

11 U.S.C. § 507(a) (3)  
O.R.S. 652.150  
Attorney Fees

In re Pioneer Fruit Distributors, Case No. 393-3621-dds7

3/30/95            DDS            unpublished

Fifteen former employees of the debtor filed priority claims for unpaid vacation pay, for 30-days wages claim under O.R.S. 652.150 and for attorney fees under O.R.S. 652.200. The trustee admitted that the debtor owed the 30-day wage claim under O.R.S. 652.150, but objected to giving this claim priority status.

Judge Sullivan made a three-part holding. First, § 507(a) (3) gave the employees third priority status for vacation pay earned 90 days before the debtor closed its doors, but not for the vacation pay earned prior to the 90 days. Second, a claim under O.R.S. 652.150 constituted a penalty and was not entitled to priority status under § 507(a) (3). Third, the Bankruptcy Code allowed a claim for pre-petition attorneys' fees, but not post-petition attorneys' fees.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case No.  
 ) 393-36251-dds7  
PIONEER FRUIT DISTRIBUTORS, )  
 ) FINDINGS ALLOWING PRIORITY  
Debtor. ) TO A PORTION OF WAGE  
 ) CLAIMS 57 - 71

Fifteen former employees of the debtor filed priority claims for vacation pay, a 30-days-wage statutory award under O.R.S. 652.150 and attorneys' fees under O.R.S. 652.200. The trustee objected. The parties agreed that the debtor paid wages when it terminated the employees but refused to pay vacation benefits under circumstances establishing willfulness justifying the statutory award. The court heard the objections on March 30, 1995.

Priority shall be allowed for that portion of vacation pay earned within the 90 days preceding bankruptcy, but denied for the rest of each claim. The claims for 30-days wages are for penalties and do not represent actual loss and should be allowed a lower priority under

11 U.S.C. § 726(a)(4). See In re Garlepied Transfer, Inc., 97 B.R. 305, 306-07 (E.D. La. 1989). Attorneys' fees earned prepetition and the non-priority wages should be allowed as a general claim and paid pursuant to 11 U.S.C. § 726(a)(2).

Section 507(a)(3) allows priority for vacation pay "earned . . . within 90 days before . . . the date of the cessation of . . ." the debtor's business. The plain language of this section gives the employees third priority treatment for vacation pay "earned" 90 days before Pioneer Fruit closed its doors, but not for vacation pay earned prior to the 90 days. In re Northwest Engineering Co., 863 F.2d 1313, 1319 (7th Cir. 1988).

With regard to the 30-days-wage statutory award under O.R.S. 652.150, the trustee argues that, because the employees did not "earn" the 30-days pay provided under O.R.S. 652.150, the employees are not entitled to priority for this portion of their claim. The crux of the trustee's argument is that an award made pursuant to O.R.S. 652.150 is a civil penalty and does not constitute wages. I agree with the trustee.

The trustee properly characterized an award made pursuant to O.R.S. 652.150 as a civil penalty and not as wages. See Garlepied Transfer, 97 B.R. at 307. The Oregon Legislature expressly labeled the award as a "penalty" in O.R.S. 652.150. Moreover, the fact that the award only arises if an employer willfully fails to pay wages further

shows that the legislature intended O.R.S. 652.150 to be a penalty. See Kling v Exxon Corp., 74 Or. App. 399, 703 P.2d 1021, 1023 (1985). Three provisions refer to O.R.S. 652.150. All three refer to it as a penalty. O.R.S. 652.332(1), 653.055(1)(c) and 658.415(7)(b). In addition, Oregon courts consistently describe O.R.S. 652.150 as a civil penalty or wage penalty. See e.g., Ochoa v Weisensee Ranch, Inc., 107 Or. App. 203, 811 P.2d 147 (1991); Perez v Coast to Coast Reforestation Corp., 100 Or. App. 715, 785 P.2d 365 (1990); Gillman v Emel, 89 Or. App. 153, 747 P.2d 390 (1987); Kling v Exxon Corp., 74 Or. App. 399, 703 P.2d 1021 (1985); Wells v Carlson, 78 Or. App. 536, 717 P.2d 640 (1986).

The employees argue that an award made pursuant to O.R.S. 652.150 constitutes wages, notwithstanding the text and context of O.R.S. 652.150. In making this argument, they compare an award under O.R.S. 652.150 to an award under the Worker Adjustment and Retraining Notification Act ("WARN"), which courts have characterized as wages. Cargo, 138 B.R. at 926-28; In re Riker Indus., Inc., 151 B.R. 823, 827 (Bankr. N.D. Ohio 1993). I disagree with the comparison.

Unlike O.R.S. 652.150, WARN uses language that falls within the meaning of wages under § 507(a)(3). WARN requires certain employers to give 60-days notice to employees of a plant closing or mass layoff. 29 U.S.C. § 2102(a)(1). It specifically describes an employer's liability as "back pay,"

which falls within the meaning of wages as used in § 507(a)(3). 29 U.S.C. § 2104. This section of WARN does not refer to "penalty" as the employees contend. In fact, at least one court that found a WARN liability to constitute "wages" emphasized that WARN does not refer to the liability as a penalty. Cargo, 138 B.R. at 926. Claimants must have referred to 29 U.S.C. § 2104(a)(3), which subjects an employer to a "civil penalty" for not giving the required notice to "unit of local government," not the employees.

Unlike O.R.S. 652.150, WARN serves a remedial purpose. Courts agree the purpose of WARN is to notify employees of an impending closing or mass layoff so that they have time to adjust. In re Hanlin Group, Inc., 176 B.R. 329, 333 (Bankr. D. N.J. 1995); Cargo, 138 B.R. at 927. In reaching this conclusion, courts have compared the employer's back pay liability to privately negotiated severance pay. Id. Section 507(a)(3) expressly includes severance pay within the meaning of wages. In comparison, O.R.S. 652.150 serves a punitive purpose, not a remedial one. It imposes a penalty when an employer wilfully withholds wages. See Kling, 74 Or. App. at 402, 703 P.2d at 1023.

Similar laws in other states provide a better comparison. California, for example, has a statute with similar language that imposes a 30-day-wage award on an employer for willfully failing to pay wages. Cal. Labor Code

§ 203 (West 1995). Courts agree that California's statute compels an employer to pay wages promptly and penalizes an employer for not doing so. Oppenheimer v. Sunkist Growers, Inc., 153 Cal. App. 2d Supp. 897, 899, 315 P.2d 117, 118 (1957). Another court characterized a similar Louisiana law that allows an employer to sue for back wages as a penalty. Garlepied Transfer, 97 B.R. at 307.

Nothing in the Bankruptcy Code provides for the allowance of a claim for post-filing attorneys' fees, priority or otherwise. In re Simon, 161 B.R. 329, 333 (Bankr. D. Mass. 1993). Such a debt is neither earned "as of the date of filing" within 11 U.S.C. § 502(b) nor earned "before the date of the filing of the petition" under 11 U.S.C. § 507(a)(4). Fees earned prepetition should be allowed as a general claim.

The parties should attempt to agree on the amounts to be allowed. Within fifteen days the trustee should present an appropriate order or request further instructions if agreement cannot be reached.

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DONAL D. SULLIVAN  
Bankruptcy Judge

cc: Jon R. Summers  
Sally R. Leisure  
Michael Schumann  
Donald Hartvig  
U. S. Trustee