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SJC-12703

FRANCOISE PARKER vs. ENERNOC, INC., & others.¹

Suffolk. October 1, 2019. - February 12, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Massachusetts Wage Act. Labor, Wages, Damages. Employment, Termination, Retaliation.

Civil action commenced in the Superior Court Department on August 19, 2016.

The case was tried before Kenneth W. Salinger, J., and posttrial motions were considered by him.

The Supreme Judicial Court granted an application for direct appellate review.

Robert R. Berluti for the plaintiff.

Donald W. Schroeder (Erin C. Horton also present) for the defendants.

Maura Healey, Attorney General, & Karla E. Zarbo, Assistant Attorney General, for the Attorney General, amicus curiae, submitted a brief.

David A. Russcol & Audrey R. Richardson, for Massachusetts Employment Lawyers Association & others, amici curiae, submitted a brief.

¹ Eric Erston and Timothy Healy.

BUDD, J. The plaintiff, Francoise Parker, a former employee of EnerNOC, Inc., was awarded damages after a jury found that the defendants violated G. L. c. 149, §§ 148, 148A & 150 (Wage Act or act), both by failing to pay the plaintiff the full amount of a commission that she had earned and by terminating the plaintiff when she complained about it, causing her to lose an additional commission. Before us are the parties' cross appeals. The defendants argue that aspects of the jury's verdict were not supported by the evidence. The plaintiff, although satisfied with the jury's work, takes issue with the trial judge's final judgment, asserting that the judge erred in his determination of the portion of the award subject to trebling under the act. See G. L. c. 149, § 150.

We conclude that the jury's verdict was supported by the evidence. We further conclude that the full amount of the commission that would have been due to the plaintiff had she not been terminated is a "lost wage" that must be trebled under the Wage Act. We therefore vacate portions of the judgment and remand the matter to the Superior Court.²

² We acknowledge the amicus brief submitted by the Attorney General, as well as the amicus brief submitted by Massachusetts Employment Lawyers Association, Immigrant Worker Center Collaborative, Lawyers for Civil Rights, and Fair Employment Project, Inc.

Background and procedural posture. We summarize the facts as the jury could have found them, reserving certain details for discussion. EnerNOC is an energy-related services provider that helps businesses improve their energy efficiency. The plaintiff marketed EnerNOC's services to prospective clients. She earned an annual base salary in addition to commissions on the sales she made.

On March 4, 2016, EnerNOC entered into a deal with Eaton Industries, negotiated by the plaintiff, worth \$20 million over five years -- the largest contract in EnerNOC's history. The contract included a so-called "termination for convenience" clause under which both parties had a one-time option to terminate the contract within the thirty days following the first anniversary of the effective date of the contract.

Under EnerNOC's sales commission policy, a commission payment on a contract that contained such a termination clause would be paid on the guaranteed portion of the contract, i.e., the first full year of the contract. In addition, pursuant to what was known as EnerNOC's "true-up" policy, an additional commission payment would be made based on the entire value of the contract as long as the contract survived past the opt-out date. Under the sales commission policy, a salesperson's eligibility for "any further [c]ommissions" would cease upon the date of termination of employment "for any reason."

On April 1, 2016, EnerNOC fired the plaintiff after she complained about not receiving her full commission on the guaranteed portion of the Eaton contract.³ On April 22, 2016, EnerNOC paid the plaintiff \$100,222.21 as commission on the guaranteed portion of the contract.

On August 19, 2016, the plaintiff filed a complaint in the Superior Court against EnerNOC and two of its officers, Eric Erston and Timothy Healy, alleging gender discrimination, Wage Act violations, breach of contract, and breach of the covenant of good faith and fair dealing. Among other things, the plaintiff alleged that she was owed a greater commission on the Eaton contract for the guaranteed period (i.e., the first year of the contract) and a separate commission under EnerNOC's true-up policy. Approximately one year later, after the opt-out period had expired without Eaton terminating the contract,⁴ the

³ Shortly before she was fired, the plaintiff complained to her supervisors about the planned application of a new "pushed deal" policy under which deals that had been expected to close in 2015 but did not close until 2016, such as the Eaton contract, would not count toward the plaintiff's sales quota for 2016. Because EnerNOC paid higher commissions once a salesperson reached their annual quota, the new policy would have significantly reduced the plaintiff's commission on the guaranteed portion of the Eaton contract and her subsequent commissions for EnerNOC's 2016 fiscal year.

⁴ The opt-out period expired in April 2017.

plaintiff amended her complaint to add a claim for quantum meruit.

In May 2018, the jury returned a verdict against EnerNOC and Erston,⁵ finding liability against EnerNOC for breach of contract and for breach of the implied covenant of good faith and fair dealing, and against both defendants for Wage Act violations, including retaliation by terminating the plaintiff.⁶ In finding for the plaintiff, the jury specifically found that a contract existed between the plaintiff and the defendants and that the defendants had a contractual obligation to pay commissions under the true-up policy. The jury awarded the plaintiff \$25,063.34 as the difference between what she was owed and what she was paid on the guaranteed portion of the contract, and awarded \$349,098.48 as the amount owed under the true-up policy.⁷ In addition, for the retaliation, the jury awarded the

⁵ The plaintiff's claims against Healy were settled before the case went to the jury.

⁶ The jury found that the defendants retaliated against the plaintiff for her complaints about the amount of her initial commission and about discrimination against her on the basis of sex. See G. L. c. 151B, § 4.

⁷ Although Eaton did not exercise its option to terminate the contract early, Eaton and EnerNOC renegotiated the contract during the guaranteed period, shortening the total length of the contract. The jury verdict form does not expressly indicate whether the award of \$349,098.48 for unpaid commissions due under the true-up policy was based on the value of the original or the renegotiated Eaton contract. However, we note that the

plaintiff \$40,000 for emotional distress and \$240,000 in punitive damages.

The defendants filed a motion for judgment notwithstanding the verdict or, in the alternative, for remittitur, which the judge denied. Pursuant to G. L. c. 149, § 150, the judge trebled \$25,063.34, the amount that had been withheld from the commission owed on the guaranteed portion of the Eaton contract, but he did not treble what would have been owed under the true-up policy (\$349,098.48).

Discussion. 1. Sufficiency of the evidence. The defendants appeal from the denial of their motion for judgment notwithstanding the verdict, arguing that there was insufficient evidence that EnerNOC had an actual true-up policy, but even if it did, it had no obligation to make an additional commission payment of \$349,098.48 to the plaintiff. This argument fails.

Although the defendants point to the fact that certain witnesses testified that EnerNOC did not have a true-up policy, multiple witnesses, including codefendant Erston, who was EnerNOC's then-senior vice-president for marketing and sales, indicated that EnerNOC did have such a policy. The evidence also included internal e-mail messages referencing the policy.

jury were presented with evidence of the original and renegotiated contract terms, including calculations of the total values and commissions associated with each.

"Review of [a denial of a motion for judgment notwithstanding the verdict] requires us to construe the evidence in the light most favorable to the nonmoving party and disregard that favorable to the moving party." O'Brien v. Pearson, 449 Mass. 377, 383 (2007). Thus, the fact that there was conflicting evidence on this point does not inure to the defendants' benefit in this analysis. See Mass. R. Civ. P. 50 (b), as amended, 428 Mass. 1402 (1998).

The defendants also claim that the plaintiff did not prove that a true-up policy existed, given that the sales commission policy that she signed explicitly stated that a contract containing the type of termination clause at issue here would "only be eligible for a . . . [c]ommission for the term length guaranteed by the contract." We note that, although the written sales commission policy stated that it "supersedes all prior plans and policies," there was sufficient evidence for the jury's finding that the defendants nonetheless had a contractual obligation to pay commissions under a true-up policy. The plaintiff's testimony indicated that she understood the express terms of the sales commission policy to include a true-up commission in the form of a second commission when the remainder of the contract became a "guaranteed term" on the expiration of the client's opt-out period. See Robert Indus., Inc. v. Spence, 362 Mass. 751, 753-754 (1973) (contract's integration clause

does not bar evidence elucidating ambiguous contract term). Further, the record included internal EnerNOC e-mail messages sent after the written policy went into effect that referred to the continued existence of a true-up policy. See Cambridgeport Sav. Bank v. Boersner, 413 Mass. 432, 439 (1992) (modification of fully integrated contract may be inferred from parties' conduct and surrounding circumstances). See generally Commonwealth v. Kelly, 470 Mass. 682, 693 (2015), quoting Commonwealth v. Longo, 402 Mass. 482, 487 (1988) ("The inferences drawn by the jury from the evidence 'need only be reasonable and possible and need not be necessary or inescapable'").⁸ There was no error on this point.

Viewed in the light most favorable to the plaintiff, the evidence was sufficient for the jury's finding that the plaintiff was entitled to a true-up commission on the Eaton contract.

⁸ The defendants also argue that the plaintiff failed to establish that she reasonably relied upon a true-up policy. This argument is misplaced. The Wage Act does not require employees to prove that they relied on a specific promise of payment to be entitled to the timely payment of wages. At any rate, there was sufficient evidence for the jury to find that the plaintiff relied on the true-up policy when working to close the Eaton deal, based on her testimony regarding her understanding that even under the sales commission policy she signed, she was entitled to a true-up commission once the Eaton opt-out date passed. See Situation Mgt. Sys., Inc. v. Malouf, Inc., 430 Mass. 875, 878-879 (2000) (evidence of reliance and prior course of dealing sufficient for jury to find existence of contract).

2. Damages under the Wage Act. a. Overview of the act.

The purpose of the Wage Act is "to protect employees and their right to wages," Electronic Data Sys. Corp. v. Attorney Gen., 454 Mass. 63, 70 (2009), by requiring employers to pay employees their wages "in a timely fashion, according to the parameters set out in the statute." Okerman v. VA Software Corp., 69 Mass. App. Ct. 771, 775 (2007). See G. L. c. 149, § 148, first par. As it pertains to commissions, the act states:

"This section shall apply, so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee, and commissions so determined and due such employees shall be subject to the provisions of [G. L. c. 149, § 150]."

G. L. c. 149, § 148, fourth par. That is, the act requires that commissions are to be paid when two conditions are met: (1) the amount of the commission "has been definitely determined"; and (2) the commission "has become due and payable." G. L. c. 149, § 148, fourth par. In contrast, other forms of wages, once earned, are to be paid on a regular schedule. G. L. c. 149, § 148, first par.

To ensure that the requirements of the Wage Act are met, the statute prohibits employers from retaliating against employees who assert their rights: "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 provisions of this chapter." G. L. c. 149, § 148A. The act also forbids "special contracts" between an employer and employee that purport to exempt the employer from the requirements of the act. G. L. c. 149, § 148, sixth par.

As for enforcement of the Wage Act, prior to 1993, there was no private right of action for employees to bring complaints against employers for violating the act. See Lipsitt v. Plaud, 466 Mass. 240, 245-246 (2013). In 1993, the Legislature "'dramatically increased' the remedies available to employees" by authorizing a private right of action for injunctive relief and civil damages, including provisions for treble damages and attorney's fees and costs. Id. at 246. See St. 1993, c. 110, § 182. The enforcement mechanism of the act was further amended in 2008 to make treble damages mandatory for "lost wages and other benefits" for violations of the act:⁹

"An employee . . . who prevails in . . . an action [for violations of the act] 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, as amended by St. 2008, c. 80, § 5.

b. Application. The jury found that EnerNOC violated the Wage Act in two ways: (1) by failing to pay the plaintiff the

⁹ An employer who violates the Wage Act is also subject to potential civil and criminal penalties in an enforcement action brought by the Attorney General. See G. L. c. 149, § 150, first par.; G. L. c. 149, § 27C.

additional amount that the jury found to be due to her under the sales commission policy as of her last day of work, and (2) by retaliating against her (by terminating her employment) after she complained that she in fact had not been paid fully under the sales commission policy. As mentioned supra, for the former violation, the jury awarded \$25,063.34; for the latter, they awarded \$349,098.48, the amount that would have been due to the plaintiff under the true-up policy had she still been employed with EnerNOC at the time the opt-out period expired.

The trial judge trebled only the amount owed but not paid to the plaintiff under the sales commission policy, i.e., \$25,063.34, concluding that because the unpaid commission amount under the true-up policy was not due and payable at the time of the plaintiff's termination, it could not be considered a lost wage. See McAleer v. Prudential Ins. Co. of Am., 928 F. Supp. 2d 280, 288 (D. Mass. 2013) ("Commissions are due and payable [under the Wage Act] when any contingencies relating to their entitlement have occurred" [quotation and citations omitted]). Given the language of the act, we are not persuaded.¹⁰ As

¹⁰ We note that the judge interpreted the Wage Act to require that commissions be "'due and payable' and . . . 'definitely determined' as of plaintiff[']s last day of employment" (emphasis added). However, the act is silent as to when a commission must satisfy the stated requirements. See Commonwealth v. McLeod, 437 Mass. 286, 294 (2002), and cases cited ("We will not add words to a statute that the Legislature

explained infra, although the plaintiff's commission never became due and payable pursuant to the true-up policy during her employment, it is, nevertheless, a "lost wage" under the act subject to trebling.

We begin by noting that we have said that the term "wages," for purposes of the Wage Act, "encompasses 'commissions when the amount of such commissions . . . has been definitely determined and has become due and payable to [the] employee.'" Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 712 (2018), quoting G. L. c. 149, § 148. See Weems v. Citigroup Inc., 453 Mass. 147, 151 (2009). However, in so stating, we did not announce a categorical rule that commissions that do not meet those conditions are considered not to be wages under the act;¹¹

did not put there, either by inadvertent omission or by design"). More significantly, as explained infra, the act does not allow an employer to set a condition under which it agrees to pay wages to an employee and then make it impossible for the employee to satisfy the condition in an effort to evade its responsibility to pay those wages. Thus, we do not agree with this interpretation. At any rate, whether and when the true-up commission became definitely determined and due and payable is not dispositive here. As discussed infra, the unpaid true-up commission was a "lost wage" resulting from a separate violation of the act -- the defendants' retaliatory termination of the plaintiff.

¹¹ Although the act does not define "wages," the plain and ordinary meaning of the word "wage" is defined as "a pledge or payment of usually monetary remuneration by an employer especially for labor or services." See Webster's Third New International Dictionary 2568 (1993); Commonwealth v. Bell, 442 Mass. 118, 124 (2004) ("We derive the words' usual and accepted

instead, the clause provides that the failure to pay commissions when they are definitely determined and due and payable is one way to violate the act. See Weber v. Coast to Coast Med., Inc., 83 Mass. App. Ct. 478, 482 (2013), and cases cited. Further, our cases interpreting the meaning of "definitely determined" and "due and payable" for the purposes of the timing of payment under the act did not contemplate whether unpaid commissions constitute "lost wages" resulting from retaliation. Compare G. L. c. 149, § 148, fourth par., with G. L. c. 149, § 150, second par. In other words, the clause defines when commissions become due to be paid promptly under the act; commissions that are not yet due to be paid may nonetheless constitute lost wages if the employer's violations of the act prevent payment of those commissions.

In addition to penalizing employers for failing to pay wages promptly (including any commissions that have been definitely determined and have become due and payable), the Wage Act separately prohibits retaliation against an employee for

meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions"). Thus, as a type of payment made based on a percentage of a sale, see Suominen v. Goodman Indus. Equities Mgt. Group, LLC, 78 Mass. App. Ct. 723, 738 (2011), a commission paid by an employer is clearly a "wage." See also Awuah v. Coverall N. Am., Inc., 460 Mass. 484, 492 (2011) ("Where an employee has completed the labor, service, or performance required of him, . . . he [or she] has 'earned' his [or her] wage").

seeking to enforce his or her rights under the act. Here, as noted, the jury found that the defendants violated the act both ways. That is, EnerNOC failed to pay the entire amount of the commission due under the sales commission policy, in violation of G. L. c. 149, § 148, fourth par., and retaliated against the plaintiff after she complained about her pay, in violation of G. L. c. 149, § 148A.

The retaliation, which took the form of terminating the plaintiff, had the effect of depriving the plaintiff of her right to be paid a commission under the true-up policy on the Eaton contract. But for the defendants' actions, the plaintiff would have been employed at EnerNOC when the opt-out period expired, and would have received the commission due under the true-up policy. Stated differently, as a result of the retaliation, the plaintiff did not receive wages she otherwise would have received.¹² Wages lost as a result of retaliation are trebled under the Wage Act. G. L. c. 149, §§ 148A, 150.

¹² Of course, had Eaton exercised its right to terminate the contract before the expiration of the opt-out period, the plaintiff would not have been entitled to the true-up commission, regardless of her employment status. However, when the opt-out period expired without Eaton terminating the contract, the defendants' retaliatory termination of the plaintiff became the sole cause of the plaintiff's losing her true-up commission. On the facts before us, the true-up commission was a wage that the plaintiff lost solely because of the defendants' retaliation.

Contrary to the defendants' contention, this outcome is not affected by the EnerNOC policy that requires continuous employment through the expiration of a contract opt-out period to collect a commission based on the true-up policy. Here, the true-up policy, in conjunction with EnerNOC's retaliatory termination of the plaintiff, made it impossible for the plaintiff to fulfill the only unmet contingency required to collect the true-up commission. A policy that conditions payment on continued employment cannot relieve an employer from the obligation of paying a commission where the employer terminates its employee in retaliation for complaining about wage violations in the first place. On these facts, the policy is therefore unenforceable under the Wage Act.¹³ Compare Electronic Data Sys. Corp., 454 Mass. at 68 (adopting Attorney General's position that "an employer may not enter into an agreement with an employee under which the employee forfeits earned wages, . . . [including] policies that condition the payment of [wages] on continuous employment").

¹³ In so concluding, we do not suggest that a period of continued employment is per se an inappropriate prerequisite upon which to condition a commission. However, such a contingency cannot be relied upon by an employer to create circumstances under which the contingency goes unfulfilled in order to deny a commission that otherwise would be due and payable to an employee.

This result makes logical sense because a fundamental purpose of the Wage Act would be undercut if employers could escape liability under the act by retaliating against employees to avoid paying commissions that would otherwise be due and payable. See id. at 70 ("As its 'special contracts' clause recognizes, the Wage Act would have little value if employers could exempt themselves simply by drafting contracts that placed compensation outside its bounds"). See also Meyer v. Veolia Energy N. Am., 482 Mass. 208, 212 (2019), quoting Commonwealth v. Curran, 478 Mass. 630, 633-634 (2018) ("Our principal objective is to ascertain and effectuate the intent of the Legislature in a way that is consonant with 'common sense and sound reason'"). Indeed, one of the questions on the verdict form was whether EnerNOC committed a "breach [of] the implied covenant of good faith and fair dealing by firing [the plaintiff] to avoid paying commissions she would have earned under the 'true-up' policy if the Eaton contract was not terminated"; the jury answered "yes." See generally Fortune v. National Cash Register Co., 373 Mass. 96, 104-105 (1977) (terminating salesperson to avoid paying bonuses due upon delivery of goods already contracted for was violation of implied covenant of good faith and fair dealing). An employment policy cannot provide a loophole through which an employer may achieve such a result via retaliatory termination.

As the jury found, and the judge noted, the award of \$349,098.48 accounted for the amount that "would have been due and payable to [the plaintiff] one year later if she had not been fired, once Eaton decided not to exercise its contractual right to terminate its software contract." Because the jury specifically found that \$349,098.48 was the amount of "unpaid Eaton contract commissions that [the plaintiff] lost because of unlawful retaliation," that amount constitutes lost wages and must be trebled.¹⁴

Conclusion. For the reasons stated, we conclude that there was sufficient evidence to support the jury's determination that EnerNOC owed the plaintiff an additional commission amount based on the company's true-up policy, and that the entire amount of the unpaid commission, not just that which was attributable to the guaranteed portion of the contract, must be trebled under the statute.

We therefore affirm the denial of the defendants' motion for judgment notwithstanding the verdict. We vacate only that portion of the judgment pertaining to compensatory damages of \$349,098.48 for the unpaid commission under the true-up policy,

¹⁴ We emphasize that, regardless of the total amount awarded for retaliation damages (here, the retaliation damages comprised \$349,098.48 for lost commission payments, \$40,000 for emotional distress, and \$240,000 as punitive damages), only that portion determined to be lost wages (here, \$349,098.48) is trebled.

which shall be trebled pursuant to G. L. c. 149, § 150. The amended judgment also shall include an award of statutory prejudgment interest, as required by law.

So ordered.