

## **Supreme Judicial Court Holds That Worker Misclassified As Independent Contractor Is Entitled to Damages, Despite Being Paid More than Comparable Employees**

August 24, 2009

On August 21, 2009, the Massachusetts Supreme Judicial Court held in *Somers v. Converged Access, Inc.* that an employee who has been misclassified as an independent contractor is entitled to damages under the Massachusetts Wage Statute, M.G.L. ch. 149 §§ 148, 148B, and 150, despite that the amount of money the worker received as an independent contractor was more than what he would have received had he been correctly classified as an employee. The Court rejected this purported defense, explaining that an individual who is misclassified is entitled to overtime and other lost wages at the rate he was paid as an independent contractor.

In 2004 and 2005, Robert Somers twice applied for permanent employment with Converged Access, Inc. (“CAI”) as a quality assurance engineer, but neither application resulted in a job offer. After turning down Somers’s second application for employment, CAI offered him a position testing CAI software products as an “independent contractor” at the rate of \$65 per hour. Somers accepted the offer and worked at CAI for four months in 2005. Although he occasionally worked more than forty hours in a work week, CAI did not pay him overtime. Somers also was not entitled to vacation and holiday pay and was not eligible for benefits available to regular CAI employees. However, based upon his high hourly rate, Somers made more money than a comparable employee of CAI, even including overtime and other benefits.

Somers sued CAI in state court, alleging that CAI misclassified him as an independent contractor and, in doing so, violated the Wage Statute by failing to pay him overtime, vacation and holiday pay and by failing to provide him other employee benefits. CAI moved for summary judgment, arguing that even if Somers had been misclassified, he was paid more for his services than what it would have paid him if he had been classified as an employee, even including overtime and other benefits. The Superior Court agreed, finding that Somers had no damages for the misclassification.

On appeal, the Supreme Judicial Court reversed the grant of summary judgment. The Court explained that Somers was presumed to be an employee under Massachusetts law and that his wage rate was \$65 per hour. It concluded that Somers did in fact have damages because he was entitled to overtime, vacation and holiday pay and other employee benefits based upon this hourly rate. In the Court’s view, CAI’s asserted defense – that Somers had been paid more than what he would have been paid as an employee – was contrary to the purposes of the statute because it undermined the financial incentives on employers to comply with the law and left employees with no meaningful protection against misclassification. The SJC remanded the case for trial. Although the case was brought when the Wage Statute did not provide for mandatory treble damages, the Court noted that should Somers prevail, he would be entitled to treble damages for any lost wages, include overtime pay calculated on the basis of his contractual rate of \$65 per hour, vacation and holiday pay and other benefits.

The bottom line is that there are few defenses available to employers accused of failing to pay wages. In rejecting the employer’s argument that Somers had no damages, the Supreme Judicial Court repeatedly referred to the Wage Statute as imposing strict liability on employers. The fact that an individual was well-compensated is not a defense to misclassifying the worker or the failure to pay overtime or other lost wages.

The decision also is troubling because it suggests that the plaintiff, if he prevailed at trial, would be entitled under the Wage Statute to vacation pay and other employee benefits. There is no automatic entitlement to vacation pay under the Wage Statute, and instead whether an employee is entitled to payment depends upon the terms of the employment contract. In *Somers*, the plaintiff may have been misclassified but he understood that he was not entitled to vacation pay. As to employee benefits, those are subject to the federal benefits law, the Employee Retirement Income Security Act (“ERISA”), not state law. Nonetheless, the Court suggests that ERISA-governed benefits might be available to the plaintiff as damages. The Court’s expansive view in *Somers* of what damages are available for violations of the Wage Statute will encourage more litigation over these issues.

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