

Dischargeability
Wrongful discharge
ORS 652.355
Attorney fees

Greenwood v. Voigt, Adversary No. 94-6493-fra
Wallace Voigt, Case No. 694-62911-fra7

11/27/1995 FRA

Unpublished

The Defendant Wallace Voigt was the owner and president of Voigt Trucking, Inc. The Plaintiff worked for Voigt's business in Idaho and, when business in Idaho did not meet expectations, moved back to Oregon at the encouragement of Voigt to work on a project in Mill City. The Mill City job was a "prevailing wage" job which meant that it was supposed to pay \$17.26/hour plus contributions to health care and retirement for total compensation of about \$23/hour. The compensation being paid to the Plaintiff and his fellow employees was \$17.26/hour without health care or retirement.

When Plaintiff and several other employees confronted Voigt about the lack of health care and retirement, Voigt stated that any employee that insisted on compensation at the statutory rate would be fired. Plaintiff chose to quit and did not find full time employment until about 90 days later. Voigt subsequently filed for bankruptcy.

The Plaintiff alleged that Voigt was liable to him either for the tort of wrongful discharge or under the provisions of ORS 652.355(2) which makes any person who discharges an employee for making a wage claim liable for actual damages. The Plaintiff further asserted that the debt is nondischargeable.

The court determined that the tort of wrongful discharge is not applicable because an Oregon Court of Appeals opinion held that ORS 652.355 is an "adequate statutory remedy" for the action complained of. Oregon case law holds that no common law remedy exists where there is an adequate statutory remedy. As for ORS 652.355, the court held that for purposes of that statute the employee was constructively fired in violation of the statute and is entitled to actual damages incurred. The court calculated actual damages as the amount Plaintiff would have earned had he continued working for Voigt Trucking, even though the amount was substandard, during the 90 days it took him to find alternative employment, less any amounts actually earned during that period. The debt was found to be nondischargeable under 11 U.S.C. § 523 (a) (6). The Plaintiff was not entitled to attorney fees under ORS 652.355 because the Code does not allow for an award of attorney fees for bringing a dischargeability action, even where the underlying state law claim provides for attorney fees.

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| | UNITED STATES BANKRUPTCY COURT | |
| | FOR THE DISTRICT OF OREGON | |
| IN RE |) | |
| WALLACE DALE VOIGT, |) | Case No. 694-62911-fra |
| Debtor. |) | |
| STEVEN R. GREENWOOD, |) | |
| Plaintiff, |) | |
| vs. |) | Adversary No. 94-6493-fra |
| WALLACE DALE VOIGT, |) | |
| Defendant. |) | MEMORANDUM OPINION |

In this adversary proceeding the Plaintiff seeks a judgment for money damages from the Debtor, his former employer's president, and a declaration that the damages are not dischargeable in this Chapter 7 case. I find that the Debtor is liable to the Plaintiff under Oregon law, and that the circumstances of the debt render it not dischargeable.

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I. FACTS

1 Plaintiff was employed by Voigt Trucking, Inc., an Oregon
2 corporation, as a truck driver. Voigt Trucking, Inc., was wholly
3 owned by the Debtor, who was also its president.¹

4 At first, Plaintiff worked for Defendant's company in Idaho
5 hauling hazardous waste. When it became clear that there was
6 insufficient work in Idaho to sustain operations, Plaintiff was
7 encouraged to return to Oregon, where he was employed by Voigt
8 Trucking on a job known as the "Mill City Slide Correct."
9 Although Plaintiff was not aware of this at the beginning, the
10 job was a "prevailing wage job" under Oregon law. Oregon law
11 requires that all wage earners employed on a job contracted for
12 by the State be paid the prevailing wage in that county. The
13 Mill City job was in Marion County, where the prevailing wage was
14 \$17.26 per hour, plus contributions toward health care and
15 retirement benefits for a total package of roughly \$23.00 per
16 hour. The compensation being paid to Plaintiff and fellow
17 employees did not include the health care and retirement
18 benefits.

19 Plaintiff confronted Defendant, and demanded that he receive
20 the prevailing wage and benefits required by law. Defendant
21 refused, stating that, if Plaintiff insisted on compensation at
22 the statutory rate, Defendant would no longer employ him.

23 Plaintiff quit. He was able to find full time employment
24 about 90 days later.

25 II. LIABILITY

26 ¹ Defendant had argued, by way of defense, that only the
corporation could be liable for the injury claimed, and that he
was not the proper party in interest. This defense was withdrawn
at trial.

1 O.R.S. 652.355 prohibits an employer from discharging or in
2 any other manner discriminating against any employee because the
3 employee made a wage claim or "discussed, or inquired about or
4 consulted an attorney or agency about a wage claim."

5 O.R.S. 652.355(2) provides that:

6 Any person who discharges or discriminates against an
7 employee in violation of subsection one of this section
8 shall be liable to the employee discharged or
9 discriminated against for actual damages or \$200,
whichever is greater. In any action under this
subsection the court may award to the prevailing party,
in addition to costs and disbursements, reasonable
attorney's fees.

10 It is clear enough that Plaintiff asserted a wage claim for
11 the purposes of this statute. What remains to determine is
12 whether he was discharged or discriminated against. Oregon law
13 recognizes that a "discharge" for the purpose of wrongful
14 discharge claims may be actual or constructive. The Oregon
15 Supreme Court, in a case where an employee was told "to resign or
16 be fired", held that the employee was fired for the purposes of
17 her employment discrimination claim. Sheets v. Knight, 308 Or.
18 220, 227, 779 P.2d 1000, 1004 (1989). In a later case the Oregon
19 Court of Appeals considered circumstances where the Plaintiff was
20 driven to resign by intolerable working conditions deliberately
21 created or maintained by the defendant. The court noted that, to
22 establish constructive discharge, a plaintiff must prove that
23 defendant deliberately created or maintained unacceptable working
24 conditions
25 with the intention of forcing a resignation, and that the
26 plaintiff quit because of those conditions when otherwise she
would have remained. Wooton v. Viking Distributing Co., Inc.,

1 136 Or.App. 56, 62, 899 P.2d 1219 (1995), citing Bratovy Sky
2 Chefs, Inc., 308 Or. 501, 504, 783 P.2d 4 (1989).

3 In the instant case Defendant created, or caused his company
4 to create, working conditions that Plaintiff found to be
5 intolerable. It might be argued that these conditions were not
6 created in order to drive Plaintiff away. (There is, for
7 example, evidence that other employees chose to tolerate the
8 conditions and remain employed by Defendant's company).

9 Nevertheless, I believe that the circumstances give rise to a
10 constructive discharge under Oregon law, at least for the
11 purposes of O.R.S. 652.355. Plaintiff was told that, if he
12 insisted on being paid in the manner the law required, he would
13 be discharged. This circumstance is by itself sufficient:

14 Oregon law does not require that Plaintiff go through the motions
15 of inducing his employer to fire him. To require that would
16 "exalt form over substance and allow employers to use a ruse to
17 escape liability if their conduct was otherwise improper."
18 Sheets v. Knight, 308 Or. 220, 227, 779 P.2d 1000, 1005 (1989).

19 In short, an employee is discharged or discriminated against
20 under O.R.S. 652.355 if it is made clear to him that he will be
21 discharged if he does any of the acts enumerated in O.R.S.
22 652.355(1).

23 Plaintiff claims that Defendant is liable not only under the
24 statute, but under the common law tort of wrongful discharge.
25 Damages under such a claim could include not only actual but
26 punitive damages. The claim cannot be sustained. Oregon courts
have held that no common law claim exists where there is an
adequate statutory remedy. The Oregon Court of Appeals has held

1 that ORS 652.355 is "an adequate statutory remedy that protects
2 the right of employees to make good faith wage claims." Carlson
3 v. Crater Lake Lumber Co., 103 Or.App. 190, 195, 796 P.2d 1216,
4 1220 (1990).²

5 III. DAMAGES

6 Under O.R.S. 652.355 Plaintiff is entitled to "actual
7 damages" incurred because of his wrongful discharge. The
8 principal element of damages is the compensation he would have
9 received had the employment continued. Tadsen v. Praegitzer
10 Industries, Inc., 136 Or.App. 247, 902 P.2d 586 (1995).
11 Plaintiff testified, without contradiction, that he began looking
12 for new employment as soon as his relationship with Voigt
13 Trucking was terminated on September 23. He succeeded in that
14 search by December 31. He claims lost wages for that period, at
15 a rate of \$210.33 per day, less \$270.00 in unemployment benefits,
16 and approximately \$1,600.00 earned on odd jobs.

17 Plaintiff is entitled to whatever pay would have been
18 received had Plaintiff continued working for Voigt Trucking,
19 notwithstanding the fact that the pay was substandard. While it
20 may seem odd that the damages would be based on the unlawfully
21 low rate of compensation, the statute provides for damages
22 ensuing from the loss of the particular job, and not a
23 hypothetical ideal job. At the going rate (for Voigt Trucking)

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25 Plaintiff argues that the Carlson case was wrongly decided by
26 the Court of Appeals, and should not be followed. However,
decisions of the Oregon Court of Appeals are binding precedent
if no contrary opinion has been rendered by the state Supreme
Court. Western Helicopter Services, Inc. v. Rogerson Aircraft
Corporation, 311 Or. 361, 811 P.2d 627 (1991).

1 of \$17.24/hour, the wages earned during the period in question
2 would have been \$137.92 for an eight hour day, for 95 working
3 days, for a total of \$13,102.40. After deducting the monies
4 earned in mitigation, the amount owed is \$11,232.40.

5 Plaintiff also seeks back pay, that is, the difference from
6 the amount actually paid during Plaintiff's employment and the
7 amount which should have been paid under the prevailing wage law.
8 Back pay is not an element of damages for wrongful termination:
9 plaintiff's injury upon being fired was not loss of pay accrued
10 to that time, but pay he would have earned thereafter but for the
11 firing. No separate claim for back pay was made in this
12 proceeding.

13 Plaintiff, in closing argument, asks for damages and
14 penalties under O.R.S. 279.356, 279.334, and 652.153. These
15 claims were not raised in the pleadings or the pretrial order,
16 and will not be considered now.

17 Finally, Plaintiff seeks an award for his reasonable
18 attorney's fees, as provided for by O.R.S. 652.355(2). The
19 Bankruptcy Code does not provide for attorneys fees incurred in
20 the pursuit of a federal cause of action, that is, the
21 determination that the debt owed was nondischargeable. Itule v.
22 Metlease, Inc., 114 B.R. 206 (Bankr. 9th Cir. 1990). The
23 existence of a right to such fees in connection with the
24 underlying state law claim does not give rise to such a right in
25 this court. See, AT & T Universal Card Services Corp. v.
26 Bonnifield, 154 B.R. 743 (Bankr. N.D. Cal. 1993) (Attorneys fees
nondischargeable, even where contract provided for such fees.)

1 IV. DISCHARGEABILITY

2 A debtor may not discharge a debt "for willful and malicious
3 injury by the debtor to another entity or to the property of
4 another entity." 11 U.S.C. § 523(a)(6).

5 1. *Willful*

6 An act is "willful" if done intentionally. It is the act
7 itself which must have been intended: it is not necessary to
8 show that the actor intended to violate the law, but only that he
9 intended to do the things which constitute a violation. Here the
10 preponderance of the evidence demonstrates that the debtor acted
11 as described in this opinion, and that his acts were intentional.

12 2. *Malicious*

13 In order to show "malice" under § 523(a)(6) plaintiff must
14 demonstrate, by a preponderance of the evidence, that: (a) the
15 debtor committed a wrongful act; (b) the act necessarily produced
16 harm to plaintiff or plaintiff's property; and (c) that the act
17 was without justification or excuse. In re Littleton, 942 F.2d
18 551 (9th Cir. 1991). Each of these elements is satisfied by the
19 facts of this case. The constructive firing was, as discussed
20 above, unlawful, and constitutes a "wrongful act" for the
21 purposes of the bankruptcy code. The loss of employment
22 necessarily injured plaintiff. No evidence was produced
23 suggesting any justification or excuse for the acts.

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26 V. CONCLUSION

1 Debtor constructively terminated plaintiff's employment
2 after plaintiff asserted a legal right to pay and benefits. This
3 action violated Oregon law, and, as a result, Debtor is indebted
4 to Plaintiff for \$11,232.40, constituting wages plaintiff would
5 have received if the unlawful act had not occurred. This debt is
6 not subject to discharge in bankruptcy.

7 This opinion constitutes the Court's findings of fact and
8 conclusions of law, which will not be separately stated. Counsel
9 for Plaintiff shall submit a form of judgment consistent with
10 this opinion.

11 FRANK R. ALLEY, III
12 United States Bankruptcy Judge
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