



Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-16-00233-CV

Julian GUERRA,
Appellant

v.

L&F DISTRIBUTORS, LLC,
Appellee

From the County Court at Law No. 2, Webb County, Texas
Trial Court No. 2013-CVZ-002396 C3
Honorable Roel Canales, Associate Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice
Dissenting Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: May 24, 2017

I concur in the majority's conclusion that this appeal is not moot and, therefore, should not be dismissed. I also concur in the majority's conclusion that the trial court erred in awarding sanctions. However, I respectfully dissent from the majority's conclusion that the trial court impermissibly modified the arbitration award because I do not believe the trial court modified the award by including language that allows L&F to comply with any applicable Internal Revenue Code requirements.

Neither party disagrees the award of \$10,126 was for past lost wages. The parties disagree on whether the Internal Revenue Code ("IRC") withholding requirements apply to payments of an

arbitration award in the same manner as they apply to judgments and settlements when the award is silent on the issue or whether L&F had the burden to obtain a ruling from the arbitrator that it could withhold the taxes. On appeal, L&F asserts the trial court did not modify the arbitration award because a requirement that a defendant comply with federal tax withholding laws is implicit in the arbitration award and the trial court simply made the requirement explicit. L&F contends an award of past lost wages is presumptively a gross award and, if Guerra wanted to receive a certain amount after taxes, he had the burden to ask the arbitrator to order he be paid that amount net of taxes. On appeal, Guerra does not address whether the IRC requires an employer to withhold taxes from an award of past lost wages under the facts of this case. Instead, he argues that, even if the IRC requires such a withholding, L&F had the burden to obtain a ruling from the arbitrator to that effect. I disagree with Guerra.

The IRC requires an “employer” that makes a “payment” of “wages” must withhold income and payroll taxes. 26 U.S.C. §§ 3102(a), 3402(a). The Second Circuit in *Noel v. N.Y. State Office of Mental Health Cent. N.Y. Psychiatric Ctr.*, 697 F.3d 209, 215 (2d Cir. 2012), held this obligation to withhold income and payroll taxes is implied in a judgment for back pay. After a jury trial on a claim Noel had been fired in violation of Title VII, a judgment was rendered that included awards of \$210,000 for back pay and \$70,000 for front pay. The judgment was silent about taxes and withholding. Noel’s former employer, the State, sent Noel a check for the amount of the back and front pay awards, less amounts withheld for federal income and payroll taxes [also other deductions]. Noel sought to enforce the judgment, arguing the awards were not subject to withholding because they were made pursuant to a judgment and were not payments of wages. The trial court agreed and ruled the State had not satisfied the judgment and ordered the State to pay Noel the amounts previously withheld. The State and the U.S. Department of Justice, as

amicus curiae, argued to the court of appeals that awards for back and front pay in employment cases are “wages” subject to mandatory tax withholding “irrespective of whether such payment is made through a settlement or a final judgment” and without the need to obtain a ruling from the court to that effect. *Id.* at 212.

The Second Circuit held the front and back pay awards to Noel were “wages” within the meaning of federal tax law. *Id.* at 213-14. The court also found, “[t]he obligation on employers to collect taxes by withholding a specified portion of the tax from wages paid is mandatory,” and “an employer who fails to withhold FICA and income taxes from the wages of his employees, or who fails to pay those withheld taxes over to the government, can be held personally liable for an amount that is equal to the amount that should have been withheld and paid over.” *Id.* at 214-15. The court concluded the obligation to withhold was implied in the Title VII judgment for back and front pay. *Id.* at 215. The court also held the district court “awarded a double benefit to Noel, ordering the State to pay directly to him amounts already paid on his behalf in satisfaction of his tax liabilities.” *Id.* at 215; *see id.* at 214, n.4 (discussing other courts that have reached the same conclusion).

Likewise, required federal taxes must be withheld from settlement payments even where the settlement agreement is silent on the issue. In *International Union, United Automobile Aerospace & Agricultural Workers v. Hydro Automotive Structures North America, Inc.*, No. 1:11-CV-28, 2015 WL 630457, at *2-*4 (W.D. Mich. Feb. 12, 2015), the parties disagreed whether the defendants could withhold FICA taxes from the amounts due some of the class members under the settlement. The court held the settlement, silent on the issue of taxes, was subject to any withholding that federal law might require. “If the parties had meant to guarantee a particular amount of cash-in-hand, they would have had to say so expressly, especially in a tax situation like

this that would require grossing up settlement payments to ensure a cash-in-hand outcome.” *Id.* at *3. *See also I.E.E. Int’l Elec. & Eng’g, S.A. v. TK Holdings Inc.*, No. 10-13487, 2015 WL 4527809 (E.D. Mich. July 27, 2015) (discussing a number of cases holding “that a settlement agreement’s silence with regard to tax consequences leaves the paying party free to withhold taxes from its settlement payment in accordance with applicable law.”).

In this appeal, the majority acknowledges these opinions, but concludes arbitration awards are not wholly analogous to trial court judgments. I do not disagree “there are fundamental differences between confirmed arbitration awards and judgments arising from a judicial proceeding.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1133-34 (9th Cir. 2000). However, when a plaintiff is awarded past lost wages on which IRC taxes may be mandated but the award is silent as to the withholding of any taxes, I believe judgments, settlement agreements, and arbitration awards for such wages must be treated the same. The IRC requires employers to collect income and FICA taxes by withholding them from wages paid to employees. 26 U.S.C. §§ 3102(a), 3402(a)(1). An employer who fails to withhold such taxes may be held liable for those taxes plus penalties and interest. 26 U.S.C. §§ 3102(b), 3403, 6651. The failure to withhold taxes also is punishable as a crime. 26 U.S.C. § 7202. In addition, even if the tax is later paid, an employer who fails to withhold is subject to liability for penalties and other statutory additions. 26 U.S.C. § 3402(d). In view of these requirements, I can see no reason to treat an arbitration award’s silence about the payment of IRC taxes in a different manner than a trial court judgment’s or a settlement agreement’s silence on the same issue. At least two courts have reached a similar conclusion.

In *Amalgamated Transit Union Local 880 v. N.J. Transit Bus Operations*, 897 A.2d 357, 362 (N.J. Super.), *certif. denied*, 907 A.2d 1012 (2006), the trial court confirmed arbitration awards

for back pay and expressly directed that the back pay awards be paid in full to each grievant and that no taxes could be deducted from the awards except as authorized by the grievant. *Id.* at 359. On appeal, the court reversed, holding the awards were subject to federal tax withholding. *Id.* at 362.

In *Subway International B.V. v. Bletas*, No. 3:10-CV-1714 JCH, 2012 WL 860372 (D. Conn. Mar. 13, 2012), *aff'd*, 512 F. App'x 82 (2d Cir. 2013), Subway obtained an arbitration award and sought to have it confirmed. Bletas opposed confirmation, arguing the award violated public policy because it failed to expressly require the withholding of applicable taxes. *Id.* at *3. The court noted the award was silent on taxes and the parties agreed public policy dictated the applicable taxes should be paid to the appropriate authorities. *Id.* at 3-*4. However, the court concluded the award did not violate that policy. *Id.* at *4. Without making any ruling as to whether withholding was required, the court concluded:

the Arbitrator's silence as to the withholding of tax payments does not create an "explicit conflict with other laws and legal precedents." Nothing in the award forbids the parties from withholding amounts pursuant to the tax laws of any jurisdiction or otherwise directs the parties to fail to pay any taxes due. The court agrees with SIBV that the award permits the parties to fully comply with any and all applicable tax laws and thus does not violate public policy.

Id. The *Bletas* case supports the proposition that, as with judgments, an obligation to comply with federal tax withholding requirements is implicit in an arbitration award.

In this appeal, we are not asked to decide whether the IRC actually requires L&F to withhold taxes. Nor did the trial court purport to rule whether withholding was actually required or, if so, in what amount. Instead, the trial court merely allowed L&F to comply with any

applicable IRC requirements.¹ I believe the issue of withholding IRC taxes, albeit not expressly stated as part of the arbitration award for past lost wages, is a necessary consequence of the award of such wages. Because it is a necessary component of an arbitration award for past lost wages, then compliance with tax withholding laws is implied in a silent award such as the one here. For these reasons, I do not believe the trial court modified the award by stating L&F could withhold “any and all federally required withholdings from the amount awarded for back pay wages.”

Sandee Bryan Marion, Chief Justice

¹ The trial court’s judgment stated L&F “should process the check for lost wages in the amount of \$10,126.00, less any and all federally required withholdings.”