

Fired worker owed unused vacation days

By Eric T. Berkman

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An employer violated the Wage Act when it refused to pay a fired employee for his unused vacation time, the Supreme Judicial Court has decided.

The employer - whose written policy provided that any employee who left on a voluntary or involuntary basis would not be paid for unused vacation time - argued that the fired worker's unused vacation time did not constitute "wages due" under the act.

But the SJC disagreed, affirming a judgment in Superior Court.

"The Wage Act does not require employers to provide their employees with paid vacation," Justice Margot G. Botsford wrote for the court. "[B]ut if an employee is 'discharged from ... employment,' the value of the vacation benefit earned up to that date and that would still be available if the employee remained at the job must be 'paid in full on the day of his discharge.'"

The 13-page decision is *Electronic Data Systems Corp. v. Attorney General, et al.*, Lawyers Weekly No. 10-099-09. [The full text of the ruling can be found by clicking here.](#)

Justice in hard times

Attorney General Martha Coakley, whose office defended the enforcement action before the SJC, said in a prepared statement that she was pleased the SJC made clear that vacation time constitutes wages.

"In these difficult economic times, it is important that employees receive their full compensation upon termination from employment," Coakley said.

Benjamin G. Robbins, of the New England Legal Foundation, said his organization submitted an amicus brief on behalf of the employer and that NELF's interpretation of the Wage Act "is that it defers entirely to the terms of an employment agreement."

While Robbins said he doubted many employers would eliminate paid vacation as a result of the decision, he suggested that some might decide to cut back on the vacation time they offer employees so as to reduce the economic burden.

Meanwhile, Cynthia Mark, of Greater Boston Legal Services, which submitted an amicus brief on behalf of the Attorney General's Office, called the ruling a "significant victory" for employees.

"We represent primarily low-wage workers, and usually they don't have much bargaining power when they get a job," she said, adding that many cannot read a personnel handbook and thus do not understand the benefits they are receiving.

"So this decision affirms that when employers promise vacation time, they can't just nullify it and take it away with the fine print," Mark said. "For our workers, this may be \$300 or \$400 a week, which is very significant to them."

Boston lawyer Philip J. Gordon, who submitted an amicus brief on behalf of the National Employment Lawyers Association, agreed.

"Once you've earned [your wages], you're going to receive them," he said. "Back-handed contracts as a way of sneaking them away is not permissible."

Counsel for the defendant, Robert P. Morris, of Morgan, Brown & Joy in Boston, declined to comment.

Uncompensated time

On April 8, 2005, plaintiff Electronic Data Systems Corp. eliminated the position held by Francis Tessicini, who had worked for either EDS or a predecessor company for 21 years.

The company maintained a written vacation-pay policy that provided that, after the first year of employment, the amount of a worker's paid vacation time would be based on the number of years he or she had been employed by EDS or a predecessor.

The policy also warned employees that "vacation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time (unless otherwise required by state law)."

On the date of his termination, Tessicini had used only a single vacation day in 2005. Pursuant to its policy, EDS did not pay him for his unused time.

Tessicini subsequently filed a complaint with the AG's Fair Labor Division asserting that the company owed him vacation payments under §148 of the Wage Act.

The attorney general determined that EDS had, indeed, violated the act, which, in addition to requiring that employees be paid for unused vacation time due under an employment contract, bars companies from exempting themselves from the law by creating a "special contract" with an employee, as EDS apparently did with its pay policy.

Accordingly, EDS received a citation requiring that it pay Tessicini \$1,800 for unused vacation time as well as a civil penalty of almost \$3,500 for intentionally failing to pay wages on time.

EDS appealed to the Division of Administrative Law Appeals, which affirmed the citation but recalculated the payment owed the employee as \$1,970.

Superior Court Judge Nancy Staffier Holtz affirmed the decision. The SJC subsequently granted the company's application for direct appellate review.

Payment due

On appeal, the SJC determined that vacation time at EDS - despite the company's claims to the contrary - is indeed earned.

"The policy states that employees are eligible for 'vacation pay' ... based on the number of hours worked each week, and, after the first year, ties the number of paid vacation weeks ... to the number of years the employee 'has worked' for EDS," Botsford said.

Relying on Advisory 99/1, issued by the attorney general in 1999 to provide guidance on the Wage Act's treatment of employers' vacation policies, the justice said that employers who choose to provide paid vacation must treat that benefit like any other wages under the act.

"As the advisory reflects, ... the Attorney General interprets the Wage Act to mean that when an employer does provide for paid vacation and an employee is entitled to paid vacation under the terms of an employment agreement, the entitlement is another form of compensation, and becomes 'due' day by day as the employee performs his or her duties," Botsford said.

"Like wages, the vacation time promised to an employee is compensation for services which vests as the employee's services are rendered," she said, quoting the advisory.

Meanwhile, the SJC rejected EDS's argument that because the Wage Act is merely the method by which private agreements regarding vacation policies can be enforced, the Wage Act provision addressing vacation payments as "wages" is only triggered when an employer violates its own policy.

"As its 'special contracts' clause recognizes, the Wage Act would have little value if employers could exempt themselves simply by drafting contracts that have placed compensation outside its bounds - as EDS attempted to do, when it stated that 'vacation time is not earned,'" Botsford said.

The SJC was similarly unimpressed with EDS's argument that the Legislature did not intend for the Wage Act to require vacation payments upon termination unless the particular employment agreement called for it.

"Certainly, the legislative history ... does not evince a clear intent to allow employers free rein to deny or condition earned 'vacation payments' in any way they choose, so long as they include the language to do so in an employment agreement," Botsford said.

The court further rejected the company's assertion that the attorney general could not have considered entitlement to paid vacation time to be the equivalent of earned wages. After all, EDS argued, the AG stated in the same advisory that employers could require workers to use their vacation days by a certain date or forfeit them.

"[T]he advisory permits loss of accrued vacation time only where the employee has a reasonable opportunity to use (and to be paid for) that time," Botsford wrote.

"The Attorney General has therefore adopted a consistent view that an employee earns, by his or her service, the right to take paid vacation," the justice said. "The employee may lose the right through voluntary nonuse, but if an employer interferes with the employee's ability to use it, for example by discharging the employee, the employer must pay the value of the earned vacation."

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