MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com
February 22, 2010
DOLAN MEDIA COMPANY

Judges: 'tip law' not retroactive

Defense bar hails trend

By David E. Frank
david.frank@lawyersweekly.com

Recent rulings by two influential trial judges have found that the treble damages provision of the tip statute does not apply retroactively, an issue that courts in Massachusetts have been split on for nearly two years.

On Feb. 8, Superior Court Judge Margaret R. Hinkle, who heads the Business Litigation Session, determined in *Hernandez, et al. v. Hyatt Corp.* that a 2008 amendment to the state's controversial tip law — G.L.c.149, §150 — was intended to be applied prospectively only.

Two months earlier, U.S. District Court Judge William G. Young, who served as chief of the court from 1997 to 2005, came to the same conclusion in *DiFiore, et al. v. American Airlines, Inc.*

"There was a point in time [when] the plaintiffs' bar had some authority on their side that made them feel they had leverage over us during settlement discussions," said Brigitte M. Duffy, the Boston lawyer who represented the defendants in *Hernandez*. "There's no question that now having the chief of the [BLS] and a former presiding judge of the federal court saying what they've said here carries some extra weight."

Duffy, who practices at Seyfarth Shaw, added that *DiFiore* and *Hernandez* are "evidence of a definite trend which swings the pendulum back in our direction. It's been a good couple of months for defense attorneys in Massachusetts — and we don't always get good months in wage and hour litigation."

The full text of the four-page *Hernandez* ruling, Lawyers Weekly No. 12-019-10, can be ordered at www.masslawyersweekly.com. *DiFiore*, Lawyers Weekly No. 02-304-09, can also be found on Lawyers Weekly's website.

ISTOCKPHOTO.COM

YOUNG

HINKLE

Both rule treble damages apply prospectively only

'Confused' judges

Scott E. Adams of Groveland, who represented the plaintiffs in *Hernandez*, said the uncertainty on retroactivity started in 2005 when the Supreme Judicial Court held in *Weidmann v. The Bradford Group* that treble damages could be awarded only on a finding that an employer had willfully committed an infraction.

That test was struck down by Chapter 80 of the Acts of 2008, which made Massachusetts the first state in the country to impose automatic treble damages for wage and hour law violations. What remained unclear was whether the Legislature intended for damages to apply to cases that pre-dated the passage of the bill.

Adams said judges across the state have been split on the question ever since. For example, he said, Superior Court Judges Raymond J. Brassard and Leila R. Kern have ruled opposite of Hinkle and Young.

"These are significant matters of law that have some important philosophical questions underlying them, and there is clearly a problem with the implementation and enforcement of them," Adams said. "There are a number of judges in

Massachusetts who seem to be very confused about why these laws were developed in the first place and what they were intended to do."

Adams also criticized the *Hernandez* ruling for dismissing his clients' breach of contract claims on grounds that the statute, which has a three-year statute of limitations, preempts any common law remedies. The common law claims, which were based on the premise that the tip statute creates an implied contract between employers and employees, carry a six-year statute of limitations, he said.

Although some courts have found that the statute does not preempt the contract claim, Adams said, Superior Court Judge Bruce R. Henry and SJC Justice Ralph D. Gants, when he sat in the BLS, ruled that it does.

"The loss of the additional three-year recovery is what really pulls the teeth out of the wage laws," he said. "In the absence of aggressive and effective wage law enforcement by the attorney general, the loss of the threat of treble damage merely adds insult to the more substantial injury in the loss of common law claims."

Amy Cashore Mariani of Boston, who represented American Airlines in the case before Young, said there is no doubt that *Weidmann* now is controlling caselaw for any complaint involving allegations of damages before 2008. But the Fitzhugh & Mariani lawyer said she still expects opposing counsel to raise the same arguments.

"The SJC has been invited to do so but has still never come down with a case that expressly states, without being dicta, that retroactivity is not in play," she said. "Until it's done, there will be certain judges and plaintiffs' counsel who say it's retroactive."

Splitting tips

During the six years leading up to the filing of a 2005 complaint in Suffolk Superior Court, the 12 plaintiffs in *Hernandez* were employed as banquet servers at the defendant Hyatt Regency Hotel.

The plaintiffs worked at the company's hotels in Boston and Cambridge where their primary duty was to serve food and beverages to guests.

Although they were paid below minimum wage, they received supplemental income from gratuities comprised of service charges collected from customers.

In their suit, the plaintiffs claimed that the hotel improperly distributed portions of those gratuities to banquet captains and other non-servers, some of whom had managerial duties. They asserted numerous claims, including breach of contract and violation of the tip statute, G.L.c.149, §150.

CASE: *Hernandez, et al. v. Hyatt Corp.,* Lawyers Weekly No. 12-019-10

COURT: Superior Court

ISSUE: Does the Massachusetts tip statute apply retroactively to cases that involve allegations of damages that arose prior to the passage of Chapter 80 of the Acts of 2008?

DECISION: No

"It's been a good couple of months for defense attorneys in Massachusetts — and we don't always get good months in wage and hour litigation."

— Brigitte M. Duffy, Boston

Substantive right

In finding the 2008 amendment did not apply retroactively, Hinkle said she agreed with Young's analysis in *DiFiore* that the legislative amendment impacts the defendant's substantive rights.

Because the Legislature eliminated any judicial discretion to impose treble damages, Hinkle said, it could hardly be viewed as a change that merely affected remedial interests.

"Judge Young begins his analysis by recalling the general principle of statutory interpretation that 'all statutes are prospective in their operation' and have 'no retroactive effect unless such effect manifestly is required by unequivocal terms,'" she wrote. "As with the plaintiffs in *DiFiore*, the plaintiffs here do not, nor can they, point to such unequivocal terms present in the Chapter 80 amendment."

Hinkle also rejected Adams' argument that the SJC in its 2009 *Somers v. Converged Access* decision had held the amendments were retroactive when Gants, writing on behalf of the court, stated that "the plaintiff will be entitled under [the statute] to … treble damages for any lost wages."

Hinkle noted that, at an earlier point in the opinion, Gants wrote that the plaintiff could seek injunctive relief and any damages incurred, including treble damages.

"Judge Young correctly concludes that the *Somers* court must have intended to list the damages available to the plaintiffs in both statements, rather than imply that treble damages are required," she wrote. "To conclude otherwise would render these two statements of law inconsistent."

Although Hinkle acknowledged that Kern reached the opposite conclusion last year in *Rosnov v. Molloy*, the BLS chief disputed her colleague's finding that mandatory treble damages have always been the governing law in Massachusetts. Hinkle said that *Weidmann* had been the law for at least three years before the passage of the statutory amendment in 2008.

"To the extent [Kern] concludes that the Chapter 80 amendment is merely remedial rather than substantive, this Court respectfully disagrees," she wrote. MLW

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