

**CORRECTED – Case
Caption and Civil Action
Number Omitted**

T. Henley Graves
Resident Judge

SUPERIOR COURT
OF THE
STATE OF DELAWARE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

November 30, 2004

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RE: Swier v. Delaware Bay Surgical Services
C.A. No. 03C-03-030

Date Submitted: September 1, 2004

Dear Counsel:

This is the Court's final Decision and Order in the case of *Swier v. Delaware Bay Surgical Services*. The parties submitted post-trial memoranda concerning whether the application of the Delaware Wage Act is appropriate in this case. For the following reasons, damages are awarded to the Plaintiff.

In March 2001, Plaintiff, Dr. Patrick Swier ("Dr. Swier") began working part time for the Defendant, Delaware Bay Surgical Services ("DBSS"). The terms of his employment were set forth in an employment agreement dated February 2001. Dr. Swier practiced part time with DBSS and part time with a practice in Baltimore, Maryland. Sometime later, the parties began discussions to increase Dr. Swier's workload to full time practice with DBSS. They began to negotiate the terms of an adjusted employment agreement. Negotiations were extensive, but eventually soured before reaching an agreement. Each party contends that the other was responsible for the termination of Dr. Swier's employment. Nonetheless, Dr. Swier submitted a letter to DBSS resigning on February 7, 2002. An early termination penalty provision contained in the contract required a breaching party to pay \$25,000 upon the termination of the agreement

without good cause. On July 19, 2002, DBSS sent Dr. Swier a letter requesting that he pay the difference between the admitted wages owed to him, \$18,356.52 and the \$25,000 in liquidated damages for terminating the employment agreement without good cause. Dr. Swier refused to accept the terms of the arrangement set forth by DBSS and instituted this action.

The parties were in serious disagreement about who terminated the employment contract, and became consequently liable for the \$25,000 in liquidated damages. Liquidated damages clauses are permissible inclusions in contracts if the potential damages are uncertain and the amount agreed upon is reasonable.¹ A liquidated damages award is appropriate unless its enforcement would serve as a penalty, rather than a reasonable assessment of anticipated damages.² The Court considers persuasive the fact that both parties believed what they labeled as a penalty clause was, in reality, a liquidated damages clause. Each has attempted to enforce the liquidated damages provision against the other arguing that \$25,000.00 is an appropriate and reasonable estimate of the damages caused by the early termination of this contract.

Dr. Swier argued that DBSS breached the employment contract by instructing him to seek employment elsewhere. At trial, however, the Court found that Dr. Swier breached the employment agreement by terminating his employment without cause on March 1, 2002. This breach implicates the enforcement of Section 12 of the employment agreement, which mandates that a breaching party must pay the other the sum of \$25,000.00 for its expenses in procuring and maintaining Dr. Swier as a physician in the practice.³ Dr. Swier, is therefore liable to DBSS for \$25,000, the amount specified in the contract as an early termination penalty.

Dr. Swier's claim for unpaid wages is a separate issue. The failure of DBSS to pay Dr. Swier his earned wages following termination is a violation of Section 1103 of the Delaware Wage Act.⁴ The consequences for an employer's failure to pay wages when due can be severe.

¹See *Lee Builders v. Wells*, 103 A.2d 918, 919 (Del. Ch. 1954).

²See *Wilmington Housing Authority v. Pan Builders, Inc.*, 665 F.Supp. 351, 354 (D. Del. 1987).

³(Employment. Agmt. of 3/01/2001, at 4).

⁴See 19 Del. C. § 1103 (a).

The statutory penalty requires that an employer “be liable to the employee for liquidated damages in the amount of ten (10) percent of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller.”⁵

Section 2 of the Employment Agreement between Dr. Swier and DBSS establishes that wages will be determined on the fifteenth of every month.⁶ The agreement entitles Dr. Swier to fifty (50) percent of all monthly collected receipts, adjusted by the salary advanced and expenses incurred for that month.⁷ “Wages” as defined by Section 1101(a)(2) are “compensation for labor or services rendered by an employee, whether the amount is fixed or determined on a time, task, piece, commission or other basis of calculation.”⁸ Therefore, the word “wages” was used to refer to the regular direct compensation which would ordinarily be paid at the end of each period of a certain number of work days.⁹ The expansive definition of wages demonstrates the broad application of the Wage Act. The statute recognizes that wage allocations and arrangements vary greatly. Dr. Swier’s wages were determined on a monthly basis. The fact that a payday is not date certain does not affect the classification of those earnings as wages.

The Defendant’s related argument asserting that the final payment made to Dr. Swier was really a severance payment is unpersuasive. DBSS argues that severance payments fall outside of the penalty provisions of the Wage Act. But, a severance payment is an additional payment made to an employee upon their departure. The \$18,356.52 owed by DBSS to Dr. Swier was for services rendered, based upon the contract’s terms. The amount was determined by dividing the collected receipts from the date of the agreement through ninety days past Dr. Swier’s termination, minus the previously paid salary and expenses. The attempt by DBSS to classify the

⁵See 19 Del. C. § 1103 (b).

⁶(Emplymt. Agmt. of 3/01/2001, at 2).

⁷See *id.*

⁸See 19 Del. C. § 1101 (a) (2).

⁹See *Department of Labor ex rel. Commons v. Green Giant Co.*, 394 A.2d 753, 755 (Del. Super. 1978).

sum as a severance package fails.

DBSS argues that since the statute requires paydays to be at least monthly, but the agreement requires one-hundred days to settle accounts, the wage statute should not be applicable. The Agreement sets forth the procedure to determine wages in the event of Dr. Swier's termination with DBSS. It calls for Dr. Swier's "final payment" to be determined as fifty (50) percent of the collected receipts for a period of ninety days after his date of termination, to be paid on the one-hundredth day after termination. The Agreement appears to take into account the delay in collections that is commonplace in medical practices. The provision of a ninety-day period following Dr. Swier's termination allows for any delayed payments for services rendered to be processed and accredited to him. The fact that this "final payment" was identically structured to Dr. Swier's regular fee schedule indicates that it reflects compensation for services performed, not a special fee allotted because of his departure from the office. The fact that this served as Dr. Swier's "final payment" does not remove it from the realm of "wages" for services rendered. Therefore, the Wage Act applies.

The Delaware Wage Act requires that "[w]henver an employee quits, resigns, is discharged, suspended or laid off, the wages earned by the employee shall become due and payable by the employer on the next regularly scheduled payday(s)...as if the employment had not been suspended or terminated."¹⁰ DBSS failed to comply with the requirements of its own agreement and the Delaware Wage Act by not supplying Dr. Swier with his earned wages on the hundredth day after termination. Dr. Swier's wages were determined on the fifteenth of every month normally. Upon termination, the scheduled payday became the hundredth day from that date, according to Section 2 of the Employment Agreement.¹¹ Therefore, DBSS had until June 10, 2002 to pay Dr. Swier for his services rendered. It was not until July 19, 2002 that DBSS attempted to make its "final payment" to Dr. Swier. Instead of a payment, DBSS requested that Dr. Swier pay the \$6,643.48 difference between \$18,356.52 in "severance pay" and \$25,000.00 in liquidated damages for Dr. Swier's breach of the employment agreement. The delay and

¹⁰See 19 Del. C. § 1103(a).

¹¹(Emplymt. Agmt. of 3/01/2001, at 2).

insufficiency of the wage payment are violations of the Delaware Wage Act.

Having determined that the \$18,356.52 figure does constitute Dr. Swier's earned wages, and that DBSS did not distribute them on the scheduled payday, the Court must next determine whether DBSS was justified in withholding payment beyond the scheduled payday. DBSS claims that it was not obligated to pay Dr. Swier because he terminated his employment contract without cause, making him liable for \$25,000 in liquidated damages, exceeding the amount due to him for services rendered. However, under Section 1107 of the Wage Act, employers are permitted to withhold wages in only three situations.¹² The early termination penalty or offset as claimed by DBSS does not fall within any of these exceptions.

Under Section 1103(b), an employer may avoid a penalty by asserting defenses to the wage claim, as long as the defenses are reasonable and pertain to the validity of the wage claim itself.¹³ The Defendants argue that *Peirson v. Hollingsworth* interprets Section 1103(b) to permit set-offs as proper justification for withholding wages. But in *Peirson*, Judge Wright ruled that "an employer would not be precluded from asserting a legal defense as a set-off **if it related to the validity of the wage claim itself.**"¹⁴

The purpose of the wage payment statute seems clear. Most employees are economically dependent on the cash flow provided by their regular wage payments. If employers could delay

¹²See 19 Del. C. § 1107. An employer may not withhold or divert wages from an employee unless:

- (1) the employer is required or permitted to do so under state or federal law; or
- (2) the deductions or withholdings are for medical, surgical or hospital care, without financial benefit to the employer, and are recorded in due course and clearly in the employer's records; or
- (3) the employer has a signed authorization by the employee for lawful deductions accruing to the benefit of the employee. See 19 Del. C. 1107 (1)-(3).

¹³See 19 Del. C. 1103 (b).

¹⁴See *Peirson v. Hollingsworth*, 251 A.2d 350, 352 (Del. Super. 1969)(emphasis added).

or withhold an employee's wages then the mischief and injury to the employee that might result is obvious. While employers may feel that it is unfair to be prohibited from making adjustments to the "wages" owed to an employee based upon financial obligations or damages the employee may have accrued, the statute's design is to prevent non-wage related set-offs. Employers, all too frequently, could hold its employees, especially one who was been terminated, at a serious disadvantage if they were permitted to unilaterally determine "damages" and then subtract them from the wages owed. It makes no difference if the employer is ultimately determined to be right in its assessment of damages. Wages must be paid first. Then, collateral economic issues, not relevant to wages, can be addressed or ultimately resolved in the proper forum.

From the outset, DBSS acknowledged that it owed Dr. Swier \$18,356.52 in wages. The early termination penalty is entirely separate from Dr. Swier's wage claim. It is a contract claim and is not a part of the wages calculation. For example, if the Court found that DBSS has wrongfully terminated Dr. Swier, the \$25,000 owed would not be considered "wages", thereby subjecting DBSS to the requirements and potential consequences of the Wage Act. The reason being simply that the liquidated damages provision has nothing to do with "wages". DBSS was not entitled to withhold Dr. Swier's wages under Section 1107 nor exempted from the penalty under Section 1103(b).

Dr. Swier's breach of the employment agreement did not waive his rights under the Wage Act. Despite the breach, he is still entitled to receive payment for the services he rendered while employed with DBSS. The Wage Act was enacted to protect employees by ensuring that they reap the fruits of their labor, despite soured employment relationships or unmet contractual obligations.

Section 1103 (b) provides that an employer who, without reasonable grounds, fails to pay an employee for services rendered after their termination will "be liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller."¹⁵ DBSS failed to pay

¹⁵See 19 Del. C. § 1103 (b).

Dr. Swier the wages rightfully owed to him. Its failure to do so results in its liability for the \$18,356.52 in wages owed Dr. Swier plus \$18,356.52 as a penalty under Section 1103 (b).

Section 1113 (c) mandates that “any judgment entered for a plaintiff in an action brought under this section *shall* include an award for the costs of the action, the necessary costs of prosecution and reasonable attorney’s fees, all to be paid by the defendant.”¹⁶ Therefore, the Court is left to resolve what constitutes “reasonable attorney’s fees” as mandated by the Wage Act. I note that the \$18,356.52 wage claim has never been in dispute. The pretrial stipulation evidences that both parties agreed on this figure. The primary issue in this litigation was the finger-pointing involved in who caused the breakup of the employment relationship, thus triggering the \$25,000 liquidated damages obligation. Therefore, an award of all Plaintiff’s attorney’s fees is inappropriate. I ask that Plaintiff’s counsel submit an affidavit as to fees claimed so the Court can make a determination of what is “reasonable” in this case.

Judgment is entered as follows:

- (a) for Defendant, \$25,000 as to its contract claim;
- (b) for Plaintiff, \$36,713.04 as to the wage claim, together with costs; and
- (c) for Plaintiff, as to attorney’s fees. The reasonableness to be determined upon the filing of Plaintiff’s counsel’s affidavit.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

THG/jfg

oc: Prothonotary

cc: Attorneys

¹⁶See 19 Del. C. § 1113 (c).