THIRD DIVISION
June 6, 2018

No. 1-17-1787

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOYCE HILLIARD, SHAWN WILLIAMS, and ANDREA WILSON,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	17 M1 107411
HARDIN HOUSE d/b/a DREXEL COUNSELING SERVICES,	)	Honorable Maureen O'Donoghue Hannon, Judge Presiding.
Defendant-Appellee.	)	

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed. Where plaintiffs voluntarily dismissed their claim with the Illinois Department of Labor, the trial court had subject matter jurisdiction of plaintiffs' complaint under the Wage Payment and Collection Act, despite plaintiffs' previously filed claim with the Illinois Department of Labor, because there was not another action pending between the same parties for the same claim. Although Rule of Professional Conduct 1.6 does not apply to plaintiffs' counsel's representation in a matter adverse to counsel's former client in this case, it is reasonable to infer counsel received relevant confidential information during the course

of his representation of the former client such that plaintiffs' counsel must be disqualified from representing plaintiffs in this case.

¶ 2 Plaintiffs' appeal the judgment of the circuit court of Cook County granting defendant's motion to dismiss their complaint pursuant to section 2-619(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a) (West 2016)). For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On February 28, 2017, plaintiffs, Joyce Hilliard, Shawn Williams, and Andrea Wilson, filed a complaint in the circuit court of Cook County against defendant, Hardin House, doing business as Drexel Counseling Services, Inc. (Drexel) under the Wage Payment and Collection Act (Act) (820 ILCS 115/1 *et seq.* (West 2016)). Plaintiffs' complaint alleged plaintiffs were former employees of defendant and defendant failed to pay plaintiffs their final compensation upon their separation from employment. Specifically, the complaint alleged:

1. Joyce Hilliard worked 80 hours over the final 2 weeks of her employment from October 30, 2016 to November 12, 2016, but did not receive $1,520.00 in final compensation.

2. Shawn Williams worked 80 hours over the final 2 weeks of his employment from August 7, 2016 to August 20, 2016, but did not receive $511.41 in final compensation.

3. Andrea Wilson worked 50 hours over the final 2 weeks of her employment from November 15, 2015 to December 2, 2015, but did not receive $750.00 in final compensation.

Plaintiffs' complaint sought judgment for the unpaid compensation plus plaintiffs' costs and attorney fees.

¶ 5 Prior to filing their complaint in the circuit court, plaintiffs filed a complaint against defendants with the Illinois Department of Labor (IDOL) for the same claims. On April 4, 2017, defendant filed a motion to dismiss plaintiffs' complaint pursuant to sections 2-619(a)(1) and 2-619(a)(3) of the Code (735 ILCS 5/2-619(a)(1), (a)(3) (West 2016)). Defendant argued section

14(a) of the Act prohibits plaintiffs from filing with IDOL and filing a civil action, and, since plaintiffs filed with IDOL first, the circuit court lacks subject matter jurisdiction. See 735 ILCS 5/2-619(a)(1) (West 2016). Additionally, defendant argued the IDOL complaint was "a pending action between the same parties for the same cause." See 735 ILCS 5/2-619(a)(3) (West 2016). Defendant's motion sought dismissal of plaintiffs' complaint with prejudice.

¶ 6 Defendant cited section 115/14(a) of the Act which reads, in pertinent part, as follows: "Any employee not timely paid *** final compensation *** shall be entitled to recover through a claim filed with the Department of Labor or in a civil action, but not both, the amount of any such underpayments ***." 820 ILCS 115/14(a) (West 2016). The motion to dismiss alleged plaintiffs all "previously issued complaints with the Illinois Department of Labor ('IDOL') for the same claims that they are bringing before this Court."

¶ 7 On April 17, 2017, defendant filed a second motion pursuant to Illinois Supreme Court Rule 137 (eff. Jul. 1, 2013) to impose sanctions against plaintiffs' attorney on the grounds the claim in plaintiffs' complaint was barred by the Act and plaintiffs' attorney "is barred from filing the claim due to conflict of interest." Defendant's motion alleged, as it pertains to this appeal, that plaintiffs' attorney, Barney Cohen, was counsel for Drexel until August 2016 and Cohen is familiar with plaintiffs because of his role as Drexel's counsel. The motion alleged that while Drexel's counsel, Cohen was privy to all aspects of Drexel's business and legal issues, including issues related to all three plaintiffs. Defendant argued Cohen violated Illinois Rules of Professional Conduct 1.6 (Ill. R. Prof. C. 1.6 (eff. Jan. 1, 2016) (hereinafter RPC 1.6)) and 1.9 (Ill. R. Prof. C. 1.9 (eff. Jan. 1, 2010) (hereinafter RPC 1.9)) by representing plaintiffs in an action adverse to Drexel's interest. The motion asked the trial court to find Cohen in violation of the Rules and to award defendant costs and reasonable attorney fees for defending the claim.

¶ 8 Plaintiffs filed a first amended complaint adding claims that Hilliard earned but was not paid vacation pay from January 20, 2016 until the end of her employment and that all plaintiffs qualified for but were not paid unemployment compensation benefits.

¶ 9 On May 3, 2017 plaintiffs filed a response to defendant's motion to dismiss. Plaintiffs argued the trial court had subject matter jurisdiction over the complaint pursuant to section 11 of the Act. Plaintiffs also argued that even if the "same parties" and "same cause" requirements are met, "section 2-619(a)(3) relief is not mandatory" and the court "must weigh the prejudice to the non-movant if the motion [to dismiss] is granted against the policy of avoiding duplicative litigation." Plaintiffs argued "there is very low risk of duplicative litigation" in this case. None of plaintiffs' cases had proceeded to an administrative hearing and plaintiffs moved to withdraw their claims before IDOL. Plaintiffs attached to the response copies of printouts of emails to a Wage Claim Specialist at IDOL asking to withdraw each of plaintiffs' claims to IDOL.

¶ 10 Plaintiffs also filed a response to defendant's motion for sanctions. Plaintiffs admitted Cohen provided legal services to Drexel from November 2015 until November 2016. Plaintiffs denied Cohen was familiar with plaintiffs in his capacity as Drexel's counsel and denied that Cohen was privy to "all" aspects of Drexel's business and legal issues. Plaintiffs admitted Cohen was "familiar with issues having to do with a limited number of [Drexel] employees" and that Cohen was "consulted about employment issues pertaining to Joyce Hilliard," but denied that Cohen was consulted regarding employment issues pertaining to Shawn Williams or Andrea Wilson. Plaintiffs' response argued, in part, defendant's motion for sanctions failed to allege Cohen revealed any information relating to Cohen's representation of Drexel or any confidential information of Drexel to plaintiffs, therefore the motion for sanctions should be dismissed. Plaintiffs further argued Cohen "is not representing [plaintiffs] in the same or substantially similar matters to matters he represented [Drexel]" and defendant made no such allegation.

Plaintiffs argued the allegations in the motion for sanctions did not allege that Cohen represented plaintiffs in a "substantially related matter" in which plaintiffs' "interests are materially adverse" to Drexel's, which is what RPC 1.9 prohibits. Plaintiffs asserted that although Drexel asked Cohen "to provide counsel regarding certain job performance related issues pertaining to Joyce Hilliard, *** none of those issues had anything to do with the issue of payment of final wages." Finally, plaintiffs argued "Cohen's representation of former employees of [Drexel] does not involve the same transactions or legal disputes, or otherwise involve a substantial risk that confidential information obtained from the prior representation of [Drexel] would materially advance Plaintiffs' representation" in this case.

¶ 11 On May 24, 2017, the trial court entered an order dismissing plaintiffs complaint based on a violation of RPC 1.6 and 1.9. The court did not specifically rule on the first filed motion to dismiss. The court denied defendant's motion for sanctions. The court's order gave plaintiffs 28 days to find new counsel and refile. Plaintiffs filed a motion to reconsider. The motion to reconsider states that at the May 24, 2017 hearing on defendant's motion, the trial court stated it had not seen or read any submission from plaintiffs on the subject of the motion, despite the fact plaintiffs filed a response to the motion on May 17, 2017. Plaintiffs' motion to reconsider argued the fact the court did not see their response prejudiced them. Plaintiffs also argued the court applied a prior version of RPC 1.6, the current version of RPC 1.6 does not prohibit the disclosure of information relating to the former representation after the representation ended, and no such disclosure of confidential or secret information occurred, was alleged, or was proved. Plaintiffs also argued the trial court did not find that Cohen was representing plaintiffs "in the same or substantially similar matter to his prior representation" of Drexel, which is "fatal to a ruling that counsel for Plaintiff[s] violated [RPC] 1.9." Additionally, plaintiffs argued defendant failed to prove Cohen was involved in the same or substantially similar matters involved in this

case on behalf of Drexel. Instead, plaintiffs argued, Cohen's representation in this case is on a "factually distinct problem" that "is not 'substantially related' " to matters Cohen handled for Drexel and thus falls within an exception to RPC 1.9. Plaintiffs argued the trial court declined to rule on this argument and thus erred in ruling that Cohen violated RPC 1.9. Plaintiffs argued the trial court remained focused on Cohen's "general knowledge of [Drexel's] business affairs." Plaintiffs argued that defendant failed to produce evidence supporting the allegations in the motion. Plaintiffs admitted Cohen advised Drexel on matters relating to employer/employee disputes but asserted that Cohen had no knowledge of specific facts gained in his representation of Drexel that are relevant to this case.

¶ 12 On June 23, 2017, the trial court issued a written order denying plaintiffs' motion to reconsider the order dismissing plaintiffs' complaint. The trial court's order found as follows:

> "It is the opinion of the Court that based on Mr. Cohen's admissions and description of his duties for Drexel over the course of the last year (2015 to 2016) he is attempting to represent the three plaintiffs in matters that are substantially related and materially adverse to his former client Drexel. [Citation.] It is reasonable to infer that confidential information would have been given to Mr. Cohen as part of his duties listed above. The information would be relevant to the instant wage claims as they would require a review of the work, financial records, and the business practices of the employer and the employees.
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> * * *
>
> The concern of the committee is the concern at issue here before this Court. Mr. Cohen was involved with advice and counseling to and for Drexel on many human resources and employment matters for a full year, including specifically the named plaintiff, the former human resources director and now, less than one

year later, seeks to represent them against their former employer Drexel *on employment related matters: specifically whether they are entitled to additional wages*. The law does not require Defendant to allege that counsel revealed specific confidential information to his new clients. It is presumed that the former client's interests are not fully protected with this change of allegiance by counsel." (Emphasis added.)

¶ 13 This appeal followed.

¶ 14 ANALYSIS

¶ 15 Drexel failed to file an appellee's brief. We ordered this appeal taken on appellants' brief only. On appeal from an order granting a motion to dismiss pursuant to section 2-619 of the Code, our standard of review is *de novo*. *Figiel v. Chicago Plan Comm'n*, 408 Ill. App. 3d 223, 229 (2011). "A section 2-619 motion to dismiss admits the legal sufficiency of the complaint (*i.e.*, all facts well pleaded), but asserts certain defects, defenses or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim." *Id.* When this court undertakes a *de novo* review we do not need to defer to the trial court's judgment or reasoning. *Wade v. Stewart Title Guaranty Co.*, 2017 IL App (1st) 161765, ¶ 60. Instead, we perform the same analysis that a trial judge would perform, "completely independent of the trial court's decision. [Citation.]" (Internal quotation marks omitted.) *Id.* Section 2-619(a)(1) of the Code provides for involuntary dismissal of a complaint where "the court does not have jurisdiction of the subject matter of the action." 735 ILCS 5/2-619(a)(1) (West 2016). Section 2-619(a)(3) of the Code provides for involuntary dismissal where "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2016).

¶ 16 In this case, the trial court did not dismiss plaintiffs' complaint on the grounds it lacked subject matter jurisdiction or that there was another action pending between the same parties for the same cause. The trial court's May 24, 2017 order granted defendant's motion to dismiss "based on violation of PRC 1.6 & 1.9." The dismissal was without prejudice to plaintiffs' right to refile with new counsel. The trial court also denied defendant's motion for sanctions under Rule 137, but it nonetheless disqualified Cohen from representing plaintiffs by "dismissing" their complaint without prejudice and granting plaintiffs leave to refile with a new attorney.

> "[T]he circuit court derives authority to impose sanctions through statutes and supreme court rules. Illinois law does not contain a single standard for sanctions. Instead, the behavior of parties is governed by general requirements for all matters before the court, as well as special requirements for different stages of litigation or causes of action. See, *e.g.*, Ill. S. Ct. R. 137 (eff. Feb. 1, 1994) (general requirements for all pleadings and motions); Ill. S. Ct. R. 219 (eff. July 1, 2002) (special standards for discovery); 735 ILCS 5/2–622 (West 2008) (special standards for pleading healing art malpractice claim). Violation of the relevant standards of behavior under which a particular action falls authorizes the circuit court, either *sua sponte* or on motion of the opposing party, to impose a sanction on the offending party. The sanction imposed may range in severity anywhere from requiring the offending party to pay the attorney fees of the other party (see, *e.g.*, Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)), up to and including dismissal of the offending party's cause of action with prejudice (see, *e.g.*, Ill. S. Ct. R. 219(c)(v) (eff. July 1, 2002))." *Santiago v. E.W. Bliss Co.*, 406 Ill. App. 3d 449, 455 (2010), rev'd in part on other grounds, 2012 IL 111792, ¶ 30.

The appeal in *Santiago* arose from a certified question involving a plaintiff who intentionally filed a complaint using a fictitious name. *Id.* at 451. Section 2-401(b) of the Code addresses misnomer of a party. 735 ILCS 5/2-104(b) (West 2010). The *Santiago* court found that "[i]f the circuit court further finds that the complaint was not filed in plaintiff's true name, then the complaint did not comply with section 2-401(b), which in turn means that the complaint was filed in violation of Rule 137 because it was not warranted by existing law." *Santiago*, 406 Ill. App. 3d at 456. In this case, the "relevant standards of behavior" that may authorize the trial court, on defendant's motion, to impose a sanction on plaintiffs are RPC 1.6 and 1.9. The rationale employed by this court in *Santiago* applies here, and if plaintiffs' complaint violates RPC 1.6 and 1.9, it also violates Rule 137 because it is not warranted by existing law. See *id.* Thus, the trial court could have properly dismissed plaintiffs' complaint without prejudice as a sanction under Illinois Supreme Court Rule 137 if plaintiffs violated RPC 1.6 and 1.9.

¶ 17 We first consider the jurisdiction of the circuit court. The basis of defendant's motion to dismiss pursuant to section 2-619(a)(1) and 2-619(a)(3) was the proceedings before the IDOL concurrent with plaintiffs' complaint in the circuit court. Section 14(a) of the Act states that "[a]ny employee not timely paid wages, final compensation, or wage supplements by his or her employer as required by this Act shall be entitled to recover through a claim filed with the Department of Labor or in a civil action, *but not both* ***." (Emphasis added.) 820 ILCS 115/14(a) (West 2016). On appeal, plaintiffs argue section 14(a) of the Act is not jurisdictional but rather simply prevents a plaintiff with a claim under the Act from obtaining a double recovery. Plaintiffs do not assert they may pursue their claims before IDOL and in the circuit court simultaneously and only argue that the court has subject matter jurisdiction of their claim. In support of their position plaintiffs cite *Krause v. USA DocuFinish*, 2015 IL App (3d) 130585, which held that a plaintiff may file a civil claim for owed wages under the Act in the circuit court

after the plaintiff has received a wage payment demand from IDOL. *USA DocuFinish*, 2015 IL App (3d) 130585, ¶ 32. Plaintiffs also reassert on appeal that they have "withdrawn their IDOL claims so as to avoid any duplicative litigation."

¶ 18 We agree with the *DocuFinish* court that section 14 of the Act does *not* mean that "[o]nce the plaintiff has filed with the DOL, he must content himself with whatever remedy results from those administrative proceedings" and "may not file a subsequent court action for lost payment of wages." *Id.* ¶¶ 24-26. Moreover, when construing a statute, "[e]ach word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. [Citations.]" (Internal quotation marks omitted.) *Id.* ¶ 23. Section 14 of the Act clearly states that an employee not timely paid final compensation shall be entitled "to recover" through a claim with IDOL or in the circuit court, "but not both." 820 ILCS 115/14(a) (West 2016). The plain language of the statute indicates that what is prohibited is recovery in both IDOL and circuit court proceedings and not separate proceedings before both. Regardless, according to the pleadings and supporting documents, which we must construe liberally in plaintiffs' favor (*Bjork v. O'Meara*, 2013 IL 114044, ¶ 21), plaintiffs withdrew their IDOL claims before the agency heard the matter. We find the trial court had subject matter jurisdiction of plaintiffs' complaint, and the record indicates that there was no other action pending between the same parties for the same cause. Accordingly, the trial court properly declined to grant defendant's motion to dismiss pursuant to sections 2-619(a)(1) and 2-619(a)(3) of the Code.

¶ 19 Next, we will review the trial court's order dismissing plaintiff's complaint without prejudice as a sanction under Rule 137 rather than a dismissal pursuant to section 2-619(a)(1) or 2-619(a)(3). "The party seeking disqualification carries the burden of proving the existence of a former attorney-client relationship. [Citation]" *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 174 (1997). "The determination of whether counsel should be disqualified is directed to the sound

discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. [Citations.] An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court. [Citation.] Where the question on appeal involves the resolution of factual issues, the trial court's determinations will not be disturbed unless they are unsupported by evidence in the record." *Id.* at 176.

> "In assessing the decision of the court below, we are mindful that attorney disqualification is generally considered a drastic measure, because it bars a party from retaining the counsel of its choice and thus destroys the attorney-client relationship. [Citations.] Courts are therefore cautious about granting motions to disqualify, lest they be used tactically as a means of harassment. [Citations.] This concern must be balanced against the need to enforce the canons of legal ethics, which are designed to protect the attorney-client relationship and maintain public confidence in the integrity of the legal profession and the administration of justice." *Pedersen & Houpt, P.C. v. Summit Real Estate Group, LLC*, 376 Ill. App. 3d 681, 685 (2007).

"[C]ourts have vital interests in protecting the attorney-client relationship, maintaining public confidence in the legal profession and ensuring the integrity of judicial proceedings. [Citations.] Disqualification exists to safeguard these vital interests. [Citation.] Therefore, any doubts as to the existence of a conflict should be resolved in favor of disqualification. [Citation.]" (Internal quotation marks omitted.) *In re Estate of Wright*, 377 Ill. App. 3d 800, 804 (2007).

¶ 20 It is with these standards in mind that we turn to our consideration of the rules as applied to this case. RPC 1.6 states, in pertinent part, as follows:

> "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in

> order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);
>
> (2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." RPC 1.6.

Contrary to the trial court's finding in its ruling on plaintiffs' motion to reconsider, we find RPC 1.6 does not apply under the circumstances of this case but instead find RPC 1.9 is applicable. Comment 1 to RPC 1.6 states:

> "This Rule governs the disclosure by a lawyer of information relating to the representation of a client *during* the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, *Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client* and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients." (Emphases added.) RPC 1.6 cmt 1.

Comment 20 to RPC 1.6 states: "The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client." RPC 1.6 cmt 20.

¶ 21 We find that RPC 1.6 does not apply to Cohen's representation of plaintiffs. The record before this court reveals that Drexel was Cohen's former client when Cohen's representation began. The text of RPC 1.6 and the Committee Comments to RPC 1.6 clearly establish that RPC 1.9 governs confidences of former clients.[1]

¶ 22 Next, we turn to RPC 1.9 to determine whether Cohen should be disqualified from representing plaintiffs. RPC 1.9 states, in pertinent part, as follows:

> "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.
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> * * *
>
> (c) A lawyer who has formerly represented a client in a matter *** shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client." RPC 1.9.

Comment 3 to RPC 1.9 states, in pertinent part, as follows:

> "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that

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[1] The prior version of RPC 1.6 read: "[A] lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure."

> confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. *** In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services." RPC 1.9 cmt 3.

¶ 23 "The supreme court has provided the following guidance for determining whether a substantial relationship exists between a current representation and a former matter, by what has come to be known as the *LaSalle* inquiry." *In re Estate of Wright*, 377 Ill. App. 3d 800, 803 (2007).

> "Under the *LaSalle* inquiry, the court first must make a factual reconstruction of the scope of the former representation. Then, it must determine whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, the court must consider whether the information is relevant to the issues raised in the litigation pending against the former client. [Citations.]" (Internal quotation marks omitted.) *In re Estate of Wright*, 377 Ill. App. 3d at 803 (quoting *Schwartz*

> *v. Cortelloni*, 177 Ill. 2d at 178, citing *LaSalle National Bank v. County of Lake*, 703 F.2d 252, 256 (7th Cir.1983)).

Issues raised in the instant case pertain to, *inter alia*, plaintiffs' wages and earned but unused vacation. 820 ILCS 115/5 (West 2016). The Act defines "wages" as "any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties, whether the amount is determined on a time, task, piece, or any other basis of calculation." 820 ILCS 115/2 (West 2016). Further, section 5 of the Act states as follows:

> "Unless otherwise provided in a collective bargaining agreement, whenever a contract of employment or employment policy provides for paid vacations, and an employee resigns or is terminated without having taken all vacation time *earned in accordance with such contract of employment or employment policy*, the monetary equivalent of all earned vacation shall be paid to him or her as part of his or her final compensation at his or her final rate of pay and no employment contract or employment policy shall provide for forfeiture of earned vacation time upon separation." (Emphasis added.) 820 ILCS 115/5 (West 2016).

An employer's vacation policy determines how vacation is earned and what a former employee can claim as earned but unused vacation. *Prettyman v. Commonwealth Edison Co.*, 273 Ill. App. 3d 1090, 1091-96 (1995).

¶ 24 Applying the *LaSalle* inquiry to this case[2], we first find that the trial court's finding as to the scope of Cohen's former representation of Drexel is taken from plaintiffs' own pleadings, therefore we cannot say the trial court's resolution of factual issues is unsupported by the record.

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[2] The trial court was not required to engage in a separate analysis as to whether the matters Cohen handled for Drexel involved the same transaction as plaintiffs' cases. If the *LaSalle* test is met, the matters are "substantially related" for purposes of RPC 1.9. See RPC 1.9 cmt 3.

Cortelloni, 177 Ill. 2d at 176. The trial court listed the following duties of Cohen while representing Drexel in its statement of the facts as taken from plaintiffs' pleadings:

- He prepared the human resources handbook;
- He worked on the executive director's employment contract and the contracts with physicians, and the defendant's form IRS 990;
- Develop HIPPA policies and procedures and training for employees;
- Prepared a conflicts of interest policy;
- Prepared an annual board member disclosure form;
- Help establish the board of directors meetings, etc.;
- "Mr. Cohen provided advice and counsel to defendant Drexel Consulting regarding 'some job performance related issues pertaining to Plaintiff Joyce Hilliard but none of those issues had anything to do with the issue of payment of final wages to Ms. Hilliard, which, is at issue before this Court.' "
- Plaintiffs admit Mr. Cohen was familiar with issues having to do with a limited number of other employees of Defendant Drexel.

¶ 25 As for the second factor in the *LaSalle* inquiry, "[o]nce the purposes for which the attorney was employed are clear, it is then possible to consider the type of information which a client would impart to an attorney performing such services for him. [Citation.]" (Internal quotation marks omitted.) *In re Estate of Klehm*, 363 Ill. App. 3d 373, 381 (2006) (citing *INA Underwriters Insurance Co. v. Nalibotsky*, 594 F. Supp. 1199, 1206 (E.D. Penn. 1984)). In assessing whether it is reasonable to infer that confidential information relevant to the subsequent representation would have been given to a lawyer representing a client in the scope of the former representation, "the court should not allow its imagination to run free with a view

to hypothesizing conceivable but unlikely situations in which confidential information 'might' have been disclosed which would be relevant to the present suit. The lawyer 'might have acquired' the [substantially related] information in issue if (a) the lawyer and the client ought to have talked about particular facts during the course of the representation, or (b) the information is of such a character that it would not have been unusual for it to have been discussed between lawyer and client during their relationship. [Citation.]" (Internal quotation marks omitted.) *INA Underwriters Insurance Co.*, 594 F. Supp. at 1206.

¶ 26 In its written judgment on plaintiffs' motion to reconsider, the trial court found "that based on Mr. Cohen's admissions and descriptions of his duties for Drexel over the course of the last year (2015 to 2016) he is attempting to represent the three plaintiffs in matters that are substantially related and materially adverse to his former client Drexel. [Citation.] It is reasonable to infer that confidential information would have been given to Mr. Cohen as part of his duties listed above. The information would be relevant to the instant wage claims as they would require a review of the work, financial records, and the business practices of the employer and the employees." We cannot say that no reasonable person would agree with the trial court in finding that it is reasonable to infer that Cohen would have received confidential information related to relevant employment matters as part of his duties for Drexel. We reject plaintiffs' argument that the finding by the trial court was "based on Mr. Cohen's general knowledge of [Drexel's] policies and practices, and an appearance of impropriety." The key duties the trial court identified for purposes of this inquiry are the preparation of a human resources employee handbook and conflicts of interest policy, and certain job performance related issues of plaintiff Hilliard. Drexel and Cohen "ought to have talked about" issues related to wages and earning vacation, particularly in the drafting of the human resources handbook, and that information "is of such a character that it would not have been unusual for it to have been discussed" during

Cohen's performance of the enumerated duties. The issue is not, as plaintiffs argue, whether Cohen represented Drexel "in any Wage Payment and Collection Act cases." The issue is whether there is a substantial risk that during the course of his representation of Drexel Cohen received confidential information that is relevant and would materially advance plaintiffs' position in the instant case under the Act. See RPC 1.9 cmt 3. The trial court could reasonably find that such a risk exists in this case.

¶ 27 Moreover, contrary to plaintiffs' assertion, the circumstances of this case are not like a lawyer who has previously represented a client in securing environmental permits to build a shopping center subsequently representing a tenant of the shopping center in an eviction proceeding. See *id.* Rather, this case is more like a lawyer who has represented a businessperson and learned extensive private financial information about that person subsequently representing that person's spouse in seeking a divorce. See *id.* It is reasonable to infer that at minimum Cohen learned extensive confidential information about Drexel's practices and policies regarding wages and earned vacations, and he is now representing plaintiffs adverse to Drexel in a claim where that information is "of the type which one would expect to be related to the issues in the present litigation." *INA Underwriters Insurance Co.*, 594 F. Supp. at 1207. In spite of plaintiffs' argument, there is more at issue that simply plaintiffs' "paychecks, or payroll information." See *Prettyman*, 273 Ill. App. 3d at 1091-96.

¶ 28 Having found the trial court did not abuse its discretion in finding that it is reasonable to infer that Cohen received confidential information relevant to this case from his former representation of Drexel, the trial court properly found "a substantial relationship between the prior and subsequent representations." *In re Marriage of Klehm*, 363 Ill. App. 3d 373, 380 (2006). Therefore, the trial court was "entitled to assume that client confidences, relevant to the subsequent litigation, were revealed during the course of the prior representation. [Citation.]"

Id. at 380-81. Accordingly, we hold the trial court did not abuse its discretion in finding Cohen should be disqualified from representing plaintiffs pursuant to RPC 1.9. On remand the court should allow plaintiffs a reasonable time to file an amended complaint with new counsel.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 31 Affirmed.