

The Seattle Times

Thursday, May 13, 1999

Microsoft Temp Suit Widens -- Appeals-Court Ruling Includes Thousands

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A federal appeals court ruled that thousands of Microsoft temporary workers could participate in a class-action lawsuit seeking millions of dollars in retirement benefits from the software giant.

Late yesterday, a panel of three judges in the 9th Circuit Appeals Court in San Francisco unanimously overturned U.S. District Judge Carolyn Dimmick's year-old decision to reduce the size of the class to a few hundred workers who held temporary jobs at Microsoft from 1987 to 1990. The panel ruled that all past and current temps could be included in the class and that Microsoft would have to prove why specific workers should not qualify for the retirement benefits.

"We consider it a really big victory," said David Stobaugh, a lawyer representing temp workers. "It vindicates what we've been saying for years."

Microsoft contends its use of temporary workers gives the company flexibility. The company, though, declined to comment on the ruling.

"We are reviewing this opinion and will have to consider all of our options," Microsoft spokesman Dan Leach said.

The ruling comes in a case filed seven years ago on behalf of temporary workers, alleging that Microsoft treats them as full-time employees in every regard but compensation. The suit claims temps are so-called "common law" employees, entitled to millions of dollars in gains from employee stock-purchase plans.

Microsoft has argued that the workers are employed by temporary agencies, not the company. That makes them ineligible for the retirement benefits.

The appeals court disagreed. It ruled that the test to determine if the workers were common-law employees was not whether they were employees of an agency, but rather, who exercises "control" over that worker.

"Even if for some purposes a worker is considered an employee of the agency, that would not preclude his status of common-law employee of Microsoft," the court ruled. "The two are not mutually exclusive."

So even though Microsoft calls some workers temps, the court ruled that some might not actually be temps.

"You are what you are, not what you are called," Stobaugh said.

It's unclear how many workers the ruling affects. Microsoft currently uses about 6,000 temps to handle such jobs as graphic design, software testing and editing content. Those workers would be eligible for claims if Microsoft can't convince the court that the company does not control the workers. Additionally, there are potentially thousands of other temps who no longer work at Microsoft that also could be eligible for an award.

"It's close to 15,000 or more workers," said Mike Blain, a former Microsoft temp and the co-founder of the Washington Alliance of Technology Workers, which is trying to organize tech workers into a union.

It's also unclear how the ruling affects another suit, filed last year, on behalf of temps excluded by Dimmick's decision. While those workers are now included in the original case, Stobaugh said the second suit would likely continue since it raised separate claims.

The appeals court also ruled that a small group of workers - independent contractors who Microsoft shifted to temporary workers in 1990 and who continue to work for the company - should immediately begin participating in the stock-purchase plan. The panel encouraged the district court to issue an order forcing Microsoft to allow that.

The appeals panel also took a shot at Microsoft's arguments, which supported Judge Dimmick's decision to reduce the class of potential plaintiffs.

"Its brief takes a scatter-gun approach, laying down heavy fire but consisting largely of blanks," the court wrote.

The suit now goes back to U.S. District Judge John Coughenour, who has taken over for Dimmick.

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