr. Clem and another ODA employee shortly after the Debtor signed the $650,000 settlement, see Trustee's hearing Ex. #7, he did not believe he could now negotiate on Debtor's behalf any favorable "non-economic" terms, such as a neutral employment recommendation or a purge of negative information from Debtor's personnel file.

Debtor did not testify or call his own expert. As noted above, his documentary evidence substantiated FAA rules violations. It did not however address with any specificity why a damage award would exceed $300,000. The documentary evidence does attempt to establish Debtor's credibility by adducing the positive results of several employment background checks and performance reviews. It also includes an explanation as to why the Oregon and CIAA actions were left off of the bankruptcy schedules. However, even if this evidence was admissible at trial of the Oregon Action, the weight of the evidence is that a fact finder would accord more weight to Judge Radcliffe's prior findings of bad faith.

Debtor also relies on evidence in the form of a letter from attorney Goldberg to Debtor's then-bankruptcy counsel, Kevin Rank, asserting that the State's Department of Justice (DOJ) was getting a lot of

pressure from the Governor's office to settle the case with the Trustee on an accelerated timeline. See, Debtor's Exhibit H. In this vein, a DOJ attorney, David Kramer testified he did not remember there being "political" pressure but conceded there were heated discussions as to what course of action to take. In any event, Ms Hoyt testified that evidence of "political pressure" would be excluded at trial for the same reasons the $650,000 settlement would be excluded. Indeed, the debtor's assertion is legally and logically untenable: assuming his allegations to be true, the measure of his damages is not enhanced by the fact that certain political figures want to pay more than the level of damages in order to keep the matter quiet. This court will not find that any Judge and Jury would support such an argument. If anything, such cynicism at trial could have a chilling effect, to say the least.

Finally, Debtor represented that Ms Snyder was willing to re-assume the litigation if it were abandoned to him. However, abandonment of the Oregon Action is not before the Court, and not likely to be allowed in any case: the asset is certainly not burdensome to the estate, unless the trustee is compelled to pursue it in expensive litigation.

Difficulties in collection**:**

The Trustee concedes that if he obtained a judgment against the State there would be no impediment to collection.

Complexity, expense, inconvenience and delay:

Ms Holt testified that damages in the Oregon Action were complex and expensive to prove. She anticipated the estate would need to hire an economist and vocational expert. She testified there would be extensive and costly pre-trial motions and discovery, including multiple depositions, and that a costly trial lasting 5-10 days would be likely. She further testified that given Marion County Circuit Court's docket, the Oregon Action could be expected the go to trial in 18-24 months. Given the time-value of $300,000 in hand, this is significant. Again, the Trustee's own testimony supported many of Ms. Hoyt's observations. The

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Trustee estimated the costs of litigation would be in the "6 figures." As to attorney's fees, the $300,000 cash settlement, at least at this juncture, will not be diminished by legal fees.[11]

In response, Debtor adduced no non-conclusory countervailing evidence as to the elements in A & C factor three.

Paramount interest of creditors and a deference to their reasonable views:

No creditor objected to the proposed settlement. Indeed, if an objection had been filed, the Court may have questioned the objector's standing, as by all accounts $300,00 will generate a surplus estate.[12] Thus it is clearly in creditors' interests to approve the settlement. That does not mean the Court is ignoring Debtor's interest in the surplus. Based on the evidence adduced however, it is more likely than not the surplus would not increase if the Oregon Action were litigated. In any event, A & C dictates that creditors' interests are paramount. In this context, it means that the interest of creditors in receiving a substantial dividend should not be put at risk in order to pursue a remote possibility of a larger award benefitting the debtor.

Conclusion: Motion to Settle:

After considering a multiplicity of factors, Ms Hoyt and the Trustee concluded the present $300,000 settlement is an excellent result. The Court finds their testimony credible. It thereby finds and concludes the Trustee has proven by a preponderance of the evidence that if the Oregon Action were taken to trial, any judgment (exclusive of a separate attorney and costs judgment) would be equal to or less than $300,000. Also, trying the matter would be costly and complex and entail significant delay. It would also threaten a 100% payout to creditors which the settlement likely assures. Weighing all the A & C factors, the proposed

[11]Matthew Goldberg, the estate's attorney who negotiated the settlement, has been employed on an hourly basis. The Court is aware that Ms Snyder filed a proof of claim asserting a right to a fee of one third of the settlement proceeds, based on her fee agreement with Debtor. The Trustee has objected to that claim and the matter has been abated pending resolution of the instant motion. See, Minute Order entered July 7, 2010. [Docket #119].

[12]As explained in Pruitt, 2011 WL 2292205 at *6, excluding Ms Snyder's claim, only approximately $26,775 in claims have been timely filed against Debtor's estate.

settlement is fair, equitable, reasonable and in the estate's best interest. The Trustee's motion will therefore be granted. Because of Debtor's intervening bankruptcy filing (and the consequent transfer of all of his assets to his estate under 11 U.S.C. § 541, the Court has been presented with a rare case where a state court defendant is allowed a mulligan to renegotiate what the evidence now reveals was an excessive settlement. That may seem to the Debtor to be a harsh result, but in fact all he has lost is a windfall which was improvidently offered and unlawfully accepted.

Amended Notice of Intent to Abandon the CIAA Claim:

The CIAA claim pre-dated the Oregon Action. It involved a breach of contract suit Debtor filed against another of his former employers. See, Pruitt, 2011 WL 2292205 at *2. Joint debtor Kay Pruitt's trustee, Ronald Sticka, a potential claimant in Debtor's case, objected to the Trustee's amended notice of intent to abandon the claim. However, he later conceded that if the renewed motion to settle the Oregon Action was granted, his objection would be moot because of the surplus the settlement proceeds would generate. The Court is thus prepared to approve the abandonment of the CIAA Action.

The Trustee's counsel is instructed to present an order granting the motion to approve settlement and approving abandonment of the CIAA claim within 10 days of this Opinion's entry. The above constitute my findings of fact and conclusions of law under FRBP 7052. They shall not be separately stated.

FRANK R. ALLEY, III
Chief Bankruptcy Judge