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INDIVIDUAL LIABILITY

Bankruptcy filing does not preclude liability for wage withholding

by Cate DeJulio

The Washington Wage Rebate Act (WWRA) allows an employee to recover double damages, costs, and attorneys' fees from not only his employer but also an officer, vice principal, or agent of the employer who willfully withholds wages. The Washington Supreme Court recently provided a stark reminder that not even a Chapter 7 bankruptcy filing will insulate decision makers, including board members, from personal liability for payment of unpaid wage claims.

What happened?

Michael Allen served as the interim chief financial officer for Advanced Interactive Systems Inc. (AIS). The company's financial situation was dire. AIS repeatedly defaulted on its loans, and its lender ultimately seized control of its U.S. bank accounts.

Zechariah Clifton Dameron IV and Daniel Standen were members of AIS's board. They and the other board members asked the lender to release the funds necessary for AIS to meet its payroll obligations. The board was responsible for authorizing all payments. AIS's existing funds were insufficient to meet its financial obligations, and its board prepared to file for Chapter 7 bankruptcy in the event the lender declined to provide additional funding. The lender declined to do so.

Following the board's decision, Allen sent termination letters to all employees except those necessary to prepare the Chapter 7 filing. The board had determined that Allen was included in that group. During the board's next meeting, it decided that when AIS filed for bankruptcy, the remaining funds would be allocated for employees, taxes, and insurance. The board then paid approximately $34,000 in insurance premiums and $8,000 in payroll advances for employees who had been retained.

Shortly thereafter, the board authorized the filing of the bankruptcy petition, adopted a resolution to use AIS's remaining assets for employees' wages, and filed for bankruptcy. AIS was not able to cover all wages owed to its employees with the amount. Allen did not receive any payment.

Allen filed a lawsuit in the U.S. District Court for the Western District of Washington alleging that the defendants willfully withheld wages in violation of the WWRA. Specifically, he claimed that he was entitled to severance pay, unused vacation, and wages for two pay periods after the company filed for bankruptcy. In response, the individual defendants argued that they were not personally liable, in part because the paydays for the wages owed fell after the company filed for

bankruptcy. Thus, the company's obligations were discharged by the bankruptcy.

What was the impact of the bankruptcy?

At Allen's urging, the district court certified two questions to the supreme court. The first question was:

> Is an officer, vice principal, or agent of an employer liable for a deprivation of wages . . . when his or her employment with the employer (and his or her ability to control the payment decision) was terminated before the wages became due and owing?

The court ruled that filing for bankruptcy does not cut off potential liability under the WWRA. Because filing for Chapter 7 bankruptcy usually results in the termination of all employees and renders regular pay periods and paydays irrelevant, the withholding of wages on the date the company files for bankruptcy—rather than on the established payday—governs the WWRA inquiry.

The second question the district court certified to the supreme court was:

> Does an officer['s], vice principal['s], or agent's participation in the decision to file the Chapter 7 bankruptcy petition that effectively terminated his or her employment and ability to control payment decisions alter the analysis? If so, how?

The supreme court's answer: An officer's participation in the decision to file the Chapter 7 bankruptcy petition makes it more likely that he will be held liable under the WWRA because it shows willfulness, the second element required to prove a WWRA violation. That is true even if the decision effectively terminates the officer's employment and ability to control payment decisions. The court emphasized that the defendants had full control over the decision to pay wages until the company filed for bankruptcy and that putting the payment of wages beyond their control by deciding to file for bankruptcy showed willfulness.

In answering the second question, the supreme court reviewed some of its previous WWRA decisions. Most notably, the court revisited its rulings on willfulness, noting that it had previously rejected a "financial inability to pay" exception and finding that a failure to pay was willful even if the corporation lacked sufficient funds to pay wages. Its rationale for ruling that officers still should be held personally liable when a corporation lacks sufficient funds is that the officers control how the company's money is used. *Allen v. Dameron,* 187 Wn.2d 692 (2017).

Takeaway for employers

The supreme court's analysis and answers to the certified questions serve as an important reminder of the robust protections provided by the WWRA and the risks to decision makers, including board members who have a hand in financial decisions. In particular, officers, vice principals, and agents cannot easily divest themselves of responsibility for withholding wages.

Under the WWRA, if a defendant took knowing and intentional actions that ultimately led to an employee's wages being withheld, the supreme court likely will find that the withholding was willful, even if the company lacked sufficient funds to pay wages or the defendant relinquished control over payment decisions. If you anticipate that your company may have insufficient funds to meet all of its obligations, including wage payments, consult counsel to assess and limit your risks.

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EMPLOYEE BENEFITS

Trump's parental leave plan likely will leave employers footing bill

President Donald Trump's latest budget proposal calls for six weeks' paid leave for new parents. And while the employee wage replacement that comes with the leave would be paid out by states, experts say states will have to draw at least some of the funding from businesses.

The program likely would lead to a significant tax on employers in the form of increased unemployment insurance (UI) taxes, according to Lisa Horn, director of congressional affairs for the Society for Human Resource Management (SHRM).

Who gets leave?

An earlier Trump paid parental leave proposal made during his campaign appeared to exclude fathers, adoptive parents, and same-sex partners. The new proposal contains few details about eligibility, but it does say the leave would be available to new mothers and fathers, including adoptive parents. It goes on, however, to say that it would ensure "all families" can afford to take time to recover from childbirth and bond with a new child without worrying about paying their bills.

The proposal doesn't set out any other eligibility requirements, such as job tenure (like the Family and Medical Leave Act (FMLA) does), full-time employment status, or an income ceiling. It also doesn't say whether the law would include job protection for employees who seek parental leave or whether states would have to provide at least a certain percentage of income replacement. Those details may be left to Congress (because this plan would require new federal legislation) or individual states.

Several states already have programs with some similar features, but they were created through existing temporary disability insurance programs and were

funded by employee payroll taxes. The programs generally offer between 55 percent and 66 percent of an employee's pay, subject to a cap.

And who pays?

According to Trump's proposal, the program would use the UI system as a base, and expenses would be offset by reforms to that system. Those changes include reducing improper payments, helping unemployed workers find jobs more quickly, and—most notably—encouraging states "to maintain reserves in their Unemployment Trust Fund accounts."

The problem with that third item is that according to the U.S. Department of Labor (DOL), many states depleted those trust funds during the recession. By the beginning of 2017, only 21 states had reached the "minimal level of adequate solvency," according to the DOL's *State Unemployment Insurance Trust Fund Solvency Report 2017.*

To resolve that issue, the administration would require states to increase their UI payroll taxes, according to the Committee for a Responsible Federal Budget. And in most states, those taxes are paid solely by employers.

Horn agreed with that assessment. "You can easily get to a scenario where this is going to lead to a significant tax increase on employers."

There are also concerns with intertwining parental leave and UI. "This is a serious departure from the original intent of and purpose of the UI system," whose purpose is to provide wage replacement to involuntarily unemployed workers, Horn said. Claimants must be able, available, and willing to work; with someone taking parental leave, that's not necessarily the case. Adding leave takers to the claimant pool jeopardizes benefits for the unemployed, she said.

Reactions

Trump's plan has received little praise from either side of the aisle. Democrats in Congress say it doesn't go far enough. Republican lawmakers say that while providing assistance to working parents is a "worthy endeavor," they're concerned with the costs and about adding more federal mandates for employers.

The National Partnership for Women & Families, responding to the proposal, voiced support for the Family and Medical Insurance Leave Act instead. That bill that would provide 12 weeks' paid leave for a variety of reasons. Wages would be replaced at 66 percent and would be funded through both employee and employer contributions.

And SHRM has its own proposal: a federal law that would allow employers to opt into a nationwide leave program and in turn receive permission to opt out of state and local requirements. If employers choose to opt into the federal program, SHRM says they would no longer be subject to state and local leave laws and could be exempt from emerging legislative initiatives like predictable scheduling. ✤

WORKPLACE ISSUES

With HR's help, employee network groups can improve retention

From the employer's perspective, employee network groups can boost engagement and retention—or they can create divisiveness. To ensure the former, employers need to be involved from the start.

By adopting a policy and welcoming network groups, businesses can encourage members to have positive effects in the workplace, according to Ray Friedman, a professor of management at Vanderbilt University's Owen Graduate School of Management. Friedman offered tips on policies and best practices during a recent presentation at the 2017 Employers Counsel Network (ECN) Conference in Nashville, Tennessee. Chelsea Petersen, editor of Washington Employment Law Letter, ia a member of ECN, a network of lawyers from all 50 states, Washington, D.C., and Canada who write BLR's state employment law newsletters.

One or many groups?

When adopting a network group policy, employers often wonder whether to sanction one all-encompassing "diversity group" or allow workers to create individual groups based on different identities.

The clear winner, according to Friedman's research, is smaller, individual groups. One of the things that determines a group's success—which he defines as helping employees to feel more comfortable and be more effective at work—is how strongly workers identify with the group. This applies regardless of whether a group is based on gender, religion, or ethnicity, for example. If

AGENCY ACTION

DOL establishes HIRE Vets Medallion Program. The U.S. Department of Labor (DOL) announced in May the HIRE Vets Medallion Program to recognize employers that recruit, retain, and employ veterans and offer charitable services in support of the veteran community. The DOL is establishing the program under the Honoring Investments in Recruiting and Employing American Military Veterans Act (HIRE Vets Act), which President Donald Trump signed into law on May 5. Criteria for the awards include the percentage of employees who are veterans, the percentage of veteran employees who are retained, the establishment of veterans' assistance and training programs, the employment of dedicated HR professionals for veterans, and income and tuition support for veterans.

Miscimarra takes helm of NLRB. President Trump has designated Philip A. Miscimarra chair of the National Labor Relations Board (NLRB). Miscimarra, a Republican, follows Democrat Mark G. Pearce in the chair role. Miscimarra went on the Board on August 7, 2013. Other current Board members are Pearce, whose term expires on August 27, 2018, and Lauren McFerran, a Democrat whose term expires on December 16, 2019. Two NLRB seats are vacant. Miscimarra's term expires December 16, 2017.

EEOC releases latest equal employment law digest. The latest *Digest of Equal Employment Opportunity Law,* a quarterly publication prepared by the Equal Employment Opportunity Commission's (EEOC) Office of Federal Operations, is available at www.eeoc.gov/federal/digest/vol_2_fy17.cfm. In addition to recent EEOC decisions and federal court cases of interest, the latest edition features a special article titled "Age Discrimination: An Overview of the Law and Recent Commission Decisions." The article discusses the analysis of age discrimination claims and recent case law, including U.S. Supreme Court and EEOC decisions. Among the points in the article is a statement that the Age Discrimination in Employment Act (ADEA) protects individuals at least 40 years old and "forbids discrimination with regard to any aspect of employment."

Agency focusing on dangers of miners working alone. The DOL's Mine Safety and Health Administration (MSHA) has launched an initiative to focus on the hazards miners may encounter when they work in areas away from others. The initiative is in response to the agency's announcement that in the first three months of 2017, five miners died in accidents that occurred when they were working alone on mine property. The initiative calls on MSHA inspectors and training specialists to engage miners and mine operators about the importance of accounting for all workers at all times. ✤

an individual doesn't strongly identify with the group's identity, neither the employee nor the employer will reap the potential benefits.

Encouraging membership and leadership

Some employers assume that network groups form because employees are dissatisfied at work, and they fear the groups will become confrontational. But that's not what Friedman's research has shown. Membership is driven by social identity and a desire for career enhancement, he determined. Groups provide mentoring and help employees feel included. They improve retention, and employees who participate have better "career optimism."

But for that to happen, an employer must signal that it views participation and leadership in network groups in a positive light. It's especially important to encourage management-level employees to join, Friedman said. Reduced turnover is linked to groups that have management in leadership positions. And "career optimism" is found when employees receive mentoring from group leaders.

Conversely, when a business reacts negatively to a network group, ambitious employees don't join, and the employer's assumptions create a self-fulfilling prophecy. "So a bit of this is under your control," Friedman said.

Benefits for employers

In addition to improved engagement and reduced turnover, network groups have other benefits for employers.

First, they can help a business achieve its affirmative action or diversity goals. It's not enough to hire minorities, Friedman said. The key is moving them up in the organization, and network groups can make that very simple. They allow workers to make high-level contacts and help management identify potential candidates.

Network groups also can serve as a mechanism for management to find out about problems in the workplace. But the company must be ready to respond to any concerns that members raise. According to Friedman, "If they're going to bring up issues, you'd better be able and willing to address them."

Employers also may find that employees in network groups end up with new skills that can be applied at work. Members often develop leadership skills and learn how to run meetings and give presentations.

Adopting a policy

When adopting a policy on employee network groups, an employer has several decisions to make, Friedman said. For example:

- Will you police the types of groups that form? Will you allow religious groups?
- If you do allow religious groups, will you require that they have a business purpose, such as professional development?

Will you require that they refrain from proselytizing? If so, how will you monitor that?

- Will you prohibit groups from participating in political, commercial, or religious activities or from opposing any of the other approved groups? And again, how will you police that?
- Will you maintain two separate group categories? (These could be "recognized organizations" that support diversity and receive company funding and "special interest organizations" for social, recreational, religious, or educational issues, which receive no funding.)

And don't be afraid to ask for more information when you receive a network group proposal, Friedman said. For example: Who are they? Why are they forming? What will they do? You may not be able to anticipate every request, but with a solid policy and some follow-up questions, you should be able to set your network groups up for success. ✤

SEX DISCRIMINATION

Use of past pay to set starting pay is 'factor other than sex'

by Nancy Williams

Many women, supported by the Equal Employment Opportunity Commission (EEOC), contend that employers perpetuate pay discrimination when they use a new hire's pay history to set starting pay. But when recently asked to consider the issue once again, the U.S. 9th Circuit Court of Appeals (whose rulings apply to all Washington employers) reaffirmed its earlier position that past pay history can be a "factor other than sex" that provides an exception to the requirements of the federal Equal Pay Act (EPA).

Female math specialist paid less than men

Aileen Rizo was hired as a math consultant for the Fresno County, California, schools. The job was classified as a management-level position for which the salary was automatically set under a schedule known as "Standard Operation Procedure 1440." The schedule consists of 12 levels, each of which contains progressive salary steps. New math consultants are hired at Level 1, at one of 10 steps ranging from $62,133 up to $81,461. The step level for new hires is set at the individual's last prior salary plus five percent.

Rizo had last been employed as a math teacher in Arizona, earning $50,630 per year, plus a $1,200 stipend in recognition of her master's degree. Even the addition of five percent to her former compensation left Rizo below the first step of the county's Level 1. So the county hired her at the minimum level—$62,133, plus a $600 stipend for her master's degree. It wasn't long before Rizo discovered that the other math consultants, all of whom were male, were making more money than she was.

When Rizo challenged her pay level, the county explained that all salaries had been set using Standard Operation Procedure 1440. Rather than accepting that explanation, Rizo sued

WORKPLACE TRENDS

Fudged time recording blamed for burnout. Many employees underreport the hours they work, a problem that many employers are unaware of and that is to blame for employee burnout, according to a study from Kimble Applications, a provider of professional services automation. In cases in which employees are working more than 40 hours a week, management is aware only about half the time, according to the "Billing and Burnout Report." Whether employees are told to underbill or are afraid of the consequences of working beyond their normal scope, the tactic leads to inaccurate projections for future projects. The study found that 19% of professionals think their management team lowballs the hours a new project will take to win a new client or project.

Study predicts automation will leave retail workers "stranded." A new analysis from investment adviser Cornerstone Capital Group finds that as many as 7.5 million retail jobs likely will be automated out of existence in the coming years, leaving a large portion of the retail workforce at risk of becoming "stranded workers." Retail cashiers are at highest risk for automation, and women hold 73% of those positions, according to the company. Some 16 million Americans are employed in retail, which represents 10% of the nation's working population and generates 6% of U.S. gross domestic product.

Glassdoor identifies most popular jobs for college grads. Jobs website Glassdoor has analyzed thousands of résumés to identify the most common jobs college students hold after graduating as well as which majors are most associated with them. Among the 20 most common jobs identified are sales associate (top majors: business, English, and political science), research assistant (top majors: electrical engineering, computer science and engineering, and mechanical engineering), teaching assistant (top majors: computer science and engineering, electrical engineering, and mechanical engineering), intern (top majors: psychology, finance, and economics), and administrative assistant (top majors: business, psychology, communications).

Survey finds small businesses the happiest places to work. A report from insurer Aflac finds that 84% of small-business employees are happy in their current job and that 48% agree that most, or all, of their happiness in their current job is actually because they work for a small business. The study says the perks many large companies offer are enticing, but working for a small business offers its own advantages that are often more important for career development. Factors such as seeing the fruits of their labor, feeling that their input matters, and being rewarded were all cited by respondents as the best parts of working for a small business. ✤

UNION ACTIVITY

UAW celebrates NLRB decision on Boston College. The United Auto Workers (UAW) union is hailing a May decision by the National Labor Relations Board (NLRB) that cleared the way for a union election for Boston College graduate students who work for the university as graduate assistants, research assistants, teaching fellows, and teaching assistants. The Boston College Graduate Employees Union—United Auto Workers filed a petition for a union election with the NLRB on March 3 after a two-year organizing campaign. A UAW statement said the Board rejected the university's arguments that its employees were exempt from the National Labor Relations Act (NLRA) because of the college's religious mission and recognized the similarity between the work of Boston College graduate employees and those at other private universities such as Columbia University, whose case restored rights for graduate employees to unionize in 2016.

Unions take aim at Trump budget. Union leaders are speaking out against the Trump administration's proposed federal budget for the 2018 fiscal year. AFL-CIO President Richard Trumka called the proposal "the most significant betrayal yet of the working people [President Donald Trump] claims to support." Mary Kay Henry, international president of the Service Employees International Union (SEIU), said the proposal would set working families back to pay for tax cuts for the rich and for corporations. Chris Shelton, president of the Communications Workers of America (CWA), called the proposal a "slap in the face" to the people who voted for President Trump based on his campaign promises. Lee Saunders, president of the American Federation of State, County and Municipal Employees (AFSCME), said the budget proposal hurts children and the elderly to provide "massive tax breaks to corporations and the wealthy."

Union leader calls for care in NAFTA renegotiation. Richard Trumka, president of the AFL-CIO, is decrying what he called mixed signals from President Trump's plan to renegotiate the North American Free Trade Agreement (NAFTA). Trumka said the plan "offers potential for progress, but a good outcome is far from guaranteed." He also said even though Trump has called NAFTA the worst trade deal in history, his administration has given conflicting signals, raising the prospect that some of NAFTA's most problematic elements could remain intact. "Working people have set a high standard for the deep reforms we are seeking in new trade deals and policies: We must elevate and effectively enforce workers' rights and environmental standards, eliminate excessive corporate privileges, prioritize good jobs and safeguard democracy. This is the standard we will use to judge any renegotiation," Trumka said. ✤

under the EPA because she was paid less than her male counterparts for the same work. Based on past 9th Circuit authority, the county asked the trial court to dismiss the case. Although troubled by the previous appellate ruling, the trial court held that a pay structure based exclusively on prior salary couldn't be a factor other than sex. But the trial court authorized an unusual midcase appeal.

Court says business purpose can justify pay

The 9th Circuit noted at the outset that to prove a violation of the EPA, an employee need show only that she is receiving different wages for equal work. Once a pay disparity is shown, the employer may defend itself with evidence that the difference is due to (1) a seniority system, (2) a merit system, (3) a system that measures earnings based on quantity or quality, or (4) a differential based "on any factor other than sex."

In a case decided some 35 years ago, the 9th Circuit concluded that an insurance company's use of pay history as one of the factors for setting starting pay amounted to a "factor other than sex." In that case, the employer claiming this exception was required to show that use of prior salary served a business policy. The trial court considering Rizo's claim had questioned whether the result would be the same when an employer used prior pay as the sole basis for a new employee's salary.

The 9th Circuit saw no distinction in the law based on whether prior pay was one of several factors or the sole factor in setting pay. Assuming otherwise equally qualified candidates, the result is the same either way. Thus, so long as an employer can show its approach serves a legitimate business purpose, it doesn't run afoul of the EPA.

In this case, the county offered four justifications for Standard Operation Procedure 1440. First, the policy is entirely objective. Second, by offering a five percent increase in pay, it encourages applicants to seek jobs with the county. Third, the policy prevents favoritism and ensures consistency. Finally, it is a judicious use of taxpayer dollars. According to the 9th Circuit, the trial court must evaluate the soundness of these justifications before deciding whether to permit Rizo to proceed with her EPA claim. *Rizo v. Yovino,* Case No. 16-15372 (9th Cir., Apr. 27, 2017).

Be careful when using past pay to set salary

Although the 9th Circuit reaffirmed the legitimacy of using past pay as a means for setting a new employee's starting pay, the key is the business purpose underlying that approach. It remains to be seen whether the county's justifications will be sufficient in this case. If you are using prior pay as a factor in setting the pay of a new hire, ask yourself why. The result will almost always be lower pay for women than for men in the same jobs. Is there a good reason? Be prepared for challenges, and be ready to explain the business purpose to avoid EPA liability.

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AGE DISCRIMINATION

9th Circuit rescues popular garbage man's claims from the trash

by Nancy Williams

When a waste company fired a long-serving and well-liked garbage truck driver, the community rallied to his support. The employer agreed to bring him back to work, but it then fired him again when he didn't provide a work authorization document within three days of rehire. A panel of the 9th Circuit recently found the employer's claimed reason for the discharge not to be legitimate and allowed the driver to proceed with claims of age discrimination and retaliation.

Worker fired after failing to show documentation

Homeowners in Manhattan Beach, California, loved Gilberto Santillan. He provided exemplary service in picking up their garbage for more than 30 years. In fact, his employer—USA Waste of California, Inc.—cited vocal community appreciation for Santillan when it sought a contract renewal with the city in 2011. Yet in December 2011, USA Waste fired Santillan, who was 53 years old at the time. The reason given was that Santillan had been involved in four accidents during a 12-month period, which Santillan denied.

A public outcry ensued. Homeowners wanted to keep their longtime garbage man. One said that Santillan "positively impacted every family on [the] street." Another introduced her sons to him because he "works hard, and has a beautiful spirit and attitude. . . . In terms of class and integrity and a radiant personality there is no one in the world who can hold a candle to Gilberto." One neighborhood child dressed up as Santillan—his "hero"—for Halloween. And, by the way, the homeowners didn't like the service they received from Santillan's replacement.

Santillan filed a grievance protesting his discharge. With the assistance of a lawyer, he reached a settlement and "last chance agreement" to return to work at USA Waste. Under the agreement, his return was conditioned on his passing the California Department of Transportation drug test and physical exam, a criminal background check, and "E-Verify." After Santillan passed the physical exam, drug test, and criminal background check, he was scheduled to come back to work in July 2012—subject to completion of an I-9 form and documentation of his eligibility to work in the United States.

Santillan reported to work with driver's license and Social Security card in hand. But USA Waste said that he also needed documentation of his work authorization number and its expiration date. Santillan brought in a letter showing an identification number, but the company said it had to have the expiration date to complete the E-Verify process. When he didn't come up with further documentation, USA Waste fired him again.

This time, Santillan sued. He claimed age discrimination and retaliation for having retained a lawyer to assist him in the grievance process—both grounds in violation of California public policy. The trial court gave short shrift to the claims, dismissing Santillan's case without a trial. Santillan appealed.

That's not a good enough reason for firing

The 9th Circuit first described the framework for presenting an age discrimination claim. Santillan had to show that he was over 40, was performing competently, and suffered an adverse employment action (e.g., being fired) plus some other circumstance suggesting a discriminatory reason. Once he supplied that evidence, USA Waste would be required to identify its legitimate reason for its action. Then Santillan would have an opportunity to attempt to undercut the proffered reason. The amount of evidence needed for a claimant to go forward is, according to the court, "very little."

On review, the 9th Circuit said the trial court had incorrectly ignored Santillan's evidence that he had been one of five "older, Spanish-speaking employees" who were fired or suspended after USA Waste brought in a new supervisor in 2009. (Although he couldn't recall the names of the others, the company identified two of them.) In addition, even though Santillan's replacement was over age 40 and had 11 years of experience, he was nonetheless some 13 years younger and far less experienced than Santillan. Unlike the trial court, the 9th Circuit concluded that was enough evidence of discriminatory motive to require USA Waste to put forward its explanation for the firing.

USA Waste's only explanation for firing Santillan was that under the grievance settlement and last chance agreement, he was required to provide proof of his legal right to work in the United States within three days of hire. His failure to do so was the reason for his dismissal. The company claimed this was a requirement of the Immigration Control and Reform Act of 1986 (IRCA). But hanging its hat on that defense proved to be the company's downfall.

First, the 9th Circuit pointed out that the IRCA has an exception to documentation requirements for a worker whose employment is continuing following reinstatement from a wrongful termination through a settlement agreement. The Act also provides an exemption for employees hired before 1986, as Santillan had been. Thus, contrary to the claims of USA Waste, the IRCA

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didn't mandate that Santillan provide proof of his employment eligibility.

The court also noted that the IRCA forbids employers from requiring more documentation of eligibility than the statute prescribes, as USA Waste appeared to do. The court concluded that "an employer's incorrect view of the law is not a legitimate reason for firing an employee." To allow otherwise would be a violation of California's public policy.

The 9th Circuit applied the same reasoning to Santillan's retaliation claim. It disagreed with the trial court's conclusion that Santillan's retention of an attorney to help negotiate his reinstatement was not protected by public policy. Santillan was exercising his legal right, and the mere closeness in time between retention of the attorney and his firing was enough to raise a question of improper retaliation. Then it was again up to USA Waste to provide its nonretaliatory reason. As with the age discrimination claim, the court found that the company's reason—Santillan's failure to provide documentation of employment eligibility—wasn't legitimate.

The court sent the case back to the trial court for further proceedings, inviting the trial court via a footnote to decide whether the case should be decided in Santillan's favor without a trial. *Santillan v. USA Waste of California, Inc.*, Case No. 15-55238 (9th Cir., Apr. 7, 2017).

Lesson: Know the ins and outs of IRCA requirements

This case makes a statement about the rights to be accorded to a longtime worker who may or may not have documents for lawful workforce participation in the United States. In this situation, there was compelling evidence of the worker's valuable contributions and broad community support for his continued employment. Whether he will be successful in proving discrimination and retaliation in the trial court is yet to be seen. The decision reminds us, however, of the importance of fully understanding the details of the IRCA and not requiring anything more of workers than the statute indicates. And if a worker has public opinion on his side, that's another reason to be sure you are making the right decision.

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