

Court asked to define damages in labor cases

by Phillip Bantz

Published: February 23rd, 2011



The Supreme Judicial Court is being asked to define the scope of recoverable damages in a closely-watched case involving a commercial cleaning services franchisor that misclassified franchisees as independent contractors.

In *Awuah, et al. v. Coverall North America, Inc.*, the SJC is expected to interpret "damages incurred" under G.L.c. 149, §150. It is an issue of first impression that could have widespread ramifications on franchises and employee misclassification cases across the state.

U.S. District Court Judge William G. Young certified the case to the SJC after concluding that state wage laws require employers to cover certain statutory costs of doing business, and that shifting such expenses to a misclassified worker constitutes damages incurred.

Young determined that the plaintiff is entitled to a portion of the statutory damages he sought, limiting potential recovery to interest on late wages and insurance premiums he paid on a policy as a substitute to workers' compensation insurance.

The plaintiff wanted to recover a wide range of damages tied to fees withheld from his wages, such as franchise fees, royalty and management fees, and the cost of supplies and equipment. He argued that the fees qualified as damages because he paid them as a result of being misclassified as an independent contractor.

The defendant countered that the plaintiff could only collect fees directly related to misclassification. And because the plaintiff had signed a contract agreeing to pay the various franchise fees, the fees were the result of a contractual obligation and not misclassification, the defendant said.

Judge Young agreed, in part, finding that "most of the fees identified by [the plaintiff] do not relate to costs that an employer must bear and thus the parties were free to agree that [the plaintiff] would bear these costs."

Young declined to calculate damages because there is no controlling SJC precedence.

The outcome of *Awuah* now depends on the SJC's reading of the law. The case will remain administratively closed with all proceedings stayed until the court responds to Young's certified questions (see sidebar on page ___).

[Young's order of certification can be found by clicking here.](#) The SJC briefs filed in the case can be found by clicking [here](#) and [here](#).

Waiting for an answer

In *Awuah*, the SJC has a precedent-setting opportunity to define the damages that are available to employees who have been misclassified as independent contractors, said plaintiff's lawyer Shannon Liss-Riordan of Lichten & Liss-Riordan in Boston.

She has asked the court to follow a broad reading of G.L.c. 149, §150, which states that employers such as the defendant who violate the commonwealth's wage laws can be held liable for "any damages incurred, and for any lost wages and other benefits."

"We're saying that 'any damages' means any damages," Liss-Riordan said. "Basically, [Young's] answer gives the workers almost nothing. We're saying it's an overly narrow view."

In her appellate brief, Liss-Riordan argues that the various fees the plaintiff paid to the defendant are, in fact, a result of his misclassification as the fees are “provided for in [the defendant’s] standard-form franchise agreement, pursuant to which it misclassifies its workers as independent contractors.”

Liss-Riordan asserts that employers are already barred by the tips statute, G.L.c. 149, §152A, from taking a cut of the gratuities an employee earns, so it follows that they should also be prohibited from docking an employee’s wages to cover business-related costs, such as advertising.

She writes in her brief that “it makes little sense to believe that the Legislature intended to prevent any deduction from employees’ tips but would allow such deductions from non-tip wages. Such a conclusion would result in a rule by which tip skimming is more protected than general wage skimming.”

By requiring companies to fully reimburse employees for all the fees they incurred as a result of misclassification, the court will send a message to employers that wage law violations will not be tolerated, Liss-Riordan said.

The defense in *Awuah* has a different view.

Essentially, the plaintiff is asking the SJC to create a common-law rule against the shifting of any business costs to employees, which would produce a “flood of litigation” and drive franchisors from the state because they would be unable to collect fees from franchisees, said one of the defendant’s attorneys, Michael D. Vhay of Boston’s DLA Piper.

“Employers would be faced with great uncertainty both with respect to what wages are covered by the state’s Wage Act and when contingent compensation must be paid,” Vhay added.

Christopher J. Perry, a management-side attorney with Morse, Barnes-Brown & Pendleton in Waltham, said he believes “there is room for the SJC to come down with a different damages ruling.” But expanding damages beyond wages and benefits could “open the door to a lot of damages unforeseen by statute,” he said.

For example, the defendant suggests in his brief that laid-off workers could claim their employers had illegally shifted the cost of business to their employees by making bad decisions that led to the company’s downfall.

“What are the costs that an employer must statutorily bear?” asked labor attorney David C. Casey of Littler Mendelson in Boston. “That question has broad implications for whether or not employers are obligated to pay for everything that an employee might utilize in performing his or her job duties. That’s an important and open question.”

Misclassified

The need to define recoverable damages under the wage statute has surfaced in the wake of a spate of recent independent contractor misclassification cases, many of which have entered or are nearing the damages phase.

In *Awuah*, Judge Young ruled that defendant Coverall had miscast its franchisees as independent contractors in violation of G.L.c. 149, §148B. He rejected the company’s argument that it was in the business of selling janitorial franchises to third parties and therefore had distinctly different business interests than its franchisees — a crucial requirement in proving that franchisees are independent contractors rather than employees.

“Describing franchising as a business in itself, as Coverall seeks to do, sounds vaguely like a Ponzi scheme — a company that does not earn money from the sale of goods and services, but from taking in more money from unwitting franchisees to make payments to previous franchisees,” the judge said.

Young’s ruling caught the labor bar’s attention as it marked the first time any court had addressed the relationship of the independent contractor statute to the franchising industry, and was the first liability ruling against a cleaning franchise company.

“What makes this case interesting is that it’s a franchisee relationship, and what does that say

about other franchisee relationships like Dunkin' Donuts, McDonald's and certain others?" Perry said. "I think it will make franchisors think very carefully about how they structure their relationships with franchisees in the future."

The SJC has scheduled arguments in *Awuah* for April.

For more information on the judge mentioned in this story, visit the Judge Center at www.judgecenter.com.

Sidebar:

Lawyers spar over certified questions

In *Awuah, et al. v. Coverall North America, Inc.*, U.S. District Court Judge William G. Young has asked the Supreme Judicial Court to respond to the following questions in his order of certification:

- May a franchisor lawfully use customer accounts-receivable financing to pay a franchisee who is characterized as an employee under G.L.c. 149, §148B?
- Do the "damages incurred" for which a misclassified worker can seek recompense under G.L.c. 149, §150 include costs that an employer statutorily must bear?
- May an employer lawfully withhold wages to an employee if the employer and employee agree that such wages are not earned until a customer remits payment?
- May an employee and his employer lawfully agree that the employee will pay some or all of the cost of workers' compensation or other insurance coverage produced to alleviate the liability of the employer?

Plaintiff's attorney Shannon Liss-Riordan of Lichten & Liss-Riordan in Boston framed the issues differently in a brief filed with the SJC. She asks the court to define the specific damages available to an employee who has been misclassified as an independent contractor.

Michael D Vhay of Boston's DLA Piper, who represents the defendant, argues that the SJC should ignore the plaintiff's statement of issues presented for review because it "improperly disregards the questions certified" to the court.

While Young certified four questions to the SJC, the judge also stated in his order that he "welcomes the advice of the [SJC] on any other questions of Massachusetts law deemed material to this case."

— Phillip Bantz