

The End of Individual Liability Under the Colorado Wage Act

By Timothy M. Kratz, Esq.

The Colorado Wage Claim Act (the “Wage Act” or “Act”),¹ provides that “employers” must immediately pay wages owed to employees on termination of their employment.² Both employers and wages are defined broadly under the Act. Employers include,

every person, firm, partnership, association, corporation, migratory field labor contractor or crew leader, receiver, or other officer of court in Colorado, and any agent or officer thereof, of the above mentioned classes, employing any person in Colorado.³

Wages include not just traditional salary compensation, but,

all amounts for labor or service performed by employees, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculating the same or whether the labor or service is performed under contract, subcontract, partnership, subpartnership, station plan, or other agreement for the performance of labor or service if the labor or service to be paid for is performed personally by the person demanding payment.⁴

Pursuant to this definition, wages have been interpreted to include employment-related benefits, vacation pay and bonuses.⁵

Under these broad definitions, employees in Colorado have had some success pursuing wage claims by naming individual directors or agents of the employer as defendants in the litigation.⁶ This approach is particularly useful for employees whose corporate employers lack the financial resources to pay the owed compensation.

On February 3, 2003, the Colorado Supreme Court dramatically changed the landscape for those former employees litigating claims under the Wage Act. In *Leonard v. McMorris*,⁷ the Court held that the Wage Act did not impose personal liability for unpaid wages or compensation on a corporation’s officers and agents. In so holding, the Court declined to follow two prior decisions from the Colorado Court of Appeals⁸ and imposed a significant limitation on employees seeking recovery under the Wage Act, particularly where their former employer is in financial distress.

The McMorris Case

The plaintiffs in *McMorris* were former employees of NationsWay, which was, at the time of the lawsuit, one of the largest privately held trucking companies in the United States. The defendants were corporate officers of NationsWay. In May of 1999, NationsWay filed for bankruptcy under Chapter 11 and terminated many of its employees. NationsWay did not pay wages and other compensation that became due after the bankruptcy filing, because the Bankruptcy Code’s automatic stay provision prevented it from paying its employees.⁹ As a

result of the Chapter 11 liquidation plan, the employees received approximately \$3 million in 2000 and \$350,000 in 2001. However, these distributions still left approximately \$12 million in unpaid wages, benefits and other compensation due to the employees.

A group of former employees filed suit in state court against individual officers of the corporation. The defendants removed the case to the United States District Court for the District of Colorado. The United States District Court then granted summary judgment in favor of the plaintiffs and found eight officers personally liable for unpaid wages and other compensation.¹⁰ Defendants appealed to the Tenth Circuit Court of Appeals, which certified questions of Colorado law to the Colorado Supreme Court because of the lack of controlling precedent.¹¹

The Colorado Supreme Court agreed to decide the following issues:

1) Whether officers of a corporation are individually liable for the wages of the corporation's former employees under the Colorado Wage Claim Act;

2) If so, whether all the corporation's officers are individually liable or only the officers who have been high ranking or active decision-makers;

3) If so, whether the Colorado Wage Claim Act imposes personal liability on officers when the corporation declares bankruptcy; and,

4) If so, whether the Colorado Wage Claim Act's "good faith legal justification" clause is a defense to the officer's personal liability to former employees under the Act when the corporation files for bankruptcy.

In a 4-3 decision, the Colorado Supreme Court held that the Wage Act does not impose personal liability on corporate officers or agents. The Court found that the statutory definition of "employer" was ambiguous and, looking beyond the plain language, concluded that the General Assembly did not intend to impose personal liability on corporate officers and agents for wages and other compensation owed to employees.

Ambiguous Definition

Looking at the actual language of the Wage Act, the Court found no words in the statute specifically imposing personal liability on agents or officers. In contrast, the Court noted, similar wage acts from other states, such as Illinois and Kansas, specifically provide that officers and agents may be personally liable for unpaid compensation to employees. The Court held that "[t]hese acts demonstrate how a legislature may choose to pierce the corporate veil and make some officers and agents personally liable in particular circumstances for payment of unpaid wages."¹²

The Court was particularly reluctant to attribute this same meaning to the Colorado provision because such an interpretation would alter the normal rules of corporate law. The Court explained as follows:

We should not attribute such intent to the General Assembly in the absence of plain or necessarily implied intent to change the pre-existing law through this definition. General principles of corporate law provide that officers and agents acting in their representative capacity for a corporation are not personally liable for those acts.¹³

Having determined that the specific language of the statute is ambiguous, the Court then turned to the legislative intent behind the Wage Act.

Legislative Intent

In determining the intent of the General Assembly, the Court turned to rules of statutory construction and examined the language, design, meaning, purpose and construct of the Act. First, the Court looked at the Act as a whole and found that it focuses on the liability of the “entity or person who created and maintained the employment relationship for payment of the wages”¹⁴ The Court reviewed several provisions of the Act and found that they all pertain to the contractual relationship between the employee and the employing entity. It then reasoned that the basic design of the Act was to ensure a mechanism for regular payment of wages and to make all unpaid wages due immediately upon an employee’s termination. The Court also noted again that no substantive provision in the Act contains words making officers and agents personally liable.

In addition, the Court also examined principles of Colorado corporate law and determined that the General Assembly did not intend to abrogate the traditional corporate shield by virtue of the Wage Act. The Court examined two important principles of law insulating corporate officers from individual liability when they are acting on behalf of the corporate entity. First, a corporation is a separate entity distinct from its officers, directors or investors. Second, under principles of agency law, a corporate officer acting in his or her representative capacity and within his or her actual authority generally is not personally liable for such representative acts unless acting on behalf of an undisclosed principal. Officers are acting for the corporation when they offer or terminate employment relationships and therefore should be shielded from personal liability arising out of those employment relationships. The Court again emphasized its reluctance to alter traditional principles of corporate law:

Requiring officers of a corporation to act as sureties for wage payment out of their personal assets in the event of business insolvency or bankruptcy would be a substantial deterrent to serving as an officer. This is not a liability that one normally anticipates in occupying such a position with a company, and the Wage Claim Act provides no clear notice that employee officers of a corporation incur such a legal obligation.¹⁵

The Court's Opinion

The Court concluded that the inclusion of “officer” and “agent” in the definition of employer has two functions. First, it makes the entity that has created the employment relationship and owes wages and other compensation under the Wage Act responsible for the actions of its agents and officers. Second, it relates to another provision of the Wage Act that imposes criminal liability on officers and agents for willful or intentional wrongful acts.¹⁶ Finally, the Court concluded that there was no evidence that the General Assembly had “specific intent” to change traditional Colorado corporate law, and without evidence of such intent, it would be inappropriate for the Court to make such a change.

Dissenting Opinion

Justice Mullarkey, joined by Justices Martinez and Bender, authored a strong dissent in which she argued first, that the plain and unambiguous language of the Wage Act holds all officers of a corporation personally liable for wages, regardless of whether the corporation has filed for bankruptcy. Second, the legislative intent of the Wage Act confirms that the General Assembly intended to hold all officers of a corporation personally liable for wages.

Examining the specific language of the statute, the dissent found that the explicit inclusion of officers in the statutory definition of “employer” clearly holds a corporate officer “personally liable for earned and unpaid wages.”¹⁷ Without such intent, “there would have been no purpose whatsoever for the General Assembly to specifically supercede the conventional meaning of ‘employer’ with the more expansive statutory definition of ‘employer’ encompassing officers.”¹⁸ With regard to legislative intent, the dissent points to the pro-labor political make-up of the General Assembly in 1959, when the more expansive definition of employer was added to the Act, and emphasizes that the General Assembly made no changes to the Act after the 1992 *Cusimano* case, where the Court of Appeals interpreted the plain language of the Act to hold corporate officers personally liable for unpaid wages.¹⁹

The Future of Individual Liability

For now, *McMorris* appears to preclude individual liability of corporate officers in Wage Act litigation. However, the Supreme Court’s opinion makes clear that the General Assembly could decide to impose such liability if it were to do so through clear and specific language. With recent corporate scandals fresh in the minds of many legislators, it will be interesting to see whether the General Assembly takes steps to create a specific provision encouraging greater individual responsibility for the acts of corporate entities.

Timothy M. Kratz is a shareholder and director of Pendleton, Friedberg, Wilson & Hennessey, P.C. His practice involves employment and commercial litigation, representing clients in a wide variety of employment matters including trade secret and non-compete disputes, Fair Labor Standards Act issues, harassment and discrimination claims, wage disputes and public

policy discharge claims. Mr. Kratz also advises clients on ways to avoid litigation through protective measures such as employment contracts, supervisor manuals and employee handbooks

Endnotes

-
- ¹ C.R.S. § 8-4-101 *et seq.* (2002).
 2. C.R.S. § 8-4-104(1)(a).
 3. C.R.S. § 8-4-101(6).
 4. C.R.S. § 8-4-101(9).
 5. *Hartman v. Freedman*, 591 P.2d 1318 (Colo. 1979); *Gray v. Empire Gas*, 679 P.2d 610 (Colo. App. 1984); *Rohr v. Ted Neiters Motor Co.*, 758 P.2d 186 (Colo. App. 1988).
 6. *Cusimano v. Metro Auto*, 860 P.2d 532, 534 (Colo. App. 1992).
 7. *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003).
 8. In *Cusimano*, the Colorado Court of Appeals held that “the Colorado Wage Claim Act imposes personal liability on at least high ranking corporate officers based solely on their status as officers.” 860 P.2d at 534. Ten years later, in *Major v. Chons Bros.*, 53 P.3d 781, 786-87 (Colo. App. 2002), the Court of Appeals held that personal liability may not attach to an agent of an employer simply because of his or her job title. However, the Court left open the possibility of personal liability, explaining that “the inquiry must focus on whether [the agent’s] status in [the corporation] was such that he had some authority or responsibility to affect [the corporation’s] wage payment policies.”
 9. 11 U.S.C. § 362(a) (2002).
 10. *Leonard v. McMorris*, 106 F. Supp. 2d 1098, 1120 (D. Colo. 2000).
 11. *Leonard v. McMorris*, 272 F.3d 1295 (10th Cir. 2001).
 12. *McMorris*, 63 P.3d at 327.
 13. *Id.*
 14. *Id.* at 329.
 15. *Id.* at 332.
 16. *See* 3 C.R.S. § 8-4-117 (2002).

17. *McMorris*, 63 P.3d at 336.

18. *Id.* at 334.

19. *Cusimano*, 860 P.2d at 534.