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Mass. Court Favors Employee In Classification Suit

By **Brendan Pierson**

Law360, New York (August 25, 2009) -- In a suit involving a software company, Massachusetts' highest court has ruled that an employee misclassified as an independent contractor can seek damages from an employer even if the employer can show that the employee would have been paid less if properly classified.

Justice Ralph D. Gants of the Supreme Judicial Court of Massachusetts ruled Friday that a lower state court was wrong to rule that even if former Converged Access Inc. contractor Robert Somers was misclassified as an independent contractor, he couldn't recover overtime and other damages because CAI had been paying more than he would have earned if he had been hired as an employee.

However, Justice Gants upheld the lower court's dismissal of an age discrimination claim Somers filed against CAI.

In 2005, Somers applied twice to work for CAI, a software company, as a qualified assurance engineer, and was rejected both times. Later that year, he was hired to do quality assurance work as an independent contractor. As an independent contractor, Somers worked at CAI's facilities, but was not paid overtime, did not receive any benefits and did not have his taxes withheld.

Eventually, CAI terminated Somers' position, but once again sought to hire a quality assurance engineer as a permanent employee. Somers applied for that position, but was again turned down.

In 2006, Somers sued CAI in the Massachusetts Superior Court Department alleging that he was discriminated against because of his age — 57 — and that he should have been classified as an employee and received benefits accordingly.

The Superior Court granted summary judgment to CAI on all counts. Although it found that there was an issue of material fact as to whether Somers was misclassified, it said that it didn't matter because Somers was paid much more as an independent contractor than he would have been as an employee.

Somers appealed to the Massachusetts Appeals Court. The Supreme Court then took on the case of its own initiative in order to resolve the issue.

Justice Gants rejected the lower court's finding that if an employee is found to be misclassified as an independent contractor, the employee's pay must be treated as his base wage, as though he were an employee, for the purpose of calculating damages.

"We conclude that this measure of damages contravenes both the plain meaning and the primary purpose of the independent contractor statute and the wage act," Justice Gants

said. "An employee misclassified as an independent contractor, as a matter of law, is an employee; his contract rate is his wage rate; and his 'damages incurred' equal the value of wages and benefits he should have received as an employee, but did not."

Justice Gants affirmed the lower court's dismissal of the age discrimination claim. He did not rule on the issue of whether Somers was misclassified, but remanded that issue to the lower court.

Harold L. Lichten, an attorney for the plaintiffs, said the decision was significant because it resolved an unsettled question in Massachusetts law, and could decide a large number of similar cases.

"It's a really important step in getting these independent contractor misclassification cases resolved," Lichten said. He noted that California's Supreme Court had reached a similar decision in a class action brought against FedEx Corp. by drivers alleging they were misclassified as independent contractors, which ultimately led to a \$27 million settlement for the drivers.

Christopher R. O'Hara, an attorney for CAI, said that he was pleased with the dismissal of the age discrimination claim and disappointed with the ruling on the damages issue. He said that the decision should be a warning to employers that use independent contractors, especially since Massachusetts law allows treble damages for misclassification.

"It's a heavy club that is wielded against the employer," he said.

Somers is represented by Lichten & Liss-Riordan PC.

CAI is represented by Todd & Weld LLP.

The case is Somers v. Converged Access Inc., case number SJC-10347, in the Supreme Judicial Court of Massachusetts.