July 30, 2020

Massachusetts High Court Trebles Unpaid Future Commissions Under the Wage Act

The Massachusetts Supreme Judicial Court (SJC) held that unpaid future commissions may be subject to mandatory trebling under the Massachusetts Wage Act in certain circumstances.

Francoise Parker, a salesperson for EnerNOC Inc., secured a contract worth $20 million over five years–the largest contract in EnerNOC's history. That contract included a termination for convenience clause that allowed the parties to terminate it within 30 days after the first anniversary of the effective date (opt-out date).

EnerNOC paid commissions on the guaranteed portion of contracts immediately. Under its true-up policy, EnerNOC paid commissions on the remaining portion of contracts when (and if) the contracts survived past the opt-out date. EnerNOC's commission policy also provided that employee commissions cease upon termination of employment "for any reason."

EnerNOC discharged Parker shortly after she complained about the amount of her commission on the guaranteed portion of the contract. Although EnerNOC terminated Parker before the opt-out date, the contract survived past that time.

Parker filed suit alleging, among other things, that EnerNOC violated the Massachusetts Wage Act by retaliating against her and refusing to pay her full commission under its true-up policy. The jury found that EnerNOC retaliated against Parker under the Wage Act by terminating her after she complained about the amount of her commission. The jury awarded Parker $349,098.48 as the commission to which she was entitled under EnerNOC's true-up policy. The trial court declined to treble the award, reasoning that the commission was not "due and payable" at the time of Parker's termination and therefore was not a "lost wage" under the Wage Act.

The SJC held that the trial court should have trebled Parker's award under the Wage Act. The SJC rejected the notion that commissions must be "definitely determined" and "due and payable" to constitute "wages" under the Wage Act. It explained that "commissions that are not yet due to be paid may nonetheless constitute lost wages if the employer's violations of the [Wage Act] prevent payment of those commissions." In the SJC's view, but for EnerNOC's retaliatory actions, Parker would have been employed on the opt-out date and would have been entitled to a $349,098.48 commission under EnerNOC's true-up policy at that time. Although Parker's commission under the true-up policy was not "due and payable" at the time of Parker's termination, the SJC held that it nevertheless constituted a "lost wage" under the Wage Act because EnerNOC's retaliatory discharge prevented Parker from receiving the commission. The SJC therefore held that Parker's $349,098.48 damage award was a "lost wage" that should have been trebled.

The SJC rejected EnerNOC's argument that Parker was not entitled to a commission under the true-up policy because she was not employed with EnerNOC when the contract survived past the opt-out date. The court noted that it was EnerNOC's retaliatory action that resulted in Parker's termination in the first instance, and that "[w]ages lost as a result of retaliation are trebled under the Wage Act." According to the SJC, an employer may not set a condition under which wages are payable and then make it impossible for employees to satisfy that condition. The SJC thus held that EnerNOC's continuous employment policy was not enforceable under the circumstances presented in the case.

The *Parker* case is a reminder that Massachusetts courts often take an employee-friendly view of the Wage Act. The decision suggests that Massachusetts courts will interpret the term "wage" broadly under the Wage Act. Employers with commissioned employees should also be aware that policies requiring continuous employment as a condition for the payment of commissions may be unenforceable in some circumstances.

Would you like to receive our *Employment and Labor Quarterly Update?* Sign up here.

Authors

Keith H. Bensten

Partner

Boston, MA | (617) 345-4740

kbensten@daypitney.com