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employment; upheld punitive damages in the amount of \$240,000 and emotional distress damages for \$40,000; and awarded \$390,000 in attorneys' fees to the plaintiff.

The 10-page decision is *Parker v. EnerNOC, Inc., et al.*, Lawyers Weekly No. 09-059-18. The full text of the ruling can be found at masslawyersweekly.com.

'Due and payable'

The plaintiff was represented by Robert R. Berluti, who argued in post-trial motions that his client's \$349,098 award should be treated as "wages" subject to mandatory trebling in light of the jury's finding that she would still have been employed but for her wrongful termination by the defendants.

Berluti said the judge acknowledged "the strength of our argument to treble that part of the damages award" and that his client planned to pursue the issue on appeal.

"The overriding point of this case is that this person worked very hard to secure a very successful contract, and an employer should not take steps to undermine the compensation that goes along with it," the Boston lawyer added. "The company shouldn't try to benefit more by undercutting the person who procured that contract."

Defense counsel Donald W. Schroeder and Erin C. Horton did not respond to requests for comment. But

Parker v. EnerNOC, Inc., et al.

THE ISSUE Could an award of \$349,098 in unpaid sales commissions be trebled under the Wage Act?

DECISION No (Superior Court/BLS)

LAWYERS Robert R. Berluti, Michael A. Bednarz and Edward F. Whitesell Jr., of Berluti, McLaughlin & Kutchin, Boston (plaintiff)
Donald W. Schroeder and Erin C. Horton, of Foley & Lardner, Boston (defense)

commissions are wages if they are 'definitely determined' and 'due and payable.' So you have to know exactly what the number is, and it has to be due," Scott said.

Ellen J. Messing said she found it unusual that Salinger cited *Okerman v. VA Software Corp.* for the "definitely determined" and "due and payable" requirements.

"The *Okerman* holding really doesn't say that and doesn't justify that reading of the statute," said the Boston attorney. "What it says is that a court has to apply the statute as written and that the language of the Wage Act regarding commissions 'applies broadly.'"

In the case at hand, Messing continued, the amount of commissions was certainly "definitely determined" and "due," but whether the commissions were "payable" was something the

'Termination for convenience'

In May, a jury returned a verdict finding that the plaintiff was not paid the sales commissions due to her by her former employer, defendant EnerNOC. In 2016, the plaintiff had helped close a \$20 million software sales contract with Eaton Industries, the largest sale in EnerNOC's history.

Under the contract's "termination for convenience" — or TFC — clause, Eaton was free to end the deal after one year. EnerNOC averred that under its commission policy, it was obligated to pay the plaintiff a sales commission only on the guaranteed first year of revenues, even if Eaton never terminated the contract.

But a jury found that the company had a binding "true-up" policy for customer deals that had a TFC clause, and thus was contractually obligated to pay additional sales commission for the remainder of the contract since Eaton did not terminate after year one.

Further, the jury said 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 plaintiff was thereupon awarded \$25,063 in commissions that were due and payable on her last day of employment; \$349,098 in unpaid sales commissions that she lost due to unlawful retaliation; \$240,000 in punitive damages; and \$40,000 for emotional distress.

In the instant post-trial motions, EnerNOC sought judgment notwithstanding the verdict or a new trial as to damages, as well as a remittitur of the punitive damages. The plaintiff moved for attorneys' fees, and the parties disagreed as to the damages subject to trebling under the Wage Act.

'Powerful policy argument'

Salinger first ruled that testimony and internal company emails supported the jury's verdict that the plaintiff was working pursuant to a "true-up" policy.

"[T]he evidence as a whole ... supported a reasonable inference that Parker knew about and reasonably relied upon the existence of the true-up policy in working diligently on EnerNOC's behalf to make the sale to Eaton," the judge wrote.

And concerning the Wage Act's trebling provision, Salinger quickly determined that the \$25,063 in commissions due and payable on the plaintiff's last day of employment would be tripled.

With respect to the separate \$349,098 awarded as damages under

the Wage Act for retaliation, Salinger noted that "it is clear the jury found that this amount would have been due and payable to Parker one year later if she had not been fired, once Eaton decided not to exercise its contractual right to terminate its software contract."

Thus, he said, he agreed with the defendants that the damage award for future commissions was not subject to trebling under the Wage Act.

He nevertheless acknowledged the plaintiff's "powerful policy argument" that the retaliation award should be trebled since the jury found the only reason she stopped working for EnerNOC was because she was unlawfully fired.

But the judge applied the statute as written, reiterating that "the Legislature specified that sales commissions only count as wages for purposes of the Wage Act if they are 'due and payable' and can be 'definitely determined' while an employee is still employed."

Salinger further upheld the \$240,000 punitive damages award, noting that it was not excessive in light of what the jury could have found to be "repeated and escalating retaliation" against the plaintiff. He also awarded the plaintiff almost \$400,000 in attorneys' fees and costs. **EW**



"The decision shows how an employee can use not only the Wage Act, but also anti-discrimination statutes and common law claims to be made whole."

— Maura A. Greene, Boston

other area employment attorneys weighed in on Salinger's ruling.

Lawrence B. Morse of Danvers observed that, particularly since the 2008 amendment providing for mandatory treble damages, the Wage Act has been a fertile field of litigation.

"Some companies may have a strong motivation to detain payments through commission provisions claimed as part of their policies and may reserve the right to change all aspects of the commission rules," he said.

But the application of the treble damages provision to retaliation claims can present challenges to counsel and courts, Morse added.

"Without citing or perhaps finding precedent on the issue, the judge's ruling on post-trial motions raises questions with regard to the application of the retaliation provisions under Chapter 149, §148A and choice of remedies," he said. "A variety of wage claims appear to be subject to the treble damages requirement, including specifically retaliation claims under Chapter 149, §150."

Boston attorney J. Jordan Scott agreed with Salinger's conclusion on the trebling question, calling it a narrow but correct ruling.

"Lost wages and other benefits" are what's trebled. And as the law states,

judge could have decided either way.

Scott said Salinger was sympathetic to the plaintiff's arguments, but even allowing for some latitude for interpretation, a judge has to abide by what the law states.

"But [the plaintiff's] interests are vindicated by the retaliation and punitive damages awards," he observed. "The jury was sending the message that retaliation is not OK, and the law will not stand for this."

Boston employee-side attorney Maura A. Greene said the ruling could have an unintended effect.

"It's certainly a narrow view of the Wage Act and could potentially give the wrong incentive for employers to make an end run around the punitive part of the statute," she said. "An employer who wrongfully terminates an employee to avoid paying commissions should not be able to circumvent the penalties associated with the Wage Act."

Though the \$240,000 awarded in punitive damages contributed to a "solid recovery" for the plaintiff, Greene said punitive awards cannot be assumed in every case.

"But the decision shows how an employee can use not only the Wage Act, but also anti-discrimination statutes and common law claims to be made whole," she added.

LAND COURT JUDGES' ASSIGNMENTS JULY 16 - AUG. 17

(Dates and times when non-dispositive motions may be marked for hearing before each Land Court judge*)

Date	Time	Judge
Wednesday, July 25	10 a.m.	Spedier, L.
Thursday, July 26	10 a.m.	Piper, J.
Monday, Aug. 13	10 a.m.	Cutler, C. J.
Wednesday, Aug. 15	10 a.m.	Spedier, L.

* To schedule a motion hearing before either Judge Foster, Judge Long, Judge Scheier, Judge Speicher or Judge Vhay, please email your request to their sessions clerks directly. Sessions clerk contact information is on the Land Court web page.

Non-dispositive motions may be marked for hearing before the judge to whom the case is assigned.

Parties and counsel are strongly encouraged to confirm dates and times with other parties before marking non-dispositive motions for hearings.

Only non-dispositive motions may be marked for hearing by a party. Dispositive motions under Mass. R. Civ. P. 12 (b) (1), 12 (b) (6), 12 (c) and 56 will be scheduled by the court in all cases. See Land Court Rule 4.

Please add the name of the judge assigned to your case on your pleadings.

All sessions at the Land Court, 3 Pemberton Sq., Boston.

CONFIRM COURTROOM ASSIGNMENTS AT THE LAND COURT'S FRONT COURTYARD ON THE 5TH FLOOR ON THE DAY OF HEARING.

*Motions in all tax lien cases, regardless of when commenced, may be marked for hearing any Thursday at 10 a.m. or 2 p.m.

For other judges' assignments: BMC, page 10; District Court, page 16; Probate & Family Court, page 28