COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SJC No. _____

AC No. 2019-P-0147

SUFFOLK COUNTY

FRANCOISE PARKER,
PLAINTIFF-APPELLANT,

v.

ENERNOC, INC., ERIC ERNST
AND TIMOTHY HEALY,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

PLAINTIFF-APPELLANT FRANCOISE PARKER'S APPLICATION FOR DIRECT APPELLATE REVIEW BY THE SUPREME JUDICIAL COURT

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Dated: February 14, 2019

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I. Request for Direct Appellate Review

Plaintiff-Appellant Francoise Parker ("Parker") requests direct appellate review by the Supreme Judicial Court pursuant to Mass. R. App. P. 11 to determine this narrow issue of law: whether retaliation damages for unpaid commissions awarded under the Wage Act, G.L. c. 149, §§ 148 and 150 (the "Wage Act"), must be trebled.

For the reasons set forth below, Parker contends that these damages should have been trebled as a matter of law and that direct appellate review under Mass. R. App. P. 11 is appropriate because this issue presents a novel question of law and is important to the public interest.

II. Statement of Prior Proceedings

A. Parker's Complaint

On August 19, 2016, Parker filed a Complaint in the Superior Court (the "Trial Court") against her former employer, Defendant-Appellee EnerNOC, Inc. ("EnerNOC"), and certain EnerNOC officers, Eric Erston ("Erston") and Timothy Healy ("Healy").[1] She filed her Amended Complaint on August 7, 2017. Parker asserted

[1] EnerNOC and Erston will collectively be referred to as "Defendants." They have asserted a cross-appeal challenging the jury verdict in Parker's favor. Healy is not relevant to Parker's appeal because Parker voluntarily dismissed her Wage Act claim against him before the case went to the jury.

claims based on, *inter alia*, unpaid commissions and for unlawful retaliation because EnerNOC terminated her employment after she complained that the company refused to pay commissions owed to her.[2]

B. Trial and Judgment

A jury trial commenced on May 2, 2018 and, on May 14, 2018, the jury returned a verdict in Parker's favor against EnerNOC and Erston on most of her claims. It found that EnerNOC violated the Wage Act by failing to pay Parker the sales commission owed to her and by retaliating against her for complaining about EnerNOC's commission policies. *See* Addendum ("Add.") pp. 36-39, Q. 5, 17-19. The Jury also found that:

> EnerNOC fired Ms. Parker to avoid its future contractual obligation under an alleged "true-up" policy to pay commissions on an already completed sale, in violation of the implied covenant of good faith and fair dealing. And the jury found that both EnerNOC and Eric Erston are liable for retaliating again Ms. Parker because she complained that she was being discriminated against based on her sex and because she complained that she was not paid the full commission owed to her by EnerNOC as wages. The jury awarded Ms. Parker a total of $374,161.82 in unpaid sales commissions, $40,000 as compensation for emotional distress, and $240,000 in punitive damages only against EnerNOC.

See Add. p. 40; *see also* Add. pp. 36-39, Q. 5, 17-19.

After denying a JNOV Motion filed by Defendants, the Court entered final judgment on June 7, 2018. Parker

[2] Parker notes that she also asserted claims for discrimination, retaliation under G.L. c. 151B and common law claims. These claims are not germane to the narrow issue of law she has raised on appeal.

filed a timely notice of appeal on June 29, 2018 on the narrow issue of whether the Trial Court erred by declining to treble her retaliation damages under the Wage Act. Defendants filed their notice of appeal on July 2, 2018, which challenged other aspects of the judgment. The appeal was docketed on January 25, 2019.

III. Statement of Facts

a. Parker Closes the Largest Contract in EnerNOC's History

Parker began working for EnerNOC on March 6, 2014 as a senior sales manager[3] and was paid an annual salary of $120,000.00, plus commissions. *See* Add. p. 51, ¶¶ 2, 4. On March 4, 2016, Parker closed a $20 million software sales contract with Eaton Industries ("Eaton"), the largest sale in EnerNOC's history.

b. EnerNOC Abruptly Terminates Parker's Employment

On April 1, 2016, less than one month after closing the Eaton contract, EnerNOC terminated Parker's employment. *See* Add. p. 52, ¶ 6; Add. p. 41. Before she was abruptly terminated, Parker had complained that EnerNOC was not paying her full commissions.

The jury rejected Defendants' argument that Parker was terminated for cause. *See* Add. p. 38, Q. 18.

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[3] She held the title of Business Development Manager within EnerNOC's Enterprise Sales department. *See* Add. p. 51 ¶ 2. EnerNOC provides energy-related services that help its customers save costs on their energy use. *Id.*, ¶ 1.

Instead, the jury found that Defendants retaliated against her for complaining about not being paid her commissions in violation of the Wage Act. *See id*.

The jury awarded Parker retaliation damages under the Wage Act in the amount of $349,098.48. *See* Add. p. 39, Q. 19. As described below, this sum represented the additional commissions Parker would have received but for Defendants' unlawful retaliation. *See id*.[4]

c. EnerNOC Underpays Parker After Firing Her

On April 22, 2016, three weeks after she was fired, EnerNOC paid her $100,222.21. *See* Add. p. 52 ¶¶ 6-7. The company claimed that this sum represented the full commission on the $20 million Eaton contract. *See id*. The jury rejected this claim. *See* Add. p. 38, Q. 17. The reason why the commission was so low was because it accounted for only thirteen months of the multi-year contract with Eaton. EnerNOC only paid the "guaranteed" portion of a contract where, as was the case here, the customer had the option of cancelling within the first year of the contract. *See* Add. p. 39, Q. 19. This option was known as a "termination for convenience" or "TFC" clause. Add. p. 41.

[4] These damages are in addition to the damages awarded to Parker for the $25,063.34 owed to her when EnerNOC miscalculated her partial Eaton commission, the punitive damages awarded under G.L. c. 151B, and the emotional distress damages. *See* Add. pp. 36-39.

Eaton, however, never opted out of the contract pursuant to its TFC clause. Add. p. 48[5] Accordingly, at the time of the jury trial, Parker would have been entitled to the full commission under the Eaton contract had she not been unlawfully fired by EnerNOC.[6] Her initial payment was also too low because EnerNOC calculated Parker's commission pursuant to a new commissions policy that was issued to Parker *after* the Eaton contract closed. *See* Add. p. 52, ¶ 7. However, Parker never accepted this new commissions policy and the jury found that the policy did not apply to her. *See* Ex. Add. p. 36, Q. 1-2. Further, the jury found that EnerNOC was bound by a "true-up" policy whereby it was obligated to pay Parker for the full amount owed under the Eaton contract—regardless of whether the contract had a TFC clause—if Eaton did not exercise the TFC clause within the first year of the contract. *See* Add. p. 48. It must be emphasized that there was nothing more Parker had to do to "earn" the full Eaton commission. *Id*. The sole reason she was deprived of the full Eaton commission was because of Defendants' unlawful retaliation. *See id*.

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[5] Parker notes that Eaton restructured its contract with EnerNOC's consent but never opted out of the contract.

[6] This amount is the "true-up" commission owed to Parker, which also represents the sum of Plaintiff's retaliation damages ($349,098.48). *See* Add. p. 39, Q. 19.

IV. Statement of Issues of Law on Appeal; Preservation of Issues of Law in Lower Court

The narrow issue of law raised by Parker's appeal is whether retaliation damages for unpaid commissions awarded under the Wage Act must be trebled.[7] This issue was raised by Parker and was properly preserved in the Trial Court. *See, e.g.,* Add. p. 33, No. 44 (Parker's Opposition to JNOV Motion).

V. Brief Argument

Less than a month after closing the largest contract in EnerNOC's history, her employment was terminated because she complained that she was owed commissions. After weighing the evidence, the jury found in Parker's favor on nearly all of her claims. On her retaliation claim, the jury awarded Parker $349,098.48 representing the additional commissions owed to her under the true-up policy. While damages under the Wage Act are mandatorily trebled by statute, the Trial Court only trebled a small portion of Parker's damages stemming from her unpaid commissions. This ruling is contrary to public policy, inconsistent with this Court's decisions, and antithetical to the purpose of the Wage Act.[8]

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[7] Parker notes that Defendants have also raised issues on appeal challenging the damages awarded to Parker. Without the benefit of Defendants' forthcoming appellate brief, she is not able to fully describe those issues or confirm that those issues were properly preserved.

[8] Parker notes that, any wage policy, including a commissions policy, that circumvents or frustrates the

1. The Trial Court's Refusal to Treble Parker's Retaliation Damages is Against Public Policy

a. The Wage Act is Designed to Dissuade Employers From Retaliating Against Their Employees

This Court has "consistently held that the legislative purpose behind the Wage Act . . . is to provide strong statutory protection for employees and their right to wages." *Crocker v. Townsend Oil Co.*, 464 Mass. 1, 13 (2012) (emphasis supplied); *see also Melia v. Zenhire, Inc.*, 462 Mass. 164, 170 (2012) ("The purpose of the Wage Act is to prevent the unreasonable detention of wages.") (internal quotations omitted). When an employee "has completed the labor, service, or performance required of him, . . . he has 'earned' his wage." *Awuah v. Coverall N. America, Inc.*, 460 Mass. 484, 492 (2011).

The Wage Act prohibits employers from retaliating against employees who assert their rights under the statute. *See* G.L. c. 149, § 148A ("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

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purpose of the Wage Act would be void under the broad prohibition against "special contracts" in G.L. c. 149, § 148. *See Melia v. Zenhire, Inc.*, 462 Mass. 164, 170 (2012) ("the Legislature decreed that '[n]o person shall by a special contract with an employee or by any other means exempt himself from [the Wage Act],'" and that "[a]n agreement to circumvent the Wage Act is illegal even when 'the arrangement is voluntary and assented to.'"), quoting *Camara v. Atty. Gen.*, 458 Mass. 756, 760–761 (2011)).

chapter.").[9] This is intended to be "a stiff antiretaliation law, which is strictly applied for the protection of employees who suffer adverse employment consequences for engaging in protected activity." *Fraelick v. PerkettPR, Inc.*, 83 Mass. App. Ct. 698, 704 (2013).

In 2008, the Legislature amended the statute to require that damages under the Wage Act must be trebled.[10] This reinforced the Legislature's intention to dissuade employers from attempting to circumvent the Wage Act and punish employers who violated the statute.[11]

By refusing to treble damages incurred under the anti-retaliatory provisions of the Wage Act, the Trial Court ignored these established policies. As noted above, Parker closed the Eaton contract weeks before EnerNOC unlawfully terminated her. It justified its refusal to pay her a commission on the full term of the Eaton contract by relying upon the TFC opt-out clause that allowed Eaton to terminate the contract within

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[9] Parker also notes that the jury found that EnerNOC retaliated against her for complaining about discrimination based on her sex in violation of G.L. c. 151B.

[10] Writing to the Legislature in 2008, Governor Patrick urged the Massachusetts Senate to carve out a "good faith" exception that would limit the trebling of damages. The Legislature rejected this request, which further highlighted its intention to treble all Wage Act violations.

[11] *See Melia*, 462 Mass. at 171, n.8.

twelve months, which would limit the term of the contract.[12] However, even the Trial Court concluded that, but for EnerNOC's unlawful retaliation, Parker would have earned the full commission owed under the entire Eaton contract. *See* Add. p. 47 ("Given the evidence presented, 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 . . .").

If affirmed, this ruling would have the polar opposite effect of the Wage Act's established goals. It would encourage employers to structure their commission policies with more contingencies and more delays. Worse, it would incentivize employers to fire employees when commissions were subject to delays or contingencies if those commissions would not be subject to treble damages. In short, this result is antithetical to the foundation of the Wage Act and the Court should reverse the Trial Court's ruling.

b. The Trial Court's Decision is Inconsistent with this Court's Holding in *Fernandes v. Attleboro Housing Auth.*, which Upheld Trebled Retaliation Damages

In *Fernandes v. Attleboro Housing Auth.*, 470 Mass. 117, 119 (2014), this Court affirmed the Superior Court's judgment that trebled retaliation damages for

[12] Parker acknowledges that Eaton eventually restructured its deal with EnerNOC. However, the jury was fully aware of that restructuring, which EnerNOC accepted, and therefore was reflected in the amount of the retaliation damages awarded by the jury.

wages the plaintiff *would have earned* but for his employer's unlawful retaliation. In that case, Fernandes was terminated after he complained that he was being underpaid. *Id*. at 120. Similar to Parker, Fernandes' judgment consisted of an award resulting from direct underpayment and a much larger award based on retaliation. *Id*. Specifically, *Fernandes* was awarded damages equivalent to the wages he would have earned after he was fired *through the date of trial*. *Id*. at 119. Most importantly, the Superior Court trebled all damages, including the retaliation damages for wages he would have earned after he was terminated. *Id*.

Here, the Trial Court concluded that, because Parker's commissions were not "due and payable" under EnerNOC's commission policy when she was terminated, any part of the jury award based on these commissions could not be trebled. *See* Add. p. 48. This result ignores the fact that these were retaliation damages and, accordingly, the ruling is directly inconsistent with *Fernandes*, which trebled the plaintiff's retaliation damages. In *Fernandes*, it would have been impossible for the plaintiff's damages to be "due and payable" under the Trial Court's reasoning because they were based on wages he would have earned *after he was fired*. Parker's retaliation damages should have similarly been trebled.

2. The Trial Court Misapplied the Wage Act

a. Parker Earned Her Unpaid Commissions

In addition to being inconsistent with the fundamental policies behind the Wage Act, *see supra*, the Trial Court's interpretation of the statute is overly narrow in light of the language and purpose of the Wage Act as well as the Legislature's decision to make treble damages mandatory. G.L. c. 149, § 150, provides in relevant part as follows:

> An employee claiming to be aggrieved by a violation of section . . . 148A . . . may . . . institute . . . a civil action for injunctive relief, ***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 cost of the litigation and reasonable attorney's fees.

(emphasis added).

In response to the uncertainty among courts as to whether trebling damages under the Wage Act was mandatory, the Legislature amended the statute to make it clear that all employees "aggrieved . . . shall be awarded treble damages . . ." *See id.*; *see also* St.2008, c. 80, § 5, amending the statute.

As set forth in *Fernandes*, *supra*, even damages for wages not yet earned will be trebled when they are awarded as retaliatory damages under the Wage Act. It is nonsensical to deprive an employee, who undisputedly has earned her commissions, *see* Add. p. 47, treble damages because she was fired illegally.

Moreover, commissions are considered due and payable when "any contingencies relating to their entitlement have occurred." *McAleer v. Prudential Ins. Co. of America*, 928 F. Supp. 2d 280, 288 (D. Mass. 2013). Whether a commission is "due and payable" depends on whether the employee took necessary action to earn the commission and whether the commission may be calculated. Here, the only reason why EnerNOC is able to claim Parker's true-up commissions were incalculable is because the company illegally fired her. If the Court were to hold any uncertainty against Parker, it would essentially nullify the Wage Act's anti-retaliation provisions by encouraging employers to fire their sales employees before a commission could be fully calculated. Accordingly, the Court should focus on whether Parker "earned" her commission.

"The word 'earn' is not statutorily defined, but its plain and ordinary meaning is '[t]o acquire by labor, service, or performance,' or '[t]o do something that entitles one to a reward or result, whether it is received or not.'" *Awuah,* 460 Mass. at 492 (2011). "Where an employee has completed the labor, service, or performance required of him, therefore, according to common parlance and understanding he has 'earned' his wage." *Id*. Thus, when considering the Wage Act's mandate that an employer must pay "wages earned" or "other benefits" to its employees, that must be read

in light of the purpose of the statute. *Water Dep't of Fairhaven v. Department of Envtl. Protection*, 455 Mass. 740, 744 (2010) (the Court's "primary duty . . . is to effectuate the intent of the Legislature in enacting" the statute at issue). Permitting an employer such as EnerNOC to avoid treble damages because it unlawfully retaliated against her would be antithetical to the core purposes of the Wage Act.[13] *See Fernandes*, 470 Mass. at 127 ("the Legislature clearly intended to sanction severely those employers who retaliate against employees who complain about purported wage violations.").

b. The Court Should Adopt the Reasoning of Recent Federal Court Decisions Addressing Unpaid Commissions

As noted in Section VI of this Application, Parker is unaware of any appellate decisions that squarely address the issue that she raises in this appeal. However, two recent cases in the United States District Court for the District of Massachusetts – *McAleer v. Prudential Ins. Co. of Am.* and *Israel v. Voya*

[13] As noted above, if EnerNOC did not fire Parker, she could have resigned immediately after the Eaton contract's TFC clause had expired, at which time EnerNOC would be obligated to pay her the full commission or face treble damages on the full amount. Thus, under the Trial Court's interpretation of the Wage Act, EnerNOC and other employers would be incentivized to terminate employees like Parker who asserted her statutory rights.

Institutional Plan Services, LLC are instructive.[14] In *McAleer*, the plaintiff received a base salary plus commissions under his employer's compensation plan. *McAleer*, 928 F. Supp. 2d at 282-83. The employer's commission plan paid commissions on a delayed basis and only to employees that were in good standing at the time. *Id.* at 288. The plaintiff, whom the employer claimed was terminated for cause, sued under the Wage Act to recover commissions from sales generated during the last months that he worked. *Id.* at 282-84. The court rejected the employer's argument that the commissions were not "due and payable" to the plaintiff. *Id.* at 288-90. Ultimately, the court held that the employer had no justification for withholding commissions earned prior to the end of employment. *Id.* at 290. The court further explained that "[i]f, indeed, [the plaintiff's] termination was the result of unlawful discrimination and not poor performance, [the employer] may not avoid liability under the Wage Act merely by asserting retention of discretion not to award commissions." *McAleer*, 928 F. Supp. 2d at 288.[15]

[14] Parker acknowledges that this Court is not obligated to adopt the holding of these decisions. However, she submits that the reasoning is persuasive and fully consistent with the language and purpose of the Wage Act. For the Court's convenience, copies of the *McAleer* and *Israel* decisions are included in the addendum. *See* Add., pp. 53-70.

[15] Parker notes that the case captioned *Israel v. Voya Institutional Plan Services, LLC*, 2017 WL 1026416, *1-3 (D. Mass. Mar. 16, 2017) follows *McAleer*. In that

The reasoning in *McAleer* makes eminent sense because, absent the trebling of damages for commissions earned towards the end of an employee's tenure, an unscrupulous employer would have an incentive to unreasonably delay the payment of commissions or, in Parker's case, terminate the employee in bad faith without any fear of treble damages. *See Fernandes*, 470 Mass. at 127 ("the Legislature clearly intended to sanction severely those employers who retaliate against employees who complain about purported wage violations.").[16] Accordingly, for the reasons stated above and in Parker's forthcoming appellate brief, she respectfully requests that the Court: (1) reverse the Trial Court's decision on the narrow issue noted above; (2) order the Superior Court to treble Parker's retaliation damages; and (3) otherwise uphold the Trial Court's judgment.

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case the Court held that, like Parker and the plaintiff in McAleer, the plaintiff-employee was owed unpaid commissions because he had "earned" the commissions before his employment ended.

[16] The authors of the Massachusetts Practice series also opined that an employer should not be able to deprive an employee of commissions because the employee was terminated before the end of a sales cycle. *See* Payment of wages on timely basis – Commissions, 45 Mass. Prac., Employment Law § 16:3 (3d ed.).

VI. Reasons Why Direct Appellate Review Is Appropriate

This appeal presents a unique situation because, while the Wage Act is a heavily litigated statute that has a widespread impact on the public interest, there is a dearth of appellate authority guiding trial courts on the narrow question described above. *See* Section IV, *supra*. Parker is unaware of any appellate authority that directly addresses that narrow issue of law. In addition to being a novel issue, the Court's decision will likely have a significant impact on the public interest by providing guidance to businesses throughout the Commonwealth that will affect how employers structure and administer commissions plans.

Under Mass. R. App. P. 11(a), direct appellate review is appropriate if:

> the questions presented for appeal are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court . . . or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

See Mass. R. App. P. 11(a).

Direct appellate review is warranted here under two of the three alternative reasons contemplated by Rule 11 because: (a) Parker's appeal presents a novel issue of law; and (b) the appeal raises an issue that is extremely important to the public interest because it may impact employers and employees throughout the Commonwealth with respect to paying commissions.

As to the first reason—a novel question of law—Parker is unaware of any appellate court addressing the narrow issue she has raised in her appeal. Indeed, it appears that very few trial courts have addressed whether unpaid commissions are "due and payable" under the Wage Act where, as in this case, an employee did everything necessary to "earn" a commission but was never paid because he or she was terminated before payment of the full commission was due under the employer's policy. *See, e.g., Israel and McAleer*, *supra.* Indeed, while the Trial Court's Decision interpreted portions of the Wage Act, it did not cite to any authority—appellate or otherwise—that directly supported its decision. *See* Add. pp. 47-48.

Direct appellate review is also warranted because the issue presented will have a significant impact on the public. It is axiomatic that the Wage Act has a wide-spread and dramatic impact on the public interest as it affects nearly every employer and employee in the Commonwealth. In *Melia*, 462 Mass. at 171, this Court observed:

> [T]he Legislature has highlighted the fundamental importance of the Wage Act by repeatedly expanding its protections. Since the enactment of the Wage Act in 1886, St. 1886, c. 87, the Legislature has broadened the scope of employees covered, the type of eligible compensation, and the remedies available to employees whose rights have been violated.

Id. at 171. Accordingly, direct appellate review is appropriate because this case raises a significant question of first impression of public interest.

VII. Conclusion

WHEREFORE, for the foregoing reasons, Parker respectfully requests that this Court grant her application for direct appellate review.

Respectfully submitted,

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Dated: February 14, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a)(6) (pertinent findings or memorandum of decision);

Rule 16(e) (references to the record);

Rule 16(f) (reproduction of statutes, rules, regulations);

Rule 16(h) (length of briefs);

Rule 18 (appendix to the briefs); and

Rule 20 (type size, margins, and form of briefs and appendices).

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on February 14, 2019, I have made service of this Application upon the attorney of record for each party, by email and the Electronic Filing System on:

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

1684CV02580 Parker, Francoise vs. Enernoc Inc

CASE TYPE:	Business Litigation	**FILE DATE:**	08/19/2016
ACTION CODE:	BA3	**CASE TRACK:**	B - Special Track (BLS)
DESCRIPTION:	Liability of Shareholders, Directors, Officers, Partners, etc.		
CASE DISPOSITION DATE	06/07/2018	**CASE STATUS:**	Closed
CASE DISPOSITION:	Judgment after Finding on Motion	**STATUS DATE:**	06/07/2018
CASE JUDGE:		**CASE SESSION:**	Business Litigation 2

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COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

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FINANCIAL DETAILS

Date	Fees/Fines/Costs/Charge	Assessed	Paid	Dismissed	Balance
08/19/2016	Civil Filing Fee (per Plaintiff) Receipt: 5762 Date: 08/19/2016	240.00	240.00	0.00	0.00
08/19/2016	Civil Security Fee (G.L. c. 262, § 4A) Receipt: 5762 Date: 08/19/2016	20.00	20.00	0.00	0.00
08/19/2016	Civil Surcharge (G.L. c. 262, § 4C) Receipt: 5762 Date: 08/19/2016	15.00	15.00	0.00	0.00
08/19/2016	Fee for Blank Summons or Writ (except Writ of Habeas Corpus) MGL 262 sec 4b Receipt: 5762 Date: 08/19/2016	15.00	15.00	0.00	0.00
	Total	**290.00**	**290.00**	**0.00**	**0.00**

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
08/19/2016		Attorney appearance On this date Robert R Berluti, Esq. added for Plaintiff Francoise Parker	
08/19/2016	1	Original civil complaint filed.	
08/19/2016	2	Civil action cover sheet filed.	
08/22/2016	3	General correspondence regarding Notice of acceptance into Business Litigation Session It has been assigned to BLS2 Notice sent 8/23/26	Sanders
09/12/2016	4	Service Returned for Defendant Enernoc Inc: Service through person in charge / agent;	
09/12/2016	5	Service Returned for Defendant Healy, Timothy: Service through person in charge / agent;	
09/12/2016	6	Service Returned for Defendant Erston, Eric: Service through person in charge / agent;	
09/13/2016	7	Party(s) file Stipulation to Extend Time to Respond to Complaint and Demand for Trial by Jury-to and including September 30, 2016 Applies To: Parker, Francoise (Plaintiff); Enernoc Inc (Defendant); Erston, Eric (Defendant); Healy, Timothy (Defendant)	
09/13/2016		Attorney appearance On this date Donald William Schroeder, Esq. added for Defendant Enernoc Inc	
09/13/2016		Attorney appearance On this date Erin Cornell Horton, Esq. added for Defendant Enernoc Inc	
09/13/2016		Attorney appearance On this date Donald William Schroeder, Esq. added for Defendant Eric Erston	
09/13/2016		Attorney appearance On this date Erin Cornell Horton, Esq. added for Defendant Eric Erston	
09/13/2016		Attorney appearance On this date Donald William Schroeder, Esq. added for Defendant Timothy Healy	
09/13/2016		Attorney appearance On this date Erin Cornell Horton, Esq. added for Defendant Timothy Healy	
09/30/2016	8	Received from Defendant Enernoc Inc: Eric Erston & Timothy Healy Answer with claim for trial by jury;	
10/04/2016		The following form was generated: Notice to Appear - BLS Sent On: 10/04/2016 15:28:42	

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11/09/2016		Event Result: The following event: BLS Rule 16 Litigation Control Conference scheduled for 11/09/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled	Sanders
11/09/2016		The following form was generated: Notice to Appear - BLS Sent On: 11/09/2016 14:33:04	
11/10/2016	9	Plaintiff Francoise Parker's Joint Motion for Entry of Protective Order: ALLOWED (dated 11/9/16) notice sent 11/10/16 Applies To: Enernoc Inc (Defendant); Erston, Eric (Defendant); Healy, Timothy (Defendant)	Sanders
11/10/2016	10	ORDER: Joint Protective Order (see P#10) (dated 11/9/16) notice sent 11/10/16	Sanders
11/10/2016	11	Plaintiff Francoise Parker's Joint Submission of Proposed Rule 16 Agenda and Tracking Order: Tracking Order Adopted as proposed. Rule 16 Conference 5/16/17 at 2:00pm (dated 11/9/16) notice sent 11/10/16	Sanders
12/09/2016	12	Plaintiff Francoise Parker's Joint Motion for entry of order on electronic discovery Applies To: Parker, Francoise (Plaintiff); Enernoc Inc (Defendant); Erston, Eric (Defendant); Healy, Timothy (Defendant)	
12/13/2016		Endorsement on Motion for (#12.0): ALLOWED for entry of order Notice sent 12/13/16	Sanders
12/16/2016	13	ORDER: on Electronic Discovery (see complete order) Notice Sent 12/16/16	Sanders
05/16/2017		Event Result: The following event: BLS Rule 16 Litigation Control Conference scheduled for 05/16/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled	Salinger
05/16/2017		The following form was generated: Notice to Appear Sent On: 05/16/2017 14:32:54	
05/17/2017	14	ORDER: Scheduling Order (see P#14) (dated 5/16/17) notice sent 5/17/17	Salinger
08/02/2017	15	Francoise Parker's Assented to Motion for leave to Amend Complaint	
08/07/2017		Endorsement on Motion for Leave to Amend Complaint (#15.0): ALLOWED (dated 8/3/17) notice sent 8/4/17	Sanders
08/07/2017	16	Amended: amended complaint filed by Francoise Parker and Jury Demand (filed 8/3/17)	
08/10/2017		Attorney appearance On this date Edward F Whitesell, Jr., Esq. added for Plaintiff Francoise Parker	

COMMONWEALTH OF MASSACHUSETTS
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08/10/2017		Attorney appearance On this date Michael Allen Bednarz, Esq. added for Plaintiff Francoise Parker	
08/11/2017	17	Defendant Enernoc Inc, Eric Erston, Timothy Healy's Motion for Extension to Respond to Amended Complaint: ALLOWED (dated 8/10/17) notice sent 8/11/17	Sanders
08/15/2017	18	Defendants Enernoc Inc, Eric Erston, Timothy Healy's Assented to Motion to extend the time to complete fact discovery until November 14, 2017	
08/22/2017		Event Result: The following event: Conference to Review Status scheduled for 09/27/2017 02:00 PM has been resulted as follows: Result: Not Held Reason: Request of Defendant	Sanders
08/22/2017		The following form was generated: Notice to Appear - BLS Sent On: 08/22/2017 12:40:02	
08/22/2017		Endorsement on Motion to (#18.0): ALLOWED extend time Discovery to be complete 11/14/17 Rule 56 CN to be held 11/15/17 at 2:00 PM Notice sent 8/23/17	Sanders
08/31/2017	19	Received from Defendant Healy, Timothy Enernoc, INC and Eric Erston: Answer to amended complaint and jury demand;	
11/15/2017		Event Result: Judge: Sanders, Hon. Janet L The following event: BLS Rule 16 Litigation Control Conference scheduled for 11/15/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled	Sanders
11/15/2017		The following form was generated: Notice to Appear - BLS Sent On: 11/15/2017 15:25:12	
11/15/2017		The following form was generated: Notice to Appear Sent On: 11/15/2017 15:28:06	
11/16/2017	20	ORDER: Revised Tracking Order Adopted by the Court (see P#20) (dated 11/15/17) notice sent 11/15/17 Judge: Sanders, Hon. Janet L	Sanders
01/03/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: BLS Rule 16 Litigation Control Conference scheduled for 01/03/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled	Salinger
01/22/2018		Attorney appearance On this date Michael Allen Bednarz, Esq. dismissed/withdrawn for Plaintiff Francoise Parker	

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02/23/2018	21	Plaintiff Francoise Parker's Motion to compel the production of allegedly privileged communications ((w/opposition)	
02/27/2018		The following form was generated: Notice to Appear Sent On: 02/27/2018 15:46:24	
03/06/2018		Endorsement on motion to compel (#21.0): the production of allegedly privileged communications DENIED for the reasons stated in the opposition. Dated: 3/5/18 Notice sent 3/5/18 Judge: Salinger, Hon. Kenneth W	Salinger
03/07/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Motion Hearing to Compel scheduled for 03/07/2018 02:00 PM has been resulted as follows: Result: Not Held Reason: By Court prior to date	Salinger
04/09/2018	22	Defendant Enernoc Inc, Eric Erston, Timothy Healy's Motion in limine to preclude evidence or consideration of speculative future damages (w/o opposition)	
04/09/2018	23	Defendant Enernoc Inc, Eric Erston, Timothy Healy's Motion in limine to preclude the testimony of attorney Michael Bednarz and related -"Evidence" or chalks (w/o opposition)	
04/09/2018	24	Defendant Enernoc Inc, Eric Erston, Timothy Healy's Motion in limine to preclude work environment evidence pre-dating plff's allegations (w/o opposition)	
04/09/2018	25	Defendant Enernoc Inc, Eric Erston, Timothy Healy's Request for attorney-conducted voir dire and proposed voir dire questions and topics	
04/10/2018	26	General correspondence regarding Defts proposed jury instructions	
04/10/2018	27	Joint Pre-Trial Memorandum filed: Applies To: Parker, Francoise (Plaintiff); Enernoc Inc (Defendant); Erston, Eric (Defendant); Healy, Timothy (Defendant)	
04/10/2018	28	Francoise Parker's Motion for leave to conduct juror panel voir dire pursuant to Massachusetts Superior Court Rule 6 (w/opposition)	
04/11/2018	31	Opposition to Defendants' motion in limine (P#24) to preclude work environment evidence pre-dating Plaintiff's allegations filed by Francoise Parker	
04/11/2018	32	Opposition to Defendants' request (P#25) for attorney-conducted voir dire and proposed voir dire questions and topics filed by	
04/12/2018	29	Opposition to Defendants' motion in limine (P#22) to preclude evidence or consideration of speculative future damages filed by Francoise Parker	
04/12/2018	30	Opposition to Defendants' motion in limine (P#23) to preclude the testimony of Attorney Michael Benarz and related "evidence" or chalks filed by Francoise Parker	

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04/12/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Final Trial Conference scheduled for 04/12/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled	Salinger
04/23/2018	33	General correspondence regarding Defts briefing to the Court on plff's Quantum Meruit claim (entered 4/20/18)	
04/27/2018	34	Defendant Enernoc Inc's Motion to preclude award of post-termination back pay or front pay (w/opposition)	
04/30/2018	35	Enernoc Inc, Eric Erston, Timothy Healy's Request for leave to Examine Kevin McSweeney	
05/02/2018		Endorsement on Motion to Preclude Award of Post-Termination Back Pay or Front Pay (#34.0): DENIED Plaintiff's opposition confirms, yet again, that she is only seeking additional commissions on the Eaton contract, emotional distress damages under GLc. 151B, punitive damages under GLc. 15B, and treble damages and attorneys fees under the wage act (dated 4/3018) notice sent 5/1/18 Judge: Salinger, Hon. Kenneth W	Salinger
05/02/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Jury Trial scheduled for 05/02/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Salinger
05/02/2018	36	Plaintiff Francoise Parker's Request for jury instructions (filed 4/12/18)	
05/02/2018	37	Francoise Parker's Memorandum of Law in Support of her Claim for Quantum Meruit (filed 4/26/18)	
05/02/2018	38	Brief filed: Trial Brief (filed 4/30/18) Applies To: Parker, Francoise (Plaintiff)	
05/02/2018	39	Francoise Parker's Request for leave to examine Jon Hartnett or in the alternative, Opposition (P#35) to Defendants' request for leave to examine Kevin McSweeney	
05/03/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Jury Trial scheduled for 05/03/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Salinger
05/03/2018	40	Francoise Parker's Memorandum of Law in support of the admission of certain spreadsheets reflecting Commission calculations under the Eaton Contracts as demonstrative exhibits	

COMMONWEALTH OF MASSACHUSETTS
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05/04/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Jury Trial scheduled for 05/04/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Salinger
05/07/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Jury Trial scheduled for 05/07/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Salinger
05/08/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Jury Trial scheduled for 05/08/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Salinger
05/08/2018	41	Defendants Enernoc Inc, Eric Erston, Timothy Healy's Motion for Directed Verdict filed Filed and DENIED for the reasons stated on the record. Judge: Salinger, Hon. Kenneth W	Salinger
05/09/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Jury Trial scheduled for 05/09/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Salinger
05/10/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Jury Trial scheduled for 05/10/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Salinger
05/11/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Jury Trial scheduled for 05/11/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Salinger
05/14/2018		Event Result: Judge: Salinger, Hon. Kenneth W The following event: Jury Trial scheduled for 05/14/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Salinger
05/14/2018		Exhibits Returned All Exhibits returned to Defendants' Attorney D.W.Schroeder	
05/15/2018	42	General correspondence regarding JURY VERDICT FORM Dated: May 14, 2018	
06/01/2018	43	Plaintiff Francoise Parker's Motion for award of attorney's fees and costs (w/opposition)	
06/01/2018	44	Defendants Enernoc Inc, Eric Erston's motion for judgment notwithstanding verdict and, in the Alternative, Motion for New Trial or Remittitur, and to Amend the Judgment (w/opposition)	

COMMONWEALTH OF MASSACHUSETTS
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06/01/2018		Event Result:: Conference to Review Status scheduled on: 06/01/2018 08:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate	Salinger
06/05/2018		Endorsement on Motion for Award of Attorneys' Fees and Costs (#43.0): Other action taken ALLOWED IN PART. See Memorandum and Order. Dated: June 4, 2018 Notice sent 6/5/18 Judge: Salinger, Hon. Kenneth W Applies To: Parker, Francoise (Plaintiff)	Salinger
06/05/2018		Endorsement on motion for judgment notwithstanding verdict (#44.0): and in the alternative, motion for new trial or remittitur DENIED See Memorandum and Order. Dated: June 4, 2018 Notice sent 6/5/18 Judge: Salinger, Hon. Kenneth W Applies To: Enernoc Inc (Defendant); Erston, Eric (Defendant)	Salinger
06/05/2018	45	MEMORANDUM & ORDER: DENY DEFENDANTS' POST-TRIAL MOTIONS, FINDINGS OF FACT AS TO REASONABLE ATTORNEYS; FEES, AND ORDER AS TO FORM AND AMOUNT OF JUDGMENT: ORDER - Defendants' motion for judgment notwithstanding the verdict, a new trial, or remittitur is DENIED. Plaintiff's motion for an award of reasonable attorneys' fees is ALLOWED IN PART. The Court will award $390,750 in attorneys' fees and $5,844.63 in costs. Final judgment shall enter providing that Ms. Parker shall: (1) recover from EnerNOC, Inc., and Eric Erston, jointly and severally, $389,098.48 in compensatory damages, plus statutory interest on that amount running from August 19, 2016, to the date that final judgment is entered, plus $390,750 in attorneys' fees and $5,844.63 in costs; and (2) also recover from EnerNOC, Inc., only, in addition to the amounts listed above, $25,063.34 in compensatory damages for unpaid wages, plus statutory interest on that amount running from April 1, 2016, to the date that final judgment is entered, plus $50,126.68 in liquidated damages under the Wage Act, plus $240,000 in punitive damages under G.L. c. 151B. Dated: June 4, 2018 Notice sent 6/5/18 Judge: Salinger, Hon. Kenneth W Judge: Salinger, Hon. Kenneth W	Salinger

COMMONWEALTH OF MASSACHUSETTS
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06/07/2018	46	FINAL JUDGMENT It is Ordered and Adjudged that deft's motion for Judgment notwithstanding the verdict a new trial or remittitur is DENIED Plff's motion for an award of reasonable attys fees is ALLOWED in part the Court will award $390,750 in attys fees and $5,844.63 in costs Final Judgment shall enter providing that Ms Parker shall (1) recover from EnerNOC Inc and Eric Erston jointly and severally $389,098.48 in compensatory damages plus statutory interest on that amount running from Aug 19, 2016 to the date that final Judgment is entered plus $390,750 in attys fees and $5,844.63 in costs and (2) also recovers from EnerNOC Inc only in addition to the amounts listed above $25,063.34 in compensatory damages from unpaid wages plus statutory interest on that amount running from April 1, 2016 to the date final judgment is entered plus $50,126.66 in liquidated damages under the Wage Act plus $240,000 in punitive damages under GL c151B entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) Judge: Salinger, Hon. Kenneth W Judge: Salinger, Hon. Kenneth W	Salinger
06/07/2018		Disp for statistical purposes	
06/29/2018	47	Notice of appeal filed. Notice sent 7/2/18 Applies To: Parker, Francoise (Plaintiff)	
07/02/2018	48	Notice of appeal filed. Notice sent 7/5/18 Applies To: Enernoc Inc (Defendant); Erston, Eric (Defendant)	
07/13/2018	49	Court received Notice Pursuant to Mass. R. App. P. 8(b)(3)(ii). Transcript will be ordered. related to appeal	
07/20/2018	50	Court received Notice Pursuant to Mass. R. App. P. 8(b)(3)(iii) related to appeal	
09/25/2018	51	CD containing PDF Transcript of 5/3/18 5/4/18 5/7/18 5/8/18 5/9/18 5/10/18 and 5/11/18 received from LMP Reporting.	
01/22/2019		Appeal: notice of assembly of record sent to Counsel	
02/01/2019	52	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10 (a) (3), please note that the above-referenced case (2019-P-0147) was entered in this Court on January 25, 2019.	

I HEREBY ATTEST AND CERTIFY ON
Feb. 6, 2019
, THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY:
First Asst. Clerk

Original

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT.
1684CV02580-BLS2

FRANCOISE PARKER

v.

ENERNOC, INC., ERIC ERSTON, and TIMOTHY HEALY

JURY VERDICT FORM

A. Breach of Contract Claim against EnerNOC.

Q.1. Was Ms. Parker's right to a commission for the Eaton deal (a) based on a continuation of the revised 2015 sales commission policy and compensation summary, or (b) not governed by the 2015 sales commission policy?

(a) Based on 2015 Sales Commission Policy ✓

(b) Not Based on the 2015 Sales Commission Policy _____

If your answer to Q.1 is "(a)", answer Q.2 and Q.3. If "(b)," skip Q.2 and Q.3.

Q.2. Did EnerNOC have a contractual obligation to apply a "true-up policy" for customer deals that had a "termination for convenience" clause?

Yes ✓ No _____

Q.3. Did EnerNOC breach Ms. Parker's compensation contract by failing to pay the full commission earned by Ms. Parker under the 2015 Sales Commission Policy for the 2016 Eaton contract?

Yes ✓ No _____

If your answer to Q.1 is "(b)" answer Q.4. If "(a)"," skip Q.4.

Q.4. Did EnerNOC breach its obligation to pay Ms. Parker a reasonable commission for the 2016 Eaton contract?

Yes _____ No _____

If your answer to Q.3 or Q.4 is "Yes," answer Q.5. If "No," skip Q.5.

Q.5. What additional amount of money is Ms. Parker entitled to receive as a commission for the Eaton deal?

(a) Unpaid Commissions Due on April 1, 2016:

$ 25,063.34 (amount in figures)

Twenty five thousand sixty three dollars and thirty-four cents (amount in words)

(b) Unpaid Commissions Due Later under "True-Up" Policy

$ 349,098.48 (amount in figures)

Three hundred forty nine thousand ninety eight dollars and forty eight cents (amount in words)

If your answer to Q.2 is "Yes," answer Q.6. If "No," skip Q.6 and Q.7, and go to Q.8.

B. Implied Covenant Claim against EnerNOC.

Q.6 Did EnerNOC breach the implied covenant of good faith and fair dealing by firing Ms. Parker to avoid paying commissions she would have earned under the "true-up" policy if the Eaton contract was not terminated?

Yes ✓ No _____

If your answer to Q.6 is "Yes," answer Q.7. If "No," skip Q.7.

Q.7. What amount of money will fairly compensate Ms. Parker for EnerNOC's breach of the implied covenant of good faith and fair dealing?

$ 349,098.48 (amount in figures)

Three hundred forty nine thousand ninety eight dollars and forty eight cents (amount in words)

If your answer to Q.1 is "(a)", answer Q.8. If "(b)," skip Q.8 through Q.11.

C. Wage Act Claims against All Defendants.

Q.8. Did EnerNOC violate the Wage Act by failing to pay Ms. Parker the full commission amount for the Eaton contract that was due and payable on Ms. Parker's last day of work for EnerNOC?

Yes ✓ No _____

If your answer to Q.8 is "Yes," answer Q.9. If "No," skip Q.9.

Q.9. What amount of money will fairly compensate Ms. Parker for EnerNOC's violation of the Wage Act?

$ 25,063.34 (amount in figures)

Twenty five thousand sixty three dollars and thirty four cents (amount in words)

D. Sex Discrimination Claims against EnerNOC and Mr. Erston.

Q.10. Did EnerNOC intentionally discriminate against Ms. Parker because of her sex?

Yes _____ No ✓

If your answer to Q.10 is "Yes," answer Q.11, Q.12, Q.13, and Q.14. If "No," skip Q.11 through Q.14, and go to Q.15.

Q.11. Did Eric Erston aid, abet, incite, or compel EnerNOC's intentional discrimination against Ms. Parker because of her sex?

Yes _____ No _____

Q.12. What amount of money will fairly compensate Ms. Parker for EnerNOC intentionally discriminating against her because of her sex, for each category of possible damages?

(a) Unpaid Eaton Contract Commissions

$_____ (amount in figures)

_____ (amount in words)

(b) Emotional Distress

$_____ (amount in figures)

_____ (amount in words)

Q.13. If you find that it is appropriate to punish EnerNOC for discriminating against Ms. Parker because of her sex, what amount of punitive damages is appropriate?

$_____ (amount in figures)

_____ (amount in words)

Q.14. If you find that it is appropriate to punish Mr. Erston for aiding, abetting, inciting, or compelling EnerNOC's discrimination against Ms. Parker because of her sex, what amount of punitive damages is appropriate?

$_____ (amount in figures)

_____ (amount in words)

E. Retaliation Claims against EnerNOC and Mr. Erston.

Q.15. Did EnerNOC retaliate against Ms. Parker for complaining that she was being discriminated against because of her sex?

Yes ✓ No _____

Q.16. Did Mr. Erston retaliate against Ms. Parker for complaining that she was being discriminated against because of her sex?

Yes ✓ No _____

Q.17. Did EnerNOC retaliate against Ms. Parker for complaining that she was not paid the full commission owed to her for the Eaton contract?

Yes ✓ No _____

If your answer to Q.17 is "Yes," answer Q.18. If "No," skip Q.18.

Q.18. Is Mr. Erston personally liable for EnerNOC retaliating against Ms. Parker because she complained that she was not paid the full commission owed to her for the Eaton contract?

Yes ✓ No _____

If you answer "Yes" to Q.15, Q.16, or Q.17, then answer Q.19.
If you answer "No" to Q.15, Q.16, and Q.17, then skip the remaining Qs.

Q.19. What amount of money will fairly compensate Ms. Parker for any unpaid Eaton contract commissions that she lost because of unlawful retaliation?

$ 349,098.48 (amount in figures)

Three hundred forty nine thousand ninety eight dollars and forty eight cents (amount in words)

If you answer "Yes" to Q.15 or Q.16, then answer Q.20. Otherwise skip Q.20.

Q.20. What amount of money will fairly compensate Ms. Parker for any emotional distress that she suffered because EnerNOC, Mr. Erston, or both of them retaliated against her for complaining that she was being discriminated against because of her sex?

$ 40,000.00 (amount in figures)

Forty thousand dollars (amount in words)

If you answer "Yes" to Q.15, then answer Q.21. If "No," skip Q.21.

Q.21. If you find that it is appropriate to punish EnerNOC for retaliating against Ms. Parker because she complained that she was being discriminated against because of her sex, what amount of punitive damages is appropriate?

$ 240,000 (amount in figures)

Two hundred forty thousand dollars (amount in words)

If you answer "Yes" to Q.16, then answer Q.22. If "No," skip Q.22.

Q.22. If you find that it is appropriate to punish Mr. Erston for retaliating against Ms. Parker because she complained that she was being discriminated against because of her sex, what amount of punitive damages is appropriate?

$ 0 (amount in figures)

zero dollars (amount in words)

I hereby certify that each of the questions answered above was answered in this manner by at least 11 of the 13 deliberating jurors.

Foreperson of the Jury Kathryn Seymour

May 14, 2018

I HEREBY ATTEST AND CERTIFY ON Feb. 6, 2019 THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: First Asst. Clerk

Notify

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT.
1684CV02580-BLS2

FRANCOISE PARKER

v.

ENERNOC, INC. and ERIC ERSTON[1]

Notice sent
6/05/2018
R. R. B.
B.,Mc. & K.
E. F. W.,JR.
M. A. B.
D. W. S.
F. & L.
E.C.H.

MEMORANDUM AND ORDER DENY DEFENDANTS' POST-TRIAL MOTIONS, FINDINGS OF FACT AS TO REASONABLE ATTORNEYS' FEES, AND ORDER AS TO FORM AND AMOUNT OF JUDGMENT

(sc)

A jury found that EnerNOC, Inc., did not pay Francoise Parker the full sales commission she had earned, and thereby breached Parker's employment contract and violated the Massachusetts Wage Act. It also found that EnerNOC fired Ms. Parker to avoid its future contractual obligation under an alleged "true-up" policy to pay commissions on an already completed sale, in violation of the implied covenant of good faith and fair dealing. And the jury found that both EnerNOC and Eric Erston are liable for retaliating against Ms. Parker because she complained that she was being discriminated against based on her sex and because she complained that she was not paid the full commission owed to her by EnerNOC as wages. The jury awarded Ms. Parker a total of $374,161.82 in unpaid sales commissions, $40,000 as compensation for emotional distress, and $240,000 in punitive damages only against EnerNOC.

EnerNOC and Mr. Erston have moved for judgment notwithstanding the verdict or a new trial as to damages awarded in connection with the "true-up" policy, and for remittitur of the punitive damage award. Ms. Parker seeks an award of reasonable attorneys' fees. And the parties disagree as to what part of the damage award is subject to trebling under Wage Act.

The Court will deny Defendants' motion for JNOV, a new trial, or remittitur, because the jury's verdict is supported by the evidence. It will award $390,750 in attorneys' fees, rather than the $540,285 requested by Parker. And it concludes that

[1] Plaintiff voluntarily dismissed with prejudice her claim against Timothy Healy, for personal liability under the Wage Act, before the case went to the jury.

under the Wage Act the $25,063.34 in commissions that were due and payable on Parker's last day of employment must be trebled, but that the $349,098.48 that the jury awarded as damages under the Wage Act for retaliation may not be trebled.

1. Defendants' Post-Trial Motions. Defendants argue that the jury's findings regarding an alleged "true-up" policy and its award of punitive damages are not supported by the evidence. The Court disagrees.

1.1. True-Up Policy. Ms. Parker helped EnerNOC close a software sales contract with Eaton Industries (Ireland) Ltd. on March 4, 2016. This deal was far and away, by an order of magnitude, the largest sale in EnerNOC's history.

The contract between EnerNOC and Eaton had a so-called "termination for convenience" ("TFC") clause under which Eaton was free to terminate the deal after one year. EnerNOC took the position that, under its published sales commission policy, it was only obligated to pay Parker a sales commission on the guaranteed first year of revenues from Eaton, even if Eaton never terminated the contract. The jury found that EnerNOC 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 if Eaton did not exercise its termination right at the end of the first year. And the jury also found that EnerNOC breached the implied covenant of good faith and fair dealing by firing Ms. Parker to avoid paying commissions she would have earned under the "true-up" policy if the Eaton contract was not terminated. Eaton renegotiated but did not terminate its contract after one year.

The jury's verdict with respect to the true-up policy and the implied covenant are supported by the evidence. The finding that EnerNOC had such a true-up policy was reasonably based on testimony of Gregg Dixon and Eric Erston, who each served as EnerNOC's senior vice president for marketing and sales, and confirmatory internal EnerNOC emails marked as exhibits 55, 56, 104, and 105. The implicit finding that Ms. Parker relied on the true-up policy when she kept working for EnerNOC to land the Eaton deal is supported by Parker's testimony that (i) she understood that EnerNOC's sales commission policies required EnerNOC to pay a commission up front on the initial guaranteed term of a software

contract with a TFC clause, and then to pay an additional commission on the rest of the contract if the customer did not exercise its TFC rights and therefore the rest of the contract became a second guaranteed revenue stream, and (ii) she relied upon that understanding in working to land the Eaton contract.

Defendants note that Parker never expressly stated that her understanding was based on the true-up policy described by Dixon and Erston, never expressly said that she relied upon that policy, and never even referred to a "true-up" policy that was separate and apart from the published sales commission policy.

But the evidence as a whole nonetheless 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, as explained above. "The inferences drawn by a jury from the evidence 'need only be reasonable and possible and need not be necessary or inescapable.' " *Commonwealth* v. *Kelly*, 470 Mass. 682, 693 (2015), quoting *Commonwealth* v. *Casale*, 381 Mass. 167, 173 (1980).

1.2. Punitive Damages. Defendants also argue that the jury's award of $240,000 in punitive damages under G.L. c. 151B is excessive. The Court disagrees.

The Supreme Judicial Court has held that to decide whether an award of punitive damages is excessive, a court should consider "the degree of reprehensibility of the defendant's conduct," whether the punitive damages are too far in excess of the "actual harm inflicted on the plaintiff," and how the punitive damage award compares to "the civil or criminal penalties that could be imposed for comparable misconduct." *Haddad* v. *Wal-Mart Stores, Inc.*, 455 Mass. 91, 109 (2009), quoting *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575, 580, 583 (1996).

None of these factors suggests that the punitive damage award in this case was excessive.

First, the jury could have found that EnerNOC engaged in repeated and escalating retaliation against Ms. Parker during early 2016 for complaining that she was being treated unfairly because of her sex. It could have found that in February 2016, after another Enterprise Business Development Manager named John Hartnett left the firm, EnerNOC deliberately did not assign any of his

accounts to Parker because she had complained that EnerNOC had proposed a new sales commission policy that discriminated against Parker because of her sex. The jury could also have found that EnerNOC barred Parker from attending the March 2016 "EnergySmart" conference, which was a key client relations and sales development opportunity, because she complained that she was denied the chance to pick up any of Hartnett's accounts because of her sex. And the jury could have found that EnerNOC fired Parker a few days later in part because she complained that she had been barred from the EnergySmart conference because of her sex.

Second, the jury awarded less in punitive damages ($240,000) than it awarded to compensate Mr. Parker for economic and emotional harm ($389,098.48).[2] By this measure, the punitive damage award is not excessive. Compare *Haddad*, 455 Mass. at 92, 109-110 ($1 million in punitive damages not excessive compared to $972,774 in compensatory damages); *Dalyrymple* v. *Winthrop*, 50 Mass. App. Ct. 611, 621 (2000) ($300,000 in punitive damages not excessive compared to $275,000 in compensatory damages).

Third, although the $240,000 punitive damage award is 24 times the $10,000 maximum civil penalty that could be awarded against EnerNOC for a first-time violation of this sort, see G.L. c. 151B, § 5, that fact does not mean that this award must be reduced. "[S]trict equivalence between punitive awards and possible civil penalties is not necessary in order for an award to meet constitutional requirements." *Aleo* v. *SLB Toys USA, Inc.*, 466 Mass. 398, 420 (2013). The SJC upheld an $18 million punitive damage award that was roughly 14 times the available civil penalties, and cited with approval decisions upholding punitive damages that are 20 or 25 times the available civil penalties. *Id.*

Considering all of these factors, the Court is not convinced that the punitive damage award in this case was excessive.

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[2] The jury found that Ms. Parker was entitled to receive $349,098.48 to compensate her for unpaid commissions that she lost because of unlawful retaliation, plus an additional $40,000 to compensate her for emotion distress she suffered because EnerNOC unlawfully retaliated against her.

2. Award of Reasonable Attorney's Fees. Ms. Parker is entitled to collect reasonable attorneys' fees and costs because she prevailed on her Wage Act and retaliation claims. See G.L. c. 149, § 150; G.L. c. 151B, § 9.

2.1. Legal Standards for Awarding Fees. "While the amount of a reasonable attorney's fee is largely discretionary, a judge 'should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." *Twin Fires Investment, LLC* v. *Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 429-430 (2005) (reviewing award of attorney's fees under c. 93A), quoting *Linthicum* v. *Archambault*, 379 Mass. 381, 388-389 (1979). "No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required." *Twin Fires* at 430, quoting *Berman* v. *Linnane*, 434 Mass. 301, 303 (2001). "[T]rial courts need not, and indeed should not, become green-eyeshade accountants" in determining what amount of attorneys' fees is reasonable in a particular case. *Fox* v. *Vice*, 563 U.S. 826, 83845 (2011). "The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Id.*

"The basic measure of reasonable attorney's fees is a 'fair market rate for the time reasonably spent preparing and litigating a case.'" *Stowe* v. *Bologna*, 417 Mass. 199, 203 (1994), quoting *Fontaine* v. *Ebtec Corp.*, 415 Mass. 309, 326 (1993); accord *Killeen* v. *Westban Hotel Venture LP*, 69 Mass. App. Ct. 784, 790 (2007) (applying this methodology to attorney fee award under the Wage Act). Plaintiffs have "the burden of showing that the claimed rate and number of hours are reasonable." *Commonwealth* v. *Ennis*, 441 Mass. 718, 722 (2004), quoting *Society of Jesus of New England* v. *Boston Landmarks Comm'n*, 411 Mass. 754, 759 (1992).

"Calculation of reasonable hourly rates should begin with the average rates in the attorney's community for similar work by attorneys of the same years' experience." *Ennis*, 441 Mass. at 722, quoting *Stratos* v. *Department of Pub. Welfare*, 387 Mass. 312, 323 (1982). Parties seeking attorney's fees "have the

burden to produce satisfactory evidence that the rates 'are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.' " *Society of Jesus of New England*, 411 Mass. at 759 n.11, quoting *Blum*, 465 U.S. at 895 (1984).

2.2. Findings as to Hours Worked. The Court finds that the total number of hours spent on legal work for which Ms. Parker seeks compensation is excessive, in part for the reasons discussed in Defendants' opposition to the motion seeking an award of attorneys' fees.

Parker seeks compensation for three lawyers, a paralegal, and a law clerk. She says that her lead trial counsel (Robert Berlutti) spent 403 hours working on this case, and that the lawyer who second chaired the case (Michael Bednarz) spent 684.9 hours on the matter. Parker also seeks compensation for 172.5 hours spent by a third lawyer (Edward Whitesell) who did not participate in the trial and never interacted with Defendants' counsel. Finally, she seeks reimbursement for 300.6 hours of work by a paralegal and 340.7 hours by a law clerk.

In the exercise of its discretion, the Court will reduce the reimbursable hours of legal work as follows. It will not award any amount for time spent by Mr. Whitesell because that work appears to be redundant and unnecessary. Much of his time was spent reviewing work by the two other lawyers. This case could easily have been handled by Mr. Berlutti and Mr. Bednarz alone. The Court will only award compensation for 350 hours of work by Mr. Berlutti and 550 hours of work by Mr. Bednarz. These reductions are warranted in part because some of the work on this case (like the preparation and filing of a lengthy trial brief) was unnecessary, and in part because some of the work was spent on substantial discovery that was relevant only to the sex discrimination claim as to which Defendants prevailed. And the Court will only award compensation for 275 hours of work by a paralegal and 150 hours of work by a legal work because the additional hours spent by these two individuals was excessive.

2.3. Findings as to Hourly Rates. The Court finds that the requested hourly rates of $495 for Mr. Berlutti, $300 for Mr. Bednarz, $150 for a paralegal, and $75 for a law clerk are reasonable. Ms. Parker provided no real evidentiary

support for these hourly rates. But the Court finds, based on its own experience in reviewing many other requests for attorneys' fees, that these figures appear to reflect prevailing market rates for similar services by persons with comparable experience. Cf. *Heller* v. *Silverbranch Constr. Corp.*, 376 Mass. 621, 629 (1978) (judge may rely on his or her "own experience as a judge and expertise as a lawyer" in setting reasonable attorney's fees); *Borne* v. *Haverhill Golf & Country Club, Inc.*, 58 Mass. App. Ct. 306, 325 (2003) ("Generally, a judge—and particularly the trial judge—can, from the judge's own experience, determine an award of legal fees; there is no requirement for an evidentiary hearing.").

Although neither *Heller* nor *Borne* hold that a judge may rely upon her or his own knowledge of prevailing market rates for legal work when awarding attorneys' fees, it appears that doing so is permissible under Massachusetts law. See *Handy* v. *Penal Institutions Comm'r of Boston*, 412 Mass. 759, 767 (1992) (affirming fee award by single justice based on plaintiffs' affidavits as well as single justice's "own personal knowledge of hourly rates in the Boston area at all relevant historical times"); *Edinburg* v. *Edinburg*, 22 Mass. App. Ct. 192, 198 (1986) (attorneys' fees may be awarded without evidentiary hearing where judge has "first hand knowledge of the work performed and of going rates") (dictum) (quoting *Robbins* v. *Robbins*, 19 Mass. App. Ct. 538, 543 n.10 (1985) (dictum)).[3]

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[3] There is a sharp split among the United States Courts of Appeals—and even among different panels within the Ninth Circuit—regarding whether trial judges may rely upon their own experience in determining a reasonable hourly rate when awarding attorneys' fees. **Compare** *Garcia-Goyco* v. *Law Envtl. Consultants, Inc.*, 428 F.3d 14, 22 (1st Cir. 2005) (court may rely on "its own knowledge and experience regarding attorneys' rates and the local market"), *Farbotko* v. *Clinton County of New York*, 433 F.3d 204, 209 (2d Cir. 2005) (court may rely upon "rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district"), *Miller* v. *Dugan*, 764 F.3d 826, 831 (8th Cir. 2014) ("When determining reasonable hourly rates, district courts may rely on their own experience and knowledge of prevailing market rates.") (quoting *Hanig* v. *Lee*, 415 F.3d 822, 825 (8th Cir. 2005)), and *Ingram* v. *Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011) (court may rely, "in part, on its own knowledge and experience" in determining reasonable hourly rate), **with** *McClain* v. *Lufkin Indus., Inc.*, 649 F.3d 374, 383 (5th Cir. 2011) ("The hourly fee awarded must be supported by the record; the district court may not simply rely on its own experience in the relevant legal market to set a reasonable hourly billing rate.") (quoting *League of United Latin*

2.4. Conclusions as to Total Fees and Costs. For the reasons discussed above, the Court will award $390,750 in attorneys' fees, calculated as follows:

	Rate	Hours	Total Fee
Atty Berlutti	$495	350	$173,250
Atty Bednarz	$300	550	$165,000
Paralegal	$150	275	$ 41,250
Law Clerk	$75	150	$ 11,250
Total			$390,750

The Court finds that Ms. Parker's request for $5,844.63 in costs is reasonable and will award that amount.

3. Form and Amount of Judgment.

3.1. Liquidated Damages under the Wage Act. The jury found that Ms. Parker was owed $25,063.34 in sales commission that were due and payable on her last day of employment. By statute, Parker is entitled to have that amount trebled as liquidated damages. See G.L. c. 149, § 150.

The jury also found that Ms. Parker was entitled to recover $349,098.48 as damages because she was fired in retaliation for complaining that she had not been paid the full commission owed to her for the Eaton contract. Given the evidence presented, 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.

The Court agrees with Defendants that this damage award for future commissions is not subject to trebling under the Wage Act. The Legislature recognized that a successful Wage Act plaintiff may recover both "lost wages and other benefits" as well as other "damages incurred." *Id.* But it only made treble damages available for an award of "lost wages and other benefits." By necessary

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Am. Citizens v. *Roscoe I.S.D.*, 119 F.3d 1228, 1234 (5th Cir. 1997)); *Gonzalez* v. *City of Maywood*, 729 F.3d 1196, 1206 (9th Cir. 2013) (court may not determine reasonable hourly rate based solely "on its experience and knowledge of prevailing rates in the community, ... without relying on evidence of prevailing market rates"), and *United Phosphorus, Ltd.* v. *Midland Fumigant, Inc.*, 205 F.3d 1219, 1234 (10th Cir. 2000) (same).

implication, treble damages are not available for an award of damages that do not constitute "lost wages and other benefits." Unpaid commissions constitute lost wages, and therefore are subject to mandatory trebling by statute, if they are "due and payable" and can be "definitely determined" as of plaintiffs last day of employment. See *Weber* v. *Coast to Coast Medical, Inc.*, 83 Mass. App. Ct. 478, 483 (2013). But the $349,098.48 that the jury awarded to Ms. Parker as damages under her retaliation claim was for a commission that did not become due and payable until one year after Parker was fired, when Eaton opted not to terminate its software contract with EnerNOC.

Ms. Parker makes a powerful policy argument in favor of nonetheless trebling this part of the damage award. After all, the jury's findings make clear that the only reason why this additional sales commission amount did not become due and payable until after Parker stopped working for EnerNOC is because she was unlawfully fired in order to avoid having to pay this additional commission amount (in violation of the implied covenant of good faith and fair dealing) and in retaliation for complaining about being denied commissions that were due (in violation of the Wage Act) and in retaliation for complaining about being discriminated against because of her sex (in violation of G.L. c. 151B). Ms. Parker argues that under these circumstances her future commissions should be treated as "wages" subject to mandatory trebling.

The Court must apply the Wage Act as it is written, however. 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. See G.L. c. 149, § 148; *Okerman* v. *VA Software Corp.*, 69 Mass. App. Ct. 771, 776 (2007). It recognized that employees who prevail on a Wage Act retaliation claim may recover damages as compensation for additional, future economic injury. And the Legislature specified that "lost wages" are subject to trebling as liquidated damages, but left other "damages" out of the trebling provision.

3.2. Statutory Interest under the Wage Act. Ms. Parker is entitled to statutory pre-judgment interest on the single damages awarded to her, but not on

Notice sent
6/05/2018

(sc)

the trebled portion of her Wage Act damages. *George* v. *National Water Main Cleaning Co.*, 477 Mass. 371, 372 (2017).

3.3. Judgment against Eric Erston. As both sides agree, EnerNOC and Mr. Erston are jointly and severally liable for a portion of the damages awarded, and for the reasonable attorneys' fees and costs. EnerNOC has sole liability for the $240,000 in punitive damages and the trebling as liquidated damages portion of Ms. Parker's recovery under the Wage Act. The Court will order that judgment be entered in a form that makes this clear.

ORDER

Defendants' motion for judgment notwithstanding the verdict, a new trial, or remittitur is DENIED. Plaintiff's motion for an award of reasonable attorneys' fees is ALLOWED IN PART. The Court will award $390,750 in attorneys' fees and $5,844.63 in costs.

Final judgment shall enter providing that Ms. Parker shall: (1) recover from EnerNOC, Inc., and Eric Erston, jointly and severally, $389,098.48 in compensatory damages, plus statutory interest on that amount running from August 19, 2016, to the date that final judgment is entered, plus $390,750 in attorneys' fees and $5,844.63 in costs; and (2) also recover from EnerNOC, Inc., only, in addition to the amounts listed above, $25,063.34 in compensatory damages for unpaid wages, plus statutory interest on that amount running from April 1, 2016, to the date that final judgment is entered, plus $50,126.68 in liquidated damages under the Wage Act, plus $240,000 in punitive damages under G.L. c. 151B.

Kenneth W. Salinger
Justice of the Superior Court

June 4, 2018

I HEREBY ATTEST AND CERTIFY ON
Feb. 6, 2019
, THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: First Asst. Clerk

Notify

Commonwealth of Massachusetts
County of Suffolk
The Superior Court

46

CIVIL DOCKET# **SUCV2016cv2580 BLS2**

FRANCOISE PARKER
Vs
ENERNOC, INC. And ERIC ERSTON

FINAL
JUDGMENT

This action came on before the Court, Kenneth W. Salinger, Justice, presiding, and the issues having been duly heard and decided:

It is **ORDERED and Adjudged that Defendants' motion for judgment notwithstanding the verdict, a new trial, or remittitur is DENIED. Plaintiff's motion for an award of reasonable attorneys'** fees is ALLOWED IN PART. The Court will award $390,750 in attorneys' fees and $5,844.63 in costs.

Final judgment shall enter providing that Ms. Parker shall: (1) recover from EnerNOC, Inc., and Eric Erston, jointly and severally, $389,098.48 in compensatory damages, plus statutory interest on that amount running from August 19, 2016, to the date that final judgment is entered, plus $390,750 in attorneys' fees and $5,844.63 in costs; and (2) also recover from EnerNOC, Inc., only, in addition to the amounts listed above, $25,063.34 in compensatory damages for unpaid wages, plus statutory interest on that amount running from April 1, 2016, to the date that final judgment is entered, plus $50, 126.68 in liquidated damages under the Wage Act, plus $240,000 in punitive damages under G.L. c. 151B. Kenneth W. Salinger, J.S.C, June 4, 2018

No Stmt 6/7/18 RRB EFW MAB DURS ECH DURS

I HEREBY ATTEST AND CERTIFY ON Feb. 6, 2019, THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: Asst. Clerk

Dated at Boston, Massachusetts this 4th day of June, 2018.

Michael Joseph Donovan
Clerk of Courts
By: Richard V Muscato
asst clerk

JUDGMENT ENTERED ON DOCKET June 7 2018
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.: SUCV2016-02580-BLS2

FRANCOISE PARKER,

Plaintiff,

v.

ENERNOC, INC., ERIC ERSTON, and TIMOTHY HEALY

Defendants.

STIPULATED-TO FACTS

1. EnerNOC has a principal place of business located at One Marina Park Drive, Boston, Massachusetts. EnerNOC provides a variety of energy-related services that help businesses use energy more efficiently and cost-effectively.

2. On March 6, 2014, Ms. Parker began working for EnerNOC as a salesperson known as a Business Development Manager ("BDM") within its Enterprise Sales department.

3. During the term of Ms. Parker's employment with EnerNOC, defendant Timothy Healy was EnerNOC's Chief Executive Officer.

4. Ms. Parker's compensation at EnerNOC included a base salary, commissions, and other benefits. Mr. Parker's annual base salary at EnerNOC was $120,000.

5. On March 4, 2016, EnerNOC entered into a contract with Eaton Industries (IRELAND) Limited ("Eaton").

6. On April 1, 2016, EnerNOC terminated Ms. Parker's employment.

7. EnerNOC paid Plaintiff $100,222.21 in commissions on the Eaton Contract on April 22, 2016.

8. Eric Erston was EnerNOC's Vice President of Global Sales when EnerNOC terminated Ms. Parker's employment.

928 F.Supp.2d 280
United States District Court, D. Massachusetts.

Christopher McALEER, Plaintiff,
v.
PRUDENTIAL INSURANCE COMPANY OF AMERICA, Prudential Annuities, Inc., and Eric Fauth, Defendants.

Civil Action No. 12–10839–DPW.
|
Feb. 28, 2013.

Synopsis

Background: Former employee brought action against his former employer, alleging age discrimination in violation of Title VII, failure to pay sales commissions in violation of Massachusetts Wage law, tortious interference with advantageous relations, and breach of the covenant of good faith and fair dealing. Employer moved to dismiss.

Holdings: The District Court, Douglas P. Woodlock, J., held that:

[1] age discrimination claim accrued on date employer issued initial termination letter and employee was required to leave office and turn in his identification and other office property, not on date of subsequent superceding termination letter;

[2] employee adequately alleged his commissions were "definitely determined," as required to state claim against employer for detaining commissions in violation of Massachusetts Wage Act;

[3] employee adequately alleged his commissions were "due and payable," as required to state claim for violation of Massachusetts Wage Act; and

[4] Massachusetts statutes that provided exclusive remedy for employment discrimination claims did not preclude claims for breach of covenant of good faith and fair dealing and tortious interference with advantageous relations.

Motion granted in part and denied in part.

West Headnotes (14)

[1] Civil Rights
Operation;accrual and computation

Employee's age discrimination claim accrued, and 300-day period for filing complaint with Equal Employment Opportunity Commission (EEOC) began to run, on date employer issued initial termination letter and employee was required to leave office and turn in his identification and other office property, not on date of subsequent superseding termination letter; superseding letter did not wipe away more than three months of employee's knowledge of allegedly discriminatory act of termination, and although employee's termination date was extended to account for disability leave, he never returned to office or did any work for employer after initial letter. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e–5(e)(1); M.G.L.A. c. 151B, § 5.

3 Cases that cite this headnote

[2] Civil Rights
Operation;accrual and computation

Employment discrimination claim accrues under Title VII when the employee has unequivocal notice of some harm resulting from an allegedly discriminatory act. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e–5(e)(1).

1 Cases that cite this headnote

[3] Civil Rights
Operation;accrual and computation

Title VII statute of limitations begins to run at the time of the allegedly discriminatory employment decision, even if the plaintiff's employment continues, and the consequences

of the allegedly discriminatory act do not occur until later. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e–5(e)(1).

4 Cases that cite this headnote

[4] Civil Rights
Tolling

Formal internal company procedures for collateral review or reconsideration of an employment decision do not toll the Title VII statute of limitations for bringing employment discrimination claim. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e–5(e)(1).

Cases that cite this headnote

[5] Labor and Employment
Payment of wages

Massachusetts Wage Act was enacted to prevent an employer from unreasonably detaining an employee's wages. M.G.L.A. c. 149, § 150.

Cases that cite this headnote

[6] Labor and Employment
What are wages

Former employee adequately alleged his commissions were "definitely determined," as required to state claim against employer for detaining commissions in violation of Massachusetts Wage Act; employee's commissions were arithmetically determinable because they were governed by compensation plan that stated "commission awarded [was] determined by comparing cumulative gross sales to a Sales Commission table," employee alleged approximate amount of gross sales he brought in and that precise figures maintained by employer were discoverable, and plan did not provide employer with discretion to withhold commissions if employee was wrongfully terminated. M.G.L.A. c. 149, § 148.

6 Cases that cite this headnote

[7] Labor and Employment
What are wages

In order for allegedly wrongfully detained commission to be "definitely determined," as required for recovery under Massachusetts Wage Act, commission must be arithmetically determinable. M.G.L.A. c. 149, §§ 148, 150.

5 Cases that cite this headnote

[8] Labor and Employment
What are wages

Discretion prevents commissions from being "definitely determined," as required for allegedly wrongfully detained commissions to be recoverable under Massachusetts Wage Act, if the employer is under no obligation to award them. M.G.L.A. c. 149, §§ 148, 150.

1 Cases that cite this headnote

[9] Labor and Employment
What are wages

Former employee adequately alleged his commissions on sales of insurance policies were "due and payable," as required to state claim against employer for detaining commissions in violation of Massachusetts Wage Act; employer's compensation plan did not specify contingencies to be satisfied to entitle employee to commission, and thus commissions on sales employee closed were earned at the time of the closing of the sales, when employee was indisputably still an active employee, even if employer did not receive insurance premiums until after it terminated employee. M.G.L.A. c. 149, §§ 148, 150.

2 Cases that cite this headnote

[10] Labor and Employment
What are wages

Commissions are "due and payable," as required for recovery of wrongfully detained commissions under Massachusetts Wage Act, when any contingencies relating to their

entitlement have occurred. M.G.L.A. c. 149, §§ 148, 150.

2 Cases that cite this headnote

[11] Labor and Employment

What are wages

In determining whether commission is "due and payable," as required for recovery of wrongfully detained commissions under Massachusetts Wage Act, if a compensation plan specifically sets out the contingencies an employee must meet to earn a commission, courts apply the terms of the plan, but when the plan does not specify, courts generally consider that the employee earns the commission and it becomes due and payable when the employee closes the sale, even if there is a delay in actual payment on the sale. M.G.L.A. c. 149, §§ 148, 150.

8 Cases that cite this headnote

[12] Civil Rights

Existence of other remedies;exclusivity

Labor and Employment

Nature and form of remedy

Under Massachusetts law as predicted by district court, Massachusetts statutes that provided exclusive remedy for employment discrimination claims did not preclude former employee's claims against former employer for breach of covenant of good faith and fair dealing and tortious interference with advantageous relations, although employee's allegations were based on age discrimination, where employee's claims were predicated not on wrongful termination but on employer's withholding of commissions earned while employee still worked for employer. M.G.L.A. c. 151B, § 1 et seq.

2 Cases that cite this headnote

[13] Civil Rights

Existence of other remedies;exclusivity

As predicted by district court, Massachusetts statutes that provide the exclusive remedy for employment discrimination claims do not preclude an employee's common law claims, even if they are based on age discrimination, so long as the employee's claims seek to remedy some tortious act other than a wrongful termination. M.G.L.A. c. 151B, § 1 et seq.

1 Cases that cite this headnote

[14] Labor and Employment

Discharge or layoff

Under Massachusetts "*Fortune* doctrine," an employer who terminates an employee without good cause in order to deprive him of commissions may violate the covenant of good faith and fair dealing.

Cases that cite this headnote

Attorneys and Law Firms

***282** Patricia A. Washienko, Marc D. Freiberger, Freiberger & Washienko, LLC, Boston, MA, for Plaintiff.

Amy Cashore Mariani, Fitzhugh & Mariani LLP, Boston, MA, for Defendants.

MEMORANDUM AND ORDER

DOUGLAS P. WOODLOCK, District Judge.

Plaintiff Christopher McAleer brings this action against his former employer alleging age discrimination and failure to pay sales commissions. He has also amended his complaint to bring common law claims for tortious interference with advantageous relations and breach of the covenant of good faith and fair dealing. Defendant Prudential Insurance Company of America moves to dismiss, arguing that the discrimination claims are time barred, that the Wage Act does not cover the commissions, and that the state law claims are duplicative and therefore preempted.

I will grant Prudential's motion to dismiss the discrimination claims because McAleer did not file his complaint within the applicable statute of limitations. However, I will deny Prudential's motion with respect McAleer's claims regarding Prudential's failure to pay sales commissions under the Wage Act and under the common law.

I. BACKGROUND

A. Facts

In 2002, Prudential acquired the company that employed Christopher McAleer, and McAleer became a Prudential employee. Prudential promoted McAleer to New England Division Sales Manager in 2005, responsible for territory ranging from Maine to Pennsylvania and West Virginia, but in 2006 Prudential demoted him to Regional Sales Manager responsible only for New Hampshire, Maine, and Massachusetts. He was 59 years old when Prudential demoted him and replaced him in the New England Division Sales Manager position with Eric Fauth, who was approximately 40–years–old.

In 2008 and 2009, McAleer's sales figures started to drop. For the first time, he received evaluations reflecting that he failed to meet expectations. McAleer alleges that his diminished sales figured resulted predominantly from the fact that Prudential twice delayed approval of competitive annuity products for sale in Massachusetts —which regularly makes up 80–85% of Prudential's total business in New ***283** England—despite having approved them for sale in the rest of the country months earlier. He approached his supervisor, Fauth, and Fauth's supervisor, Rodney Allain, and asked them to adjust his sales targets to reflect the months when he did not have a competitive product to sell. They declined to adjust his targets and, on June 24, 2009, Prudential fired McAleer for failure to meet evaluation expectations and sales goals. Although Prudential continued to pay McAleer his base salary until the effective date of his termination, December 21, 2009, it stopped paying his commissions after his last day in the office, July 24, 2009.

McAleer contends the delays in approving competitive products for sale in Massachusetts and his supervisors' refusal to adjust his target goals were a scheme to force him out motivated by age discrimination. McAleer was 62 years old on the effective date of his termination. Both Allain and Fauth were approximately 43 years old. [1] McAleer alleges that Prudential hired two younger employees to replace him after he was fired, though he does not specify their ages. He further alleges that while he worked at Prudential, his supervisors, Fauth, Allain, and the Broker Deal Sales Manager, Rick Singmaster, consistently made ageist comments such as “you're too old for this,” “this is a young man's job,” and “it's clear from your condition that you are getting too old to do this job.”

The Human Resources division at Prudential investigated the claims of age discrimination, but informed McAleer on January 29, 2010—five months after he first lodged his claim and one month after the effective date of his termination—that it found no evidence of discrimination.

B. Procedural History

Fauth issued a final warning letter regarding sales goals to McAleer on May 24, 2009, informing him that he had failed to meet his sales targets and that Prudential would terminate his employment if his sales figures did not improve within 30 days. McAleer first raised his concerns regarding age discrimination to Prudential's Human Resources department about two weeks later, on June 8, 2009. Prudential informed McAleer of his termination by a letter, dated July 24, 2009. This was also his last day in the office. He was required to return his ID badge, security key card, and any company property, such as computer equipment. The letter noted that McAleer had accrued 58 days of unused paid time off, and therefore calculated that the effective date of his termination would be October 13, 2009. McAleer again notified the Human Resources department of his concerns regarding age discrimination about one week later, on August 1, 2009. After his last day in the office, and on the first day he began to be paid for his unused vacation days, McAleer requested and received short-term disability leave lasting 12 weeks, until October 17, 2009. Because McAleer did not spend his unused vacation time while on disability leave, this extended his effective termination date from October 13, 2009 until December 21, 2009. Prudential issued McAleer a new termination letter, superceding and replacing the previous letter, and memorializing the new effective termination date.

Near the end of his disability leave, on September 30, 2009, McAleer filed a complaint with the Fair Labor Division of the Massachusetts Attorney General's Office

demanding payment of commissions not ***284** paid since his last day in the office. About one year later, on August 31, 2010, he filed claims with both the Massachusetts Commission Against Discrimination ("MCAD") and the Equal Employment Opportunity Commission ("EEOC").

MCAD issued McAleer a right-to-sue letter just over one year later, on September 16, 2011. EEOC issued him a right-to-sue letter on November 3, 2011, one year and three months after McAleer filed his claim. Both McAleer and his counsel allege that neither received the letter from the EEOC until McAleer's counsel contacted the EEOC on February 28, 2012 when the EEOC faxed a copy of the November 3, 2011 letter to McAleer's counsel.

McAleer filed this action on May 9, 2012, 180 days after the EEOC issued its right-to-sue letter. That was 71 days after McAleer and his counsel received the right-to-sue letter by fax from the EEOC.

McAleer filed an Amended Complaint, now the operative pleading in this case, on October 1, 2012 and Prudential moved to dismiss the Amended Complaint on October 22, 2012.

II. STANDARD OF REVIEW

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal citation omitted). " 'Naked assertion[s]' devoid of 'further factual enhancement' " do not constitute adequate pleading. *Id.* (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). All well-pleaded factual allegations in the complaint must be taken as true and all reasonable inferences must be drawn in the pleader's favor. *SEC v. Tambone,* 597 F.3d 436, 441 (1st Cir.2010) (en banc). Unless the alleged facts push a claim "across the line from conceivable to plausible," the complaint is subject to dismissal. *Iqbal,* 556 U.S. at 680, 129 S.Ct. 1937.

III. DISCUSSION

A. Statute of Limitations

[1] Title VII requires plaintiffs to file discrimination claims with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e)(1). In Massachusetts, however, a plaintiff may file an action no later than 300 days from the date of the alleged discrimination. M.G.L. 151B § 5; *see also Thomas v. Eastman Kodak Co.,* 183 F.3d 38, 47 n. 5 (1st Cir.1999). McAleer filed his claim with the EEOC on August 31, 2010. Therefore, his action falls outside of the statute of limitations if his claim accrued before November 4, 2009.

[2] An employment discrimination claim accrues when the employee has unequivocal notice of some harm resulting from an allegedly discriminatory act. *See Eastman Kodak,* 183 F.3d at 50 ("[T]he statute of limitations is triggered only if ... 'some tangible effects of the discrimination were apparent to the plaintiff,' i.e. if 'the plaintiff is aware that he will in fact be injured by the challenged practice.' " (quoting *Johnson v. General Elec.,* 840 F.2d 132, 136–137 (1st Cir.1988))); *Angeles–Sanchez v. Alvarado,* No. 92–2165, 1993 WL 147472, *3 (1st Cir. May 7, 1993) (holding that the statute of limitations begins to run when termination is "unequivocal, and communicated in a manner such that no reasonable person could think there might be a retreat or change in position prior to the termination" (internal quotations omitted)).

The focus of the parties' dispute is whether Prudential's July 24, 2009 termination letter was unequivocal. Prudential ***285** contends that the letter was unequivocal notice of termination because McAleer was asked to leave the office and turn in his ID and any other office property, and because any extensions of the effective date of his termination were purely administrative and did not affect whether he would be employed by the company going forward. Prudential therefore reasons that McAleer's claim accrued on that date, and that his claims must be dismissed because he did not file his claim within 300 days of July 24, 2009. McAleer, by contrast, argues that because Prudential's November 4, 2009 letter "replace[d] and supercede[d]" the July 24, 2009 letter and reflects the extension of his effective termination date, he did not have unequivocal notice until November 4, 2009. He reasons that because he filed his claim exactly 300 days after this second letter, his claim is timely. McAleer's position is untenable for a number of reasons.

[3] First and foremost, the existence of a second letter does not change when McAleer had notice of his termination. The Supreme Court has made clear that the statute of limitations begins to run at the time of the allegedly discriminatory decision, even if the plaintiff's employment continues, and the consequences of the allegedly discriminatory act—in this case termination—do not occur until later. *Delaware State College v. Ricks,* 449 U.S. 250, 257–58, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). Prudential notified McAleer of his termination on July 24, 2009. The fact that the final consequences of that decision came later does not change when McAleer learned of the decision. Nor does a confirmatory, superceding letter somehow wipe away more than three months of McAleer's knowledge that Prudential had fired him.

Second, McAleer's contention that a reasonable person in his position would have believed that Prudential had rescinded its decision to terminate him because he "remained employed for more than two additional months after the initial purported October 13, 2009 termination date" is not plausible. McAleer does not allege that he returned to the office, got a new ID, did any work for Prudential, or even had any discussions with Prudential about returning to some job there. Absent such allegations, the only reasonable interpretation is that Prudential merely adjusted the effective date of his termination to account for his short-term disability leave, not that Prudential had reconsidered his termination, and certainly not that it had rescinded his termination.

[4] In fact, this case is an even clearer instance of unequivocal notice than either of the two cases McAleer attempts to distinguish: *Ricks,* 449 U.S. 250, 101 S.Ct. 498; *Eastman Kodak,* 183 F.3d 38. Both *Ricks* and *Eastman Kodak* make clear that formal internal company procedures for collateral review or reconsideration of an employment decision do not toll the statute of limitations. *See Ricks,* 449 U.S. at 261, 101 S.Ct. 498; *Eastman Kodak,* 183 F.3d at 52. In *Ricks,* for example, the Supreme Court held that an employer's affirmative indication of a willingness to change its decision if it found the plaintiff's grievance meritorious "does not suggest that the earlier decision was in any respect tentative." *Ricks,* 449 U.S. at 261, 101 S.Ct. 498. Accordingly, McAleer's contention that Prudential *implied* it might be reconsidering his termination—because his employment was extended past the initially stated October 13, 2009 date as a purely formalistic matter when he requested disability leave—does not and cannot suggest that the initial decision was equivocal or tentative.

Finally, McAleer relies on a line of caselaw that does not apply to the facts alleged in this case to support his erroneous contention ***286** that Prudential's July 24, 2009 letter was merely equivocal notice of termination. *Svensson v. Putnam Inv. LLC,* 558 F.Supp.2d 136 (D.Mass.2008); *Wheatley v. AT & T,* 418 Mass. 394, 636 N.E.2d 265 (1994); *Angeles–Sanchez v. Alvarado,* 993 F.2d 1530 (Table) (1st Cir.1993).

In both *Svensson* and *Wheatley,* the courts found notice equivocal relying on the rule that "[w]hen ... the notice establishes a transition period during which the employee may seek other opportunities within the company prior to termination, or contains a promise to be reinstated to a specific position in the future, courts have deemed the notice equivocal." *Svensson,* 558 F.Supp.2d at 142. In *Svensson,* at the time the employer gave the employee notice, it also "promised her that she would be considered for Portfolio Management positions as they became available." *Id.* at 143. Similarly, in *Wheatley,* the court held that "[b]ecause AT & T held out the possibility of other employment within the company, the letter ... did not trigger the ... statute of limitations." *Wheatley,* 636 N.E.2d at 268. That reasoning is inapplicable here. If a company offers an employee another job or the possibility of future reinstatement, the employee is unlikely to file an action for discrimination for fear that filing such an action would prejudice any reconsideration of the employer's decision. *See Svensson,* 558 F.Supp.2d at 142; *Wheatley,* 636 N.E.2d at 268 n. 8. However, that concern does not extend to the facts alleged in this case. McAleer does not allege that Prudential offered him the possibility of another position at the company or that he might be reinstated at some future time. The July 24, 2009 letter from Prudential terminating McAleer was absolute, without offering the possibility of reinstatement or transfer to another position. McAleer had no reason to fear that filing his claim would somehow prejudice a possible return to Prudential.

His citation to *Angeles–Sanchez* is equally unavailing. That case involved an employee resignation resulting from an allegedly hostile and discriminatory employment atmosphere. The First Circuit held that

> although Sanchez submitted her resignation on July 2, she reserved 19 days for it to take effect. This waiting period reasonably could indicate, as Sanchez avers, that if [her employer] ended the hostile atmosphere forcing her departure, she might rescind her resignation.

Angeles–Sanchez, 1993 WL 147472, at *3. The July 24, 2009 termination letter to McAleer contained no such waiting period during which Prudential might have changed its decision. It merely informed him that he was entitled to payment for his unused vacation time. The only letter in this case which might be considered analogous to the plaintiff's letter in *Angeles–Sanchez* would be Fauth's May 24, 2009 final warning letter, which informed McAleer that Prudential would terminate his employment if his sales figures did not improve in the next 30 days. That May letter—not the July 24, 2009 letter—is the one that afforded a waiting period similar to the one discussed in *Angeles–Sanchez* that might have constituted equivocal notice of termination. The July letter took effect immediately and with no waiting period, as indicated in the letter itself, stating "[t]oday will be your last day in the office." Thus, the waiting period reasoning that the First Circuit relied on in *Angeles–Sanchez* to find Sanchez's resignation equivocal cannot logically extend to support a similar finding with respect to Prudential's July 24, 2009 letter.

McAleer failed to file his claims with the EEOC within the limitations period, and I must therefore dismiss Counts I–V of the Amended Complaint (the discrimination ***287** claims) with prejudice because they are untimely.

Because I find McAleer did not initiate this action within the required 300 day statute of limitations, I do not consider the alternative argument that his failure to sue within 90 days of receipt of a right-to-sue letter separately bars this action. Consequently, I also do not address McAleer's equitable tolling argument based upon the dispute about the date of the actual receipt of the EEOC right-to-sue letter.

B. Massachusetts Wage Act

[5] **[6]** The Massachusetts Wage Act was enacted to prevent an employer from unreasonably detaining an employee's wages. *See Am. Mut. Liab. Ins. Co. v. Comm'r of Labor & Indus.,* 340 Mass. 144, 163 N.E.2d 19, 21 (1959); *Boston Police Patrolmen's Ass'n v. Boston,* 435 Mass. 718, 761 N.E.2d 479, 481 (2002). It provides a cause of action for loss of wages and other benefits. *See* M.G.L. 149 § 150; *Okerman v. VA Software Corp.,* 69 Mass.App.Ct. 771, 871 N.E.2d 1117, 1121 n. 6 (2007). It applies "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 ..." [2] M.G.L. 149 § 148 (emphasis added). McAleer seeks to recover unpaid sales commissions he earned while employed with Prudential but which Prudential has not paid since his last day in the office, July 24, 2009. Prudential argues that the Wage Act does not apply to these commissions because Prudential retained discretion to interpret the commission plan and therefore the commissions were neither "definitely determined" nor "due and payable." However, I find that McAleer has pled facts sufficient to state a claim under the Wage Act.

1. Definitely Determined

[7] In order to be "definitely determined," a commission must be "arithmetically determinable." *Wiedmann,* 831 N.E.2d at 312. The Annuities Regional Coordinator Sales Compensation Plan, which governs McAleer's compensation, states that the "commission awarded is determined by comparing cumulative gross sales to a Sales Commission table" attached as an appendix to the plan, and updated periodically. Although McAleer does not allege the precise amount of the cumulative gross sales he brought in, he alleges approximate amounts and further alleges that Prudential precisely tracks these sales such that he can seek production of the precise figures in discovery. Between his allegations regarding the commission plan and his allegations regarding the cumulative gross sales on which the commissions are calculated, McAleer has pled sufficient facts to show that the amount of his unpaid commissions is "arithmetically determinable" and therefore "definitely determined" under the meaning of the Wage Act. *See* ***288** *Okerman,* 871 N.E.2d at 1124–25 ("Okerman set out in his complaint the applicable commission plan ... detailing the ways in which his commissions were calculated as a percentage of

revenue. He also set out the revenue he brought into VA.... Okerman therefore pleaded facts which, if proved true at trial, would satisfy the requirement that commissions be 'arithmetically determinable.' "); *see also Wiedmann,* 831 N.E.2d at 312.

Prudential argues that because the plan affords it complete discretion for interpretation and payment calculation—including discretion to determine whether McAleer was eligible to receive commissions as an active employee in good standing—McAleer's commissions cannot be arithmetically determinable. This argument fails.

[8] Discretion prevents commissions from being definitely determined if the employer is under no obligation to award them. *See Weems v. Citigroup Inc.,* 453 Mass. 147, 900 N.E.2d 89, 94 (2009) (holding that the "operative fact" in finding discretionary bonuses not to be definitely determined is "not [that] they are labeled bonuses, but [that] the employers are, apparently, under no obligation to award them"). While Prudential exercises substantial discretion in the *administration* of the commission plan, the commissions are not *themselves* discretionary. The plan does not afford Prudential carte blanche to withhold or modify commission payments for any reason. It simply affords discretion over factual determinations, calculations, and eligibility. To interpret the discretion under the plan as broadly as Prudential would have it would render the plan meaningless.

Under the plan, Prudential retains discretion to determine eligibility, and to withhold payments from an employee it deems ineligible or an employee who has been terminated for cause, including poor performance. Prudential therefore argues that because it terminated McAleer and found him ineligible to receive commissions, his claims cannot be definitely determined. However, McAleer challenges the legality of his termination itself. If, indeed, his termination was the result of unlawful discrimination and not poor performance, Prudential may not avoid liability under the Wage Act merely by asserting retention of discretion not to award commissions.

However, the commission plan affords Prudential the power to "adjust the Sales Incentive to reflect the interruption of employment" for employees "who have been on a paid or unpaid leave of absence for any reason, including but not limited to short-term disability." McAleer does not challenge the legality of his disability leave or in any way connect it with the alleged age discrimination. Therefore, Prudential arguably has the discretion to adjust commissions to account for the time McAleer was out on disability. The plan specifically provides, however, that "[o]ther Incentive Payments that will become due during a leave of absence will be paid as earned," so Prudential does not have discretion to withhold commissions earned before McAleer began his disability leave, but that became due during his leave. Since the commissions at issue are alleged to have been earned before the period of disability, the retention of discretion on the basis of a later disability does not prevent the commissions in this case from being definitely determined.

2. Due and Payable

[9] **[10]** Commissions are due and payable when "any contingencies relating to their entitlement have occurred." *Sterling Research, Inc. v. Pietrobono,* No. 02–40150, 2005 WL 3116758, at *11 (D.Mass. Nov. 21, 2005); ***289** *Micciche v. N.R.I. Data & Bus. Prod., Inc.,* No. 09–11661, 2011 WL 4479849, at *6 (D.Mass. Sept. 27, 2011). The Annuities Regional Coordinator Sales Compensation Plan does not specify precisely what contingencies must be satisfied to entitle McAleer to commission payments. It says only that "[a] percentage of variable annuities gross sales will be awarded monthly based on cumulative gross sales results." The Complaint alleges that Prudential would delay payment on commissions earned until Prudential received the payment of the premium.

[11] When a compensation plan specifically sets out the contingencies an employee must meet to earn a commission, courts apply the terms of the plan, *see e.g., Watch Hill Partners v. Barthel,* 338 F.Supp.2d 306, 307–08 (D.R.I.2004), however, when the plan does not specify, courts generally consider that the employee earns the commission and it becomes due and payable when the employee closes the sale, even if there is a delay in actual payment on the sale. *See Micciche,* 2011 WL 4479849, at *7; *Sheedy v. Lehman Bros. Holdings Inc.,* No. 11–11456, 2011 WL 5519909, at *4 (D.Mass. Nov. 14, 2011); *DeSantis v. Commonwealth Energy Sys.,* 68 Mass.App.Ct. 759, 864 N.E.2d 1211, 1219 n. 12 (2007).

In *Micciche,* the court found commissions due and payable where the plaintiff closed the sales with a customer while he was still employed with the defendant company, but was terminated before the customer

actually remitted payment. *See Micciche,* 2011 WL 4479849, at *3, *7. The court specifically stated, "[t]he significant delay in the remission of payment is attributable to the evaluation, and is not something for which a commission should be docked." *Id.* at *3 n. 7. Similarly, in *Sheedy,* where the incentive compensation was contingent on employment with the defendant employer for five years, but the employer went bankrupt during that five-year period, the court held that the plaintiff had earned a proportion of the incentive payment equal to the proportion of the five-year period she had worked before the bankruptcy and termination. *Sheedy,* 2011 WL 5519909, at *4.

Here, taking the facts in the light most favorable to the plaintiff, any sales McAleer closed while employed at Prudential may have been earned, and could have been due and payable, at the time of the closing, even if Prudential did not receive the premiums until after it terminated McAleer's employment. McAleer does not claim that he should be paid for commissions "in his pipeline" but not closed before his termination. *See Scalli v. Citizens Fin. Grp., Inc.,* No. 03–12413, 2006 WL 1581625, at *14 (D.Mass. Feb. 28, 2006). He seeks only those commissions he earned while he worked at Prudential.

Prudential argues that it was under no obligation to pay commissions after July 24, 2009 because that was McAleer's last day in the office, after which he was not an "active" employee, citing *Perry v. New England Bus. Serv., Inc.* for the proposition that non-"active" employees are not eligible for commission payments and therefore that no such payments could have been due and payable. This argument fails for at least three reasons.

First, and most fundamentally, *Perry* has absolutely no bearing on the Wage Act or its meaning. In *Perry,* the First Circuit addressed an ERISA case with no mention of—or implications for—the Massachusetts Wage Act, and it based its determination that the employee was not "active" on the definition of an "active" employee in the employee's particular ERISA benefits plan, which is not similar to any language in the compensation plan at issue in this case. *See Perry v. New England Bus. Serv., Inc.,* 347 F.3d 343 (1st Cir.2003).

Second, Prudential's argument that McAleer was not an active employee between ***290** July 24, 2009, his last day in the office, and December 21, 2009, the effective date of his termination, is belied by both of McAleer's termination letters, which state "[y]ou will continue your health and/or life insurance coverage *as an active employee* until your retirement date" (emphasis added). Thus, at this stage, McAleer has pled facts, which, taken in the light most favorable to him and drawing all reasonable inferences in his favor, could support a reasonable finding that he was still an "active" employee, as Prudential understood that term, until the effective date of his termination.

Finally, even if McAleer was not an active employee between July 24, 2009 and December 21, 2009, Prudential has not provided any justification to find that this precludes commissions from becoming due and payable if he earned them during the period of his indisputably active employment before July 24, 2009.

Therefore, I cannot find, as a matter of law, that McAleer's Wage Act allegations fail to state a claim.

D. Exclusive Remedy

[12] Prudential argues that McAleer's common law claims are improper because they are entirely duplicative of his discrimination claim. It argues that under Massachusetts law, M.G.L. 151B constitutes the exclusive remedy for discrimination, requiring dismissal of any common law claims based on the same set of facts. In support of this proposition, Prudential identifies three cases. *See Mouradian v. General Electric,* 23 Mass.App.Ct. 538, 503 N.E.2d 1318 (1987); *Melley v. Gillette Corp.,* 19 Mass.App.Ct. 511, 475 N.E.2d 1227 (1985); *Comey v. Hill,* 387 Mass. 11, 438 N.E.2d 811 (1982). None of these cases stands for the proposition that M.G.L. 151B precludes or preempts all traditional tort claims, even if based on many of the same facts. Furthermore, McAleer's common law claims do not entirely overlap his discrimination claims. I therefore deny Prudential's motion to dismiss the common law claims.

[13] *Mouradian* and *Melley* refused to create a common law cause of action for wrongful dismissal of an at-will employee based on the public policy against age discrimination. *Mouradian,* 503 N.E.2d at 1320 ("As did the plaintiff in *Melley,* Mouradian asks us to recognize a new, and possibly duplicative, common law action based on violation of public policy ... expressed in c 151B."); *Melley,* 475 N.E.2d at 1228 ("The difficulty with Melley's argument is that a finding that certain conduct

contravenes public policy does not, in itself, warrant the creation of a new common law remedy for wrongful dismissal by an employer."). *Mouradian* went further, dismissing various common law claims including a claim for breach of the covenant of good faith and fair dealing, and clarifying that,

> [i]t is of no significance that Mouradian's claims are framed in terms of several different violations of express and implied contract and separate torts because they all have a common denominator—a supposed entitlement to recover on common law principles for alleged wrongful termination because of age.

Mouradian, 503 N.E.2d at 1320. However, this holding applies only when the common law claims are mere proxies for wrongful termination, where "[t]he plaintiff ... has no common law right unless [the court] create[s] one now." *Melley,* 475 N.E.2d at 1229. Both *Mouradian* and *Melley* expressly acknowledge that, despite M.G.L. 151B, a plaintiff "may have a claim against his employer on some other *recognized* common law ground." *Mouradian,* 503 N.E.2d at 1320 (emphasis added); *see also Melley,* 475 N.E.2d at 1229 ("[T]he statute broadens existing remedies ***291** rather than requiring resort to it as exclusive of all other remedies." (quoting *Comey,* 438 N.E.2d at 817)). In other words, it is clear that "c. 151B was not meant to be an exclusive remedy." *Comey,* 438 N.E.2d at 817. The statute itself provides, in relevant part, that "nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth relating to discrimination." M.G.L. 151B § 9. Because 151B expressly provides that it does not repeal "any other law of this commonwealth," which must include the common law developed by the courts of the Commonwealth, I will not interpret it as preventing a plaintiff from pursuing claims based on existing common law causes of action. Therefore, a court may entertain common law claims, even if they are based on age discrimination, so long as they seek to remedy some tortious act other than a wrongful termination.

In *Mouradian,* the plaintiff conceded that he could not predicate his common law claims on any adverse action other than wrongful termination based on age discrimination. *Mouradian,* 503 N.E.2d at 1319–20. The "common denominator" for each of his claims was "a supposed entitlement to recover on common law principles for alleged wrongful termination because of age." *Id.* at 1320. By contrast, McAleer does not simply disguise a wrongful termination claim as other common law claims. Although the wrongful conduct and bad faith he alleges is based on age discrimination, the substance of his tortitous interference and breach of the covenant of good faith and fair dealing claims are predicated on Prudential withholding commissions he earned while he was still employed there, not wrongful dismissal.

[14] Under the *Fortune* doctrine, an employer who terminates an employee "without good cause" in order to deprive him of commissions may violate the covenant of good faith and fair dealing. *Krause v. UPS Supply Chain Solutions, Inc.,* No. 08–cv10237, 2009 WL 3578601, at *14 (D.Mass. Oct. 28, 2009). In *Krause,* I held that a plaintiff may state a claim for breach of the implied covenant of good faith and fair dealing based on improper refusal to pay commissions in violation of the Wage Act where the plaintiff sought to prove that her termination was "without good cause" by showing discrimination. *Id.* The same may be said of McAleer's claim.

IV. CONCLUSION

For the foregoing reasons, I grant Defendant's Motion to Dismiss the Amended Complaint (Dkt. 26) with prejudice with respect to Counts I–V, alleging age discrimination, but deny the motion with respect to Count VI, alleging violation of the Wage Act, Count VII alleging breach of the covenant of good faith and fair dealing, and Count VII, alleging tortious interference with advantageous relations.

All Citations

928 F.Supp.2d 280

Footnotes

1 The Complaint alleges that Allain and Fauth were approximately 40 years old in 2006, making them approximately 43 in 2009.

2 Although certain courts have imposed additional restrictions on the application of the Wage Act to commissions, *see Cumpata v. Blue Cross Blue Shield of Mass.,* 113 F.Supp.2d 164, 168 (D.Mass.2000) (holding that the Wage Act does not apply to commissions "above and beyond" plaintiff's base salary); *Com. v. Savage,* 31 Mass.App.Ct. 714, 583 N.E.2d 276, 278 (1991), more recent decisions of the Massachusetts state appellate courts have rejected such additional restrictions. *See Wiedmann v. The Bradford Group, Inc.,* 444 Mass. 698, 831 N.E.2d 304, 312 (2005); *Okerman v. VA Software Corp.,* 69 Mass.App.Ct. 771, 871 N.E.2d 1117, 1122 (2007) ("[T]he language of the wage act ... is restricted in its application *only* by the requirements that the commissions be "definitely determined" and "due and payable." " (emphasis added)). I am, of course, bound by decisions of the Massachusetts Supreme Judicial Court. *See Moores v. Greenberg,* 834 F.2d 1105, 1107 n. 3 (1st Cir.1987)

2017 WL 1026416
United States District Court, D. Massachusetts.

Joel B. ISRAEL, Plaintiff,
v.
VOYA INSTITUTIONAL PLAN SERVICES, LLC, Defendant.

Civil Action No. 15-cv-11914-ADB
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Signed 03/16/2017

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MEMORANDUM AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

ALLISON D. BURROUGHS, U.S. DISTRICT JUDGE

***1** Plaintiff Joel Israel filed this suit seeking approximately $32,000 in unpaid wages and commissions that he alleges Defendant Voya Institutional Plan Services, LLC ("Voya") unlawfully withheld from him in violation of the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, § 148. The Court previously denied Voya's Motion to Dismiss and to Compel Arbitration on October 26, 2015. [ECF No. 26]. Now before the Court are motions for summary judgment filed on May 11, 2016 by Israel [ECF No. 48] and Voya [ECF No. 49]. Voya argues that because Israel resigned voluntarily, he is not entitled to compensation under the terms of the employment agreement. Israel claims he was involuntarily terminated and also argues that the compensation constituted "commissions" which were withheld in violation of the Massachusetts Wage Act. Voya responds that the compensation was a bonus and therefore not protected by the Wage Act. For the reasons set forth below, Israel's motion is granted, and Voya's motion is denied. In addition, Israel's pending motion to strike [ECF No. 60] is denied as moot.

I. FACTUAL BACKGROUND [1]

A. Relevant Events

Israel began working for ING Institutional Plan Services, LLC on November 11, 2013. Voya Institutional Plan Services, LLC is the successor-in-interest to ING Institutional Plan Services, LLC, and Voya and ING are treated as the same entity for the purposes of this proceeding. Israel was employed by ING (hereinafter referred to as Voya) as a "Sales Rep-Retirement Services." He was an employee at will. Israel was paid a fixed annual income of $50,000, plus a variable amount based on sales. His variable compensation was determined according to a policy set forth in a document entitled Advisor Production Compensation Plan Summary (the "Plan"), which is discussed in more detail below.

In order to be employed as a "Sales Rep-Retirement Services," Israel was required to register as a "registered representative" with the Financial Industry Regulatory Authority ("FINRA"). When Israel applied to be a "registered representative," Voya submitted a form known as the U-4 to FINRA. When Israel ceased to be employed by Voya, it was required to submit a form known as the U-5 to FINRA.

Israel applied to transfer to a similar position at a different Voya entity in July 2014. Upon consideration of Israel's application, Voya came to believe that, in his initial application for employment, Israel had not been truthful about his reason for leaving his previous employer. On September 26, 2014, Voya informed Israel that it would not allow him to transfer, and furthermore, that it planned to terminate his employment. At that time, Voya presented Israel with the option of submitting a letter of resignation, which would allow Voya to report on the U-5 that Israel's termination was "voluntary," rather than firing him, which would require the involuntary termination to be reported on the U-5. Israel elected to resign, and submitted a letter of resignation the same day. The letter read as follows: "Effective 9/26/2014 I am tendering my resignation. I am willing to continue to work until I am told my services are no longer needed. I expect

to be paid for all my work, unused vacation, commissions earned, and expenses (travel) incurred within the legally allowable period."

B. The Plan

***2** According to the terms of the Plan, the variable component of Israel's compensation consisted of three parts: the Individual Component, the Discretionary Component, and the Forfeiture Component.

The Individual Component was a percentage of revenue generated by an "eligible" employee. Israel was considered an "eligible" employee for most of his employment and received payments accordingly, except for the compensation in dispute. Israel generated revenue for Voya when individual participants in defined contribution benefit plans, such as 401(k) plans, consulted with Israel and then authorized Voya to make investment decisions on their behalf instead of self-directing their investments. In order for revenue to be included in the Individual Component, the authorization given to Voya had to remain in effect for at least three consecutive months.

During the course of his employment, Israel was never entitled to receive a payment from the Discretionary Component, and for purposes of this motion, the Discretionary Component is not relevant.

The Forfeiture Component was based on the compensation generated by Voya employees who were no longer eligible to participate in the Plan. The amount that would have been paid to the employee was forfeited and distributed to remaining Plan participants on a per-capita basis. The Plan document explained that current Plan participants receive this compensation because "the participants and accounts associated with the forfeited production compensation represent a service commitment for the remaining eligible participants." Part of the variable compensation that Israel seeks comes from the forfeiture component.

Beyond the three categories of compensation, under the heading "Payments," the Plan document stated: "Payments under this program are paid in the payroll immediately following the third month after the month that production activity occurred (i.e. Payments in respect to enrollment activity in January, will be paid in the May 15th pay period). In order for a participant to qualify for a production bonus, the participant must achieve certain levels of performance, as described above, and fulfill his/her duties satisfactorily and in a manner that enhances the image and reputation of [Voya], each determined by [Voya] in its sole discretion."

The Plan provided that a "participant who accepts a non-eligible position within [Voya], involuntarily terminates, becomes permanently disabled, retires, or dies shall receive any bonus earned under this Program prior to such event, provided all requirements are met. In the event of death, payment will be issued in the name of the deceased and forwarded to his/her estate. Employee should be actively employed (not on a leave of absence or terminated) to receive payment. Employee who resigns (voluntary termination) will not be entitled to any pro-rated payment."

The Plan specified that Voya reserved the authority to "decide all questions and matters relating to the interpretation and administration of the Plan." It also stated that "no person shall have any claim or right to be granted a bonus award under this Plan," and that "decisions to pay or not to pay an award, [and] the amount of the award to be paid ... shall be made by the Board of Directors or its designee(s), in its sole and absolute discretion."

C. Israel's Participation in the Plan

***3** Israel was paid the variable component of his compensation, calculated according to the Plan, on a monthly basis beginning on or about February 15, 2014, through September 15, 2014. Following his resignation, Israel was not paid any of the variable compensation that was earned prior to his resignation but that would have normally been paid after his employment with Voya had ended, due to the 3-month lag time in the payment of the variable component.

The parties agree that, if Israel is entitled to variable compensation under the Plan for the months of June, July, August and September 2014, it would consist of the following amounts: $5,514.43 for revenue generated from lines of business in June 2014; $5,889.94 for revenue generated from lines of business in July 2014; $15,144.52 for revenue generated from lines of business in August 2014; and $5,200.10 for revenue generated from lines of business in September 2014.

II. DISCUSSION

A. Standard of Review

"Summary judgment is appropriate 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.' " Lockridge v. The Univ. of Me. Sys., 597 F.3d 464, 469 (1st Cir. 2010) (quoting Fed. R. Civ. P. 56). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). "A 'material' fact is one 'that might affect the outcome of the suit under the governing law.' " Lockridge, 597 F.3d at 469 n.3 (quoting Anderson, 477 U.S. at 248).

B. Voluntariness of Termination

Israel argues that he was involuntarily terminated, and thus, under the terms of the Plan, he is eligible to receive the variable compensation for the months in question. Voya responds that Israel tendered his resignation voluntarily, which makes him ineligible to receive the variable compensation. Voya cites cases in support of the existence of a general presumption that resignations are voluntary, but it appears that these cases concerned situations in which the employee had some sort of legal right to employment or due process, and thus was entitled to greater procedural protections than an at-will employee. See Pierce v. Alice Peck Day Mem'l Hosp., No. CIV. 00-318-M, 2002 WL 467125, at *5 n.2 (D.N.H. Mar. 11, 2002) (plaintiff alleging she was fired in violation of FMLA); Lewis v. Bos. Redevelopment Auth., No. CIV. A. 94-12103-GAO, 1996 WL 208473, at *4 (D. Mass. Apr. 4, 1996) (government employee alleging he was a "permanent employee" entitled to statutory protections); Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975) (plaintiff alleging wrongful termination from government employment). It is unclear whether these cases apply in the present context, where Israel was an at-will employee with no entitlement to continued employment or procedural due process.

Regardless of the applicability of these cases, however, Voya is correct that the resignation was a voluntary termination. Israel chose to resign, rather than to be fired, because he stood to gain certain benefits, including that the U-5 form would reflect a voluntary departure, and he could truthfully represent to future employers that he had left Voya voluntarily. Since he obtained these benefits by submitting a voluntary resignation, it would be inequitable and inconsistent to rule now that his termination was involuntary for purposes of his compensation. Although it is possible that Israel may not have understood that he risked losing some compensation when he opted to resign, as his resignation letter suggests, the Court is nevertheless unable to conclude that Israel was involuntarily terminated. Thus, it appears that Voya did not violate the terms of the Plan by failing to pay the variable compensation to Israel.

C. Massachusetts Wage Act

***4** Israel next claims that Voya's refusal to pay him the variable compensation violates the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, § 148. Israel argues that the variable compensation was a commission, not a bonus, under the framework of the act, and therefore it must be paid to Israel. Voya denies that the Wage Act applies in this case, arguing that the compensation is a bonus that falls outside the act's protections, or alternately, if it was a commission, it was not "due and payable" under the terms of the act.

The Wage Act requires employers to pay employees earned wages within a specified amount of time. Id. "The basic purpose of the act is 'to prevent the unreasonable detention of wages.' " Weems v. Citigroup Inc., 900 N.E.2d 89, 92 (Mass. 2009) (quoting Boston Police Patrolmen's Ass'n, Inc. v. City of Boston, 761 N.E.2d 479, 481 (Mass. 2002)). The terms of the Wage Act are applicable to 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." Mass. Gen. Laws ch. 149, § 148. Bonuses, in contrast, are generally not covered by the act. Doucot v. IDS Scheer, Inc., 734 F. Supp. 2d 172, 193 (D. Mass. 2010).

The act prohibits employers from entering into a "special contract" with an employee to exempt the employee from the protections of the act. Mass. Gen. Laws ch. 149, § 148. A contract purporting to release rights and remedies conferred by the Wage Act is only enforceable if the agreement is "stated in clear and unmistakable terms," and it "must specifically refer to the rights and claims under the Wage Act that the employee is

waiving." Crocker v. Townsend Oil Co., 979 N.E.2d 1077, 1087 (Mass. 2012). The Supreme Judicial Court has "consistently held that the legislative purpose behind the Wage Act (and especially the 'special contract' language) is to provide strong statutory protection for employees and their right to wages." Id. at 1086.

The parties dispute whether compensation under the Plan constituted a commission or a bonus. The statute does not define commission or bonus, aside from the description of a covered commission as being "definitely determined" and "due and payable." Mass. Gen. Laws ch. 149, § 148. Nor have the cases established a precise definition. "The term 'commission' is commonly understood to refer to compensation owed to those in the business of selling goods, services, or real estate, set typically as a percentage of the sales price." Suominen v. Goodman Indus. Equities Mgmt. Grp., LLC, 941 N.E.2d 694, 705 (Mass. App. Ct. 2011).

Courts have determined that a commission must be based on the sales or revenue generated by the individual employee, as distinguished from a payment based on a percentage of the business's overall profits, which is not a commission. For example, where a physician was employed by a company that agreed to pay her a base salary plus a percentage of the profits generated by her own practice, the profit-related payments were commissions protected by the Wage Act. Feygina v. Hallmark Health Sys., Inc., No. MICV2011-03449, 2013 WL 3776929, at *5 (Mass. Super. July 12, 2013). The court explained that "[w]here an employee is promised both a base salary and additional payments based 'on the amount of revenue [s]he generated' for her employer, those additional payments are 'commissions' subject to the Wage Act." Id. (quoting Okerman v. VA Software Corp., 871 N.E.2d 1117, 1119, 1122–25 (Mass. App. Ct. 2007)). The court in Feygina contrasted that case with Suominen, which concerned a construction manager who was promised a share in the profits generated by the projects he worked on. Suominen, 941 N.E.2d at 696–99. The court in Suominen decided that, "[w]hatever the precise boundary of the term 'commission' as used in the Wage Act," any money that the construction manager was owed under the profit-sharing plan was not a commission covered by the Wage Act. Id. at 705. Later, Roma v. Raito, Inc., No. 1:13-CV-10297-LTS, 2015 WL 1523098 (D. Mass. Mar. 31, 2015) relied on Suominen in holding that a similar profit sharing plan did not constitute a commission for purposes of the Wage Act. In Roma, the plaintiff was hired to head the defendant's district office and was promised a share of that office's profits. Id. at *1. The court explained that, because the agreement "expressly called for a share of the profits [of the business]—not a percentage of a sales price from the sale of goods, services or real estate," the payments were not commissions. Id. at *7.

***5** In this case, it appears that the majority of Israel's variable compensation, the Individual Component, was based on revenue only from the accounts where Israel personally persuaded the client to allow Voya to actively manage their funds. This indicates that the payments would constitute commissions, not bonuses, under the logic of Feygina, Suominen, and Roma. The Forfeiture Component is a closer call. It was based on accounts that had been served by an investment advisor who was no longer participating in the compensation plan, but Israel and others received a share of that revenue because those accounts "represent a service commitment for the remaining" employees. While this means it is less like a commission, because it is not tied to Israel's work on those accounts, it is also not as all-encompassing as a general profit-sharing agreement; rather, it is a payment related to a certain subset of accounts for which Israel was expected to do some amount of work, and presumably he did do work on those accounts during his final months of employment.

Voya also argues that the variable compensation is not a commission because it is based on an ongoing stream of revenue, rather than a one-time sale. The definition of "commission" used by the cases, "compensation owed to those in the business of selling goods, services, or real estate, set typically as a percentage of the sales price," Suominen, 941 N.E.2d at 705, arguably contemplates this result. Voya's argument would mean, however, that individuals working in certain positions or industries, like Israel, would be ineligible to receive commissions protected by the Wage Act, since the transactions that generate revenue do not involve a singular "sale." It is not clear, however, why compensation based on a stream of revenue should be treated differently when the compensation is otherwise structured precisely like a commission: it rewards the work that Israel did to successfully persuade the customer to use Voya's services, as well as the work he did to assist that customer on an ongoing basis, and provides Israel a percentage of the

profits from that sale. Further, the Court is mindful that the Massachusetts Appeals Court in Okerman cautioned against attempts to read limitations into the Wage Act that are not present in the actual text of the statute, 871 N.E.2d at 1122–23, and the Wage Act says nothing to indicate that certain industries or types of revenue should be excluded from the act's protections for commissions. Thus, the Court cannot conclude that the variable compensation is not a commission merely because it is based on an ongoing stream of revenue rather than a one-time sale.

Next, Voya contends that the variable compensation was a bonus (or, alternatively, a commission falling outside the protections of the Wage Act) because the compensation was subject to contingencies which meant it was not "due and payable" to Israel at the time of his departure. The Plan required the participant to be "actively employed (not ... terminated) to receive payment," and Israel was not employed at the time he would have received the variable compensation in question. In addition, per the terms of the plan, Voya retained broad discretion: "The decisions to pay or not to pay an award, the amount of the award to be paid and to whom an award will be paid, shall be made by the Board of Directors or its designee(s), in its sole and absolute discretion."

Voya likens these terms in the Plan to cases holding that retention bonuses are outside the terms of the Wage Act, but that comparison misses the mark. In Weiss v. DHL Express, Inc., 718 F.3d 39, 42 (1st Cir. 2013), the employee received a bonus, paid in two annual installments, which was conditioned solely on his remaining an employee of the company "in good standing." The terms of the agreement allowed the employer to deny the bonus if, in its judgment, the employee was terminated for good cause. Id. at 46. The court held that because the employer reasonably decided that the employee did not satisfy these contingencies, it was under no obligation to pay the bonus. Id. at 47–48. In Weems v. Citigroup Inc., 900 N.E.2d 89, 91 (Mass. 2009), employees received some of their "annual discretionary incentive bonus" in the form of stock that vested in three years. The court determined that the Wage Act did not apply to this part of the employees' compensation because the awards were discretionary and contingent on the employee remaining with the company for the time it took the stock to vest. Id. at 94. Lastly, in Sheedy v. Lehman Bros. Holdings Inc., No. CIV.A. 11-11456-RGS, 2011 WL 5519909, at *1 (D. Mass. Nov. 14, 2011), the employee received a "one-time incentive signing bonus" of $1,000,000 that her employment agreement characterized as a "forgivable loan." The balance was to be reduced by $200,000 on each anniversary of her employment for five years. Id. The court held that the portion of the loan that had not been forgiven at the time of the employee's termination "was never 'earned' within the meaning of the Wage Act," so she was required to return it to the employer. Id. at *2, *4.

***6** Weiss, Weems, and Sheedy were cases in which the payments in question, occasional bonuses designed to incentivize the employees to stay with the employer, normally would fall outside the terms of the Wage Act. In each of those cases, the employee attempted to argue that the bonuses were protected by the act because they had already become "definitely determined" and "due and payable." The courts rejected those arguments, finding that the payments were discretionary or subject to certain contingencies that had not been met. Thus, these cases provide only limited guidance in assessing the present case. The variable compensation earned by Israel is much closer to a commission than any of the bonus agreements discussed in Weiss, Weems, and Sheedy, since it was part of Israel's monthly pay and was calculated as a share of the revenue he generated, rather than being a once-yearly bonus based entirely on remaining employed. Further, holding that *any* payment conditioned on a contingency automatically falls outside the protections of the Wage Act would open up a loophole in the act and directly contravene the prohibition on special contracts. The better reading of these cases is that a true bonus normally falls outside the bounds of the act, with the possible exception of a situation where the bonus has been promised, the employee has fulfilled her end of the bargain, and yet the employer attempts to renege. See Sheedy, 2011 WL 5519909, at *4 ("The law is clear that incentive or other bonus compensation is outside the scope of the Wage Act unless it qualifies as 'commissions' that are ascertained and due.").

The parties have also discussed McAleer v. Prudential Ins. Co. of Am., 928 F. Supp. 2d 280 (D. Mass. 2013), which is in many ways the most factually similar to the present case. In McAleer, the employee received a base salary plus commissions under a Prudential compensation plan that resembled Voya's compensation plan (though it was based on discrete sales rather than revenue streams). Id. at 282–83; Am. Compl., Ex. 2, McAleer (No. 1:12-cv-10839-DPW), ECF No. 26-2. Like Voya's plan, the Prudential

plan provided that commissions would be paid on a delayed basis, and would only be paid to individuals who were employed in good standing at the time of payment; no payment would be made to those who resigned or were terminated for cause. Id. The employee, whom Prudential claimed was terminated for cause, sued under the Wage Act to recover commissions from sales generated during the last months that he worked. McAleer, 928 F. Supp. 2d at 282–84. Prudential argued that the commissions were not "definitely determined" because Prudential retained the discretion not to award them. Id. at 288. The court disagreed. Id. The court read the terms of Prudential plan as giving Prudential discretion in the *administration* of the plan, but not the decision whether to award the commissions at all, explaining that interpreting "the discretion under the plan as broadly as Prudential would have it would render the plan meaningless." Id. The court also rejected Prudential's argument that the commissions were not "due and payable" to the employee. Id. at 288–90. Ultimately, the court held, *inter alia*, that Prudential had no justification for withholding commissions earned prior to the end of employment. Id. at 290. McAleer establishes that commissions contemplated by an employment contract that reserves some discretion for the employer are not removed from the ambit of the Wage Act due solely to the discretionary aspect of the contract. [2]

Dictionary definitions of "commission" and "bonus" provide some additional insight, and further indicate that Israel's variable compensation was a commission, not a bonus. Black's Law Dictionary defines "Bonus" as "[a] premium paid in addition to what is due or expected; esp., a payment by way of division of a business's profits, given over and above normal compensation <year-end bonus>." Bonus, *Black's Law Dictionary* (10th ed. 2014). The definition goes on to explain that "[i]n the employment context, workers' bonuses are not a gift or gratuity; they are paid for services or on consideration in addition to or *in excess* of the compensation that would *ordinarily* be given." Id. (emphasis added). Evident in this definition is the occasional, infrequent, and exceptional nature of a bonus. Rather than forming a part of the employee's ordinary compensation, a bonus is something unusual, above and beyond the normal paycheck. In contrast, Israel's variable compensation was paid monthly and constituted a significant portion of his monthly pay. The word "commission" comes much closer to describing the variable compensation that Israel received. The Oxford English Dictionary defines "commission" as "[p]ayment, or a payment, for services or work done as an agent in a commercial transaction, typically a set percentage of the value involved." Commission, n.7b, *OED Online* (2016), http://www.oed.com/view/Entry/37135 (last visited Mar. 8, 2017). [3] Israel's work involved generating revenue that Voya would receive over time, not all at once. The dictionary definition of "commission" appears to allow for the possibility that a percentage of a stream of revenue could qualify as a commission.

***7** Lastly, it is worth noting that the authors of the relevant section of the Massachusetts Practice Series anticipated this type of Wage Act case and recognized it as one that would be particularly difficult to resolve:

> [S]ometimes employers impose contingencies unrelated to the completion of the sale, which present more difficult questions. Suppose, for example, an employer computes commissions on a quarterly basis and imposes a requirement that the employee be employed as of the close of the calculation period in order to receive payment. It is doubtful that such a provision could be invoked to deny commission payments to an employee on sales completed during the computation cycle merely because the employee's employment terminated prior to the completion of the cycle, particularly if the termination were involuntary and without good cause. Otherwise, the basic purpose of the statute—to assure payment of income on a timely basis and payment in full to employees on termination—could be avoided by simply imposing as an arbitrary condition retention in employment on the date of payment.

Payment of wages on a timely basis—Commissions, 45 Mass. Prac., Employment Law § 16:3 (3d ed.).

Considering all of the above, the Court concludes that the variable compensation in dispute constituted commissions that were "definitely determined" and "due and payable" once Israel left Voya's employment. The payment scheme is undeniably more like a commission than a bonus. There is also no real question that the amount was "definitely determined,"[4] since the parties agree on the precise amount that would have been paid to Israel for the months in question had he remained employed by Voya. The case comes down to whether the amount in question was "due and payable" to Israel once he resigned.

Given the purpose of the Wage Act to provide robust protection for employees against the unreasonable detention of wages, and considering the warning in Okerman against judicial attempts to narrow the law, 871 N.E.2d at 1122–23, the Court determines that Voya's decision to withhold the commissions that Israel earned during his final months of employment violated the Wage Act. Israel did the work to earn the commissions prior to his resignation, and the fact that it may have taken Voya a few months to make a final calculation as to the exact amount of the commissions is not sufficient to take them outside the scope of the Wage Act. See Feygina, 2013 WL 3776929, at *2, *5 (commissions earned prior to termination of employment were protected by Wage Act even though they were not calculable until several months later). Further, to decide otherwise would be to permit, even encourage, employers to evade the law by imposing lengthy delays on the payment of commissions and conditioning the payments on continued employment. Indeed, in this case, the amount that Israel stands to lose is determined entirely by the length of time that Voya delayed payment; if Voya had imposed a six-month lag on commission payments, for example, then Israel would have potentially lost six months' worth of commissions. It does not appear that the Wage Act permits an employer to withhold commissions in such a manner, and the Court will not sanction that approach. Therefore, Voya must pay Israel the commissions that he earned prior to his resignation.

III. CONCLUSION

***8** Accordingly, Israel's motion for summary judgment [ECF No. 48] is GRANTED, and Voya's motion for summary judgment [ECF No. 49] is DENIED. Israel's motion to strike [ECF No. 60] is DENIED as moot. Israel may file a motion for attorneys' fees by April 7, 2017.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 1026416, 2017 Wage & Hour Cas.2d (BNA) 83,108

Footnotes

1 The following facts are drawn from the parties' joint stipulation of uncontested facts, [ECF No. 48-3], supplemented by particular facts set forth in Israel's statement of facts [ECF No. 48-2] that Voya has admitted [ECF No. 56]. While the parties differ on how to characterize certain facts, and dispute the admissibility of an affidavit [ECF Nos. 61, 68, 69], the parties essentially agree on the underlying material facts.

2 The employee in McAleer alleged that he had been fired due to age discrimination. The court explained that, "[i]f, indeed, his termination was the result of unlawful discrimination and not poor performance, Prudential may not avoid liability under the Wage Act merely by asserting retention of discretion not to award commissions." Id. at 288. This suggests that the court may have believed that a termination for cause could be justification for the employer to retain commissions. However, the court did not reach that question, and nothing in the Wage Act states that a commission may be withheld if the employer had good cause to terminate the employment.

3 Similarly, the Merriam-Webster dictionary defines "commission" as "a fee paid to an agent or employee for transacting a piece of business or performing a service," in particular, "a percentage of the money received from a total paid to the agent responsible for the business." Commission, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/commission (last visited Mar. 8, 2017).

4 "Definitely determined" has been interpreted to mean "arithmetically determinable." Wiedmann v. The Bradford Grp., Inc., 831 N.E.2d 304, 312 (Mass. 2005), superseded by statute on other grounds.