

No Good Deed Goes Unpunished

March 4, 2013

In a decision handed down on March 4, 2013, the Massachusetts Supreme Judicial Court dealt a blow to a Massachusetts employer that made gratuitous severance payments to a former employee in a bid to avoid litigation. [*Dixon v. City of Malden*](#), SJC-11137 (March 4, 2013).

Gary Dixon worked for the City of Malden as the director of a city-owned nursing home. When the City terminated Dixon in 2007, it failed to cash-out his accrued, unused vacation days because it had a “policy” of not paying out vacation to employees it terminated “for cause.” Although the parties never reached a formal resolution of Dixon’s complaints that the City improperly terminated him and denied him vacation pay, the City continued paying Dixon his full salary for three months after it terminated him. It did not require Dixon to sign a “release of claims,” nor did it refer to the salary continuation as a payout of Dixon’s accrued vacation.

Once the salary continuation ceased, Dixon sued the City to collect his outstanding vacation balance of more than \$13,000. The City denied that it owed Dixon anything, arguing that the salary continuation amounted to nearly \$20,000, some \$6,000 more than the City owed Dixon for his accrued vacation. The trial court agreed with the City. It held that while the City technically violated the Wage Act by failing to cash out Dixon’s accrued vacation on the date it terminated him, Dixon “came away with more from the City than was owed.”

In an unsurprising decision, the SJC overturned the trial court and reaffirmed the decision it reached in [*Somers v. Converged Access*](#), which held that any “violation of the Wage Act results in damages,” regardless of the employer’s good faith mistake, and regardless of any windfall enjoyed by the plaintiff.

In *Dixon*, the SJC refused to credit the City’s salary continuation towards its vacation obligation because the salary continuation was “not a substitute for payment for accrued vacation time.” Why? The court reasoned that the City had not characterized the “salary payments as payment for vacation accrual,” and had not communicated “in any way that the salary continuation was payment for accrued vacation time.” This semantic failure resulted in the City owing Dixon the additional \$13,000, along with the costs and fees associated with bringing his lawsuit.

Held: An employer’s failure to pay wages, whether cash, commission, vacation or holiday pay, cannot be mitigated by gratuitous, after-the-fact payments. Employees who have not received payment for unused vacation time to which they are entitled may seek relief under G. L. c. 149, § 150.

Where did the City go wrong? Let us count the (many) ways.

Let's start with the City's vacation policy, which permitted it to withhold vacation payout if it terminated an employee "for cause." Massachusetts does not require employers to provide paid vacation. However, if an employer offers vacation as a benefit, it must cash out accrued but unused vacation upon an employee's separation. This requirement applies regardless of whether the employee quits or is fired. Why? [General Law c. 149, § 148](#) describes the word "wages" as including "vacation payments."

Second, if an employer terminates an employee, all wages must be paid "in full" and "on the day of the discharge." [General Law c. 149, § 148](#). Even if the City had called the continued payments to Dixon "vacation payout" rather than "salary continuation," it still would have run afoul of the requirement to pay all wages on the day of termination.

Nonetheless, the SJC noted that "had the city paid the plaintiff payments labeled as vacation pay, and merely been late in those payments, the city would not have been foreclosed from offsetting those payments from what was owed." Said another way, the City would have owed Dixon a lot less had it only called the post-termination payments by another name.

Third, the City either did not have a "use it or lose it" vacation policy or it had a *very* generous one. At the time he was terminated, Dixon had accrued 10 weeks of unused vacation, totaling more than \$13,000 — no small chunk of change. A "use it or lose it" policy would have helped the City mitigate its financial obligation to a departing employee like Dixon. A "use it or lose it" policy refers to an employer's requirement that employees use their allotted yearly vacation time or forfeit the paid time off. Under such policies, some employers permit employees to "roll over" a certain number of vacation days. However, a good policy will cap the number of vacation days that an employee has "in the bank" at any one time.

Fourth, the City did not condition the continuation of Dixon's salary on his execution of a release of claims. When employment relationships go south, employers often will give employees something to which they are not otherwise entitled, such as salary continuation or a lump sum of money. In exchange, the former employee agrees not to sue the employer. Such a "release of claims" contained in a separation agreement is akin to an insurance policy: pay a little now to avoid a lot later. It's curious then why the City would have continued to pay Dixon — ostensibly to avoid litigation — without requiring him to promise the same.

Take-Aways:

- Review your vacation policy. Remember that vacation is considered a wage under Massachusetts law. Employers must pay out accrued but unused vacation upon an employee's separation with the employer. Such payments are due on the date of termination if the separation is involuntary. It is due on the next regularly scheduled payroll if the separation is voluntary.
- To avoid massive payouts, implement a "use it or lose it" vacation policy. Determine a reasonable cap of days that employees can bank at any one time.

- Invest in the insurance policy called a separation agreement. It is much less expensive to pay an involuntarily terminated employee severance than to engage in litigation and its associated distractions.
- Consult with an experienced employment attorney to help you draft an enforceable separation agreement. The SJC reminded us only weeks ago that Massachusetts has some [quirky release requirements](#), particularly with respect to the release of Wage Act claims.