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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12703

FRANCOISE PARKER,
Plaintiff-Appellant,

v.

ENERNOC, INC., and
ERIC ERSTON,
Defendants-Appellees/Cross-Appellants.

On Appeal from a Judgment of Suffolk Superior Court

BRIEF *AMICUS CURIAE* OF MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION, IMMIGRANT WORKER CENTER COLLABORATIVE, LAWYERS FOR CIVIL RIGHTS, AND FAIR EMPLOYMENT PROJECT IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENTS

Massachusetts Employment Lawyers Association, Inc., is a Massachusetts nonprofit corporation. It has no parent corporation and there is no publicly held corporation holding 10% or more of its stock.

The Immigrant Worker Center Collaborative is an umbrella organization comprised of the following members groups, all of which are non-profit organizations that do not have any parent corporations, and there are no publicly held corporations holding 10% or more of their stock: Brazilian Worker Center, Brazilian Women's Group, Centro Comunitario de Trabajadores, Chelsea Collaborative, Chinese Progressive Association, Lynn Worker Center, Massachusetts Coalition for Occupational Safety and Health, and Metrowest Worker Center/Casa del Trabajador.

Lawyers for Civil Rights, Inc., is a Massachusetts nonprofit corporation. It has no parent corporation and there is no publicly held corporation holding 10% or more of its stock.

Fair Employment Project, Inc., is a Massachusetts nonprofit corporation. It has no parent corporation

and there is no publicly held corporation holding 10% or more of its stock.

DECLARATION OF AUTHORSHIP

Pursuant to Mass. R.A.P. 17(c)(5), no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed monetarily toward the preparation of this brief; no person or entity other than *amici* and their counsel contributed monetarily toward the preparation of this brief; and *amici* and their counsel do not represent and have not represented any party to the present appeal, and were not parties and did not represent any parties in any proceeding or legal transaction at issue in the present appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.................................. 6

ISSUES PRESENTED...................................... 8

INTEREST OF AMICUS CURIAE............................. 9

INTRODUCTION... 13

STATEMENT OF THE CASE................................ 16

STATEMENT OF FACTS................................... 16

SUMMARY OF ARGUMENT.................................. 16

ARGUMENT... 18

I. The Plaintiff's Unpaid Commissions Were "Wages" Subject to the Wage Act Because She Fully Earned Them During Her Employment And They Became "Due and Payable" After Her Retaliatory Termination.. 18

a. The Wage Act Applies Broadly to All Commissions Earned During Employment, And Requires the Court to Award Treble Damages For "Lost Wages And Other Benefits" Due to Retaliation Or Other Violations............... 19

b. Conditioning Payment of Commissions on Continued Employment Is an Unlawful "Special Contract" And Is Therefore Unenforceable...... 24

c. Employers Cannot Circumvent the Wage Act By Terminating Employees Who Have Earned Commissions That Are Not Yet Due and Payable.. 28

II. Ms. Parker's Unpaid Commissions Also Qualify As "Lost Wages" Because She Lost the Opportunity to Remain an Employee Until They Became Due and Payable Because Of Defendants' Unlawful Retaliation.. 31

CONCLUSION... 39

CERTIFICATE OF COMPLIANCE............................ 40

CERTIFICATE OF SERVICE............................... 41

TABLE OF AUTHORITIES

Cases

Awuah v. Coverall N. Am., Inc., 460 Mass. 484 (2011) 20, 22
Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404 (1995) 28
Boston Police Patrolmen's Assn. v. Boston, 435 Mass. 718 (2002) 19
Calixto v. Coughlin, 481 Mass. 157 (2018)........... 33
Commonwealth v. Savage, 31 Mass. App. Ct. 714 (1991) 22
Crocker v. Townsend Oil Co., Inc., 464 Mass. 1 (2012) 22
Electronic Data Sys. Corp. v. Attorney General, 454 Mass. 63 (2009) 25, 26, 27, 29
Fernandes v. Attleboro Hous. Authy., 470 Mass. 117 (2014) 32, 33
Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374 (2000) 36
Fontaine v. Ebtec Corp., 415 Mass. 309 (1993)....... 36
Fraelick v. PerkettPR, Inc., 83 Mass. App. Ct. 698 (2013) 33
Gram v. Liberty Mut. Ins. Co., 384 Mass. 659 (1981) 28, 30
Gram v. Liberty Mut. Ins. Co., 391 Mass. 333 (1983) 28
Haddad v. Wal-Mart Stores, Inc. (No. 1), 455 Mass. 91 (2009) 35
Harrison v. NetCentric Corp., 433 Mass. 465 (2001) 30
Israel v. Voya Institutional Plan Svcs., LLC, 2017 WL 1026416 (D. Mass. Mar. 16, 2017) .. 22, 23, 24
Levesque v. Schroeder Inv. Mgmt. N. Am., Inc., 368 F. Supp. 3d 302 (D. Mass. 2019) 29
Lipsitt v. Plaud, 466 Mass. 240 (2013).............. 31
Massachusetts State Police Commissioned Officers Ass'n v. Commonwealth, 462 Mass. 219 (2012) 34
McAleer v. Prudential Ins. Co. of Am., 928 F. Supp. 2d 280 (D. Mass. 2013) 24

Okerman v. VA Software Corp.,
69 Mass. App. Ct. 771 (2007) 20, 21, 22
Prozinski v. Northeast Real Estate Servs., LLC,
59 Mass. App. Ct. 599 (2003) 22
Selmark Assocs. v. Ehrlich, 467 Mass. 525 (2014).... 35
Smith v. Winter Place LLC,
447 Mass. 363 (2006) 33, 34, 35, 38
Sullivan v. Brookline, 435 Mass. 353 (2001)......... 37
Travers v. Flight Servs. & Sys., Inc.,
808 F.3d 525 (1st Cir. 2015) 34
Weber v. Coast to Coast Medical, Inc.,
83 Mass. App. Ct. 478 (2013) 20
Weems v. Citigroup Inc.,
453 Mass. 147 (2009) 18, 22, 30

Statutes

G.L. c. 149... 13
G.L. c. 149, § 148............................. passim
G.L. c. 149, § 148A............................ passim
G.L. c. 149, § 150......................... 19, 34, 37
G.L. c. 151B............................... 14, 35, 36
Statutes 1943, c. 467............................... 13
Statutes 1966, c. 319............................... 13
Statutes 1977, c. 590............................... 13
Statutes 1993, c. 110, § 182........................ 13
Statutes 1998, c. 236, § 11......................... 13
Statutes 2008, c. 80, § 5........................... 13

Other Authorities

Lipchitz, Wilson, et al., Massachusetts Superior
Court Civil Practice Jury Instructions § 5.3.2
(3d Ed., 2d Supp. 2018) 35

ISSUES PRESENTED

1. Whether earned commissions that are “due and payable” after the date of an employee’s termination and purportedly contingent on the employee’s continued employment are “wages” within the meaning of the Wage Act, G.L. c. 149, §§ 148, 148A, and 150.
2. Whether earned commissions that are not paid due to a retaliatory and unlawful termination are “lost wages” subject to mandatory trebling pursuant to the Wage Act, G.L. c. 149, §§ 148, 148A, and 150.

INTERESTS OF AMICI CURIAE

Massachusetts Employment Lawyers Association (MELA) is a voluntary membership organization of more than 150 lawyers who regularly represent employees in labor, employment, and civil rights cases in Massachusetts. MELA is an affiliate of the National Employment Lawyers Association (NELA), the country's largest organization of lawyers who represent employees and applicants with workplace-related claims (approximately 3,000 attorneys).

MELA's members actively advocate for the rights of employees before the executive, legislative and judicial branches. MELA has filed numerous *amicus curiae* briefs in cases before the Appellate Courts of Massachusetts, including: Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456 (2017); Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290 (2016); Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., 474 Mass. 382 (2016); Bulwer v. Mount Auburn Hosp., 473 Mass. 627 (2016); Psy-Ed Corp. v. Klein, 459 Mass. 697 (2011; Gasior v. Mass. Gen. Hosp., 446 Mass. 645 (2006; and Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367 (2005).

The **Immigrant Worker Center Collaborative** is an umbrella organization of eight worker centers in Massachusetts that separately and together advocate for low-wage and immigrant workers.[1] Each worker center has low-wage workers as its members, with a focus on immigrant workers. The centers help these workers understand and enforce their workplace rights, find legal counsel when appropriate, and advocate for protective workplace policies. As a membership group of low-wage workers in Massachusetts, IWCC is in a unique position to explain the impact of the important public policies embodied in the wage laws. These policies include the strong protection against retaliation and the availability of effective remedies, including treble damages for lost wages, for compensating workers when they are subject to illegal retaliation.

Lawyers for Civil Rights (LCR) fosters equal opportunity and fights discrimination on behalf of

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[1] These organizations are the Brazilian Worker Center, Brazilian Women's Group, Centro Comunitario de Trabajadores, Chelsea Collaborative, Chinese Progressive Association, Lynn Worker Center, Massachusetts Coalition for Occupational Safety and Health, and Metrowest Worker Center/Casa del Trabajador.

people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. As part of this mission, LCR actively litigates employment cases on behalf of employees of color and low-wage workers. Increasingly, LCR's clients are subjected to wage theft and retaliation for asserting protected rights. As a result, LCR has a strong interest in ensuring that courts apply the protections of Massachusetts employment laws, including the Wage Act, consistent with their remedial purpose and in a manner that recognizes the realities of the 21st century economy.

Fair Employment Project, Inc. ("FEP") is a non-profit organization incorporated in 2007. FEP was founded by public-interest attorneys concerned about the lack of legal resources for lower-income workers whose employment rights have been violated. FEP's mission is to protect those rights by providing legal assistance and resources to workers. Over the past 11 years, FEP has assisted more than 8000 Massachusetts workers. A substantial number of those workers report that they are owed wages. Fair Employment Project joins this brief, as the outcome of this case will

have a significant impact on the ability of employees to redress wage violations. For this reason, FEP respectfully requests that its views be considered by this Court.

INTRODUCTION

By enacting the Wage Act (G.L. c. 149, § 148 *et seq.*), the Legislature established a robust public policy requiring employers to pay employees their earned wages in a timely fashion. Wage theft is a significant problem for employees of all walks of life, and the existence of the Wage Act represents a legislative judgment that common-law remedies are not sufficient incentive to make employers pay employees what they are owed without delay. The Legislature has repeatedly broadened the scope of the Wage Act, such as by including commissions and vacation pay within the definition of "wages," St. 1943, c. 467; St. 1966, c. 319; by establishing a private right of action, St. 1993, c. 110, § 182; by prohibiting retaliation for seeking prompt payment, St. 1977, c. 590; St. 1998, c. 236, § 11; and by making treble damages a mandatory remedy for all "lost wages and other benefits" caused by a violation, St. 2008, c. 80, § 5.

In this case, the Plaintiff, Francoise Parker (Ms. Parker), closed a major sale for Defendants, her employers, and by doing so she did everything necessary to earn substantial commissions. Part of the commission was due and payable immediately, but

the rest was payable a year later, contingent on the customer, Eaton, not exercising a "termination for convenience" option and, purportedly, on the Plaintiff's continued employment. The Plaintiff complained of sex discrimination, see G.L. c. 151B, and violations of the Wage Act. The employer subsequently terminated Plaintiff's employment, and the jury found that the termination was retaliatory. See G.L. c. 149, § 148A. If not for that illegal termination, the balance of Plaintiff's commissions would have been due and payable when, a year after the sale, the customer did not cancel its contract. These wages were lost by virtue of the retaliatory termination, and should have been trebled by statute. But the trial court instead arbitrarily cut off the treble damages at the date of termination, holding that most of the retaliation damages were "future commissions" not subject to trebling.

The court below erred because commissions earned during employment are "wages" covered by the Wage Act even if the employee is no longer employed when they are due and payable. The Superior Court's decision in this case, if upheld, would create a perverse incentive for unscrupulous employers to steal earned

commissions from their employees by firing them before the commissions come due. Unlike with other types of wages, payment of commissions under the Wage Act may be delayed until the amount owed "has been definitely determined and has become due and payable," G.L. c. 149, § 148, fourth par., which may occur weeks or months in the future. Employees may thus accrue significant amounts of commissions over time, for which a claim for payment under the Wage Act has not yet ripened. Once those commissions are calculable and payable, the employer must pay them promptly or see them trebled. But under the Superior Court's logic, the employer could terminate an employee just before the earned commissions were due, and face no consequences at all under the Wage Act. Even if the termination were found to be retaliatory, the employer would essentially have to pay only what it should have paid to begin with – single damages. This dilution of the Wage Act's remedies would be contrary to the purpose of the statute to protect workers against wage theft and retaliation. It also would create great uncertainty about the nature of the back pay and front pay remedies generally available in retaliation cases, which easily fall within any plausible definition of

"lost wages and other benefits." Accordingly, the Court should reverse this aspect of the Superior Court's judgment.[2]

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth in the Appellant's opening brief.

STATEMENT OF FACTS

Amici adopt the Statement of the Facts as set forth in the Appellant's opening brief.

SUMMARY OF ARGUMENT

Ms. Parker's earned but unpaid commissions must be considered "wages" under the Wage Act, and therefore "lost wages" subject to trebling, because she earned them during her employment and they were "due and payable" prior to judgment. (pp. 18-19.) The Wage Act applies to all wages earned while employed, even though some commissions may not be immediately determined and due; a contrary

[2] Amici additionally urge the Court to uphold the remainder of the judgment for the Plaintiff for the reasons stated in the Plaintiff's briefs.

interpretation would encourage employers to terminate employees in order to avoid paying them earned commissions, contrary to this Court’s common-law precedents and the text and structure of the Wage Act. (pp. 19-24.)

Conditioning payment of earned commissions on continued employment is a prohibited “special contract” that cannot be enforced under the Wage Act because it would permit employers to decline to pay wages that employees have earned. (pp. 24-27.) In particular, terminating an employee like Ms. Parker in bad faith violates both the implied covenant of good faith and fair dealing and the Wage Act’s prohibition of “special contracts or other means” of evading obligations under the Wage Act. (pp. 28-31.)

Ms. Parker’s unpaid wages are also subject to trebling because they represent back pay that would have been paid but for her retaliatory termination, and therefore “lost wages.” The remedies for retaliation are broader than for a nonpayment claim, and excluding post-termination lost earnings from the treble damages remedy would give employers an incentive to fire employees who assert their rights,

directly contrary to the policy underlying the anti-retaliation provision of the Wage Act. (pp. 31-38.)

ARGUMENT

I. The Plaintiff's Unpaid Commissions Were "Wages" Subject to the Wage Act Because She Fully Earned Them During Her Employment And They Became "Due and Payable" After Her Retaliatory Termination.

The Wage Act requires prompt payment of earned commissions, with only two limitations: that they be "definitely determined and due and payable to the employee." Weems v. Citigroup Inc., 453 Mass. 147, 151 (2009). At least as of April 2017, the full amount of Ms. Parker's commissions was calculable, and since the customer's termination for convenience option had expired, the commissions were due and payable. Thus, at that point the commissions unambiguously constituted "wages" subject to the full remedies of the Wage Act. It should not be relevant that Ms. Parker was no longer employed by Defendants when the commissions otherwise became due. This Court has held that a contract for compensation that is contingent on continued employment is an unenforceable "special contract" under the Wage Act, and the requirement is similarly unlawful in the context of

commissions generally. At the very least, where an employee has been terminated in violation of the Wage Act and common law (as the jury found in this case), the employer should not be permitted to enforce the condition of continued employment in a commissions agreement. For all of these reasons, the unpaid commissions were "wages" under the Wage Act as of April 2017, well before the judgment in this case, and as such the statute required them to be trebled. The Superior Court's contrary ruling must be reversed.

a. The Wage Act Applies Broadly to All Commissions Earned During Employment, And Requires the Court to Award Treble Damages For "Lost Wages And Other Benefits" Due to Retaliation Or Other Violations.

The Legislature passed the Wage Act to address "the evil of unreasonable detention of wages" by employers. Boston Police Patrolmen's Assn. v. Boston, 435 Mass. 718, 720 (2002). In order to effectuate this goal, the Legislature has provided strong remedies; Defendants concede that "[e]mployees who prevail on their Wage Act claims are entitled to three times the amount of the 'lost wages and other benefits' they are awarded," as well as attorney's fees and other relief. (Red Br. 26-27.) See G.L. c. 149, § 150. The employee's right to payment

encompasses all "wages earned," G.L. c. 149, § 148, and the employee has "earned" the wages once she "has completed the labor, service, or performance required by [her]." Awuah v. Coverall N. Am., Inc., 460 Mass. 484, 492 (2011). "By its terms, the language of the [W]age [A]ct regarding commissions applies broadly, and is restricted in its application only by the requirements that the commissions be 'definitely determined' and 'due and payable.'" Okerman v. VA Software Corp., 69 Mass. App. Ct. 771, 776 (2007) (emphasis supplied). The treble damages remedy applies to commissions meeting these requirements just as any other wages. See Weber v. Coast to Coast Medical, Inc., 83 Mass. App. Ct. 478, 482-83 (2013).

Commissions do differ from other types of compensation in one respect, however: timing. Under the Wage Act, most wages must be paid weekly or bi-weekly, an employee departing voluntarily must be fully paid on the next pay day, and "any employee discharged from such employment shall be paid in full on the day of his discharge." G.L. c. 149, § 148, first par. Thus, for most terminated employees, it is very clear whether or not their employer has complied with the law by paying any outstanding wages

immediately. However, the picture is less clear for commissions because, by their nature, they may be subject to contingencies (such as a customer placing an order or choosing not to cancel a contract) and the amount due may not be immediately calculable. Accordingly, the Legislature only applied these timing requirements to commissions "so far as apt," which the Appeals Court has correctly interpreted to mean that payment may be delayed until the legislative requirements (i.e., definitely determined and due and payable) have been met. See Okerman, 69 Mass. App. Ct. at 779. Therefore, commissions that have not yet become due when an employee is terminated need not be paid on the date of termination, but the Wage Act does require payment once the commissions meet the definition of "wages."

The Superior Court incorrectly held that, even though Ms. Parker had done everything required to earn her commissions, they were not subject to trebling under the Wage Act because they were not due and payable "as of plaintiff[']s last day of employment" (Blue Br. 52) – that is, that they ceased to be "wages" once she was fired. This interpretation is contrary to the language of the statute because, once

commissions are "earned," see Awuah, 460 Mass. at 492, the "only limitation contained in the act's language [is] that commissions be 'definitely determined' and 'due and payable." Weems, 453 Mass. at 151. The Wage Act is not limited by its terms to commissions that come due before an employee quits or is fired, and our courts have cautioned against "improperly engraft[ing]" restrictions not contained in the text of the Wage Act.[3] Okerman, 69 Mass. App. Ct. at 776. Thus, in Israel v. Voya Institutional Plan Svcs., LLC, 2017 WL 1026416 (D. Mass. Mar. 16, 2017), the court

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[3] While Defendants suggest that the Wage Act must be read "narrowly," Prozinski v. Northeast Real Estate Servs., LLC, 59 Mass. App. Ct. 599, 603 (2003), that statement derives from dicta in a limited number of early Appeals Court cases discerning limitations in the Wage Act based on its title and "from the placement of the provision in the weekly payment statute." Commonwealth v. Savage, 31 Mass. App. Ct. 714, 716 (1991). But since Prozinski and Savage, this Court has discerned not a "narrow" remedy but a "legislative purpose behind the Wage Act . . . to provide strong statutory protection for employees and their right to wages." Crocker v. Townsend Oil Co., Inc., 464 Mass. 1, 13 (2012). The Appeals Court itself has also recognized that "the [W]age [A]ct applies more broadly than Savage suggested," Okerman, 69 Mass. App. Ct. at 779, yet employers continue to cite Prozinski and Savage in attempts to inappropriately limit the scope of the Wage Act. This Court should clarify the broad remedial nature of the Wage Act and state explicitly that these dicta are not good law. Courts should only apply the limitations to the Wage Act explicitly included by the Legislature. See Weems, 453 Mass. at 151-55.

awarded summary judgment to an employee whose employer refused to pay him commissions, purportedly conditional on continued employment, that he had earned before he resigned. Id. at *1, *5. It was not relevant that the commissions had not yet been determined when the employee left: "Israel did the work to earn the commissions prior to his resignation, and the fact that it may have taken Voya a few months to make a final calculation as to the exact amount of the commissions is not sufficient to take them outside the scope of the Wage Act." Id. at *7.

If commissions ceased to be wages once employees were terminated, then employers who fired commission-earning employees would gain a double windfall, both depriving the employees of wages they had done everything necessary to earn, and also eliminating the employees' recourse under the Wage Act.[4] The

[4] As the court in Israel also wrote, construing "wages" to exclude commissions not yet due at the end of employment would "permit, even encourage, employers to evade the law by imposing lengthy delays on the payment of commissions and conditioning the payments on continued employment. Indeed, in this case, the amount that Israel stands to lose is determined entirely by the length of time that Voya delayed payment; if Voya had imposed a six-month lag on commission payments, for example, then Israel would have potentially lost six months' worth of

Legislature could not have intended this type of perverse incentive. This Court should clarify instead that, as to commissions that meet the Wage Act's requirements, the statute requires prompt payment whether or not the employee is still employed. Cf. McAleer v. Prudential Ins. Co. of Am., 928 F. Supp. 2d 280, 290 (D. Mass. 2013) (noting lack of justification for refusing to pay commissions earned while employed simply because they were not due and payable before termination). This straightforward interpretation mandates reversal of the Superior Court's denial of treble damages.

b. Conditioning Payment of Commissions on Continued Employment Is an Unlawful "Special Contract" And Is Therefore Unenforceable.

The Superior Court also erred in giving effect to Defendants' commission policy purporting to require continued employment in order for salespersons like Ms. Parker to receive their full commissions on sales. The trial judge noted that the jury found that the amount of $349,098.48 "would have been due and payable to Parker one year later if she had not been fired,"

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commissions. It does not appear that the Wage Act permits an employer to withhold commissions in such a manner . . . ." Israel, 2017 WL 1026516 at *7.

but nonetheless held that the termination allowed the employer to avoid treble damages. (Blue Br. 51.) But employers cannot get around the Wage Act's requirements by taking away earned wages from employees who are fired or leave. "No person shall by a special contract with an employee or by any other means exempt himself from" the requirements of the Wage Act. G.L. c. 149, § 148, sixth par.

In Electronic Data Sys. Corp. v. Attorney General, 454 Mass. 63 (2009) (EDS), this Court addressed an employer's policy that purportedly caused employees to forfeit all vacation time if they were no longer employed – even if their departure was due to termination, as with the individual employee at issue in that case. Id. at 66-67. Under the Wage Act, "wages" explicitly include "any holiday or vacation payments due an employee under an oral or written agreement," and therefore vacation time must be paid out when an employee is terminated. G.L. c. 149, § 148, first par. The employer in EDS tried to circumvent this requirement by placing conditions on vacation time, specifically including in its vacation policy: "If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused

vacation time . . . ." EDS, 454 Mass. at 65. This Court agreed with the Attorney General that this condition was invalid because employees earn vacation time by working throughout the year, and employers cannot deprive them of that earned time (or its monetary equivalent) by terminating them. See id. at 71. "[T]he Wage Act would have little value if employers could exempt themselves simply by drafting contracts that placed compensation outside its bounds." Id. at 70. Attempting to condition these wages on continued employment was considered a "special contract" that the Wage Act rendered unenforceable. See id. at 70-71.

The same analysis should apply to Defendants' commission policy. Based on the jury's findings, Defendants had agreed to pay commissions on the entire value of the Eaton contract, with only two contingencies: that Eaton not exercise its option to terminate the contract, and that Ms. Parker remain employed with Defendants. The former is entirely appropriate and, as Defendants admit, "the key contingency that would have made a commission due and payable" but did not occur until long after Ms. Parker's termination. (Red Br. 33.) Once the

customer declined to cancel the contract, Ms. Parker's fully earned commission was due and, as the jury found, should have been paid. The only obstacle was, as in EDS, "the sole [remaining] contingency of an active employment status." (Blue Br. 15.) The Wage Act does not "allow employers free rein to deny or condition earned [compensation] in any way they choose, so long as they include the language to do so in an employment [policy]." EDS, 454 Mass. at 70-71. If Ms. Parker had still been employed in April 2017, there is no question that her commissions would have been considered wages. Denying these commissions because she was no longer employed, a contingency entirely unrelated to the work she did to earn the commissions or the revenue received by the employer, is exactly the type of "special contract" that is prohibited by the Wage Act. It is unenforceable, and once it is removed from the analysis it is clear that the unpaid commissions are lost wages subject to trebling under the Wage Act.

c. Employers Cannot Circumvent the Wage Act By Terminating Employees Who Have Earned Commissions That Are Not Yet Due and Payable.

Paying earned commissions to terminated employees is an implied part of the employment contract, which is therefore protected under the Wage Act. In Gram v. Liberty Mut. Ins. Co., 384 Mass. 659 (1981) (Gram I), this Court held that fair dealing required an employer who terminated an employee without good cause to pay future commissions reasonably attributed to the plaintiff's work while employed, even without evidence of the employer's improper motive. See id. at 672 & n.10. The Court's purpose was to "deny [the employer] any readily definable, financial windfall resulting from the denial to Gram of compensation for past services." Gram v. Liberty Mut. Ins. Co., 391 Mass. 333, 335 (1983) (Gram II). Because the covenant of good faith and fair dealing is implied in every employment contract, see Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407-08 (1995), a commission plan like Defendants' must be understood to include payment of earned commissions after termination. See Gram I, 384 Mass. at 672. Defendants' attempt to disclaim this inherent legal duty must be rejected.

More specifically in this case, the Defendants' bad-faith termination of Ms. Parker's employment constituted a prohibited "special contract or other means" of circumventing the Wage Act. Defendants purported to make part of Ms. Parker's commissions contingent on her continued employment, but unilaterally made fulfillment of that contingency impossible by terminating her. That maneuver, if permissible, could render many employees' commissions illusory or subject to the whim of their employers. This Court had no difficulty holding that employers could not deny employees earned vacation pay in this manner. See EDS, 454 Mass. at 71. The same should be true of commissions. Just a few months ago, a federal court persuasively held, with reference to a policy "that sales-related pay will not be disbursed if the employee is terminated," that "the prescribed withholding of earned commissions constitutes a special contract in violation of the [Wage] Act." Levesque v. Schroeder Inv. Mgmt. N. Am., Inc., 368 F. Supp. 3d 302, 314 (D. Mass. 2019). Employers are free to incentivize productive employees to stay by offering discretionary bonuses, which are not subject

to the Wage Act,[5] but they cannot hold employees' earned commissions hostage and take them away whenever they decide to terminate the employment relationship.

While employees like Ms. Parker have common-law claims for bad-faith termination (indeed, the jury found for Ms. Parker on such a claim), those remedies are not sufficient to vindicate the policies of the Wage Act. This Court has long found it unlawful to terminate an employee in bad faith to avoid payment of commissions on past work, regardless of whether the employee engaged in protected activity. See Fortune v. National Cash Register Co., 373 Mass. 96, 104-06 (1977) (finding violation of implied covenant of good faith and fair dealing where employer terminated employee without cause to avoid paying sales commissions); Gram I, 384 Mass. at 671-72 to future renewal commissions on past sales where employee discharged without cause). But in order to vindicate

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[5] See Weems, 453 Mass. at 153-54 (certain bonus compensation not subject to Wage Act "not because they are labeled bonuses, but because the employers are, apparently, under no obligation to award them"); cf. Harrison v. NetCentric Corp., 433 Mass. 465, 473 (2001) (unvested stock grants not subject to rule of Fortune and Gram I where they were "not earned compensation for past services, but compensation contingent on [future] continued employment").

that common-law right against bad-faith termination, an employee may have to pay legal fees out of pocket, without any ability to recoup them from the employer, and cannot claim for multiple or punitive damages. The Wage Act imposes "enhanced penalties and remedies" in addition to the common-law claims that remain available to employees. See Lipsitt v. Plaud, 466 Mass. 240, 249-52 (2013). Where employers like these Defendants refuse to pay due and payable commissions, whether during or after an employee's employment, they should be subject to the full remedies of the Wage Act, including treble damages for lost wages.

II. Ms. Parker's Unpaid Commissions Also Qualify As "Lost Wages" Because She Lost the Opportunity to Remain an Employee Until They Became Due and Payable Because Of Defendants' Unlawful Retaliation.

As a separate basis for awarding treble damages on Ms. Parker's retaliation claim, the unpaid commissions constituted "lost wages" under the Wage Act because the jury found that they would have been paid but for Defendants' unlawful and retaliatory termination. Defendants argue strenuously that "any commissions purportedly due to Ms. Parker . . . were not 'due and payable' when she was terminated" (Red Br. 39), but the timing of her termination was

Defendants' choice. If she had still been employed in April 2017, the unpaid commissions would have been wages even as Defendants interpret the Wage Act. Ms. Parker "lost" those "wages" because of Defendants' retaliation. Defendants offer no plausible interpretation of the term "lost wages" that would exclude commissions that are not paid due to retaliation.

The statutory structure and case law support this understanding of the damages available in a Wage Act retaliation claim. By passing the antiretaliation provision of the Wage Act, "the Legislature clearly intended to sanction severely those employers who retaliate against employees who complain about purported wage violations," a purpose that would not be served by limiting the remedies available. See Fernandes v. Attleboro Hous. Authy., 470 Mass. 117, 127 (2014). This Court has recently held that, to show a violation of the payment of wages provision of the Wage Act, G.L. c. 149, § 148, plaintiffs must point to earned wages for which "the employees' work actually ha[s] been performed" and "the wages [are] presently . . . due to be paid by the employer."

Calixto v. Coughlin, 481 Mass. 157, 161 (2018).[6] But retaliation claims are fundamentally different from underlying claims for nonpayment of wages. "In order to maintain an actionable claim under § 148A, a plaintiff is not obliged to successfully prove her right to seek recovery of the untimely paid 'wages' in question. It is enough that a plaintiff . . . reasonably believed the remuneration in question fell within the scope of the Wage Act." Fraelick v. PerkettPR, Inc., 83 Mass. App. Ct. 698, 706 (2013) (emphasis supplied). See Smith v. Winter Place LLC, 447 Mass. 363, 367 (2006) ("employee who reasonably believes" in complaint of violation of "rights under the laws governing wages and hours" protected from retaliation).

While a nonpayment claim applies only to previously earned wages, the same is not true for retaliation claims. Both this Court and the U.S. Court of Appeals for the First Circuit have affirmed judgments of treble back pay for retaliation under the Wage Act. See Fernandes, 470 Mass. at 119; Travers v.

[6] As discussed above, the jury found that Ms. Parker earned these wages, and they were due and payable long before the trial court's judgment.

Flight Servs. & Sys., Inc., 808 F.3d 525, 531, 538 (1st Cir. 2015). An employee could have a viable retaliation claim even if she had no "lost wages or other benefits," G.L. c. 149, § 150, second par., for instance if she only sustained emotional distress or reputational damage after being "penalized by an employer in any way" for asserting her rights under the wage and hour laws. G.L. c. 149, § 148A, first par. But the treble damages remedy in § 150 is not limited to "wages" that are "lost" in any particular manner – the Legislature could have specified "back wages" or "unpaid wages," but instead it used the more general term "lost." The state troopers subject to unpaid furloughs in Massachusetts State Police Commissioned Officers Ass'n v. Commonwealth, 462 Mass. 219 (2012), could not bring a nonpayment claim for lost opportunities to earn wages in the future because § 148 only applies to earned wages; they had not lost any wages previously "earned." See id. at 225-26. The same is not true for a retaliation claim under § 148A, which has a distinct purpose "to encourage enforcement of the wage laws by protecting employees who complain about violations of the same." Smith, 447 Mass. at 368.

The category of "lost wages and other benefits" must be correspondingly broader for a retaliation claim than for a nonpayment claim; it must be understood to include back pay and front pay causally linked to a retaliatory act. Juries are routinely instructed that back pay is "the amount of the plaintiff's <u>lost earnings</u> from the date of the adverse employment decision until [the date of judgment]" and includes "the value of <u>employment benefits, and health insurance benefits</u>" that the plaintiff would have received but for the defendant's unlawful acts. Lipchitz, Wilson, et al., <u>Massachusetts Superior Court Civil Practice Jury Instructions</u> § 5.3.2 (3d Ed., 2d Supp. 2018) (emphasis supplied). Similarly, an award of front pay "is intended to compensate a plaintiff for the loss of future earnings" due to an unlawful termination. <u>Haddad</u> v. <u>Wal-Mart Stores, Inc. (No. 1)</u>, 455 Mass. 91, 102 (2009); <u>accord</u> <u>Selmark Assocs</u>. v. <u>Ehrlich</u>, 467 Mass. 525, 545 n.36 (2014) (describing front pay as "consequential damages in the form of lost future earnings and benefits").[7] The damages

[7] These cases under G.L. c. 151B equally inform the remedies available for retaliation under G.L. c. 149, § 148A. <u>See</u> <u>Smith</u>, 447 Mass. at 364 n.4 (finding "no

remedies of back pay and front pay, when awarded, are the jury's finding of what "lost wages and other benefits" the defendant's retaliation has caused – they are instructed using virtually that same language. Ms. Parker's unpaid commissions can easily be understood as a jury award of back pay, which the judge found supported by the evidence, and which consequently comes within the Wage Act's core remedy for retaliation.[8]

The implications of excluding Ms. Parker's unpaid commissions from the category of "lost wages" would also be absurd and contrary to the statutory purpose. See Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375-376 (2000) ("If a sensible construction is available, we shall not construe a statute . . . to produce absurd results."); Sullivan

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reason to interpret the retaliation provision of the wage laws differently" from the retaliation remedies under c. 151B).

[8] It underscores the seriousness with which the Legislature treated Wage Act retaliation that it applied the treble damages remedy to "lost wages" such as back pay and front pay. It is up to the Legislature to determine which conduct warrants multiple damages. Cf. Fontaine v. Ebtec Corp., 415 Mass. 309, 321-22 (1993) (noting that Legislature prescribed double or treble damages for willful acts of age discrimination but not for other types of discrimination under G.L. c. 151B).

v. Brookline, 435 Mass. 353, 360 (2001) ("[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature . . ."). Imagine that an employer, Salescorp, employs a sales representative, Jones, with a 10% commission due and payable after goods are delivered to the customer, 90 days after the sale. Jones believes that Salescorp has paid his commissions late in the past, so after he makes several large sales, he tells his supervisor that the Wage Act requires prompt payment of his commissions when due, that Salescorp has violated this requirement in the past, and that he will file a complaint with the Attorney General if it happens again. If Salescorp doubts its ability to pay on time, it faces the real possibility of treble damages if Jones files a complaint soon after the commissions are due. See G.L. c. 149, § 150, first par. ("The defendant shall not set up as a defence a payment of wages after the bringing of the complaint."). However, if the commissions do not get trebled before they are due and payable, Salescorp can avoid the risk of treble damages by firing Jones in retaliation for asserting his rights – exactly what the Legislature wished to

avoid.[9] See Smith, 447 Mass. at 368 (rejecting interpretation of § 148A that would have "encourage[d] employers to terminate employees as soon as they caught wind of any internal concerns about potential wage violations, so that they might obviate potential penalties and retaliation claims . . ."). In that case, as in this one, the unpaid commissions must be considered lost wages so that Salescorp has no incentive to fire Jones. In order to effectuate the statutory purpose of protecting whistleblowers, an employer should be worse off, or at least no better off, for engaging in illegal retaliation. Because Ms. Parker "lost" the "wages" that she earned, and would have been paid, as a result of Defendants' retaliation, those commissions should be trebled.

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[9] Indeed, even if Jones sued Salescorp for nonpayment of wages, the Superior Court's reasoning would allow Salescorp to reduce its damages by terminating his employment before more commissions came due, effectively and unjustifiably moving the unpaid commissions from the category of "lost wages and other benefits" to mere "other damages."

CONCLUSION

For the foregoing reasons, Amici urge this Honorable Court to reverse so much of the judgment of the Superior Court as refused to treble the unpaid commissions as "lost wages" under the Wage Act, and otherwise affirm.

Respectfully Submitted for
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CERTIFICATE OF COMPLIANCE

I, David A. Russcol, hereby certify that I have complied with all relevant provisions of Massachusetts Rules of Appellate Procedure 16, 17, 19, and 20 with respect to the contents, format, filing, and service of the within brief.

This brief was printed in 12-point Courier New font, with 10 characters per inch, and contains 27 non-excluded pages.

/s/ David A. Russcol
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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12703

FRANCOISE PARKER,
Plaintiff-Appellant,

v.

ENERNOC, INC., and
ERIC ERSTON,
Defendants-Appellees/Cross-Appellants.

CERTIFICATE OF SERVICE

I, David A. Russcol, hereby certify that, on September 10, 2019, I served the foregoing Brief *Amicus Curiae* of Massachusetts Employment Lawyers Association, Immigrant Worker Center Collaborative, Lawyers for Civil Rights, and Fair Employment Project in Support of Plaintiff-Appellant on the following counsel of record by submitting it through the eFileMA system:

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