

**Labor & Employment Alert  
January 2019**

**Supreme Judicial Court Issues Important Decision Protecting Employers  
– Back Pay Awards Do Not Constitute “Wages” Under the Wage Act and  
Thus Are Not Subject To Trebling**

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In a recent decision, *Calixto v. Coughlin*, the Massachusetts Supreme Judicial Court (“SJC” or “Court”) declined to classify a court-ordered “back pay” award as “wages” under the Massachusetts Wage Act (“Wage Act”). In response to a request for briefs from the Court, Murphy, Hesse, Toomey & Lehane, LLP (MHTL), on behalf of its public and private clients, submitted an *amicus* brief, supporting the defendant employer’s position. The Greater Boston Chamber of Commerce and the New England Legal Foundation also submitted *amici* briefs. This decision – a significant victory for employers – has far-reaching consequences and helps to protect employers from punitive and excessive penalties in many employment contexts. Had the case been decided for the plaintiffs, it could have had significant ramifications for employers, extending the punitive damage scheme under the Wage Act (strict liability, treble damages, attorneys’ fees, individual liability, etc.) to a myriad of different employment contexts.

**The Underlying Case**

The plaintiffs in this case brought a class action lawsuit under a federal statute, the WARN Act, because their employer ceased operations and laid off its entire workforce without providing a 60 day notice period (as required by the WARN Act) or pay in lieu of this notice. The federal district court entered default judgment against the company and ordered a back pay award of almost \$2 million dollars in total for this violation. After failing to be able to collect this amount from the defunct company, the same plaintiffs brought suit in state court under the Wage Act, suing the company’s former corporate officers in their personal capacity and seeking Wage Act penalties, including treble damages (nearly \$6 million dollars in this case) which are mandatory under the Wage Act for successful claims.

The Wage Act provides for strict timelines for the payment of earned wages (for example, wages must be paid weekly or bi-weekly “within six days of the termination of the pay period during which the *wages were earned* if employed for five or six days in a calendar week . . .”), and also provides that wages must be paid “in full on the day of an employee’s discharge.” In short, the plaintiffs claimed that the \$2 million WARN act

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damages constituted wrongfully withheld “earned wages” under the Wage Act, which should therefore be trebled and for which the officers in the company were individually and personally liable.

The Defendants submitted a motion to dismiss which the Superior Court allowed. The Supreme Judicial Court granted direct appellate review.

### **The Court’s Decision**

The SJC agreed with the Defendants’ (and MHTL’s) position. The Court ruled that the back pay award in this case does not constitute “wages earned” under the Wage Act and therefore the Superior Court properly dismissed the underlying claim. The Court also dismissed the plaintiffs’ breach of fiduciary duty claim.

Central to the Court’s decision was its analysis of the language of the Wage Act which by its terms protects only “wages earned.” Applying the “plain and ordinary” meaning of those words, the Court determined that back pay awards do not qualify as “wages earned” because they are not payments for labor or services that were “actually performed.” As the Court pointed out, back pay is meant to compensate a variety of different types of employment law violations under State and Federal law. In short, it is meant to compensate employees for the amount they “would have earned” had a violation of the statute not occurred.

### **Impact on Employers**

The Court’s reasoning is critical as it extends the impact of this case beyond federal WARN Act violations, which are relatively rare, to back pay awards in many different contexts. As MHTL pointed out in its amicus brief, there are dozens of laws, both state and federal, which permit an award of back pay as a remedy in cases where an employee was suspended, demoted or terminated in violation of the applicable statute or common law claim and lost pay as a result. These laws include Title VII, the Fair Labor Standards Act, and the National Labor Relations Act, M.G.L. c. 150E, and numerous common law claims, among many others, covering topics for example, such as discrimination, harassment, equal pay, retaliation, whistle blowing, and civil rights. Needless to say, extending the reach of the Wage Act to back pay awards in this case would have had dramatic – and likely deleterious – effects on employers across the state by imposing extreme Wage Act penalties for non-Wage Act violations.



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As the Court reasoned, however, “earned wages are not the equivalent of back pay . . .,” and this is true in multiple contexts: “for wages earned but unfairly compensated, as in cases of unequal pay, or for wages not earned, due to failure to hire because of discrimination or the failure to provide notice, as under the WARN Act.” Though not specifically addressed, the Court’s reasoning would presumably apply to other types of common labor and employment law damages awards and payments such as front pay, and emotional distress damages.

A copy of the Court’s decision can be found [here](#).

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*This Alert was drafted by Attorney Kier Wachterhauser. The Amicus Brief was prepared by Attorneys Geoffrey Wermuth and Arthur Murphy. If you have any questions about this issue, please contact the above attorneys or the attorney responsible for your account, or call (617) 479-5000.*

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