

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

JOHN GALLENTINE,	)	Case Number CI 07-4892
	)	
Plaintiff,	)	
	)	
v.	)	
	)	<b>ORDER</b>
B & R STORES, INC.,	)	
	)	
Defendant.	)	

The defendant, B&R Stores, Inc. (B&R Stores), appeals from a decision of the Lancaster County Court finding that the paid time off (PTO) policy of B&R Stores constitutes earned but unused vacation time that is due and payable to an employee as wages upon termination from employment. As a result of its determination, the county court entered judgment in favor of the plaintiff, John Gallentine (Gallentine), and against B&R Stores in the amount of \$956.23, \$765 in unpaid wages and \$191.25 in attorney's fees, plus post-judgment interest and court costs.

**FACTS**

The facts have been stipulated to as follows:

B&R Stores hired Gallentine as a meat cutter at its 70th and Van Dorn Streets store on July 22, 2004. On July 1, 2006, Gallentine was promoted to Meat Department Manager. As Meat Department Manager, Gallentine was earning \$765.00 per week.

On April 11, 2007, Gallentine met with B&R Stores' Meat Department Director. During that meeting, Gallentine was advised of several problem areas in his meat department. More specifically, Gallentine was provided with a "Decision Day" document. Generally

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speaking, the "Decision Day" document provided Gallentine with the option of either resigning or agreeing to make improvements in his performance. Gallentine initially selected the second option, signing the "Decision Day" document and agreeing to the improvements outlined in the document. When the "Decision Day" document was presented to Gallentine, he was not informed that any resignation needed to include any advance notification.

On April 12, 2007, Gallentine entered the office of the store manager at the 70th and Van Dorn Streets store and informed the assistant store director that he was resigning, effective immediately. At the time of his resignation, Gallentine had accrued 45 hours of paid time off (PTO) equaling \$765.00.

On January 26, 2005, Gallentine signed a "Disclaimer & Acknowledg[ment]"<sup>1</sup> acknowledging that he had read B&R Stores' "Russ's Market Associate Manual" (the Associates' manual). With respect to PTO, the Associates' manual provides, in part, that

[u]pon termination, associates will be paid for up to a maximum of four weeks (160 hours) of accrued and unused paid time off of their last paycheck. However, *no accrued and unused paid time off will be paid to any associate who (1) fails to give two weeks['] notice upon resignation; (2) is involuntarily terminated; or (3) has less than the required amount of continuous service as described in the policy.*

(Emphasis added.) Gallentine believed that he did not have to give two weeks' notice, since the Associates' manual also provides that "[e]mployment is terminable at will so that both Russ's Market and its associates remain free to choose to end their work relationship at any time." B&R Stores refused to pay Gallentine for his 45 hours of accrued PTO when he resigned, because he failed to give two weeks' notice.

Gallentine filed suit in small claims court, which was removed to the county court. As previously noted, the county court found that the B&R Stores' PTO policy constitutes earned but unused vacation time that is due and payable to an employee as wages upon

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<sup>1</sup> The parties' stipulation is that the Disclaimer & Acknowledgment was signed on July 26, 2005; however, the actual document shows that it was signed by Gallentine on January 26, 2005.

termination from employment, regardless of whether the employee does or does not give notice prior to his or her resignation. As a result of its determination, the county court entered judgment in favor of Gallentine and against B&R Stores in the amount of \$956.23, \$765 in unpaid wages and \$191.25 in attorney's fees, plus post-judgment interest and court costs. This appeal followed.

#### STANDARD OF REVIEW

On addressing the standard of review of a judgment rendered in a bench trial of a law issue, the Nebraska Supreme Court has stated:

'On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the "case for error appearing on the record made in the county court." [Citation omitted.] A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.' [Citation omitted.]

As appellate courts, reviewing a judgment in a bench trial of a law action in the county court, the Supreme Court and a district court do not reweigh evidence, but consider the judgment in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

[Citation omitted.] See, also, Neb. Rev. Stat. § 25-2733(1) [(Cum. Supp. 2006)]: 'In all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county court . . .'<sup>2</sup>

#### DISCUSSION

This case involves the Nebraska Wage Payment and Collection Act (the Act).<sup>3</sup> Under the Act in effect at the time of Gallentine's resignation<sup>4</sup>, "[w]henver an employer . . . separates an employee from the payroll, the unpaid wages shall become due on the next

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<sup>2</sup> *Dammann v. Litty*, 234 Neb. 664, 670, 452 N.W.2d 522, 526-27 (1990).

<sup>3</sup> NEB. REV. STAT. §§ 48-1228 through -1232 (Reissue 2004, as amended).

<sup>4</sup> The Act was amended by legislation (LB 255) that became effective April 3, 2007, prior to Gallentine submitting his resignation to B&R Stores. As a result, the amendments apply to the facts of this case.

regular payday or within two weeks of the date of termination, whichever is sooner . . .”<sup>5</sup>

Insofar as relevant, the Act defines wages as follows:

Wages means compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis. Paid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee . . . have specifically agreed otherwise. . . .<sup>6</sup>

“Fringe benefits” is defined to include “sick and vacation leave plans . . . and any other employee benefit plans or benefit programs . . .”<sup>7</sup>

The court finds that PTO, or paid time off, which is clearly a fringe benefit since it is an employee benefit, constitutes wages under the Act. That determination, however, does not end the court’s inquiry. Even though found to be wages under the Act, unless it is found to be unused vacation leave, PTO, which is “paid leave”, is not to be included “. . . in the wages due and payable at the time of separation, unless the employer and the employee . . . have specifically agreed otherwise.” The first question, then, is whether PTO is unused vacation leave. B&R Stores argues that it is not. Gallentine, on the other hand, argues that PTO is intended to approximate vacation leave, as opposed to sick leave, and, as a result, is merely vacation leave disguised as PTO. The Act does not define “paid leave” or “vacation leave”, unpaid or otherwise.

In 2006, the Nebraska Supreme Court decided *Roseland v. Strategic Staff Mgmt.*<sup>8</sup> In *Roseland*, full-time employees who had accrued paid vacation time based upon their length

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<sup>5</sup> NEB. REV. STAT. § 48-1230(2)(a) (Supp. 2007).

<sup>6</sup> NEB. REV. STAT. § 48-1229(4) (Supp. 2007).

<sup>7</sup> NEB. REV. STAT. § 48-1229(3) (Supp. 2007).

<sup>8</sup> 272 Neb. 434, 722 N.W.2d 499 (2006).

of employment<sup>9</sup> sued for accrued but unused vacation time, after their voluntary resignations from employment. The employer argued that the employees were not entitled to their accrued but unpaid vacation time, pointing to an employee handbook, which provided that, “[u]pon termination, employees will not be paid for unused vacation time.”<sup>10</sup> In concluding that accrued vacation time that is part of an employment agreement is due and payable as wages upon termination of employment, the Supreme Court found that “[t]he payment of vacation pay was an ‘agreed to’ benefit between [the employer] and its employees, see 48-1229(4), and [the employer] could not circumvent the payment of wages that had accrued by refusing to disburse accrued vacation pay because employment had been terminated.”<sup>11</sup>

In response to *Roseland*, the 2007 Nebraska Legislature passed LB 255. According to the Introducer’s Statement of Intent,

[t]he purpose of LB 255 is to amend the Nebraska Wage Payment and Collection Act to provide for conditions and limitations on the use and payment of accrued but unused leave as stipulated by a policy or agreement made between the employer and the employee.

The amendment provides this clarification as a result of a Nebraska Supreme Court Decision to require payment of unused vacation leave upon termination, notwithstanding a provision in the employer’s handbook stating that unused vacation would not be paid at the time of termination

Insofar as relevant to this case, the LB 255 amendment to the Act involved the inclusion of the following provision within the definition of wages:

Paid leave, *other than earned but unused vacation leave*, provided as a fringe benefit by the employer shall not be included in the wages due and

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<sup>9</sup> After one year of continuous service, employees were eligible for 1 week of paid vacation; after two years of continuous service, they were eligible for two weeks of paid vacation; and, after five years of continuous service, they were eligible for three weeks of paid vacation.

<sup>10</sup> 272 Neb. at 436, 722 N.W.2d at 501.

<sup>11</sup> *Id.* at 440, 722 N.W.2d at 503.

payable at the time of separation, unless the employer and employee . . . have specifically agreed otherwise.<sup>12</sup>

Addressing the LB 255 amendment to § 48-1229(4), Senator Cornett stated during floor debate that the purpose of LB 255, as amended, was to provide

. . . that all paid leave, except earned but unused vacation leave, shall not be paid out at the time of the employee's separation unless the employer and employee or the employer and a collective bargaining unit have agreed otherwise. Sick leave has been a major concern for employers across the state since [the] *Roseland* ruling came out. The [Business and Labor C]ommittee felt that it was appropriate to address sick leave; however, there are numerous other types of paid leave, such as bereavement and paid time off, or PTO. *By using the generic term "paid leave," it is our intention that any type of paid leave other than vacation leave does not have to be paid out at the time of separation unless otherwise bargained.*" . . .<sup>13</sup>

According to the Associates' manual, PTO is available to both full-time and part-time associates. In addition to PTO, the Associates' manual describes "Funeral Leave", Jury Duty Leave", "Military Leave" and "Educational Leave." The Associates' manual does not refer to vacation or sick leave. With respect to the accruing of PTO by a full-time associate, the Associates' manual provides:

Full-time associates qualify for paid time off after completing one year (52 consecutive weeks) of employment. . . . Full-term hourly associates accrue one hour of paid time off for every 52 hours worked, up to a maximum of 45 hours for one year of service. Salaried associates will be paid their regular weekly salary for one week of paid time off. . . .

Paid time off for full-time associates is as follows: One week after one year of continuous service, two weeks after two years of continuous service, and three weeks after ten years of continuous service.

As can be seen, the amount of PTO received by a full-time associate increases with his or her employment. As such, it is strikingly similar to the paid vacation time discussed in *Roseland*; however, the court finds that PTO is not vacation leave.

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<sup>12</sup> NEB. REV. STAT. § 48-1229(4) (Supp. 2007) (emphasis added).

<sup>13</sup> Floor Debate, 100th Legislature, 1st Sess. 3 (February 28, 2007) (emphasis added).

As is clear from reviewing the manner in which it may be used, PTO is a hybrid benefit program available to employees. As described by B&R Stores in its brief:

. . . PTO supplants vacation and sick leave. Under this type of policy, instead of being given set days for vacation leave and other set days for sick leave, the employee would simply receive PTO. Unlike under the traditional regime, the employee would not lose any of the PTO merely because he or she did not become ill, thus providing a greater, more flexible benefit to the employee.<sup>14</sup>

That PTO is different from vacation leave was recognized by Sen. Cornett during the floor debate on LB 255, when he stated that there are “numerous . . . types of paid leave, such as . . . paid time off, or PTO.”<sup>15</sup>

While PTO constitutes wages under the Act, it does not represent and has never represented vacation leave. As such, PTO is not includable in wages due and payable to Gallentine at the time of his separation, unless Gallentine and B&R Stores specifically agreed otherwise.

Under the terms of the Associates’ manual, Gallentine was entitled to be “paid for up to a maximum of four weeks (160 hours) of accrued and unused paid time off”, as long as he gave two weeks’ notice at the time of his resignation. Gallentine failed to give two weeks’ notice. As a result, he failed to adhere to the agreement and was not entitled to be paid for his 45 hours of accrued and unused PTO.

#### CONCLUSION

For the reasons set forth herein, the court finds that the decision of the county court should be, and it hereby is, reversed. This case is remanded to the county court with directions to dismiss Gallentine’s complaint, each party to pay his or its attorney’s fees and costs incurred.

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<sup>14</sup> Page 8 of B&R Stores’ brief.

<sup>15</sup> Footnote 13, *supra*.

Within two judicial days after this decision becomes final, the clerk of this court shall issue a mandate in appeals from the county court and transmit the mandate in appeals to the clerk of the county court on the form prescribed by the Supreme Court, together with a copy of this order.

Each party is to pay his or its attorney's fees and costs incurred in this appeal.

A copy of this order is sent to counsel of record and to the Honorable Susan I. Strong.

Dated June 18, 2008.

SO ORDERED.

BY THE COURT



Paul D. Merritt Jr.  
District Judge

c: Mr. James L. Haszard, Mr. Douglas J. Peterson