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No. 93056-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
IN

MICHAEL ALLEN,

Appellant,

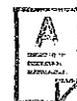
v.

ZECHARIAH CLIFTON DAMERON IV and DANIEL STANDEN,

Respondents.

ANSWER BRIEF OF APPELLANT MICHAEL ALLEN
TO BRIEF OF *AMICUS CURIAE* WASHINGTON
EMPLOYMENT LAWYERS ASSOCIATION

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ORIGINAL

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I. INTRODUCTION

The amicus brief filed by the Washington Employment Lawyers Association (“WELA”) shows the importance of the Court’s decision in this case for all the workers of Washington. A ruling contrary to the arguments that WELA advances would allow the individuals who control the financial decisions of an employer to use the corporate bankruptcy process as an escape hatch for their own personal liability under RCW 49.52. This Court should reaffirm the principles it established in *Morgan v. Kingen*, 166 Wn.2d 526, 210 P.3d 995 (2009), and answer the certified questions to make clear that defendants Zechariah Clifton Dameron IV and Daniel Standen are individually liable for all of the wages that plaintiff Michael Allen earned as a result of his employment with AIS Inc.

II. WELA CORRECTLY ARGUES THAT BECAUSE ALLEN EARNED ALL OF THE WAGES AT ISSUE BEFORE DEFENDANTS DIRECTED AIS INC. TO FILE CHAPTER 7 BANKRUPTCY, DEFENDANTS ARE INDIVIDUALLY LIABLE FOR THE WAGES.

WELA accurately frames the primary issue before the Court as follows: “[W]hether Dameron and Standen may escape personal liability for Allen’s unpaid wages because the wages did not become due until after AIS filed for bankruptcy.” WELA Br. at 12. As WELA states, *Morgan* directly rejects the argument that an individual defendant can defeat a claim for willful withholding of wages under RCW 49.52 by asserting he

lacked control over employee wages on the pay day for the wages because of the employer's Chapter 7 bankruptcy. *Id.* at 14. "The district court's conclusion that Dameron and Standen did not have control over payment of wages required by *Ellerman* [*v. Centerpoint Prepress Inc.*, 143 Wn.2d 514, 519, 22 P.3d 795 (2001)] is tantamount to the adoption of the dissent in *Morgan*." WELA Br. at 14.

Morgan holds that, for the purpose of deciding individual liability under RCW 49.52 for willful withholding of wages, the date when an employer's obligation to pay wages to its workers accrues does not depend on the wage pay day. Instead, the determinative factor is whether the workers earned the wages while the corporate officers controlled the financial decisions of the company. WELA correctly reasons that Allen earned all three categories of wages at issue in this case—unpaid salary, accrued vacation benefits, and his severance payment—before defendants Standen and Dameron directed that AIS Inc. file for Chapter 7 bankruptcy protection. WELA Br. at 14.

"*Morgan* unambiguously establishes that individuals who control [the] payment of wages are liable for salary earned before a company files for bankruptcy. . . . There is no basis for distinguishing the salary owed to Allen for work performed prior the chapter 7 filing from salary owed to the unpaid employees in *Morgan*." *Id.* at 15.

As WELA also asserts, there is no basis for distinguishing the vacation pay that AIS Inc. owed to Allen. “[V]acation pay is simply an alternate form of wages, earned at the time of other wages, but whose receipt is delayed.” *Local No. 186, United Packing House Food & Allied Workers v. Armour & Co.*, 446 F.2d 610, 612 (6th Cir. 1971). Washington law is in accord. *See Walters v. Center Electric, Inc.*, 8 Wn. App. 322, 326-27, 506 P.2d 883 (1973); *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 285, 202 P.3d 1009 (2009).

WELA also correctly argues that Washington law has long recognized that employees earn contractual severance pay when they perform the work specified in their employment agreements. WELA Br. at 17-18 (citing *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 633, 700 P.2d 338 (1985)), Severance pay is just as much “remuneration for services rendered *during the period* covered by the [employment] agreement,” *Barrett*, 40 Wn. App. at 633 (emphasis supplied), as salary or vacation pay. It is for that very reason that severance pay constitutes compensation due by reason of employment and wages under RCW 49.52. *Dice v. City of Montesano*, 131 Wn. App. 675, 689, 128 P.3d 1253 (2006). Because Allen earned his severance pay before defendants directed AIS Inc. to file Chapter 7 bankruptcy, *Morgan* holds them personally liable for it.

As WELA suggests, any other rule would effectively allow the officers and managing agents of an insolvent employer to decide their own personal liability for the compensation the company has promised to pay its workers. WELA Br. at 18-19. Dameron and Standen decided when to file AIS Inc.'s Chapter 7 petition. They knew filing the bankruptcy petition would terminate both Allen's employment and their roles as the de facto officers of the corporation. They chose not to pay the known wage obligations of Allen (and dozens of other AIS Inc. employees) including payments due at termination. As *Morgan* holds, the happenstance of the pay days for such known employer wage obligations has no bearing on individual liability under RCW 49.52. WELA Br. at 19.

III. SHOULD THE COURT EVEN REACH WHETHER A CORPORATE DIRECTOR CAN BE INDIVIDUALLY LIABLE UNDER RCW 49.52, THE COURT SHOULD FOLLOW WELA'S ANALYSIS.

WELA notes that the district court not only presumed in its certified questions that Dameron and Standen were officers, vice-principals, or agents of AIS Inc. but also, in a companion case, expressly found that defendants were individually liable under RCW 49.52. WELA Br. at 5, 12. Allen agrees with WELA that "[i]f it considers the issue, the Court should find that Dameron and Standen are within the class of individuals who may be personally liable for failure to pay wages."

WELA Br. at 6. A contrary ruling would allow those who control the financial decisions of a corporate employer, including the payment of wages, to absolve themselves of individual liability simply by giving themselves the title of “director.” See WELA Br. at 12.

Allen further agrees that “Washington courts have applied a functional test to determine whether a person may be held liable under RCW 49.52.070.” WELA Br. at 9. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998), *Ellerman, Morgan, and Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 336 P.3d 1112 (2014), all establish that individuals face personal liability under RCW 49.52 “if those individuals exercise control over the employer’s funds and still fail to pay their employees.” WELA Br. at 9 (quoting *Failla*, 181 Wn.2d at 656). The law recognizes that directors may, and frequently do, function as the agents of the corporate entity they direct. WELA Br. at 10-11 (quoting Restatement (Second) of Agency § 14C, cmt. b). Acceptance of defendants’ argument that they are outside the scope of RCW 49.52 because they had the title of “director” rather than “officer” “would undermine the very purpose of RCW 49.52.070.” WELA Br. at 11.

IV. CONCLUSION

This Court should adopt in all respects the analysis of RCW 49.52 set forth in WELA’s amicus brief.

RESPECTFULLY SUBMITTED this 29th day of September 2016.

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I hereby certify that on September 29, 2016, I emailed a copy of
Answer Brief of Appellant Michael Allen to Brief of *Amicus Curiae*

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I hereby declare under the penalty of perjury of the laws of the
State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on this 29th day of September
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Please file the attached Answer Brief of Appellant Michael Allen to Brief of *Amicus Curiae* Washington Employment Lawyers Association.

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