COLORADO COURT OF APPEALS

DATE FILED: September 24, 2020
CASE NUMBER: 2018CA2455

Court of Appeals No. 18CA2455
City and County of Denver District Court No. 17CV34019
Honorable Martin F. Egelhoff, Judge

Blount, Inc.,

Plaintiff-Appellee,

v.

Colorado Department of Labor and Employment, Division of Labor Standards and Statistics,

Defendant-Appellant,

and

Cynthia Walter,

Defendant.

JUDGMENT AFFIRMED

Division A
Opinion by JUDGE TOW
Terry and Yun, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 24, 2020

Holland & Hart, LLP, Steven M. Gutierrez, Bradford J. Williams, Denver, Colorado, for Plaintiff-Appellee

Philip J. Weiser, Attorney General, John August Lizza, First Assistant Attorney General, Krista Maher, Senior Assistant Attorney General, Evan P. Brennan, Assistant Attorney General, Denver, Colorado, for Defendant-Appellant

No Appearance for Defendant

¶ 1 Colorado Department of Labor and Employment, Division of Labor Standards and Statistics (the Division) appeals the district court's judgment reversing the Division hearing officer's order that Blount, Inc. (Blount), pay Cynthia Walter earned vacation wages upon her separation from employment. We affirm, albeit on different grounds than those relied on by the district court.

I. Background

A. The Colorado Wage Claim Act

¶ 2 The Colorado Wage Claim Act (CWCA) governs the rights of employees and obligations of employers with respect to the payment of wages. §§ 8-4-101 to -123, C.R.S. 2019. "The purpose of the [CWCA] is to assure the timely payment of wages and to afford adequate judicial relief when wages are not paid. The [CWCA] is to be liberally construed to carry out that purpose." *Hartman v. Cmty. Responsibility Ctr., Inc.*, 87 P.3d 202, 207 (Colo. App. 2003). Under the CWCA, a terminated employee is entitled to "wages or compensation for labor or service earned, vested, determinable, and unpaid at the time of such discharge." § 8-4-109(1)(a), C.R.S. 2019 (the wages provision). Wages include "[v]acation pay earned in accordance with the terms of any agreement. If an employer

provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee." § 8-4-101(14)(a)(III), C.R.S. 2019 (the vacation pay provision).[1]

B. Blount's Vacation Policy

¶ 3 Blount's vacation policy states that "Blount provides paid vacation to its eligible Team Members for rest and recreation. Blount increases the amount of paid vacation offered to Team Members as recognition for service." Blount calculates vacation allowances at the beginning of each calendar year:

> The Vacation Allowance for each Team Member is determined on January 1st of each calendar year . . . . The Vacation Allowance for which a Team Member is eligible depends on the Team Member's length of employment and his or her status of either a full-time or part-time employee . . . . Any portion of a Team Member's Vacation Allowances that are not used by December 31 will roll over to the next calendar year . . . .

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[1] Effective December 15, 2019, the director of the Division has added Rule 2.15 to clarify section 8-4-101(14)(a)(III), C.R.S. 2019. Because the rule was not in effect at the time of the hearing officer's order, we do not apply it here.

> Vacation is not considered an entitlement or a right. . . . Unused Vacation Allowances are not paid to Team Members at any time, including upon termination of employment . . . unless otherwise required by state or local laws.

¶ 4 Under "Separation of Employment," Blount states that "unused vacation is not paid to the Team Member, unless otherwise required by law."

C. Walter's Employment

¶ 5 Blount employed Walter from 2013 to 2016. According to Walter's earnings statement submitted at the hearing, her hourly rate of pay was $15.7594. At the time Walter resigned, she had a total vacation allowance of 104 hours. She was not paid for her unused vacation time at the time she left the company and subsequently filed a complaint with the Division.

¶ 6 A compliance investigator agreed with Walter and determined that Blount owed Walter wages for her unused vacation time. Blount pursued an administrative appeal, and the Division hearing officer affirmed the initial determination.

¶ 7 Blount then sought judicial review of the hearing officer's order. *See* § 8-4-111.5(5), C.R.S. 2019 (a hearing officer's order constitutes a final agency action subject to judicial review). The

district court reversed the hearing officer's order, holding that Blount's policy allocated vacation time prospectively and therefore Walter had not "earned" her vacation time.

¶ 8 The Division now appeals the district court's judgment.

II. Standard of Review

¶ 9 Under the CWCA, judicial review of a hearing officer's decision is governed by section 24-4-106, C.R.S. 2019. § 8-4-111.5. "In an appeal from the district court's ruling in such a judicial review proceeding, we review the decision of the administrative body itself, not that of the court." *Citizens for Clean Air & Water v. Colo. Dep't of Pub. Health & Env't*, 181 P.3d 393, 396 (Colo. App. 2008) (citing *City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244 (Colo. 2004)). In reviewing the Division's actions, we stand in the same position as the district court. *See Haney v. Colo. Dep't of Revenue*, 2015 COA 125, ¶ 14. Thus, we review the agency action using the same standard of review employed by the district court. *Romero v. Colo. Dep't of Human Servs.*, 2018 COA 2, ¶ 25.

¶ 10 We must set aside an agency action that is

> (I) Arbitrary or capricious;
> (II) A denial of statutory right;

(III) Contrary to constitutional right, power, privilege, or immunity;
(IV) In excess of statutory jurisdiction, authority, purposes, or limitations;
(V) Not in accord with the procedures or procedural limitations of this article 4 or as otherwise required by law;
(VI) An abuse or clearly unwarranted exercise of discretion;
(VII) Based upon findings of fact that are clearly erroneous on the whole record;
(VIII) Unsupported by substantial evidence when the record is considered as a whole; or
(IX) Otherwise contrary to law, including failing to comply with section 24-4-104(3)(a) or 24-4-105(4)(b).

§ 24-4-106(7)(b). We review de novo the Division's interpretation of law. *Citizens for Clean Air & Water*, 181 P.3d at 396; *see also* § 24-4-106(7)(d) ("In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply the interpretation to the facts duly found or established."). Further, "we presume the validity and regularity of the administrative proceedings and resolve all reasonable doubts as to the correctness of the administrative ruling in favor of the agency." *Romero*, ¶ 25.

III. Analysis

A. Walter's Vacation Pay was Determinable

¶ 11 There is no dispute that Blount's vacation policy was in effect throughout Walter's employment and at the time of her separation from employment. Nor is there any dispute regarding Walter's rate of pay or vacation allowance. Therefore, Walter's vacation pay was "determinable."

B. Walter's Vacation Pay was Earned

¶ 12 The term "earned" is not defined in the Colorado Wage Act. "When a statute does not define a term, we assume that the General Assembly intended to give the term its usual and ordinary meaning." *Roup v. Commercial Research, LLC*, 2015 CO 38, ¶ 8. The commonly understood meaning of "earn" is "[t]o acquire by labor, service, or performance." Black's Law Dictionary 642 (11th ed. 2019).

¶ 13 The substance of Blount's policy provides employees with vacation pay in exchange for labor. Although Blount argues that there is a difference between earning vacation pay based on years of service *to be completed* in the upcoming calendar year and years of service *completed thus far*, we perceive this as nothing more than

semantics. After all, there is no functional difference between providing a given number of vacation hours to someone who will complete five years of employment during the present year and providing the same number of vacation hours to someone who completed four years of employment during the preceding year. Under Blount's policy, the amount of vacation an employee is allocated is established by the number of years the employee has worked for the company. In other words, the vacation policy provides vacation pay in exchange for labor rendered to Blount. Therefore, Walter "earned" vacation pay under the terms of the policies by working for Blount for three years.

C. Walter's Vacation Pay was not Vested

¶ 14 In addition to being earned and determinable, Blount argues that vacation pay must be vested before an employee is entitled to it upon separation from employment.

¶ 15 Walter contends we may not consider this contention because Blount did not raise this issue until the matter was before the district court. We note that Blount's argument rests on the Colorado Supreme Court's decision in *Hernandez v. Ray Domenico Farms, Inc.*, 2018 CO 15, which was not yet decided when the

administrative proceedings were completed and the hearing officer's order was issued. Because Blount did not have the benefit of the supreme court's subsequent clarification of the law, it cannot be expected to have made the argument now available to it. But it can rely on this decision nonetheless. *See, e.g.*, *Scott v. Scott*, 2018 COA 25, ¶ 21 ("Judicial decisions are generally applied retroactively." (citing *Erskine v. Beim*, 197 P.3d 225, 227 (Colo. App. 2008))).

¶ 16 As noted, the wages provision requires an employer to pay to an employee upon termination all wages that are "earned, vested, determinable, and unpaid." § 8-4-109(1)(a). But the vacation pay provision only refers to vacation benefits that are "earned and determinable" at the time of separation. § 8-4-101(14)(a)(III). Thus, it is not entirely clear from the statutory language whether vacation pay must be vested before a separating employee is entitled to it. In *Hernandez*, the supreme court clarified the interplay of these sections. The court quoted the wages provision, noting that "[t]his may include wages of the sort that are due and payable regularly throughout the time of employment and also some types of compensation — like vacation pay, § 8-4-101(14)(a)(III) — that are payable only at separation." *Hernandez*, ¶ 9. However, the court

also recognized that certain categories of wages, such as unused vacation time, "would not be available until separation because they *may* not become 'vested' . . . under the employment agreement until that time." *Id.* at ¶ 12 (emphasis added). Thus, after *Hernandez*, it is clear that before a separating employee is entitled to vacation pay, it must be not only earned and determinable, but also vested.

¶ 17 Here, Blount's policy explicitly provided that "Unused Vacation Allowances are not paid to Team Member at any time, including upon termination of employment." Therefore, under the terms of the policy, Walter's unused vacation pay never vested, even upon her separation from employment.

¶ 18 Because the vacation pay provided to Walter under the terms of Blount's policy was not vested upon her separation from employment, the Division's determination that Blount must pay Walter for her unused vacation time was contrary to law, and thus cannot stand. § 24-4-106(7)(b)(IX).

D. Right to Payment

¶ 19 Walter also contends that the CWCA creates a right to payment for earned vacation time upon separation from her employer, independent of the parties' agreement. We disagree.

¶ 20 The CWCA, which defines vacation pay as that "earned *in accordance with the terms of any agreement*," § 8-4-101(14)(a)(III) (emphasis added), does not create an independent right to compensation for unused vacation. Rather, the CWCA "establishes minimal requirements concerning when and how agreed compensation must be paid and provides remedies and penalties for an employer's noncompliance with those requirements." *Barnes v. Van Schaack Mortg.*, 787 P.2d 207, 210 (Colo. App. 1990). As a result, "the employee's substantive right to compensation and the conditions that must be satisfied to earn such compensation remain matters of negotiation and bargaining, and are determined by the parties' employment agreement, rather than by the statute." *Nieto v. Clark's Mkt., Inc.*, 2019 COA 98, ¶ 11 (*cert. granted* Apr. 20, 2020) (quoting *Barnes*, 787 P.2d at 210). Because the CWCA does not create a statutory right to payment for unused vacation time in the absence of a contractual obligation, Blount does not owe Walter for her unused vacation time independent of the parties' agreement.

¶ 21 As a result, the anti-waiver statute also does not apply. § 8-4-121, C.R.S. 2019 ("Any agreement, written or oral, by any employee purporting to waive or to modify such employee's rights in violation

of [the CWCA] shall be void."). If there is no right to non-vested vacation pay, it cannot be said that Walter was asked to waive any such right.

IV. Conclusion

¶ 22 The judgment is affirmed.

JUDGE TERRY and JUDGE YUN concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

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