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Future commissions can be trebled under Wage Act

Retaliatory firing deprived employee of earned comp

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BERLUTI Prevails at SJC

A jury's award of unpaid future sales commissions should have been trebled under the Massachusetts Wage Act, the Supreme Judicial Court has ruled.

Plaintiff Francoise Parker had secured a $20 million software sales contract for her employer, defendant EnerNOC.

Under EnerNOC's commission policy, Parker was entitled to a commission on the first year of revenue under the contract, which the customer was entitled to terminate after a year. EnerNOC fired Parker when she complained of sex discrimination and being deprived of her full commission.

A Suffolk Superior Court jury found that EnerNOC unlawfully retaliated against Parker and that it violated the Wage Act by paying her less than it owed. Additionally, the jury found the retaliation cost Parker $349,000 in additional sales commissions it would have contractually owed her for the remainder of the contract once the customer's opt-out period expired.

Judge Kenneth W. Salinger, sitting in the Business Litigation Session, determined that Parker was not entitled to treble damages on the $349,000, holding that because the future commissions were not yet "due and payable" at the time of her firing, they did not constitute lost wages within the meaning of the Wage Act.

But the SJC reversed.

"But for the defendants' actions, the plaintiff would have been employed at EnerNOC when the opt-out period expired, and would have received the commission due," Justice Kimberly S. Budd wrote for the full court. "Stated differently, as a result of the retaliation, the plaintiff did not receive wages she otherwise would have received. Wages lost as a result of retaliation are trebled under the Wage Act. G.L.c. 149, §§148A, 150."

The 18-page decision is *Parker v. EnerNOC, Inc., et al.*, Lawyers Weekly No. 10-025-20. The full text of the ruling can be found at masslawyersweekly.com.

Parker v. EnerNOC, Inc., et al.

THE ISSUE	Should a jury's award of unpaid future sales commissions have been trebled under the Massachusetts Wage Act?
DECISION	Yes (Supreme Judicial Court)
LAWYERS	Robert R. Berluti of Berluti, McLaughlin & Kutchin, Boston (plaintiff) Donald W. Schroeder and Erin C. Horton, of Foley & Lardner, Boston (defense)

Employers on notice

Plaintiff's counsel Robert R. Berluti of Boston said the ruling made "logical sense" based on the policies behind the Wage Act.

"An employer should not be able to benefit from unlawful conduct like discharging an employee in retaliation for asserting rights under the Wage Act," he said. "A ruling the other way would create a perverse situation in which an employer would actually be rewarded by way of avoiding the penalties under the Wage Act."

The defendants' attorneys, Donald W. Schroeder and Erin C. Horton, could not be reached for comment. But Boston employment lawyer Sean P. O'Connor said the decision underscores that while commissions may not yet be "definitely determined" or "due and payable," they still can be considered wages subject to trebling under the Wage Act when retaliatory conduct is involved.

"People typically think about the Wage Act in regards to its protections of employees' rights to their wages," O'Connor said. "However, this decision serves as a reminder that the Wage Act's protections against retaliation are just as significant and that the consequences for violating those protections can be substantial."

Joshua A. Robbins of Boston said that, in light of the decision, employers need to be careful in handling employees' complaints regarding their compensation or they risk significant liability.

"In this case, this was a very significant amount," he said.

David A. Russcol of Boston, who submitted an amicus brief on behalf of the Massachusetts Employment Lawyers Association, said the decision confirms that an employer cannot promise wages to an employee with conditions attached and then prevent the employee from satisfying those conditions.

"That should put employers on notice that if they withhold earned wages such as commissions, even once an employee is no longer employed, they do so at their peril," Russcol said.

To the extent the case focused on the act of retaliatory termination after the plaintiff complained about missing commissions, it could help future plaintiffs pursue claims as well, according to Lawrence B. Morse of Danvers.

At the same time, Morse said, several findings had to converge for the court to find a Wage Act violation, noting that the findings hinged on the opt-out contingency in the sales contract and the commission policy that gave the plaintiff the right to collect additional commissions once an unexercised opt-out expired.

"There may be a limitation in other circumstances, as the court stated that it did not construe continued employment as a 'per se inappropriate prerequisite as a condition in a commission policy,'" Morse said. "Companies may be expected to test that proposition since commission policies often require continued employment."

'True up' policy

On March 4, 2016, EnerNOC, an energy-related services provider, closed a $20 million software sales contract with Eaton Industries, the largest contract in EnerNOC's history. The plaintiff negotiated the deal.

Under the contract's "termination for convenience" — or TFC — clause, both parties had a one-time option to terminate the contract within 30 days after the first anniversary of its effective date.

Under EnerNOC's sales commission policy, a commission on a contract with a TFC would be paid on the guaranteed portion of the contract — in other words, the first full year.

Additionally, EnerNOC had a "true-up" policy for customer deals with a TFC clause, in which it would pay an additional commission based on the entire value of the deal as long as the contract survived past the opt-out date. Its sales commission policy further stated that a salesperson's eligibility for such commissions would cease upon termination "for any reason."

On April 1, 2016, EnerNOC fired the plaintiff after she complained about not receiving her full commission on the guaranteed portion of the contract.

The plaintiff filed suit in Superior Court on Aug. 19, 2016, alleging gender discrimination, Wage Act violations, and breach of the covenant of good faith and fair dealing.

In her complaint, the plaintiff claimed she was owed a bigger commission on the guaranteed portion of the contract and a separate commission under the true-up policy. She added a quantum meruit claim the following April when the opt-out period expired without Eaton canceling the contract.

In May 2018, a jury found that EnerNOC breached the implied covenant of good faith and fair dealing by firing the plaintiff to avoid paying those commissions and in retaliation for her complaints of being discriminated against based on her sex and not being paid what she was owed.

The jury awarded $25,063 as the difference between what the plaintiff was owed and paid on the guaranteed portion of the contract, and $349,098 owed under the true-up policy. It also awarded $240,000 in punitive damages and $40,000 in emotional distress damages stemming from EnerNOC's retaliation.

Salinger trebled the $25,063 under the Wage Act but did not treble the $349,098 owed under the true-up policy, finding that those commissions were not "due and payable" the date of the plaintiff's termination. The plaintiff appealed.

Due and payable

The SJC found that the unpaid commission amount under the true-up policy indeed constituted a "lost wage" subject to trebling under the Wage Act.

"The retaliation, which took the form of terminating the plaintiff, had the effect of depriving the plaintiff of her right to be paid a commission under the true-up policy on the Eaton contract," Budd wrote.

> "A policy that conditions payment on continued employment cannot relieve an employer from the obligation of paying a commission where the employer terminates its employee in retaliation for complaining about wage violations in the first place."
>
> **— Justice Kimberly S. Budd**

The court also found that EnerNOC's policy, which required continuous employment through the expiration of an opt-out period in order to collect a commission based on a true-up policy, did not affect the outcome.

"Here, the true-up policy, in conjunction with EnerNOC's retaliatory termination of the plaintiff, made it impossible for the plaintiff to fulfill the only unmet contingency required to collect the true-up commission," Budd said. "A policy that conditions payment on continued employment cannot relieve an employer from the obligation of paying a commission where the employer terminates its employee in retaliation for complaining about wage violations in the first place."

Accordingly, the SJC vacated the lower court's judgment with respect to the unpaid commission under the true-up policy, ordering that it be trebled.