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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the Trial Judge correctly concluded that the agreements entered into between ABC Disposal, Inc., and its employees, by which the employee voluntarily agrees to pay for damages they have caused to company property and/or third party's personal property, through weekly payments from their wages, do not violate the special contract provision of the Wage Act, M.G.L. c. 149, §§148-150, since the wages due to the employee are promptly credited to that employee and a present benefit is received.
2. Whether the Trial Judge correctly concluded that the deductions made from the employee's wages for damage done to company property and/or third party's personal property by the employee, where fault has been determined and the amount of the damage is ascertainable by calculation, constitute "valid set-off" deductions permissible under M.G.L. c. 149, §§148-150.

**STATEMENT OF CASE**

**Nature of the Case**

The nature of the present action involves a dispute between the Appellant and Appellees as to the

applicability of Massachusetts General Laws, Chapter 149, § 148 et seq, the Wage Act, to agreements entered into between the Appellees and their employees for the repayment of damages caused by said employees to company vehicles and/or third party's personal property.

**Prior Proceedings**

Prior to February 12, 2007, the Fair Labor Division of the Attorney General's Office ("Appellant") conducted an audit of ABC Disposal, Inc. ("ABC") in response to complaints from ABC employees regarding deductions made from their wages. (R.A. 00089). On February 12, 2007, the Attorney General's Office, Fair Labor Division, issued a citation, WH070009, against Michael A. Camara ("Mr. Camara") and ABC (collectively "Appellees") for an intentional violation of G.L. c. 149, §148. (R.A. 00089). The citation required Mr. Camara and ABC to make a restitution payment of \$21,487.96 and to pay \$9,410.00 as a penalty. (R.A. 00084). On February 16, 2007, Mr. Camara and ABC filed an appeal from the citation with the Division of Administrative Law Appeals, ("DALA"). (R.A. 00089). The parties agreed to file Cross-Motions for Summary Decision together with an agreed to Joint Statement of

Facts. (R.A. 00035). The Administrative Magistrate for DALA issued an administrative decision upholding the Attorney General's citation. (R.A. 00069).

On April 14, 2008, Mr. Camara and ABC filed a Complaint in the Bristol County Superior Court pursuant to G.L. c. 30A for judicial review of the Administrative Magistrate's decision. (R.A. 00084). Mr. Camara and ABC filed with the Bristol County Superior Court a Motion for Judgment on the Pleadings, along with the Attorney General's Opposition to said Motion for Judgment on the Pleadings and a Reply Brief to the Opposition. (R.A. 00079;00064;00178). On June 25, 2009, after a hearing, the Honorable David A. McLaughlin issued his Memorandum of Decision and Order on Plaintiff's Motion for Judgment on the Pleadings in favor of Mr. Camara and ABC overturning the DALA ruling and invalidating the Attorney General's citation. (R.A. 00181). Justice McLaughlin concluded that the Appellees did not violate the Wage Act since the employees wages were properly credited to that employee and the set off deductions for the damages conferred an immediate benefit on the employee as it reduced the employees liability. (R.A. 00182). Further, Justice McLaughlin concluded that Appellees were entitled to recovery

those amounts as a valid set-off permissible under G.L. c. 149, §150. (R.A. 00183).

On June 25, 2009, the Superior Court entered a Notice of Final Judgment. (R.A. 0185). Thereafter, the Attorney General filed a Notice of Appeal, and on September 2, 2009, the case was entered into the Appeals Court. (R.A. 00186).

**Disposition in the Trial Court**

The Trial Court, the Honorable McLaughlin, J. presiding, concluded that the Division of Administrative Law Appeals' Decision on the Parties Motion for Summary Decision, upholding the citation issued against the Appellees, was based on an error of law. Justice McLaughlin concluded that Appellees did not violate the Wage Act since the employees wages were properly credited to that employee and the set off deductions for the damages conferred an immediate benefit on the employee as it reduced the employees liability. (R.A. 00182). Justice McLaughlin further concluded that Appellees were entitled to recovery those amounts as a valid set-off permissible under G.L. c. 149, §150. (R.A. 00183).

Based on Justice McLaughlin's Decision, it was Ordered and Adjudged that: (1) The Appellees Motion for

Judgment on the Pleadings was allowed; (2) The Summary Decision of the Administrative Law Appeals was reversed; and the Motion of the Appellant to Affirm the Decision and Order of the Division of Administrative Law Appeals was denied. (R.A. 00185).

**STATEMENT OF FACTS**

ABC Disposal Service, Inc., is a Massachusetts corporation, with a usual place of business at 1245 Shawmut Avenue, New Bedford, Bristol County, Massachusetts. (R.A. 00035). Michael Camara is the Vice President of ABC. Camara is a statutory employer of ABC's employees pursuant to G.L. c. 149 and c. 151. (R.A. 00035). ABC provides curbside collection and disposal of solid waste and recycling for participating households and small businesses within the State of Massachusetts. (R.A. 00035). As such, ABC employees must drive from house to house and to business to business to collect said solid waste. (R.A. 00036). On occasion, in association with driving said collection trucks, ABC employees have caused damage to the trucks and/or personal property. (R.A. 00036).

In an effort to promote safety and decrease careless driving, ABC initiated a policy by which after a thorough investigation, if there is a determination

of fault on the part of the driver, he/she is given the option of either accepting disciplinary action, which may include a verbal or written warning or suspension, or, in the alternative, to enter into an agreement whereby the damages caused by the driver are setoff against the driver's wages. ABC has a written policy involving its "Accident reporting procedures:" which is contained in its Workplace Policies packet of information which is distributed to employees upon hiring. (R.A. 00036).

The procedures provide that the company can impose disciplinary action on employees who are involved in accidents or who cause damage to property when the accident or damage is determined to have been preventable. (R.A. 00036).

The procedures provide the employee who causes a preventable accident with two options: 1) pay for the damage or 2) receive a suspension and 90 days probation. If an employee chooses to pay for the damage, the accident does not become part of his or her personnel record. The procedures also provide that depending on the severity of the accident, termination of employment is possible. (R.A. 00036).

Although the Accident Reporting Procedures provide that ABC can impose a suspension and 90 days probation for drivers involved in a preventable accident, in practice, drivers who decide not to pay for damages caused in a preventable accident often receive a written warning but no suspension. (R.A. 00037).

The determination of fault is made only after the ABC Safety Officer completes the Accident Reporting Procedures in accordance with ABC's written policy, reviews the company's internal incident reports, the driver's accident kit prepared by the driver, photos of the accident, police reports if available, insurance reports if available and interviews the driver and any witnesses. The Safety Officer then reports his findings to the Safety Manager. If a determination is made that it was a preventable accident, the Safety Manager, after consultation with ABC management, offers the driver a choice of making payment for the damages or accepting discipline. (R.A. 00037). Once it is determined that the damage was caused by the actions of the driver, the driver may, but is not required to, voluntarily enter into a written agreement with ABC for the payment of the cost of the damage by a setoff

against wages due to the employee in lieu of accepting disciplinary action. (R.A. 00037).

The written agreement is for a liquidated amount based upon the actual damages resulting from the accident." (R.A. 00037). ABC employs a Safety Officer and a Safety Director for the purpose of investigating all accidents and determining whether they were preventable. (R.A. 00037). The Safety Officer, who is also the Environmental and Health Officer, has held this position with ABC since on or about January 2004. (R.A. 00038). Prior to working for ABC, he was the Environmental, Health and Safety Officer for Epic Co. for six years. He holds certifications from OSHA. (R.A. 00038).

The Safety Manager is also the manager of Human Resources. She has been with ABC for three years and has been employed in Human Resources for over 30 years. (R.A. 00038). The Safety Manager determines the amount of damages by appraisals or invoices from various sources. (R.A. 0038).

The driver has the choice of paying for the damages, accepting discipline or finding new employment. The setoff agreement between the driver and ABC is voluntary, and according to the records of ABC,

some have chosen not to enter into an agreement accepting other disciplinary action instead. (R.A. 00038).

According to the ABC Fleet Safety Program regarding Accident Reporting and Investigation, every accident is required to be reported, investigated and reviewed. (R.A. 00038). Each vehicle should be equipped with a Vehicle Accident Report Kit. (R.A. 00038). It is the responsibility of the driver to ensure that a Vehicle Accident Report Kit is in the vehicle. The kit should include an accident report and disposable camera. (R.A. 00038). Drivers are required to submit the written accident report to the Environmental Health and Safety Officer immediately following their involvement in a vehicle accident. (R.A. 00038). Supervisors and Safety Manager must be notified immediately of all accidents. (R.A. 00038).

The primary purpose of investigating an accident is to find out its cause and initiate action to eliminate or control similar vehicle accidents. (R.A. 00039). Another purpose is to determine whether the accident was preventable. (R.A. 00039). A preventable accident is one in which the drivers fail to exercise

reasonable precautions to prevent the accident from occurring. (R.A. 00039).

Each driver's supervisor is required to investigate all vehicle accidents with the Safety Officer. (R.A. 00039). The policy of the company was adopted with the view and hope of obtaining a reduction in accidents and increasing safety awareness by its drivers for the large trucks driven by them. (R.A. 00039). In response to ABC's policy, ABC's cost for damage done to vehicles and personal property has decreased each year since its implementation. (R.A. 00039). The cost for damage to vehicles and personal property has been reduced by 78 percent from 2003 to 2006. (R.A. 00039).

When employees have been found to have caused damage and voluntarily choose to permit a setoff by ABC, the setoff occurs on a weekly basis by an average of \$15.00 to \$30.00 per week. (R.A. 00039). The amounts set off by ABC by agreement with its employees for driver negligence resulting in damage to the trucks or personal property has in no instance reduced a driver's pay below that of minimum wage standards. (R.A. 00039).

The Fair Labor Division of the Attorney General's Office conducted an audit of the deductions made by ABC

from June 2004 through March 2006. (R.A. 00040). The audit revealed that ABC deducted \$21,487.96 from the wages of 27 employees during this time period for accidents in which ABC determined the employees were at fault, and the employees voluntarily chose to pay for the damages caused by them instead of other sanctions. (R.A. 00040).

On or about February 12, 2007, the Attorney General's Office, Fair Labor Division issued Citation WH070009 against Michael A. Camara and ABC for an intentional violation of G.L. c. 149, §148. (R.A. 00040). The citation included \$21,487.96 in restitution and a \$9,410.00 penalty. (R.A. 00040). On or about February 16, 2007, Michael A. Camara and ABC appealed the issuance of the citation to the Division of Administration Law Appeals. (R.A. 00040).

#### ARGUMENT

- A. THE AGREEMENTS ENTERED INTO BETWEEN ABC AND ITS EMPLOYEES DO NOT VIOLATE THE SPECIAL CONTRACT PROVISION OF THE WAGE ACT SINCE THE WAGES DUE TO THE EMPLOYEE ARE PROMPTLY CREDITED TO THAT EMPLOYEE AND THE DEDUCTIONS ARE TO SET-OFF AMOUNTS INCURRED BY ABC FOR THE DAMAGES CAUSED BY THE EMPLOYEE TO COMPANY PROPERTY AND/OR THE PERSONAL PROPERTY OF THIRD PARTIES.**

The Trial Judge (McLaughlin, J.), correctly concluded that the agreements entered into between ABC

and its employees do not violate the special contract provision of the Wage Act since the employee is credited for the wages they earn and the deductions confer an immediate benefit to the employee as it reduced their liability. (R.A. 00182).

The Wage Act prohibits an employer from withholding payment of earned wages. Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 703 (2005); See also Boston Police Patrolmen's Ass'n, Inc., v. Boston, 435 Mass. 718, 720 (2002) (the purpose of the Wage Act is to prevent the unreasonable detention of wages).

In the present action, ABC does not unreasonably withhold or detain earned wages of its employees by entering into the subject agreements. The employees receive their wages, however, they then instruct ABC to deduct from those wages the amounts necessary to repay ABC for the damages that they themselves have caused. (R.A. 00036; 00037). In Massachusetts, an employee is liable to their employer for any loss resulting from the employees' negligence with respect to a third party, just as he would be for any such injury to the employers property. See Buhl v. Viera, 328 Mass. 201, 202(1952). If, after a thorough investigation, the damage to the company property or the personal property

of a third party has been determined to have been caused by the fault of the employee, he/she is given a choice to accept disciplinary action or repay the actual amounts expended by ABC as a result of the employees negligence. (R.A. 00036; 00037). ABC does not automatically withhold or detain these amounts, or make it mandatory for the employees to sign the agreements before they receive the wages they have earned. The employee does not give up any statutory right to receive his or her earned wages. The employee can agree to make repayment of said amounts by way of he deductions or accept the disciplinary action. (R.A. 00036; 00037; 00038). In either scenario, the employee receives their wages and the benefits therefrom.

In his Decision and Order, Justice McLaughlin specifically found that:

"in the present matter, wages due to an employee are properly credited to that employee and a present benefit is received by the employee. A set off of \$15.00 to \$30.00 for damages by the employee confers an immediate benefit as it reduces the employee's liability." (R.A. 00182).

The present action is unlike any of the cases relied upon by the Administrative Magistrate for the DALA in issuing her administrative decision, or the Appellant in its Brief. The agreements entered into by

the employees in this matter do not require the employee to defer payment of wages until the company is financially stable. Dobin v. Cioview Corp., 2003 WL 22454602 (Mass.Super.Ct. Oct. 29, 2003) (agreements to defer wages were found to violate the special contract provision of the Wage Act). The agreements do not require the employee to sign a confidentiality agreement in return for payment of wages. Allen v. Intralearn Software Corp., 2006 Mass.App.Div. 71. (agreements that condition the payment of earned wages on the employee signing a confidentiality agreement found to violate the special contract provision of the Wage Act). Finally, the agreements do not contain a forum selection clause requiring the employee to commence civil actions against the employer, including those pursuant to the Wage Act, in a forum other than Massachusetts. Kirby v. Miami Systems Corp., 1999 WL 788442 (Mass.App.Div.) (holding that forum selection clause within an employment contract will not prevent a Massachusetts employee from bringing a claim under the Wage Act in Massachusetts).

The cases relied upon by the Appellant involve contracts which were signed by the employees in exchange for employment and payment of wages. To the

contrary, the Plaintiffs' set-off agreements do not place conditions on the employee's recovery of wages or the employee's employment. The set-off agreements allow an employee to make payment for damage that the employee has caused and is therefore liable, but only if the employee agrees to do so. Again, Justice McLaughlin found that cases such as Dobin were clearly distinguishable from the facts of the present case. (R.A. 00182).

Additionally, such indemnification agreements have been found not to violate wage statutes or public policy where the agreement was entered into voluntarily and the deductions made constitute sums of money actually expended by the employer for damage caused by an employee. Hanks v. Shreveport Yellow Cabs., 187 So. 817, (1939). (weekly deductions placed into an indemnification fund did not violate Louisiana Wage Statute since the deductions constituted sums of money actually expended by the company, pursuant to the employee's agreement, in caring for damages that arose and existed by reason of plaintiff's operation of his cab).

The ABC employees, who enter into the set-off agreements, receive the benefit of all of wages they

earn and the deductions constitute sums of money actually expended by ABC in caring for damages that arose and existed by reason of employees operation of the disposal trucks. The written agreement is for a liquidated amount based upon the actual damages resulting from the accident. (R.A. 00037). These damages are determined by appraisals or invoices from various sources. (R.A. 00038). ABC pays all sums associated with the employee's accidents, and only seek reimbursement after a thorough investigation. There is no condition upon the payment of the employees' wages.

Given the foregoing, Justice McLaughlin correctly held that the indemnification agreements do not violate M.G.L.A. 149, § 148 et seq, as the employee receives a benefit from the wages, the agreements are entered into voluntarily, and for a liquidated sum of money, which

is actually expended by the Appellees.<sup>1</sup> Therefore, Trial Court's decision should be upheld.

**B. THE TRIAL JUDGE CORRECTLY DETERMINED THAT THE DEDUCTIONS MADE BY ABC FROM THE EMPLOYEES WAGES CONSTITUTE "VALID SET-OFF" DEDUCTIONS, PERMISSIBLE UNDER THE WAGE ACT.**

The Trial Judge correctly concluded that, as a matter of law, the agreements entered into between ABC and its employees do not violate M.G.L., c. 149, §148 since the deductions made from the employees' wages constitute "valid set-off" deductions permissible under the statute. (R.A. 00183). M.G.L.A. 149, § 148 provides that an employer may make valid set-off deductions from the weekly wage of an employee. Pursuant to M.G.L.A. 149, § 148 "for the purpose of this section the words salaried employee shall mean any employee whose remuneration is on a weekly, bi-weekly, semi-monthly, monthly or annual basis, even though

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<sup>1</sup> It is important to note that the Appellant in its Brief, as it did previously in its Motion for Summary Decision and Opposition to the Appellees Motion for Judgement on the Pleadings, has brought to the Court's attention the proposition that the Attorney General's interpretation of the Wage Act is entitled to deference. See M.G.L. c. 23, § 3(b); M.G.L. c. 30A, § 14; Elec. Data Sys., v. Atty. Gen., 454 Mass. 63, 69 (2009). Justice McLaughlin, in his Decision and Order, expressly acknowledged this proposition and still found in favor of the Appellees. (R.A. 00183).

deductions or increases may be made in a particular pay period." Further, Massachusetts General Law 149, § 150 states that when a complaint is filed against an employer for violation of M.G.L.A. 149, § 148, a valid set-off is a defense.

M.G.L. 149, § 150 provides in relevant part that:

On the trial no defense for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a **valid set-off** (emphasis added) against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid.

As stated above, in Massachusetts, an employee is liable to their employer for any loss resulting from the employees' negligence with respect to a third party, just as he would be for any such injury to the employers property. See Buhl, 328 Mass. at 202. Where the employer has reimbursed a third party, for damage done to that third party's personal property by the employee, or the employer has paid the employees debt to a third party, the employer may make setoff deductions from an employees' weekly wages to recoup said sums. Brennan v. Veterans Cleaning Services, Inc. 482 F.2d 1362, 1369 (1973). These set-off deductions are considered valid where the damage done by the

employee is liquidated or ascertainable by calculation. Id. This rule is analogous to where an employee misappropriated the employer's funds. In such a case, "as a matter of law the employee would owe such amounts to the employer, and as a matter of fact, the repayment of moneys taken in excess of the money paid to the employee in wages would not reduce the amount of his wages." Mayhue's Super Liquor Stores, Inc., v. Hodgson, 464 F.2d 1196, 1198 (1972).

As there exists no case law in Massachusetts regarding valid set-off deductions within the context of M.G.L.A. 149, § 148, the Trial Court looked to other jurisdictions for guidance. (R.A. 00183). The facts of the Brennan v. Veterans Cleaning Service, Inc., are similar to the facts of the present action. In this case, the Secretary of Labor brought suit against three corporations and an individual who was the owner and president of the two corporations and secretary of the third to enjoin them from violating the minimum wage and overtime compensation provisions of Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201. Id. at 1364. The defendants deducted from the weekly paychecks of an employee, Amos Jones, a total of \$1,661.60. The deductions were made to pay back advances or draws made

to Jones before he received his regular paycheck on Friday and for deductions stemming from an auto accident in which Jones was in while driving a company truck. Id at 1368. The defendant employer paid a fine issued to Jones for the accident, paid the amount necessary to replace the company truck and the paid the amount needed to compensate the third party for the loss of his automobile. Jones agreed to repay the Defendant for these expenditures by way of weekly deductions of \$15 until repayment. Id at 1368.

The U.S. Court of Appeals for the Fifth Circuit determined that, in the context of the Fair Labor Standards Act, a repayment by paycheck deductions of free and clear advances to employees does not violate the minimum wage requirement. Id at 1369. The court found that "this loan-repayment principle should likewise apply to deductions to pay third-party creditors of the employee at the employee's direction and with his consent, or to recoup such amounts already paid out, when the employee has consented to the arrangement." Brennan, 482 F.2d at 1369. As such, under this rule, "the deductions to recoup amounts expended to pay Jones' [the employee] fine and to compensate the owner of the automobile damaged in the

traffic accident were permissible and should be counted as wages to the extent their amounts can be ascertained." Id. In regards to the amounts deducted for the damaged company truck, the court found that, although an employee may have a bona fide undisputed debt to his employer, the deductions for such a debt should not reduce the employee's net wage below that of statutory minimum wage. Id.

There is no dispute that "on occasion, in association with driving said collection trucks, ABC employees have caused damage to the trucks and/or personal property." (R.A. 00036). After a thorough investigation, if there is a determination of fault on the part of the driver, in lieu of disciplinary action, the driver may enter into a voluntary written agreement whereby the damages caused by the driver are setoff against the driver's wages. (R.A. 00036). The written agreement is for a liquidated amount based upon the actual damages resulting from the accident. (R.A. 00037).

Based on the above, Justice McLaughlin held that ABC had a valid set-off for the damages cause by the employees and, as such, had a defense to the M.G.L. c. 149, §148. (R.A. 00182). Prior to the time the

employees enter into the agreements, fault has been determined, the damages are liquidated and have been calculated, and ABC has actually paid for the damage caused by the employee.

Therefore, the Trial Court correctly held that the Appellee's set-off deductions, agreed to by the employees for liquidated and ascertainable sums, do not violate the provisions of M.G.L.A. 149, § 148. (R.A. 00182).

The Appellant, in its Brief, makes several unavailing, and in some cases contradictory, arguments that the deductions made pursuant to the Appellee's agreements were not the type of "valid set-off" deductions contemplated by the statute.

First, the Appellant argues that the language in M.G.L. 149, § 150 implicitly contemplates that the defenses contained therein, attachment by trustee process, valid assignment and valid set-off, require some form of due process through the court system. (See Appellant's Brief, p.20-22). However, contrary to this argument, the Appellant then states that it, and the Department of Labor and Industries, have found set-off deductions to be valid where it is undisputed that an employer has given an unpaid loan or wage advance to

the employee without judicial process. (See Appellant's Brief, p.24). Set-off deductions for an unpaid loan or wage advance to the employee is identical to the situation at hand. ABC performs a thorough investigation and it is not until after ABC has paid for the damages caused by the employee are the agreements entered into by the parties. Fault and the amount of damages are undisputed. Further, if the employee does not agree with ABC's determination as to fault, they are not required to enter into the agreements.

Massachusetts Courts, although they have never interpreted the term "valid set-off" in the context of M.G.L. 149, § 150, understand it to refer to "circumstances where there exists a clear and established debt owed to the employer by the employee." Somers v. Converged Access, Inc., 454 Mass. 582, 593 (2009). In the present matter, there exists a clear and established debt owed by the employee for the damages they have caused. ABC does not make a snap judgment or un-investigated decision regarding the liability of the employee; it follows a specific procedures developed to determine the cause of the damage. The agreements are only entered into if the accident is determined to be

the fault of the employee. There is no automatic recovery through wage deductions. The present case is distinguishable from the cases cited by the Appellant as the debt is clear and established.<sup>2</sup>

Further, if the legislature required an employer to seek judicial review prior to making "valid set-off" deductions pursuant to M.G.L., c. 149, § 150, it would have included such language in the statute. See Somers, 454 Mass. At 592 (holding that if the legislature was concerned with the risk that an employee misclassified as an independent contractor would enjoy a "windfall" at the employer's expense for a violation of M.G.L. c. 149, §148, even though the employee was paid more than they would have as an employee, it could have included language that would have avoided such a risk).

Second, the Appellant's argument that "set-off" deductions made pursuant to the subject agreements is

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<sup>2</sup> The Appellant cites two cases which are unreported and are inappropriate citations, and thus these cases should be given no weight as precedent: Olsson v. E.F. Institute for Cultural Exchange, Inc., Civil Action No. 00-4075, 5 & n.4 (Middlesex. Super. Ct. July 20, 2001) (no set-off defense where employee violated a non-competition agreement) and Technology in Medicine, Inc. V. Gorman, Civil Action No. 66CV0450 (Milford District Ct. March 6, 2003) (no set-off defense where it was unclear whether an employee agreed to repay a draw advance to a commissioned employee in the event no commissions were earned).

an assignment of future wages is again incorrect. (See Appellant's Brief, p.28-31) There is no assignment of wages or rights in those wages. The deductions are made to "set-off" amounts actually expended by the ABC<sup>3</sup>. In essence, the employee is paying back ABC for expending monies, which the employee has been paid by ABC, as a result of the employees negligent actions.

Therefore, the Trial Judge correctly concluded that, as a matter of law, the agreements entered into between ABC and its employees do not violate M.G.L., c. 149, §148 et seq, since the deductions made from the employees' wages constitute "valid set-off" deductions permissible under the statute. rule, the Petitioners, ABC Disposal and Michael Camara have not violated M.G.L.A. 149, § 148.

#### CONCLUSION

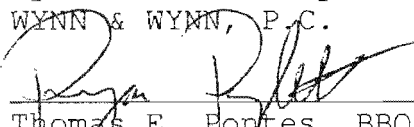
Based on the foregoing, the Appellees respectfully request that the Decision and Order of the Trial Court be upheld as Justice McLaughlin correctly concluded that, as a matter of law, the agreements entered into

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<sup>3</sup> As defined in the Appellant's Brief - "Setoff" is defined as : "1 a thing that makes up for or set off something else; counterbalance; compensation 2 a) a counterbalancing debt claimed by a debtor against a creditor b) a claim fr this 3 OFFSET (n.4 &8)." Webster's New World Dictionary 1223 (3<sup>rd</sup> College ed. 1988).

between ABC and its employees do not violate the special contract provision of the Wage Act since the employee is credited for the wages they earn and the deductions confer an immediate benefit to the employee as it reduces their liability and the deductions made from the employees' wages constitute "valid set-off" deductions permissible under the statute.

Respectfully Submitted,  
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By their Attorneys,  
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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO.: 2008-0511

MICHAEL A. CAMARA, Individually	)
and ABC DISPOSAL SERVICE, INC.,	)
Plaintiff,	)
	)
v.	)
	)
THE DIVISION OF ADMINISTRATIVE LAW	)
APPEALS AND OFFICE OF THE ATTORNEY	)
GENERAL - FAIR LABOR AND BUSINESS	)
PRACTICES DIVISION,	)
Defendants.	)

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR  
JUDGMENT ON THE PLEADINGS AND ON DEFENDANTS' REQUEST  
TO AFFIRM DECISION OF ADMINISTRATIVE LAW APPEALS**

The plaintiff, ABC Disposal Service, Inc., ("ABC"), is a Massachusetts corporation with a usual place of business in New Bedford, Massachusetts. The plaintiff, Michael Camara ("Camara"), is ABC's vice president. Pursuant to G.L. c. 149 and G.L. c. 151, ABC and Camara are statutory employers. ABC provides services to collect and dispose of waste and also recycles waste. In the process of collecting waste, truck drivers have had incidents which involve damage to ABC trucks and to the property of third parties.

In an effort to promote safety, ABC instituted a policy whereby a determination is made, after investigation, whether an ABC driver was at fault in the incident. If fault is found, the driver may be given an option of accepting disciplinary action or payment of the damages. The disciplinary action may include a warning or suspension. There is no appeal from the decision as to fault. When the driver has chosen to pay for the damages, the amount of damages are ascertained by the safety manager whose decisions are final.

The policy has been effective with the cost for damages, vehicles and personal property being reduced by 78% from 2003 to 2006.

When an employee has been found liable for damages and has voluntarily chosen to permit an off-set by ABC, the "set off occurs on a weekly basis by an average of \$15.00 to \$30.00 per week." At no time has any driver's pay been reduced below minimum wage standards.

An audit of the deductions made by ABC from the pay of drivers during the period of June 2004 to March 2006 was conducted by The Fair Labor and Business Practices Division of the Office of the Attorney General. It was determined that voluntary deductions in the amount of \$21,487.96 were made from the wages of twenty-seven (27) employees during that period. A citation issued against ABC for intentional violation of G.L. c. 149, § 18, which included \$21,487.96 in restitution and a \$9,410.00 penalty.

In the decision granting the Respondent's Motion for Summary Decision, it was ruled that the "special contract" language of G.L. c. 148, § 148, prohibited the contracts by which the employees would pay for the property damage caused by them. The Administrative Magistrate ruled that G.L. c. 149, § 150, which provides that a valid set off is a defense to a G.L. c. 148, § 148 charge, is not applicable in this case. The decision cites to a Superior Court ruling, Dobin v. CIOview, 16 Mass. L. Rptr. 31, 785 (November 10, 2003), as support for its position. The court is unable to reach the same result as the facts in the Superior Court decision are clearly distinguishable. The Dobin case concerns delays in payment of wages admittedly due to the employee. To the contrary, in the present matter, wages due an employee are properly credited to that employee and a present benefit is received by the employee. A set off of \$15.00 to \$30.00 for damages caused by the employee

confers an immediate benefit as it reduces the employee's liability.

Pursuant to G.L. c. 30A, an agency decision may only be set aside where the action exceeds the agency's authority, is based on an error of law, is arbitrary or capricious or is an abuse of discretion.

In this case, ABC bears the burden of demonstrating error. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989). The decision is subject to *de novo* review, Buchanan v. Contributory Ret. Appeals Bd., 65 Mass. App. Ct. 244, 246 (2005), with deference given to the legal interpretation of the Attorney General and Division of Administrative Law Appeals are entitled to deference.

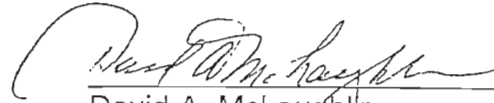
In this court's analysis, the question is one of law. The Division of Administrative Law Appeals is of the position that the agreed upon deduction from the employee's pay is a forfeiture of earned wages and is therefore barred by the "special contract" provision of the statute. The Fair Labor Division does not recognize that the employer had a claim against the employee that was undisputed as to fault and undisputed as to amount. The employer is entitled to recover those amounts, Brennan v. Veteran's Cleaning Services, Inc., 482 F2d 1362, 1369 (1973), and has a valid set off. Section 150 provides that a valid set off is a defense to a G.L. c. 149, § 148 claim. Thus, the decision on Motion for Summary Decision is based on an error of law.

### ORDER

For the foregoing reasons, the Plaintiffs' Motion for Judgment on the Pleadings is ALLOWED, the Summary Decision of the Division of Administrative Law Appeals is REVERSED and the Motion of the Defendant to Affirm the Decision and Order of the

Division of Administrative Law Appeals is DENIED.

By the Court,

A handwritten signature in black ink, appearing to read "David A. McLaughlin", written over a horizontal line.

David A. McLaughlin  
Justice of the Superior Court

DATED: June 25, 2009

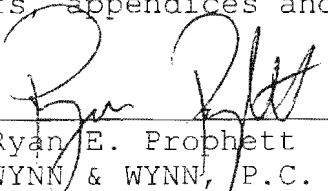
COMMONWEALTH OF MASSACHUSETTS  
MASSACHUSETTS APPEALS COURT

Appeals/Case No. 2009-P-1645

Michael A. Camara and \*  
ABC Disposal Service, Inc. \*  
Plaintiffs-Appellees \*  
\*  
vs. \*  
\*  
Office of the Attorney \*  
General, and the Division of \*  
Administrative Law Appeals \*  
Defendants-Appellants \*

CERTIFICATE OF COMPLIANCE WITH RULES OF  
APPELLATE PROCEDURE PURSUANT TO MASS.R.APP.P. 16(k)

I, Ryan E. Prohett, counsel for the Plaintiffs/Appellees, hereby certify that the Brief submitted on behalf of Michael A. Camara and ABC Disposal Service, Inc. complies with the rules of the Court that pertain to the filing of briefs, appendices and other papers, including, but not limited to: Mass.R.App.P. 16(a) (pertinent findings or memorandum of decision); Mass.R.App.P. 16(e) (references to the record); Mass.R.App.P. 16(f) (reproduction of statutes, rules regulations); Mass.R.App.P. 16(h) (length of briefs); Mass.R.App.P. 18 (appendix to the briefs); and Mass.R.App.P. 20 (form of briefs, appendices and other papers).

  
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