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Labor Law--Vacation Pay Liability after Termination of Employment

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Comments

LABOR LAW—VACATION PAY LIABILITY AFTER TERMINATION OF EMPLOYMENT

Introduction

In *Monterosso v. St. Louis Globe-Democrat Publishing Co.*,[1] former employees of the Globe-Democrat brought an action to recover vacation pay and severance pay allegedly due under a collective bargaining agreement, and for statutory penalties.[2] The preamble of the collective bargaining agreement declared that "all wages, vacation credits and severance pay credits shall be considered as an earned equity. . . ." The "Vacations" article of the agreement provided for a two week vacation each year at straight time pay and that:

> 6. If an employe is discharged for cause, or in any other manner severs his connection with the office prior to taking an earned vacation, such vacation pay shall be due and payable to him within one week from the date of such action. In the event of the death of an employe prior to taking an earned vacation, such vacation pay shall be due and payable to a beneficiary designated by him, or, if no beneficiary has been named, to his estate, within one week.

During the trial, plaintiff employees argued in part:

(1) Vacation pay is additional wages in fact, in law, and under the agreement. It constitutes deferred compensation for services already rendered, an "earned equity" which cannot be destroyed by termination of employment.

(2) The unpaid vacation pay constitutes "unpaid wages . . . then earned at the contract rate" within the meaning of the Missouri statute which imposes penalties for witholding wages due a discharged employee.[3]

The trial court rendered judgment for the plaintiffs for vacation pay plus interest, but denied their penalty claim.

On plaintiff's appeal, the judgment denying penalties was affirmed by the Missouri Supreme Court. Although vacation pay, under the contract, was an "earned equity" due and payable upon termination of employment, it did not constitute "unpaid wages" within the meaning of the Missouri statute. The employer, therefore, did not subject himself to penalty by withholding payment.

Before World War II, paid vacations for production workers were the exception rather than the rule.[4] Wartime wage controls and periodic economic reces-

1. 368 S.W.2d 481 (Mo. 1963), *cert. denied*, 375 U.S. 908 (1963). See also the companion cases preceding Monterosso at 368 S.W.2d 452, 481.
2. § 290.110, RSMo 1959; see *infra* note 30.
3. *Ibid.*
4. Wolk & Nix, *Paid Vacation Provisions in Collective Agreements*, 75 U.S. Month. Lab. Rev. 162 (1952).

sions since the war have forced labor to accept more paid vacations and other "fringe benefits" in lieu of hourly wage gains. Today, paid vacations are an integral part of our cultural complex.[5] Modern industrial management recognizes that employees are entitled to receive annual vacations with pay more as a matter of right than gratuity.[6] Practically every existing industrial agreement provides for employee vacations with pay. The emergence of these new vacation rights and obligations has given rise to a good deal of litigation concerning an employer's vacation pay liability after termination of employment. The purpose of this article is to discuss that liability and to question more specifically: (1) Do vacation rights and obligations established by a collective bargaining agreement survive the termination of employment?[7] (2) Is vacation pay protected by the various civil and penal statutes meant to preserve to the worker his wage earnings?

I. Survival of Vacation Rights

A. *Contractual Approach v. Conceptual Approach*

If the parties to a collective bargaining agreement expressly call for survival of vacation rights, as they did in the principal case, the court will give effect to their expressed intention. If, however, the parties do not mention survival, the question becomes one of contract construction.[8] The court, upon a reading of the entire agreement, must determine if they intended these rights and obligations to survive the termination of employment. In cases such as this, there is little uniformity of approach. Courts and arbitrators have reached surprisingly different results, although construing provisions and agreements which are nearly identical.[9]

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5. Daykin, *Vacation Rights Under Collective Bargaining Agreements*, 17 Arb. J. (n.s.) 34 (1962).

6. *But see* Fair Labor Standards Act of 1938 (Chandler Act) § 7(d) (2), as amended, 63 Stat. 913 (1949), 29 U.S.C. § 207(d) (2) (1958). Paid vacations are not required and, aside from trade agreements, rest entirely within the employer's discretion.

7. 54 Nw. U. L. Rev. 646 (1959) (termination of collective bargaining agreements).

8. Allen v. Globe-Democrat Publishing Co., 368 S.W.2d 460, 446 (Mo. 1963); *supra* note 1, at 487; *In re* Brooklyn Eagle, Inc., 32 Lab. Arb. 156, 167 (W. Wirtz 1959).

9. See cases collected, CCH Lab. L. Rep. § 59,510; Annot., 30 A.L.R.2d 351 (1953). There is also little uniformity with regard to survival of other kinds of earned fringe benefits:

Bonus: Croskey v. Kroger Co., 259 S.W.2d 408 (K.C. Mo. App. 1953) (bonus cannot be defeated by wrongful discharge); Annot., 81 A.L.R.2d 1066 (1962) (bonus and profit-sharing plans).

Seniority: Oddie v. Ross Gear & Tool Company, 305 F.2d 143 (6th Cir. 1962), *cert. denied*, 371 U.S. 941 (1962) (seniority rights do not survive plant movement); Zdanok v. Glidden Co., 185 F. Supp. 441 (S.D.N.Y. 1960), *rev'd*, 288 F.2d 99 (2d Cir. 1961), *aff'd on a jurisdictional question only*, 370 U.S. 530 (1962) (seniority rights survive plant movement); ACF Industries, Inc. v. Industrial Comm'n., 320 S.W.2d 484 (Mo. 1959) (forfeiture of seniority rights by failing to report for work after layoff); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532 (1962); Lowden, *Survival of Seniority Rights Under Collective Agreements: Zdanok v. Glidden Co.*, 48 Va. L. Rev. 291 (1962); 61 Colu. L. Rev. 1363 (1961), 110 U. Pa. L. Rev. 458 (1962),

Reasons for this lack of uniformity are at least two-fold. *First,* most courts and arbitrators transform the contractual question into a conceptual question of the inherent nature and purpose of vacation benefits. While purporting to determine if vacation benefits survive *under the contract,* the real thrust of most opinions concerns whether or not these benefits should survive *because of their inherent nature.*[10] *Second,* courts and arbitrators cannot agree upon the correct concept of vacation benefits to be followed. There are two differing judicial analyses: (i) "the refresher theory," and (ii) "the payment for past services rationale."[11]

B. *Controlling Conceptual Theories*

Under the "refresher theory," the purpose of the vacation with pay is to provide a short interlude of rest and relaxation to promote the employee's mental and physical well being, and refresh him for future service. Even if it is not a gratuity, these courts reason, a vacation is nevertheless to be regarded principally as a means of replenishing the energy of the worker in preparation for another period on the job. Consequently, if he is not returning to work, he is not entitled to recover vacation pay.[12] This analysis favors the employer by ending his vacation obligation upon termination of the employment.[13] However, courts which fol-

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13 W. RES. L. REV. 360 (1962) (seniority rights as vested contractual rights); Annot., 90 A.L.R.2d 975 (1963) (seniority rights).

Severance Pay: Irwin v. Globe-Democrat Publishing Co., 368 S.W.2d 452 (Mo. 1963) (dismissal pay upon termination); Ackerman v. Globe-Democrat Publishing Co., 368 S.W.2d 469 (Mo. 1963) (severance pay upon termination for limited reasons); Globe-Democrat Publishing Co. v. Industrial Comm'n., 301 S.W.2d 846 (St. L. Mo. App. 1957) (severance pay upon termination for any reason except misconduct); Annots., 40 A.L.R.2d 1044 (1955), 147 A.L.R. 151 (1943) (severance and dismissal pay).

Arbitration Provisions: Procter & Gamble Industrial Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962) (duty to arbitrate does not survive the contract); Posner v. Grunwald-Marx, Inc., 14 Cal. Rptr. 297, 363 P.2d 313 (Cal. 1961) (duty to arbitrate survives plant closing); Endicott Johnson Corp. v. Lane, 274 App. Div. 833, 80 N.Y.S.2d 639 (1948), *aff'd* 299 N.Y. 725, 87 N.E.2d 450 (1949), *cert. denied,* 338 U.S. 892 (1949) (duty to arbitrate survives contract).

Retirement Compensation: Weisner v. Electric Power Board, 48 Tenn. App. 178, 182-83, 344 S.W.2d 766, 768 (1961) (pension rights held part of employee's compensation for services rendered).

10. Clearly, one cannot completely disassociate the contractual question from the conceptual question, for common concepts and understandings as to the nature and purpose of "vacation," "vacation pay," and "wages" can be said to play a real part in the intent of parties who use these words in a written agreement. Nonetheless, courts do emphasize the conceptual aspect of the survival question.

11. *In re* Brooklyn Eagle, Inc., *supra* note 8, at 168.

12. Bondio v. Joseph Binder, Inc., 24 So. 2d 398 (La. Ct. App. 1946); See also, Butler v. United States, 101 Ct. Cl. 641 (1944); Linn v. Motor Supply, Ltd., 45 Hawaii 121, 364 P.2d 38 (1961); Wanhope v. Press Co., 256 App. Div. 433, 10 N.Y.S.2d 797, *aff'd* 281 N.Y. 607, 22 N.E. 2d 171 (1939); Illinois Powder Mfg. Co., 26 Lab. Arb. 37 (1956).

13. Bondio v. Joseph Binder, Inc., *supra* note 13, at 401 the court said: "The parties to the agreement in contracting for the allowance of vacations, did not intend that the stipulation should be considered as providing a cash bonus in lieu of vacation pay for those employees who might see fit to discontinue their employment prior to the time the employer fixed the dates which the vacations would be

low the "refresher theory" will not permit the employer to destroy the obligation of his own accord by discharging the employee without just cause. While a slightly larger number of courts and a few arbitrators still follow the "refresher theory," modern authority favors the "payment for past services rationale," which has been adopted by a substantially larger number of arbitrators and a strong and growing minority of the courts.[14]

Under the "payment for past services rationale," vacation pay is said to constitute additional wages which regularly accrue to the worker in accordance with the rate schedules outlined in the agreement.[15] Unless contract modifications are involved, therefore, vacation rights are fully earned and vested rights which exist after the plant closes, or the eligible employees die, retire, quit, or are discharged for cause. Such analysis favors the working man for it keeps his employer's vacation obligation alive.

C. *Conditions and Qualifications*

Vacation clauses usually specify certain qualification requirements which tend to promote the employer's interest in continuity of service (i.e. minimum qualification period and employment status on eligibility date). Where these express qualifications have not been met, that is, where the employee is not yet eligible under the contract to receive a vacation with pay at the time of discharge or severance, a related problem arises. Courts which follow the "payment for past services rationale" are faced with the dilemma of subjecting what they consider fully earned and vested rights to conditions which destroy them. They deal with their dilemma in several different ways.

Some of these courts talk of qualification requirements as strict conditions precedent or conditions subsequent and deny recovery. The employee must be "eligible" before he is entitled to receive his earned benefit upon severance, no matter what the reason for termination of employment may be. Fraud or unconscionable conduct on the part of the employer must be shown before the court will grant recovery to an ineligible employee.[16] The majority of the courts which espouse the "payment for past services rationale," however, follow a more liberal view and

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given." *But see* Sewell v. Sharp, 102 So. 2d 259 (La. Ct. App. 1958) where a recent Louisiana court stated: "In a contract of employment providing for a vacation with pay, such a stipulation is, in effect, a stipulation for additional wages; that is, that the benefits so provided constitute a portion of the benefits accruing to the employee in compensation for services rendered."

14. *In re* Brooklyn Eagle, Inc., *supra* note 8, at 168.

15. *In re* Wil-low Cafeterias, 111 F.2d 429 (2d Cir. 1940); General Tire & Rubber Co. v. Local No. 512, 191 F. Supp. 911 (D.R.I. 1961); Livestock Feeds v. Local Union No. 1643, 221 Miss. 492, 73 So. 2d 128 (1954); Kidde Mfg. Co. v. United Elec. Radio & M. Workers, 27 N.J. Super. 183, 99 A.2d 210 (1953); Textile Workers Union v. Paris Fabric Mills, Inc., 18 N.J. Super. 422, 87 A.2d 458 (1952), *aff'd* 22 N.J. Super. 381, 92 A.2d 40 (1952); Valeo v. J. I. Case Co., 119 N.W.2d 384 (Wis. 1963); Pattenge v. Wagner Iron Works, 275 Wis. 495, 82 N.W.2d 172 (1957); 56 C.J.S. *Master & Servant* § 96 (1948).

16. Division of Labor Law Enforcement v. Mayfair Mkts., 102 Cal. App. 2d Supp. 943, 227 P.2d 463 (1951); Treloar v. Steggeman, 333 Mich. 166, 52 N.W.2d 647 (1952); Pattenge v. Wagner Iron Works, 275 Wis. 495, 82 N.W.2d 172 (1957).

apply these express qualification requirements only to voluntary acts attributable to the employee, such as early abandonment of work or discharge for cause. Under this view, the employer cannot escape liability for earned vacation pay by early discharge or going out of business before the eligibility date, even if these actions are without fault on his part.[17] California has even permitted the "ineligible" employee to recover a pro-rata share of his vacation pay upon a theory of "substantial performance."[18]

The increasing willingness of the courts and arbitrators to avoid express qualification requirements, or call them mere promises of the employee, the breach of which does not discharge the employer's duty to pay vacation pay, is a measure of the growing strength of the "payment for past services rationale." These tribunals seem to say that justice demands a construction of the agreement which will protect the faultless worker's fully earned and vested right to vacation pay, even if we must construe away express conditions.

D. *In Missouri*

Missouri courts have not been called upon to construe the express qualification requirements of a vacation clause in connection with the survival question. But, Missouri generally denies recovery for part performance of a specific term employment contract,[19] unless the contract is severable.[20] And a vacation pay provision which requires a worker to be employed for a specific length of time to be eligible for a vacation with pay would seem to fit the pattern of a deferred payment, specific term employment contract which is entire and unseverable. This case law, coupled with the orthodox contract construction principles followed in *Monterosso*, indicates that Missouri, even if it adopted the "payment for past services rationale," would probably treat the expresss qualification requirements as strict conditions precedent, and deny recovery where the employee was not "eligible" under the contract to receive vacation pay.[21]

II. Statutory Protection of Vacation Rights

A. *In General*

The term "wages" as broadly and liberally construed today may include any and all types of compensation for services rendered.[22] By using this broad defini-

17. Livestock Feeds v. Local Union No. 1643, *supra* note 15, at 132; *In re* Brooklyn Citizen, 90 N.Y.S.2d 99, 105 (1949); Textile Workers Union of America v. Brookside Mills, 203 Tenn. 71, 309 S.W.2d 371 (1957).

18. Division of Labor Enforcement v. Ryan, 106 Cal. App. 2d 833, 236 P.2d 236 (1951); Posner v. Grunwald-Marx, Inc., 14 Cal. Rptr. 308, 363 P.2d 313 (1961).

19. Holding v. Kessinger, 191 S.W. 1077 (Spr. Mo. App. 1917); Paul v. Minneapolis Threshing Mach. Co., 87 Mo. App. 647 (K.C. Ct. App. 1901); Berry, *Quasi Contractual Recovery for Services Rendered Under a Broken Contract*, 2 Mo. Bull. L.S. 39 (1909). 56 C.J.S. *Master & Servant* § 83 (1948).

20. Maratta v. Chas. H. Heer Dry Goods Co., 190 Mo. App. 420, 177 S.W. 718 (Spr. Ct. App. 1915); Lindner v. Cape Brewery & Ice Co., 131 Mo. App. 680, 111 S.W. 600 (St. L. Ct. App. 1908).

21. 368 S.W.2d 481, 487.

22. *In re* Public Ledger, Inc., 161 F.2d 762 (3d Cir. 1947) (severance pay); Harrison v. Terminal R.R., 126 F.2d 421 (8th Cir. 1942) (tips); State v. Weatherby, 350 Mo. 741, 168 S.W.2d 1048 (1943) (attorney fee); Reddick v. Northern Ac-

tion of "wages," many courts have extended the protection of various *civil* wage exemption/priority statutes to vacation pay and other earned fringe benefits.[23] The ascendancy of the "payment for past services rationale" and the strong public welfare motives of these statutes (designed to protect the worker's means of subsistence from the claims of creditors) would seem to justify such extention.

Where, as in the principal case, the statute protects the worker's "wages" by exacting a *penalty* for withholding payment or making non-payment a *crime*, the courts have not adopted the broad definition of the term. Vacation pay generally does not constitute "wages" within the meaning of these statutes, for the reason that they are penal and must be strictly construed.[24] Thus, as the Illinois Appellate Court stated in a 1960 opinion:

> We are not persuaded that "vacation pay" should not be grouped with "fringe benefits" (as opposed to wage benefits) when this penal act is sought to be used for enforcement or payment. If the term "wages" is to be expanded to include bargaining agreement "vacation pay," it is a matter for legislative action.[25]

The failure to extend penal protection to vacation pay has been criticized on the ground that statutes which prescribe a penalty in order to promote public welfare (by protecting the wage earner) should not be given the strict construction generally accorded our penal laws.[26] Certainly, if vacation pay is to be treated as additional wages, there is no reason why it should not receive full statutory protection—civil and penal.

B. *In Missouri*

At the time of the *Monterosso* decision, the Missouri wage penalty statute was a legal nightmare for employers and corporation attorneys. The statute was so worded that a discharged employee could bring his action to recover a claimed unpaid wage within 60 days from the date of discharge and cause the daily penalty to continue to accrue all during the pendency of the litigation.[27] Employers have

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cident Co., 185 Mo. App. 277, 165 S.W. 354 (Spr. Ct. App. 1914) ("wages" not as broad as the word "income"); Koppen v. Union Iron & Foundry Co., 181 Mo. App. 72, 163 S.W. 560 (St. L. Ct. App. 1914) (salary); Bovard v. K.C. Ft. S. & M. Ry., 83 Mo. App. 498 (K.C. Ct. App. 1900) (compensation for services rendered); Ciarla v. Solvay Process Co., 184 App. Div. 629, 172 N.Y. Supp. 426 (1918) (bonus).

23. *In re* Public Ledger, Inc., *supra* note 22; *In re* Wil-low Cafeterias, Inc., *supra* note 15; *In re* Capital Service, Inc., 136 F Supp. 430 (S.D. Cal 1955); *In re* Munro-van Helmes Co., 30 CCH Lab. Cas. § 70, 141 (N.D. Ala. 1956) (vacation pay constitutes "wages due to workmen" within the meaning of the Chandler Act); 59 HARV. L. REV. 796 (1946); 32 MINN. L. REV. 294 (1948). See Annot., 3 L. Ed.2d 1845 (1959).

24. 368 S.W.2d 481, 488; People v. Vetri, 309 N.Y. 401, 131 N.E.2d 568 (1955) (New York wage penalty act held not to protect vacation pay).

25. Conlon-Moore Corp. v. Cummins, 28 Ill. App. 2d 372, 171 N.E.2d 676 (1960).

26. 22 BROOKLYN L. REV. 340 (1955); 7 SYRACUSE L. REV. 344 (1955).

27. § 290.220, RSMo 1959 (old statute) ". . . then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid; provided, such wages shall not continue more than sixty days, *unless an action therefor shall be commenced within that time.*" (Emphasis added.)

been assessed penalties as high as $5,690.38 for failure to pay on request a mere $59.45 wage claim.[28] The statute has been called "a drastic statutory penalty of doubtful constitutionality."[29] In all probability, the severity of the penalty imposed by the Missouri statute most accounts for the fact that our courts have always strictly limited its application to traditional hourly "wages."[30]

Strong professional criticism of the wage penalty statute and recommendations of The Missouri Bar Committee on Labor Law, led our legislature, in this last session, to amend the law so as to place a definite 60 day limit on the penalty.[31] It will be interesting to note if our courts will be inclined to extend the protection of this statute to earned fringe benefits, specifically vacation pay, now that the wage withholding penalty is more reasonable.

Conclusion

Missouri appellate courts have permitted recovery of vacation pay after termination of employment where the agreement expressly calls for survival of the benefit, but, to date, they have not been called upon to construe a vacation pay provision where survival is uncertain.[32] Just what concept of vacation rights Missouri courts will adopt when faced with this problem is not clear.

In the principal case, holding that unpaid vacation pay was not "unpaid wages . . . then earned at the contract rate" within the meaning of the wage penalty statute, the Missouri Supreme Court concluded that the parties themselves differentiated between vacation pay and wage pay. Wages and vacations, said the court, are dealt with in separate sections of the agreement and are treated as separate and distinct in the agreement preamble. Therefore, by implication, the parties excluded vacation pay from the definition of wages.[33] The court's argument in this regard is unconvincing, however, in view of the fact that nearly all collective bargaining agreements separate vacation pay and wage pay in this manner. Such treatment is the usual form for trade agreements. Courts which follow the "payment for past services rationale" would say that such separation does not

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28. Bruun v. Katz Drug Co., 173 S.W.2d 906 (Mo. 1943), 211 S.W.2d 918 (Mo. 1948), 221 S.W.2d 717 (Mo. 1949) (employer exposed to $26,000 penalty from $8.96 wage claim); McLaurin v. Frisella Moving & Storage Co., 355 S.W.2d 360 (St. L. Mo. App. 1962).

29. Stix, *Unlimited Wage Liability After Dismissal*, 19 J. Mo. Bar 244 (1963).

30. Durant v. Industrial Products Mfg. Co., 241 Mo. App. 266, 235 S.W.2d 574 (K.C. Ct. App. 1951); Quinn v. T. M. Saymen Products Co., 296 S.W. 198 (St. L. Mo. App. 1927).

31. § 290.110 RSMo 1963 Supp. The new statute is much the same as the old except that the italicized portion has been removed. See *supra* note 27.

32. 368 S.W.2d 481; Brandt v. Beebe, 332 S.W.2d 463 (K.C. Mo. App. 1960) (pro-rata recovery of vacation pay allowed under binding survival provision); see also, Vail v. Rumsey & Sikemeier Co., 137 Mo. App. 446, 119 S.W. 42 (St. L. Ct. App. 1909) (vacation pay increased with salary), and Birch v. Glasgow Savings Bank, 114 Mo. App. 711, 90 S.W. 746 (K.C. Ct. App. 1905) (clerk discharged while on vacation with pay entitled to recover salary up to day of discharge).

33. 368 S.W.2d 481, 488-89.

mean that the parties did not consider vacation pay "additional wages" or that they thereby meant to exclude it from the definition of "wages."[34]

The Missouri Supreme Court's distinction between vacation pay and wage pay along with the orthodox contract construction principles followed in *Monteroso* indicate that the court would probably find the conservative "refresher theory" more to its liking. Nonetheless, there is a marked trend toward the "payment for past services rationale" in recent arbitration awards and judicial decisions of other jurisdictions, and Missouri may be swept into this rising flood of precedent.

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34. See Brampton Woolen Co. v. Local Union 112, 95 N.H. 255, 61 A.2d 796 (1948) where the court said at 797: "We believe that ordinary men in the position of these individual defendants would have thought of vacation pay as part of their pay of wages and no reason appears why the same meaning should not have been equally plain to their employers. There can be little doubt that workers generally consider the money which comes to them as a result of overtime or vacation pay as a part of their wages and courts have recognized this fact. Nor is it controlling that vacation pay is under a separate article from that devoted to wages and that the word 'pay' rather than wages, is used. The agreement must be viewed as a whole. . . ."