Dobin v. CIOview Corp.

Superior Court of Massachusetts, At Middlesex

October 28, 2003, Decided ; October 29, 2003, Filed

2001-00108

Reporter
2003 Mass. Super. LEXIS 291 *; 16 Mass. L. Rep. 785

Amy Dobin v. CIOview Corporation

Disposition: Motion for partial summary judgment allowed in part and denied in part.

Core Terms

wages, salary, employees, monthly, defer, commissions, deferral, checks, termination, damages, paying, treble, days, salaried employee, attorney general, payment of wages, benefits, partial summary judgment, post-dated, weekly, tardy, wrongful termination, civil action, summary judgment, attorney's fees, monthly salary, pay period, labor law, bi-weekly, foregone

Case Summary

Procedural Posture

Plaintiff employee sued defendant company, alleging that the company violated Mass. Gen. Laws ch. 149, §§ 148, 150 because it failed to pay her salary on time, wrongfully terminated her employment, and committed breach of contract and breach of the implied covenant of good faith. Both parties filed motions for partial summary judgment.

Overview

A company hired an employee who had worked as a consultant. Five months later, the company's founder told the employee that the company was bankrupt and asked her if she would agree to defer receipt of her salary to help the company survive. After that conversation, the company deferred payment of the employee's salary for nine months. Two months after the employee started receiving her salary again, she informed the founder that she had learned it was unlawful to defer compensation, even if an employee agreed to a deferral. Seven days later, the company gave the employee checks for all salary she was owed, but terminated her employment. The employee immediately filed suit. The trial court held that (1) the company violated Mass. Gen. Laws ch. 149, § 148 by deferring payment of the employee's salary, but under the circumstances of the case, the employee was not entitled to treble damages; and (2) because Mass. Gen. Laws ch. 149, § 150 gave the employee a statutory cause of action from wrongful termination based on her claim that she was being penalized for asserting her rights under Massachusetts's Wage Act, the court would dismiss her common-law claim for wrongful termination.

Outcome
The trial court allowed the employee's motion for partial summary judgment on her claim under the Wage Act, but found that she was not entitled to payment of treble damages on that claim. The court also granted the company's motion for partial summary judgment on the employee's claim for wrongful termination, but only to the extent that the employee asserted that claim under the common law.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > General Overview

HN1[] **Wage & Hour Laws, Wage Payments**

Massachusetts's Wage Act specifically includes salaried employees within its scope. While the entire Wage Act is hardly a model of legislative draftsmanship, it is plain

from the language of Mass. Gen. Laws ch. 149, § 148 that, while an employer may pay a salaried employee wages in advance, it may not delay payment for more than six days from the termination of the pay period in which such wages were earned by the employee.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

HN2 **Wage & Hour Laws, Wage Payments**

See Mass. Gen. Laws ch. 149, § 148.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Governments > Legislation > Interpretation

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employees

Labor & Employment Law > Wage & Hour Laws > General Overview

HN3 **Wage & Hour Laws, Wage Payments**

Massachusetts's Wage Act defines a "salaried employee," not in the context of excluding such persons from the scope of the Act but in the context of including them. Mass. Gen. Laws ch. 149, § 148. By specifically noting that an employee engaged in a bona fide executive, administrative, or professional capacity may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly, the Act demonstrates that it recognizes that these high-ranking employees are protected under the Act. If highly-paid salaried employees were excluded from the Act, the legislature would have needed to draw a line separating those whose wages are protected under the Act from those whose wages are not. The absence of any such line, and the arbitrariness of any court interposing such a line, reflects the legislative intent that no such distinction be drawn.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > Compensation & Benefits

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

Labor & Employment Law > Wage & Hour Laws > General Overview

HN4 **Wage & Hour Laws, Wage Payments**

Mass. Gen. Laws ch. 149, § 148 provides that no person shall by a special contract with an employee or by any other means exempt himself from Mass. Gen. Laws ch. 149, §§ 148 or 150. The apparent purpose of this provision is to bar employers from inducing their employees to waive or otherwise surrender the protections they are provided under Massachusetts's Wage Act. The provision is unconditional; it sets forth no circumstance in which such a waiver would be lawful. When determining a statute's meaning, a court should give statutory words their usual and ordinary meaning, considered in light of the aim to be accomplished by the legislature. The words used in Mass. Gen. Laws ch. 149, § 148 are clear, as is the legislature purpose, i.e., the Act prevents the unreasonable detention of wages. Viewing the words used in this provision in light of the statute's legislative purpose, it is plain that the legislature intended to bar any contract between an employer and an employee that denied the employee the prompt payment of wages guaranteed by the Wage Act.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

HN5 **Wage & Hour Laws, Wage Payments**

Under Massachusetts's Wage Act, wages must be regular, not episodic, and contingent only upon an employee's performance of his or her job.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wage & Hour Laws > General Overview

HN6 **Wage & Hour Laws, Wage Payments**

Enforcing the provision of Mass. Gen. Laws ch. 149, § 148 which prohibits an employee from exempting himself or herself from Mass. Gen. Laws ch. 149, §§ 148 or 150 may adversely affect those start-up companies which ask employees to forego wages until the company reaches financial viability. However, the language of the Wage Act is crystal clear on this point, and, unless and until the Act is amended, the Superior Court of Massachusetts is obligated to enforce its clear mandate.

Labor & Employment Law > Wage & Hour Laws > Administrative Proceedings > General Overview

HN7 **Wage & Hour Laws, Administrative Proceedings**

See Mass. Gen. Laws ch. 149, § 150.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Definition of Employers

HN8 **Wage & Hour Laws, Wage Payments**

The Superior Court of Massachusetts, at Middlesex, understands the provision of Mass. Gen. Laws ch. 149, § 150 barring the defense of post-complaint payment of wages to mean that an employer found in violation of Massachusetts's Wage Act is required to pay treble the amount of wages and benefits that were unpaid at the time the complaint was brought; the employer may not reduce this amount by making payment after it learns of the complaint. The corollary to this interpretation is that an employer is not required to pay treble the lost wages and benefits if the wage and benefit payments were tardy but made before suit was brought. When wages and benefits are tardy but paid before the complaint was brought, the loss of wages and other benefits is simply the interest foregone from the delay in payment, which would be trebled under the Act. Under this interpretation, tardy pre-complaint payment may not classically constitute a defense to a Wage Act violation, but it would greatly mitigate the amount of damages.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

HN9 **Wage & Hour Laws, Wage Payments**

The Superior Court of Massachusetts, at Middlesex, rejects the argument that the prohibition of the defense of post-complaint payment under Massachusetts's Wage Act applies only to suits brought by the Massachusetts Attorney General, not to suits brought by private persons. The court can find no rational reason why the legislature would have barred this defense for actions brought by the Attorney General but permitted it for actions brought by a wage earner.

Governments > Legislation > Statutory Remedies & Rights

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

HN10 **Legislation, Statutory Remedies & Rights**

When the legislature has provided a statutory cause of action to an at-will employee who has been discharged for exercising his or her statutory rights, there is no need to add a common-law remedy.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wrongful

Termination > Remedies > General Overview

HN11[] **Wage & Hour Laws, Wage Payments**

See Mass. Gen. Laws ch. 149, § 148A.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Governments > Legislation > Statutory Remedies & Rights

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

Labor & Employment Law > Wrongful Termination > General Overview

HN12[] **Wage & Hour Laws, Wage Payments**

Mass. Gen. Laws ch. 149, § 150 provides that an employee may bring a civil action against his or her employer, claiming a violation of Mass. Gen. Laws ch. 149, § 148A. Therefore, to the extent that an employee asserts a claim for wrongful termination, in violation of Mass. Gen. Laws ch. 149, § 148A, and a common-law claim for wrongful termination, the common-law claim must be dismissed in view of the availability of the statutory remedy.

Judges: **[*1]** Ralph D. Gants, Justice of the Superior Court.

Opinion by: Ralph D. Gants

Opinion

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

The plaintiff, Amy Dobin ("Dobin"), in her Third Amended Complaint, has filed suit alleging four causes of action against her former employer, the defendant CIOview Corporation ("CIOview"): (1) failure to pay salary in violation of the Wage Act, G.L.c. 149, §§ 148 & 150; (2) wrongful termination in violation of public policy; (3) breach of contract for the alleged failure to pay earned commissions; and (4) breach of the implied covenant and good faith for allegedly terminating her to avoid paying her commissions that were about to be earned. Dobin has moved for partial summary judgment on the Wage Act claim, while CIOview has cross-moved for partial summary judgment on the Wage Act claim and the wrongful termination claim.

BACKGROUND

In September 1998, Scott McCready, with two other investors, began CIOview, a company that developed and sold software designed to help large information technology vendors improve their information **[*2]** technology purchase decisions. [1] Initially, McCready was CIOview's sole employee. Later, McCready's wife, Ann Palermo, became its second employee and Dobin became its third.

Before becoming an employee, Dobin had been retained by CIOview as a consultant. McCready offered her a management position overseeing three account relationships and developing best practices for two of CIOview's major customers. [2] In a document entitled Job Offer for Amy Dobin, dated September 1, 1999, McCready offered her an annual salary of $ 75,000 per year based on a three-day workweek, as well as monthly commissions. Dobin accepted the terms of employment set forth in that Job Offer and began work as an employee in September 1999. In or about June 2000, her annual salary was increased to $ 95,000, still based on a three-day work week.

[*3] Dobin was timely paid her salary for the months of September 1999 through January 2000. According to McCready, in or around February 2000, McCready, Palermo, and Dobin discussed the financial condition of CIOview. McCready testified that they recognized that CIOview, technically, was bankrupt in that it had only enough money to pay its rent, electric, and telephone bills for four to six months, but not enough to pay its three employees. They discussed the possibility of closing the company but the three of them agreed that

[1] The company was named Avantsoft when it was formed and later changed its name to CIOview.

[2] McCready and Dobin differ over how Dobin became an employee. McCready recalled that Dobin wanted the security of being an employee, and asked to become one. Dobin recalled that McCready told her that his board of directors would not allow him to continue to pay her at the consulting rate she had been charging, and asked her to join CIOview as an employee.

they would keep the company alive by deferring any salary payments until business improved and the corporation could afford to pay them.

Dobin has testified that no such meeting ever occurred with McCready and Palermo. Yet, the discussion she recalls between her and McCready is similar in content to that described by McCready. According to Dobin, McCready initiated a discussion with her in late January or early February 2000 in which he told her that there was not enough money to pay salaries, just enough to pay rent and utilities for three or four months. He asked her whether she would defer her salary. She asked him whether salaries would be the first obligation **[*4]** paid when the money came in, and he said salaries would be paid right after rent and utilities. They discussed the possibility of selling the assets of CIOview and estimated the value of those assets. She did not consider quitting her job because she believed in the company and in McCready, and believed the company had some large deals pending. They also discussed that the salary deferral would likely be needed only in the short term because the company had a large deal pending and anticipated the receipt of venture capital. In short, Dobin admits that she agreed to defer her salary for a period of time provided that salaries would be the first things paid, after rent and utilities, when money came into the company.

Dobin received her monthly salary for February 2000 in October 2000, and her March 2000 salary in November 2000. On December 6, 2000, she was paid her salary for April and May 2000. That same day, Dobin spoke with McCready and told him that she had spoken with the Attorney General's Office, and had learned that, under the labor laws in Massachusetts, it was unlawful to delay her compensation even if she had agreed to it. She followed up on this discussion by sending McCready **[*5]** an email on December 7, 2000 that listed the websites which discussed the Massachusetts labor laws. McCready replied with an email to her that same day in which he wrote:

I am very well aware of the labor laws as they pertain to Massachusetts. I think you are missing a key issue which is that you agreed to have your compensation delayed, this was done with your wishes. Your were well aware of the financial situation at CIOview at the time you did this so it was done with full knowledge. Anyway I am not the person to try and make the importance of this point to you.

Please put together a complete picture of the sales commissions you believe are owed to you under the terms of your employment.

Dobin replied by email that same evening. She wrote:

True, I was aware of the financial situation at CIOview and did agree to delay my compensation UNTIL MONEY CAME IN TO PAY THE SALARIES, AND UNDER THE CONDITION THAT WHEN THE MONEY CAME IN, THE SALARIES WOULD BE THE FIRST THINGS PAID. At the time, nobody was receiving their salaries. Since that time you have hired 2 additional employees/contractors and are paying them. In addition you are now hiring outside firms to do work for you and you **[*6]** are paying them. [Emphasis in original.]

I was not aware of the State Labor Laws regarding payment of wages until this week. If you were aware of the State Labor Laws, then you should have been aware that such an agreement is a direct violation of the laws. Chapter 149, *section 148* of these labor laws clearly states that "No person shall by special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty." These labor laws also state that employees must be paid weekly or bi-weekly, when in fact you have been paying us monthly.

I realize that CIOview is a small struggling start up company, but it is a corporation and it is operating in the state of Massachusetts. All corporations must abide by the federal and state laws governing them, regardless of the size of the company or the hardships that they face . . .

I have remained working at CIOview for 15 months because I fully believe in and support our mission and our products, and I enjoy working with you and Ann. I believe in the company's future and would like to continue working for you. I have not filed any complaints with the Attorney General and don't want to. I **[*7]** sincerely hope we can resolve these issues and move forward . . .

On December 12, 2000, McCready instructed CIOview's accountant to prepare checks for Dobin paying her the balance due for her monthly salary. On December 13, 2000, McCready told Dobin that her employment at CIOview was being terminated, and provided her with seven checks for the period from June through December 15, 2000, each post-dated December 15, 2000. Once these checks were successfully negotiated and subsequent checks for vacation pay were delivered, Dobin had received all the salary payments due to her

during the course of her employment at CIOview, albeit belatedly.

On December 13, 2000, immediately after her termination, Dobin initiated this action in Superior Court. CIOview did not receive notice of the complaint until it was served on December 22, 2000.

DISCUSSION

Count I: The Wage Act Claim

In her motion for partial summary judgment, Dobin argues that she is entitled to judgment as a matter of law on her claim for deferred salary payments under the Wage Act. To prevail on this claim, Dobin must establish conclusively that: (1) she is an employee within the meaning of the Wage Act, G.L.c. 149, § 148 **[*8]** , whose monthly salary payment is a "wage" as defined in the Act; (2) Dobin and CIOview's agreement to defer her compensation is void as a matter of law; and (3) CIOview may not assert its belated payment of Dobin's back salary as a defense. CIOview contests each of these elements, so this Court will consider each in turn.

Is Dobin an employee within the meaning of the Wage Act whose monthly salary payment is a "wage" under the Act?

Under the plain language of G.L.c. 149, §§ 148 and 150, this Court finds that Dobin was an "employee" protected under the Wage Act and that her monthly payment of salary was a "wage" whose timely payment was mandated by the Act.

Dobin was a salaried employee, to be paid $ 75,000 per year, plus monthly commissions, until June 2000, when her annual salary was increased to $ 95,000. **HN1**[] The Wage Act specifically includes salaried employees within its scope:

HN2[] An employer may make payment of wages prior to the time that they are required to be paid under the provisions of this section, and such wages together with any wages already earned and due under this section, if any, may be paid weekly, bi-weekly, **[*9]** or semi-monthly to a salaried employee, but in no event shall wages remain unpaid by an employer for more than six days from the termination of the pay period in which such wages were earned by the employee. For the purposes of this section the words salaried employee shall mean any employee whose remuneration is on a weekly, bi-weekly, semi-monthly, monthly or annual basis, even though deductions or increases may be made in a particular pay period.

G.L.c. 149, § 148. While the entire Wage Act is hardly a model of legislative draftsmanship, it is plain from this language that, while an employer may pay a salaried employee wages in advance, it may not delay payment "for more than six days from the termination of the pay period in which such wages were earned by the employee." *Id.* Here, Dobin had agreed to be paid on a monthly basis, which, in view of her administrative position, was specifically authorized by the Wage Act. *Id.* ("employees engaged in a bona fide executive, administrative or professional capacity as determined by the attorney general . . . may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be **[*10]** paid monthly"). Consequently, under the Wage Act, Dobin was required to be paid her monthly wage no more than six days after the termination of her monthly pay period.

Other courts that have interpreted the Wage Act more narrowly have focused on the payment of commissions or bonuses, not the payment of wages arising from a salary. For instance, the Appeals Court, in considering whether the payment of commissions to a real estate broker falls within the rubric of the Wage Act, looked to the title of the amendment that revised the Act to include the payment of commissions--"An Act relative to the weekly payment of commissions due to certain employees"--and the placement of the provision concerning commissions in the portion of the statute addressing the weekly payment of wages, and inferred "a Legislative purpose to assist employees who would ordinarily be paid on a weekly basis, such as retail salespeople, and for whom commissions constitute a significant part of weekly income." Commonwealth v. Savage, 31 Mass.App.Ct. 714, 716, 583 N.E.2d 276 (1991). Finding that real estate brokers did not fall in that category, the Court held that their commissions are not protected **[*11]** by the Wage Act. *Id.* In *Baptista v. Abbey Healthcare Group, Inc*., United States District Judge Richard Stearns, in considering whether a business executive was entitled to the prompt payment of stock options under the Wage Act, found "no reason to extend the protections of a wage earner's statute to cover bonuses potentially owing to highly paid executives . . ." Baptista v. Abbey Healthcare Group, Inc., 1996 U.S. Dist. LEXIS 22797, Civ. Action No. 95-10125-RGS, slip op. (D.Mass. April 10, 1996). Judge Stearns specifically contrasted the claimed award of a bonus from the payment of wages. *Id.* Similarly, Judge Carol Ball, in considering whether a contract attorney is entitled under the Wage Act to prompt payment for work

he had performed, found that the compensation he was seeking was neither a wage nor a commission under the Act because it "was contingent on a number of factors." *Dennis v. Jager, Smith & Stetler, 11 Mass. L. Rep. 567 (Suffolk Superior Ct. 2000)* . None of these cases held that wages fall outside the scope of the Act because they were paid to a highly-paid salaried employee.

Nor could any such interpretation square with the language of the Wage Act or permit any **[*12]** reasonable administration of the Act. As discussed earlier, ***HN3***[⬆] the Act specifically defines a "salaried employee," not in the context of excluding such persons from the scope of the Act but in the context of including them. See *G.L.c. 149, § 148*. Moreover, by specifically noting that "employees engaged in a bona fide executive, administrative or professional capacity . . . may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly," the Act demonstrates that it recognizes that these high-ranking employees are protected under the Act. See *id.* Finally, if highly-paid salaried employees were indeed excluded from the Act, the Legislature would have needed to draw a line separating those whose wages are protected under the Act from those whose wages are not. The absence of any such line, and the arbitrariness of any court interposing such a line, reflects the legislative intent that no such distinction be drawn. See *Kohli v. RES Engineering, 13 Mass. L. Rep. 108, 2000 Mass. Super. LEXIS 463 *5 -*6 Civil Action No. 00-02458, (Middlesex Superior Ct. 2000) (Garsh, J.)*.

2. **[*13]** Is Dobin and CIOview's agreement to defer her compensation void as a matter of law?

HN4[⬆] The Wage Act specifically provides, "No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty." *G.L.c. 149, § 148*. The apparent purpose of this provision was to bar employers from inducing their employees to waive or otherwise surrender the protections they are provided under the Wage Act. The provision is unconditional; it sets forth no circumstance in which such a waiver would be lawful. Here, CIOview contends that Dobin volunteered to defer payment of her salary until business had improved. Indeed, CIOview contends that she benefitted from this deferral, because CIOview would have folded without this agreement to defer and she would never have received the salary payments that she ultimately did receive.

When determining a statute's meaning, a court should give statutory words their usual and ordinary meaning, considered in light of the aim to be accomplished by the Legislature. *Surrey v. Lumbermens Mut. Cas. Co., 384 Mass. 171, 177, 424 N.E.2d 234 (1981)*. Here, **[*14]** the words used in the statute are clear, as is the legislature purpose--to prevent the unreasonable detention of wages. See *American Mut. Liab. Ins. Co. v. Commissioner of Labor & Indus., 340 Mass. 144, 147, 163 N.E.2d 19 (1959)*. Viewing the words used in this provision in light of the statute's legislative purpose, it is plain that the Legislature intended to bar any contract between an employer and employee that denied the employee the prompt payment of wages guaranteed by the Wage Act. The oral deferral agreement entered into between CIOview and Dobin was precisely such a prohibited agreement because it would have permitted CIOview to postpone paying Dobin her monthly wages well beyond the six days provided under the Act.

CIOview contends that, as a result of the oral deferral agreement, Dobin's salary was no longer a "wage" as defined in the Act because it had become contingent upon a future event--the improved financial position of the company. This Court recognizes that ***HN5***[⬆] wages under the Act must be regular, not episodic, and contingent only upon the employee's performance of her job. See *Commonwealth v. Savage, 31 Mass.App.Ct. at 716*; *Huebsch **[*15]** v. Katahdin Indus., Inc., 2001 Mass. Super. LEXIS 209 at *3, 13 Mass. L. Rptr. 180 (Middlesex Superior Ct. April 24, 2001) (Kottmyer, J.)*. Certainly, if Dobin, as in *Huebsch*, were to receive a lump sum payment above and beyond her first year salary if she worked at least 100 days in her first year, her entitlement to that lump sum would be conditional upon her having worked that number of days. See *Huebsch v. Katahdin Indus., Inc. at *3*. In this case, however, Dobin's salary was not contingent upon *her* performing any condition beyond performing her job, so her wages continued to accrue during the time she went without pay. Instead, the deferral agreement between Dobin and CIOview simply attempted to postpone the moment payment became due for the wages she had already earned, based on the financial ability of the company to afford those wages, which is precisely what the unambiguous language of the Wage Act forbids.

Nor did the deferral agreement transform all her wages into the type of deferred compensation that the Supreme Judicial Court found were not wages under the Wage Act. See *Boston Police Patrolmen v. City of Boston, 435 Mass. 718, 720, 761 N.E.2d 479 (2002).* **[*16]** In *Boston Police Patrolmen*, the Supreme

Judicial Court held that the portion of wages which an employee chose to defer and place in a tax-exempt deferred compensation plan are not "wages" under the Act, recognizing that, if they were, "employees could lose the federal tax benefit for which the deferred compensation statute was created." *Id. at 721*. Here, in contrast to *Boston Police Patrolmen*, there is no state statute specifically authorizing the deferral so as to qualify for federal tax benefits under the Internal Revenue Code. Compare with *id. at 720*. Indeed, to the contrary, there is a state statute specifically prohibiting the deferral and no evidence that the employee chose deferral to enjoy any beneficial tax consequence.

This Court recognizes that ***HN6***[⬆] enforcing this provision in the Wage Act may adversely affect those start-up companies which ask employees to forego wages until the company reaches financial viability. This Court does not offer any opinion as to whether the Wage Act is wise in prohibiting deferral agreements in all circumstances, or whether there are ways in which start-ups can avoid this prohibition by paying employees **[*17]** only the minimum wage and offering bonuses that are conditioned on the company's financial performance. The fact of the matter is that the language of the Wage Act is crystal clear on this point, and, unless and until the Act is amended, this Court is obligated to enforce its clear mandate.

May CIOview assert its belated payment of Dobin's back salary as a defense?

G.L.c. 149, § 150 reads:

HN7[⬆] The attorney general may make complaint against any person for a violation of section one hundred and forty-eight within three months after the date thereof. On the trial no defence [sic] for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid. The defendant shall not set up as a defence [sic] a payment of wages after the bringing of the complaint . . .

Any employee claiming to be aggrieved by a violation of *section 148* . . . may, at the expiration of ninety days after **[*18]** the filing of a complaint with the attorney general, or sooner, if the attorney general assents in writing, and within three years of such violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief and any damages incurred, including treble damages for any loss of wages and other benefits. An employee so aggrieved and who prevails in such an action shall be entitled to an award of the costs of the litigation and reasonable attorney fees.

Dobin contends that, since she filed her complaint on December 13, 2000 and the checks she received for unpaid monthly salary were post-dated December 15, 2000, CIOview is barred by the language of *§ 150* from using this belated payment of wages as a defense. CIOview, based on the location of this provision in the statute--directly below the reference to civil actions initiated by the Attorney General--contends that the limitation on the use of this defense applies only to cases brought by the Attorney General, not to those brought directly by aggrieved employees.

To resolve this debate, this Court must first look at the language of this provision **[*19]** in the context of the entire statute in an effort to discern legislative intent. At first glance, the statutory prohibition against using post-complaint payment of wages as a defense seems bizarre, since a wage payment by an employer after the statutorily mandated time period could not possibly constitute a defense to a violation under the Wage Act, regardless of whether it was made before or after the filing of the complaint. For instance, if an employer were to defer paying wages until three months after the close of the pay period, it could not offer as a defense its tardy payment to its employees, because the fact that payment was ultimately, albeit belatedly, made does not negate the fact that it was late. Therefore, to give a literal meaning to this provision is essentially to give it no meaning.

However, if one were to view this provision barring a defense of post-complaint payment in the context of the provision that speaks of treble damages for any loss of wages and benefits, it is possible to give this provision the meaning likely intended by the Legislature. Although this Court is not aware of any legislative history on the subject, it is apparent that the Legislature wished **[*20]** to deter an employer from failing timely to pay wages and then, when a complaint was filed against it, effectively mooting the claim by then making payment. If this tardy payment were allowed to mitigate damages, the wage earner's claim would not truly be mooted, since her wage payment would still be untimely, but the damages would simply be the money interest the wage earner lost from the delay in obtaining this money, which

would likely be a trifling amount when considered against the time and expense of litigation, even if it were trebled.

HN8[] This Court understands the provision barring the defense of post-complaint payment to mean that an employer found in violation of the Wage Act is required to pay treble the amount of wages and benefits that had been unpaid at the time the complaint was brought; the employer may not reduce this amount by making payment after it learns of the complaint. The corollary to this interpretation is that an employer is not required to pay treble the lost wages and benefits if the wage and benefit payments were tardy but made before suit was brought. When wages and benefits are tardy but paid before the complaint was brought, the "loss of wages and other **[*21]** benefits" is simply the interest foregone from the delay in payment, which would be trebled under the Act. Under this interpretation, tardy pre-complaint payment may not classically constitute a "defense" to a Wage Act violation, but it would greatly mitigate the amount of damages.

In reaching this interpretation, HN9[] this Court rejects CIOview's argument that the prohibition of the defense of post-complaint payment applies only to suits brought by the Attorney General, not to suits brought by private persons. This Court can find no rational reason why the Legislature would have barred this defense for actions brought by the Attorney General but permitted it for actions brought by the wage earner herself.

With this interpretation of the "defense" of tardy payment, it is plain that Dobin must prevail on summary judgment as to liability with respect to her Wage Act claim. She was an employee whose monthly wages were covered under the Wage Act; the deferral agreement was void under the statute; and CIOview's December 15, 2000 wage payments were tardy under the Act--the payment of wages through December 1, 2000 should have been paid within six days of the end of the pay period, and the payments **[*22]** through December 13, 2000 should have been paid in full on the date of discharge, not post-dated to December 15. See G.L.c. 149, § 148.

Since CIOview paid Dobin in full on December 13, 2000 with checks post-dated December 15, 2000, the key issue is whether these payments should be viewed as having been paid before or after "the bringing of the complaint," since these payments would be awarded as treble damages only if they were paid after "the bringing of the complaint." There is no dispute that Dobin was fired on December 13, 2000 and paid in full that day with checks post-dated to December 15, that she filed her Wage Act claim later that same day, and that CIOview had notice of her filing of a Wage Act claim only when it was served with the complaint on December 22, 2002. Under these circumstances, in view of the spirit and purpose of the Wage Act, this Court finds that CIOview made its wage payments *before* the "bringing of the complaint" when it furnished Dobin with checks on December 13--before the action had been filed--that were post-dated to December 15. Certainly, there is no dispute that CIOview intended to pay Dobin all the back pay due to **[*23]** her before it knew she had brought a Wage Act suit, and Dobin had the checks in hand before she filed her suit. Under these circumstances, Dobin could not ensure treble damages simply by filing her complaint before the post-dated checks became payable; the commitment to pay had preceded the filing of the complaint and the negotiation date for the checks was only two days later.

Therefore, under the circumstances of this case, the only damages that Dobin may be awarded under the Wage Act, apart from attorneys fees and the costs of litigation, are the foregone interest she suffered from the delay in paying her monthly wages, trebled. This Court shall await written submissions from the parties as to the amount of this foregone interest, as well as reasonable attorneys fees and the cost of litigation, before ascertaining a damage award.

Count II: Wrongful Termination Claim

Dobin claims she was fired in retaliation for invoking her rights under the Wage Act to McCready and is entitled to relief for her wrongful termination in violation of public policy. CIOview has moved for summary judgment, claiming that Dobin cannot maintain a common-law claim for wrongful termination contrary **[*24]** to public policy when there is a statutory remedy under the Wage Act.

CIOview is correct that, HN10[] when the Legislature has provided a statutory cause of action to an at-will employee who has been discharged for exercising her statutory rights, there is no need to add a common-law remedy. See Mello v. Stop & Shop Cos., 402 Mass. 555, 557, 524 N.E.2d 105 (1988); King v. Driscoll, 418 Mass. 576, 584 n. 7, 638 N.E.2d 488 (1994). Here, there is plainly a statutory remedy available to Dobin: G.L.c. 149, § 148A provides, HN11[] "No employee shall be penalized by an employer in any way as a result of any action on the part of an employee to seek

his or her rights under the wages and hours provision of this chapter," and G.L.c. 149, § 150 HN12[⬆] provides that an employee may bring a civil action against her employer claiming a violation of § 148A. Therefore, to the extent that Dobin has brought a common-law claim of wrongful termination, such claim must be dismissed in view of the availability of the statutory remedy.

To the extent, however, that Dobin's claim in Count II is a civil action brought under G.L.c. 149, § 150 **[*25]** , it survives summary judgment. Dobin has presented evidence that she was fired after she informed McCready that she had spoken with the Attorney General's Office about her rights under the Wage Act and had asked that CIOview pay her in accordance with the Wage Act. While the reasons for Dobin's termination are certainly in dispute, there is a genuine issue of material fact as to whether Dobin's termination was in retaliation for action she took to invoke her rights under the Wage Act.

ORDER

For the reasons detailed above, this Court *ORDERS* as follows:

Dobin's motion for partial summary judgment is hereby *ALLOWED* as to liability with respect to her Wage Act claim--Count I. This Court finds that the only damages that Dobin may be awarded under the Wage Act, apart from attorneys fees and the costs of litigation, are the foregone interest she suffered from the delay in paying her monthly wages, trebled. This Court shall await written submissions from the parties as to the amount of this foregone interest, as well as reasonable attorneys fees and the cost of litigation, before ascertaining a damage award. CIOview's cross motion for partial summary judgment is hereby *DENIED* **[*26]** as to Count I.

CIOview's motion for partial summary judgment as to the wrongful termination claim--Count II--is *ALLOWED* to the extent that Dobin has brought a common-law claim of wrongful termination. To the extent, however, that Dobin's claim in Count II is a civil action brought under G.L.c. 149, § 150, CIOview's motion for partial summary judgment is *DENIED*.

Ralph D. Gants

Justice of the Superior Court

DATED: October 28, 2003

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Clermont v. Monster Worldwide, Inc.

United States District Court for the District of Massachusetts

April 6, 2015, Filed

Civil Action No. 14-14328-LTS

Reporter
102 F. Supp. 3d 353 *; 2015 U.S. Dist. LEXIS 47064 **; 24 Wage & Hour Cas. 2d (BNA) 1109

MARC CLERMONT, individually and on behalf of all others similarly situated, Plaintiff, v. MONSTER WORLDWIDE, INC., SALVATORE IANNUZZI, and DAVID TRAPANI, Defendants.

Core Terms

funds, wages, damages, pay in full, treble, electronic transfer, attorney general, lost wages, benefits, vacation

Counsel: **[**1]** For Marc Clermont, On behalf of himself and all others similarly situated, Plaintiff: Anthony S. Augeri, LEAD ATTORNEY, The Augeri Law Group, PLLC, North Andover, MA.

For Monster Worldwide, Inc., Salvatore Iannuzzi, David Trapani, Defendants: Anne S. Bider, LEAD ATTORNEY, Seyfarth Shaw, Boston, MA; Barry J. Miller, LEAD ATTORNEY, Seyfarth Shaw, LLP, Boston, MA.

Judges: Leo T. Sorokin, United States District Judge.

Opinion by: Leo T. Sorokin

Opinion

[*355] MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS

SOROKIN, J.

I. INTRODUCTION

Defendant Monster employed Plaintiff. Am. Compl. ¶ 15. On April 3, 2014, Monster ("Defendant") terminated Plaintiff's employment. Id. ¶ 16. On that day Defendant, via its bank, issued an electronic transfer of funds from its account to Plaintiff's bank account in the full amount of all wages due, which was $26,401.50. Id. ¶ 18. The funds appeared in Plaintiff's account the next day, April 4. Id. ¶ 19. Defendant knew at the time it issued the electronic transfer that Plaintiff would not receive the funds until April 4. Doc. No. 5. On October 22, 2014, Plaintiff filed this lawsuit in Massachusetts Superior Court, Compl., and filed an amended complaint on October 30, 2014, Am. Compl. Defendant received **[**2]** service of the amended complaint on November 14, 2014. Defs.' Notice Rem. ¶ 3. Defendants filed a notice of removal on December 4, 2014, asserting diversity jurisdiction. Id.

Plaintiff claims a violation of the Massachusetts Wage Act, *chapter 149, section 148 of the Massachusetts General Laws* on his own behalf and on behalf of others similarly situated. Am. Compl. ¶ 2. Defendant has moved to dismiss. Defs.' Mot. Dismiss. Given that the foregoing facts appear undisputed, neither party has suggested it needs discovery to prepare its case and the case presents questions of law, the Court treats the parties' filings as cross-motions for judgment on the pleadings.

II. Statutory Requirement

The statute defines when employers must pay terminated employees: "any employee discharged from such employment shall be paid in full on the day of his discharge." *Mass. Gen. Laws ch. 149, § 148*. Statutory language must be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved **[*356]** usage of the language" and in consideration of the purpose of the "cause of its enactment." *Bos. Police Patrolmen's Ass'n v. City of Bos., 435 Mass. 718, 761 N.E.2d 479, 481 (Mass. 2002)* (citing *O'Brien v. Dir. of the Div. of Emp't Sec'y, 393 Mass. 482, 472 N.E.2d 253, 258 (Mass. 1984))*.

The purpose of the Massachusetts Wage Act is to ensure that employees receive prompt payment of wages, **[**3]** *Wiedmann v. The Bradford Grp., Inc., 444 Mass. 698, 831 N.E.2d 304, 308 (Mass. 2005)*, and to

"prevent the unreasonable detention of wages" by employers. *Melia v. Zenhire, Inc., 462 Mass. 164, 967 N.E.2d 580, 587 (Mass. 2012)*; see also, *Newton v. Comm'r of the Dep't of Youth Servs., 62 Mass. App. Ct. 343, 816 N.E.2d 993, 995 (Mass. App. Ct. 2004)*. The Act requires "that an employer expeditiously pay a terminated employee his full wages and similar compensation," *Suominen v. Goodman Indust. Equity Mgmt. Grp., LLC, 78 Mass. App. Ct. 723, 941 N.E.2d 694, 705 (Mass. App. Ct. 2011)*, which "must" be paid in full on the day that the employee is terminated, *Prozinski v. Ne. Real Estate Servs., 59 Mass. App. Ct. 599, 797 N.E.2d 415 (Mass. App. Ct. 2003)*.

The plain meaning of the language "paid in full on the day of his discharge" requires the employer to transfer control over the funds to the employee on the day of discharge. By selecting the word "paid," the past tense of "to pay," the Legislature required the completion of the act of payment, a requirement emphasized by the conditions on payment, the employer must make payment "in full" and do so "on the day" of discharge. Payment is, thus, incomplete until the recipient of the funds has some control over the funds. Several reasons support the foregoing plain language construction.

First, the limited case law applying this aspect of the statute has interpreted the language in this manner. The Superior Court of the Commonwealth, in a decision by now Chief Justice Gants, ruled that giving post-dated checks to a discharged employee on the date of discharge made the payment "tardy under the Act." *Dobin v. CIOview Corp., No. 2001-00108, 2003 Mass. Super. LEXIS 291, 2003 WL 22454602, at *8 (Mass. Supp. Oct. 29, 2003)*. Because the checks **[**4]** were post-dated, the plaintiff in Dobin, though in possession of the checks, did not have control over the funds.

Second, the context in which the statute applies supports requiring the transfer of control over the funds to the employee to occur on the day of discharge. The parties — employer and employee — are necessarily going their separate ways. The employer has severed its employment relationship with the employee and the Legislature has required the employer to complete that process by making payment that day. By requiring the employer to relinquish control of the funds to the employee, the statute ensures a clean final separation of the parties.

Third, under Massachusetts law generally, "payment" occurs when funds are "tendered and accepted." *Goldman v. Peterson, 1997 Mass. App. Div. 189 (1997)* (quoting Black's Law Dictionary (6th ed. 1990)). When paying by check, the Supreme Judicial Court of Massachusetts ("SJC") has ruled that payment is made "when the check is 'drawn on an account with sufficient funds to cover' [it]...and is delivered to the payee." *First Nat'l Ins. Co. v. Commw., 391 Mass. 321, 461 N.E.2d 789, 792-93 (Mass. 1984)* (citing *Terry v. Kemper Ins. Co., 390 Mass. 450, 456 N.E.2d 465, 468 (Mass. 1983)*) (emphasis added). Due to the similar nature of transferring funds through the delivery of a check and through electronic transfer from one bank account to another, the **[**5]** SJC ruling applies equally here. An employer makes **[*357]** "payment" electronically when the funds are received in the employee's bank account.

Fourth, numerous Massachusetts statutes use the phrase "paid in full." See, e.g., *Mass. Gen. Laws. ch. 172, § 24* ("no dividends shall be declared or paid ...until all such cumulative dividends shall have been paid in full"); *ch. 62C, § 67* (an application for registration may be denied if tax payable "has not been paid in full"); *ch. 164, § 1H(b)(2)* ("the transition charge and its payment...shall be binding...until the bonds are paid in full"). Generally, the statutes use the phrase in the sense that paid in full means the recipient has received payment or control over the funds. Two statutes in particular bear mention. *Chapter 65, section 22* provides that "[a]ny unpaid amount of the tax shown to be due on said return...shall be paid in full with the return," meaning that the Commissioner must receive payment with or at the time of receipt of the return, not later by electronic transfer initiated the day of the return. *Mass. Gen. Laws ch. 65, § 22*. Similarly, *Chapter 140, section 114B* authorizes certain creditors to collect a delinquency charge "on any payment not paid in full within fifteen days of its due date," plainly authorizing the delinquency **[**6]** charge when payment issues electronically within the time period but reaches the creditor after the time period. *Mass. Gen. Laws ch. 140, § 114B*.

Applying the foregoing interpretation to the undisputed facts set forth in Plaintiff's complaint establishes that Defendant violated the statute, subject to any defenses. Defendant did not turn over to the Plaintiff control over the funds on the day of his discharge, thus Plaintiff was not paid in full on April 3rd. Certainly, defendant's payment method: (1) may have actually given Plaintiff access to the funds faster than handing him a check; (2) maybe preferred by many persons; and (3) appears, perhaps, commercially reasonable in a general sense. The statute permits electronic transfer payments, provided, the discharged employee is paid in full on the

day of discharge. However, the payment method, as implemented in this case, does not comply with the statute, rather it is akin to placing cash in an overnight mail envelope knowing that delivery to the employee will not occur until the next day. This the statute, as written, does not permit.[1]

III. Damages

Chapter 149, section 150 authorizes the Commonwealth's attorney general to bring either a civil or criminal action to enforce the mandates of *section 148*. *Mass. Gen. Laws ch. 149, § 150*. In such action "no defence [sic] for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid." Id. The section also provides that the "defendant shall not set up as a defence [sic] a payment of wages after the bringing of the complaint." Id.

The second paragraph of the section allows an aggrieved employee to bring a private civil action to enforce *section 148*, provided the employee first files a complaint with the attorney general and either **[*358]** 90 days elapses or the attorney general assents to the earlier filing of a private action by the employee. Id. The paragraph regarding the private action contains **[**8]** no provisions regarding defenses. It does though define the damage remedy: "An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees." Id.

Plaintiff reasons that the Defendant paid late, therefore it has established liability and for damages the Court "shall" award treble damages subject only to a possible setoff for the April 4 wage payment. The Court does not agree with Plaintiff's reasoning regarding damages. The structure of the section creates the private right of action as a derivation of the civil public action the Legislature authorized the attorney general to file — the employee can only file after initiating some contact with the attorney general. For this reason, the various provisions governing defenses to the attorney general's actions apply with equal force to private civil actions. Or, as now Chief Justice Gants ruled as a Justice of the Superior Court: "This Court can find no rational reason why the Legislature would have barred this defense [of payment] for actions brought by the Attorney General **[**9]** but permitted it for actions brought by the wage earner herself." *Dobin, 2003 Mass. Super. LEXIS 291, 2003 WL 22454602, at *8*.

Thus, the statute prohibits an employer from defending a private action based upon payment of wages after the "bringing of the complaint," *ch. 149, § 150*, meaning that "an employer found in violation of the Wage Act is required to pay treble the amount of wages and benefits that had been unpaid at the time the complaint was brought; the employer may not reduce the amount by making payment after it learns of the complaint. The corollary to this interpretation is that an employer is not required to pay treble the lost wages and benefits if the wage and benefit payments were tardy but made before the complaint was brought." *Dobin, 2003 Mass. Super. LEXIS 291, 2003 WL 22454602, at *7*. In that circumstance, Dobin held that the "'loss of wages and other benefits'" is simply the interest foregone from the delay in payment, which would be trebled under the Act." Id.

No doubt *Dobin* was decided when the statute vested judges with the discretion to decide whether to award treble damages. Subsequently, in 2008, the Legislature made trebling of "lost wages and other benefits" mandatory. 2008 Mass. Acts ch. 532. Nonetheless, because the statute authorizes, albeit implicitly, a defense arising **[**10]** from a specific, tardy, wage payment made before the "bringing of the complaint" these wages, i.e. the tardy wages paid before the bringing of the complaint, are not "lost wages" within the meaning of the remedy statute.

Plaintiff relies heavily on two SJC cases. The first, *Dixon*, did not consider the question before this Court. It held "that the failure to pay unpaid wages [in the form of accrued vacation pay] cannot be mitigated by gratuitous, after-the-fact payments and that employees who have not received payment for unused vacation time to which they are entitled may seek relief" under the statute. *Dixon v. City of Malden, 464 Mass. 446, 984 N.E.2d 261, 265 (Mass. 2013)*. Contrary to Plaintiff's suggestion, the SJC's statement that the defendant in Dixon "relies on several cases that do not have precedential value" does not constitute a repudiation of

[1] I note that Defendant has not contended that discovery would reveal information regarding the electronic transfer that would render **[**7]** it equivalent to a check, i.e., that upon initiation of the transfer, that somehow Plaintiff obtained some control over the funds prior to receipt of the funds the next day.

the reasoning of *Dobin*. Id. The SJC did not cite Dobin.

The two cases, Dixon and Dobin, are factually distinct. In *Dobin*, the wages **[*359]** due and owing were paid specifically, but late. *Dobin, 2003 Mass. Super. LEXIS 291, 2003 WL 22454602, at *2*. In *Dixon*, the city never paid the accrued vacation time due and owing, but argued that gratuitous payments made in a hoped for effort to deter litigation qualified as the vacation payments. *Dixon, 984 N.E.2d at 262*. While the SJC did say that "a violation **[**11]** of the Wage Act results in damages" and that the statute imposes "'strict liability,'" it made these statements in the context of an employer failing to pay the wages due and owing. *Id. at 266*. This language plainly concerned the case then at hand in which Plaintiff had not been paid, for two sentences later the SJC ruled that "[i]n these circumstances, the plaintiff has incurred damages under the terms of the statute because the city did not pay his earned unused vacation time." *Id. at 265-66*.

Somers is similarly of no assistance to Plaintiff here. See *Somers v. Converged Access, Inc., 454 Mass. 582, 911 N.E.2d 739 (Mass. 2009)*. Both *Dixon* and *Somers* establish firmly that the statute requires timely payments clearly denoted as payments for the wages at issue in order to qualify as payments under the statute. *Dixon, 984 N.E.2d at 264-65*; *Somers, 911 N.E.2d at 749-50*. Both forbid employers from reducing damage awards based on other different payments made by the employer. *Dixon, 984 N.E.2d at 265*; *Somers, 911 N.E.2d at 750*. These questions do not arise here, which concerns whether Plaintiff suffered "lost wages" under *section 150* when the employer made full payment for all wages, made clear the payment was for that purpose, but did so one day late under the requirements of *section 148*.

That leaves the question of interest. While *Dobin* suggests it is available, in Plaintiff's supplemental filing, he appears **[**12]** to have disavowed any claim for interest arising from the one day delay in payment: "Nowhere does the Wage Act mention damages being the interest on the unpaid wages...The absence of any interest-only damages provision for late payments of wages...conclusively shows the legislature intended not to include such damages in the Wage Act..." Doc. No. 22 at 3-4.

Accordingly, Plaintiff is not entitled to trebled damages, lost wages or other benefits. The parties shall file a joint statement within ten days advising the Court (1) if any party believes further factual development might affect resolution of the issues before the Court and (2) any other matter requiring resolution prior to entry of judgment.

SO ORDERED.

/s/ Leo T. Sorokin

Leo T. Sorokin

United States District Judge

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Littlefield v. Adcole Corp.

Superior Court of Massachusetts, At Essex

June 18, 2015, Decided

Opinion No.: 131234, Docket Number: ESCV2015-00017

Reporter
2015 Mass. Super. LEXIS 83 *; 32 Mass. L. Rep. 706

Kenneth E. Littlefield v. Adcole Corporation et al.[1]

Core Terms

termination, wages, pleadings, benefits, trebled, motion for judgment, treble damages, damages, parties, lost wages, reasonable attorney's fees, filing of the complaint, attorney general, pay period, checks, tardy

Case Summary

Overview

HOLDINGS: [1]-Although an employee was paid his last wages and accrued vacation benefits after his last day of work, as the employee received all of the wages and benefits he was due before he filed suit for a violation of *Mass. Gen. Laws ch. 149, §148*, he was entitled to treble damages under *Mass. Gen. Laws ch. 149, §150* only on the interest on the unpaid amount for the short period between termination and payment, as well as reasonable attorneys fees and litigation costs.

Outcome
Judgment on the pleadings allowed.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1 **Motions to Dismiss, Failure to State Claim**

The effect of a motion for judgment on the pleadings pursuant to *Mass. R.Civ.P. 12(c)* is to challenge the legal sufficiency of the complaint. A motion for judgment on the pleadings is actually a motion to dismiss that argues that the complaint fails to state a claim upon which relief can be granted. In considering such a motion, the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true. A motion for judgment on the pleadings may not be allowed where genuine issues of fact exist. Thus, in considering a motion for judgment on the pleadings, the moving party is deemed to have admitted as true the nonmoving party's assertions of fact.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

HN2 **Wage & Hour Laws, Wage Payments**

Mass. Gen. Laws ch. 149, § 148, provides that a terminated employee must be paid in full on the day of his or her termination.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wage & Hour Laws > Remedies > Costs & Attorney Fees

Labor & Employment Law > Wage & Hour

[1] John Brooks Reece, Jr., Peter A. Hunter, and Douglas H. Vandenberg.

Laws > Remedies > Damages

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

HN3[] **Wage & Hour Laws, Wage Payments**

See *Mass. Gen. Laws ch. 149, § 150*.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

Labor & Employment Law > Wage & Hour Laws > Defenses > General Overview

HN4[] **Wage & Hour Laws, Wage Payments**

Mass. Gen. Laws ch. 149, § 150 provides that a defendant shall not set up as a defense a payment of wages after the bringing of the complaint.

Labor & Employment Law > Wage & Hour Laws > Remedies > Damages

Labor & Employment Law > Wage & Hour Laws > Defenses > General Overview

HN5[] **Remedies, Damages**

When wages and benefits are tardy but paid before a complaint is brought, the loss of wages and other benefits is simply the interest foregone from the delay in payment, which would be trebled under the Massachusetts Wage Act. Under this interpretation, tardy pre-complaint payment may not classically constitute a defense to a Wage Act violation, but it will greatly mitigate the amount of damages.

Civil Procedure > ... > Pleadings > Complaints > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

HN6[] **Pleadings, Complaints**

In the context of *Mass. Gen. Laws ch. 149, § 150* "bringing of the complaint" refers to the commencement of a civil action.

Judges: [*1] Thomas Drechsler, Justice of the Superior Court.

Opinion by: Thomas Drechsler

Opinion

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

This action arises out of the termination of the Plaintiff, Kenneth Littlefield's ("Littlefield") employment by his ex-employer, Adcole Corporation ("Adcole"). Littlefield alleges that Adcole and the individual defendants (collectively the "Defendants") failed to compensate him for his accrued wages as well as his accrued vacation time on the date of his termination in violation of the Massachusetts Wage Act, *G.L.c. 149, §148*. Littlefield brought the instant action seeking treble damages for lost wages as well as reasonable attorneys fees and costs pursuant to *G.L.c. 149, §150*, against the Defendants. The Defendants have moved for judgment on the pleadings pursuant to *Mass.R.Civ.P. 12(c)*. For the reasons set forth below, the Defendants' motion for judgment on the pleadings is *ALLOWED*.

BACKGROUND

The material facts in this case are uncomplicated and undisputed.[2] Between October 26, 1999 and November 12, 2014, Littlefield was employed by Adcole as Director of Human Resources. On August 27, 2014, Littlefield was informed that his employment at Adcole would be terminated, with the effective **[*2]** date to be determined. On October 23, 2014, Littlefield was informed that his termination date was slated for November 12, 2014.

At the time of his termination, Littlefield had accrued five hundred twenty-two (522) hours of unused vacation time, which he was to be paid for upon termination

[2] All facts are derived from the complaint and taken as true for the purposes of this decision. Furthermore, at the hearing the parties generally agreed as to the accuracy of the facts as set forth in the complaint and in their respective pleadings.

under Adcole company policy. Additionally, at the time of his termination on November 12, 2014, Littlefield was owed wages for pay periods of November 2, 2014 through November 8, 2014 and November 9, 2014 through November 15, 2014. The amount Littlefield was allegedly owed on his termination date was $30,090.27 in unused vacation, $1,844.61 for the pay period ending November 8, 2014, and $1,383.46 for the pay period ending November 12, 2014.

On November 10, 2014, Adcole processed a payroll check in the amount of $1,844.61 to Littlefield for the pay period ending November 8, 2014, which was deposited in Littlefield's account on November 13, 2014. On November **[*3]** 17, 2014, Adcole processed a payroll check in the amount of $1,844.61 to Littlefield for the pay period ending November 15, 2014, which was deposited in Littlefield's account on November 20, 2014. On November 23, 2014, Adcole processed a payroll check in the amount of $30,090.27 as compensation for his accrued vacation time, which was deposited in Littlefield's account on November 26, 2014. The parties do not dispute that none of the above discussed payments were made on November 12, 2014—the date of Littlefield's termination.

On November 18, 2014—in the midst of Adcole processing the payments owed to Littlefield—Littlefield filed a complaint with the Attorney General's Office alleging a Wage Act violation by Adcole based on their failure to fully compensate him with all monies owed to him on the date of his termination.[3] Littlefield received a right to sue letter from the Attorney General's Office on November 21, 2014. Littlefield then filed the instant action in this Court on January 7, 2015, which action was served on the Defendants via acceptance of service on January 13, 1015. The parties do not dispute that Adcole paid Littlefield all monies owed to him by November 26, 2014—approximately **[*4]** six weeks prior to the filing of the complaint in this Court, and approximately 5 weeks before the Defendants received notice of said complaint.

DISCUSSION

I. Standard of Review

HN1[] The effect of a motion for judgment on the pleadings pursuant to *Mass.R.Civ.P. 12(c)* is to challenge the legal sufficiency of the complaint. *Burlington v. District Attorney for N. Dist., 381 Mass. 717, 717, 412 N.E.2d 331 (1980)*. "A motion for judgment on the pleadings is actually a motion to dismiss that argues that the complaint fails to state a claim upon which relief can be granted. In considering such a motion, the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true." *Iannacchino v. Ford Motor Co., 451 Mass. 623, 625, 888 N.E.2d 879 at n.7 (2008)* (internal citations, quotations, and modifications omitted). A motion for judgment on the pleadings may not be allowed where genuine issues of fact exist. *Canter v. Planning Bd. of Westborough, 7 Mass.App.Ct. 805, 808, 390 N.E.2d 1128 (1979)*. Thus, in considering a motion for judgment on the pleadings, the moving party is deemed to have admitted as true the nonmoving party's assertions of fact. *Tanner v. Board of Appeals, 27 Mass.App.Ct. 1181, 1182, 541 N.E.2d 576 (1989)*.

II. The Massachusetts Wage Act

HN2[] *General Laws c. 149, §148*, provides that a terminated employee must be paid in full on the day of his or her termination. *General Laws c. 149, §150*, provides in pertinent part:

> HN3[] An employee claiming to **[*5]** be aggrieved by a violation of section[ ] . . . 148, . . . may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf . . . a civil action for . . . any damages incurred, and for any lost wages and other benefits. *An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys fees*.

G.L.c. 149, §150 (2008 ed.) (emphasis added). HN4[] That statute goes on to provide that "[t]he defendant shall not set up as a defence [sic] a payment of wages after the bringing of the complaint." *Id.*

Here, Littlefield argues that the damages provision found in *G.L.c. 149, §150*, entitles him to treble damages on the approximately $30,000 that was not immediately paid to him on the date of his termination. Essentially, Littlefield contends that any violation of *G.L.c. 149, §148*, strictly and immediately triggers the treble damages provision of *G.L.c. 149, §150*, on any amount unpaid as of the date of termination despite

[3] The correspondence to the Attorney General was not served upon the Defendants.

Adcole having paid the entirety **[*6]** of what was owed prior to Littlefield filing the instant action. Littlefield is of the position that Adcole is thus barred from using the defense of payment in this case to absolve it from his claim to treble damages.

The Defendants, on the other hand, contend that because the full amount owed was paid prior to the filing of the complaint, the only amount to be trebled is the interest on the unpaid amount for the short period between termination and payment. Both parties agree that Littlefield is entitled to reasonable attorneys fees and costs.

While the authority on the issue in the Commonwealth is scant, the little that does exist is highly instructive under the factual scenario presented in this case.

Chief Justice Gants, then of the Superior Court, was faced with a nearly identical issue in *Dobin v. CIOview Corp., 16 Mass. L. Rptr. 785 (Mass.Super. 2003)*. The Plaintiff ("Dobin") in *Dobin* was terminated by her employer, and on the same day of her termination was given several checks which constituted her unpaid salary to that date. *Id. at 786*. The checks were all backdated to two days after the termination date. *Id.* Later, on the same day of her termination, Dobin brought suit against her ex-employer for violation of the Wage Act arguing that the back-dated **[*7]** checks did not constitute payment on the date of her termination. *Id.*

One issue before the *Dobin* court was whether, in issuing the checks on the date of Dobin's termination, the employer had paid Dobin all she was due prior to her filing of the complaint later that same day. *Id. at 788*. The effect of such a scenario—belated payments made before the filing of a complaint—viewed in the light of *G.L.c. 149, §150*, was thoroughly analyzed by Justice Gants:

> This Court understands the provision barring the defense of post-complaint payment to mean that an employer found in violation of the Wage Act is required to pay treble the amount of wages and benefits that had been unpaid at the time the complaint was brought; the employer may not reduce this amount by making payment after it learns of the complaint. The corollary to this interpretation is that an employer is not required to pay treble the lost wages and benefits if the wage and benefit payments were tardy but made before suit was brought.

Id. at 789. Thus, Justice Gants explained:

> ***HN5***[⬆] When wages and benefits are tardy but paid before the complaint was brought, the loss of wages and other benefits is simply the interest foregone from the delay in payment, which would be **[*8]** trebled under the Act. Under this interpretation, tardy pre-complaint payment may not classically constitute a defense to a Wage Act violation, but it would greatly mitigate the amount of damages.

Id.

Although *Dobin* involved an earlier version of *G.L.c. 149, §150*, the difference between the "*Dobin* version" and the current version[4] has no bearing on the analysis in the instant case.[5] Indeed, the District Court for the District of Massachusetts spoke directly to the issue recently in *Clermont v. Monster Worldwide, Inc., No. 14-14328, 102 F. Supp. 3d 353, 2015 U.S. Dist. LEXIS 47064 (D.Mass. Apr. 2015)*:

> No doubt *Dobin* was decided when the statute vested judges with the discretion to decide whether to award treble damages. Subsequently, in 2008, the Legislature made trebling of lost wages and other benefits mandatory. Nonetheless, because the statute authorizes, albeit implicitly, a defense arising from a specific, tardy, wage payment made before the bringing of the complaint these wages, i.e. the tardy wages paid before the bringing of the complaint are not lost wages with the meaning of the remedy statute.

*2015 U.S. Dist. LEXIS 47064, [WL] at *9-10* (internal quotations and citations omitted). The District Court explicitly adopted the reasoning of *Dobin*, with respect to the effect of a belated but **[*9]** pre-complaint payment of wages. *2015 U.S. Dist. LEXIS 47064, [WL] at *9* ("In that circumstance, *Dobin* held that the loss of

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[4] At the time of *Dobin*, the damages provision of the statute read "a civil action for . . . any damages incurred, including treble damages for any loss of wages and other benefits. An employee so aggrieved and who prevails in such an action shall be entitled to an award of the costs of the litigation and reasonable attorney fees." *G.L.c. 149, §150* (2002 ed.) (compare with *G.L.c. 149, §150* (2008 ed.) as set out *supra*).

[5] At the motion hearing, both parties agreed that the difference between the language of the statute at the time *Dobin* was decided and the current language has no effect on the application of the damages provision in the instant case.

wages and other benefits is simply the interest foregone from the delay in payment, which would be trebled under the Act") (internal quotations and citations omitted).

Here, just as in *Dobin*, the amounts due to Littlefield were paid late, yet before the filing of the complaint in this Court. As the only existing authority on the issue in the Commonwealth—while not controlling—*Dobin* is instructive and indeed persuasive. The minor factual distinctions between this case and *Dobin* do not change the **[*10]** Court's opinion on the issue.[6]

Littlefield also argues that the filing of the complaint form with the Attorney General constitutes the "bringing of the complaint" as set forth in *G.L.c. 149, §150*. Littlefield cites no authority for this proposition. Both *Dobin* and *Clermont* addressed civil actions filed after the wages were paid in full. This Court finds that the ***HN6***[⬆] "bringing of the complaint" refers to the commencement of a civil action. Moreover, both *Dobin* and *Clermont* reference the fact that the Defendants in those cases paid the full amount due prior to receiving *notice* of the filing of the complaint. *Dobin, 16 Mass. L. Rptr. at 789* ("the employer may not reduce [the amount owed to the employee] by making payment *after it learns of the complaint*) (emphasis added); *Clermont, No. 14-14328, 2015 U.S. Dist. LEXIS 47064, [WL] at *9* (same) (quoting *Dobin, 16 Mass. L. Rptr. at 789*). This implies a need for notice to be provided to the Defendants, which is not achieved **[*11]** by simply filing a complaint form with the Attorney General without notice to the Defendants. Thus, regardless of which "complaint" is contemplated by the statute, the undisputed facts of this case are that the Defendants were not notified of any complaint until after the wages were paid in full.

For all of these reasons, Littlefield is entitled only to what the plaintiff in *Dobin* was entitled: reasonable attorneys fees, litigation costs, and the forgone interest suffered as from the delay of payment of the monies owed him, trebled pursuant to *G.L.c. 149, §150*. *Dobin, 16 Mass. L. Rptr. at 790*.

ORDER

For the foregoing reasons, the Defendants' motion for judgment on the pleadings is ALLOWED. If the parties cannot agree on the amount of attorneys fees, costs, or the amount of the forgone interest trebled, they may file a pleading with the Court under Rule 9A.

Thomas Drechsler

Justice of the Superior Court

Dated at Salem, Massachusetts this 18th day of June 2015

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[6] That Dobin was actually handed postdated checks on the date of her termination and Littlefield received direct deposits in the days and weeks after is not dispositive on the issue. Both Littlefield and Dobin were paid all they were owed before they filed their respective complaints, which is the core issue in *Dobin* and in the instant case.