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On January 25, 2011, Massachusetts' highest court has held that the Massachusetts Wage Act limits an employer's right to deduct from employee wages the costs of property damage, even where an employer determines that an employee is at fault for the damage, and the employee agrees to accept the deduction.

In *Camara v. Attorney General*, the employer, ABC Disposal Service, Inc. ("ABC"), established a policy under which drivers at fault for damaging company trash trucks were given the option of either accepting undetermined disciplinary action or entering into an agreement to set-off the cost of the damage against their wages. ABC alone made the determination of a driver's fault in an accident and the amount of damages due. This finding was not subject to an internal appeal process. Rather than accepting disciplinary action for their accidents, some drivers entered into written agreements with ABC to pay for the damages through a deduction or "set-off" against their wages.

After conducting an investigation, the Attorney General's Office issued a civil citation against ABC (and Camara, ABC's Vice-President) requiring payment in excess of \$21,000 as restitution and in excess of \$9,000 as a civil penalty. After a hearing, the Division of Administrative Law Appeals ("DALA") upheld the Attorney General's citation. Upon ABC's appeal in the Superior Court, a judge overturned the DALA decision and invalidated the citation.

The SJC upheld the Attorney General's civil citation against the employer and found that the Massachusetts Wage Act, M.G.L. c.149, §148 prohibits parties from entering into "special contracts" to exempt themselves from the requirements of the Wage Act. The SJC affirmed the Attorney General's finding that the written agreement between ABC and those employees who elected that approach in lieu of discipline was an unenforceable "special contract" even if the agreement was voluntary.

The SJC also held that the deduction did not constitute a "valid setoff," a term used, but not defined in the Wage Act. The SJC affirmed the Attorney General's narrow definition of this term to apply only in narrow circumstances, including those "where there exists a clear and established debt owed to the employer by the employee." The Court held that a process whereby ABC unilaterally determined liability and the amount of damages, with no role for an independent decision maker did not amount to "a clear and established debt owed to the employer by the employee."

Notwithstanding the ruling against the employer, the SJC provides useful guidance by indicating a list of non-exclusive examples of circumstances where an employer may take a "valid set-off":

- Proof of an undisputed loan or wage advance from the employer to the employee;
- Theft of the employer's property by the employee as established in an "independent and unbiased proceeding" with due process protections for the employee;
- When the employer has obtained a judgment against the employee for the value of the employer's property.

This decision makes clear that Massachusetts permits wage deductions as a result of company losses caused by employees' negligent or willful conduct only in very limited circumstances. Courts, relying on the *Camara* decision and the text of the Wage Act, will be reluctant to approve of any set off against employees' wages. Because businesses face substantial potential fines, triple damages and because certain managers can be held personally liable for violations of the Wage Act, employers should refrain from taking any deduction from wages unless it meets one of the narrow exceptions set forth in this decision. Employers should consult with their MBJ attorney to discuss whether it is

appropriate to make a deduction or set off from any wages.

*Nathan L. Kaitz is an attorney with Morgan, Brown & Joy, LLP. Nathan may be reached at (617) 523-6666 or at [nkaitz@morganbrown.com](mailto:nkaitz@morganbrown.com). Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.*

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