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IN THE
COURT OF APPEALS OF INDIANA

Family Dental Care, P.C.,
Appellant-Defendant,

v.

Christine Mousa,
Appellee-Plaintiff.

December 30, 2021

Court of Appeals Case No.
21A-PL-670

Appeal from the Lake Superior
Court

The Honorable Calvin Delee
Hawkins, Judge

Trial Court Cause No.
45D02-1805-PL-68

Altice, Judge.

Case Summary

- [1] Family Dental Care, P.C. (Family Dental) breached its employment contract with Christine Mousa, DDS (Dr. Mousa) and, in bad faith, failed to pay her wages that were due of nearly \$23,000. The parties stipulated below that, prior to Family Dental's termination of the employment contract, Dr. Mousa had earned such wages. Following a bench trial, the trial court awarded Dr. Mousa

damages in the amount of \$94,465.82, which included unpaid wages plus prejudgment interest, other damages related to the premature termination of the contract, and liquidated damages. The trial court, however, denied Dr. Mousa's request for attorney fees.

[2] On appeal, Family Dental challenges only the award of \$45,995.24 in liquidated damages. Family Dental argues that Ind. Code § 22-2-5-2, which provides for statutory liquidated damages for an employer's bad faith failure to pay wages, was inapplicable because Dr. Mousa failed to submit her claim to the Indiana Department of Labor (the DOL) before filing suit. Dr. Mousa responds that exhaustion of administrative remedies here would have been futile because her claim for unpaid wages exceeded the \$6,000 threshold for processing by the DOL. Thus, Dr. Mousa contends that the trial court properly awarded statutory liquidated damages and, on cross appeal, argues that the trial court was required to also award attorney fees under I.C. § 22-2-5-2.

[3] We affirm in part, reverse in part, and remand.

Facts & Procedural History

[4] Family Dental, through its principal Chanbo Sim, DDS (Dr. Sim), hired Dr. Mousa as an employee in March 2018. The parties executed an employment agreement, which was drafted by Dr. Sim's wife and went into effect on March 5, 2018, Dr. Mousa's first day of work. Pursuant to the agreement, Dr. Mousa was to receive thirty percent of her net collections. The agreement also included a termination provision that required a thirty-day written notice.

[5] Dr. Sim soon began to believe Dr. Mousa was being overcompensated, so he presented her, on March 28, 2018, with three options that would each reduce her future compensation. Dr. Mousa rejected any proposed change to the terms of her employment and requested a thirty-day written notice if Family Dental intended to terminate the current employment contract. When Dr. Mousa arrived at work on Monday, April 2, 2018, she discovered that her schedule had been cleared of patients. Dr. Sim handed her a check for \$825.97, from which no employment taxes were withheld, and refused to provide the thirty-day notice of termination. Despite subsequent collections for dental services performed by Dr. Mousa, Family Dental did not forward any additional sums to Dr. Mousa.

[6] On May 16, 2018, Dr. Mousa filed a complaint against Family Dental and Dr. Sim for breach of contract, conversion, and violation of wage law. The parties later stipulated to the dismissal of Dr. Sim as a defendant and to the fact that, at a minimum, Family Dental owed Dr. Mousa \$22,997.62 in unpaid wages.¹ Additionally, the trial court granted partial summary judgment in favor of Family Dental on the conversion claim and in favor of Dr. Mousa on Family Dental's later-filed counterclaim for an alleged breach of the employment agreement's noncompete clause.

¹ Dr. Sim and his office manager acknowledged that they knew by about July 2018 that Dr. Mousa was owed this amount, yet payment was withheld because Dr. Mousa had filed the instant suit.

[7] A bench trial was held on March 3, 2021, solely on the issues of damages, as Family Dental acknowledged breaching the employment agreement. The parties stipulated to the majority of the facts and exhibits. Particularly relevant to this appeal, the parties stipulated that Dr. Mousa did not file a claim with the DOL prior to initiating this action. The stipulated exhibits also included information related to the DOL's online wage claim portal, which indicated that claims over \$6,000 could not be processed by the DOL and directed such a claimant to consult a private attorney.

[8] On March 18, 2021, the trial court issued its order, concluding that Family Dental acted in bad faith by its failure to pay the wages due and awarding damages as follows:

4. That Plaintiff is due and owed \$22,977.62^[2] with prejudgment interest accruing at the rate of 8 percent from July 23, 2020, specifically \$5,365.34.

5. That due to Defendant's breach of the contract's termination clause, Plaintiff is entitled to \$20,127.62.

6. That due to Defendant's bad faith, Plaintiff is entitled to liquidated damages in the sum of \$45,995.24.

² There appears to be a scrivener's error here, as the parties stipulated that the amount of wages due was \$22,997.62, which is \$20 more than the amount awarded.

7. That since the herein cause is a breach of contract case and since there was no provision in said contract for attorney fees, Plaintiff is not entitled to same.

Appellant's Appendix Vol. 2 at 18-19.

[9] Family Dental now appeals the liquidated damages award, and Dr. Mousa appeals the denial of attorney fees. Additional information will be provided below as needed.

Discussion & Decision

[10] Although the trial court's order does not reference any statute, it is apparent, and the parties agree, that the liquidated damages were awarded under I.C. § 22-2-5-2. This statute, commonly referred to as the Wage Payment Statute and part of the Wage Payment Act (WPA), provides:

Every such person, firm, corporation, limited liability company, or association who shall fail to make payment of wages to any such employee as provided in section 1 of this chapter shall be liable to the employee for the amount of unpaid wages, and the amount may be recovered in any court having jurisdiction of a suit to recover the amount due to the employee. The court shall order as costs in the case a reasonable fee for the plaintiff's attorney and court costs. *In addition, if the court in any such suit determines that the person, firm, corporation, limited liability company, or association that failed to pay the employee as provided in section 1 of this chapter was not acting in good faith, the court shall order, as liquidated damages for the failure to pay wages, that the employee be paid an amount equal to two (2) times the amount of wages due the employee.*

Id. (emphasis supplied).

[11] There are two ways to arrive at application of the Wage Payment Statute, and the appropriate method is determined by the claimant's status at the time of filing his or her claim. *See Hollis v. Def. Sec. Co.*, 941 N.E.2d 536, 540 (Ind. Ct. App. 2011) (holding that an employee's status at the time the claim is filed is the relevant inquiry in determining which statutory procedural framework applies), *trans. denied*. The WPA, I.C. Chap. 22-2-5, applies to wage claims asserted by "current employees [or] those who have voluntarily left employment, either permanently or temporarily." *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 705 (Ind. 2002). By contrast, the Wage Claims Act (WCA), I.C. Chap. 22-2-9, pertains to wage disputes involving "employees who have been separated from work by their employer and employees whose work has been suspended as a result of an industrial dispute." *Steele*, 766 N.E.2d at 705. The distinction is relevant because a claimant under the WPA may file directly with the trial court, while involuntarily separated employees proceeding under the WCA must first seek administrative relief by filing a wage claim with the DOL. *See id.*; *Reel v. Clarian Health Partners, Inc.*, 917 N.E.2d 714, 715 (Ind. Ct. App. 2009), *trans. denied*.

[12] Because Dr. Mousa was terminated by Family Dental, her wage claim, filed after her involuntary separation, clearly fell under the WCA, and her suggestion to the contrary is without merit. *See Hollis*, 941 N.E.2d at 540. Further, Dr. Mousa stipulated below that she failed to file a claim with the DOL prior to

filing her complaint with the trial court.³ Dr. Mousa argues, however, that her claim would have been automatically denied by the DOL because it exceeded \$6,000 and, thus, “exhausting her administrative remedies was not only futile, but administrative remedies were unavailable.” *Appellant’s Brief* at 5.

Accordingly, Dr. Mousa claims that she was entitled to take her wage claim straight to court and seek attorney fees and liquidated damages under the Wage Payment Statute. We cannot agree.

[13] I.C. § 22-2-9-4 governs the DOL’s responsibilities regarding wage claims filed under the WCA and provides:

(a) It shall be the duty of the commissioner of labor to enforce and to insure compliance with the provisions of this chapter, to investigate any violations of any of the provisions of this chapter, and to institute or cause to be instituted actions for penalties and forfeitures provided under this chapter. The commissioner of labor may hold hearings to satisfy himself as to the justice of any claim, and he shall cooperate with any employee in the enforcement of any claim against his employer in any case whenever, in his opinion, the claim is just and valid.

(b) The commissioner of labor may refer claims for wages under this chapter to the attorney general, and the attorney general may initiate civil actions on behalf of the claimant or may refer the claim to any attorney admitted to the practice of law in Indiana. The provisions of [the Wage Payment Statute] apply to civil

³ On appeal, Dr. Mousa indicates, throughout her brief, that the DOL denied her claim. This, however, misstates the record, as the parties expressly stipulated that no claim was filed with the DOL.

actions initiated under this subsection by the attorney general or his designee.

Subsection (b) above is the path for WCA claimants, like Dr. Mousa, to obtain liquidated damages and attorney fees under the Wage Payment Statute. We have explained, “the plain language of [this subsection] states that only ‘the attorney general or his designee’ may seek those damages. To become the ‘designee’ of the attorney general, a claimant – or more specifically his or her attorney – must obtain a letter of referral.” *Reel*, 917 N.E.2d at 719; *Lemon v. Wishard Health Servs.*, 902 N.E.2d 297, 300 (Ind. Ct. App. 2009), *trans. denied*. Here, Dr. Mousa did not pursue administrative remedies through the DOL, which could have resulted in referral of her claim to her private attorney. *See Lemon*, 902 N.E.2d at 300-01 (observing that a claimant under the WCA “*must* approach the DOL before [being] entitled to file a lawsuit in court” and “[t]he DOL is then entitled to investigate the claim and refer the claim to the Attorney General, who may either institute an action on the claimant’s behalf or refer the claim to an attorney”) (emphasis in original).

[14] The fact that Dr. Mousa’s claim exceeded \$6,000 does not negate the need for a letter of referral for her counsel to seek redress for her under the Wage Payment Statute. I.C. § 22-2-9-5⁴ of the WCA allows the DOL to prosecute wage claims

⁴ This statute provides for the assignment of claims and joinder of actions as follows:

(a) The commissioner of labor is hereby authorized to take assignments of wage claims of less than six thousand dollars (\$6,000), rights of action for penalties, mechanics and other liens of workers, without being bound by any of the technical rules with reference to the validity of such

less than \$6,000⁵ on its own by taking assignment of them from the claimants. *Reel*, 917 N.E.2d at 715. In this vein, the DOL does not permit a claimant to file a claim in excess of this amount on its online portal. Rather, the DOL expressly directs that such a claimant “may need to consult a private attorney.” *Appellee’s Appendix* at 10 (DOL’s online wage claim form). A private attorney, presumably aware of the statutory requirements, can then seek a referral letter.

[15] Stated another way, the limited authority granted by I.C. § 22-2-9-5 to the commissioner of the DOL to take assignment of wage claims under \$6,000 without referring them to the Attorney General “has no bearing on the claimants’ duty to first submit their claims to the DOL.” *Reel*, 917 N.E.2d at 721. We agree with the position consistently taken by the Indiana federal district courts rejecting claims of futility and holding that a claimant under the WCA seeking redress for unpaid wages greater than \$6,000 must still pursue administrative exhaustion before filing in court. *See West v. Liberty Life Assurance Co. of Bos.*, 2021 WL 1177072, at *3 (N.D. Ind. Mar. 26, 2021); *Tesler v. Miller/Howard Invs., Inc.*, 2017 WL 2840839, at *3 (S.D. Ind. 2017); *Grass v.*

assignments, and shall have power and authority to prosecute actions for the collection of such claims of persons who, in the judgment of the commissioner:

(1) are entitled to the services of the commissioner; and

(2) have claims which are valid and enforceable in the court.

(b) The commissioner shall have power to join various claimants in one (1) preferred claim or lien, and, in case of suit, to join them in one (1) cause of action.

⁵ Before 2007, this amount was \$800.

Damar Servs., Inc., 2014 WL 2773027, at *15 (S.D. Ind. 2014). As explained by the district court in *West*:

Indiana Code 22-2-9-5 does not dispense with the exhaustion requirement as Ms. West suggests, but rather specifies who is authorized to take assignment of a claim. The \$6,000 statutory limitation on the Commissioner does not render administrative exhaustion futile, because the Commissioner of Labor is not the only entity authorized to take assignment of a wage claim. In addition to the Commissioner taking assignment of such claims, Indiana Code 22-2-9-4(b) allows that “the commissioner of labor may refer claims for wages under this chapter to the attorney general, and the attorney general may initiate civil actions on behalf of the claimant or may refer the claim to any attorney admitted to the practice of law in Indiana.”

2021 WL 1177072, at *3.

[16] We share the dissent’s concern regarding the imprecise language used by the DOL on its online wage claim form, which indicates that the DOL cannot accept or process claims in excess of \$6000. This is misleading to a lay person, and the DOL should clarify that while it is not permitted by law to take assignment of such claims for administrative resolution, it can still investigate and refer the claims to the attorney general for initiation of civil action by the attorney general or a private attorney designated by the attorney general. Regardless, however, the statutory language is clear – in the context of the WCA, only the attorney general or the designee of the attorney general may proceed under the Wage Payment Statute.

[17] In sum, we find Dr. Mousa’s futility argument unavailing. Liquidated damages and attorney fees under the Wage Payment Statute were not available to her because she bypassed the DOL, resulting in her attorney never being designated by the Attorney General to seek such relief. Thus, we conclude that the trial court erred in awarding liquidated damages to Dr. Mousa but that it properly denied her request for attorney fees. On remand, the trial court is directed to reduce the damages award accordingly.

[18] Judgment affirmed in part, reversed in part, and remanded.

Mathias, J., concurs.

Bailey, J., dissents with opinion.

I N T H E
C O U R T O F A P P E A L S O F I N D I A N A

Family Dental Care, P.C.,
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v.

Christine Mousa,
Appellee-Plaintiff.

Court of Appeals Case No.
21A-PL-670

Bailey, Judge, dissenting.

[19] I agree with the majority opinion, as far as it goes. That is, it is clear that the Wage Claims Act (“WCA”)⁶ applies to Mousa’s wage claim because she was involuntarily separated from her employment. *See, e.g., Walczak v. Labor Works-Ft. Wayne LLC*, 983 N.E.2d 1146, 1149 (Ind. 2013). It is also clear that the WCA requires that claimants exhaust their administrative remedies by filing their claims with the Indiana Department of Labor (“the DOL”) before filing a lawsuit seeking payment of their claims. *Id.*; Ind. Code § 22-2-9-4; *see also* 610 Ind. Admin. Code 6-2-2 (regarding initiation of an investigation). However, as a matter of equity, I would affirm the trial court’s order awarding Mousa liquidated damages because it would have been futile for her to seek an

⁶ Ind. Code §§ 22-2-9-0.1 through 8.

administrative remedy, as shown by the uncontested fact that the DOL refuses to even accept for processing any wage claim over \$6,000.00. And, for the same reason, I would reverse the trial court's denial of Mousa's attorney fees and costs.

[20] The WCA very clearly mandates that the DOL investigate the wage claims of former employees such as Mousa who have been involuntarily terminated from their employment and act on such claims or cause action to be taken on the claims by the attorney general ("AG") or a private lawyer designated by the AG. I.C. § 22-2-9-4(a) ("It *shall be the duty* of the commissioner of labor to enforce and to insure compliance with the provisions of this chapter, *to investigate any violations ...*, and to *institute or cause to be instituted* actions for penalties and forfeitures provided under this chapter.") (emphases added); *see also*, 610 I.A.C. 6-2-3 (noting the DOL "shall conduct an investigation" of properly filed claims). And, unlike the following subsection, i.e., Indiana Code Section 22-2-9-5, subsection 4 is not limited to claims that are more than \$30 and less than \$6,000. Thus, while the WCA merely "authorize[s]" the DOL to prosecute actions for wage claims less than \$6,000, the law requires the DOL to investigate and ensure prosecution of all wage claims under the Act, no matter the amount of the claim. *See Walczak*, 983 N.E.2d at 1149 (noting subsection 4 of the WCA "impose[s] a duty" upon the DOL to investigate and institute, or cause to be instituted, enforcement actions, while subsection 5 "also authorize[s]" the DOL itself to prosecute actions for claims more than \$30 but less than \$6,000).

[21] Despite the clear mandate of the WCA, the undisputed facts of this case disclose that the DOL refuses to even process⁷ any wage claim greater than \$6,000. *See* Appellant’s App. at 57-58 (“Stipulations and Agreed Exhibits); Ex. L at 50 (DOL’s online wage claim form, stating “The Indiana Department of Labor **cannot** accept claims less than \$30 or more than \$6000”) (emphasis original); Ex. M at 53-54 (DOL’s online wage claim information, stating “Denial of Claim; This claim will not be processed if: ... The gross amount of your claim is less than \$30 or more than \$6,000”). Therefore, it is apparent that the DOL would not have accepted Mousa’s wage claim greater than \$6,000—not even to “process” it—had she attempted to submit it to the DOL. In short, the DOL appears to violate state law by refusing to enforce and ensure compliance with the WCA, investigate alleged violations regardless of the amount claimed, and “institute or cause to be instituted” actions to enforce compliance, all as mandated by Indiana Code Section 22-2-9-4.

[22] Generally, a “trial court has full discretion to fashion equitable remedies that are complete and fair to all parties involved[,] and equity has power, where necessary, to pierce rigid statutory rules to prevent injustice.” *In re 2014 Johnson Cnty. Tax Sale*, 48 N.E.3d 340, 346 (Ind. Ct. App. 2015) (quotations and citation omitted); *see also, e.g., G&N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 243 (Ind.

⁷ Thus, it is not clear how the majority believes Mousa could have obtained from the DOL “direct[ion] to consult with a private attorney” about her claim when she was not permitted to even file her claim with the DOL for processing in the first place. Slip Op. at _____. The fact of the DOL’s refusal to even process wage claims greater than \$6,000 was not addressed in *Reel v. Clarian Health Partners, Inc.*, 917 N.E.2d 714 (Ind. Ct. App. 2020), *trans. denied*, cited by the majority.

2001) (same); *Gary Cmty. Sch. Corp. v. Serv. Emp. Int'l*, 839 N.E.2d 1195-96 (Ind. Ct. App. 2005) (noting a trial court has broad discretion in framing its decrees so that the relief conforms to the circumstances of each particular case, so long as the relief is based on the issues raised), *trans. denied*. Moreover, we do not require the exhaustion of administrative remedies “where it would be futile.” *Lythgoe v. Summers*, 626 N.E.2d 564, 567 (Ind. Ct. App. 1993), *trans. denied*. To prevail on a claim of futility, “one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances.” *Shoemaker v. Ind. State Police Dept.*, 62 N.E.3d 1242, 1246 (Ind. Ct. App. 2016) (quotation and citation omitted), *trans. denied*. “In other words, the exhaustion requirement will be relaxed when there is grave doubt as to the availability of the administrative remedy.” *Id.*

[23] Here, the DOL made it plain in its application process that it would have been impossible for Mousa to file her wage claim with the agency, as the DOL only accepts for processing those claims that are for more than \$30 or less than \$6,000. Because Mousa’s wage claim exceeded \$6,000, the administrative remedy was clearly unavailable to her. It would be unjust to deny Mousa relief when no remedy other than a lawsuit was available to her.

[24] Thus, the trial court did not err in granting Mousa equitable relief in the form of liquidated damages; but it did err in refusing Mousa’s request for attorney fees and costs. Indiana Code Section 22-2-5-2 provides that the court “shall order”

liquidated damages where the employer did not act in good faith⁸ and “shall order” reasonable attorney fees and costs in successful wage claims. And Indiana Code Section 22-2-9-4(b) states that Chapter 5, Section 2 of the Wage Payment Statute applies to claims for wages initiated by the AG or his designee under the WCA. Of course, here, neither the AG nor a private lawyer designated by the AG could initiate a lawsuit on Mousa’s behalf because the DOL refuses to process, investigate, and refer to the AG any claim such as Mousa’s that exceeds \$6,000. Again, Mousa should not suffer a loss of her claims simply because the DOL fails to comply with the law. Therefore, I would reverse the trial court decision regarding attorney fees and costs.⁹

[25] I respectfully dissent.

⁸ The trial court found Family Dental did not act in good faith and so correctly ordered it to pay liquidated damages.

⁹ “[A]ttorney fees and costs” includes appellate attorney fees. *R.L. Turner Corp. v. Wressell*, 44 N.E.3d 26, 41 (Ind. Ct. App. 2015) (citing *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 706 (Ind.2002)), *trans. denied*.